

Employee Concerns (and Strategies) in an Employer Internal Investigation for Sexual Harassment

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Notifying the Employer of an Unwelcome Sex-Based Situation

Historically, sexual harassment within a work setting is defined as (1) tangible job benefit (*quid pro quo*) harassment such as unwelcome sexual advances or requests for sexual favors in exchange for continued employment or career advancement; *quid pro quo* harassment can directly affect the career path of employees. (2) *Hostile work environment* situations, which may be comprised of verbal or physical conduct of a sexual nature, as well as a severe or pervasive hostility in the workplace subjectively experienced and objectively supported as occurring as a result of sex, which may also have indirect impact on employee performance.¹

In any situation of workplace discrimination, including sexual harassment, an employee is well served by his or her record-keeping of the date, time and frequency of any occurrences, as well as the particular acts or words involved.

Although an employee may be quite tempted to resign or quit her position due to severe harassment, it is a decision that the employee may deeply regret later, as her “case” may be significantly weakened by the act of resigning.

Save for the certain special and extreme circumstances known as ‘constructive discharge,’ the employee must first file a formal complaint notifying the employer of the employee’s belief that she is being treated differently in the workplace on the basis of her gender; that the terms, conditions, benefits or privileges of her

¹ To sustain her burden of proof under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1983, and N.Y. Exec. Law § 290 et. seq., a plaintiff must show by a preponderance of the evidence that the employer's conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that are sufficiently severe or pervasive to alter the conditions of the victim's employment. Whether a workplace should be viewed as hostile or abusive - from both a reasonable person's standpoint as well as the victim's subjective perception - can only be determined by considering the totality of the circumstances. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993) (quoting *Meritor Savings Bank, FSB, v. Vinton*, 477 U.S. at 65, 67, 106 S. Ct. at 2404, 2405 (1985)).

employment are being degraded as a result of her gender—that she is being harassed on the basis of her sex.

While federal law and New York City law impose strict liability on the corporation for the acts of its supervisors if an adverse employment action is taken against the aggrieved employee (although New York State law does not), it is still vitally important for the employee to document her travails and convey these challenges to the employer in a demonstrable fashion. Documentation is a key component of the successful sexual harassment investigation, from the employee's perspective.

The employee must “*actually notify*” the employer of her belief that disparate treatment or discriminatory animus is afoot, so that the company has the opportunity to “*investigate*” the sexual harassment complaint and launch prompt, corrective action to redress any illegality that may be discovered.

The Key Point from the Plaintiff's Perspective:

From the employee's point of view, the unwelcome sex-based conduct must be described and denominated as *discriminatory*. In other words, in some fashion (even in plain English consistent with the employee's education level and her own writing ability), it must be noted that the employee believes that the terms and conditions of her employment are being degraded as a result of her “*protected activity*” of sex or gender. Verbal complaints simply do not count as the employer can later cast or spin the nature of the “complaint” as far more tepid or classically “whiny” in nature than that which was communicated to management in the first instance. *Important note: the interests of employee and employer are generally not in harmony.*

Case in Point: Employee, Alexandra Babe, a 21 year old administrative assistant freshly graduated from the Katherine Gibb school, is hired by the Les Mis Ogyny, a French company doing business in NY, to work directly for its veteran, rainmaking corporate officer, Jean Claude Van Hand. During the four months that Babe is employed by Les Mis, she experiences classic sexual harassment. Van Hand constantly serenades her with unwanted leering and “flattery,” telling her how beautiful she is, calling her at home at night, wherein he drunkenly promises a life together after he leaves his wife, groping and pulling her onto his lap in his office, kissing her in the elevator, etc. One day, beside herself from this relentless unwelcome, sex-based attention (not to mention sexual abuse) showered upon her by this powerful man 26 years her senior, she steels her nerves and visits the human resource department of Les Mis, where Van Hand has worked for 18 years. Weeping freely, Babe vividly describes to HR Director Patty Pretext, all of the objectifying and lurid conduct she has been compelled to abide during her 16 weeks of employment with Les Mis. Suitably shocked, *shocked*, that sexual harassment could exist within the confines of Les Mis, Pretext indicates that she will immediately commence an investigation of

these claims, whereupon she sends Babe home early and advises her to sit tight and relax over the weekend (it's a Friday afternoon when the complaint is lodged) and to call Monday morning at 9:30 am so that Pretext can inform her of the results of the investigation. Babe dutifully calls on Monday and is advised by Pretext that Van Hand has vigorously denied these "*spurious*" allegations and is in fact, quite upset at being falsely accused. She is further advised that unfortunately, given the lack of any corroboration whatsoever, Babe's brief tenure with Les Mis (compared with Van Hand's almost two decades of valued service), must come to an end as they will be forced to "let her go" (euphemism for being "run out of town on a rail").

Pretext continues that Babe will receive a "severance check" for 2 weeks pay, more than she would otherwise be entitled to, they'll also package up her personal effects and ship them to her home and they won't contest her claim for unemployment (although she won't be eligible anyway given her abbreviated work history) and they'll graciously provide a neutral reference (which is their policy anyway). So, what's an aggrieved young woman to do?

If Babe can demonstrate that she formally complained (invoked a protected activity) through either a letter sent via overnight courier or certified mail, or if she had the foresight to tape record the complaint session with Pretext (the real life Babe in fact did tape record this session as New York is a "one-party consent" jurisdiction for recording purposes—only one person in the room must "consent" to a secret recording of a colloquy of two or a conversation among many, and the consenting person may be the recording person--she'll be in a substantially empowered position vis-à-vis her leverage to resolve this matter to her advantage.

This letter of notification should be sent in a 'provable' fashion such as by United States certified mail, return receipt requested, or with an overnight courier such as FedEx. The notification may also be sent through the employer's intranet email system, if a "read" status report may be generated and printed to prove that the complaint was received by management or Human Resources. Verbal complaints always lead to problems of proof and credibility if the employer later denies ever receiving the complaint or downplay the nature of the complaint, for example, stating that the complaint merely presented a personality conflict between the harassed and the harasser.

Quite often, retaliation complaints are far stronger than the original, underlying complaint of sexual harassment, or any kind of discrimination for that matter. For example, Babe may never be able to "prove" that Van Hand is sexually harassing her at work due to a lack of corroboration of any kind, no witnesses, written statements, emails or the like, and Van Hand has denied even holding so much as an impure thought in his mind regarding Babe. Yet if the intrepid Babe formally complained in a provable fashion (as our true life heroine did through her audio taped HR session) or had sent a written complaint by FedEx, for example,

to document the illegal treatment, sexual advances, pervasive hostility, etc., and Van Hand continued in his predatory ways, or Les Mis blamed Babe for the situation and engaged in adverse employment actions against her (see, a *special note on retaliation*, below), Babe can demonstrate that her employer's hostility or adverse employment action occurred on the heels of the complaint *because* of the complaint that Babe just filed. For the purposes of client empowerment, assuming that Les Mis is disinclined to see eye to eye with Babe regarding the allegations of harassment, this *paper trail* is often sufficient to pave the way for a negotiated severance agreement that will allow Babe (and other similarly situated aggrieved women) to depart the company with dignity and her head held high.

Alternatively, Les Mis can always launch corrective action, severely punish Van Hand, apologize to Babe, promote her and laud her courage within the company, and make her feel seen and heard through a true, balanced investigation into her complaints of disparate treatment. That would be a terrific outcome that would obviate her ability to later file a successful lawsuit of any kind and would certainly be in the best interest of Babe and Les Mis, assuming that the allegations are true.

Quitting, then, is like "*throwing out the baby with the bath water*," and will substantially limit the employee's chances to successfully prosecute and/or settle his or her claim, as the "damages" will be severely limited by the employee's resignation. In addition, if the employee quits, he or she will probably not be entitled to collect unemployment benefits as the Employer will say that the employee has "*abandoned her position without good cause*."

The Prospective Client

A thorough in-person consultation or interview with the prospective employee client is particularly vital in potential sexual harassment cases, due to the question of a potential Plaintiff's credibility, as well as the sensitive and intimate subject matter. While the typical inquiries regarding conflicts of interest and possible deadlines can be conducted through telephone work, the discussion of law, facts, narrative flow of the prospective client's tale and legal strategizing and advice giving is best handled through the in-person consultation.

Meeting with the Prospective Client Employee

- Consider charging a flat consultation fee initially, to ensure that you have time to fully interview the client, and are able to discern all important information. Later you may choose to offer a contingency retainer. A full and complete assessment of your prospective client's issues and concerns cannot be optimally made during the typical "free consult" of 30 minutes or less.

- Prior to the consultation, request that the client bring with her (or send in advance) all documents that may be relevant to the case, such as employee handbooks, pay stubs, the employer's sexual harassment policy or letters or e-mails from the alleged harasser. Check to see how the employee has been keeping track of the problems at work, *i.e.*, a journal, or if the employee has filed any sort of internal complaint up to this point. The attorney should obtain information regarding the employer's sexual harassment policy, including the prospective client's knowledge of the policy and how it has been enforced in the past, including disciplinary procedures.
- The consultation should include only the prospective client or clients. Should the client bring in third parties, the attorney-client privilege is nullified. The third party could be later subpoenaed to testify as to substance of the consultation.
- In dealing with the topic of sexual harassment, special consideration should be given in discussing the situation with the client. An attorney should approach the employee client with patience and empathy. Some employees may be particularly distressed if they have a background of domestic violence and/or sexual abuse. Others may have cultural or religious backgrounds that cause them embarrassment and self-consciousness in recounting remarks and actions of a sexual nature. Avoid accusatory or judgmental tones that may suggest a lack of sensitivity.
- Of course, during the consultation, the attorney's goal is to: review the facts of the situation that brought the employee to the office; to evaluate the strengths and weakness of the case, and to advise as to the employee's best course of action in terms of strategy. The attorney should be prepared to discuss how to best approach the employer to report the harassment, if the employee has not already done so, how to handle to optimally handle the internal investigation, or to review any investigation that has already taken place. The attorney would also need to gather the facts and circumstances of the harassment, including the duration of the harassment and the type of harassment (words, actions, jokes, pictures), and its frequency. Employers may use the "stray remark" defense, suggesting that with no nexus to the alleged adverse employment action, occasional remarks, without more, do not establish discrimination. See *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir.1998); *Balut v. Loral Elec. Sys.*, 988 F.Supp. 339, 348-49 (S.D.N.Y.1997) (Conner, J.), *aff'd*, No. 98-7053, 1998 WL 887194 (2d Cir.1998). *Ramos v. Marriott Intern., Inc.* 134 F.Supp.2d 328 (S.D.N.Y. 2001). Where harassers' remarks were made six months prior to termination were not the only evidence plaintiff was treated less favorably

than similarly situated male employees, remarks such as “you wanted to do a man's job, you better make sure you have what it takes in your pants to do it;” and “never send a woman to do a man's job” cannot be considered stray.

- The location of the harassment (workplace or at an outside)
 - Whether other employees were subject to the harassment and, if so, the gender of those other employees
 - The existence and identity of any witnesses to the harassment or others who may have knowledge of the harassment and their positions with the Employer
- The attorney will also want to elicit detailed information on how the harassment affected the employee in performing his or her work, including any emotional distress corroboration (consultation with physicians, therapists, etc.). This information will become important in assessing damages.
 - The prudent attorney will also get detailed information regarding the employee's past employment history, including any positive or negative performance evaluations, disciplinary actions, any terminations for cause, and if the employee has submitted any claims of sexual harassment against any other former employers. (Prior charges by Plaintiff against other employers are relevant at trial, *Watson v. E.S. Sutton, Inc.*, (Not Reported in F.Supp.2d) 2005 WL 2170659 (S.D.N.Y. 2005)).
 - Basically, the attorney should try to discern if the employee client has any past history that could reflect negatively if brought out in discovery or trial. Similarly, the attorney should inquire as to any potential “*after-acquired evidence*” issues. Under the after-acquired evidence doctrine, evidence of a Plaintiff's misconduct could be considered in determining whether the Plaintiff would be barred from some or all remedies, even though the misconduct was discovered after the adverse employment decision was effectuated.
 - Of course, the attorney needs to know all and any information about the person who harassed the employee client. Important distinctions come into play depending upon whether the harasser was the employee client's supervisor, or simply a co-employee. Generally, determine whether the harasser had the authority to hire, fire, discipline, promote, demote or give assignments and raises. In addition, was the harasser known to have engaged in such behavior to any other employee? The attorney also needs to know if the harasser was ever romantically or sexually involved with the employee in a consensual relationship, and if the employee and the harasser ever socialized outside the workplace, as such instances may present certain challenges to a successful sexual harassment claim.

- The attorney needs to determine the extent of the hard damages incurred to the employee client, including loss of wages if the employee is no longer working (mitigated by unemployment and any new employment), and any medical/psychiatric treatment.
- The attorney needs to assess the employee client for credibility and demeanor. Significant changes in narrative, contradictions and unwillingness to expound upon his or her story may suggest that the employee is not being entirely truthful with the attorney. In addition, if the employee gets angry or argumentative easily, she may also do so in the course of the internal investigation, during depositions, or during trial.

When the Employer Responds to a Sexual Harassment Complaint **The Internal Investigation**

The employer has a legal obligation to take prompt and remedial action when notified of an Employee's sexual harassment complaint. See, *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998).

Generally, the requirement of remedial action entails:

- ♀ That the employer actually promptly investigates the allegations of harassment.
- ♀ That the employer determines the appropriate response under the circumstances, with the goal of ending the harassment taking place.
- ♀ That the employer promptly informs the complaining employee and other relevant parties of the determination resulting from any internal investigation and whether the employer actually disciplined the harasser (if necessary and appropriate).

Again-from the employee's perspective, initiating a complaint to the employer in response to sexual harassment is necessary and important because:

- ♀ If no tangible negative employment action has been taken against the employee, (such as a firing, a failure to hire, a demotion, a detrimental job transfer or a decision causing a significant change in benefits), an employer may plead an affirmative defense that it exercised reasonable care to prevent and correct sexually harassing conduct, and the Plaintiff

unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or otherwise to avoid the harm. See, *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *Patterson v. CBS*, 2000 U.S. Dist. LEXIS 6916 (S.D.N.Y. 2000).

- ♀ Employers are required to remedy such sexual harassment situations by federal law. See, e.g., *EEOC Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11. If the Commission finds that the harassment has been eliminated, all victims made whole, and preventive measures instituted, the Commission normally will administratively close the charge because of the employer's prompt remedial action." EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050. In addition, responding to a complaint demonstrates to employees that the company takes the issue of sexual harassment and any complaints seriously and is committed to eliminating sexual harassment in the workplace.
- ♀ The worst actions the employer can take in response to a complaint of sexual harassment are to (1) do nothing regarding the situation; (2) procrastinate in its investigation; or (3) avoid the complaining employee. Such actions may be perceived as retaliatory (*retaliation* as legally defined under the various "Human Rights Laws"), and serve as additional causes of action should the employee move forward in filing a claim with a state or federal agency, or in state or federal court.

The Process of an Internal Investigation

Ideally, while the investigation is proceeding, the employer should initiate interim measures to prevent continued harassment. These measures should not give the complainant the perception that he or she is being retaliated against (see below).

The attorney for the employee should advise the client what to expect from a formal company investigation. Alternatively, if the attorney is reviewing a situation where an investigation took place, to the best of available evidence and the employee's recollection, the attorney may determine if the investigation was appropriately thorough with the following general hallmarks of a serious internal investigation.

- The investigator obtains as much detail as possible from the employee, using open-ended questions—Who? What? Where? When?
- The investigator attempts to determine if there are any witnesses to corroborate the allegations;

- The investigator assures the employee that the harassment is not tolerated by the employer, and that there will be no retaliation for good faith claims of harassment or providing information concerning the claims;
- The investigator assures the employee that confidentiality will be maintained to the extent possible, and also instructs the employee of the desirability to maintain confidentiality;
- Assures the employee that the matter is taken seriously, and that it will be investigated and any determination will be reported to the employee;
- The investigator prepares a written report of the interview which records the facts obtained during the interview (not the investigator's comments or conclusions);
- Allows the employee to review the report, make corrections, and sign the report.
- The investigator does not express disbelief to the employee, even if there is reason to doubt the truthfulness of what is being said.
- The investigator interviews the accused, advising him or her of the nature of the complaint, that an investigation is being conducted, obtains a response to the specific allegations, advises as to confidentiality, determines if there are witnesses to corroborate the accused's side of the story, and affirms to the accused the company policy that harassment will not be tolerated, and witnesses cannot be retaliated against for providing information about such claims, and prepares a written report of the interview to the same standards as the report for the employee complainant;
- The investigator interviews witnesses with open-ended questions, reiterates company policy, advises as to confidentiality, and prepares a written report to the same standards as the report for the complainant.

The Ellerth/Faragher problem and some countermeasures:

The problem: An employer may take advantage of the *Faragher* defense if the employee neglects to redress the harassment through any grievance procedure established by the employer. See, *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2nd Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), *subsequent proceedings at* (S.D.N.Y. 2000) and 267 F.3d 147 (2nd Cir. N.Y. 2001), *cert. denied*, 535 U.S. 951 (2002). (Employer established that it had an anti-harassment policy with a procedure for filing complaints. The evidence also showed that the company took complaints seriously, and plaintiff failed to report the alleged harassment.)

As noted by the EEOC: "A complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could

have reduced the harm, then the affirmative defense could operate to reduce damages.” (<http://www.eeoc.gov/policy/docs/harassment.html#VD>) See, also, *O'Dell v. Trans World Entertainment Corp.* 153 F.Supp.2d 378 (S.D.N.Y. 2001), (granting employer summary judgment on its affirmative defense where plaintiff, on the advice of counsel, refused to participate in employer's investigation of sexual harassment).

- ♀ See, *Kolp v. New York State Office of Mental Health*, 15 F. Supp. 2d 323 (W.D.N.Y. 1998). An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible negative employment action is taken, a defending employer may raise an affirmative ‘Ellerth/Faragher’ defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.
- ♀ To survive a motion for summary judgment, a plaintiff claiming she was the victim of an unlawful hostile work environment must elicit evidence from which a reasonable trier-of-fact could conclude that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment. In addition, the plaintiff must show that a specific basis exists for imputing the objectionable conduct to the employer. Where an employee is the victim of sexual harassment, including harassment in the form of a hostile work environment, by non-supervisory co-workers, an employer's vicarious liability depends on the Plaintiff showing that the employer knew (or reasonably should have known) about the harassment but failed to take appropriate remedial action. *Finnerty v. William H. Sadlier, Inc.*, 2006 U.S. App. LEXIS 8620 (2d Cir. April 7, 2006)
- ♀ The analysis differs where the harassment is attributed not to non-supervisory co-workers but to a supervisor with immediate or successively higher authority over the employee. In that circumstance, a court looks first to whether the supervisor's behavior culminated in a tangible employment action against the employee. If it did, the employer will, *ipso facto*, be vicariously liable. If no tangible employment action is present, an employer will still be liable for a hostile work environment created by a supervisor unless the employer successfully establishes an affirmative defense. That defense requires the employer to show that (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the Plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Finnerty v. William H. Sadlier, Inc.*, 2006 U.S. App. LEXIS 8620 (2d Cir. April 7, 2006)

- ♀ An affirmative defense *may not be sufficient* if the employer cannot prove it exercised reasonable care to prevent and correct the harassment. Similar to the Seventh Circuit case of *Loughman v. Malnati Organization, Inc.*, F.3d 404 (7th Cir. 2005), in which the Circuit Court reversed a grant of summary judgment in favor of the Defendant employer, finding that when alleged harassment is physically assaultive, employers must be more aggressive in remedying it, *Kolp* demonstrated that if there are unresolved issues regarding the effectiveness of the grievance process, the case can withstand a summary judgment challenge by Defendants.

- ♀ If Defendant employer asserts the *Faragher* affirmative defense, the Plaintiff's counsel should carefully analyze the *timing* between the complaints and the subsequent remedial measures. Plaintiff should propound discovery as to *each and every* remedial measure Defendant employer undertook to correct the offensive behavior. Even if Defendant undertakes remedial action, Plaintiff should nonetheless argue both at the summary judgment stage and at trial that a jury question is presented as to the adequacy of the evidence and the defense. Plaintiff may argue that the remedial measures were nothing more than a *sham* to avoid liability. The attorney should adduce evidence that the employer has ignored or resisted sexual harassment/discrimination complaints from other employees. See, *Finn-Verburg v. New York State Dep't of Labor*, 122 F.Supp.2d 329, 334 (N.D.N.Y. 2000), where summary judgment was denied as Plaintiff presented evidence supporting her contention filing a complaint would be futile, as other women complained regarding sexual harassment and were retaliated against for filing the complaints. Whether the defendant employer had taken "reasonable care" was a question of fact for the jury to determine.

- ♀ Of course, the attorney, in the course of litigation, should move to strike if Defendant fails to plead *Ellerth/Faragher* as an affirmative defense, which Defendant is obligated to file. If it does not, and Defendant moves for summary judgment on this basis, Plaintiff should file a Motion to Strike Defendant's Motion immediately. If Defendant attempts to put evidence in at trial on this affirmative defense, Plaintiff should object. If Defendant did plead the affirmative defense, but did not put sufficient evidence in on it, move for a directed verdict on this issue.

- ♀ When circumstances permit, such as when the employer appears to have initiated inadequate remedial measures, employed attorneys in the investigatory process, and/or possibly retaliated against the Plaintiff, the attorney-client and work product privileges of any post-harassment internal investigation may be waived, because the Defendant employer

has put sufficiency of its internal investigation of the employee's sexual harassment complaint at issue by asserting the *Ellerth* affirmative defense. See, *McGrath v. Nassau County Health Care Corp.*, 204 F.R.D. 240 (E.D.N.Y. 2001). See, also *Pray v. New York City Ballet Co.*, (Not Reported in F.Supp.) 1997 WL 266980 (S.D.N.Y. 1997). Where the employer has relied upon an internal investigation and subsequent corrective action for its defense, it has placed that conduct "in issue," and may not prevent discovery of such an investigation based on attorney-client or work-product privileges solely because the employer has hired attorneys to conduct its investigation. And, *Harding v. Dana Transp., Inc.*, 914 F.Supp. 1084 (D.N.J. 1996), holding that in the interest of justice, a Defendant may not withhold essential information with regard to its internal investigation of a Plaintiff's sexual harassment claim.

- ♀ Continuing violation pitfall: Employer's internal investigations do not constitute a "continuing violation" for the purposes of the continuing violation exception to the Title VII limitations period. Also, an employer's internal investigation did not toll the date on the employee's Title VII claim accrued under the continuing violation exception to the Title VII limitations period. *Ryan v. New York State Thruway Authority*, 889 F.Supp. 70 (N.D.N.Y. 1995).

Retaliation Claims: Retaliation occurs when an employer, employment agency, or labor organization takes an adverse action against an employee because she engaged in a protected activity, for example, complaining to the employer company regarding sexual harassment occurring in the workplace. Examples of adverse actions include: termination of employment, refusal to hire, and denial of promotion, transfers, demotions, forcing the employee to work with the harasser, threats, unjustified negative performance evaluations, unjustified negative references, increased surveillance, opposition to unemployment benefits, and any other action such as an assault or unfounded civil or criminal charges that are likely to deter one from complaining of harassment.

- ♀ While retaliatory adverse actions do not include petty slights, as stated by the recent Supreme Court decision of *Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259 (2006) it can include actions which fall short of termination, including, according to Justice Breyer, anything "*that contributes significantly to the employee's professional advancement.*"
- ♀ An employee is protected against retaliatory acts by employer on the basis of her opposing unlawful employment practices under Title VII, as well as state law, and often local law. The opposition clause in Title VII protects a broad variety of activities, for example, protesting or complaining about potential discrimination and refusing to perform a task out of a reasonable belief that the order is discriminatory. The manner in which the employee chooses to

oppose an unlawful employment practice must be reasonable and not disruptive. Reasonableness is measured by a balancing test, which limits protection for the wide range of activities covered by the opposition clause. For example, the opposition clause does not protect the employee who objects to an employer's practices by means of unlawful, illegal conduct, nor does it protect employees' opposition activities that cause an employee to neglect duties of the job.

- ♀ Therefore, counsel for the employee client should advise the client to keep careful record of any activities or communications opposing the harassment, and to avoid unlawful or disruptive conduct at the workplace, both to protect the employee from accusations of unreasonable conduct, and to prepare for any future claims of retaliation.

- ♀ In addition, regarding protection under the "opposition clause," the employee must have had a good faith, reasonable belief that the underlying employment practice she opposed was unlawful under Title VII or state or city law. Additionally, the employer must have "understood, or reasonably understood, that the Plaintiff's opposition was directed at conduct prohibited by Title VII. See, for example, *Jowers v. Lakeside Family and Children's Services*, 2005 U.S. Dist. LEXIS 30977 (S.D.N.Y. November 22, 2005), in which the court found against a Plaintiff who failed to adequately articulate alleged Title VII discrimination practices, even failing to mention the word "discrimination" in an internal complaint. **See above--the critical importance of filing the colorable internal complaint in a provable fashion.**

- ♀ Therefore, counsel for the employee client, assisting the employee with initiating an internal investigation, should take care to avoid vague and ambiguous allegations, and to ensure any internal complaints are specific in alleging incidences of actionable sexual harassment (or any other violations of the federal, state or local antidiscrimination statutes). The client needs to understand that a distinction exists between (i) a problem "getting along" with a co-worker or supervisor and (ii) conduct which rises to the level of sexual harassment or of other kinds of discriminatory animus related to a protected status. General *hostile work environment* harassment does not exist. The *hostility* and the *harassment* must be occurring due to the employee's "protected activity." In reporting the conduct, the sexual (or sex-based) nature of the harasser's behavior needs to be explained. While the client does not need to use the term "sexual harassment" in reporting the conduct, he or she must use words that put the employer on notice of the sexual harassment.