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HARASSMENTS CLAIMS: HANDLING INTERNAL INVESTIGATIONS AND LITIGATION[1]

A. Types of Harassment and Retaliation Defined and Illustrated

There are three primary federal anti-discrimination/harassment statutes which apply to private employers: 1) the Civil Rights Act of 1964 as amended; 2) the Age Discrimination in Employment Act and 3) the Americans with Disabilities Act. In addition, under limited circumstances private employers may be subject to damages under the Rehabilitation Act of 1973. Finally, Nevada has its own statutes which prohibit discrimination and harassment. See Nev. R. Stat. 613.

The Civil Rights Act of 1964 states that it is unlawful for an employer or employment agency to fail or refuse to hire or to discharge any individual or otherwise to discriminate against them with respect to their compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) & (b). Furthermore it is unlawful for a labor organization to exclude or to expel from its membership or otherwise to discriminate against any individual on the basis of his race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(c).

The Age Discrimination in Employment Act states that it is it is unlawful for an employer or employment agency to fail or refuse to hire or to discharge any individual or otherwise to discriminate against them with respect to their compensation, terms, conditions, or privileges of employment, because of the individual's age. 29 U.S.C. § 623(a) & (b). Furthermore it is unlawful for a labor organization to exclude or to expel from its membership or otherwise to discriminate against any individual on the basis of his age. 29 U.S.C. § 623(c).

The Americans with Disabilities Act states that it is unlawful for an employer to discriminate against a qualified individual with a disability because of the disability of

[1]The following material is not intended to constitute legal advice. Prior to making any decisions on the information contained herein you should seek out and discuss with an attorney any questions or decisions you are about to make concerning the legal issues set forth herein.

such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). The ADA also states:

> As used in subsection (a) of this section, the term "discriminate" includes-
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> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
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> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
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> (3) utilizing standards, criteria, or methods of administration -
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> (A) that have the effect of discrimination on the basis of disability; or
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> (B) that perpetuate the discrimination of others who are subject to common administrative control;
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> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
>
> (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
>
> (6) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills

> of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. § 12112(b).

_____Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 provides in pertinent part that:

> No otherwise qualified individual with a disability in the United States, as defined in Section 706(8) of this title, shall, solely by reason of her or his disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .

29 U.S.C. § 794. Section 706(8) of the Rehabilitation Act of 1973 defines an individual with a disability as:

> [A]ny person who (I) has a physical or mental impairment which substantially limits one or more of such persons's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B).

Based on recent United States Supreme Court Opinions, States are immune from monetary liability under the Age Discrimination in Employment Act and the Americans with Disabilities Act. However, an individual can still proceed and obtain injunctive relief for these causes of action.

However, all employers, with fifteen or more employees, and all public employers are covered by Nevada Revised Statute 613.330 which states:

> 1. Except as otherwise provided in NRS 613.350, it is an unlawful employment practice for an employer:
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> (a) To fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to his compensation, terms, conditions or privileges of employment, because of his race, color, religion, sex, sexual orientation, age, disability or national origin; or
>
> (b) To limit, segregate or classify an employee in a way which would deprive or tend to deprive him of employment opportunities or otherwise adversely affect his status as an employee, because of his race, color, religion, sex, sexual orientation, age, disability or national origin.
>
> 2. It is an unlawful employment practice for an employment agency to:
>
> (a) Fail or refuse to refer for employment, or otherwise to discriminate against, any person because of the race, color, religion, sex, sexual orientation, age, disability or national origin of that person; or
>
> (b) Classify or refer for employment any person on the basis of the race, color, religion, sex, sexual orientation, age, disability or national origin of

that person.

3. It is an unlawful employment practice for a labor organization:
(a) To exclude or to expel from its membership, or otherwise to discriminate against, any person because of his race, color, religion, sex, sexual orientation, age, disability or national origin;
(b) To limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any person, in any way which would deprive or tend to deprive him of employment opportunities, or would limit his employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of his race, color, religion, sex, sexual orientation, age, disability or national origin; or
(c) To cause or attempt to cause an employer to discriminate against any person in violation of this section.

4. It is an unlawful employment practice for any employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining, including, without limitation, on-the-job training programs, to discriminate against any person because of his race, color, religion, sex, sexual orientation, age, disability or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

5. It is an unlawful employment practice for any employer, employment agency, labor organization or joint labor-management committee to discriminate against a person with physical, aural or visual disabilities by interfering, directly or indirectly, with the use of an aid or appliance, including, without limitation, a guide dog, hearing dog, helping dog or other service animal, by such a person.

6. It is an unlawful employment practice for an employer, directly or indirectly, to refuse to permit an employee with a visual or aural disability to keep his guide dog, hearing dog or other service animal with him at all times in his place of employment.

7. For the purposes of this section, the terms “guide dog,” “hearing dog,” “helping dog” and “service animal” have the meanings ascribed to them respectively in NRS 426.075, 426.081, 426.083 and 426.097.

An individual may allege harassment based on any of the above protected classes. Harassment that results in a tangible employment action or is sufficiently severe or pervasive to alter the conditions of employment will establish an actionable claim under any of the above statutes. (See e.g., **Faragher v. City of Boca Raton**, 524 U.S. 775, 786 (1998); see also **Oncale v. Sundowner Offshore Servs., Inc.**, 523 U.S. 75, 80-81 (1998)(noting that Title VII is not a "general civility code," and only prohibits sexual harassment that is "so objectively offensive as to alter the 'conditions' of the victim's employment.").

In June of 2006 the United States Supreme Court entered its decision in

Burlington Northern and Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) clarified the law regarding retaliation. The interesting issue with this case is how the U.S. Supreme Court broadened the legal concepts behind Title VII and retaliation litigation. In reaching its decision, the U.S. Supreme Court resolved a split in the U.S. Circuit Courts of Appeals. In particular, the sixth circuit had said that a plaintiff must show an "adverse employment action which it defined as a "Materially adverse change in the terms and conditions" of employment. (i.e. the sixth circuit applied the same standard for retaliation that they applied to a substantive discrimination offense). On the other hand the Seventh Circuit and the District of Columbia have held that the Plaintiff must show that the "employer's challenged action would have been material to a reasonable employee which means that the employer's action would likely have "dissuaded a reasonable worker from making or supporting a charge of discrimination." Finally, the Ninth Circuit followed the EEOC guidance and has said that the Plaintiff must simply establish that "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.

> In **White** the U.S. Supreme Court held:
>
> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

In reaching its conclusion the U.S. Supreme Court held:

> a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " . . . . The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson,* 519 U.S., at 346, 117 S.Ct. 843. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. *Ibid*. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.

White, 126 S.Ct. At 2415. The Court also noted that:

> this standard does *not* require a reviewing court or jury to consider "the nature of

> the discrimination that led to the filing of the charge." *Post,* at 2420 (ALITO, J., concurring in judgment). Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

The factual background in **White** is a fact pattern Plaintiff's attorney's see on a frequent basis. In **White** the U.S. Supreme Court's decision states:

> In June 1997, Burlington's roadmaster, Marvin Brown, interviewed White and expressed interest in her previous experience operating forklifts. Burlington hired White as a "track laborer," a job that involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way. Soon after White arrived on the job, a co-worker who had previously operated the forklift chose to assume other responsibilities. Brown immediately assigned White to operate the forklift. While she also performed some of the other track laborer tasks, operating the forklift was White's primary responsibility.
>
> In September 1997, White complained to Burlington officials that her immediate supervisor, Bill Joiner, had repeatedly told her that women should not be working in the Maintenance of Way department. Joiner, White said, had also made insulting and inappropriate remarks to her in front of her male colleagues. After an internal investigation, Burlington suspended Joiner for 10 days and ordered him to attend a sexual-harassment training session.
>
> On September 26, Brown told White about Joiner's discipline. At the same time, he told White that he was removing her from forklift duty and assigning her to perform only standard track laborer tasks. Brown explained that the reassignment reflected co-worker's complaints that, in fairness, a " 'more senior man' " should have the "less arduous and cleaner job" of forklift operator.
>
> On October 10, White filed a complaint with the Equal Employment Opportunity Commission (EEOC or Commission). She claimed that the reassignment of her duties amounted to unlawful gender-based discrimination and retaliation for her having earlier complained about Joiner. In early December, White filed a second retaliation charge with the Commission, claiming that Brown had placed her under surveillance and was monitoring her daily activities. That charge was mailed to Brown on December 8.

> A few days later, White and her immediate supervisor, Percy Sharkey, disagreed about which truck should transport White from one location to another. The specific facts of the disagreement are in dispute, but the upshot is that Sharkey told Brown later that afternoon that White had been insubordinate. Brown immediately suspended White without pay. White invoked internal grievance procedures. Those procedures led Burlington to conclude that White had *not* been insubordinate. Burlington reinstated White to her position and awarded her backpay for the 37 days she was suspended. White filed an additional retaliation charge with the EEOC based on the suspension.

White, 126 S.Ct. at 2409. The Court held that whether the 37 day suspension and the reassignment constituted unlawful retaliation was a question of fact to be decided by the jury.

Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act prohibit retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity. All of these statutes define protected activity as consisting of the following conduct:

(1) opposing a practice made unlawful by one of the employment discrimination statutes (also known as the "opposition" clause); or

(2) filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute (also known as the "participation" clause).

(See Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a); Section 4(d) of the ADEA, 29 U.S.C. § 623(d); Section 503(a) of the ADA, 42 U.S.C. § 12203(a); and Section 15(a)(3) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3).

An adverse action is an action taken by an employer or its agents to try to keep an employee from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

- employment actions such as termination, refusal to hire, and denial of promotion;
- other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and
- any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

However, adverse employment actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history. In addition it is important to note that, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed unlawful discrimination.

Furthermore, subsequent or prior employers can be liable for retaliation against current or former employees who have opposed a discriminatory practice or participated in an employment discrimination proceeding.

B. Attorney's Changing Role in the Internal Workplace Investigations

For years all attorney's did was advise clients and litigate cases. However, with the changing nature of employment litigation, the increased expenses if a employer is found liable for discrimination, harassment or retaliation, and sometimes simply because the employer needs a neutral fact finder, employers are now using attorneys to conduct some or all of an investigation into these allegations. Important decisions for an employer to make are whether to use an attorney hired internally (i.e., an employee) or outside counsel specifically hired to conduct the investigation. Furthermore, simply because an attorney conducts the investigation, the facts learned by the attorney may not be privileged.

In order to determine whether an employer has any liability for alleged discriminatory conduct, it must conduct a thorough investigation. Internal investigations should follow several distinct steps. These steps include, but are not limited to, (1) Planning; (2) What methods are you going to use to conduct the investigation; (3) Preserving Evidence; (4) Interviewing Witnesses; (5) Determining the Conclusion; and (6) Who should be advised of the conclusion?

Prior to starting an investigation the employer needs to determine the purpose of the investigation. This should start with an initial determination as to what caused the event which lead to the investigation. An employer then needs to determine who should have overall responsibility for the investigation and whether the investigation should be subject to the attorney-client privilege. Furthermore, the employer needs to determine whether law enforcement needs to be involved and is it likely civil litigation will occur.

The employer should then determine what methods it needs to use to conduct the investigation. Many times this is a simple as reviewing company records, personnel files or searching the desks, lockers, purses or individual employees. However, in this

age of computers and instant messaging, this may also include electronic data, voice mail, e-mail and computer files. The employer must then determine whether it needs to conduct surveillance, use shoppers, undercover investigations, and or police investigations to determine what occurred. Furthermore, the employer may need to conduct drug and alcohol testing, and/or medical exams.

Once the employer has determined what methods the employer should use to conduct the investigation, the employer then needs to start conducting the investigation. If the employer has decided to use an attorney to conduct the investigation, the initial step the attorney must do is to insure that key documents and electronic data have been safeguarded. In the event electronic data has been erased or documents have been destroyed, can the data be restored or the documents recreated. Furthermore, if possible have photographs been taken which show the date and time of each photograph. Furthermore, in the event video tapes of the event exist they should be immediately preserved. It is extremely important that all physical evidence has been stored to avoid deterioration.

After safeguarding electronic data and key documents the attorney should begin interviewing witnesses. It is important that there always be two people present when an investigation occurs. The attorney should ask the questions and the other person should act as a witness and take notes. The person taking notes should create a detailed written record of each interview. Furthermore, attorney should explain the purpose of the interview and emphasize that the employer takes this matter very seriously. Avoid asking leading and/or compound questions. Ask questions which invite the witness to provide narrative answers to questions. The attorney should avoid myths and stereotypes and ask non-judgmental questions. Furthermore, attorney asking the questions should avoid the appearance of favoritism.

Once the attorney has interviewed the witnesses, the attorney should determine what happened. In order to determine what happened, the attorney must consider the credibility of the various witnesses which were interviewed. Furthermore, the attorney should consider whether there is any corroboration of the allegations which led to the investigation. In reaching a determination, the attorney should consider the bias of the witnesses and the consistency, if any, of the witness statements. Furthermore, the attorney should consider whether the alleged harasser has any prior history of similar misconduct. Once this information is correlated with the physical and electronic evidence, the attorney then reaches his conclusion as to what occurred. Once this decision is reached the attorney can then advise the employer what disciplinary action, if any, should be taken.

Once the conclusion has been reached the attorney should only communicate the determination to those who have a need to know. Furthermore, the employer

should communicate the results of the investigation to the employee who raised the complaint which led to the investigation.

C. How to Handle Cases of Individual Liability

There is no individual liability for violations of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973 and the Nevada Anti-Discrimination Statutes, Nevada Revised Statutes Chapter 613. However, a growing trend in litigation is to file claims of Intentional Infliction of Emotional Distress, Assault, Battery, Defamation, Libel and Slander. Usually these claims are brought as ancillary and supplemental claims to employment discrimination claims. When these types of individual claims are brought by an employee against coworkers and/or management the employer must decide if there is a conflict. If there is a chance that the employer may decide to cast the employee to the wolves, i.e., its not our fault, it was that one bad employee, who we fired, who caused all the problems, then under no circumstances should the employer's attorney represent the coworker and/or management and the employer.

D. When is the Employer Liable?

In **Faragher v. City of Boca Raton**, 524 U.S. 775, 807 - 808, 118 S.Ct. 2275, 2292 - 2293, 141 L.Ed.2d 662 (1998), the United States Supreme Court stated:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment

> culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. See *Burlington,* 524 U.S., at 762-763, 118 S.Ct., at 2269.

In **Burlington Industries, Inc. v. Ellerth**, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), the United States Supreme Court stated:

> "*Quid pro quo* " and "hostile work environment" do not appear in the statutory text. The terms appeared first in the academic literature, see C. MacKinnon, Sexual Harassment of Working Women (1979); found their way into decisions of the Courts of Appeals, see, *e.g., Henson v. Dundee,* 682 F.2d 897, 909 (C.A.11 1982); and were mentioned in this Court's decision in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). See generally E. Scalia, The Strange Career of *Quid Pro Quo* Sexual Harassment, 21 Harv. J.L. & Pub. Policy 307 (1998).In *Meritor,* the terms served a specific and limited purpose. There we considered whether the conduct in question constituted discrimination in the terms or conditions of employment in violation of Title VII. We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit. Less obvious was whether an employer's sexually demeaning behavior altered terms or conditions of employment in violation of Title VII. We distinguished between *quid pro quo* claims and hostile environment claims, see 477 U.S., at 65, 106 S.Ct., at 2404-2405, and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive. *Ibid.* The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive.

In **Oncal v. Sundowner Offshore Services, Inc.**, 523 U.S. 75, 82, 118 S.Ct. 998, 1004, 140 L.Ed.2d 201 (1998), the U.S. Supreme Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. The Court stated:

> harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses

> to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted *discrimina[tion]* ... because of ... sex."

Id. at 80 - 81, 118 S.Ct. at 1002.

In **National R.R. Passenger Corp. v. Morgan**, 536 U.S. 101, 122 S.Ct. 2061, 2074, 153 L. Ed. 2d 106 (2002), the United States Supreme Court confirmed that hostile environment claims based on protected statuses other than sex or gender is the same general standards as are used in sexual harassment cases. The court also held that hostile environment claims are generally considered, "continuing violations", extending the usual one hundred eighty day (180) or three hundred day (300) statute of limitations that applies in the Title VII case. As a result, "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period." **Id.** at 122, 122 S.Ct. at 2077. However, the acts in the claim must be " part of the same unlawful employment practice." The court gave two examples of situations in which hostileness may not be part of the same unlawful employment practice:

> If the incident within the filing period has " no relation" to the incidents occurring beyond the filing period, then most recent incident is not "part of the same hostile environment" and the employee cannot recover for any of the remote incidents.
> * * * *
> If there has been "certain intervening action by the employer," making the recent incident "no longer part of the same hostile environment," then the employee cannot recover for the remote incidents.

In the typical sexual harassment case the employer either alleges that the conduct did not occur, or that some other factor other than sexual harassment was the reason why the employer took the action that it did. The later scenario is called the mixed motive case. In **Desert Palace, Inc. v. Costa**, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) the United States Supreme Court addressed section 107 of the Civil Rights Act of 1991 which amended Title VII of the Civil Rights Act of 1964 and which established standards in a mixed motive case. The United States Supreme Court stated:

> In particular, § 107 of the 1991 Act, which is at issue in this case, "respond[ed]" to *Price Waterhouse* by "setting forth standards applicable in 'mixed motive' cases" in two new statutory provisions. 511 U.S., at 251, 114 S.Ct. 1483. The first establishes an alternative for proving that an "unlawful employment practice" has occurred:

> " 'Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.' " 42 U.S.C. § 2000e-2(m).
>
> The second provides that, with respect to " 'a claim in which an individual proves a violation under section 2000e-2(m),' " the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B). [FN2] In order to avail itself of the affirmative defense, the employer must "demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor." *Ibid.*

In addition, in **Costa** the Court also stated:

> Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases." *Ibid.* That rule requires a plaintiff to prove his case "by a preponderance of the evidence," *ibid.* using "direct or circumstantial evidence," *Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 714, n. 3, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), we recognized that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination." *Id.,* at 147, 120 S.Ct. 2097 (emphasis added). The reason for treating circumstantial and direct evidence alike is both clear and deep- rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 508, n. 17, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

However, Title VII does not proscribe all conduct of a sexual or racial nature in the workplace. It does however proscribe unwelcome sexual or racial conduct that is a term or condition of employment.

In **Clark County School District v. Breeden**, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001), the U.S. Supreme Court held that an employees complaint about an isolated incident was not protected by Title VII because she could not reasonably believe that one single crude remark could violate Title VII: it was, at worst, the court

held, an "isolated incident" that cannot remotely be considered "extremely serious," as the cases require. In **Breeden**, the employee had reported to upper management to her supervisor and another male employee had chuckled, in her presence, about a statement that appeared in a file that all three employees were reviewing as part of their job. The file disclosed that a job applicant had told a co-worker: "I hear making love to you is like making love to the Grand Canyon." When the plaintiff's supervisor read the comment aloud and said, "I don't know what that means," the other male employee said, "I'll tell you later." The two men then chuckled. The court held that this was an isolated comment and, while crude, does not meet the standard for sexual harassment.

Similarly, in **Ngeunjuntr v. Metropolitan Life Insurance Co.**, 146 F.3d 464 (7th Cir. 1998), the court examined a racial and ethnic hostility claim. Ngeunjuntr claimed that a manager of Met Life "gave him the finger" and got "mad" at him for things which other employees did without consequences. He alleged another manager stated that he did not trust Ngeunjuntr or "the yellow race" or Buddhists, and told Ngeunjuntr to go back east. Finally, he alleged another manager told him that "you Middle Eastern people are a pain in the butt." The Seventh Circuit held that these incidents were insufficient to establish a racial and ethnic hostility claim.

On the other hand, in **Stiner v. Showboat Operating Co.**, 25 F.3d 1459, 1463 - 1464 (9th Cir., 1994), the Ninth Circuit Court of Appeal's overturned the U.S. District Court for the District of Nevada's decision granting summary judgment against the Plaintiff's sexual harassment claims and stated:

> The district court erred in endorsing Showboat's argument that Trenkle's conduct was not sexual harassment because he consistently abused men and women alike. In the first place, that argument mischaracterizes his actual behavior. The numerous depositions of Showboat employees reveal that Trenkle was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct. *See Harris,* 510 U.S. at ----, 114 S.Ct. at 369 (defendant called plaintiff a "dumb ass woman," said "you're a woman, what do you know," suggested "negotiating" her raise at the local Holiday Inn, and "jokingly" asked whether she had had sex with clients). While Trenkle may have referred to men as "assholes," he referred to women as "dumb fucking broads" and "fucking cunts," and when angry at Steiner, suggested that she have sex with customers. And while his abuse of men in no way related to their gender, his abuse of female employees, especially Steiner, centered on the fact that they were females. It is one thing to call a woman "worthless," and another to call her a "worthless broad." Furthermore, even if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby "cure" his conduct toward women. *Ellison* unequivocally directs us to consider what is

offensive and hostile to a reasonable *woman. Ellison,* 924 F.2d at 878 ("conduct that many men consider unobjectionable may offend many women"). And finally, although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that *both* men and women working at Showboat have viable claims against Trenkle for sexual harassment.

E. How to Litigate the Harassment Case

The least expensive time to settle a discrimination case is during the informal settlement conference with the Nevada Equal Rights Commission. At this point the employer has spend a minimal amount of money on attorney's fees in preparing the case. Furthermore, neither party is 100% welded to proceeding in an adversarial setting. While many employers argue that they have nothing wrong and they will see the employee "rot in hell" before they will pay a dime, settlement is not only a business decision it is an economic issue. An employer is rarely 100% correct. On the other hand, it is also true that employees are rarely 100% correct. As a result, an employer should carefully weigh the pros and cons of settling a case during the administrative phase. Remember, settlements do not always cost money. You could reinstate the employee, or in the alternative, if you are aware that the employee does not wish to return to work, you could make an unconditional offer to return to work which cuts off the employee's future right to back pay if that is rejected. Obviously the danger of this tactic is if you do not want the employee to come back to work and the employee accepts, you now have an employee that you would prefer not working for you back in your work force. Furthermore, many times you can settle a case at this stage by simply agreeing to pay three (3) to six (6) weeks severance pay or paying an employee's COBRA payments for several months. These in the long run are de minimis expenses for a corporation. Each case however needs to be analyzed on its merits. Some cases there is absolutely no liability for the company. However, if the company is going to spend $100,000.00 litigating against the case, if the employee has an attorney, then the company may wish to settle the case in this stage, or in the alternative, simply wait and see if the employee files a lawsuit. Furthermore, prior to settling the case, an employer should attempt to determine whether the resume that the employee provided or the employment application the employee filled out are accurate, or if the employee engaged in any activity which, had the employer known at the time of the employee's employment, the employee would not have been hired. If the employer is able to find inaccuracies in the resume or application of the employee, the employer can argue that they are not responsible for any back pay under the After Acquired Evidence Doctrine. Under this doctrine an employer argues that but had they known the truth about the employee they would have never hired the employee or alternatively they would have fired the employee as soon as they learned the truth. Therefore, as a matter of law the employer is not liable for back pay.

However, it an employer chooses not to settle a dispute, or the employee is simply o, the next step is litigation. If the employee files the law suit in state court the attorney representing the employer should immediately remove the case to federal court. There are three primary advantages for an employer which removes a case to federal court. First, the summary judgment standard is stricter in federal court. As a result it is more difficult for the employee to prevail. Second, if the employee does survive summary judgment, the next step is jury selection, federal courts allow limited voir dire. As a result, it is more difficult for an employee to obtain a favorable jury. Third, the jury verdict in federal court must be unanimous. If just one person thinks the employee is lying, is greedy or what happened really wasn't that bad, the employee loses.

Once the case is removed to federal court and the answer is filed, you must conduct the Rule 26 conference where the parties meet and attempt to "settle" the case. Typically parties have one-hundred and eighty days to conduct discovery in federal court. Within thirty days of the close of discovery the employer should file a Motion for Summary Judgment. A Motion for Summary Judgment is an attempt by the employer to dismiss the case prior to going to trial. Even if the employer does not prevail, many times a Motion for Summary Judgment will narrow the issues the employer faces when it goes to trial.

Under the Federal Rules of Civil Procedure a motion for summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In **Celotex Corp. v. Catrett**, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), **cert. denied**, 484 U.S. 1066 (1988), the United States Supreme Court held that the non-moving party has the burden of "showing that there is a genuine issue for trial" by presenting specific facts contained within an affidavit, depositions, answers to interrogatories or admissions on file. The non-moving party must demonstrate a genuine issue of fact rather than some "metaphysical doubt" that the facts could be otherwise. **Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.**, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The Supreme Court declared in **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed. 202 (1986), that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

In deciding a motion for summary judgment, "the trial court should view all

evidence in the light most favorable to the party opposed to the motion. The court may not resolve any material factual dispute, but must deny the motion and proceed to trial if it finds that such an issue exists." **Environmental Defense Fund v. Marsh**, 651 F.2d 983 (5th Cir. 1981). Intent is the ultimate issue of fact to be determined in an employment discrimination suit. **Pullman-Standard v. Swint**, 456 U.S. 273, 288-89, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). "As a general rule, summary judgment is not a proper vehicle for resolving claims of employment discrimination which often turn on an employer's motivation and intent." **Delgado v. Lockheed-Georgia Co.**, 815 F.2d 641, 644 (11th Cir. 1987)(citing **Hayden v. First National Bank of Mt. Pleasant**, 595 F.2d 994, 997 (5th Cir. 1979)("[w]hen dealing with employment discrimination cases, which usually necessarily involve examining motive and intent . . . granting of summary judgment is especially questionable). **See also** 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, **Federal Practice & Procedures, Civil 2d** § 2732.2. The court then declared "[i]n the absence of direct evidence of discrimination, motivation and intent must often be proven through the use of circumstantial evidence which may necessitate the resolution of conflicting inference, a task peculiarly within the province of the jury." **Delgado**, 815 F.2d at 644. In **Batey v. Stone**, 24 F.3d 1330, 1336 (11th Cir. 1994), the court stated that "the granting of summary judgment in employment discrimination cases, "which usually necessarily involve examining motive and intent, . . . is especially questionable."

The important issue to remember about the Motion for Summary Judgment is if the employer wins, the case is over. If the employer loses the Motion for Summary Judgment you are going to trial. However, prior to trial the Court will order the parties to a settlement conference. If the case doesn't settle, the pretrial memorandum, motions in limine, proposed jury instructions and a trial brief must be filed. The jury is then selected and the trial begins. Unfortunately, once the trial is completed, litigation does not necessarily end. Now is when Motions to Set Aside the Verdict, Motions for Attorneys Fees and Costs and Appeals are filed. The litigation can continue for another three to six years.

Respectfully Submitted,

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