BOX 10:

EEO
U.S. EEOC Mediation National Call to Action Feb 11, 99
Language Rts/ EEOC
EEOC Guidance on Undoc.
Civil Rights Housing Vouchers
Civil Rights Minority Farmers
Civil Rights Presidential Nominees
Staff Meetings/ issues
Welfare (cases)
Civil Rights Empowerment Zones
Civil Rights Economic Report
Civil Rights Education
Civil Rights Criminal Justice
Civil Rights Affirmative Action
Civil Rights To do
Civil Rights FY 1999 Civil Rights
Civil Rights Environmental Justice
ETS
Civil Rights Fair Lending
LA Shootings
Fannie Mae/ HUD
Inner City Econ. Dev
LCCR
LIHTC
OFCCP
Prison Lit. Reform
Self- Assessment Guide
Torture Report
HUD – FY99
HUD/ Disability Laws
FY2000 – Ideas
Unphoned
HUD One America Init.
Minorities/ TV
MLK Plague
Pay Equity
Race Report
PIR General
- Race Initiative Gen. Info, Talking Points
- PIR: Policy
- PIR: Calendar
- PIR: Board Mtgs.

One America Memo
Feb 10th/ 11th
May 19th/20th

June 17th
PBS TownHall

♦ EEOC News

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FOR IMMEDIATE RELEASE February 23, 1999

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EEOC AND TANIMURA & ANTLE SETTLE SEXUAL HARASSMENT CASE IN THE AGRICULTURAL INDUSTRY

SAN JOSE, CALIFORNIA - The United States Equal Employment Opportunity Commission and Tanimura & Antle, one of the largest lettuce growers/distributors in the United States, announced today that they reached a $1,855,000 voluntary settlement, approved by U.S. District Court Judge James Ware in San Jose, California. The settlement through a Consent Decree avoids protracted litigation by the EEOC on behalf of two employees and a class of current and former Tanimura & Antle employees who were allegedly subjected to sexual harassment and retaliation in Salinas, California, and Yuma, Arizona.

In its federal court complaint, the EEOC alleged that a Tanimura & Antle production manager subjected a female employee, Blanca Alfaro, to quid pro quo sexual harassment, i.e. required sexual favors as a condition for employment and the receipt of job benefits. The EEOC alleged that Alfaro was subsequently subjected to a hostile work environment, which included constant unwelcome sexual advances by that production manager and another management employee. The Commission further alleged that Alfaro was discharged in retaliation shortly after complaining about the unwelcome advances.

Based on its investigation, the EEOC also alleged that other workers were subjected to similar types of harassment by managerial and supervisory personnel and were retaliated against for complaining about the repeated harassment. The company's retaliatory conduct allegedly included the creation of a hostile work environment and, in some cases, actual discharge.

The EEOC further alleged that Tanimura & Antle unlawfully retaliated against one male employee, Elias Aragon, when he complained about the sexual harassment of Ms. Alfaro. This retaliation included verbal abuse and suspension without cause, until he was ultimately discharged.

Under the Consent Decree, which will be enforced over the next three years, Tanimura & Antle may pay up to a total sum of $1,855,000 as damages to be allocated to Alfaro, Aragon and current and former applicants and employees employed by Tanimura & Antle from September 25, 1994 to February 8, 1999 for their claims of alleged sexual harassment, sex-based harassment and retaliation. Alfaro's and Aragon's specific recoveries remain confidential by court order. Claims for compensation under the decree must be filed between March 1, 1999 and July 31, 1999 with the EEOC or its designated agents. The company agreed that it will revise as necessary its existing sexual harassment policy and the handling of complaints of harassment. Tanimura & Antle will provide mandatory sexual harassment training to all of its employees, including supervisors and managers. Tanimura & Antle, with headquarters in Salinas, has additional operations in Oxnard and Huron, California (near Fresno) and Yuma, Arizona.

Ida L. Castro, the Chairwoman of the EEOC, said: "This settlement represents a precedent - setting effort by the EEOC with regard to sexual harassment in the agricultural industry in California. This is a fair and equitable settlement that helps create an agricultural workplace that is free of sexual harassment. The lawyers representing both the EEOC and Tanimura & Antle insisted on principle, but recognized the need to find common ground. This is a win-win situation for the company, for the EEOC, and, most of all, for the employees."

EEOC General Counsel C. Gregory Stewart said: "The importance of the injunctive non-monetary relief elements of this settlement – the no harassment policy, the training, or other items -- cannot be overestimated. We are optimistic that this Decree will make concrete differences in the day-to-day lives of the migrant farmworkers at Tanimura. If we are right about this, then the benefits to both the mission of our agency and the objectives of the agricultural community can be huge."

Tanimura & Antle President Rick Antle stated, "This settlement is indicative of our commitment to our employees. Tanimura and Antle does not and will not tolerate sexual harassment in its workplace. While we were never able to substantiate the allegations made by the EEOC in this case, we feel it is in the best interest of our current and former employees to resolve this matter by establishing a claim fund for individuals who may have suffered from sexual harassment while under our employ. In an effort to better serve employees in the agricultural industry, we have agreed to contribute up to $400,000 to charitable organizations that address women's and employees' rights in the geographic areas where our Company operates. We hope this endeavor will increase services provided to the agricultural employee who is often a hidden but vital contributor to the California economy."

Mike Antle, Vice-President of Operations for Tanimura & Antle, added, "Treating employees with dignity and respect is the basis of our employee-relations philosophy. Our bilingual training programs echo this philosophy as will the additional training that will take place under the settlement. In particular, we will provide employees with the skills to recognize and prevent sexual harassment. This will entail altering perceptions of what is and is not acceptable conduct in the agricultural work-place, potentially altering long-held stereotypes regarding male and female interactions that have been in existence for centuries."

Carmen Ponce, Vice-President for Human Resources, noted, "The settlement reached in this case is due to the Tanimura & Antle families putting their employees first which has continuously earned them the distinction of being the foremost innovative employer in the agricultural industry. This settlement has far reaching implications in that it gives the agricultural industry a wake-up call about its role in educating agricultural employees about their rights, about internal complaint procedures and about how to respond to uncomfortable situations in the workplace. In performing this role, employers like Tanimura & Antle afford themselves the affirmative defenses recently given to us by the Supreme Court, at least as to claims pertaining to a hostile work environment."

William R. Tamayo, EEOC's Regional Attorney in the San Francisco District Office which filed the case, added, "Agribusiness is California's largest industry and employs a million workers each year. Farmworker women have raised civil rights issues to the EEOC, and consequently, the Commission has made sexual harassment in the agricultural industry a priority for civil rights enforcement. This Consent Decree and Tanimura's resolve to eradicate sexual harassment serve as models for ensuring that these workers, particularly immigrant women who don't speak English, are protected."

Susan L. McDuffie, EEOC San Francisco District Director, stated, "This Settlement provides immediate compensation to women who suffered discrimination. Employers in the agricultural industry must realize that sexual harassment and retaliation will not be tolerated. This settlement provides protection for migrant farm workers and it ensures fairness and cooperation and dignity for every employee at Tanimura & Antle. This is a good result."

Jose Padilla, Executive Director of California Rural Legal Assistance, added, "Our office, along with the Women's Employment Rights Clinic of Golden Gate University Law School, represented Blanca Alfaro, an individual in this case, and we were able to obtain a satisfactory confidential settlement on her behalf."

✦✦✦✦✦

EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act, which prohibits discrimination against individuals 40 years of age or older, sections of the Civil Rights Act of 1991; the Equal Pay Act; and Title I of the Americans with Disabilities Act. The San Francisco District's jurisdiction includes Northern and Central California, Hawaii, Guam, American Samoa, Wake Island and the Commonwealth of the Northern Mariana Islands.

Emily Heller - COS

Language Issues
(Bush)
english only - local level -
9th Circuit - CA.
5th Cirt - TX

can have English - Only
unless hardship & damage
by individual

EEOC: nat'l ~~origin~~ origin violation unless valid
business rzn (safety, etc).
NY Case - no foreign languages on ~~s~~ facility or
~~on~~ around the ppty.
Signs in ~~the~~ foreign languages - local ordinance

Michigan - Af Action - Ward Connerly
Florida - " " - no
TX

On Quebec - sig on aff. action

Bill Lan Lee -
Hatch

Jobs Discrimination Agency Lightening Its Load

A1

By STEVEN A. HOLMES

WASHINGTON, Feb. 21 — When LuAnne Borzych filed a sexual harassment charge last year with the Equal Employment Opportunity Commission against a shipping company in Orlando, Fla., her complaint might have disappeared into the commission like so many others in recent years.

But officials at the commission's branch office in Miami suggested last April that Ms. Borzych and her employer submit their dispute to official mediation. They agreed that if they reached a settlement, the matter would not go to court.

The hearing before a mediator trained in discrimination law took one day and involved no lawyers. And while the small cash settlement she received was not all that Ms. Borzych had hoped for, she pronounced herself satisfied.

"The lady that took care of the case was extremely good at what she was doing," Ms. Borzych, 38, said in a telephone interview. "She made me understand it on my level, everything that was being said. She didn't guide me or direct me. I have to say I was pleased."

Ms. Borzych's experience illustrates what has been a striking change in the Equal Employment Opportunity Commission, an agency that has long been considered one of the most troubled and ineffective in the Federal Government.

For years it was an agency that barely got around to investigating complaints of discrimination, let alone taking action against companies that engaged in biased practices. The best that people who filed charges could hope for was that after 180 days of sitting on the complaint, the agency would grant permission to sue the company in court — a right the accuser already had.

In the last four years, the agency has more than halved its backlog of pending cases, from a high of 111,451 in June 1995 to slightly more than 52,000 today. In recent years it has won large class-action discrimination cases against the Mitsubishi Corporation and Lockheed Martin.

Congress increased its budget to $279 million for 1999, $37 million more than it received last year and the agency's first increase in years. And even some critics among civil rights groups and plaintiffs' lawyers have resumed recommending that people who believe they are victims of bias on the job file complaints with the agency. That is a marked change from the last years of the Bush Administration, when some of these lawyers told clients not to bother.

"I am not saying we are thrilled with the state of the commission in 1999," said Nancy Kreiter, an official with Woman Employed, a civil rights organization based in Chicago. "But relative to the totally broken agency that it was," said Ms. Kreiter, who has been one of the agency's harshest critics, "it has been mended and put back together and is on its way to being a fully functioning enforcement agency."

All is not perfect, of course. The agency still takes an average of 276 days to adjudicate a complaint, nowhere near the goal of fewer than 120 days that its new chairwoman, Ida L. Castro, has set.

And Ms. Castro's predecessor, Gilbert F. Casellas, said too many lawyers in the agency's field offices still filed frivolous and poorly thought-out class-action lawsuits.

"You got too many cowboys out there who want notches on their belts," he said. "Everybody's looking for the next Mitsubishi."

Much of the credit for the commission's resurrection has gone to Mr. Casellas, who presided over an overhaul beginning about five years ago to bring down the backlog, promoted alternative ways to resolve disputes, including mediation and arbitration, and looked to file high-profile lawsuits against companies that jolted other companies into becoming aware of the practices that often spawned discrimination complaints.

Civil rights groups were able to pressure the Republican-controlled Congress into providing more money for the agency by asserting that it was hypocritical for conservative opponents of affirmative action to say that all that was needed to help minorities and women was the strict enforcement of anti-bias laws, and then not to increase financing for agencies like the commission.

And some labor experts say the thriving economy has also helped, since accusations of bias often proliferate when companies are laying off workers.

The pilot mediation program that handled Ms. Borzych's case was begun two years ago during Mr. Casellas's tenure. In 1997, the program won $10.8 million in settlements for 780 people. Last year, $17 million in settlements was awarded to 1,500 people. With a bigger budget, the agency is planning to expand the program, with a goal of 8,000 settlements in the 2000 fiscal year.

Ms. Castro, chairwoman of the commission since the fall, hopes that by diverting more cases into mediation, "we can invest our resources to go after the really bad actors, those companies that simply refuse to adhere to the law."

In addition, Ms. Castro said the agency would have more time and money for cases that will help clarify and establish precedents in Federal employment discrimination law.

That the agency is being looked on more favorably is, to some longtime observers in the field, nothing short of amazing. Begun in 1965 to handle complaints of job discrimination based on race, sex, religion, national origin and age (disability was added later), the agency has always been a bureaucratic mess. Unlike other regulatory agencies, like the Federal Communications Commission and the Securities and Exchange Commission, it has never had the resources or management talent to prevent the complaints filed with it annually from piling up.

"It deals with real people as opposed to other regulatory agencies that deal with industries where there are big dollars at stake," said Lawrence Z. Lorber, a lawyer who represents large corporations in discrimination disputes. "So there is an institutional interest — whether people like them or not — to have those agencies work well. You've never had that with the E.E.O.C."

The backlog grew significantly when Justice Clarence Thomas of the Supreme Court was chairman in the 1980's. Mr. Thomas believed that each complaint, no matter how seemingly trivial, should be fully investigated. The number grew even more in the 1990's under Evan Kemp, whose tenure as chairman coincided with the passage of the Americans With Disabilities Act, which expanded the agency's responsibilities. The act made it unlawful to discriminate against people with physical and mental disabilities.

The agency drifted without leadership in the first years of the Clinton Administration. Mr. Casellas, Mr. Clinton's first appointed chairman, did not take over until October 1994. Five weeks later the Republicans took control of Congress.

"The overarching strategy was to get the backlog down, keep the Republicans in Congress engaged and committed and show them that I wasn't a firebrand," said Mr. Casellas, who is now in private business.

He instituted a system of triage both for pending cases and new complaints. Investigators would look at the complaints and urge those filing them to submit them first to binding arbitration, and later, when money became available for the pilot program, to mediation. People were urged to drop those complaints that looked like they had little or no merit.

"A lot of it was clearing out the junk in the system, and more carefully screening the incoming cases," Mr. Casellas said.

The agency also began holding seminars with businesses to explain the intricacies of Federal employment discrimination law. The view was that if businesses were more familiar with the law, they would take fewer actions that might result in complaints.

And finally, the agency vigorously pursued a series of high-profile class-action discrimination lawsuits that got the attention of many large corporations. It negotiated a $34 million settlement in a sexual harassment suit against Mitsubishi Motor Corporation's American subsidiary last year, and a $183 million settlement in 1997 in an age discrimination complaint that had been filed against Lockheed Martin's predecessor, Martin Marietta.

The New York Times
MONDAY, FEBRUARY 22, 1999

Backlog - eliminate frivolous cases
- mediation - Goal - 7,000 ~~res~~ resolution of mediation
-

Budget
- FY 1999 - $33 m - Commerce Justice
~~Fed~~ POTUS
- Goodling - got $ last year
- Senate - thought House was too generous

Goal
28,000 inventory
average 6 month
End of fiscal 2000

NPL
Auditing ~~act~~ - ee accountable
Unions

~~Cat...~~
Commission - decide which ~~case~~ cases to ~~...~~ litigate
- Investigators decide dismissal

Technical ~~##~~ violation - ...
No judgement - deal w/ all cases.

External
Affirmative Action
Fed workers.
1972 last direction - draft pending
~~...~~ Post-Adarand - Fed doesn't know what to do.
Comm. has to vote on guidance
Aida ~~sta~~ needs to decide

Fed sector -
Proposal to make change
Legal Times articles
FEPA - take power to investigate all agency + take to EEOC
agency would oppose ~~the~~ can overrule
Pros - unions. Dem. leadership.
Republicans - eliminate in EEOC in Fed Sector - go to OPM

Gay rights legislation
Kennedy / Specter -
~~...~~ discrimination - law
some harassment
polls ok.
Fed sector cannot discriminate on gay. Outside not covered.

Asian Am
Anti-immigrant - national + English only rules Accent Discrimination.
Glass Ceiling - looking for good cases to litigate
Affirmative Action -

The U.S. Equal Employment Opportunity Commission

FOR IMMEDIATE RELEASE
Monday, June 21, 1999

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EEOC ISSUES COMPREHENSIVE POLICY GUIDANCE ON EMPLOYER LIABILITY FOR HARASSMENT BY SUPERVISORS

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) today released a comprehensive policy guidance explaining the circumstances under which employers can be held liable for unlawful harassment by supervisors. The guidance, which analyzes the recent Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, addresses the steps employers should take to prevent and correct harassment. It also explains the nature of employees' obligations to bring complaints of harassment to their employers' attention. EEOC also released a summary of the guidance geared to small employers.

"Issuing this guidance marks another step in the Commission's on-going effort to promote voluntary compliance with the equal employment opportunity laws," said EEOC Chairwoman Ida L. Castro. "The guidance will broaden the understanding regarding the legal obligation of employers to effectively address harassment, and the obligation of employees to utilize their company's complaint mechanisms prior to filing a charge of discrimination. Following the steps set forth in this guidance will help employers and employees safeguard their rights and avoid violations of the law."

In *Ellerth* and *Faragher*, the Supreme Court ruled that employers are "vicariously liable" for harassment by supervisors. However, if the harassment did not result in a tangible job action, the employer can raise an affirmative defense that it exercised "reasonable care" to prevent and correct the harassment, and that the employee unreasonably failed to use its complaint procedure. The guidance explains that, based on the Supreme Court rulings, the standard of liability in a sexual harassment case also applies to harassment based on race, sex (of a sexual or non-sexual nature), national origin, age, disability, and harassment based on opposition to discrimination or participation in complaint proceedings.

In addition, the document includes practical advice, such as how an employer should conduct an investigation. It also lists examples of corrective measures that employers may take.

The guidance will be available on EEOC's web site (www.eeoc.gov) shortly after release of the document. It can also be obtained by calling or writing to EEOC's Office of Communications and Legislative Affairs, 1801 L Street, NW, Washington, D.C. 20507.

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act, which protects workers 40 and older; the Equal Pay Act; the Americans with Disabilities Act, which prohibits discrimination against qualified individuals with disabilities in the private sector and state and local governments; prohibitions against discrimination affecting persons with disabilities in the federal government; and sections of the Civil Rights Act of 1991.

This page was last modified on June 21, 1999.

Office of the Chairwoman

U.S. Equal Employment Opportunity Commission
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Washington, D.C. 20507
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FAX TRANSMITTAL

DATE: 6/18/99 TIME:

TO: Irene Bueno

ORGANIZATION: The White House

FAX NUMBER: (202) 456-5581

SENDER: Ida L. Castro

SENDER'S TELEPHONE #: (202) 663-4001

DOCUMENT: Harassment Guidance Info.

# of Pages Transmitted (including cover): 13

SPECIAL INSTRUCTIONS:

PLEASE TELEPHONE SENDER IF YOU DO NOT RECEIVE ALL DOCUMENTS.

(FOR INTERNAL USE ONLY)

Talking Points: Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

This guidance explains the circumstances in which employers are legally responsible for unlawful harassment by supervisors. It provides practical, easy to understand information regarding the duty of employers to prevent and correct harassment and the duty of employees to stop harassment by complaining to management.

GENERAL

- The Supreme Court issued two major decisions in June of 1998 that explained when employers are legally responsible for unlawful harassment by supervisors: *Burlington Industries v. Ellerth* and *Faragher v City of Boca Raton*. The Court set forth the following standard of liability for harassment by supervisors:

  1. An employer always is liable for a supervisor's harassment if it culminates in a tangible employment action.

  2. If a supervisor's harassment does not culminate in a tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

     a. the employer exercised reasonable care to prevent and correct promptly any harassment;

     and

     b. the employee unreasonably failed to use any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

THE LIABILITY STANDARD SET FORTH IN *FARAGHER* AND *ELLERTH* APPLIES TO ALL FORMS OF UNLAWFUL HARASSMENT BY SUPERVISORS

- The same legal standard applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, age, or disability, or because the employee opposed discrimination or participated in complaint proceedings. This point has been recognized by numerous courts.

DEFINITION OF "SUPERVISOR"

The question of who qualifies as a supervisor is critical, because an employer is liable under the standard set forth in Faragher and Ellerth only if the harasser had supervisory authority over the employee whom he or she harassed. (If the harasser was a co-worker, the employer is liable only if it knew or should have known about the harassment and failed to take immediate and appropriate corrective action. That same standard applies to harassment by a non-employee, but the extent of the employer's control over the non-employee is taken into account.)

- An individual qualifies as an employee's supervisor if:

    a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*

    b. the individual has authority to direct the employee's daily work activities.

- Employees who merely relay other officials' instructions and report back to them are not considered supervisors, nor are employees who coordinate work on only a particular project of limited scope.

- In some circumstances, an employer could be found vicariously liable even if the harasser had no actual supervisory authority over the employee. This would occur if the harasser reasonably *appeared* to have such authority, as could be the case with an official who has broad delegated powers.

HARASSMENT THAT RESULTS IN A TANGIBLE EMPLOYMENT ACTION

The question of what is a "tangible employment action" is critical because an employer has no defense if its supervisor's harassment culminated in a tangible employment action.

- A "tangible employment action" is a significant change in employment status. Unfulfilled threats of a tangible employment action are not sufficient.

- Examples of tangible employment actions are: hiring, firing, promotion, failure to promote, demotion, undesirable reassignment, a decision causing a significant change in benefits, a compensation decision, and work assignment.

- An employer is automatically liable for harassment that culminates in a tangible employment action regardless of whether the employee rejected a supervisor's unwelcome sexual demands and was subjected to an adverse tangible job action or submitted to the supervisor's demands and consequently obtained a tangible job benefit. In either situation, the supervisor's harassment has led to a discriminatory, tangible job action.

- An employer is not necessarily liable in every case in which harassment by a supervisor is followed by a tangible employment action. There must be proof that the harassment was causally *linked* to the tangible employment action. There would be a strong inference that a harassing supervisor who undertook a tangible job action affecting the employee did so for discriminatory reasons related to the harassment. However, if there is proof that the tangible employment decision was based on a legitimate, non-discriminatory reason, then the employer would have an opportunity to raise the affirmative defense to the harassment.

  - For example, in one case an employee claimed that he was illegally fired as a result of harassment. However, the facts showed that the employee had embezzled funds from the employer and that the employee was fired for that reason. The employee could still try to prove that he had been harassed, but the employer could assert the affirmative defense because the harassment did not culminate in a tangible employment action.

HOSTILE ENVIRONMENT HARASSMENT THAT DOES NOT RESULT IN A TANGIBLE EMPLOYMENT ACTION: EFFECT OF NEW STANDARD OF LIABILITY

- If an employer proves that it exercised reasonable care to prevent and correct harassment *and* that the employee could have avoided all of the harm by complaining to management but unreasonably failed to do so, then the employer will avoid all liability. If the employee only could have avoided some, but not all, of the harm, then the affirmative defense will only limit damages.

- The employer must prove *both* prongs of the affirmative defense. For example, if the employer exercised reasonable care to prevent and correct harassment, but the employee exercised reasonable care by promptly complaining, then the affirmative defense will fail. If the employer promptly corrected harassment once the employee complained, but it failed to exercise reasonable care to prevent it, then the affirmative defense also will fail.

- In most circumstances, if both the employer and the employee exercise their respective duties of reasonable care, then the harassment will be "nipped in the bud" before it rises to the level of a violation of federal law and there will be no liability. This is because an effective anti-harassment policy and complaint procedure encourages employees to complain to management *before* harassment becomes severe or pervasive. If management promptly responds to such a complaint, then it usually can stop the harassment before it crosses the threshold of a violation of federal law.

WHAT CONSTITUTES REASONABLE CARE BY AN EMPLOYER TO PREVENT AND CORRECT HARASSMENT?

This question is of the most practical significance to employers. The Guidance provides straightforward, practical advice to employers.

- There are no "safe harbors" for employers to avoid liability based purely on the written content of their anti-harassment policies and complaint procedures. Whether or not an employer can prove that it exercised reasonable care depends on the particular factual circumstances.

- Small businesses may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal procedures.

- An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

Prohibition Against Harassment: An employer's anti-harassment policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, or disability, or because an employee has complained about discrimination or participated in complaint proceedings. The employer should encourage employees to complain to management *before* the harassment becomes severe or pervasive.

Retaliation: An employer should make clear that it will not tolerate adverse treatment of employees because they complain about harassment or provide information related to such complaints.

Complaint Process: An employer should:
- clearly explain the complaint process;
- ensure that there are no unreasonable obstacles to complaints;
- designate more than one individual to take complaints;
- instruct all supervisors to report complaints to appropriate officials; and
- explain the time frame for filing an EEOC or state FEPA charge and explain that the deadline runs from the last date of harassment, not from the date that the complaint to management is resolved.

Confidentiality: An employer should make clear to employees that it will protect the confidentiality of harassment complaints to the extent possible.

Effective Investigation:

- An employer should set up a mechanism for a prompt, thorough, and impartial investigation of alleged harassment.
- The alleged harasser should not have any direct or indirect control over the investigation.
- The employer should take interim steps to ensure that the harassment stops while the investigation is ongoing. If the parties have to be separated, then the separation should not burden the employee who has complained of harassment. An involuntary transfer of the complainant could constitute unlawful retaliation. Other examples of

interim measures are making scheduling changes to avoid contact between the parties or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

- The Guidance lists several examples of questions that may be appropriate to ask the parties to a harassment complaint and others who may have relevant information.
- If there are conflicting versions of events, the investigator will have to assess each party's credibility. The Guidance lists factors to consider.

Corrective Action:

- If management determines that harassment occurred, it should take immediate and appropriate corrective action to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur.
- Disciplinary measures should be proportional to the seriousness of the misconduct.
- Remedial measures should not penalize the complainant.
- The guidance lists examples of remedial measures that may be appropriate.

Other Preventive and Corrective Measures: An employer's duty of reasonable care is not limited to implementing an anti-harassment policy and complaint procedure. Additional measures include:

- correcting harassment that is clearly unwelcome regardless of whether a complaint is made (*e.g.*, erasing graffiti containing racial or sexual epithets);
- training supervisors to ensure that they understand their responsibilities under the anti-harassment policy and complaint procedure;
- monitoring supervisors' compliance with those responsibilities; and
- keeping records of harassment complaints to reveal any patterns of harassment by the same individuals.

WHAT CONSTITUTES REASONABLE CARE BY AN EMPLOYEE TO AVOID OR STOP HARASSMENT?

Employees who are subjected to harassment should utilize their employer's complaint process at an early stage and "nip the problem in the bud." While failure to complain after the first or second incident might not be unreasonable, delay after further incidents could defeat a legal claim by the employee challenging the harassment.

- Normally, the employer can prove the second prong of the affirmative defense by showing that the employee unreasonably failed to utilize its complaint procedure.

- The employee should provide truthful information and otherwise cooperate in the investigation.

- If a legal claim is brought, the burden is on the employer to prove that the employee's failure to complain or delay in complaining was unreasonable.

- Circumstances that might reasonably explain an employee's failure to complain are:

  - a specific basis to fear retaliation;
  - an unreasonable obstacle to making a complaint, such as inaccessibility of the individuals designated to take complaints; and
  - a reasonable belief that the complaint process was ineffective.

LIABILITY FOR HARASSMENT BY HIGH-LEVEL OFFICIAL

- An employer is automatically liable for harassment by an official who is sufficiently high in the organization's hierarchy to be considered an "alter ego" of the employer. Examples are president, owner, partner, and corporate officer.

FOR YOUR
USE ONLY.

EEOC

(FOR INTERNAL USE ONLY)

QUESTIONS AND ANSWERS: ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS

GENERAL

Why did the Commission issue this guidance?

- The Commission issued this guidance in order to explain to both employers and employees how to apply the recent Supreme Court decisions on liability for harassment by supervisors (*Faragher v. Boca Raton* and *Burlington Industries v. Ellerth*).

What are the most important points that employers and employees should take from the new guidance?

- **Employers** must take an active role in preventing and correcting harassment. The most important steps for achieving that goal are to communicate a strongly-worded anti-harassment policy and to implement an effective complaint procedure.

- **Employees** who are subjected to harassment should promptly complain to management.

Why didn't the Commission address in the new guidance issues regarding the definition of harassment and liability for harassment by non-supervisors?

- The guidance does explain the basic standards for determining whether harassment violates federal law and when employers are liable for harassment by co-workers and non-employees (on pp. 2-3). It emphasizes that Title VII is not a "civility code" and that federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not "extremely serious." A more detailed explanation was not necessary since the Commission has already provided extensive guidance on these issues. *See, e.g.*, Guidelines on Sexual Harassment, Policy Statement on Current Issues in Sexual Harassment, Policy Statement on Sexual Favoritism, and Enforcement Guidance on *Harris v. Forklift Systems*, all of which are available through EEOC's web site (www.eeoc.gov).

Why didn't the Commission address same-sex harassment in this guidance, since the Supreme Court recently issued a decision on that question?

- The Commission has already made clear that same sex harassment can violate Title VII

(Compliance Manual Section 615). Questions about how to prove a violation in such cases are fact-specific and are best resolved through individual cases.

Will the Commission revise its Guidelines on Sexual Harassment?

- The Commission will rescind subsection (c) of the Guidelines, which has been superseded by the new guidance.

DEFINITION OF "SUPERVISOR"

Isn't the definition of "supervisor" in the guidance too broad? Won't it include workers who really are not supervisors?

- The guidance explains that supervisors are those employees who have real authority over other employees in the workplace. This is either because they have the authority to undertake or recommend tangible employment actions, such as hiring, firing, and promotion, or because they have the authority to direct the daily work activities of subordinates. Not only do they act for the employer, but the authority they have been given significantly heightens their ability to harass others in the workplace.

- On the other hand, employees who merely relay other officials' instructions and report back to them are not considered supervisors. Nor are employees who supervise work on only a particular project of limited duration.

Is the definition of "supervisor" in the guidance based on the definition of that term under any other statute, for example, the National Labor Relations Act?

- No. The term "supervisor" has a specific meaning when determining whether an employer is liable for harassment under the workplace discrimination laws. That definition is not affected by the definition of the term under any other statute. Nor does it affect the definition of supervisor under any other statute.

TANGIBLE EMPLOYMENT ACTIONS

Why is an employer automatically liable when its supervisor's harassment results in a tangible employment action?

- The Supreme Court determined that an employer is automatically liable in these cases because an employer acts through its supervisors in making tangible employment decisions. Therefore, when a supervisor makes a tangible employment decision for a discriminatory reason, it is as if the employer did so itself. As a result, the employer should be responsible for that action. This, of course, is the rule when a supervisor discriminates against an employee in hiring, firing, promotion, etc. The employer is automatically liable for the supervisor's actions.

Is the employer always liable if an employee is terminated after he or she was harassed by a supervisor?

- No. There would be a strong inference of discrimination if a supervisor who harassed an employee terminated that individual. However, if the evidence showed that the termination was for a legitimate, non-discriminatory reason, then the employer would have an opportunity to raise the affirmative defense to the harassment. For example, in a recent case an employee claimed that he was illegally fired as the result of harassment. However, the facts showed that the employee had embezzled funds from the employer and that the employee was fired for that reason. The employee could still try to prove that he had been harassed, but the employer could assert the affirmative defense because the harassment did not culminate in a tangible employment action.

Why should an employer be liable when an employee submitted to her supervisor's sexual demands and was promoted as a result? Shouldn't the employer be able to prove that it had a strong anti-harassment policy and complaint procedure, and that it was unreasonable for the employee to feel forced to submit?

- The Supreme Court made clear that an employer is liable *whenever* harassment culminates in a tangible employment action. It also specifically described tangible employment actions in both positive and negative terms, for example, hiring *and* firing. It would make no sense to say that an employer is always liable when its supervisor *denies* a job benefit to an employee who rejects his sexual demands, but that a different standard applies when its supervisor *grants* a job benefit because an employee submitted to his sexual demands. In either situation, the supervisor is making a job decision on a discriminatory basis. Failure to complain to management is no defense in such cases.

Is constructive discharge a "tangible employment action"? In other words, is the employer automatically liable if an employee felt forced to resign because of harassment by his or her supervisor?

- The Commission did not address this specific issue in the guidance and believes that it will be better resolved in the context of the limited number of cases in which it might arise. In any event, it won't make a practical difference in most cases because the majority of circuits have held that there is no constructive discharge unless the employee complained to management and management failed to correct the harassment before the employee resigned. An employee who proves constructive discharge under that standard will have complained to the employer and thus precluded it from raising the affirmative defense to the harassment.

HARASSMENT THAT DOES NOT RESULT IN A TANGIBLE EMPLOYMENT ACTION

Employers' Duty

Why should an employer be liable if it did everything in its power to prevent and to stop harassment?

- The Supreme Court made clear that in order to prove the affirmative defense, it is not enough for the employer to show that it acted properly to prevent and correct harassment. The Court held that the employer must *also* prove that the employee unreasonably failed to complain or otherwise avoid the harm. If the employer can't prove *both* prongs of the affirmative defense, then it is liable. This result is consistent with general liability principles which make employers responsible for their supervisors' discriminatory acts and with the principle that civil rights protections should be broadly construed.

Why didn't the Commission provide a model anti-harassment policy and complaint procedure for all employers?

- The Commission did not provide a model policy because no single policy or complaint procedure would be suitable for every business. For example, small employers may be able to effectively prevent and correct harassment through informal mechanisms, while larger employers may need more formal procedures. Decisions on how to structure a policy and procedure are best left to individual businesses; they should not be made by the government.

Why doesn't a mediation or other alternative dispute resolution process fulfill the employer's responsibility to correct harassment?

- Management is obligated to investigate any complaint of harassment and, if it finds that harassment occurred, to stop the misconduct and ensure that it does not recur. The employer does not fulfill this obligation through mediation or some other ADR process. This is because those processes focus on resolving a dispute as opposed to correcting the problem.

Would an employer be liable if an employee told her supervisor about harassment but asked the supervisor not to report the matter and the supervisor did not report it?

- The employer could be found liable in such circumstances because its supervisor knew about the harassment and failed to stop it. To help avoid conflicts between an employee's desire to discuss harassment on a confidential basis and the employer's obligation to stop harassment, the employer should consider setting set up an informational phone line, staffed by non-management personnel, which employees can use to discuss questions or concerns anonymously.

If an employee who has filed a harassment complaint with the employer says that she fears ongoing harassment during the investigation, should the employer transfer her to another office as an interim measure?

- No, unless the employee wants such a transfer. If the parties have to be separated, then the separation should not burden the employee who has complained of harassment. An involuntary transfer of the complainant could constitute unlawful retaliation. It is, however, important for employers to take interim steps after a complaint has been filed to make sure that the harassment stops while the investigation is ongoing. Other examples of such measures are making scheduling changes to avoid contact between the parties or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

How should an employer resolve a complaint of harassment when the investigation boils down to a "he said/she said" situation, with no eye-witnesses?

- The employer will have to assess the credibility of each of the parties. The guidance, on p. 24, lists factors to consider in assessing credibility. For example, is the testimony of one of the parties more believable on its face? Does one of the parties have a reason to lie? Is there corroboration for either party's testimony? Even if there are no eye-witnesses, other witnesses might corroborate a complainant's testimony if, for example, they discussed the incidents with him or her around the time that they occurred.

Is it the safest course for an employer to fire any employee who has engaged in harassment?

- No, unless the harassment was very severe or pervasive. The punishment should fit the crime. If the harassment was minor, such as a few off-color remarks by an individual with no prior history of harassment, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was very severe or persistent, then suspension or discharge may be appropriate.

What have you done for employers who get sued when they try to discipline harassers? Aren't employers in a no-win situation?

- The Commission is concerned about the situation that some employers find themselves in and has provided guidance on this topic. Footnote 72 explains that if an accused harasser claims that he or she was disciplined on a discriminatory basis, the EEOC will find no violation as long as the employer had a good faith belief that the discipline was warranted and if it treated accused harassers the same, regardless of race, sex, or other protected class status.

Employees' Duty

Does an employee fulfill his or her obligation to exercise reasonable care by complaining to management?

- Yes, if the employee provides timely and truthful information to support the allegation and otherwise cooperates in the investigation. However, if the employee unreasonably delays complaining, the employer may be able to successfully defend the case.

Should employees complain to management the very first time an incident of harassment occurs?

- Yes, if the harassment is severe. If it is not, the employee may be justified in waiting to see if s/he can correct the problem by asking the harasser to stop. If the harassment persists, then the employee should complain to management.

The guidance states that fear of retaliation could justify an employee's failure to complain. Don't virtually all employees fear retaliation if they complain to management?

- It is true that fear of retaliation is common. However, a vague, generalized fear of retaliation would not be sufficient to justify an employee's failure to complain if the employer has a strong policy against retaliation and enforces it.

Ida Castro -

Robert (Bob) Sanano - detail from field - / Luis Lopez (appointee) = Staff

Vicki Rivera] Federal sector backlog

Carlton Holden

Language Right - Bob + Luis

+ Worker Exploitation

3 Jobs

CEO/Management

Management

Initiative

- Technology

- Hiring Staff

- Training

FY 1999 - $ 279 million

Fixed cost = 80%

$37 million increase targeted

15 years on initiatives

FY 2000 ~~Add~~ $33 million

Relationship to the WH -

- Swearing - In

- Nat'l Mediation - VP - partners w/ business. ~~&~~ bar.

Press

- NY Times

- Federal Page article

- ~~FEHS~~ Human Resource SHRM

Working w/ business

Good manager

nation advocacy base - not reaching out, too slow, litigation strategy

EEOC - webpage

(2)

Need more impact litigation

Outreach — Hispanic + Asian - outreach + participation

AfAm, Women + Disability -

pursuit strategy

Stable staff, have not hired new ee - resource issue - can be creative

(2) Commission Chair + Commission - separate entity

4 Additional Commissioners - 3-2 party, serve on appointment

1 Dep seat vacant, 1 Rep. - liberal & business ~~oth~~ act out

~~1~~ Focus on policy of agency.

? ~~BD~~ No portfolio

(3) General Counsel - PAS Appointment - independent?

— legal strategy

(4) Outside groups

- WH + Congress

Comm. Mtg — Monthly Commission Mtg - public

~~Sta~~ Use the last 4-5 mtg to open up a dialogue

Small business attacked EEOC

Promised to open up a dialogue w/ major small business

-3/1/99 - Guidance on Rsnble Accomodation under ADA

Issued the guidance

Directed to small business Q+A

3

Jewishmen
Filipino nurses

Enforcement

Language Rights
National Origin
Race Hiring
Sexual harassment
ADA cases

Escalated media, increased visibility -> trust

Civ Rights Recommendation

Private - investigate etc.

Federal Sector
~~[illegible]~~ Investigatory Role, prosecute + enforce ~~[illegible]~~ adjudicate
①
EEOC [Hearings - AJ
Appellate Role
② Coordinating Federal Directive - pre-Award - has not been updated. EEOC lead, ~~agency~~ agencies have objected

Backlog -
Private 310 days to process claim to get position to go to ct
Fed Sector - 1,317 days
444 - Investigation by agencies
multiclaims

Regulatory Reform Proposal - OMB - ruling - not much controversy
~~at~~ don't know when we can release
OMB
Vote to commission
Need to publish again, Training

1 notice
possible
VP meet

Get ~~[illegible]~~ ledel dabb
Who in omb.?

4

Morley - Nat'l Reinvention in VP'S office
~~[illegible]~~ Whoped

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HIGHLIGHTS OF CONSENT DECREE IN EEOC V. TANIMURA & ANTLE No. C99-20088 JW (N.D. Cal.) February 1999

Background

Blanca Alfaro, a farmworker, filed charges with the EEOC alleging that she had been sexually harassed by a Tanimura & Antle supervisor and retaliated against for opposing the harassment. The EEOC (San Francisco District) investigated and determined that harassment and retaliation did occur against Alfaro and other women. Based on those findings, the EEOC filed a complaint in the U.S. District Court for the Northern District of California, alleging that officials of Tanimura & Antle, a major agricultural grower, sexually harassed Blanca Alfaro, a Tanimura & Antle employee, through quid pro quo harassment and by creating a hostile work environment and that other women were also harassed. Furthermore, EEOC alleged that Alfaro was retaliated against for opposing sexual harassment.

Elias Aragon, another Tanimura & Antle employee, filed a charge with EEOC alleging that he had been retaliated against because he was associated with Blanca Alfaro. Consequently, the EEOC also alleged in federal court that officials of Tanimura & Antle retaliated against him and other employees.

Terms:

In order to avoid protracted litigation, the EEOC and Tanimura & Antle negotiated a voluntary settlement in the form of a Consent Decree approved by U.S. District Court Judge James Ware with the following terms:

1. **Compensation**: Tanimura & Antle will provide $1,855,000 as compensation to Alfaro, Aragon and other employees and job applicants who were sexually harassed, discriminated against because of sex, or otherwise retaliated since September 25, 1994.

2. The Decree confirms that Alfaro's matter was settled through a satisfactory sum that is not disclosed. Similarly, the Decree confirms that Aragon's matter was settled through a satisfactory sum that is not disclosed.

3. **Claims**: EEOC will review the claims of other employees and determine the proper damage awards. If the awards for the claimants do not exhaust the settlement fund, Tanimura agrees to provide the remainder up to $400,000 to women's organizations and employee

organizations in the counties in which Tanimura conducts business.

4. **Training**: Tanimura & Antle will implement a preventive sexual harassment program including training of supervisors and managers about the law of sexual harassment, the company's duty to monitor its work areas and to investigate charges of harassment. Tanimura will also compile and distribute instructions to supervisors with respect to hiring and discipline which will also include the company's "no harassment" policy. Tanimura & Antle is also required to inform all employees about the law of sexual harassment, provide educational materials, and conduct training.

5. The alleged harasser and supervisor, Hector Garcia, who no longer works for the company, cannot be rehired for the length of the consent decree.

6. Another supervisor, Fortunato Serna, has been reprimanded and directed to counseling and training on sexual harassment.

7. As part of the settlement, Tanimura & Antle admits no liability for any alleged violations.

8. Current or future charges by other Tanimura & Antle employees are not affected by this Decree and can still be pursued, investigated and litigated. However, if the discrimination occurred within the period covered by this Consent Decree, i.e. September 25, 1994 to February 8, 1999, the charging party could possibly seek recovery under the Decree.