OOC BROWN BAG LUNCH SERIES
AVOIDING & RESPONDING TO SEXUAL HARASSMENT CLAIMS
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I. Introduction – What Is Sexual Harassment?

The Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. §§ 1301 *et seq.*, applies thirteen federal labor and employment law statutes to all legislative branch employing offices and employees. Title VII of the Civil Rights Act of 1964 ("Title VII") is one of the federal employment law statutes incorporated by the CAA and explicitly prohibits discrimination on the basis of "race, color, religion, sex, and national origin." While Title VII's statutory language does not expressly prohibit "sexual harassment," the Equal Employment Opportunity Commission (EEOC), the federal agency entrusted with enforcement of Title VII, has interpreted sexual discrimination as including sexual harassment and the EEOC's guidelines specifically identify sexual harassment as a type of sexual discrimination. Moreover, the Supreme Court has expressly approved of the EEOC's conclusion that the statutory language in Title VII proscribes "sexual harassment" as one manifestation of discrimination on the basis of sex. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-66 (1986).

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.

In practical terms, courts generally classify sexual harassment claims as either (1) *Quid Pro Quo* harassment; or (2) Hostile Work Environment harassment. It is important to note, however, that these terms are not found in the statute, and are only used by courts to mark a "rough demarcation" between cases in which the alleged harassment is accompanied by a threat that is carried out and those where a threat may be absent entirely. *Schiano v. Quality Payroll Sys.*, 445

F.3d 597, 603 (2d Cir. 2006). A plaintiff does not need to specifically identify which theory they are pursuing in their complaint as long as the employing office is on notice as to the nature of the allegations. *See Steele v. Schafer*, 535 F.3d 689, 694 (D.C. Cir. 2008).

II. When Is Harassment "Based on Sex"?

To bring a claim for sexual harassment under Title VII, a plaintiff must be able to show that the harassment they experienced was because of their gender. This "based on sex" requirement has been disputed in cases where the harassment arose from a failed relationship, and when the harasser is accused of being hostile towards both men and women.

1) ***Harassment Was Not Based on Sex***
   a) *Succar v. Dade Cty. Sch. Bd.*, 229 F.3d 1343 (11th Cir. 2000) –The male plaintiff began a consensual sexual relationship with a female co-worker. After the relationship deteriorated, the plaintiff was "verbally and physically harassed" by this co-worker. The court reasoned that this harassment was not motivated by the plaintiff's male gender, but instead derived from "contempt for [the plaintiff] following their failed relationship." The plaintiff's gender was "merely coincidental" to the harassment.

2) ***Harassment Was Based on Sex***
   a) *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225 (1st Cir. 2007) – In sharp contrast to the approach in *Succar*, the First Circuit concludes that sexual harassment cases involving a prior failed relationship *necessarily* are based on sex because "presumably the prior relationship would never have occurred if the victim were not a member of the sex preferred by the harasser." The victim's gender is thus "inextricably linked to the harasser's decision to harass." Conduct complained of by the plaintiff, not the source of conflict, is dispositive as to whether the harassment is based on sex, and the use of degrading, gender-based epithets by the plaintiff's co-worker thus satisfied the "based on…sex" requirement.
   b) *Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83 (D.D.C. 2007) – When the harassing conduct involves explicit or implicit proposals of sexual activity between members of the opposite sex, courts are entitled to assume that the proposals would not have been made to someone of the same sex.
   c) *EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840 (9th Cir. 2005) – Plaintiff alleged a hostile work environment because she found her supervisor's conduct to be intimidating to female employees. The supervisor "lung[ed] across the table" at the plaintiff, regularly yelled at women in the office, and otherwise acted in a physically aggressive manner. The main factual question for the court to resolve was whether the supervisor's treatment of women was sufficiently different from his treatment of men to be "based…on sex." Holding that the dispositive question is whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," the court allowed the claim to proceed past the summary judgment stage upon finding a qualitative and quantitative difference of treatment between men and women.

3) ***Same-Sex Sexual Harassment***
   a) *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) – Same-sex sexual harassment is actionable under Title VII under the same standards that apply to heterosexual sexual harassment. The plaintiff always bears the burden of establishing

that "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination*…because of…sex'" (emphasis in original).

b) *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 (5th Cir. 2012) – The Fifth Circuit reads *Oncale* as allowing a plaintiff alleging same-sex sexual harassment to provide some "credible evidence" that the harasser is homosexual. This may be done by providing evidence that (1) "the harasser 'intended to have some kind of sexual contact with the plaintiff rather than to merely humiliate him for reasons unrelated to sexual interest,'" or (2) "evidence that the harasser 'made same-sex sexual advances to others, especially to other employees'" (quoting *La Day v. Catalyst Tech.*, 302 F.3d 474, 480 (5th Cir. 2002)). Evidence that the plaintiff was harassed by a member of the same sex and that this harassment was of a sexual nature "rather than merely humiliating…is sufficient to support a verdict in the plaintiff's favor."

c) *Dick. v. Phone Directories Co.*, 397 F.3d 1256 (10th Cir. 2005) – The Tenth Circuit requires only a showing that the harasser "acted out of sexual desire" to satisfy the "based on…sex" requirement in a same-sex harassment case. Evidence of the harasser's sexual orientation is not necessary, because the court "note[s] the possibility that an alleged harasser may consider herself 'heterosexual' but nonetheless propose or desire sexual activity with [a member of the same sex] in a harassing manner."

d) *Franchina v. City of Providence*, — F.3d — 2018 WL 550511 (1st Cir. 2018) – While Title VII contains no protections for individuals based on their sexual orientation, the First Circuit concludes that a lesbian plaintiff may pursue a sexual harassment claim under a "sex-plus" theory. A sex-plus theory allows a gay or lesbian plaintiff to assert a claim of sexual harassment as long as "he or she was discriminated <u>at least in part</u> because of his or her gender" (emphasis in original). In rejecting the employer's argument that the plaintiff was discriminated against solely because of her sexual orientation, the court holds that the use of gender-specific epithets such as "b**ch" and "c**t" were sufficient to establish that the harassment experienced by the plaintiff was at least in part "based on sex."

III. *Quid Pro Quo* Sexual Harassment

Quid pro quo sexual harassment takes place when a supervisor conditions tangible employment actions upon the acceptance of sexual advances. *Lutkewitte v. Gonzalez*, 436 F.3d 248, 250-51 (D.C. Cir. 2006). Examples of *quid pro quo* sexual harassment include: (1) demanding sexual favors in exchange for a promotion or a raise; (2) disciplining a subordinate who ends a romantic relationship; and (3) changing job or performance expectations after a subordinate refuses repeated requests for a date.

1) Elements of *Quid Pro Quo* Sexual Harassment

a) In order to prove *quid pro quo* sexual harassment the employee must show that: (1) they belong to a protected group; (2) the employee was subject to unwelcome harassment; (3) the harassment was based upon sex; (4) the employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment; and (5) the employer knew or should have known of the harassment and took no effective remedial action. *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986).

2) When Are the Sexual Advances "Unwelcome"?

a) *Souther v. Posen Constr., Inc.*, 523 F. App'x 352 (6th Cir. 2013) – To determine whether sexual advances or requests are unwelcome, courts will focus on the plaintiff's "words, deeds, and deportment." The plaintiff's after-the-fact statement during deposition that she felt coerced into starting a sexual relationship with her supervisor was contradicted by evidence in the record that the plaintiff was a willing participant in the extramarital affair. The plaintiff and her supervisor took trips together, including an overnight camping trip, and resided together in a hotel. The supervisor also offered to make repairs and upgrades to the plaintiff's home, which she freely accepted, and gave money to the plaintiff when she asked. Furthermore, the plaintiff trusted her supervisor with her private information, including her banking information and password to her email account. "Given the nature of the close and consensual relationship, no jury could find [the supervisor's] advances unwelcome."

3) What Is a "Tangible Employment Action"?

a) A tangible employment action involves "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

b) *Not a Tangible Employment Action*

i) *Lutkewitte v. Gonzalez*, 436 F.3d 248, 252-53 (D.C. Cir. 2006) – Plaintiff argued that her submission to her supervisor's sexual advances resulted in a tangible employment action when she was provided with a new take-home car. The court holds that this is not a tangible employment action because the plaintiff was already in possession of a government-provided, take-home car, and that the receiving of a new car therefore created "no significant change in her ability to effectively perform her job duties or on the conditions of her employment."

ii) *Alaniz v. Zamora-Quezada*, 591 F.3d 761 (5th Cir. 2009) – The owner of a health clinic began a meeting with the plaintiff-employee by asking her to sit on his lap and explaining to her that she could make more money by engaging in a sexual relationship with him. She rejected the advance, and the next day was told that she would be moved from HR manager to office administrator. The court held that this did not constitute a tangible employment action because the plaintiff's duties, salary, and benefits remained the same despite the change in title. Furthermore, there was no evidence that the plaintiff's placement on a two-week paid probation prior to her termination altered her employment responsibilities.

c) *Examples of Tangible Employment Actions*

i) *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84 (2d Cir. 2002) – The district court committed reversible error by treating the Supreme Court's list of tangible employment actions in *Ellerth* (listed above) as exhaustive. When an employee *submits* to the sexual demands of her supervisor, retention of employment will be considered a tangible employment action. An employer's conditioning the receipt of the plaintiff's paycheck on submission to the supervisor's sexual demands also constitutes a tangible employment action.

ii) *Pa. State Police v. Suders*, 542 U.S. 129 (2004) – Constructive discharge is a tangible employment action for purposes of sexual harassment claims under Title VII. However, in order to be actionable, the constructive discharge must be accompanied by some "official act."

4) When Is There a "Causal Nexus" Between the *Quid Pro Quo* Harassment and the Tangible Employment Action?

a) *Giddens vs. Cmty. Educ. Centers, Inc.*, 540 F. App'x 381, 387-88 (5th Cir. 2013) – The plaintiff was terminated from her position as a corrections officer after denying unwelcome sexual advances from her supervisor. The court held there was an insufficient "nexus" between the tangible employment action of termination and the plaintiff's denial of her supervisor's advances because her termination was the result of frequent unexcused absences that were uncovered by two independent investigators. As a result, the plaintiff was unable to proceed under a *quid pro quo* theory.

b) *Russell v. Univ. of Tex. of Permian Basin*, 234 F. App'x 195 (5th Cir. 2007) – The court refused to hold that the rejection of plaintiff's bid for a tenure-track position was causally connected to the refusal of sexual advances from a co-worker. Although the co-worker sat on the committee responsible for tenure decisions, the plaintiff did not present evidence connecting the co-worker to the ultimate decision not to extend tenure to the plaintiff. The close temporal proximity of the events was not alone sufficient to establish causation.

5) Employer Liability for *Quid Pro Quo* Harassment

a) The Supreme Court has adopted a standard resembling strict liability when a plaintiff-employee seeks to impose vicarious liability on an employer for *quid pro quo* harassment by a supervisor. "[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." Therefore, if a plaintiff satisfies all the elements of a *quid pro quo* sexual harassment claim, the employing office will be vicariously liable for the harassment. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 762 (1998).

IV. Hostile Work Environment Harassment

A hostile work environment is one that subjects an employee to discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment. Examples of behaviors that can create a hostile environment if they are unwanted or uninvited include: (1) off-color jokes or teasing of a sexual nature; (2) comments about body parts or sex life; (3) suggestive pictures, posters, calendars, or cartoons; (4) leering, staring, or gestures; (5) repeated requests for dates; (6) excessive attention in the form of love letters, telephone calls or gifts; and (7) touching, pats, hugs, shoulder rubs, or pinches.

1) Elements of a Hostile Work Environment

a) In order to establish the existence of a hostile work environment, the plaintiff-employee must show that (1) they belonged to a protected group; (2) the employee was the subject of unwelcome sexual harassment; (3) the harassment complained of was based on sex; and (4) the harassment was sufficiently severe or pervasive to unreasonably interfere with work performance or create an intimidating, hostile, or offensive work environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-68 (1996).

2) Subjectively and Objectively Offensive

To establish an actionable hostile work environment, the plaintiff must show that the environment is "both objectively and subjectively hostile." This requires that "a reasonable person would find the environment hostile or abusive and that the victim perceived it to be so."

Johnson v. Shinseki, 811 F. Supp. 2d 336, 345 (D.D.C. 2011). No single factor is required for an environment to be considered hostile or abusive, and a plaintiff does not need to prove concrete psychological harm. "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

The speaker's intentions are not relevant to whether a comment is offensive. The dispositive question is whether a reasonable person would find the comment hostile or abusive, and whether the victim perceived it as such. *Taiwo v. Office of the Architect of the Capitol*, No. 09-AC-106 (CV, RP), 2012 WL 3042381 (OOC Board July 24, 2012). Comments made outside of an employee's presence generally cannot be used as the basis for a hostile work environment claim. *Bergbauer v. Mabus*, 934 F. Supp. 2d 55, 91 (D.D.C. 2013). However, such comments may be used to support a hostile work environment claim if the employee learns of them after-the-fact. *Lowery v. Office of the Architect of the Capitol*, No. 10-AC-14 (CV, RP), 2012 WL 6561376 (OOC Board Dec. 12, 2012) (holding comments made outside of the plaintiff's presence relevant to hostile work environment claim when plaintiff-employee was "well aware of the continual derisive conduct directed toward him").

a) *Behavior Was Subjectively Offensive but Not Objectively Offensive*
   i) *Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (7th Cir. 2002) – On two consecutive days the plaintiff's commanding officer came up behind her, rubbed her back, and placed his hand on her shoulder. The plaintiff expressed her disapproval of these actions during the second incident, which prompted the commanding officer to state that he would not touch her again. The officer followed through on this promise. Two months later, the plaintiff objected to the commanding officer instructing her to raise her arms and remove her hat during a uniform inspection. Evidence suggested that at least the raising of the arms was a standard operating procedure used to inspect the fit of a subordinate's blazer. While the plaintiff found these interactions subjectively offense, the court held that the plaintiff "could not demonstrate that an objectively reasonable person would have found her working conditions hostile." Furthermore, the court wrote that "discipline in police departments is quasi-military in nature and sworn officers expect to participate in inspections, drills, and other activities that…are often unpleasant and, in the eyes of the subordinate, demeaning."
b) *Behavior Was Not Subjectively Offensive*
   i) *Gore v. Lockheed Martin IS & GS Def.*, 208 F. Supp. 3d 260 (D.D.C. 2016) – Plaintiff was asked by her supervisor whether "every woman fantasizes about being [a] stripper." During her deposition, the plaintiff stated that she found the question to be "unexpected" and inappropriate, but that she was not "upset" or offended. Based on these responses the court held that the question was not subjectively offensive to the plaintiff, and could not be used in support of a claim of a hostile work environment.

3) "Reasonable Person" or "Reasonable Person in the Plaintiff's Position"

a) Courts are split as to whether the hypothetical reasonable person used to determine whether comments are objectively offensive should be endowed with the relevant characteristics of the plaintiff. Supporters of both the "reasonable person" and the "reasonable person in the plaintiff's position" tests have found support from language in Supreme Court cases. *Compare Harris*, 510 U.S. at 21 (using "reasonable person" standard) *with Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) (using "reasonable person in the plaintiff's position" standard).

b) *King v. Frazier*, 77 F.3d 1361, 1363 (Fed. Cir. 1996) – "Both [the objective and subjective] inquires…require that sexual harassment be judged from *the perspective of the one being harassed*" (emphasis added).
c) *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) – "Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person *with the same fundamental characteristics*" (emphasis added).
d) *Richardson v. N.Y. State Dep't of Corr. Servs.*, 180 F.3d 426, 436 n.3 (2d Cir. 1999), *abrogated on other grounds* – The Second Circuit here endorses the "reasonable person" standard and rejects the view that the hypothetical reasonable person should be endowed with any particular characteristics. "This [reasonable person] standard makes clear that triers of fact are not to determine whether some ethnic or gender groups are more thin-skinned than others."

4) When Is Sexual Harassment "Unwelcome"?

a) The intent of the harasser is not relevant to the question of whether the conduct was welcome. Sexual harassment claims contain no *mens rea* requirement, as found in criminal law. *King v. Frazier*, 77 F.3d 1361, 1363 (Fed. Cir. 1996).
b) *Sexual Harassment Not Unwelcome*
   i) *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991) – Plaintiff-employee of a jail alleged that she was handcuffed to the drunk tank, poked with a cattle prod, subjected to suggestive remarks and lewd jokes, physically hit and punched in the kidneys, and her head grabbed and forcefully placed in members' laps. However, evidence showed that the plaintiff "relished [in] reciprocating in kind," was put on probation for use of offensive language, had an "exhibitionistic habit" of not wearing a bra on days she wore only a T-shirt to work, "participated in suggestive giftgiving," "reveled in the sexual horseplay," and "had 'one of the foulest mouths' in the department.'" Moreover, other woman employees testified that the male officers left them alone when they asked to stop with dirty jokes, and the plaintiff admitted to never telling the deputies that she was offended by the language and actions. The Seventh Circuit affirmed the trial court's conclusion that the plaintiff "welcomed the sexual hijinx of her co-workers."
c) *Sexual Harassment Unwelcome*
   i) *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007 (7th Cir. 1994) – Plaintiff was the first woman to work in the factory's tinsmith shop. She alleged that she was subjected to derogatory comments of a sexual character on a daily basis, continually being referred to as "whore" and "c**t" and having her property defaced in gender-specific ways. The district court concluded that the plaintiff "invited" this language by using vulgar language herself, calling other employees terms such as "f**k head" and "dick head," but the Seventh Circuit reversed and remanded, separating vulgar and mildly offensive "shop talk" from conduct that was "deeply offensive and sexually harassing." Judge Posner also writes that the "asymmetry of positions" must be taken into account, observing that "she was one woman; they were many men."
   ii) *Beard v. Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001) – The general manager of a restaurant repeatedly, over a three-week period, brushed himself against the plaintiff's breasts and rubbed cooking tongs and other objects across her breasts. The court found a jury could reasonably find that the manager's advances were unwelcome in spite of testimony at trial that the plaintiff touched a male employee's upper thigh in a

sexually suggestive manner and frequently spoke in sexually suggestive terms in the workplace. Although the plaintiff's alleged actions were relevant to whether the manager's conduct was welcome, it was not conclusive, and the fact that she explicitly objected to having her breasts touched was more persuasive.

iii) *Brokenborough v. Dist. of Columbia*, 236 F. Supp. 3d 41 (D.D.C. 2017) – Although the alleged harasser claimed that the plaintiff never represented to him that his sexual advances were unwelcome, the court found that the plaintiff had satisfied the "unwelcomeness" element of her prima facie case because she directly rejected the advances and walked away, requested reassignment, and "went out of her way to avoid contact with him, including leaving her post when he was near and taking leave from work."

iv) *EEOC v. Prospect Airport Servs.*, 621 F.3d 991 (9th Cir. 2010) – The male plaintiff-employee consistently told a co-worker that he was uninterested in her romantic advances. Plaintiff complained to management on more than one occasion, but the suggestive communications did not stop and management responded dismissively, telling the plaintiff that the harassment "was a joke" and that the plaintiff should "walk around singing to yourself…I'm too sexy for my shirt." The district court ruled that the conduct was not severe and pervasive enough to amount to sexual harassment "for a reasonable man," because objectively "most men…would have 'welcomed' the behavior." The Ninth Circuit reversed, holding that the plaintiff made the unwelcomeness of the conduct explicit and that "men as well as women are entitled under Title VII to protection from a sexually abusive working environment."

5) The Severe or Pervasive Requirement

To determine whether a hostile working environment is "severe or pervasive" courts routinely look at the frequency of the discriminatory conduct, its offensiveness, and whether it interferes with an employee's work performance. Whether harassment is "severe or pervasive" is not a rigid determination but instead a sliding scale in which severity and pervasiveness are balanced together. For instance, the more pervasive the sexual harassment is, the less severe it must be to fulfill the severity or pervasiveness requirement. *See Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008).

a) *Sexual Harassment Is Sufficiently Severe*

i) *Johnson v. Shinseki*, 811 F. Supp. 2d 336 (D.D.C. 2011) – A male co-worker of the female plaintiff began making sexual comments to her, but she did not report anything to her supervisors until she was physically touched. The co-worker's behavior became more aggressive over time including attempting to kiss her, soliciting her for sex, grabbing and pinching her breasts, and grabbing and spanking her buttocks. The court found that because the harassment caused the plaintiff to leave the workforce and seek medical treatment, and because of the "escalating nature" of the harassment, the harassment was sufficiently severe to constitute a hostile working environment.

ii) *EEOC v. Fred Meyer Stores, Inc.*, 954 F. Supp. 2d 1104 (D. Or. 2013) – The inquiry into whether conduct is severe must take into account not only hostility directly targeted at the plaintiff, but any prior misconduct of which the plaintiff is aware. The female-plaintiff was the manager of the seafood department of a grocery store and was aware of sexual misconduct by a male customer towards employees under her direction. She learned from other workers that this customer had repeatedly bumped

into an employee, put his hand down employees' shirts, and touched employees against their will. This male customer ultimately "poked" the plaintiff's breast before laughing and walking away. The court held that it was reasonable for the plaintiff to assume that the repeated harassment was condoned and would continue, and that the pattern of conduct created a jury question as to whether "a reasonable woman would have felt that [the customer's] continued behavior created a hostile work environment."

b) *Sexual Harassment Is Insufficiently Severe*
   i) *Rouiller v. U.S. Capitol Police*, No. 15-CP-23 (CV, AG, RP), 2017 WL 106137 (OOC Board Jan. 9, 2017) – The plaintiff-employee alleged a hostile work environment when a commanding officer asked the Office of the Inspector General to conduct an investigation into the plaintiff's relationship with a subordinate, other superior officers did not forward information to the plaintiff, and the Employment Counsel did not respond to the plaintiff's emails. The OOC Board characterized these complaints as primarily "trivial matters" or "minor slights," and pointed out that some of these actions were dictated by USCP procedures or influence from third parties such as the Fraternal Order of Police, and thus could not possibly be used to support a harassment claim.
   ii) *Tucker v. Johnson*, 211 F. Supp. 3d 95 (D.D.C. 2016) – The plaintiff-employee complained that a colleague's behavior "left [her] feeling generally uncomfortable and uneasy" when he would comment on her clothes, perfume, and necklace running along her breast line, at times follow her around and "suddenly appear" where she was, and, at least three times, "[snuck] up behind me and then [hung] over top of me, looking down my shirt." While the court characterized these actions as "unquestionably inappropriate workplace conduct," it held that "general feelings of workplace discomfort or unease—even those resulting from inappropriate workplace conduct of a sexual nature—are simply not enough to support a claim for hostile work environment."
   iii) *Swann v. Office of Architect of Capitol*, 73 F. Supp. 3d 20 (D.D.C. 2014) – An employee claimed she was subject to a hostile work environment due to her co-worker's behavior on seven occasions. The first four incidents were work-related, including employment actions such as termination of a grace period for late arrival. The remaining incidents were not deemed severe enough to amount to a hostile work environment. These incidents included employees passing around a bathing suit photo of the employee that was already publicly posted, offensive coworker speech related to condoms and other "sexual equipment," and the lack of female locker room at their place of employment. The incidents were not severe because they were the type of isolated daily annoyances and "ordinary tribulations of the workplace" not covered by Title VII.

c) *Sexual Harassment Is Sufficiently Pervasive*
   i) *Lyles v. District of Columbia*, 17 F. Supp. 3d 59 (D.D.C. 2014) – An employee of the District of Columbia's Department of Mental Health alleged a hostile work environment on the basis of sex when a subordinate "made lewd gestures toward [her], including imitating…spanking," "[went] out of his way when passing [her] in the hall to brush up next to her," patted the plaintiff on the buttocks, "grabbed [her] breast" on one occasion, and "star[ed] menacingly at her" after being transferred to a different office. This sexual harassment took place at least once a week for over a year. The district court held that the "ongoing" and "repeated[]" nature of this

harassing conduct precluded summary judgment for the employer, and distinguished the case from claims where the harassing behavior was "isolated or infrequent." The question of whether the conduct was sufficiently "severe or pervasive" was reserved for the jury.

d) *Sexual Harassment Is Insufficiently Pervasive*
   i) *Dudley v. Wash. Metro. Area Transit Auth.*, 924 F. Supp. 2d 141 (D.D.C. 2013) – "The cumulative effect of many de minimis harms is not a workplace filled with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment'" (quoting *Harris*, 510 U.S. at 21).
   ii) *Rucker v. Architect of Capitol*, 869 F. Supp. 2d 88 (D.D.C. 2012) – The plaintiff-employee alleged a hostile work environment based on two interactions with a male supervisor. The first incident involved the supervisor telling the plaintiff while she was directing traffic that he "liked the way [she] was using [her] hands" and that he "wanted [her] to rub oil all over" his body. The second incident occurred over a year later, when the supervisor "approached [her] from behind and slid his hand up [her] leg and under [her] skirt" as they both walked down a hallway. While characterizing this conduct as "reprehensible," the court held that two incidents occurring roughly a year apart from each other were insufficiently pervasive to amount to a hostile work environment.
   iii) *Murphy v. City of Aventura*, 383 F. App'x 915 (11th Cir. 2010) – The Eleventh Circuit affirms a district court's ruling that the harassment alleged is insufficiently pervasive to sustain a hostile work environment claim. The plaintiff-employee claimed to be the subject of sex discrimination when her supervisor used unduly harsh and profane language when talking to her on eighteen separate occasions. This harassing language included calling the plaintiff a "dumb f***," "whore," "stupid sh**," "goddamn f***-up," "mindless[]…hooker," and "goddamn slut." The court concluded that nine of these eighteen remarks were "generalized profanity and insults" not related to the plaintiff's gender and that the remaining nine sex-based remarks were insufficiently pervasive due to being spread across a period of two years and eight months.

6) When Does Harassment Interfere with an Employee's Work Performance?

a) *Lack of Interference with Work Performance*
   i) *Highlander v. K.F.C. Nat'l Mgmt.*, 805 F.2d 644 (6th Cir. 1986) – Plaintiff-employee of a restaurant alleged a hostile work environment based on sex when (1) her supervisor touched the plaintiff's legs, buttocks, and name tag displayed over her breast on one occasion, (2) she had a meeting with a supervisor to discuss a promotion and the supervisor "placed his arm around her and stated if she was interested in becoming a co-manager, 'there is a motel across the street,'" and (3) because of the crude conversation that permeated the restaurant. The Sixth Circuit concluded that these discrete incidents of harassment did not unreasonably interfere with the plaintiff's work performance. The court highlighted evidence in the record of the plaintiff stating "she didn't think [the first incident] was that big of a deal" and she did not want to raise "a big stink about it," and that her husband had characterized the second incident as a joke. Furthermore, the plaintiff admitted that her poor performance evaluations were because of her inability to respond to the high business

volume at the location she was assigned to and was unable to present any evidence linking the alleged misconduct to her work performance.

ii) *Tucker v. Johnson*, 211 F. Supp. 3d 95 (D.D.C. 2016) – General feelings of workplace discomfort or unease do not constitute sufficient interference with an employee's work performance to sustain a hostile work environment claim.

iii) *Murphy v. City of Aventura*, 383 F. App'x 915 (11th Cir. 2010) – The plaintiff was unable to establish that the nine sex-based offensive remarks she was subjected to unreasonably interfered with her work performance because her supervisor rated her job performance as excellent or exemplary and the plaintiff was awarded a raise and a commendation. Additionally, the plaintiff's depression and other mental illnesses did not surface until a month after her termination.

b) *Interference with Work Performance*

i) *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642 (5th Cir. 2002), *overruled on other grounds*, *Bosarge v. Cheramie Marine, LLC*, 675 F. App'x 417 (5th Cir. 2017) – The court holds that the allegedly harassing conduct interfered with the plaintiff's work performance when the harassment humiliated the plaintiff, involved reprimands and demotion, and caused severe psychological effects requiring the plaintiff to leave the workplace and seek medical treatment.

ii) *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring): "To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" (quoting *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 349 (6th Cir. 1988)).

V. The Employer's Affirmative Defense

While an employer is always strictly liable for a meritorious *quid pro quo* sexual harassment claim, the Supreme Court in *Faragher* and *Ellerth* relied on principles of vicarious liability to establish an affirmative defense to liability for employers to claims of a hostile work environment. The employer has an affirmative defense to a hostile work environment claim if (1) the harassment did not result in a tangible employment action, (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (3) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *See Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The *Ellerth* and *Faragher* decisions both involved supervisor harassment, but lower courts have since expanded on the holding to explain how this standard is applied in co-worker and subordinate harassment cases. The OOC Board of Directors has clarified that the *Ellerth/Faragher* affirmative defense is available to legislative branch employing offices. *See Solomon v. Office of Architect of Capitol*, No. 02-AC-62 (RP), 2005 WL 6236948, at *10 n.7 (OOC Board Dec. 7, 2005).

1) *Employer's Reasonable Care*

a) *Johnson v. Shinseki*, 811 F. Supp. 2d 336 (D.D.C. 2011) – Supervisors are under no affirmative duty to discover harassment among co-workers as long as a policy against harassment is in place, the supervisor makes this policy known, and the policy includes an effective complaint procedure for victims to report misconduct. The court determined that because the Department of Veterans Affairs promulgated a policy to prevent sexual

harassment in the workplace and the plaintiff in fact attended mandatory sexual harassment training during her time of employment, the Department was "entitled to rely on its employees to bring problems with their co-workers to its attention."

b) *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272 (11th Cir. 2003) – An employer's "size, location, geographic scope, organizational structure, and industry segment" are all relevant to the inquiry as to whether an employer's anti-harassment policy adequately fulfills Title VII's deterrent purpose. At a minimum, employers must establish a complaint procedure designed to encourage victims of harassment to come forward without requiring the victim to first complain to the offending supervisor. The plaintiff argued that the employer failed to exercise reasonable care by (1) failing to check the supervisor's references before hiring him and (2) failing to name the person to whom internal grievances should be submitted. Ruling in favor of the employer, the court held that not checking references is a "common practice" of employers and that the complaint procedure was not defective for directing employees generally to report to HR instead of a specific individual.

c) *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013) – Fannie Mae argued it should be entitled to the *Ellerth/Faragher* affirmative defense when it responded to the plaintiff's internal complaint by firing the harassing supervisor three months after receiving notice of the harassment. Reversing the district court's ruling in favor of the employer, the D.C. Circuit holds that a three month delay during which the plaintiff was required to work for the allegedly harassing supervisor was not a "prompt" response, and that a reasonable jury could find that Fannie Mae failed to exercise reasonable care.

d) *Doyle v. Denver Dep't of Human Servs.*, No. 09-cv-03042-WYD-KMT, 2011 WL 5374750 (D. Colo. Nov. 8, 2011) – In violation of the agency's express policy, the employing agency failed to inform the plaintiff of the results of its internal investigation into the plaintiff's claim of a retaliatory hostile work environment. This failure to inform the plaintiff is cited by the court as evidence relevant to the question of whether the employer's proffered reason for the plaintiff's termination was pretextual. "[A] plaintiff may show pretext by presenting evidence that an employer 'acted contrary to a written company policy prescribing the action to be taken by the [defendant-employer] under the circumstances' or 'acted contrary to an unwritten policy or company practice when making the adverse employment action affecting the plaintiff'" (quoting *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000)).

2) *Plaintiff's Unreasonable Response*

a) *Leopold v. Baccarat, Inc.*, 239 F.3d 243 (2d Cir. 2001) – Once an employer demonstrates that a plaintiff failed to use an internal complaint procedure, the burden shifts to the plaintiff to explain why. A plaintiff's generalized fear of retaliation is not sufficient to explain failure to use an internal complaint procedure; some credible evidence must be proffered showing either that the employer ignored or resisted similar complaints or that the employer took adverse actions against employees in response to such complaints.

b) *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009) – The plaintiff failed to come forward in a reasonable manner when she responded to supervisor harassment not by following the established complaint procedure but instead by posting a copy of her employer's sexual harassment policy to her office door and confiding in a friend that she believed she was being sexually harassed. While the friend the plaintiff confided in was a member of management, the company's complaint procedure directed employees specifically to "immediately contact an EEO Counselor or the EEO Manager," which the plaintiff failed

to do. The D.C. Circuit affirms the district court's ruling that the *Ellerth/Faragher* affirmative defense relieved the employing office of liability.

c) *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272 (11th Cir. 2003) – The plaintiff unreasonably failed to take advantage of her employer's anti-harassment policy when she waited until September to report supervisor harassment that began in mid-June. The court emphasizes the fact that if the plaintiff had reported earlier, "most of the incidents complained of could have been avoided." By failing to take advantage of her employer's complaint procedure, the plaintiff "did not give [the employer] an opportunity to address the situation," and the court therefore would not hold the employer liable for the harassment.

d) *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999) – The D.C. Circuit clarifies that while a delay in reporting will always be relevant to the inquiry as to whether a plaintiff acted unreasonably in responding to sexual harassment, the "unreasonable response" element of the *Ellerth/Faragher* test "is not intended to punish the plaintiff merely for being dilatory." Instead, the element is intended to reflect the general theory of damages that a victim has a duty to mitigate her damages. The ultimate question is whether "a reasonable person in [the victim's position] would have come forward early enough to prevent [the] harassment from becoming 'severe or pervasive.'" The Court refused to hold that a four month delay in reporting was unreasonable as a matter of law, holding that as the party moving for summary judgment the employer had the burden of demonstrating the absence of any issue of genuine fact and finding it not clear from the record when a reasonable person would have reported the misconduct.

3) ***Affirmative Defense as Applied to Co-Worker Harassment***

a) While the Supreme Court relied on vicarious liability principles in articulating the employer affirmative defense for supervisor harassment, lower courts have turned to negligence standards in evaluating employer liability for co-worker harassment.

b) *Curry v. District of Columbia*, 195 F.3d 654 (D.C. Cir. 1999) – An employer may be held liable for the harassment of one employee by a fellow, non-supervisor employee if (1) the harassment did not result in a tangible employment action, (2) the employer knew or should have known of the harassment, and (3) the employer failed to implement prompt and appropriate corrective action. The District made its policy against harassment known and established an effective complaint procedure, and was therefore entitled to rely on its employees to bring problems with their co-workers to its attention. Furthermore, a "prompt and appropriate corrective action" does not require a formal disciplinary action. The District satisfied the "prompt and appropriate corrective action" element when a supervisor admonished the harasser and asked him to stop immediately.

c) *EEOC v. Prospect Airport Servs.*, 621 F.3d 991 (9th Cir. 2010) – Summary judgment in favor of the employer is reversed upon the Ninth Circuit's holding that a reasonable jury could find that management was aware of the harassing conduct by the plaintiff's co-worker but failed to respond appropriately. The plaintiff had repeatedly brought his concerns to management, but management took no steps to stop the harassment despite being aware that the harassment was continuing.

d) *MacCluskey v. Univ. of Conn. Health Ctr.*, 707 F. App'x 44 (2d Cir. 2017) – The plaintiff-employee alleged that she was sexually harassed by a co-worker who was placed on a "last chance" agreement ten years prior due to similar inappropriate conduct. The Second Circuit affirms the district court's ruling that the "last chance" agreement placed the employer on constructive notice once the plaintiff informed her supervisor of the

harassing conduct she experienced, and that the employer acted unreasonably by failing to inquire further despite becoming aware of a "situation" with a worker on a "last chance" agreement.

4) ***Affirmative Defense as Applied to Subordinate-to-Supervisor Harassment***

a) *Lyles v. District of Columbia*, 17 F. Supp. 3d 59 (D.D.C. 2014) – An employer may be held liable for the harassment of a supervisor by a subordinate if (1) the employer knew or should have known of the harassment, and (2) the employer failed to implement prompt and appropriate action, but (3) *an employer will not be liable* if the supervisor plaintiff had the ability to stop the harassment and failed to do so. The court endorses this standard because it "empowers the supervisor to remove or reprimand the subordinate-harasser," and observes that other courts confronting this issue have developed a similar standard. *See, e.g., Mingo v. Roadway Express*, *Inc.,* 135 F. Supp. 2d 884 (N.D. Ill. 2001); *Perkins v. Gen. Motors Corp.*, 709 F. Supp. 1487 (W.D. Mo. 1989); *Lewis v. Sugar Creek Stores, Inc.*, no. 96-CV-0100E(H), 1996 WL 685730 (W.D.N.Y. Nov. 25, 1996).

5) ***Employer Responsibility for Employee Use of Social Media***

a) *Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010) – This case is recognized as one of the only cases to discuss whether employers "should have known" about allegedly discriminatory conduct between co-workers on social media.[1] The plaintiff alleged that her employer should have known about a discriminatory comment posted by a co-worker on Facebook about a picture of the plaintiff at a company outing because the company "allowed its employees to post photos and comments on the website during company time for company purposes." The court rejected this argument, finding no evidence that the defendant ordered or encouraged its employees to upload company activity pictures, "much less comment on them," and that the company did not condone the use of Facebook during company time. Furthermore, the company acted promptly and appropriately upon learning of the harassing conduct by blocking access to Facebook from all office computers.

b) *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000) – The Supreme Court of New Jersey holds that if an employer provides an "Internet forum" for its employees' use that is "closely related to the workplace environment," and receives notice that the plaintiff's co-employees are using to the forum to harass the plaintiff, the employer has a duty to "remedy that harassment."

VI. Evidentiary and Procedural Issues

1) Statute of Limitations

a) *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002) – A hostile work environment encompasses a *single* unlawful employment practice. An employer is therefore liable for all of the acts that comprise the hostile work environment as long as the claim is timely filed. A hostile work environment claim is timely filed if *any act* that

[1] *See* Robert H. Bernstein, *On the Horizon: Employer Liability for Employee Social Media Communications and Conduct, in* EMPLOYMENT LAW 2011: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR (2011), Westlaw 2011 WL 601170 ("To date, there is only one reported case directly addressing an employee's claim that co-worker postings on a social media site may support a hostile work environment claim.").

occurred as a result of the hostile work environment took place within the statute of limitations.

b) *Rouiller v. U.S. Capitol Police*, No. 15-CP-23 (CV, AG, RP), 2017 WL 106137 (OOC Board Jan. 9, 2017) – The OOC Board applies the above standard and holds that the Board has subject-matter jurisdiction over a hostile work environment claim as long as one of the allegedly discriminatory acts contributing to the hostile work environment occurred within the 180-day statutory time period for filing a complaint.

c) *Baird v. Gotbaum*, 662 F.3d 1246 (D.C. Cir. 2011) – The D.C. Circuit declines to dismiss a retaliatory hostile work environment claim on the grounds that it contains discrete acts of discrimination that could be actionable on their own. As long as the discrete incidents that would be time-barred by the statute of limitations if brought as separate actions are "adequately linked into a *coherent* hostile environment claim" (emphasis added), they may be included in a timely-filed hostile work environment claim.

2) Intervening Actions

a) *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002) – Because a hostile work environment is treated as a single unlawful employment practice, an "intervening action" by the employer may sever a hostile work environment claim into discrete acts of discrimination. The dispositive question for a court determining whether a hostile work environment claim should be treated as a single unlawful employment practice is whether each act complained of is "part of [a] whole."

b) *Greer v. Paulson*, 505 F.3d 1306 (D.C. Cir. 2007) – The plaintiff alleged a hostile work environment due to a number of racially offensive incidents that occurred in her workplace prior to her taking a 16-month leave of absence. During her leave the plaintiff's entire division was reorganized and she was assigned to a new supervisor whom she had never met. The court held that this reorganization constituted an intervening action because there was no evidence that the new supervisor was "perpetuating" or "condoning" the racially hostile environment allegedly created by the plaintiff's former supervisor. The allegations involving the new supervisor were too "obviously different" from the earlier allegations to form part of the same hostile work environment claim.

c) *Vickers v. Powell*, 493 F.3d 186 (D.C. Cir. 2007) – Although roughly half of the alleged incidents comprising the hostile work environment were committed by a successor supervisor, the court holds that "routine personnel actions such as…retirement and…promotion…cannot be the type of 'intervening action[s] by the employer' that would sever the earlier incidents from the more recent." Distinguishing the case from *Greer*, the plaintiff did not take an extended leave from the workplace and the court found nothing in the record to suggest that the plaintiff's new supervisor "in any way" intended to address the allegedly hostile environment created by his predecessor. To the contrary, the plaintiff claimed that the harassment intensified after the change in management. A reasonably jury could therefore conclude that the incidents all originated from the same hostile work environment.

d) *Turner v. U.S. Capitol Police Bd.*, 983 F. Supp. 2d 98 (D.D.C. 2013) – The supervisor about whom the plaintiff complained was removed from her line of supervision, which the court holds constituted an intervening action severing the single timely alleged incident from those that occurred earlier. The court therefore did not consider the more recent act to be related to the others for purposes of a hostile work environment claim.

3) Pleadings

a) *Ruffin v. Cong. Budget Office*, 79 F. Supp. 3d 246 (D.D.C. 2015) – An employee's allegation of "disparate treatment and unfair compensation because of race, sex, and reprisal" during OOC-mandated mediation did not place the employing office on notice of a hostile work environment claim when the plaintiff was unable to provide any evidence that he had elsewhere asserted a hostile work environment claim during the OOC process. Judging the hostile work environment claim to not be exhausted, the court dismissed the hostile work environment claim for a lack of jurisdiction.

b) *Herbert v. Architect of Capitol*, 839 F. Supp. 2d 284 (D.D.C. 2012) – A plaintiff is not required to list every particular incident comprising a hostile work environment in his initial complaint because a hostile work environment is viewed as a single unlawful employment practice and an "indivisible whole."

c) *Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008) – A plaintiff does not need to specifically allege in her complaint that she is pursuing a hostile work environment theory of discrimination as long as the defendant is on notice as to the nature of her claims. The plaintiff's complaint alleged "discrimination," which in principle includes a hostile work environment theory, and specifically requested "reassignment 'to a less hostile working environment.'" It was too late for the defendant to argue that the plaintiff never asserted a hostile working environment claim when it acknowledged in its motion for summary judgment that the plaintiff allegedly "experience[d] a hostile work environment."

d) *Reshard v. Lahood*, 443 F. App'x 568 (D.C. Cir. 2011) – In her complaint the plaintiff alleged an "environment" of "direct acts of racial discrimination" and "professional suppression." Neither the plaintiff nor the employing office, however, acknowledged a hostile work environment claim in the filings leading up to the district court's order of summary judgment. The plaintiff therefore waived her right to pursue a hostile work environment theory, for it must be clear at some point in the pre-trial process that a hostile work environment claim is being litigated.

e) *Hollabaugh v. Office of Architect of Capitol*, 847 F. Supp. 2d 58 (D.D.C. 2012) – The Federal Rules of Civil Procedure require "more than an unadorned, the-defendant-unlawfully-harmed me accusation." The plaintiff's claim that she was the first woman employed in the Elevator Shop in the Senate Office Buildings was not "sufficient to 'raise a right to relief above the speculative level'" when the complaint otherwise contained only bare allegations and legal conclusions.

4) Summary Judgment

a) *Solomon v. Office of Architect of Capitol*, No. 02-AC-62 (RP), 2005 WL 6236948, at *8 (OOC Board Dec. 7, 2005) – "[T]he circuit courts of appeal appear to disfavor the dismissal of hostile work environment claims unless the totality of the circumstances can be considered…that is to say, unless discovery has been completed."

b) *Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83 (D.D.C. 2007) – A plaintiff claiming unlawful *quid pro quo* harassment may, absent direct evidence, prove her case under the *McDonnell Douglas* burden-shifting framework. If a plaintiff establishes a prima facie case of *quid pro quo* sexual harassment, the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the adverse action. If the defendant succeeds in providing such a reason, the *McDonnell Douglas* framework disappears and the plaintiff bears the burden of persuasion to show that the defendant's proffered explanation is pretext.

c) *Bergbauer v. Mabus*, 934 F. Supp. 2d 55 (D.D.C. 2013) – "Hostile work environment cases do not typically apply the *McDonnell Douglas* burden shifting framework. Instead, the question is whether the plaintiff, based on a totality of the circumstances, has demonstrated causation sufficient to survive summary judgment or to succeed at trial."

5) Evidence

a) *Henson v. City of Dundee*, 682 F.2d 897, 912 n.25 (11th Cir. 1982) – "We note that in a case of alleged sexual harassment which involves close questions of credibility and subjective interpretation, *the existence of corroborative evidence or the lack thereof is likely to be crucial*" (emphasis added).

b) *EEOC Policy Guidance on Current Issues of Sexual Harassment* – "[T]he Commission may make a finding of harassment based solely on the credibility of the victim's allegation. As with any other charge of discrimination, a victim's account must be sufficiently detailed and internally consistent so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation. By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence." (https://www.eeoc.gov/policy/docs/currentissues.html)

c) *Admissibility of 'Me Too' ('Other Employee'/Prior Bad Acts) Evidence*

i) *Sprint/United Mgmt. v. Mendelsohn*, 552 U.S. 379 (2008) – The Supreme Court holds that evidence of allegedly discriminatory actions by supervisors of the defendant company who played no role in the adverse employment decision challenged by the plaintiff is neither *per se* admissible nor *per se* inadmissible. Instead, courts are to perform a "fact-intensive, context-specific inquiry" to determine if the evidence is relevant to the plaintiff's circumstances and theory of the case under Federal Rule of Evidence ("FRE") 401, or unduly prejudicial to the defendant under FRE 403.

ii) *Hayes v. Sebelius*, 806 F. Supp. 2d 141 (D.D.C. 2011) – Courts are consistent in holding that 'me too' evidence involving the *same decision-maker* that was responsible for the adverse employment action in the plaintiff's case is relevant and admissible under the Federal Rules of Evidence for the purpose of proving intent or motive to discriminate/retaliate. When considering whether to admit such 'me too' evidence, factors courts should consider include: "(1) whether past discriminatory or retaliatory behavior is close in time to the events at issue in the case, (2) whether the same decisionmaker was involved, (3) whether the witness and plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated."

iii) *Calobrisi v. Booz Allen Hamilton*, 660 F. App'x 207 (4th Cir. 2016) – While 'other employees' evidence cannot be treated as probative as to whether the *events* alleged by the plaintiff actually occurred, "[a]s a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory *intent*" (emphasis added). The Fourth Circuit reverses the district court's exclusion of 'other employees' evidence, holding this exclusion was not justified despite the district court's concerns that admission of such evidence would create "mini-trials" over the relevance of other employee testimony. The evidence the plaintiff sought to introduce included testimony from other women employees concerning a history of departures and abrupt demotions caused by the employer's all-male "Leadership Team."

iv) *Warrilow v. Qualcomm, Inc.*, 268 F. App'x 561 (9th Cir. 2008) – The Ninth Circuit holds that the district court did not abuse its discretion by excluding the testimony of prior Qualcomm employees who claimed to experience the same type of discrimination as the plaintiff. Citing only to FRE 403, the court concludes that that the trial judge correctly determined that the "allegations would unfairly prejudice the defendant and would distract the jury from the real issues at trial."

VII. Retaliation

The CAA contains an anti-retaliation provision, Section 207, which prohibits an employing office from retaliating against any covered employee for opposing any practice made unlawful by the CAA, including sexual harassment. The CAA also makes it unlawful for an employing office to retaliate against an employee for participating in any kind of proceeding under the CAA. Retaliation claims brought under the CAA are generally analyzed under the same framework as Title VII retaliation claims. *See Britton v. Office of Architect of Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC Board May 23, 2005).

It is important to note that the federal courts and the OOC Board of Directors interpret the second element of the CAA's retaliation provision differently while evaluating the employing office's actions: the federal courts apply the "dissuade a reasonable worker from making or supporting a charge of discrimination" language from *Burlington Northern,* while the OOC Board applies a "reasonably likely to deter protected activity" standard.[2] The OOC Board states that it sees "no functional distinction" between the two standards. *Williams*, 2017 WL 5635714 at *11, n.5.

1) Elements of a Retaliation Claim

a) *Williams v. Office of Architect of Capitol*, Nos. 14-AC-11 (CV, RP), 14-AC-48 (CV, RP), 15-AC-21 (CV, RP), 2017 WL 5635714 (OOC Board Nov. 21, 2017) – To establish a prima facie case of retaliation under Section 207 of the CAA, a complainant must show that: (1) he engaged in activity protected by Section 207(a); (2) the employing office took action against him that is reasonably likely to deter protected activity; and (3) a causal connection existed between the two.

b) *Solomon v. Office of Architect of Capitol*, No. 02-AC-62 (RP), 2005 WL 6236948, at *10 (OOC Board Dec. 7, 2005) – Once the complainant has established a prima facie case, the burden-shifting framework of *McDonnell Douglas* applies: the employing office must rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions, and then the employee must prove intentional retaliation by demonstrating that the employer's proffered legitimate reason was false and that retaliation was the "true reason" for the employing office's actions. The employee retains the ultimate burden of persuasion.

2) Protected Activity

a) *Crawford v. Metro. Gov't of Nashville and Davidson Cty., Tenn.*, 555 U.S. 271 (2009) – The anti-retaliation provisions of Title VII protect not only the victims of the alleged

[2] *Compare Williams v. Office of Architect of Capitol*, Nos. 14-AC-11 (CV, RP), 14-AC-48 (CV, RP), 15-AC-21 (CV, RP), 2017 WL 5635714 (OOC Board Nov. 21, 2017) with *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

conduct, but any employee who speaks out about discrimination in response to an internal investigation.

b) *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19 (D.C. Cir. 2013) – An employee's opposition to an employment practice is protected under Title VII as long as the employee "reasonably and in good faith *believed* [the practice] was unlawful under the statute," even if the employment practice did not actually amount to a violation of Title VII (quoting *McGrath v. Clinton*, 666 F.3d 1377, 1380 (D.C. Cir. 2012)).

c) *Dozier-Nix v. Dist. of Columbia*, 851 F. Supp. 2d 163 (D.D.C. 2012) – An employee's rebuffing of unwanted sexual advances is alone sufficient to establish protected activity under Title VII in support of a retaliation claim. *See also Ogden v. Wax Works*, 214 F.3d 999, 1007 (8th Cir. 2000) (rejection of offensive conduct is most "basic form of protected activity" under Title VII).

d) *Patterson v. Office of Architect of Capitol*, No. 08-AC-48 (RP), 2010 WL 2641754 (OOC Board. June 23, 2010) – "We conclude that protection under the participation clause of Section 207 of the CAA extends to participation in a hearing or proceeding under the CAA, *without regard to the nature or merits of the claim* advanced in that hearing or proceeding" (emphasis added).

3) Adverse Action by the Employing Office

a) As noted above, the standard for what constitutes actionable conduct by the employing office differs depending on whether a claim is proceeding in federal court or in an administrative hearing at the OOC. The federal courts are not bound to adhere to OOC Board precedent. Despite the difference in language, however, the District Court for the District of Columbia has stated that "the [OOC] standard is indistinguishable from the standard applied by the district court." *Turner v. U.S. Capitol Police*, 653 F. App'x 1, 3 (D.D.C. 2016).

b) *OOC Board – "Reasonably Likely to Deter"*

i) *Britton v. Office of Architect of Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC Board May 23, 2005) – The OOC Board points to Congress's use of the term "intimidate" in Section 207, in addition to "reprisal" and "discriminate," as evidence of its intent to broadly define the type of employer conduct proscribed by the anti-retaliation provision. The Board therefore adopts the EEOC's definition of an adverse action as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." However, even under this broader definition, the CAA should not be viewed as a "civility code," and actions will not be considered reasonably likely to deter protected activity if they are merely petty slights, trivial annoyances, or decisions that the employee simply dislikes or disagrees with.

ii) *Solomon v. Office of Architect of Capitol*, No. 02-AC-62 (RP), 2007 WL 5914215 (OOC Board Jan. 19, 2007) – The Board declines to adopt the Hearing Officer's rationale that the employing office's lack of response to the employee's grievance failed to amount to an adverse action "reasonably likely to deter" because the employee continued with the protected activity. The Board determined that "[s]uch rationale broadly precludes any employee who continues with protected activity from making a claim of retaliation," and that "*Britton* does not stand for such broad preclusion."

iii) *Kemp v. Architect of Capitol*, Nos. 13-AC-01 (CV, FL, RP), 13-AC-35 (AG, CG, RP), 2015 WL 4597722 (OOC Board. July 22, 2015) – The employee alleged that in

retaliation for participating in a previous case, his supervisor disapproved payment for 17 hours of overtime, became angry, raised his voice, and said he would not pay for the overtime because it had not been preapproved. Although the employee eventually received payment for the overtime worked, he had to submit three separate requests and it took six months for him to receive the payment. The Board holds that the disapproval and protracted delay of the overtime payment was reasonably likely to deter an employee from engaging in protected activity.

c) *Federal Court – "Materially Adverse"*
   i) *Moran v. U.S. Capitol Police Bd.*, 820 F. Supp. 2d 48 (D.D.C. 2011) – A materially adverse action by an employer sufficient to support a retaliation claim is one that results "in significant harm or hardship, such as affecting…'position, grade level, salary, or promotion opportunities.'" A paid suspension alone does not rise to this level unless it causes some further harm or hardship.
   ii) *Ross v. U.S. Capitol Police*, 195 F. Supp. 3d 180 (D.D.C. 2016) – The HR department of the U.S. Capitol Police proposed termination of the plaintiff, an officer and long-standing participant in civil rights litigation against the Capitol Police. Plaintiff alleged that he was constructively discharged because he was erroneously told by HR that he would be able to remain in good standing if he resigned instead of challenging the termination proposal. Noting that "retaliatory adverse actions 'encompass a broader sweep of actions'" than tangible employment actions required for a discrimination claim, the district court denied the employer's motion to dismiss. The court holds that the USCP's proposed notice of termination standing alone satisfied the adverse action requirement because it could well have "dissuade[d] a reasonable worker from making or supporting a charge of discrimination." *But see Moran*, 820 F. Supp. 2d at 58 (holding a proposal to terminate is not necessarily materially adverse).
   iii) *Dozier-Nix v. Dist. of Columbia*, 851 F. Supp. 2d 163 (D.D.C. 2012) – A retaliatory action directed at a third party, instead of the plaintiff who engaged in the protected activity, may still constitute a "materially adverse" action sufficient to support a retaliation claim. The court allows the plaintiff's claim that she was retaliated against when her supervisor threatened to deny the plaintiff's husband the permanent work assignment he requested to proceed past the summary judgment stage. Adverse actions against a plaintiff's fiancé or best friend would also support a retaliation claim, though reprisal against a "mere acquaintance" would not; determining whether the plaintiff's relationship to the third party facing reprisal is close enough to support a retaliation claim depends on whether a reasonable worker would be dissuaded from making or supporting a charge of discrimination because of the reprisal. *See Ali v. Dist. of Columbia Gov't*, 810 F. Supp. 2d 78, 89-90 (D.D.C. 2011).
   iv) *Robinson v. Ergo Sols.*, 257 F. Supp. 3d 47 (D.D.C. 2017) – The court refuses to hold as a matter of law whether the employer's revoking of the plaintiff's teleworking privileges, which she had enjoyed for 15 years previously, amounted to a materially adverse employment action. Whether this action was sufficiently harmful to dissuade a reasonable employee from complaining of discrimination is a factual determination left for the jury.
   v) *Ghori-Ahmad v. U.S. Comm'n on Int'l Religious Freedom*, 969 F. Supp. 2d 1 (D.D.C. 2013) – Changes in job duties and responsibilities are not actionable when they cause a "purely subjective harm to reputation or satisfaction." The D.C. District Court refuses to grant the employer's motion for summary judgment on the plaintiff's retaliation claim, however, on grounds that such changes in responsibilities may

support a retaliation claim when "the decline in quality and quantity of [plaintiff's] assignments prevented her from performing well enough [to secure a more permanent position]."

4) Causation

a) The plain language of Section 207 prohibits employing offices from retaliating against employees "because" the employees have engaged in protected activity. The complainant bears the burden to establish a causal connection between the protected activity and the allegedly retaliatory action.

b) *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) – "Title VII retaliation claims must be proved according to traditional principles of but-for causation…This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."

c) *Evans v. U.S. Capitol Police Bd.*, Nos. 14-CP-18 (CV, RP), 13-CP-61 (CV, RP), 13-CP-23 (CV, RP), 2015 WL 9257402 (OOC Board Dec. 9, 2015) – The plaintiff failed to demonstrate that retaliatory animus caused his suspension or demotion when the evidence showed that the employing office's actions were consistent with established policies and other, similarly situated employees were treated the same way.

d) *Sheehan v. Office of Architect of Capitol*, No. 08-AC-58 (CV, RP), 2011 WL 332312 (OOC Board Jan. 21, 2011) – In order to establish causation, a complainant must demonstrate by a preponderance of the evidence standard that the decision-maker had knowledge of the plaintiff's protected activity. A decision-maker cannot be "motivated to retaliate by something unknown to him" (quoting *Brungart v. BellSouth Telecomm, Inc.*, 231 F.3d 791, 799 (11th Cir. 2000)).

e) *Moran v. U.S. Capitol Police*, 82 F. Supp. 3d 117 (D.D.C. 2015) – The temporal proximity between the plaintiff's protected activity and the allegedly retaliatory act "must be close enough to permit a reasonable jury to infer that the adverse employment action was in retaliation for the plaintiff's lawful and protected conduct." The opinion suggests that alleged retaliatory acts that occur three to four months after the protected activity "push the temporal requirement…to its outer limit" (quoting *Gustave-Schmidt v. Chao*, 360 F. Supp. 2d 105, 118-19 (D.D.C. 2004)).

f) *Robinson v. Ergo Sols.*, 257 F. Supp. 3d 47 (D.D.C. 2017) – In determining whether the allegedly retaliatory act is close enough in temporal proximity to the plaintiff's protected activity for a reasonable jury to infer a retaliatory motive, courts are reluctant to apply "a rigid cut-off" that "would only encourage malfeasant employers to wait until the time limit has just passed." By denying the employer's motion for summary judgment, the court refuses to hold as a matter of law that a six-month delay between the protected activity and the adverse event is too long to sustain a claim, characterizing a six-month gap as a "gray area" for the jury to resolve.

5) Retaliatory Hostile Work Environment

a) *Patterson v. Office of Architect of Capitol*, No. 08-AC-48, 2010 WL 2641754 (OOC Board June 23, 2010) – Retaliatory hostile work environment claims are analyzed under the same framework as discriminatory hostile work environment claims, as described above. A complainant alleging a retaliatory hostile work environment must show that he was subjected to harassing conduct that could reasonably be construed as so severely or pervasively hostile that it creates both an objectively and subjectively hostile or abusive

work environment, and that the conduct was causally connected to the complainant's claimed protected activity.

b) *Bergbauer v. Mabus*, 934 F. Supp. 2d 55, 91 (D.D.C. 2013) – While *Burlington Northern* can be read as *allowing* courts to apply a "materially adverse" rather than "sufficiently severe or pervasive 'to alter the conditions of the victim's employment'" standard for retaliatory hostile work environment claims, the opinion does not *require* it. The "consistent practice among district judges in [the D.C.] circuit" is to apply the more stringent discrimination standard. Furthermore, evidence that a supervisor and plaintiff had a poor relationship *before* the plaintiff engaged in protected activity may weaken the causal connection between the allegedly retaliatory employment action and the plaintiff's protected activity. The court refuses to consider the plaintiff's loss in pay, poor performance reviews, or removal of certain job duties as part of a retaliatory hostile work environment claim because such actions are sufficiently concrete to serve as distinct and discrete retaliation claims on their own.

c) *Baird v. Gotbaum*, 792 F.3d 166 (D.C. Cir. 2015) – The plaintiff alleged that her employer's repeated failure to investigate her internal complaints constituted a retaliatory hostile work environment. Affirming the district court's order of dismissal, the D.C. Circuit holds that "a trivial incident does not become nontrivial because an employer declines to look into it." The court described the plaintiff's internal complaints as concerning "occasional name-calling, rude emails, lost tempers and workplace disagreements—the kind of conduct courts frequently deem uncognizable under Title VII," and writes that "[a] retaliatory failure-to-remediate claim is not actionable unless the underlying incident would itself be actionable."

VIII. Resources for Employing Offices

Sexual harassment is a widespread problem in the workplace. Close to 7000 sexual harassment charges were filed with the EEOC in 2016, before the #MeToo movement made waves in the media this past fall.[3] Despite the large number of charges pursued, studies suggest sexual harassment is widely underreported, with 72% of workers experiencing sexual harassment failing to report the misconduct.[4] While the problem may therefore seem intractable, the good news for employers is that there is little disagreement about the steps employers can take to both reduce harassment in the workplace and decrease the chance of being found liable for harassment if it does occur. The recommendations that both public and private organizations make to employing offices is remarkably consistent. Ensuring that anti-harassment expectations are regularly communicated from the top management of the employing office is key, as is providing an effective complaint procedure for victims to report misconduct.

1) Relationships in the Workplace

a) *EEOC v. Prospect Airport Servs.*, 621 F.3d 991 (9th Cir. 2010) – "People spend most of their waking hours with other people at their workplaces, so that is where many meet and begin social relationships, and someone has to make the first overture. Some people have more social finesse than others…but mere awkwardness is insufficient to establish the

[3] EEOC, CHARGES ALLEGING SEX-BASED HARASSMENT (https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm).

[4] Career Builder, New CareerBuilder Survey Finds 72 Percent of Workers Who Experience Sexual Harassment at Work Do Not Report It (Jan. 20, 2018), http://press.careerbuilder.com/2018-01-19-New-CareerBuilder-Survey-Finds-72-Percent-of-Workers-Who-Experience-Sexual-Harassment-at-Work-Do-Not-Report-it.

'severe or pervasive' element" of a hostile work environment claim. Romantic overtures only begin to become actionable when, as in this case, the target of the overtures makes their unwelcomeness known to the instigator and/or the employer, and the overtures continue regardless.

b) *Perez v. City of Roseville*, — F.3d —, 2018 WL 797453 (9th Cir. Feb. 9, 2018) – Female police officer alleged that she was terminated for having an affair with a fellow officer, after the male officer's wife complained to the police department. The plaintiff did not deny the extra-marital affair, but there was no evidence that she had engaged in any sexual conduct while on duty. She claimed that the termination violated her Constitutional right to privacy and intimate association. The district court granted summary judgment in favor of the Department, but the Ninth Circuit reversed and remanded, holding that terminating a police officer on the basis of "private, off-duty, personal" sexual conduct is unconstitutional, because "constitutional guarantees of privacy and free association prohibit the State from taking adverse employment action on the basis of private sexual conduct unless it demonstrates that such conduct negatively affects on-the-job performance or violates a constitutionally permissible, narrowly tailored regulation."

2) Guidelines for Employers

a) *OPM Guidelines for Preventing Harassment in the Workplace*
   i) Provide effective training, including how to handle potential disciplinary issues early. Supervisor-specific training should be available to the relevant employees.
   ii) Use a combination of computer-based and in-person training.
   iii) Include legal counsel in training and awareness sessions for supervisors and managers.
   iv) Provide training on interpersonal and conflict resolution skills.
   v) Full manual can be found at: https://www.opm.gov/policy-data-oversight/employee-relations/reference-materials/nofearact.pdf

b) *EEOC Guidance for Preventive Action*
   i) Employers should take "all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."
   ii) An effective preventive program includes an explicit policy against sexual harassment that is clearly and regularly communicated to employees and an effective complaint procedure.
   iii) The procedure for resolving sexual harassment complaints should be designed to encourage victims of harassment to come forward and should not require a victim to first complain to the offending supervisor. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.
   iv) Employers should investigate reports promptly and thoroughly upon receiving an initial complaint, and take immediate and appropriate corrective action by doing whatever is necessary to end the harassment and make the victim whole. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary.

v) If the Commission finds that the harassment has been eliminated, all victims made whole, and preventive measures instituted, the Commission normally will administratively close the charge because of the employer's prompt remedial action.
vi) Full guidance can be found at: https://www.eeoc.gov/policy/docs/currentissues.html.

c) Kathie Ragsdale, *Is Your Company Ready to Effectively Deal with Sexual Harassment?*, 35 Bus. N.H. Mag. 1, 44 (2018).
i) "For employers who wish to avoid sexual harassment complaints or judgments, the advice is straightforward:
(1) Have a written policy prohibiting sexual harassment
(2) Train both managers and employees about acceptable behavior
(3) Make it clear to whom an employee should report any incident of alleged harassment
(4) Take complaints seriously and follow up swiftly
(5) Update the policy and training materials regularly
(6) Set an example from the top down that creates a culture where it is understood that sexual harassment will [not] be tolerated."

d) Orrick Global Employment Law Group, *New Lawsuit Alleges Rush to Judgment in #MeToo Climate*, JD SUPRA (Feb. 13, 2018), https://www.jdsupra.com/legalnews/new-lawsuit-alleges-rush-to-judgment-in-82278/.
i) On February 4, 2018, a former employee of the improvisational theater group Upright Citizens Brigade sued his former employer alleging gender discrimination and wrongful termination. The plaintiff was fired after the employer received complaints that he raped and drugged several women. He alleges that he was summarily terminated without being questioned or receiving an opportunity to explain the alleged conduct, and that the employer's practice of "believ[ing] all women" constituted gender discrimination against men.
ii) "The best protection against these types of claims is a full and fair investigation. Although there may be pressure to curtail or skip such an investigation in the current [#MeToo] environment," employers should still interview all relevant parties– including the accused employee.

e) *See also EEOC Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors* (https://www.eeoc.gov/policy/docs/harassment-facts.html).