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SEX, RACE AND OTHER HARASSMENT IN THE WORKPLACE[1]

There are three primary federal anti-discrimination 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

[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.

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 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-
>
> (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;
> (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);
> (3) utilizing standards, criteria, or methods of administration -
> (A) that have the effect of discrimination on the basis of disability; or
> (B) that perpetuate the discrimination of others who are subject to common administrative control;
> (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:
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> (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.

A. Recent Court Cases and Their Implications.

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, S.Ct. at 2068. 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:
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> > " '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.*

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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).

B. Is it Harassment or Just Obnoxious Behavior?:

> Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a) states:
> It shall be an unlawful employment practice for an employer –
> . . . to fail or refuse to hire or to discharge any individual, or otherwise to discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

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.

C. What Constitutes a "Hostile Workplace Environment?"

In **Oncal v. Sundowner Offshore Services, Inc.**, 523 U.S. 75, 80, 118 S.Ct. 998, 1002, 140 L.Ed.2d 201 (1998), the U.S. Supreme Court stated:

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discriminat [ion]* ... because of ... sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, 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." *Harris, supra,* at 25, 114 S.Ct., at 372 (GINSBURG, J., concurring).

In **Oncal**, the Court went on to state:

> [T]here is another requirement that prevents Title VII from expanding into a general civility code: As we emphasized in *Meritor* and *Harris,* the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor

> androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." *Harris,* 510 U.S., at 21, 114 S.Ct., at 370, citing *Meritor,* 477 U.S., at 67, 106 S.Ct., at 2405-2406. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace--such as male-on-male horseplay or intersexual flirtation--for discriminatory "conditions of employment."

Id. at 81, 118 S.Ct. at 1002 - 1003.

D. Employer Liability Principles as They Affect Management of Complaints.

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. See **Faragher v. City of Boca Raton**, 524 U.S. 775, 807 - 808, 118 S.Ct. 2275, 2292 - 2293, 141 L.Ed.2d 662 (1998). When an employee has been harassed by a supervisor and an actionable hostile environment or tangible job detriment has occurred, settle. On the other hand, if there has been no tangible job detriment, an employer should raise its affirmative defense to liability as set for by the Supreme Court in **Faragher**. 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.

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 in dicta set forth the standard of

employer liability that would apply where there is harassment by co-workers and non-employees. In particular the Court stated:

> An employer can be liable . . . where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII.

Id. at 745.

E. Avoiding Harassment Claims:

Several different methods exist which can help employers avoid complaints without tying managements hands. Among these methods are open door policies, the establishment of an ombudsman, and discrimination complaint hotlines. Open door policies have several benefits. They allow an employee to speak to the head of the company and bypass their direct supervisors. Therefore, this can allow early intervention in a problem and resolution of the problem before a charge of discrimination is filed. However, open door policies can also lead to problems when employees abuse the open door policy and can take up substantial time better spent on other issues.

For a brief time ITT Sheridan owned Caesars Palace and the Desert Inn in Las Vegas, Nevada. Among the many innovations ITT brought to Las Vegas was an ombudsman. The ombudsman reported directly to the President of ITT. Any employee could submit a grievance to the ombudsman concerning the terms and conditions of their employment. The ombudsman would review the grievance and either advise the employee that they were going to investigate or that they were not going to investigate.

In the event the ombudsman conducted an investigation the ombudsman had the authority to resolve the issue on behalf of the company. This process allowed a neutral party to investigate and resolve issues prior to formal complaints and/or charges of discrimination being filed. In the event the ombudsman decided not to investigate the grievance, the ombudsman would forward the grievance to the appropriate person in the company.

Another method of avoiding complaints is to allow the employee to anonymously call a hot line and report issues of discrimination, harassment and retaliation. The hot line then forwards the information to the appropriate person in the company to investigate the allegations.

These methods all allow employees to report allegations of discrimination outside of the chain of command. They allow management to continue their day to day activities of managing the company while some neutral person investigates the allegations.

F. Liability for Claims of Harassment by Third Parties (Venders, Customers, etc.

In 1980, the EEOC issued guidelines defining sexual harassment. See 45 Fed. Reg. 74676 (1980) (codified at 29 C.F.R. § 1604.11). These guidelines addressed employer liability for sexual harassment of employees by non-employees and state:

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility that the employer may have with

respect to the conduct of such non-employees.

See also 29 C.F.R. § 1604.11(e)(employers may be liable for sexual harassment perpetrated by nonemployees "in the workplace, where the employer ... knows or should have known of the conduct, and fails to take immediate and appropriate corrective action.").

Third party harassment, i.e. harassment by independent contracts, vendors, guests, invitees, etc., should be contrasted with two far more common situations, harassment by supervisors and harassment by co-workers. Harassment by supervisors can, depending on the circumstances, constitute quid pro quo or hostile environment harassment. Harassment by co-workers is always a matter of hostile environment harassment. Third party harassment, like co-worker harassment is always a matter of hostile environment harassment. Therefore employer liability for third party harassment is essentially a matter of negligence: whether the employer knew or should have known of the harassment and failed to take reasonable corrective action. However, third party harassment differs from co-worker harassment in that an employers control over non-employees can differ significantly from the control that an employer has over employees. Indeed common sense dictates that the degree of control may vary depending on the type of harassment involved, for example an employer has more control over an independent contractor than it does over a major customer or client. As a result the EEOC Compliance Manuel explains that for third party harassment, unlike co-worker sexual harassment, the employer's potential liability depends "on the basis of the total facts and circumstances of each case, including employer knowledge

corrective action, control, and other legal responsibility." See EEOC Compliance Manuel, sec. 615.3 "Sexual Harassment Guidelines."

The United States Supreme Court has recognized that while the EEOC Guidelines are not binding law they constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance. See **Meritor Savings Bank, FSB v. Vinson**, 477 U.S. 57, 65, 106 Supreme Court. 2399, 91 L. Ed. 2d 49 (1986). The United States Court of Appeals for the Ninth Circuit has cited to the guidelines with respect to third party harassment. In **Folkerson v. Circus Circus Enterprises, Inc.**, 107 F.3d 754 (9th Circuit 1998), the Court held that:

> an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct. *See Trent,* 41 F.3d at 526 (where employer hires outside trainer to train its employees, a function often carried out by company supervisors, and outside trainer harasses employees, company may be liable under Title VII); *Powell v. Las Vegas Hilton Corp.,* 841 F.Supp. 1024, 1028 (D.Nev.1992) (where employer egregiously mishandled employees repeated complaints about harassment from casino customers, employer either ratified or was complicitous in the harassment); 29 C.F.R. § 1604.11(e) (employers may be liable for sexual harassment perpetrated by nonemployees "in the workplace, where the employer ... knows or should have known of the conduct, and fails to take immediate and appropriate corrective action.").

The Ninth Circuit's decision is binding on the United States District Courts in the state of Nevada. However, employers should be aware that not all courts agree with the Ninth Circuit. In **Williams v. Astra USA, Inc.**, 68 F. Supp. 2d 29 (D. Mass. 1999), the court granted the defendants motion for summary judgment, noting that "a significant portion of the complaint is devoted to discriminatory acts allegedly committed

by third parties, many of whom have no affiliation with Astra." The court rejected the plaintiff's reliance on the EEOC Guidelines. **Astra** was a race discrimination case wherein third party customers made racially discriminatory remarks. The court stated that the Guidelines are not controlling. Furthermore, most courts that have considered the EEOC Guideline have done so in the context of sexual harassment claims, not race discrimination. Therefore, the court was persuaded that the employer should not be held liable under Title VII for the allegedly racially discriminatory acts of third parties with whom the employer had no affiliation and over whom the employer had no control or influence. Id at 35. However, in light of the U.S. Supreme Court's 2002 decision **National R.R. Passenger Corp. v. Morgan**, supra, this decision by Massachusetts District Court was probably in error.

Respectfully Submitted,

Lyons Law Firm

Keith M. Lyons Jr., Esq.