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A Legal Professional Association

WORKPLACE HARASSMENT

Presented to The Akron Bar Association
by Kerri L. Keller

COLLECTIVE EXPERIENCE . COLLABORATIVE CULTURE . CREATIVE SOLUTIONS

WHAT WILL WE COVER TODAY?

- Statutory Law and Protected Classes
- Types of Actionable Workplace Harassment
- Workplace Harassment Liability Standards
- Damages

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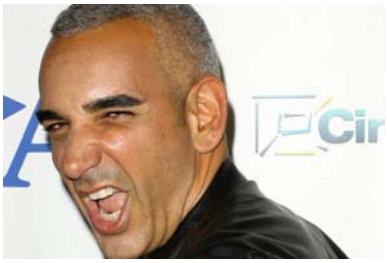
WHAT IS HARASSMENT IN THE WORKPLACE?



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WHAT IS HARASSMENT IN THE WORKPLACE?

Billionaire Alki David Ordered to Pay Out Nearly $74 Million in Damages to Accusers per Los Angeles Magazine.

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ARE HARASSMENT CLAIMS DECREASING?

April 2019 EEOC Press Release:

- Overall number of charges are down per EEOC FY 2018 data, but the number of sexual harassment charges increased, as did the number of sexual harassment lawsuits filed by the agency.
- There were 76,418 discrimination charges filed, which represents the lowest number of charges since FY 2006.
- The top five reasons chargers were filed in FY 2018 were retaliation, sex discrimination, disability, race, and age.

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WHAT IS HARASSMENT?

- Harassment = "Discrimination" for purposes of federal and Ohio anti-discrimination laws. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000).
- In other words, a claim for workplace harassment is necessarily a claim for discrimination." *Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. App. No. 86651, 2006-Ohio-2587, *app. denied*, 111 Ohio St.3d 1431 (2006).

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WHAT IS HARASSMENT?

- Defined generally as "unwelcome conduct."
- It becomes unlawful if:
  - enduring the offensive conduct becomes a condition of employment.
    - *Quid Pro Quo* – limited to sexual harassment cases
  - the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
    - Hostile Work Environment – all protected classes

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TYPES OF SEXUAL HARASSMENT

- ***Quid pro quo,*** **i.e. "this for that"**
  - Involves a tangible employment action.
  - Commonly thought of as "put out or get out."
  - Committed by someone in a position of authority with decision making power.

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TYPES OF SEXUAL HARASSMENT

- **Hostile work environment**
  - Unlike *quid pro quo* harassment, anyone can be the harasser – a supervisor, co-worker, customer, or vendor.
  - More common, more pervasive, least understood.

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HARASSMENT CAN BE BASED ON MULTIPLE GROUNDS

- Race
- Sex
- Ancestry
- Genetic Information
- Color
- Pregnancy
- Age
- Veteran Status
- Religion
- National Origin
- Disability
- Military Status
- Gender Identity/
- Transgender

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HOSTILE WORK ENVIRONMENT EXAMPLES

- NOTE: A hostile work environment can result with respect to conduct based on any protected class, i.e. gender, race, color, religion, national origin (Title VII).

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HOSTILE WORK ENVIRONMENT EXAMPLES

- **Other laws can form the basis for claims of hostile work environment, such as the ADEA and ADA.**
  - *See generally*, 42 U.S.C. §12101 *et seq.*; *Chander v. Cleveland Metropolitan School District*, 2019 WL 4394135 (analyzing hostile work environment claim under the ADEA) , *app. filed*, No. 19-3957 (6th Cir. Oct. 7, 2019).
  - *See generally*, 29 U.S.C. §621 *et seq.*; *Repka v. Bd. of Education*, 28 F. App'x 455 (6th Cir. 2002) (analyzing hostile work environment claim under the ADA).

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HARASSMENT PROBLEMS OCCUR FOR THREE BASIC REASONS:

1. People have different opinions on what constitutes appropriate workplace behavior based on gender, social, cultural and geographical conditions.
2. Incorrect assumptions about what other persons consider to be appropriate workplace behavior.
3. **Employers fail to define appropriate workplace behavior standards for their staff.**

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FEDERAL STATUTORY BASIS

- **Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.***
  - "It shall be an unlawful employment practice for an employer … to discriminate against any individual … because of such individual's ***race***, ***color***, ***religion***, ***sex***, or ***national origin***[.] 42 U.S.C. §2000e-2(a).
  - "The terms 'because of sex' or 'on the basis of' include, but are not limited to, because or on the basis of ***pregnancy***, childbirth, or related medical conditions[.]" 42 U.S.C. §2000e(k).

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STATE STATUTORY BASIS

- **The Ohio Civil Rights Act, Ohio Rev. Code §4112.01 *et seq.***
  - "It shall be an unlawful discriminatory practice: For an employer, because of the ***race***, ***color***, ***religion***, ***sex***, ***military status***, ***national origin***, ***disability***, ***age***, or ***ancestry*** of any person, to … discriminate against that person." O.R.C. §4112.02(A).
  - "[T]he terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of ***pregnancy***, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. O.R.C. §4112.01(B).

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HOSTILE WORK ENVIRONMENT

- "A claim of 'hostile environment' sexual harassment is a form of sex discrimination that is actionable under Title VII." *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
- "Hostile work environment" defined: A workplace permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abuse environment. This standard requires an objectively hostile or abusive environment, and the victim's subjective perception that the environment is abusive. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

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HOSTILE WORK ENVIRONMENT

- "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*
- But "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)).

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HOSTILE WORK ENVIRONMENT

The employee must establish:

(1) he or she was a member of a protected class;
(2) the harassment was unwelcome;
(3) the harassment was based on the employee's protected class;
(4) the harassment created a hostile work environment; and
(5) employer liability. *Wierengo v. Akal Security, Inc.*, 580 Fed. Appx. 364 (6th Cir. 2014); *Hidy Motors, Inc. v. Sheaffer*, 183 Ohio App.3d 316 (2d Dist. App. 2009).

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HOSTILE WORK ENVIRONMENT

- **These elements apply to all types of hostile work environment claims, regardless of the protected class that underlies the claim. *Crawford v. Medina General Hospital*, 96 F.3d 830 (6th Cir. 1996).**
  - "The elements and burden of proof are the same, regardless of the discrimination context in which the claim arises." *Crawford* (age harassment claim; and observing the same standard applies to race and national origin harassment claims); *see also Plautz v. Potter*, 156 Fed. Appx. 812 (6th Cir. 2005) (hostile work environment claim premised on Americans With Disabilities Act).

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HOSTILE WORK ENVIRONMENT

The "cumulative theory" of hostile work environment harassment based on more than one protected class: *Wade v. Automation Personnel Services, Inc.*, 612 Fed. Appx. 291 (6th Cir. 2015).

This theory can be advanced under "special circumstances," *viz.*, where a plaintiff alleges multiple hostile work environment claims based on different protected classes if one of his or her independent claims is sufficient on its own. Wade based his harassment claim on an alleged hostile work environment based on his sex, race and religion. But "[n]one of Wade's individual claims of hostile work environment rise to the level of 'severe or pervasive' conduct and these allegations in the aggregate suffer from the same flaw."

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HOSTILE WORK ENVIRONMENT

***But see Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999). Because the plaintiff presented enough evidence to state a race harassment claim, he was permitted to proceed on a cumulative harassment theory based on race and religion (his status as a "black Muslim"), even though the religious harassment claim failed on its own.**

"The theory of a hostile-environment claim is that the cumulative effect of ongoing harassment is abusive. It would not be right to require a judgment against Hafford if the sum of all of the harassment he experienced was abusive, but the incidents could be separated into several categories, with no one category containing enough incidents to amount to 'pervasive' harassment. Although there is enough evidence of racial harassment for that claim to stand on its own, the district court should allow at trial for consideration of the possibility that the racial animus of Hafford's co-worker's was augmented by their bias against his religion."

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

- **Traditional hostile work environment:** Severe or pervasive conduct comprised of verbal, graphic, or other communicative abuse that expressly stigmatizes an employee's protected class (*e.g.* racial epithets or slurs, demeaning comments about the protected class, jokes perpetuating stereotypes about protected classes, unwelcome sexual behavior). The conduct can be physical as well as communicative.
- **Discriminatory hostile work environment:** Severe or pervasive conduct comprised of treating an employee more harshly than other employees because of his or her protected class, without necessarily overtly or expressly denigrating the protected class.

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

- For a harassment claim to be actionable, the work environment must be objectively hostile. The employee "must show 'that under the "totality of the circumstances the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Kubik v. Central Michigan Univ. Bd. of Trustees*, 717 Fed. Appx. 577 (6th Cir. 2017).
- The Sixth Circuit sets a high bar. *Kubik*; *Phillips v. UAW International*, 854 F.3d 323 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 980 (2018). Because Title VII is not "a general civility code," "the statutory scheme will not protect employees from all acts of a boorish, callous, condescending, or overbearing supervisor." *Daniels v. Pike Cty. Commissioners*, 706 Fed. Appx. 281 (6th Cir. 2017).

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

- Isolated incidents, unless extremely serious, will not suffice, and occasional offensive utterances do not rise to the level necessary to create an unlawful hostile work environment. *Phillips*, *supra*. (upholding summary judgment on race harassment claim because the incidents on which the claim were based were not severe or pervasive enough, even though they expressly denigrated African-Americans).
- "[T]his court has found even offensive and bigoted conduct insufficient to constitute a hostile work environment if it is neither pervasive nor severe enough to satisfy the claim's requirements." *Phillips*.

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

- *Reed v. Proctor & Gamble Mfg. Co.*, 556 Fed. Appx. 421 (6th Cir. 2014), *cert. denied*, 135 S.Ct. 84 (2014) (no hostile work environment where the plaintiff was subject to race-based comments and his supervisor stood behind him and made a noose out of telephone cord);
- *Williams v. CSX Transp. Co.*, 643 F.3d 502 (6thCir. 2011) (no hostile work environment where defendant called Jesse Jackson and Al Sharpton "monkeys" and said "black people should go back where they came from," among other racist comments); and
- *Clay v. UPS*, 501 F.3d 695 (6th Cir. 2007) (15 racially motivated comments and several instances of disparate treatment over a two-year period were isolated and not pervasive, and therefore not actionable).

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

"In the Sixth Circuit, even where comments are 'socially repulsive,' 'deplorable' and racially-charged, they do not create a hostile work environment if they are 'too infrequently made' and 'neither physically threatening nor humiliating.' Further, when 'there is no evidence the comments unreasonably interfered with [Plaintiff's] work performance,' the Sixth Circuit has 'repeatedly recognized that 'occasional ... offensive utterances' do not rise to the level required to create a hostile work environment."

Lumpkin v. Adalet/Scott Fetzer Co., 2017 WL 2080242 (N.D. Ohio May 15, 2017) (citations omitted) (however, summary judgment was denied based on frequent racist nicknames in a case the court said was "a close call"). *Id.*

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

Recent Ohio cases applying O.R.C. Ch. 4112:

- *Slivers v. Clay Twp. Police Dept.*, 2d Dist. App. No. 27867, 2018-Ohio-2970 (summary judgment affirmed in case involving two inappropriate remarks by supervisor, including that the plaintiff would have to "give it up" if hired, and many inappropriate remarks by a co-worker over one-year period, including mocking plaintiff when she was ill and urinating blood by saying, "my name is Tina and my **** hurts").
- *Diller v. Miami Valley Hosp.*, 2d Dist. App. No. 27342, 2017-Ohio-9051 (summary judgment affirmed in case involving three incidents of inappropriate sexual comments by supervisor).

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

Recent Ohio cases applying O.R.C. Ch. 4112:

- *Kuivila v. City of Newton Falls*, 11thDist. App. No. 2016-T-0010, 2017-Ohio-7967 (summary judgment affirmed in case involving female council member's sexual harassment of male police chief during a two-year period, involving numerous incidents including expressing a sexual desires).
- *Retuerto v. Berea Moving Storage & Logistics*, 8thDist. App. No. 102116, 2015-Ohio-2404 (reversing summary judgment in case involving supervisor's repeated expressions of affection, staring, following, brushing up against the plaintiff, and an incident of crawling under her desk to fix a computer cord, over a six-month period).

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

Can a single use of the "n" word constitute an objectively hostile work environment?

- Yes. Castleberry v. STI Group, 863 F.3d 259 (3rd Cir. 2017) (42 U.S.C. §1981 claim) (supervisor told two African-American employees in front of co-workers that if they had "n****r-rigged" a fence, they would be fired; "[t]his constitutes severe conduct that could create a hostile work environment"). The court, at length, emphasized a hostile work environment can be shown by either severe or pervasive conduct).

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TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS

Can a single use of the "n" word constitute an objectively hostile work environment?

- Maybe (probably). *Daniel v. T&M Protection Resources, LLC*, 689 Fed. Appx. 1 (2ndCir. 2017) (Title VII claim) (supervisor said "you f****ng n****r" to African American employee). The court declined "to confront the issue of whether the one-time use of the slur 'n****r' by a supervisor to a subordinate can, by itself, support a claim for hostile work environment," but "we conclude that the district court improperly relied on our precedents when it rejected this possibility as a matter of law"). After a bench trial on remand, the district court found the "n" work was never, in fact, used. 2018 WL 3621810 (S.D.N.Y. July 18, 2018).

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DISCRIMINATORY HOSTILE WORK ENVIRONMENT

- **Discriminatory hostile work environment: Treating an employee more harshly than other employees because he or she is a member of a protected class.**
- **Unlike the traditional type of hostile work environment harassment, this type of harassment need not expressly identify the protected class to be unlawful, although it must be motivated by it.**

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DISCRIMINATORY HOSTILE WORK ENVIRONMENT

- "[T]he conduct underlying a sexual harassment claim need not be overtly sexual in nature. *Any* unequal treatment of any employee *that would not occur but for the employee's gender* may, if sufficiently severe or pervasive under the *Harris* standard, constitute a hostile environment in violation of Title VII." *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999) (emphasis in original).
- "An action that is not explicitly racial in nature may constitute proof of a hostile work environment if it would not have occurred but for the plaintiff's race." *Chancellor v. Coca-Cola Enterprises, Inc.*, 675 F.Supp.2d 771 (S.D. Ohio 2009).

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DISCRIMINATORY HOSTILE WORK ENVIRONMENT

- "Harassing conduct that is simply abusive, with no sexual element, can support a claim for hostile environment sexual harassment if it is directed at the plaintiff because of his or her sex." *Hampel v. Food Ingredient Specialties, Inc.*, 89 Ohio St.3d 169 (2000) (construing O.R.C. Ch. 4112).
- "[A]ny harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment[.]" *Hampel* (quoting *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985)).

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QUID PRO QUO SEXUAL HARASSMENT

In order to establish a *quid pro quo* sexual harassment claim, an employee must establish the following elements:

- He or she is a member of the protected class;
- He/she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors;
- The harassment was based on the employee's sex;
- The employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits, or his/her refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and
- The existence of *respondeat superior* liability.

Howington v. Quality Restaurant Concepts, LLC, 298 Fed. Appx. 436 (2008) (Title VII); *Scarvelli v. Melmont Holding Co.*, 9thDist. App. No. 05CA008793, 2006-Ohio-4019 (O.R.C. Ch. 4112).

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QUID PRO QUO SEXUAL HARASSMENT

"Tangible job detriment" = "adverse employment action." *Sanford v. Main Street Baptist Church Manor, Inc.*, 327 Fed. Appx. 587 (6thCir. 2009).

- A termination, suspension, demotion, unfavorable reassignment, and loss of pay or benefits constitute tangible job detriments for purposes of a *quid pro quo* harassment claim, as does the withholding of job benefits such as a promotion. *Sanford v. Main Street Baptist Church Manor*; *Howington v. Quality Restaurant Concept*.

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QUID PRO QUO SEXUAL HARASSMENT

Is a constructive discharge a tangible job detriment for purposes of a *quid pro quo* harassment claim?

- Yes. However, "[t]hat [the plaintiff] may proceed on her hostile work environment claim is, in itself, insufficient to prove constructive discharge," because "a constructive discharge requires conditions that exceed 'ordinary' discrimination; otherwise, a complaining employee is expected to remain on the job while seeking redress." *Hollar v. RJ Coffey Cup, LLC*, 505 F.Supp.2d 439 (N.D. Ohio 2007) (Title VII and O.R.C. Ch. 4112).

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QUID PRO QUO SEXUAL HARASSMENT

- *Respondeat superior* liability: Employers are held strictly liable for the conduct of supervisory personnel who have plenary authority to hire, fire, promote and discipline employees, or who have significant control over such decisions. *Howington v. Quality Restaurant Concept*, *supra*.
- If the harassment is committed by someone without such authority, the claim fails. *Collins v. Flowers*, 9thDist. App. No. 04CA008594, 2005-Ohio-3797, *app. denied*, 107 Ohio St.3d 1698 (2005) ("Appellant's claim against appellee for quid pro quo sexual harassment cannot survive summary judgment because Flowers had no supervisory authority over appellant and could not offer job benefits or threaten job detriment to appellant based on appellant's respective submission or refusal to submit to Flowers' sexual advances").
  - *Keep in mind*, a hostile work environment harassment claim might lie under the same facts.

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SAME SEX HARASSMENT

- **Same sex harassment is recognized under both federal and Ohio law. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (Title VII); *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000) (O.R.C. Ch. 4112).**
- **The same elements applicable to traditional hostile work environment claims apply to same sex harassment claims (the conduct was unwelcome; the conduct was based on sex; the conduct was sufficiently severe or pervasive to constitute a hostile work environment; and there is a basis for employer liability).**
- **To establish the harassing conduct was based on sex, the victim must prove:**
  - The harasser is acting out of sexual desire; or
  - The harasser is motivated by a hostility to the presence of the victim's gender in the workplace; or
  - The harasser treats males and females differently in a mixed-gender workplace.

Wade v. Automation Personnel Services, Inc., 612 Fed. Appx. 291 (6thCir. 2015).

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SEXUAL ORIENTATION/GENDER

- Discrimination because of one's ***sexual orientation*** is a form of sex discrimination. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (*en banc*); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (*en banc*).
- But not in the Sixth Circuit (yet). *Gilbert v. Country Music Association, Inc.*, 432 F. App'x 516 (6th Cir. 2011); *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2005), *cert. denied*, 551 U.S. 1104 (2007); *Grimsley v. American Showa, Inc.*, 2017 WL 3605440 (S.D. Ohio Aug. 21, 2017).
- And, other courts also are waiting for a clear mandate that sexual orientation is considered a protected class. *Troutman v. Hydro Extrusion USA, LLC*, 388 F.Supp.3d 400 (M.D. Penn. 2019) ("The law of the Third Circuit remains clear – sexual orientation is not covered by the protections of Title VII."

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SEXUAL ORIENTATION/GENDER

- However, discrimination based on ***transgender and transitioning status*** was found be a form of sex discrimination. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (2018); *see also, Parker v. Strawser Const.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018).
- Sex stereotyping claims by individuals who identify with the opposite sex have long been recognized. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Smith v. City of Salem*, 378 F.3d 566 (2004).

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SEXUAL ORIENTATION & TRANSGENDER STATUS – U.S. SUPREME COURT OCT. 2019 TERM

- There are three cases before the United States Supreme Court this term which may impact how sex discrimination is defined.
  - *R.G. & G.R. Funeral Homes, Inc. v. EEOC*, No. 18-107 (argued Oct. 8, 2019) (whether Title VII prohibits discrimination against transgender people based on (1) their status or (2) their sex stereotype under *Price Waterhouse v. Hopkins*)
  - *Bostock v. Clayton County, Georgia*, No. 17-1618 (argued Oct. 8, 2019) (whether discrimination against an employee because of sexual orientation constitutes prohibited discrimination "because of . . . sex" under Title VII)
  - *Altitude Express, Inc. v. Zarda*, No. 17-1623 (argued Oct. 8, 2019) (whether Title VII's prohibition on discrimination "because of . . . sex" includes discrimination based on an individual's sexual orientation)

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SEXUAL ORIENTATION/GENDER

The EEOC considers ***sexual orientation*** and ***gender identity/transgender status*** to be forms of sex discrimination under Title VII.

- *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers* (Aug. 2015);
- *Baldwin v. Foxx*, EEOC app. No. 0120133080 (July 2015) (sexual orientation);
- *Lusardi v. McHugh*, EEOC App. No. 0120133395 (March 2015) (gender identity/transgender status);
- *Macy v. Holder*, EEOC App. No. 0120120821 (April 2012) (gender identity/transgender status).

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SEXUAL ORIENTATION/GENDER

- Ohio court do not recognize sexual orientation discrimination claims under O.R.C. Ch. 4112. *Burns v. Ohio State Univ. College of Medicine*, 10th Dist. App. No. 13-AP-633, 2014-Ohio-1190, *app. denied*, 139 Ohio St.3d 1473 (2014); *Inskeep v. Western Reserve Transit Authority*, 7th Dist. App. No. 12-MA-72, 2013-Ohio-897; *Giannini-Bauer v. Schwab Retirement Plan Services*, 9th Dist. App. No. 25171, 2010-Ohio-6453, *app. denied*, 128 Ohio St.3d 1482 (2011).
- Discrimination based on *gender identity/transgender status* is prohibited sex discrimination under O.R.C. Ch. 4112. *Parker v. Strawser Construction, Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018). Apparently, no Ohio courts have addressed this issue.

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WHEN DOES AN ENVIRONMENT BECOME HOSTILE?

- **Determination is based on two factors:**
  - The unwelcome conduct is subjectively abusive to the person affected, and
  - Objectively severe or pervasive enough to create an environment that a *reasonable person* would find abusive.

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WHAT COURTS CONSIDER:

- The frequency of the unwelcome conduct;
- The severity of the unwelcome conduct;
- Whether the conduct was physically threatening, humiliating, or merely an offensive utterance;
- Whether the conduct unreasonably interfered with work performance;

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WHAT COURTS CONSIDER:

- The effect on the employee's physical and psychological well-being; and
- Whether the harasser was a superior or person with authority.
  - *See e.g.*, *Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993).

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WHAT COURTS CONSIDER:

- **NOTE: All of these factors are relevant & there is no single factor that is required.**
- However,"[s]imple teasing,...offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

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EMPLOYER LIABILITY:

- An employer is generally responsible for the acts of its supervisors and managers, i.e. Vicarious Liability
- An employer is liable for harassment between employees (co-worker harassment) if it knew or should have known about it and failed to take corrective action. the complaint procedures

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LIABILITY FOR SUPERVISOR CONDUCT:

- *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (setting forth the standard for employer liability based on the harassing conduct of supervisory personnel).
- When determining employer liability for harassment, "[t]he terms ***quid pro quo*** and **hostile work environment** are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Ellerth*.

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LIABILITY FOR SUPERVISOR CONDUCT:

***Faragher* and *Ellerth* liability standard for harassment perpetrated by a supervisor:**

- An employer is subject to vicarious (***strict***) liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee, when the employee suffers a *tangible employment action*. "No affirmative defense is available ... When the supervisor's harassment culminates in a tangible employment action[.]"

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LIABILITY FOR SUPERVISOR CONDUCT:

<u>Cont.</u> When no tangible employment action is taken, an employer may raise an affirmative defense to liability, subject to proof by a preponderance of the evidence. This defense comprises two essential elements:

- The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid the harm otherwise. *See, Faragher/ Ellerth.*

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LIABILITY FOR SUPERVISOR CONDUCT:

An employer's implementation of an anti-harassment policy with a complaint procedure is critical:

- "While proof that an employer had promulgated an anti-harassment policy with a 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." *See, Faragher/Ellerth.*

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LIABILITY FOR SUPERVISOR CONDUCT:

Ohio courts have followed *Faragher* and *Ellerth* to analyze claims O.R.C. Ch. 4112 claims.

- *E.g. Ellis v. Jungle Jim's Market, Inc.*, 12th Dist. App. No. CA2014-12-254, 2015-Ohio-4226;
- *McGraw v. Pilot Travel Centers, LLC*, 10th Dist. App. No. 11AP-699, 2012-Ohio-1076;
- *Edwards v. Ohio Institute of Cardiac Care*, 170 Ohio App.3d 619 (2d Dist. App. 2007).

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LIABILITY FOR SUPERVISOR CONDUCT:

Who is a "supervisor" for purposes of *Faragher/Ellerth*?

An employee is a "supervisor" whose actions can subject an employer to liability for harassment "only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Vance v. Ball State University*, 570 U.S. 421 (2013) (quoting *Ellerth*).

NOTE: The Court in *Vance* rejected the EEOC's broader definition, which includes employees with significant discretion over another's daily work.

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LIABILITY FOR SUPERVISOR CONDUCT:

For strict liability to apply, the tangible employment action must have been taken by the supervisor who perpetrated the harassment.

Ellis v. Jungle Jim's Market, Inc., 12th Dist. App. No. CA2014-12-254, 2015-Ohio-4226 (allowing employer to raise *Faragher/Ellerth* defense even though the employee had suffered a tangible employment action, because the supervisor who harassed her was not involved in that decision).

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LIABILITY FOR SUPERVISOR CONDUCT:

Cont.:

Edwards v. Ohio Institute of Cardiac Care, 170 Ohio App.3d 619 (2d Dist. App. 2007) (allowing employer to raise *Faragher/Ellerth* defense even though the employee had been fired, because there was no evidence the harassing supervisor "made the decision to fire her, orchestrated her termination, or participated in any way in the decision to fire her").

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LIABILITY FOR SUPERVISOR CONDUCT:

Is a constructive discharge a "tangible employment action" that precludes an employer from raising the *Faragher/Ellerth* defense to a harassment claim?

- No. But the "affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she could face unbearable working conditions." *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

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LIABILITY FOR SUPERVISOR CONDUCT:

- *Plautz v. Potter*, 156 F. App'x 812 (6th Cir. 2005) (disability harassment case; the court held that *Suders* "concluded that constructive discharge, while a potential liability-incurring employment action for the employer, is not a 'tangible employment action'" and "[t]herefore the affirmative defenses available to employers in non-tangible action cases are available in constructive discharge cases").

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LIABILITY FOR SUPERVISOR CONDUCT:

- *EEOC v. Spitzer Management, Inc.*, 866 F. Supp. 2d 851 (N.D. Ohio 2012) (national origin harassment case; allowing assertion of *Faragher/Ellerth* defense in constructive discharge situation).
- *Kennison v. Burger King Restaurant*, 2007 WL 1544583 (N.D. Ohio May 24, 2007) (sexual harassment case; allowing assertion of *Faragher/Ellerth* defense in constructive discharge situation).

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LIABILITY FOR SUPERVISOR CONDUCT:

- Although the U.S. Supreme Court in *Faragher* and *Ellerth* downplayed the use of the terms "quid-pro-quo" and "hostile work environment" in its analysis of employer liability, those terms have generally been used to demarcate whether a tangible employment action has occurred. In general, quid pro quo claims involve tangible employment actions while hostile-work-environment claims involve severe and pervasive harassment that did not culminate in a job detriment." *Edwards v. Ohio Institute of Cardiac Care*, 170 Ohio App.3d 619 (2d Dist. App. 2007).

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LIABILITY FOR EMPLOYEE'S HARASSMENT OF CO-WORKER:

In order to establish employer liability for a hostile work environment created by a co-worker, the employee "must establish [the employer] knew or should have known of the harassment yet failed to take prompt and appropriate corrective action."

- *Wierengo v. Akal Security, Inc.*, 580 F. App'x 364 (6th Cir. 2014) (Title VII);
- *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6th Cir. 2008) (O.R.C. Ch. 4112, but relying on Title VII case law);

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LIABILITY FOR EMPLOYEE'S HARASSMENT OF CO-WORKER:

- *Parker v. Strawser Construction, Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018) (Title VII and O.R.C. Ch. 4112);
- *McGraw v. Pilot Travel Centers, LLC*, 10th Dist. App. No. 11AP-699, 2012-Ohio-1076 (O.R.C. Ch. 4112).

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LIABILITY FOR EMPLOYEE'S HARASSMENT OF CO-WORKER:

- What is an appropriate response to co-worker harassment that will insulate an employer from liability?
- "A response is generally adequate if it is reasonably calculated to end the harassment. And whether a response is effective is measured not by the extent to which the employer disciplines or punishes the alleged harasser, but rather if the steps taken by the defendant halt the harassment. Evaluation of the response is a fact-specific inquiry and must be done on a case-by case basis." *McGraw v. Pilot Travel Centers*, *supra* (citing *Satterfield v. Karnes*, 736 F. Supp. 2d 1138 (S.D. Ohio 2010)).

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EMPLOYER LIABILITY:

"[E]ither (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." *Hampel v. Food Ingredient Specialties, Inc.*, 89 Ohio St.3d 169 (2000).

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EMPLOYER LIABILITY:

- For Hostile Work Environment claims, even one supervisor's knowledge of harassment may be enough to impute knowledge to the employer.
- **Takeaway:** Knowledge & failure to take immediate and effective action = liability.

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EXAMPLES:

- Courts generally will not find liability:
  - where employees are asked on a couple of dates;
  - where incidents are minor, isolated, or take place over a long span of time; and
  - where crude remarks are isolated and infrequent.

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EXAMPLES:

- Courts generally will find liability:
  - where an employee is touched in a sexually offensive manner while confined in a work space;
  - where an employee is subjected to a long pattern of conduct/ridicule/abuse;
  - where an employee is forced to endure repeated sexual advances.

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INDIVIDUAL LIABILITY FOR HARASSMENT:

Employees, including supervisors, do not meet the Title VII, ADA, and ADEA definitions of "employer" and, therefore, may not be sued and held liable for violations of these laws.

- *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997) (Title VII, ADA, and ADEA, *see* n. 6);
- *Mays v. City of Oak Park*, 285 F. App'x 261 (6th Cir. 2008) (ADA);
- *Holmes v. City of Cincinnati*, 2016 WL 1625815 (S.D. Ohio April 25, 2016) (Title VII and ADA);
- *Bailey v. East Liverpool City Hosp.*, 2015 WL 5102768 (N.D. Ohio Aug. 31, 2015) (ADEA).

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INDIVIDUAL LIABILITY FOR HARASSMENT:

- Supervisors can be held individually liable for their violations of O.R.C. Ch. 4112. *Genaro v. Cent. Transp., Inc.*, 84 Ohio St.3d 293 (1999); *Griffin v. Finkbeiner*, 689 F.3d 584 (6th Cir. 2012).
- Individuals may qualify as supervisors under O.R.C. Ch. 4112 if they have the authority to supervise, evaluate, discipline, promote, or terminate the plaintiff. *Fulst v. Thompson*, No. 2009 WL 4153222 (S.D. Ohio Nov. 20, 2009).
- A harasser can also be held liable under Ohio common law theories (e.g., assault and battery, intentional infliction of emotional distress).

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THIRD PARTY HARASSMENT:

- Third Party Harassment (suppliers, customers, etc.). Same standard as co-worker harassment, but consideration is given to the extent of the employer's control over the non-employee. *See, Thompson v. Panos X Foods, Inc.*, 2016 WL 1615702 (E.D. Mich. 2016) (denying summary judgment where server complained about sexual harassment by a customer).

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EMPLOYER'S DUTY TO EXERCISE REASONABLE CARE

- An employer who exercised reasonable care is generally not liable for harassment if the employee could have avoided all the harm.
- Proof that an employee unreasonably failed to use a complaint procedure provided by the employer will normally satisfy the employer's burden.
- *Burden lies with the employer to prove that the employee's failure to complain was unreasonable.*

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EMPLOYEE'S FAILURE TO COMPLAIN

- Conclusion about whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstance and information available to the employee at the time of the purported failure.
- An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment.

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DAMAGES:

In addition to back pay, non-economic and compensatory damages can be recovered for violations of Title VII and the ADA, although damages are capped. 42 U.S.C. §1981a(a)(1), (2), (b)(1), (3).

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DAMAGES:

Neither non-economic compensatory damages nor punitive damages are available under the ADEA. *C.I.R. v. Schleier*, 515 U.S. 323 (1995); *Hill v. Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983); *Ricks v. Potter*, 608 F. Supp. 2d (N.D. Ohio 2008). However, liquidated (double) damages are available for willful violations. *Carberry v. Monarch Marketing Systems, Inc.*, 30 F. App'x 389 (6th Cir. 2002).

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DAMAGES:

- Non-economic compensatory damages and punitive damages may be recovered for violations of O.R.C. Ch. 4112. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417 (1999).
- O.R.C. Ch. 4112 claims are considered tort claims for purposes of Ohio's tort reform statute. *Sivit v. Village Green of Beachwood*, 8th Dist. App. No. 98401, 2013-Ohio-103, *affirmed in part and reversed in part on other grounds*, 143 Ohio St.3d 168 (2015); *Williams v. Sims Bros., Inc.*, 889 F. Supp. 2d 1007 (N.D. Ohio 2012). Therefore, O.R.C. Ch. 4112 claims are subject to the statute's damages caps codified at O.R.C. 2315.18(B) and 2315.21(D).

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QUESTIONS?

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2019

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WORKPLACE HARASSMENT

Presented to The Akron Bar Association by Kerri L. Keller

COLLECTIVE EXPERIENCE . COLLABORATIVE CULTURE . CREATIVE SOLUTIONS

2 **WHAT WILL WE COVER TODAY?**

- Statutory Law and Protected Classes
- Types of Actionable Workplace Harassment
- Workplace Harassment Liability Standards
- Damages

3 **WHAT IS HARASSMENT IN THE WORKPLACE?**

4 **WHAT IS HARASSMENT IN THE WORKPLACE?**

5 **ARE HARASSMENT CLAIMS DECREASING?**

April 2019 EEOC Press Release:

- Overall number of charges are down per EEOC FY 2018 data, but the number of sexual harassment charges increased, as did the number of sexual harassment lawsuits filed by the agency.
- There were 76,418 discrimination charges filed, which represents the lowest number of charges since FY 2006.
- The top five reasons chargers were filed in FY 2018 were retaliation, sex discrimination, disability, race, and age.

6 **WHAT IS HARASSMENT?**

- Harassment = "Discrimination" for purposes of federal and Ohio anti-discrimination laws. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000).
-
- In other words, a claim for workplace harassment is necessarily a claim for discrimination." *Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. App. No. 86651, 2006-Ohio-2587, *app. denied*, 111 Ohio St.3d 1431 (2006).

7 **WHAT IS HARASSMENT?**

- Defined generally as "unwelcome conduct."
- It becomes unlawful if:
  - enduring the offensive conduct becomes a condition of employment.
    - *Quid Pro Quo* – limited to sexual harassment cases
  - the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
    - Hostile Work Environment – all protected classes

8 **TYPES OF SEXUAL HARASSMENT**

- *Quid pro quo*, i.e. "this for that"
  - Involves a tangible employment action.
  - Commonly thought of as "put out or get out."
  - Committed by someone in a position of authority with decision making power.

9 **TYPES OF SEXUAL HARASSMENT**

- Hostile work environment
  - Unlike *quid pro quo* harassment, anyone can be the harasser – a supervisor, co-worker, customer, or vendor.
  - More common, more pervasive, least understood.

10 **HARASSMENT CAN BE BASED ON MULTIPLE GROUNDS**

11 **HOSTILE WORK ENVIRONMENT EXAMPLES**

- NOTE: A hostile work environment can result with respect to conduct based on any protected class, i.e. gender, race, color, religion, national origin (Title VII).

12 **HOSTILE WORK ENVIRONMENT EXAMPLES**

- Other laws can form the basis for claims of hostile work environment, such as the ADEA and ADA.
  - *See generally*, 42 U.S.C. §12101 *et seq.; Chander v. Cleveland Metropolitan School District*, 2019 WL 4394135 (analyzing hostile work environment claim under the ADEA) , *app. filed*, No. 19-3957 (6th Cir. Oct. 7, 2019).
  - *See generally*, 29 U.S.C. §621 *et seq.; Repka v. Bd. of Education*, 28 F. App'x 455 (6th Cir. 2002) (analyzing hostile work environment claim under the ADA).

13 **HARASSMENT PROBLEMS OCCUR FOR THREE BASIC REASONS:**

1. People have different opinions on what constitutes appropriate workplace behavior based on gender, social, cultural and geographical conditions.
2. Incorrect assumptions about what other persons consider to be appropriate workplace behavior.
3. Employers fail to define appropriate workplace behavior standards for their staff.

14 **FEDERAL STATUTORY BASIS**

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*
  - "It shall be an unlawful employment practice for an employer … to discriminate against any individual … because of such individual's *race*, *color*, *religion*, *sex*, or *national origin*[.] 42 U.S.C. §2000e-2(a).
  -

- "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because or on the basis of *pregnancy*, childbirth, or related medical conditions[.]" 42 U.S.C. §2000e(k).

15 **STATE STATUTORY BASIS**

- The Ohio Civil Rights Act, Ohio Rev. Code §4112.01 *et seq.*
  - "It shall be an unlawful discriminatory practice: For an employer, because of the *race*, *color*, *religion*, *sex*, *military status*, *national origin*, *disability*, *age*, or *ancestry* of any person, to … discriminate against that person." O.R.C. §4112.02(A).
  - "[T]he terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of *pregnancy*, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. O.R.C. §4112.01(B).

16 **HOSTILE WORK ENVIRONMENT**

- "A claim of 'hostile environment' sexual harassment is a form of sex discrimination that is actionable under Title VII." *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
- "Hostile work environment" defined: A workplace permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abuse environment. This standard requires an objectively hostile or abusive environment, and the victim's subjective perception that the environment is abusive. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

17 **HOSTILE WORK ENVIRONMENT**

- "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*
- But "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)).

18 **HOSTILE WORK ENVIRONMENT**

The employee must establish:
(1)he or she was a member of a protected class;
(2)the harassment was unwelcome;
(3)the harassment was based on the employee's protected class;
(4)the harassment created a hostile work environment; and
(5)employer liability. *Wierengo v. Akal Security, Inc.*, 580 Fed. Appx. 364 (6th Cir. 2014); *Hidy Motors, Inc. v. Sheaffer*, 183 Ohio App.3d 316 (2d Dist. App. 2009).

19 **HOSTILE WORK ENVIRONMENT**

- These elements apply to all types of hostile work environment claims, regardless of the protected class that underlies the claim. *Crawford v. Medina General Hospital*, 96 F.3d 830 (6th Cir. 1996).

- "The elements and burden of proof are the same, regardless of the discrimination context in which the claim arises." *Crawford* (age harassment claim; and observing the same standard applies to race and national origin harassment claims); *see also Plautz v. Potter*, 156 Fed. Appx. 812 (6th Cir. 2005) (hostile work environment claim premised on Americans With Disabilities Act).

20 **HOSTILE WORK ENVIRONMENT**

The "cumulative theory" of hostile work environment harassment based on more than one protected class: *Wade v. Automation Personnel Services, Inc.*, 612 Fed. Appx. 291 (6th Cir. 2015).

This theory can be advanced under "special circumstances," *viz.*, where a plaintiff alleges multiple hostile work environment claims based on different protected classes if one of his or her independent claims is sufficient on its own. Wade based his harassment claim on an alleged hostile work environment based on his sex, race and religion. But "[n]one of Wade's individual claims of hostile work environment rise to the level of 'severe or pervasive' conduct and these allegations in the aggregate suffer from the same flaw."

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21 **HOSTILE WORK ENVIRONMENT**

But see Hafford v. Seidner, 183 F.3d 506 (6th Cir. 1999). Because the plaintiff presented enough evidence to state a race harassment claim, he was permitted to proceed on a cumulative harassment theory based on race and religion (his status as a "black Muslim"), even though the religious harassment claim failed on its own.

"The theory of a hostile-environment claim is that the cumulative effect of ongoing harassment is abusive. It would not be right to require a judgment against Hafford if the sum of all of the harassment he experienced was abusive, but the incidents could be separated into several categories, with no one category containing enough incidents to amount to 'pervasive' harassment. Although there is enough evidence of racial harassment for that claim to stand on its own, the district court should allow at trial for consideration of the possibility that the racial animus of Hafford's co-worker's was augmented by their bias against his religion."

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22 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

- Traditional hostile work environment: Severe or pervasive conduct comprised of verbal, graphic, or other communicative abuse that expressly stigmatizes an employee's protected class (*e.g.* racial epithets or slurs, demeaning comments about the protected class, jokes perpetuating stereotypes about protected classes, unwelcome sexual behavior). The conduct can be physical as well as communicative.
-
- Discriminatory hostile work environment: Severe or pervasive conduct comprised of treating an employee more harshly than other employees because of his or her protected class, without necessarily overtly or expressly denigrating the protected class.

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23 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

- For a harassment claim to be actionable, the work environment must be objectively hostile. The employee "must show 'that under the "totality of the circumstances the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Kubik v. Central Michigan Univ. Bd. of Trustees*, 717 Fed. Appx. 577 (6th Cir. 2017).

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- The Sixth Circuit sets a high bar. *Kubik*; *Phillips v. UAW International*, 854 F.3d 323 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 980 (2018). Because Title VII is not "a general civility code," "the statutory scheme will not protect employees from all acts of a boorish, callous, condescending, or overbearing supervisor." *Daniels v. Pike Cty. Commissioners*, 706 Fed. Appx. 281 (6th Cir. 2017).
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24 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

- Isolated incidents, unless extremely serious, will not suffice, and occasional offensive utterances do not rise to the level necessary to create an unlawful hostile work environment. *Phillips*, *supra*. (upholding summary judgment on race harassment claim because the incidents on which the claim were based were not severe or pervasive enough, even though they expressly denigrated African-Americans).
-
- "[T]his court has found even offensive and bigoted conduct insufficient to constitute a hostile work environment if it is neither pervasive nor severe enough to satisfy the claim's requirements." *Phillips*.
  -
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25 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

- *Reed v. Proctor & Gamble Mfg. Co.*, 556 Fed. Appx. 421 (6th Cir. 2014), *cert. denied*, 135 S.Ct. 84 (2014) (no hostile work environment where the plaintiff was subject to race-based comments and his supervisor stood behind him and made a noose out of telephone cord);
- *Williams v. CSX Transp. Co.*, 643 F.3d 502 (6thCir. 2011) (no hostile work environment where defendant called Jesse Jackson and Al Sharpton "monkeys" and said "black people should go back where they came from," among other racist comments); and
- *Clay v. UPS*, 501 F.3d 695 (6th Cir. 2007) (15 racially motivated comments and several instances of disparate treatment over a two-year period were isolated and not pervasive, and therefore not actionable).
  -

26 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

"In the Sixth Circuit, even where comments are 'socially repulsive,' 'deplorable' and racially-charged, they do not create a hostile work environment if they are 'too infrequently made' and 'neither physically threatening nor humiliating.' Further, when 'there is no evidence the comments unreasonably interfered with [Plaintiff's] work performance,' the Sixth Circuit has 'repeatedly recognized that 'occasional … offensive utterances' do not rise to the level required to create a hostile work environment."

Lumpkin v. Adalet/Scott Fetzer Co., 2017 WL 2080242 (N.D. Ohio May 15, 2017) (citations omitted) (however, summary judgment was denied based on frequent racist nicknames in a case the court said was "a close call"). *Id.*

27 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

Recent Ohio cases applying O.R.C. Ch. 4112:

- *Slivers v. Clay Twp. Police Dept.*, 2d Dist. App. No. 27867, 2018-Ohio-2970 (summary judgment affirmed in case involving two inappropriate remarks by supervisor, including

that the plaintiff would have to "give it up" if hired, and many inappropriate remarks by a co-worker over one-year period, including mocking plaintiff when she was ill and urinating blood by saying, "my name is Tina and my **** hurts").

- *Diller v. Miami Valley Hosp.*, 2d Dist. App. No. 27342, 2017-Ohio-9051 (summary judgment affirmed in case involving three incidents of inappropriate sexual comments by supervisor).

28 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

Recent Ohio cases applying O.R.C. Ch. 4112:

- *Kuivila v. City of Newton Falls*, 11thDist. App. No. 2016-T-0010, 2017-Ohio-7967 (summary judgment affirmed in case involving female council member's sexual harassment of male police chief during a two-year period, involving numerous incidents including expressing a sexual desires).

- *Retuerto v. Berea Moving Storage & Logistics*, 8thDist. App. No. 102116, 2015-Ohio-2404 (reversing summary judgment in case involving supervisor's repeated expressions of affection, staring, following, brushing up against the plaintiff, and an incident of crawling under her desk to fix a computer cord, over a six-month period).

29 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

Can a single use of the "n" word constitute an objectively hostile work environment?

- Yes. Castleberry v. STI Group, 863 F.3d 259 (3rd Cir. 2017) (42 U.S.C. §1981 claim) (supervisor told two African-American employees in front of co-workers that if they had "n****r-rigged" a fence, they would be fired; "[t]his constitutes severe conduct that could create a hostile work environment"). The court, at length, emphasized a hostile work environment can be shown by either severe or pervasive conduct).

30 **TYPES OF HOSTILE WORK ENVIRONMENT CLAIMS**

Can a single use of the "n" word constitute an objectively hostile work environment?

- Maybe (probably). *Daniel v. T&M Protection Resources, LLC*, 689 Fed. Appx. 1 (2ndCir. 2017) (Title VII claim) (supervisor said "you f****ng n****r" to African American employee). The court declined "to confront the issue of whether the one-time use of the slur 'n****r' by a supervisor to a subordinate can, by itself, support a claim for hostile work environment," but "we conclude that the district court improperly relied on our precedents when it rejected this possibility as a matter of law"). After a bench trial on remand, the district court found the "n" work was never, in fact, used. 2018 WL 3621810 (S.D.N.Y. July 18, 2018).

31 **DISCRIMINATORY HOSTILE WORK ENVIRONMENT**

- Discriminatory hostile work environment: Treating an employee more harshly than other employees because he or she is a member of a protected class.

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- Unlike the traditional type of hostile work environment harassment, this type of harassment need not expressly identify the protected class to be unlawful, although it must be motivated by it.
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32 **DISCRIMINATORY HOSTILE WORK ENVIRONMENT**

- "[T]he conduct underlying a sexual harassment claim need not be overtly sexual in nature. *Any* unequal treatment of any employee *that would not occur but for the employee's gender* may, if sufficiently severe or pervasive under the *Harris* standard, constitute a hostile environment in violation of Title VII." *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999) (emphasis in original).
-
- "An action that is not explicitly racial in nature may constitute proof of a hostile work environment if it would not have occurred but for the plaintiff's race." *Chancellor v. Coca-Cola Enterprises, Inc.*, 675 F.Supp.2d 771 (S.D. Ohio 2009).

33 **DISCRIMINATORY HOSTILE WORK ENVIRONMENT**

- "Harassing conduct that is simply abusive, with no sexual element, can support a claim for hostile environment sexual harassment if it is directed at the plaintiff because of his or her sex." *Hampel v. Food Ingredient Specialties, Inc.*, 89 Ohio St.3d 169 (2000) (construing O.R.C. Ch. 4112).
  -
- "[A]ny harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment[.]" *Hampel* (quoting *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985)).

34 **QUID PRO QUO SEXUAL HARASSMENT**

In order to establish a *quid pro quo* sexual harassment claim, an employee must establish the following elements:

- He or she is a member of the protected class;
- He/she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors;
- The harassment was based on the employee's sex;
- The employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits, or his/her refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and
- The existence of *respondeat superior* liability.

Howington v. Quality Restaurant Concepts, LLC, 298 Fed. Appx. 436 (2008) (Title VII); *Scarvelli v. Melmont Holding Co.*, 9thDist. App. No. 05CA008793, 2006-Ohio-4019 (O.R.C. Ch. 4112).

35 **QUID PRO QUO SEXUAL HARASSMENT**

"Tangible job detriment" = "adverse employment action." *Sanford v. Main Street Baptist Church Manor, Inc.*, 327 Fed. Appx. 587 (6thCir. 2009).

- A termination, suspension, demotion, unfavorable reassignment, and loss of pay or benefits constitute tangible job detriments for purposes of a *quid pro quo* harassment claim, as does the withholding of job benefits such as a promotion. *Sanford v. Main Street Baptist Church*

Manor; Howington v. Quality Restaurant Concept.

36 **QUID PRO QUO SEXUAL HARASSMENT**

Is a constructive discharge a tangible job detriment for purposes of a *quid pro quo* harassment claim?

- Yes. However, "[t]hat [the plaintiff] may proceed on her hostile work environment claim is, in itself, insufficient to prove constructive discharge," because "a constructive discharge requires conditions that exceed 'ordinary' discrimination; otherwise, a complaining employee is expected to remain on the job while seeking redress." *Hollar v. RJ Coffey Cup, LLC*, 505 F.Supp.2d 439 (N.D. Ohio 2007) (Title VII and O.R.C. Ch. 4112).

37 **QUID PRO QUO SEXUAL HARASSMENT**

- *Respondeat superior* liability: Employers are held strictly liable for the conduct of supervisory personnel who have plenary authority to hire, fire, promote and discipline employees, or who have significant control over such decisions. *Howington v. Quality Restaurant Concept*, *supra*.
-
- If the harassment is committed by someone without such authority, the claim fails. *Collins v. Flowers*, 9thDist. App. No. 04CA008594, 2005-Ohio-3797, *app. denied*, 107 Ohio St.3d 1698 (2005) ("Appellant's claim against appellee for quid pro quo sexual harassment cannot survive summary judgment because Flowers had no supervisory authority over appellant and could not offer job benefits or threaten job detriment to appellant based on appellant's respective submission or refusal to submit to Flowers' sexual advances").
  -
  - *Keep in mind*, a hostile work environment harassment claim might lie under the same facts.

38 **SAME SEX HARASSMENT**

- Same sex harassment is recognized under both federal and Ohio law. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (Title VII); *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000) (O.R.C. Ch. 4112).
- The same elements applicable to traditional hostile work environment claims apply to same sex harassment claims (the conduct was unwelcome; the conduct was based on sex; the conduct was sufficiently severe or pervasive to constitute a hostile work environment; and there is a basis for employer liability).
- To establish the harassing conduct was based on sex, the victim must prove:
  - The harasser is acting out of sexual desire; or
  - The harasser is motivated by a hostility to the presence of the victim's gender in the workplace; or
  - The harasser treats males and females differently in a mixed-gender workplace.

  Wade v. Automation Personnel Services, Inc., 612 Fed. Appx. 291 (6thCir. 2015).

39 **SEXUAL ORIENTATION/GENDER**

- Discrimination because of one's *sexual orientation* is a form of sex discrimination. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (*en banc*); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (*en banc*).

- But not in the Sixth Circuit (yet). *Gilbert v. Country Music Association, Inc.*, 432 F. App'x 516 (6th Cir. 2011); *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2005), *cert. denied*, 551 U.S. 1104 (2007); *Grimsley v. American Showa, Inc.*, 2017 WL 3605440 (S.D. Ohio Aug. 21, 2017).
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- And, other courts also are waiting for a clear mandate that sexual orientation is considered a protected class. *Troutman v. Hydro Extrusion USA, LLC*, 388 F.Supp.3d 400 (M.D. Penn. 2019) ("The law of the Third Circuit remains clear – sexual orientation is not covered by the protections of Title VII."

40 **SEXUAL ORIENTATION/GENDER**

- However, discrimination based on *transgender and transitioning status* was found be a form of sex discrimination. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (2018); *see also, Parker v. Strawser Const.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018).
- Sex stereotyping claims by individuals who identify with the opposite sex have long been recognized. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Smith v. City of Salem*, 378 F.3d 566 (2004).
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41 **SEXUAL ORIENTATION & TRANSGENDER STATUS – U.S. SUPREME COURT OCT. 2019 TERM**

- There are three cases before the United States Supreme Court this term which may impact how sex discrimination is defined.
  - *R.G. & G.R. Funeral Homes, Inc. v. EEOC*, No. 18-107 (argued Oct. 8, 2019) (whether Title VII prohibits discrimination against transgender people based on (1) their status or (2) their sex stereotype under *Price Waterhouse v. Hopkins*)
  - *Bostock v. Clayton County, Georgia*, No. 17-1618 (argued Oct. 8, 2019) (whether discrimination against an employee because of sexual orientation constitutes prohibited discrimination "because of . . . sex" under Title VII)
  - *Altitude Express, Inc. v. Zarda*, No. 17-1623 (argued Oct. 8, 2019) (whether Title VII's prohibition on discrimination "because of . . . sex" includes discrimination based on an individual's sexual orientation)
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42 **SEXUAL ORIENTATION/GENDER**

The EEOC considers *sexual orientation* and *gender identity/transgender status* to be forms of sex discrimination under Title VII.

- *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers* (Aug. 2015);
- *Baldwin v. Foxx*, EEOC app. No. 0120133080 (July 2015) (sexual orientation);
- *Lusardi v. McHugh*, EEOC App. No. 0120133395 (March 2015) (gender identity/transgender status);
- *Macy v. Holder*, EEOC App. No. 0120120821 (April 2012) (gender identity/transgender status).
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43 **SEXUAL ORIENTATION/GENDER**

- Ohio court do not recognize sexual orientation discrimination claims under O.R.C. Ch. 4112. *Burns v. Ohio State Univ. College of Medicine*, 10th Dist. App. No. 13-AP-633, 2014-Ohio-1190, *app. denied*, 139 Ohio St.3d 1473 (2014); *Inskeep v. Western Reserve Transit Authority*, 7th Dist. App. No. 12-MA-72, 2013-Ohio-897; *Giannini-Bauer v. Schwab Retirement Plan Services*, 9th Dist. App. No. 25171, 2010-Ohio-6453, *app. denied*, 128 Ohio St.3d 1482 (2011).
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- Discrimination based on *gender identity/transgender status* is prohibited sex discrimination under O.R.C. Ch. 4112. *Parker v. Strawser Construction, Inc*., 307 F. Supp. 3d 744 (S.D. Ohio 2018). Apparently, no Ohio courts have addressed this issue.

44 **WHEN DOES AN ENVIRONMENT BECOME HOSTILE?**

- Determination is based on two factors:
  - The unwelcome conduct is subjectively abusive to the person affected, and
  - Objectively severe or pervasive enough to create an environment that a *reasonable person* would find abusive.

45 **WHAT COURTS CONSIDER:**

- The frequency of the unwelcome conduct;
- The severity of the unwelcome conduct;
- Whether the conduct was physically threatening, humiliating, or merely an offensive utterance;
- Whether the conduct unreasonably interfered with work performance;

46 **WHAT COURTS CONSIDER:**

- The effect on the employee's physical and psychological well-being; and
- Whether the harasser was a superior or person with authority.
  - *See e.g.*, *Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993).

47 **WHAT COURTS CONSIDER:**

- NOTE: All of these factors are relevant & there is no single factor that is required.
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- However,"[s]imple teasing,…offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

48 **EMPLOYER LIABILITY:**

- An employer is generally responsible for the acts of its supervisors and managers, i.e. Vicarious Liability
- An employer is liable for harassment between employees (co-worker harassment) if it knew or should have known about it and failed to take corrective action. the complaint procedures

49 **LIABILITY FOR SUPERVISOR CONDUCT:**

- *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (setting forth the standard for employer liability based on the harassing conduct of supervisory personnel).
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- When determining employer liability for harassment, "[t]he terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Ellerth*.

50 **LIABILITY FOR SUPERVISOR CONDUCT:**

Faragher and *Ellerth* liability standard for harassment perpetrated by a supervisor:

- An employer is subject to vicarious (*strict*) liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee, when the employee suffers a *tangible employment action*. "No affirmative defense is available … When the supervisor's harassment culminates in a tangible employment action[.]"

51 **LIABILITY FOR SUPERVISOR CONDUCT:**

Cont. When no tangible employment action is taken, an employer may raise an affirmative defense to liability, subject to proof by a preponderance of the evidence. This defense comprises two essential elements:

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- The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
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- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid the harm otherwise. *See, Faragher/ Ellerth.*

52 **LIABILITY FOR SUPERVISOR CONDUCT:**

An employer's implementation of an anti-harassment policy with a complaint procedure is critical:

- "While proof that an employer had promulgated an anti-harassment policy with a 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." *See, Faragher/Ellerth*.

53 **LIABILITY FOR SUPERVISOR CONDUCT:**

Ohio courts have followed *Faragher* and *Ellerth* to analyze claims O.R.C. Ch. 4112 claims.

- *E.g. Ellis v. Jungle Jim's Market, Inc.*, 12th Dist. App. No. CA2014-12-254, 2015-Ohio-4226;
- *McGraw v. Pilot Travel Centers, LLC*, 10th Dist. App. No. 11AP-699, 2012-Ohio-1076;
- *Edwards v. Ohio Institute of Cardiac Care*, 170 Ohio App.3d 619 (2d Dist. App. 2007).

54 **LIABILITY FOR SUPERVISOR CONDUCT:**

Who is a "supervisor" for purposes of *Faragher/Ellerth*?

An employee is a "supervisor" whose actions can subject an employer to liability for harassment "only when the employer has empowered that employee to take tangible

employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Vance v. Ball State University*, 570 U.S. 421 (2013) (quoting *Ellerth*).

NOTE: The Court in *Vance* rejected the EEOC's broader definition, which includes employees with significant discretion over another's daily work.

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55 **LIABILITY FOR SUPERVISOR CONDUCT:**

For strict liability to apply, the tangible employment action must have been taken by the supervisor who perpetrated the harassment.

Ellis v. Jungle Jim's Market, Inc., 12th Dist. App. No. CA2014-12-254, 2015-Ohio-4226 (allowing employer to raise *Faragher/Ellerth* defense even though the employee had suffered a tangible employment action, because the supervisor who harassed her was not involved in that decision).

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56 **LIABILITY FOR SUPERVISOR CONDUCT:**

Cont.:

Edwards v. Ohio Institute of Cardiac Care, 170 Ohio App.3d 619 (2d Dist. App. 2007) (allowing employer to raise *Faragher/Ellerth* defense even though the employee had been fired, because there was no evidence the harassing supervisor "made the decision to fire her, orchestrated her termination, or participated in any way in the decision to fire her").

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57 **LIABILITY FOR SUPERVISOR CONDUCT:**

Is a constructive discharge a "tangible employment action" that precludes an employer from raising the *Faragher/Ellerth* defense to a harassment claim?

- No. But the "affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she could face unbearable working conditions." *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

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58 **LIABILITY FOR SUPERVISOR CONDUCT:**

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- *Plautz v. Potter*, 156 F. App'x 812 (6th Cir. 2005) (disability harassment case; the court held that *Suders* "concluded that constructive discharge, while a potential liability-incurring

employment action for the employer, is not a 'tangible employment action'" and "[t]herefore the affirmative defenses available to employers in non-tangible action cases are available in constructive discharge cases").

59 **LIABILITY FOR SUPERVISOR CONDUCT:**

- *EEOC v. Spitzer Management, Inc.*, 866 F. Supp. 2d 851 (N.D. Ohio 2012) (national origin harassment case; allowing assertion of *Faragher/Ellerth* defense in constructive discharge situation).
- *Kennison v. Burger King Restaurant*, 2007 WL 1544583 (N.D. Ohio May 24, 2007) (sexual harassment case; allowing assertion of *Faragher/Ellerth* defense in constructive discharge situation).

60 **LIABILITY FOR SUPERVISOR CONDUCT:**

- Although the U.S. Supreme Court in *Faragher* and *Ellerth* downplayed the use of the terms "quid-pro-quo" and "hostile work environment" in its analysis of employer liability, those terms have generally been used to demarcate whether a tangible employment action has occurred. In general, quid pro quo claims involve tangible employment actions while hostile-work-environment claims involve severe and pervasive harassment that did not culminate in a job detriment." *Edwards v. Ohio Institute of Cardiac Care*, 170 Ohio App.3d 619 (2d Dist. App. 2007).

61 **LIABILITY FOR EMPLOYEE'S HARASSMENT OF CO-WORKER:**

In order to establish employer liability for a hostile work environment created by a co-worker, the employee "must establish [the employer] knew or should have known of the harassment yet failed to take prompt and appropriate corrective action."

- *Wierengo v. Akal Security, Inc.*, 580 F. App'x 364 (6th Cir. 2014) (Title VII);
- *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6th Cir. 2008) (O.R.C. Ch. 4112, but relying on Title VII case law);

62 **LIABILITY FOR EMPLOYEE'S HARASSMENT OF CO-WORKER:**

- *Parker v. Strawser Construction, Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018) (Title VII and O.R.C. Ch. 4112);
- *McGraw v. Pilot Travel Centers, LLC*, 10th Dist. App. No. 11AP-699, 2012-Ohio-1076 (O.R.C. Ch. 4112).

63 **LIABILITY FOR EMPLOYEE'S HARASSMENT OF CO-WORKER:**

- What is an appropriate response to co-worker harassment that will insulate an employer

from liability?

- "A response is generally adequate if it is reasonably calculated to end the harassment. And whether a response is effective is measured not by the extent to which the employer disciplines or punishes the alleged harasser, but rather if the steps taken by the defendant halt the harassment. Evaluation of the response is a fact-specific inquiry and must be done on a case-by case basis." *McGraw v. Pilot Travel Centers*, *supra* (citing *Satterfield v. Karnes*, 736 F. Supp. 2d 1138 (S.D. Ohio 2010)).

64 **EMPLOYER LIABILITY:**

"[E]ither (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." *Hampel v. Food Ingredient Specialties, Inc.*, 89 Ohio St.3d 169 (2000).

65 **EMPLOYER LIABILITY:**

- For Hostile Work Environment claims, even one supervisor's knowledge of harassment may be enough to impute knowledge to the employer.
- Takeaway: Knowledge & failure to take immediate and effective action = liability.

66 **EXAMPLES:**

- Courts generally will not find liability:
  - where employees are asked on a couple of dates;
  - where incidents are minor, isolated, or take place over a long span of time; and
  - where crude remarks are isolated and infrequent.

67 **EXAMPLES:**

- Courts generally will find liability:
  - where an employee is touched in a sexually offensive manner while confined in a work space;
  - where an employee is subjected to a long pattern of conduct/ridicule/abuse;
  - where an employee is forced to endure repeated sexual advances.

68 **INDIVIDUAL LIABILITY FOR HARASSMENT:**

Employees, including supervisors, do not meet the Title VII, ADA, and ADEA definitions of "employer" and, therefore, may not be sued and held liable for violations of these laws.

- *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997) (Title VII, ADA, and ADEA, *see* n. 6);

- *Mays v. City of Oak Park*, 285 F. App'x 261 (6th Cir. 2008) (ADA);
- *Holmes v. City of Cincinnati*, 2016 WL 1625815 (S.D. Ohio April 25, 2016) (Title VII and ADA);
- *Bailey v. East Liverpool City Hosp.*, 2015 WL 5102768 (N.D. Ohio Aug. 31, 2015) (ADEA).
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69 **INDIVIDUAL LIABILITY FOR HARASSMENT:**

- Supervisors can be held individually liable for their violations of O.R.C. Ch. 4112. *Genaro v. Cent. Transp., Inc.*, 84 Ohio St.3d 293 (1999); *Griffin v. Finkbeiner*, 689 F.3d 584 (6th Cir. 2012).
- Individuals may qualify as supervisors under O.R.C. Ch. 4112 if they have the authority to supervise, evaluate, discipline, promote, or terminate the plaintiff. *Fulst v. Thompson*, No. 2009 WL 4153222 (S.D. Ohio Nov. 20, 2009).
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- A harasser can also be held liable under Ohio common law theories (e.g., assault and battery, intentional infliction of emotional distress).
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70 **THIRD PARTY HARASSMENT:**

- Third Party Harassment (suppliers, customers, etc.). Same standard as co-worker harassment, but consideration is given to the extent of the employer's control over the non-employee. *See, Thompson v. Panos X Foods, Inc.*, 2016 WL 1615702 (E.D. Mich. 2016) (denying summary judgment where server complained about sexual harassment by a customer).

71 **EMPLOYER'S DUTY TO EXERCISE REASONABLE CARE**

- An employer who exercised reasonable care is generally not liable for harassment if the employee could have avoided all the harm.
- Proof that an employee unreasonably failed to use a complaint procedure provided by the employer will normally satisfy the employer's burden.
- *Burden lies with the employer to prove that the employee's failure to complain was unreasonable.*

72 **EMPLOYEE'S FAILURE TO COMPLAIN**

- Conclusion about whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstance and information available to the employee at the time of the purported failure.
- An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment.

73 **DAMAGES:**

In addition to back pay, non-economic and compensatory damages can be recovered for violations of Title VII and the ADA, although damages are capped. 42 U.S.C. §1981a(a)(1), (2), (b)(1), (3).

74 **DAMAGES:**

Neither non-economic compensatory damages nor punitive damages are available under the ADEA. *C.I.R. v. Schleier*, 515 U.S. 323 (1995); *Hill v. Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983); *Ricks v. Potter*, 608 F. Supp. 2d (N.D. Ohio 2008). However, liquidated (double) damages are available for willful violations. *Carberry v. Monarch Marketing Systems, Inc.*, 30

F. App'x 389 (6th Cir. 2002).

75 **DAMAGES:**

- Non-economic compensatory damages and punitive damages may be recovered for violations of O.R.C. Ch. 4112. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417 (1999).
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- O.R.C. Ch. 4112 claims are considered tort claims for purposes of Ohio's tort reform statute. *Sivit v. Village Green of Beachwood*, 8th Dist. App. No. 98401, 2013-Ohio-103, *affirmed in part and reversed in part on other grounds*, 143 Ohio St.3d 168 (2015); *Williams v. Sims Bros., Inc.*, 889 F. Supp. 2d 1007 (N.D. Ohio 2012). Therefore, O.R.C. Ch. 4112 claims are subject to the statute's damages caps codified at O.R.C. 2315.18(B) and 2315.21(D).

76 **QUESTIONS?**