



By Patricia S. Eyres

Harassment Measures

Recent court decisions have more sharply defined the contours of sexual harassment and provided a means of minimizing employer liability

Despite the increased media and judicial attention paid to sexual harassment over the last decade and the growing recognition that California employers may be held strictly liable for abusive behavior by their employees holding leadership positions,¹ claims of sexual harassment due to a hostile work environment are at an all-time high.² These claims are based on the conduct of power holders and coworkers alike. Newspapers still contain headlines announcing the latest sexual harassment verdict.³ Reading past the headlines, it is clear that liability frequently results from an employer's failure to take immediate and appropriate corrective action over months or years.⁴

A trio of sexual harassment cases decided in 1998 by the U.S. Supreme Court—*Ellerth v. Burlington Industries, Inc.*, *Faragher v. City of Boca Raton*, and *Oncale v. Sundowner Offshore Services, Inc.*⁵—underscore the continuing significance of this area of the law. The Supreme Court addressed a wide range of

issues in these cases. Moreover, California employment law specialists are acutely aware of the broad bases under state law for imposing vicarious liability on employers when their supervisors or employees harass others⁶ and personal liability on the individual harassers themselves.⁷ While federal cases brought under Title VII of the Civil Rights Act of 1964⁸ are limited to employers with 15 or more employees,⁹ even very small employers are within the reach of the California Fair Employment and Housing Act.¹⁰ Unlike Title VII, the FEHA explicitly mentions harassment as an unlawful employment practice,¹¹ and while the FEHA generally defines "employer" as a person who regularly employs five or more people, the harassment standards apply to organizations with a single employee.¹²

Law offices as employers have not escaped

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the rise in harassment complaints. In fact, sexual harassment and retaliation in the law office, and the increased willingness of employees to sue a law firm and individual harassers within the firm, are matters of growing concern.¹³

Significant exposure for sexual harassment arises more often from the employer's response to a complaint than from the behavior that triggers the protest. It is not so much the underlying behaviors, such as those that involve unwelcome physical, verbal, or visual conduct of a sexual nature, that create significant damage awards. Many of these behaviors, particularly jokes, innuendo, and graphic

done so, new employees such as the plaintiff in *Weeks* would not have been confronted with a legally hostile work environment.

Case after case upholding employer liability for sexual harassment emphasize three common violations:

- The absence of separate sexual harassment policies and accessible reporting procedures.¹⁹
- Inconsistent or ineffective enforcement of existing policies and procedures.²⁰
- Inappropriate reactions to formal and informal complaints. These reactions include failing to treat the complaint seriously,²¹ discouraging the offended employee from

two basic issues. First, did any form of sexual harassment occur? Second, if sexual harassment is proven, who may be held liable? If the harasser is a supervisor, and the harassment results in "tangible job action"²⁶ to the detriment of the victim of the harassment, the employer will be automatically liable under the theory of vicarious liability. If there is harassment but no tangible job action, the employer may be able to establish an affirmative defense.

Defining Sexual Harassment

The Equal Employment Opportunity Commission (EEOC), the federal agency that

Plaintiffs can sue for both compensatory and punitive damages. However, the purpose of workplace harassment laws is neither to compensate victims nor to punish offenders.

e-mail, occur in workplaces every day.¹⁴ Most employees confronted with offensive behavior in the workplace do not immediately file formal complaints, unless and until the situation becomes untenable.¹⁵ Rather, it is the way management handles the issue, or fails to deal with a complaint, that subjects an employer to far greater legal exposure. The employer's legal responsibility to conduct an immediate investigation and then to take prompt and appropriate corrective action is the focus of most sexual harassment cases.¹⁶

In *Kelly-Zurian v. Wohl Shoe Company*,¹⁷ for example, a trial judge found an employer accountable for its supervisor's pattern of harassment. The California Court of Appeal was especially critical of a senior manager who, in response to the employee's initial complaint of sexual harassment, insisted that she confront the harasser directly before invoking the company's complaint process. This failure to treat the employee's complaint seriously constituted independent grounds for liability.

Likewise, in *Weeks v. Baker & McKenzie*,¹⁸ the jury returned a verdict of \$7.1 million in favor of a secretary in a law firm who was subjected to a sexually hostile environment for less than 70 days. The significant punitive damages awarded in *Weeks* were based on evidence that the firm had ignored complaints about the same offender for several years. In upholding more than \$3.5 million of the original award, the trial judge found the firm failed to meet its legal obligation to take immediate and appropriate corrective action to stop the offending behavior. Had the firm

coming forward,²² threatening or abusive behavior, or acts of retaliation.²³

Plaintiffs can sue for both compensatory and punitive damages. However, the purpose of workplace harassment laws is neither to compensate victims nor to punish offenders. These are by-products of the legal system and secondary to what should be the primary objective: to stop the offending behavior and maintain a harassment-free work environment.²⁴ The U.S. Supreme Court focused on prevention in *Ellerth*:

Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context.... To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe and pervasive, it would also serve Title VII's deterrent purpose.²⁵

Taking legal action beyond the employer's internal complaint process should be reserved for situations in which the employer cannot—or will not—abide by legal obligations to address workplace harassment. Accordingly, both federal and California courts will continue to scrutinize the efforts of employers to maintain a harassment-free environment and their internal responses to complaints.

In every sexual harassment case, there are

enforces Title VII of the 1964 Federal Civil Rights Act,²⁷ defines sexual harassment as:

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
2. submission to or rejection of such conduct is used as the basis for employment decisions affecting such individuals, or
3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.²⁸

Sexual harassment is not confined to female victims. Men have brought charges of sexual harassment in increasing numbers when they are faced with hostile or offensive sexual behavior.²⁹ The number of sexual harassment complaints filed by men with the EEOC quadrupled in the last decade, and in the year 2000, they accounted for 13.6 percent of all sexual harassment complaints filed with the federal agency.³⁰

In California, the FEHA expressly outlaws harassment "because of sex, [which] includes sexual harassment...."³¹ Employees most often file their complaints with the California Department of Fair Employment and Housing (DFEH), which investigates complaints of conduct that, whether intentional or unintentional, violates the FEHA's



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prohibition against harassment.³²

Conditional or quid pro quo harassment is the most commonly recognized form of sexual harassment. It occurs when an employment benefit is conditioned on sexual favors: "Sleep with me or else." It also occurs when actual or threatened job detriment follows rejection of sexual advances: "Remember who writes your performance appraisal."

This type of harassment involves a differential in power—although not necessarily a situation in which the employee directly reports to the alleged harasser—as well as unwelcome sexual advances and explicit or implicit job-related threats. An employee faced with a sexual advance under these circumstances has essentially three choices: quit, submit, or take the chance that the threats will be carried out. For sexual harassment to exist, adverse employment action need not materialize, nor is any direct threat of harm or physical coercion required. The harasser's weapon is the credible exercise of power over the employee's job.

The twin Supreme Court rulings in *Faragher* and *Ellerth* held that for purposes of imposing vicarious liability on an employer for the harassing acts of a supervisor, the distinction between quid pro quo and hostile environment harassment is immaterial. When tangible job action stems from any type of supervisory harassment—even in the absence of sexual advances or job-related threats—the employer will be automatically liable.³³

The definition of "supervisor" is correspondingly broad. According to the EEOC, a supervisor is someone who "has authority to undertake or recommend tangible employment decisions affecting the employee; or who has authority to direct the employee's daily work activities."³⁴ Essentially, for vicarious liability purposes, a supervisor is an individual who has direct power over an employee's job status or the work environment in which the employee must perform. In the law office, partners fall squarely within the definition. Associates and even senior paralegals who direct the work of junior professionals and/or support staff—in the office, or at remote locations for depositions or trial—may also qualify as supervisors.

Actionable hostile environment harassment occurs when an employee is forced to work in an offensive, intimidating, or hostile setting that is created by unwelcome sexually explicit or demeaning behavior. It is not necessary for a plaintiff to establish either tangible job action³⁵ or sexual advances.³⁶

Most significantly, a claim for hostile environment sexual harassment does not require proof of intent to harass. Many people accused of harassment genuinely believe their behav-

ior is "funny," "cute," or "attractive." Some even believe it is welcome by everyone. What the harasser thinks, believes, or intends is wholly irrelevant in determining whether sexual harassment has occurred. What matters is the victim's reasonable perception of what is offensive, intimidating, hostile, or abusive.³⁷ Not surprisingly, many cases focus on the perceptions and reactions of the parties. Individuals have different thresholds of tolerance for behavior that is sexual in nature. The trier of fact must determine whether it was reasonable for the victim with an individual set of life experiences to have found the conduct offensive, intimidating, hostile, or abusive. The same standard applies to claims of offensive conduct based on race, religion, age, and disability.³⁸

Claims of hostile environment harassment lead the way in the recent surge in sexual harassment claims. The elements constituting hostile environment harassment claims fall into four categories:

- 1) Physical conduct of a sexual nature, including touching, pinching, blocking a person's passage in aisles and walkways, leering, gestures, and suggestive body language.³⁹
- 2) Verbal conduct, such as jokes, insults, sexual comments, innuendo, and the repeated use of terms of affection. Verbal conduct also can include more subtle behavior, such as compliments, repeated requests for dates (which are declined), or slightly suggestive comments that are perceived negatively.⁴⁰
- 3) Visual materials, such as personal notes that are graphic or intrusive, cartoons, posters, and pinups.⁴¹ A wave of new visual harassment cases focuses on abusive e-mail, inflammatory messages,⁴² downloads of offensive digital materials, and multimedia messaging, which allows users to add audio, video, and still photo elements to their e-mail messages.⁴³ Indeed, a major law firm in England was embarrassed when one of its top associates forwarded a lewd e-mail message from his girlfriend to six friends and the content ended up on millions of computers around the world. The message also made front page headlines with the firm prominently identified.⁴⁴
- 4) Gender-based animosity, created by either sexually graphic derogatory speech that is directed toward members of a particular gender, or threats and hazing that are not overtly sexual.⁴⁵

Because hostile environment harassment is not a question of power, liability is not confined to conduct by managers or supervisors. Inappropriate sexual behavior is actionable when the harasser is a coworker⁴⁶ or a third party⁴⁷ who interacts with the employee in the latter's work environment. As with other employers, a law firm will be liable for co-



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The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education elimination of bias credit by the State Bar of California in the amount of 1 hour.

1. Sexual harassment by a coworker cannot occur without direct physical contact.
True.
False.
2. The intent of the alleged harasser is not a relevant consideration in determining whether sexual harassment has occurred.
True.
False.
3. A California court can impose liability for sexual harassment when there is evidence that the employer's corrective action is not sufficiently harsh to make an example of the harasser.
True.
False.
4. A workplace harassment investigation is only required after a lawsuit is served on the employer.
True.
False.
5. An employee who observes, but does not participate in, offensive or inappropriate workplace behavior of coworkers cannot be held personally liable for sexual harassment.
True.
False.
6. An individual may state a cause of action for sexual harassment whether or not he or she was directly targeted by the offensive conduct.
True.
False.
7. When a supervisor is aware of improper or offensive conduct or other witnesses come forward, an investigation must proceed regardless of the victim's cooperation.
True.
False.
8. An employee who makes a good faith internal complaint about sexual harassment that cannot be substantiated through a neutral investigation is protected from all forms of retaliation.
True.
False.



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6. True False
7. True False
8. True False
9. True False
10. True False
11. True False
12. True False
13. True False
14. True False
15. True False
16. A B C D
17. A B C D
18. A B C D E
19. A B C D E
20. A B C D

9. A law firm is not liable for a hostile work environment created by a senior associate attorney when a partner is not aware of the harassing behavior.

- True.
- False.

10. A California employer is not legally responsible for a hostile work environment created by a third-party vendor unless a supervisor knows or reasonably should know about the behavior.

- True.
- False.

11. The California Legislature effectively overruled the California Supreme Court by passing a statute providing that a nonsupervisory employee may be personally liable for sexual harassment.

- True.
- False.

12. An employee must prove a loss of pay or benefits to successfully sue for harassment due to hostile work environment.

- True.
- False.

13. Under federal law, an employer may establish an affirmative defense to a harassment lawsuit by proving that it enacted a sexual harassment policy prior to the alleged harassing behavior by a supervisor.

- True.
- False.

14. An employee who experiences retaliation after making a sexual harassment complaint must first prove that harassment actually occurred before filing retaliation charges.

- True.
- False.

15. The sexual harassment provisions of the California Fair Employment and Housing Act apply to employers with five or more employees.

- True.
- False.

16. A paralegal employee confides to a first-year partner that he was offended by the lewd and suggestive remarks of a good client of the law firm while he was preparing a document production. The conduct was a single episode and he has been able to avoid any further contact with the client by asking an associate on the case to communicate with the client. The responsibility of the first-year partner is to:

- A. Tell the paralegal employee to report the conduct to the billing partner on the case.
- B. Advise the paralegal employee of the law firm's sexual harassment policy and the various complaint avenues it provides.
- C. Tell the paralegal employee he is probably too sensitive and may have misunderstood the remarks. The employee should be reminded that he is still required to do his job, but because of the law the first-year partner should make sure that the billing partner is told of the incident.
- D. Take the complaint seriously and make sure it is addressed through the appropriate channels and that an investigation is undertaken.

17. In response to a complaint by a law firm employee about offensive language, including

swearing, by opposing counsel at a deposition, the firm must:

- A. Investigate the circumstances and take appropriate corrective action if harassing behavior is substantiated.
- B. Tell the employee that it was probably just an isolated situation because the opposing counsel's witness was ineffective. If the same behavior occurs a second time, the employee should report it.
- C. Notify the opposing counsel's firm and let that firm investigate the situation.
- D. Take no action because an isolated incident of swearing can never constitute sexual harassment.

18. An associate attorney in a law firm tells a member of the executive committee of the firm that he was embarrassed by the sexually explicit jokes told by representatives of a consulting firm who regularly come into the office to work on litigation support projects. The joking has increased over the last few weeks because the consulting firm representatives are working long hours preparing for another trial. The associate said nothing to the consultants directly. Six months ago he brought the joking behavior to the attention of the billing partner on one of the cases involving the representatives. The associate acknowledges, "I just wanted her to know about it, but because we were preparing for trial, we agreed not to do anything at that point." No other employees have complained. California law requires the member of the firm's executive committee to:

- A. Take immediate steps to fire the consultants.
- B. Make sure that a neutral fact-finding investigation is conducted in order to determine whether sexual harassment has occurred or is occurring.
- C. Tell the associate that he must make a complaint under the law firm's harassment policy.
- D. Wait until the current project is completed before asking for an investigation, unless another employee makes a formal complaint.
- E. None of the above.

19. A law firm can use the *Faragher/ Ellerth* affirmative defense to vicarious liability for persistent off-color e-mail messages sent by a partner to a new associate, if:

- A. The firm has a policy prohibiting harassment in any form and providing accessible complaint procedures.
- B. The policy is consistently enforced.
- C. The harassing partner has told other partners that the associate's work is standard but there is no tangible job action.
- D. A and B.
- E. None of the above.

20. Sexual harassment in a California workplace is prohibited when the employer has:

- A. At least 15 employees.
- B. Five or more employees.
- C. At least one employee.
- D. None of the above.

worker harassment if a supervisor (law firm partner or otherwise) knows or reasonably should know about unwelcome sexual behavior and fails to report it or to see that an investigation takes place.⁴⁸

Affirmative Defense to Vicarious Liability

The central question before the U.S. Supreme Court when it decided *Faragher* and *Ellerth*⁴⁹ in tandem was whether an employer could be held vicariously liable for the harassing acts of a supervisor that created a hostile working environment if the employee had not made an internal complaint before filing the lawsuit. Under these rulings, the basis for recovery against an employer for the harassing acts of a supervisor does not depend solely on the existence of job-related threats. When a supervisor's harassment results in a tangible job action that constitutes 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, the company may be automatically liable. This is so even if the employee has not complained to higher management.

When there is no adverse job action, the company may still be liable unless it had an enforceable harassment policy and internal complaint procedure, trained supervisors on harassment prevention, and the victim unreasonably failed to use the internal complaint procedure. An employer thus can invoke what has come to be known as the *Faragher/Ellerth* affirmative defense under these circumstances.

In *Faragher*, the plaintiff, who was working as a lifeguard, was subjected to a hostile environment as a result of the actions of two supervisors. The elements of the hostile environment included off-color comments, sexual innuendo, and threats of retaliation if the plaintiff made a complaint. Although the employer had a sexual harassment policy, it was not consistently enforced and did not provide effective means for making a complaint. In *Ellerth*, the plaintiff's supervisor made sexual advances that included threats regarding her job. These threats were never carried out, and the plaintiff received an earned promotion. Still, the Supreme Court concluded that the plaintiff's supervisor created a hostile and offensive work environment and determined that the lack of a tangible job action did not preclude a cause of action for sexual harassment. However, the Court held that the plaintiff's employer could attempt to prove the elements of the newly created affirmative defense.

Under the standard set forth in *Faragher* and *Ellerth*, employers are required to enact

an effective, accessible, and consistently enforceable and enforced harassment policy and complaint procedure. When an employee complaint arises, the employer must promptly investigate complaints through a neutral fact-finding process, and if harassment is substantiated, take immediate and appropriate corrective action. Retaliation against the complainant must be strictly prohibited during and following the investigation process.

Additionally, the employer must effectively communicate the essentials of the harassment policy to all employees. Some indicators of an effective employer response include evidence that the employer instituted training programs for managers and employees about sexual harassment, proof of active measures to uncover harassing actions without waiting for a formal complaint, and evidence that the employer's disciplinary process treats the problem of sexual harassment at least as seriously as other types of workplace misconduct.

The Supreme Court set forth specific guidelines for internal complaint procedures that will qualify for the *Faragher/Ellerth* affirmative defense. First, the procedure must not require that the complaint be made to, or handled at any stage by, the accused harasser and must not be directly or indirectly controlled by the accused harasser. Second, the procedure must be capable of stopping any harassment by seriously addressing the concerns of all parties and providing effective corrective action. The complaint procedure must be reasonably prompt and still allow enough time for a complete investigation. Finally, the employer must take affirmative steps to prevent any retaliation against the complainant, the accused harasser, and all independent witnesses.

Addressing the bases for finding that the employee had "reasonable grounds" not to complain prior to filing an external complaint, the Court focused on:

- Procedures that are controlled by the alleged harasser.
- Evidence that the employer tolerated retaliation against prior complainants or dilatory responses to past complaints.
- Demeaning treatment of past complainants.
- Failures in the past to conduct meaningful investigations.
- Prior unreasonable failures to find harassment.
- The provision of unreasonable or inadequate relief for harassment in the past.

Courts interpreting the *Faragher/Ellerth* affirmative defense suggest that management's previous inaction or failure to treat complaints seriously, an ineffective investigation process, or the existence of actual or threatened retaliation against employees who

complain may be used as evidence that the harassment victim's failure to invoke an internal policy was not unreasonable. This interpretation is used by the EEOC when it investigates a harassment complaint.⁵⁰

The applicability of the *Faragher/Ellerth* affirmative defense under California law is unclear. California appellate courts have consistently imposed strict liability on employers for the harassing conduct of their supervisors or managers.⁵¹ Currently there are only two reported decisions that address the applicability of the affirmative defense to a cause of action for sexual harassment under the FEHA—and the results are split. In *Kohler v. Inter-Tel Technologies*,⁵² the Ninth Circuit held that a California employer was not liable for sexual harassment under the FEHA because the employee did not suffer any adverse employment action and quit without using the company's complaint procedures. *Kohler* focuses squarely on the *Faragher/Ellerth* affirmative defense, noting that although the applicability of the defense under the FEHA had not yet been addressed, state courts consistently look to Title VII in interpreting the FEHA. The court was apparently persuaded that the defense should apply in California, because "the language of FEHA provides an even stronger basis for applying the federal affirmative defense than does Title VII itself." The decision refers to the FEHA's "requirement that employers 'take all reasonable steps to prevent harassment from occurring.'"⁵³

Accordingly, the Ninth Circuit concluded that the FEHA's preventative approach mirrors the first prong of the affirmative defense and found on the factual record that the employer exercised reasonable care to prevent and promptly correct sexual harassment against the plaintiff. The Ninth Circuit, at least, was persuaded that the California Supreme Court would eventually adopt the affirmative defense.

Indeed, a definitive ruling on the applicability of the *Faragher/Ellerth* affirmative defense in California by the California Supreme Court is pending and expected this year. A decision by the court of appeal that is the only case decided by a California state court addressing the issue reached a conclusion contrary to the one by the Ninth Circuit in *Kohler*, and the supreme court is reviewing the court of appeal's decision. On November 29, 2001, the Third District Court of Appeal held that the *Faragher/Ellerth* affirmative defense is not available to an employer in a sexual harassment case brought under the FEHA. In *Department of Health Services v. Superior Court*,⁵⁴ the court held that despite the fact that the plaintiff suffered no tangible job action and that the employer conducted

a prompt investigation and took corrective action, the employer was nevertheless strictly liable for the supervisor's harassing behavior.⁵⁵ The court concluded that the FEHA and Title VII differ in their treatment of employer liability for supervisory harassment. On February 13, 2002, the California Supreme Court vacated the opinion and granted review.

While waiting for the decision, California employers should continue taking proactive steps to ensure their work environments are free from harassment and retaliation. Careful, consistent enforcement of internal complaint procedures remains the best method for preventing harassment and promptly correcting inappropriate workplace conduct.

Retaliation

Retaliation, also referred to as reprisal, is a separate cause of action based on discrimination. Both Title VII and the FEHA expressly prohibit direct or indirect retaliation against anyone who engages in protected actions, including the complainant, the defending party, and all independent coworker wit-

nesses.⁵⁶ The remedies under these statutes would be hollow if employees had to fear retribution, adverse treatment by supervisors or coworkers, or other harmful results from making a good faith harassment claim. In addition, the existence of retaliation, express or implied, for exercising the right to complain in good faith about workplace harassment often results in awards of punitive damages.

Retaliation complaints are rapidly increasing, as they are often raised concurrently with a harassment claim.⁵⁷ The stringent prohibitions against retaliation are designed to keep employers from punishing an individual who makes a complaint for harassment or discrimination or who participates in the investigation process as the claimant, the target, or an independent witness. Employees are protected against retaliation if they have a reasonable and good faith belief that the alleged discrimination has occurred, even if the charges are later unsubstantiated.⁵⁸

Direct retaliation includes a wide variety of adverse actions, including changed work assignments, differential treatment, refusal by supervisors to communicate about work per-

formance, unwarranted changes in performance reviews, demotion, and threats by management and supervisors.⁵⁹ Indirect retaliation may include repeated ridicule by supervisors; ostracism by coworkers that is ignored, tolerated, or incited by supervisors; taunts; threats by coworkers; or other coercive activities.

One of the significant retaliation cases under Title VII involved the law office of the Securities and Exchange Commission. In *Broderick v. Ruder*,⁶⁰ the plaintiff was a staff attorney at the SEC. She complained to management that the work environment was "sexually charged" due to rampant consenting behavior among several attorneys and staff. The conduct included persistent verbal and physical conduct in the office during the work day. Her complaints were consistently rebuffed and passed off as "overly sensitive." The plaintiff was then denied a promotion that she had objectively earned. The three-judge panel concluded that the plaintiff had proved the existence of a hostile working environment and retaliation. In addition to damages for the harassment itself, the plain-

Nuts and Bolts of a Sexual Harassment Policy

Law firms should create comprehensive and enforceable policies prohibiting all forms of workplace harassment (including harassment based on race, religion, ethnicity, age, disability, and sexual orientation). The policy should be in writing and distributed to all attorneys and support staff. A policy should define the problem carefully so that all attorneys in the firm and other law firm employees will know what type of conduct is unacceptable, and the policy should offer an effective complaint procedure.

Sexual harassment law places an emphasis on prevention, and law firms should certainly lead the way in this area. Also, an effective policy and complaint procedure may provide an affirmative defense for employers against a claim of vicarious liability. The sexual harassment component of a workplace harassment policy should include the following points:

Briefly define prohibited harassment. The description should cover:

- Unwelcome sexual advances that include threats of job detriment or promises of job benefits.
- Unwelcome physical, verbal, or visual behavior of a sexual nature that creates an offensive, intimidating, hostile, or abusive work environment.

Law firms without a separate e-mail policy should expressly prohibit attorneys and other law firm employees from sending or retrieving on law firm computers 1) inflammatory messages, 2) downloaded jokes, 3) digital pictures, and 4) other offensive material.

Identify the persons who are covered by the policy. The law firm should specify in its policy that the firm will investigate all reports or complaints of harassment that occur in any of the firm's work environments. The policy should be clear that the firm will investigate claims against any alleged harasser, including partners, associates, managers, coworkers, third-party vendors, visitors, or clients.

Provide several avenues for making an internal complaint about harassment and require that managers and supervisors with

knowledge of possible harassment report it to proper personnel.

Attorneys or other law firm employees who wish to make a complaint about harassment should be assured of access to the appropriate decision makers. Employees should have the ability to bypass the harasser when making a sexual harassment complaint. The policy should require that any person who knows or learns of unwelcome harassing behavior should report it to the firm administrator or managing partner, whether or not there is a specific complaining party. The policy also should provide for an immediate, neutral fact-finding investigation of reports and complaints.

Unequivocally prohibit all forms of retaliation. The law firm should specify that all individuals who participate in the investigation process (the complaining party, the alleged harasser or harassers, and all independent witnesses who may have relevant information) will be protected from retaliation. The policy should state that complaints of actual or threatened retaliation will be separately investigated, and the law firm will provide several channels for raising these issues.

Express the law firm's commitment to take immediate and appropriate corrective action. The law firm should inform attorneys and other law firm employees that the firm will take prompt and proper corrective action following its investigation of all substantiated claims of workplace harassment. Disciplinary policies should be objective and consistently applied.

Provide for training and information. The policy should make training a top priority. The law firm should provide appropriate training for partners, associates, paralegals, and others who have power over other people or the environment in which firm employees will be working (including remote locations). The training should include both the substance of the policy and the firm's commitment to consistent enforcement.

The law firm should inform attorneys and other law firm employees about the policy when they are first hired and periodically during employment. — P.S.E.

tiff's remedies included an order of promotion and back pay.⁶¹

Precise policies are powerful tools in managing any professional workplace. (See "Nuts and Bolts of a Sexual Harassment Policy," page 45.) Like other employers, law firms must address the issue of sexual harassment comprehensively and definitively. A law firm must protect the people who work at the firm as well as the firm itself. The breadth of conduct that can create hostile work environments, coupled with the prospect of liability that can result in significant awards for damages, make it more important than ever for law firms to enact effective prevention policies, educate attorneys and staff about them, and enforce them consistently. ■

¹ See *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397 (1994) (supervisor harassment actionable regardless of whether the employer knows or should have known and fails to intervene); *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 836 (1998); *Doe v. Capital Cities*, 50 Cal. App. 4th 1038 (1996).

² The number of harassment charges filed with the EEOC has mushroomed. In 1991, the EEOC logged 6,883 sexual harassment complaints, and by 1998 the number of new filings swelled to 15,618. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002, at 4 (June 18, 1999). By 2001, the number of new complaints had remained high, with new filings at 15,475. CORPORATE LEGAL TIMES, Apr. 2002, at 58.

³ Lisa Girion, *Harassment Verdict Prompts Review*, L.A. TIMES, Apr. 9, 2002, at 1 (A jury award in San Diego for "a record \$30.6 million...for sexual harassment against Ralphs Grocery Company sent shock waves through California's business community."). *Gober v. Ralphs Grocery Co.*, San Diego Superior Court No. 72142 (Apr. 5, 2002).

⁴ The jury foreman in the Ralphs case said, "We scolded them. Ralphs could have stopped this any time along the way. That's why they are being punished. They chose to ignore it." Girion, *supra* note 3. See also *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1146 (1998).

⁵ *Ellerth v. Burlington Indus., Inc.*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998 (1998).

⁶ The Government Code defines 11 unlawful employment practices, including harassment. GOV'T CODE §12940. Sexual harassment is addressed in subsection (j) (4) (C).

⁷ GOV'T CODE §12940(j) (3). In 1999, the California Supreme Court held that a nonsupervisory harassing employee could not be held personally liable for his or her conduct. *Carrisaes v. Department of Corrections*, 21 Cal. 4th 1132 (1999). After the Carrisaes decision, the California Legislature added §12940(j) (3) to clarify that "[a]n employee...is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

⁸ The Civil Rights Act of 1964, 42 U.S.C. §2000e-2(e) (2).
⁹ *Id.*

¹⁰ The California Fair Employment and Housing Act, GOV'T CODE §§12940 *et seq.*

¹¹ GOV'T CODE §12940(j) (4) (C).

¹² Compare GOV'T. CODE §12940(j) (4) (A) with §12926(d).
¹³ See *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128 (1998); *Broderick v. Ruder*, 685 F. Supp. 1269 (D. D.C. 1988).

¹⁴ Harassment laws are not intended to impose a "civil behavior code." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1002 (1998); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2283 (behavior must be "so objectively offensive as to alter the 'conditions' of the victim's employment"); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993) (behavior must be both objectively offensive to a reasonable person in the community and subjectively offensive to the plaintiff).

¹⁵ See *Corcoran v. Shoney's Colonial, Inc.*, 24 F. Supp. 2d 601 (W.D. Va. 1998) ("[T]hough unwanted sexual remarks have no place in the work environment, it is far from uncommon for those subjected to such remarks to ignore them when they are first made.").

¹⁶ See, e.g., *Steiner v. Showboat Operating Co.*, 25 F. 3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) (employer remedial action inadequate when the employer twice changed plaintiff's shift); *Splunge v. Shoney's, Inc.*, 97 F. 3d 488, 490 (11th Cir. 1996) (harassment so pervasive that management could be deemed to have constructive knowledge; requires corrective action in absence of complaints); *Guess v. Bethlehem Steel Corp.*, 913 F. 2d 463, 465 (7th Cir. 1990) (remedial measure is ineffective per se if it results in a worsening of the situation for the victim of sexual harassment).

¹⁷ *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397 (1994).

¹⁸ *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128 (1998).

¹⁹ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2293 (policy did not permit bypassing harassing supervisors). See also *Vinson v. Meritor Sav. Bank*, 477 U.S. 57, 72 (1986) (complaint process inadequate when complaint could only be made to harassing supervisor); *Wilson v. Tulsa Junior Coll.*, 164 F. 3d 534, 541 (10th Cir. 1998) (complaint process deficient when it permitted bypassing of the harassing supervisor but the other avenue was physically inaccessible); *Varner v. National Super Mkts., Inc.*, 94 F. 3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 519 U.S. 1110 (1997) (complaint procedure ineffective if it does not require any supervisor with knowledge of the harassment to report the information to those in a position to take appropriate action).

²⁰ *Dees v. Johnson Controls World Servs., Inc.*, 168 F. 3d 417, 422 (11th Cir. 1999) (employer liable despite immediate corrective action when it had prior knowledge of the harassment and did not enforce its policy); *Perry v. Ethan Allen*, 115 F. 3d 143, 149 (2d Cir. 1997) (employer liable for coworker harassment; employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it).

²¹ *Broderick v. Ruder*, 685 F. Supp. 1269, 1271 (D. D.C. 1988).

²² *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F. 3d 1368 (D.C. Cir. 1998).

²³ Surveys have shown that a common reason for the failure to report harassment to management is a fear of retaliation. See, e.g., Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOCIAL ISSUES 117, 121-22 (1995) (citing further studies).

²⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2292 (1998).

²⁵ *Ellerth v. Burlington Indus., Inc.*, 524 U.S. 742, 118 S. Ct. 2257, 2270 (1998). See also *Matthews v. Superior Court*, 34 Cal. App. 4th 598, 606 (1995) (legislative

intent behind the FEHA is to eliminate discriminatory practices).

²⁶ *Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257; *Faragher*, 524 U.S. 775, 807, 118 S. Ct. 2275.

²⁷ The Civil Rights Act of 1964, tit. VII, 42 U.S.C. §2000e-2(a) (1).

²⁸ EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. ch. xiv, pt. 1604, §1604.11 (1990).

²⁹ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1002 (1998). See also *Sanchez v. Azteca Rest. Enters., Inc.*, ___ F. 3d ___ (9th Cir. 2001) (harassment aimed at the plaintiff was based on his sex because it reflected a belief that he did not act according to a male stereotype).

³⁰ *Gregory Weaver, Growing Number of Men Complain of Sexual Harassment*, KNIGHT-RIDDER TRIBUNE BUSINESS NEWS, May 23, 2001.

³¹ GOV'T. CODE §12940(j) (1).

³² *Ellerth v. Burlington Indus., Inc.*, 524 U.S. 742, 118 S. Ct. 2257 (1998). See also Guidelines of the Fair Employment and Housing Commission (FEHC), CAL. CODE REGS. tit. 2, §§7291.1(f) (1), 7287.6(b).

³³ *Ellerth*, 118 S. Ct. 2257; *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998).

³⁴ *Ellerth*, 118 S. Ct. at 2275-76.

³⁵ *Id.*

³⁶ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998 (1998) (harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex if members of one sex are exposed to disadvantageous terms or conditions of employment); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993) (abusive comments by the owner of the company, without proof of sexual advances); *Birschtein v. New United Motor Mfg., Inc.*, 92 Cal. App. 4th 994 (2001) (staring); *Accardi v. Superior Court*, 17 Cal. App. 4th 341 (1993) (intimidation and hostility).

³⁷ *Harris*, 510 U.S. at 21; *Fisher v. Palos Verdes Peninsula Hosp.*, 214 Cal. App. 3d 590, 608 (1989).

³⁸ See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. ch. xiv, pt. 1604, §1604.11 n.1 ("The principles involved here continue to apply to race, color, religion or national origin."). See also EEOC COMPLIANCE MANUAL §615.11(a) ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment...").

³⁹ *Birschtein*, 92 Cal. App. 4th at 998; *Walker v. Sullair Corp.* 736 F. Supp. 94, 100 (W.D. N.C. 1990) (suggestive gestures).

⁴⁰ See *Jew v. University of Iowa*, 749 F. Supp. 946, 958 (S.D. Iowa 1990) (sexually derogatory comments, including speculation about the plaintiff's intimacies with a colleague); *Accardi v. Superior Court*, 17 Cal. App. 4th 341, 353 (1993) (rumors of sexual conduct, mimicking, threats of bodily harm, and graphic sexual expressions).

⁴¹ *Ellison v. Brady*, 924 F. 2d 872 (9th Cir. 1991) (explicit and persistent personal notes sent by a coworker).

⁴² See, e.g., *Greenslade v. Chicago Sun-Times, Inc.*, 112 F. 3d 853 (7th Cir. 1997) (graphic messages); *Comiskey v. Automotive Indus. Action Group*, 40 F. Supp. 2d 877 (E.D. Mich. 1999) (inflammatory jokes and demeaning messages).

⁴³ For example, R.R. Donnelly & Sons, Dow Chemical, and Chevron, among others, have fired or disciplined employees for abuses of the company's e-mail policies, including the exchange of sexually graphic pictures. See generally *Debra Pressly, Action at Chicago Printer: A Reminder to All Workers E-Mails Not Private*, KNIGHT-RIDDER TRIBUNE BUSINESS NEWS, Mar. 12, 2002; *Greg Miller, Fired by Big Brother Fearing Sexual Harassment Lawsuits, Dow Chemical Co. Fired Workers Who Forwarded Lewd E-Mail*, L.A. TIMES MAGAZINE, Jan. 28, 2001, at 10; *Chevron Settles Women's Sexual*

Harassment Suit for \$2.2 Million, L.A. TIMES, Feb. 22, 1995, at Business 2. In other recent cases, employees used workplace computer systems to store their personal journals or diaries, including those revealing sexual fantasies about coworkers or other company representatives.

⁴⁴ Janet Whitman, *Carlyle Associate Said to Resign after Off-Color E-Mail*, Dow Jones News Service, May 22, 2001.

⁴⁵ See, e.g., *Kopp v. Samaritan Health Sys.*, 13 F. 3d 264 (8th Cir. 1993) (grabbing by lapels, shaking, derogatory terms based on gender); *Hall v. Gus Constr. Co.*, 842 F. 2d 1010 (1988) (derogatory labels about women); *Accardi v. Superior Court*, 17 Cal. App. 4th 341, 355 (1993) (threats of bodily harm motivated by gender-based hostility).

⁴⁶ See, e.g., *Ellison v. Brady*, 924 F. 2d 872, 875 (9th Cir. 1991) (coworker's persistent personal notes); *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922 (M.D. Ala. 1992) (subordinate's sexual overtures and demeaning comments toward his boss); *Noland v. McAdoo*, 39 F. 3d 269 (10th Cir. 1994) (coworker harassment).

⁴⁷ See, e.g., *Sparks v. Regional Med. Ctr. Bd.*, 792 F. Supp. 735 (M.D. Ala. 1992) (hospital employee harassed by independent contractor); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992) (casino employee harassed through stares and verbally abusive customers); *Trent v. Valley Elec. Ass'n*, 41 F. 3d 524 (9th Cir. 1994) (meter reader plagued by sexual commentary from a safety training consultant).

⁴⁸ See, e.g., *Splunge v. Shoney's, Inc.*, 97 F. 3d 488, 490 (11th Cir. 1996) (employer obligated to take corrective action when harassment was so pervasive that higher management could be deemed to have constructive knowledge).

⁴⁹ *Ellerth v. Burlington Indus., Inc.*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998).

⁵⁰ EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999).

⁵¹ See note 1, *supra*.

⁵² *Kohler v. Inter-Tel Techs.*, 244 F. 3d 1167 (9th Cir. 2001).

⁵³ *Id.* at 1174 (quoting Gov't CODE §12940(a), (j)(1)).

⁵⁴ Department of Health Servs. v. Superior Court, Sacramento Superior Court No. 98AS02085 (2001), certified for publication and then vacated when review was granted by the California Supreme Court, Feb. 13, 2001.

⁵⁵ *Id.*

⁵⁶ Gov't. CODE §12940(h).

⁵⁷ EEOC charges alleging retaliation for participation in Title VII protected activity increased from 10,499 in FY 1992 to 20,407 in FY 2001. This represents an increase from 14.5% to 25.2% of all Title VII claims. See <http://www.EEOC.gov/stats/charges.html>.

⁵⁸ See *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 527 (9th Cir. 1994). The Ninth Circuit held that the retaliation claim should be considered by a jury, because the plaintiff reasonably believed that she had a viable harassment complaint. Even if the underlying complaint could not be substantiated, if it was brought in good faith, the broad policy of the antidiscrimination laws is to provide an effective avenue to raise the issue of retaliation.

⁵⁹ See, e.g., *Hirase-Doi v. US West Communications, Inc.*, 61 F. 3d 777, 784 n.3 (10th Cir. 1995) ("alleged threatening stares...in apparent retaliation for the complaints about sexual harassment"); *Birschtein v. New United Motor Mfg., Inc.*, 92 Cal. App. 4th 994 (2001) (overt acts of sexual harassment were "transmuted" into a "daily series of retaliatory acts").

⁶⁰ *Broderick v. Ruder*, 685 F. Supp. 1269, 1272 (D. D.C. 1988).

⁶¹ *Id.*

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