APPENDIX

EXHIBIT 1

U.S. Equal Employment Opportunity Commission

Section 12: Religious Discrimination

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:	EEOC-CVG-2021-3
Concise Display Name:	Section 12: Religious Discrimination
Issue Date:	01-15-2021
General Topics:	Religion
Summary:	This document addresses Title VII's prohibition against religious discrimination in employment, including topics such as religious harassment, and workplace accommodation of religious beliefs and practices.
Citation:	Title VII
Document Applicant:	Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff
Previous Revision:	Yes. This document replaces previously existing guidance by the same title issued 7/22/08.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to

provide clarity to the public regarding existing requirements under the law or agency policies.

EEOC	***DIRECTIVES TRANSMITTAL***	Number 915.063
		1/15/21

SUBJECT:	Compliance Manual on Religious Discrimination
PURPOSE:	This sub-regulatory document supersedes the Commission's Compliance Manual on Religious Discrimination issued on July 22, 2008. **The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. Any final document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.**
EFFECTIVE DATE:	Upon Publication.
EXPIRATION DATE:	Until rescinded.
ORIGINATOR:	Office of Legal Counsel

———————————————

Janet Dhillon, Chair

SECTION 12: RELIGIOUS DISCRIMINATION

SECTION 12: RELIGIOUS DISCRIMINATION

OVERVIEW[1]

This Section of the Compliance Manual focuses on religious discrimination under Title VII

of the Civil Rights Act of 1964 (Title VII). Title VII protects workers from employment discrimination based on their race, color, religion, sex (including pregnancy, sexual orientation, and transgender status),**[2]** national origin, or protected activity. Under Title VII, an employer is prohibited from discriminating because of religion in hiring, promotion, discharge, compensation, or other "terms, conditions or privileges" of employment, and also cannot "limit, segregate, or classify" applicants or employees based on religion "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."**[3]** The statute defines "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it]

is unable to reasonably accommodate . . . without undue hardship on the conduct of the employer's business."**[4]** "Undue hardship" under Title VII is not defined in the statute but has been defined by the Supreme Court as "more than a de minimis cost"**[5]** – a lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA), which is defined by statute as "significant difficulty or expense."**[6]**

These protections apply whether the religious beliefs or practices in question are common or non-traditional, and regardless of whether they are recognized by any organized religion.**[7]** The test under Title VII's definition of religion is whether the beliefs are, in the individual's "own scheme of things, religious."**[8]** Belief in God or gods is not necessary; nontheistic beliefs can also be religious for purposes of the Title VII exemption as long as they "'occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons.'"**[9]** The non-discrimination provisions of the statute also protect employees who do not possess religious beliefs or engage in religious practices.**[10]** EEOC, as a federal government enforcement agency, and its staff, like all governmental entities, carries out its mission neutrally and without any hostility to any religion or related observances, practices, and beliefs, or lack thereof.**[11]**

The number of religious discrimination charges filed with EEOC has increased significantly from fiscal years 1997 to 2019, although the total number of such charges remains relatively small compared to charges filed on other bases.**[12]** Many employers seek legal guidance in managing equal employment opportunity ("EEO") issues that arise from religious diversity as well as the demands of the modern American workplace. This document is designed to be a practical resource for employers, employees, practitioners, and EEOC enforcement staff on Title VII's prohibition against religious discrimination. It explains the variety of issues considered in workplace-related religious discrimination claims, discusses typical scenarios that may arise, and provides guidance to employers on how to balance the rights of individuals in an environment that includes people of varying religious faiths, or no faith.**[13]** **However, this document does not have the force and effect of law and is not meant to bind the public in any way. It is intended to provide clarity to the public on existing requirements under the law and how the Commission will analyze these matters in performing its duties**.

For ease of reference this document is organized by the following topics:

I – Coverage issues, including the types of cases that arise, the definition of "religion" and "sincerely held," the religious organization exemption, and the ministerial exception.
II – Employment decisions based on religion, including recruitment, hiring, segregation, promotion, discipline, and compensation, as well as differential treatment with respect to religious expression; customer preference; security requirements; and bona fide occupational qualifications.
III – Harassment, including harassment based on religious belief or practice as a condition of employment or advancement, hostile work environment, and employer liability issues.
IV – Reasonable accommodation, including notice of the conflict between religion and work where applicable, scope of the accommodation requirement and "undue hardship" defense, and common methods of accommodation.
V – Related forms of discrimination, such as discrimination based on national origin, race, or color, as well as retaliation.

12-I COVERAGE

Types of Cases

Title VII prohibits covered employers, employment agencies, and unions**[14]** from engaging in disparate treatment and from maintaining policies or practices that result in unjustified disparate impact based on religion. Historically, courts and the Commission characterized denial of accommodation as a separate cause of action. **[15]** In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court stated that there are only two causes of action under Title VII: "disparate treatment" (or "intentional discrimination") and "disparate impact."**[16]** It treated a claim based on a failure to accommodate a religious belief, observance, or practice (absent undue hardship) as a form of disparate treatment.**[17]** The Commission recognizes that harassment and denial of religious accommodation are typically forms of disparate treatment in the terms and conditions of employment. Different types of fact patterns may arise in relation to Title VII religious discrimination, including:

- treating applicants or employees differently (disparate treatment) by taking an adverse action based on their religious beliefs, observances, or practices (or lack of religious beliefs, observances or practices) in any aspect of

employment, including recruitment, hiring, assignments, discipline, promotion, discharge, and benefits;

- taking adverse action motivated by a desire to avoid accommodating a religious belief, observance, or practice that the employer knew or suspected may be needed and would not pose an undue hardship;
- denying a needed reasonable accommodation sought for an applicant's or employee's sincerely held religious beliefs, observances, or practices if an accommodation will not impose an undue hardship on the conduct of the business;
- intentionally limiting, segregating or classifying employees based on the presence or absence of religious beliefs, observances, or practices (also a form of disparate treatment), or enforcing a neutral rule that has the effect of limiting, segregating, or classifying an applicant or employee based on religious beliefs, observances, or practices and that cannot be justified by business necessity (disparate impact);
- subjecting employees to harassment because of their religious beliefs, observances, or practices (or lack of religious beliefs, observances or practices) or because of a belief that someone of the employee's religion should not associate with someone else (e.g., discrimination because of an employee's religious inter-marriage, etc.);
- retaliating against an applicant or employee who has opposed discrimination on the basis of religion, or participated in any manner in an investigation, proceeding, or hearing regarding discrimination on the basis of religion, including by filing an equal employment opportunity (EEO) charge or testifying as a witness in someone else's EEO matter, or complaining to a human resources department about alleged religious discrimination.

Although more than one of these issues may be raised in a particular case, they are discussed in separate parts of this manual for ease of use.

· NOTE TO EEOC INVESTIGATORS ·

Charges involving religion, like charges filed on other bases, may give rise to more than one theory of discrimination (e.g., termination, harassment, denial of reasonable accommodation,

or other forms of disparate treatment, as well as retaliation). Therefore, these charges could be investigated and analyzed under all theories of liability to the extent applicable.

A. Definitions

Overview: Religion is very broadly defined for purposes of Title VII. The presence of a deity or deities is not necessary for a religion to receive protection under Title VII. Religious beliefs can include unique beliefs held by a few or even one individual; however, mere personal preferences are not religious beliefs. Individuals who do not practice any religion are also protected from discrimination on the basis of religion or lack thereof. Title VII requires employers to accommodate religious beliefs, practices and observances if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer.

1. Religion

Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief," not just practices that are mandated or prohibited by a tenet of the individual's faith.**[18]** Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, Sikhism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.**[19]** Further, a person's religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion."**[20]** A belief is "religious" for Title VII purposes if it is "religious" in the person's "own scheme of things," i.e., it is a "sincere and meaningful" belief that "occupies a place in the life of its possessor parallel to that filled by . . . God."**[21]** The Supreme Court has made it clear that it is not a court's role to determine the reasonableness of an individual's religious beliefs, and that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."**[22]** An employee's belief, observance, or practice can be "religious" under Title VII even if the employee is affiliated with a religious group

that does not espouse or recognize that individual's belief, observance, or practice, or if few – or no – other people adhere to it.**[23]**

Religious beliefs include theistic beliefs as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."**[24]** Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious,**[25]** beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death."**[26]**

Courts have looked for certain features to determine if an individual's beliefs can be considered religious. As one court explained: "'First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.'"**[27]**

Social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII.**[28]** However, overlap between a religious and political view does not place it outside the scope of Title VII's religion protections, as long as that view is part of a comprehensive religious belief system and is not simply an "isolated teaching."**[29]** Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, and refraining from certain activities. Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons.**[30]** Whether the practice is religious is therefore a situational, case-by-case inquiry, focusing not on what the activity is but on whether the employee's participation in the activity is pursuant to a religious belief.**[31]** For example, one employee might observe certain dietary restrictions for religious reasons while another employee adheres to the very same dietary restrictions but for secular (e.g., health or environmental) reasons.**[32]** In that instance, the same practice in one case might be subject to reasonable accommodation under Title VII because an employee engages in the practice for religious reasons, and in another case might not be subject to reasonable accommodation because the practice is engaged in for

secular reasons.**[33]** However, EEOC and courts must exercise a "light touch" in making this determination.**[34]**

The following examples illustrate these concepts:

EXAMPLE 1

Employment Decisions Based on "Religion"

An otherwise qualified applicant is not hired because he is a self-described evangelical Christian. A qualified non-Jewish employee is denied promotion because the supervisor wishes to give a preference based on religion to a fellow Jewish employee. An employer terminates an employee based on his disclosure to the employer that he has recently converted to the Baha'i Faith. Each of these is an example of an employment decision based on the religious belief or practice of the applicant or employee, and therefore is discrimination based on "religion" within the meaning of Title VII.

EXAMPLE 2

Religious Practice versus Secular Practice

A Seventh-day Adventist employee follows a vegetarian diet because she believes it is religiously prescribed by scripture. Her vegetarianism is a religious practice, even though not all Seventh-day Adventists share this belief or follow this practice, and even though many individuals adhere to a vegetarian diet for purely secular reasons.

EXAMPLE 3

Types of Religious Practice or Observance

A Catholic employee requests a schedule change so that he can attend a church service on Good Friday. A Muslim employee requests an

exception to the company's dress and grooming code allowing her to wear her headscarf, or a Hindu employee requests an exception allowing her to wear her bindi (religious forehead marking). An employee asks to be excused from the religious invocation offered at the beginning of staff meetings because he objects on religious grounds or does not ascribe to the religious sentiments expressed. An adherent to Native American spiritual beliefs seeks unpaid leave to attend a ritual ceremony. An employee who identifies as Christian but is not affiliated with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited. Each of these requests relates to a "religious" belief, observance, or practice within the meaning of Title VII. The question of whether the employer is required to grant these requests is discussed in the section below addressing religious accommodation.

EXAMPLE 4

Supervisor Considers Belief Illogical

Morgan asks for time off on October 31 to attend the "Samhain Sabbat," the New Year observance of Wicca, her religion. Her supervisor refuses, saying that Wicca is not a "real" religion but an "illogical conglomeration" of "various aspects of the occult, such as faith healing, self-hypnosis, tarot card reading, and spell casting, which are not religious practices." The supervisor's refusal to accommodate her on the ground that he believes her religion is illogical or not a "real religion" violates Title VII unless the employer can show her request would impose an undue hardship. The law applies to religious beliefs even though others may find them "incorrect" or "incomprehensible."**[35]**

EXAMPLE 5

Unique Belief Can Be Religious

Edward practices the Kemetic religion, based on ancient Egyptian faith, and affiliates himself with a tribe numbering fewer than ten members. He states that he believes in various deities, and follows the faith's concept of Ma'at, a guiding principle regarding truth and order that represents physical and moral balance in the universe. During a religious ceremony he received small tattoos encircling his wrist, written in the Coptic language, which express his servitude to Ra, the Egyptian god of the sun. When his employer asks him to cover the tattoos, he explains that it is a sin to cover them intentionally because doing so would signify a rejection of Ra. These can be religious beliefs and practices even if no one else or few other people subscribe to them.**[36]**

EXAMPLE 6

Personal Preference That Is Not a Religious Belief

Sylvia's job has instituted a policy that employees cannot have visible tattoos while working. Sylvia refuses to cover a tattoo on her arm that is the logo of her favorite band. When her manager asks her to cover the tattoo, she states that she cannot and that she feels so passionately about the importance of the band to her life that it is essentially her religion. However, the evidence demonstrates that her tattoos and her feelings do not relate to any "ultimate concerns" such as life, purpose, death, humanity's place in the universe, or right and wrong, and they are not part of a moral or ethical belief system. Simply feeling passionately about something is not enough to give it the status of a religion in someone's life. Therefore, her belief is a personal preference that is not religious in nature.**[37]**

2. Sincerely Held

Title VII requires employers to accommodate those religious beliefs that are "sincerely held."**[38]** Whether or not a religious belief is sincerely held by an applicant or employee is rarely at issue in many types of Title VII religious claims. **[39]** For example, with respect to an allegation of discriminatory discharge or harassment, it is the motivation of the discriminating official, not the actual beliefs

of the individual alleging discrimination, that is relevant in determining if the discrimination that occurred was because of religion. A detailed discussion of reasonable accommodation of sincerely held religious beliefs appears in § 12-IV, but the meaning of "sincerely held" is addressed here.

Like the religious nature of a belief, observance, or practice, the sincerity of an employee's stated religious belief is usually not in dispute and is "generally presumed or easily established."**[40]** Further, the Commission and courts "are not and should not be in the business of deciding whether a person holds religious beliefs for the 'proper' reasons. We thus restrict our inquiry to whether or not the religious belief system is sincerely held; we do not review the motives or reasons for holding the belief in the first place."**[41]** The individual's sincerity in espousing a religious observance or practice is "largely a matter of individual credibility."**[42]** Moreover, "a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance,"**[43]** although "[e]vidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is, of course, relevant to the factfinder's evaluation of sincerity."**[44]** Factors that – either alone or in combination – might undermine an employee's credibility include: whether the employee has behaved in a manner markedly inconsistent with the professed belief;**[45]** whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;**[46]** whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons);**[47]** and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

However, none of these factors is dispositive. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.**[48]** Similarly, an individual's belief may be to adhere to a religious custom only at certain times, even though others may always adhere,**[49]** or, fearful of discrimination, he or she may have forgone his or her sincerely held religious practice during the application process and not revealed it to the employer until after he or she was hired or later in employment.**[50]** An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion, or because the employee adheres to some common practices but not others.**[51]** As noted, courts

have held that "Title VII protects more than . . . practices specifically mandated by an employee's religion."**[52]**

3. Employer Inquiries into Religious Nature or Sincerity of Belief

Because the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice, the employer would be justified in seeking additional supporting information. *See infra* § 12-IV-A-2.

· NOTE TO EEOC INVESTIGATORS ·

If the Respondent (R) disputes that the Charging Party's ("CP's") belief is "religious," consider the following:

⇒ **Begin with the CP's statements.** What religious belief, observance, or practice does the CP claim to have that conflicts with an employment requirement? In most cases, the CP's credible testimony regarding his belief, observance, or practice will be sufficient to demonstrate that it is religious. In other cases, however, the investigator may need to ask follow-up questions about the nature and tenets of the asserted religious beliefs, and/or any associated practices, rituals, clergy, observances, etc., in order to identify a specific religious belief, observance, or practice or determine if one is at issue, which conflicts with an employment requirement.

⇒ **Since religious beliefs can be unique to an individual, evidence from others is not always necessary.** However, if the CP believes such evidence will support his or her claim, the investigator could seek evidence such as oral statements, affidavits, or other documents from CP's religious leader(s) if applicable, or others whom CP identifies as knowledgeable

regarding the religious belief, observance, or practice in question that conflicts with an employment requirement.

⇒ **Remember, where an alleged religious observance, practice, or belief is at issue, a case-by-case analysis is required.** Investigators should not make assumptions about the nature of an observance, practice, or belief. In determining whether CP's asserted observance, practice, or belief is "religious" as defined under Title VII, the investigator's general knowledge will often be sufficient; if additional objective information has to be obtained, the investigator should nevertheless recognize the intensely personal characteristics of adherence to a religious belief.

⇒ **If the Respondent disputes that CP's belief is "sincerely held," the following evidence may be relevant:**

⇨ Oral statements, an affidavit, or other documents from CP describing his or her beliefs and practices, including information regarding when CP embraced the belief, observance, or practice, as well as when, where, and how CP has adhered to the belief, observance, or practice; and/or,

⇨ Oral statements, affidavits, or other documents from potential witnesses identified by CP or R as having knowledge of whether CP adheres or does not adhere to the belief, observance, or practice at issue (e.g., CP's religious leader (if applicable), fellow adherents (if applicable), family, friends, neighbors, managers, or coworkers who may have observed his past adherence or lack thereof, or discussed it with him).

B. Covered Entities

Overview: Title VII coverage rules apply to all religious discrimination claims under the statute. However, specially defined "religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions, and the ministerial exception bars EEO claims by employees of religious institutions who perform vital religious duties at the core of the mission of the religious institution.

Title VII's prohibitions apply to employers, employment agencies, and unions,**[53]** subject to the statute's coverage.**[54]** Those covered entities must carry out their activities in a nondiscriminatory manner and provide reasonable accommodation unless doing so would impose an undue hardship.**[55]** Unions also can be liable if they knowingly acquiesce in employment discrimination against their members, join or tolerate employers' discriminatory practices, or discriminatorily refuse to represent employees' interests, and employment agencies can be liable for participating in the client-employer's discrimination.**[56]**

C. Exceptions

1. Religious Organizations

What Entities are "Religious Organizations"? Under sections 702(a) and 703(e)(2) of Title VII, "a religious corporation, association, educational institution, or society," including a religious "school, college, university, or educational institution or institution of learning," is permitted to hire and employ individuals "of a particular religion . . . ."**[57]** This "religious organization" exemption applies only to those organizations whose "purpose and character are primarily religious," but to determine whether this statutory exemption applies, courts have looked at "all the facts," considering and weighing "the religious and secular characteristics" of the entity.**[58]** Courts have articulated different factors to determine whether an entity is a religious organization, including (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up of coreligionists.**[59]** Depending on the facts, courts have found that Title VII's religious organization exemption applies not only to churches and other houses of worship, but also to religious schools, hospitals, and charities.**[60]**

Courts have expressly recognized that engaging in secular activities does not disqualify an employer from being a "religious organization" within the meaning of

the Title VII statutory exemption. "[R]eligious organizations may engage in secular activities without forfeiting protection" under the Title VII statutory exemption.**[61]** The Title VII statutory exemption provisions do not mention nonprofit and for-profit status.**[62]** Title VII case law has not definitively addressed whether a for-profit corporation that satisfies the other factors can constitute a religious corporation under Title VII.[63]

Where the religious organization exemption is asserted by a respondent employer, the Commission will consider the facts on a case-by-case basis; no one factor is dispositive in determining if a covered entity is a religious organization under Title VII's exemption.

Scope of Religious Organization Exemption. Section 702(a) states, "[t]his subchapter shall not apply to … a religious corporation, association, educational institution, or society . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities."[64] Religious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, national origin (as well as the anti-discrimination provisions of the other EEO laws such as the ADEA, ADA, and GINA), and may not engage in related retaliation.[65] However, sections 702(a) and 703(e)(2)[66] allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion.[67] The definition of "religion" found in section 701(j) is applicable to the use of the term in sections 702(a) and 703(e)(2), although the provision of the definition regarding reasonable accommodations is not relevant.[68]

Courts have held that the religious organization's assertion that the challenged employment decision was made on the basis of religion is subject to a pretext inquiry where the employee has the burden to prove pretext.[69] Courts also have held that any inquiry into the pretext of a religious organization's rationale for its decision must be limited to "sincerity" and cannot be used to challenge the validity or plausibility of the underlying religious doctrine.[70] For example, one court has held that a religious organization could not justify denying insurance benefits only to married women by asserting a religiously based view that only men could be the head of a household when evidence of practice inconsistent with such a belief established "conclusive[ly]" that the employer's religious justification was "pretext" for sex discrimination.[71]

In *EEOC v. Mississippi College*, the court held that if a religious institution presents "convincing evidence" that the challenged employment practice resulted from discrimination on the basis of religion, section 702 "deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."**[72]** Despite the court's use of "jurisdiction" here, it has been held in light of the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, that Title VII's religious organization exemptions are not jurisdictional.[73]

The religious organization exemption is not limited to jobs involved in the specifically religious activities of the organization.[74] Rather, "the explicit exemptions to Title VII . . . enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"**[75]** In addition, the exemption allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs.[76] Consistent with applicable EEO laws, the prerogative of a religious organization to employ individuals "'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."[77] Some courts have held that the religious organization exemption can still be established notwithstanding actions such as holding oneself out as an equal employment opportunity employer or hiring someone of a different religion for a position.[78]

EXAMPLE 7

Religious Organization Exemption Applies

Justina taught mathematics at a small Catholic college, which requires all employees to agree to adhere to Catholic doctrine. After she signed a pro-choice advertisement in the local newspaper, the college terminated her employment because of her public support of a position in violation of Church doctrine. Justina claimed sex discrimination, alleging that male professors were treated less harshly for other conduct that violated Church doctrine. Because the

exemption to Title VII preserves the religious school's ability to maintain a community composed of individuals faithful to its doctrinal practices, and because evaluating Justina's discipline compared to the male professors, who engaged in different behavior, would require the court to compare the relative severity of violations of religious doctrines, Title VII's religious organization exemption bars adjudication of the sex discrimination claim.[79] The analysis would be different if a male professor at the school signed the same advertisement and was not terminated, because "[r]equiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer's ability to create and maintain communities of the faithful."**[80]**

2. Ministerial Exception

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,**[81]** the Supreme Court "unanimously recognized that the Religion Clauses [of the First Amendment] foreclose certain employment-discrimination claims brought against religious organizations."[82] The Court held that the First Amendment safeguards the right of a religious organization, free from interference from civil authorities, to select those who will "personify its beliefs," "shape its own faith and mission," or "minister to the faithful."**[83]** This rule is known as the "ministerial exception," apparently because "the individuals involved in pioneering cases were described as 'ministers,'"[84] but as discussed below, the exception is not limited to "ministers" or members of the clergy. The rule provides "an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."**[85]**

The exception applies to discrimination claims involving selection, supervision, and removal against a religious institution by employees who "play certain key roles."[86] "The constitutional foundation" of the Court's holding in *Hosanna-Tabor* was "the general principle of church autonomy."**[87]** "Among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion."[88] The First Amendment "outlaws" such intrusion because "[s]tate interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion."[89] "This does not mean that

religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission."[90]

A "religious institution" for purposes of the ministerial exception is one whose "mission is marked by clear or obvious religious characteristics."[91] Like Title VII's religious organization exemption, courts have applied the ministerial exception to religious employers beyond churches and other houses of worship.[92] But unlike the statutory religious organization exemption, the ministerial exception applies regardless of whether the challenged employment decision was for "religious" reasons.[93]

As the Supreme Court stated in *Our Lady of Guadalupe School v. Morrissey-Berru*, the ministerial exception applies to employees who perform "vital religious duties" at the core of the mission of the religious institution.[94] The Supreme Court in *Hosanna-Tabor* declined to adopt a "rigid formula"**[95]** for deciding when the ministerial exception applies. Instead, in deciding whether a Lutheran school teacher's retaliation claim was barred by the ministerial exception, the Supreme Court looked to "all the circumstances of her employment," recognizing four "considerations" or "circumstances that [it] found relevant in that case": (1) the employee's formal title; (2) education or training; (3) the employee's own use of the title; and (4) the "important religious functions" the employee performed.[96] The Court further explained that, while relevant, "a title, by itself, does not automatically ensure coverage,"[97] and that the title "minister" is not "a necessary requirement," cautioning against "attaching too much significance to titles."[98] Relatedly, while academic requirements are relevant, "insisting in every case on rigid academic requirements could have a distorting effect" and "judges have no warrant to second-guess [a religious institution's qualification] judgment or to impose their own credentialing requirements."[99] The Court rejected the view that the ministerial exception "should be limited to those employees who perform exclusively religious functions" and cautioned against placing too much emphasis on the performance of secular duties or the time spent on those duties.[100]

In *Our Lady of Guadalupe School,* the Court reiterated that the four "considerations" relevant in *Hosanna-Tabor* are not intended to constitute a four-factor test because "a variety of factors may be important."[101] The Court explained that *Hosanna-Tabor* directs "courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of

the exception."[102] The circumstances that were instructive in *Hosanna-Tabor* are not "inflexible requirements" and may have "far less significance in some cases" because "[w]hat matters, at bottom, is what an employee does."[103]

The religious institution's "definition and explanation" of an employee's role "in the life of the religion in question is important."**[104]** The ministerial exception is not limited to the head of a religious congregation, leaders, ministers, or members of the clergy, and can apply to "lay" employees and even non-"co-religionists" or those not "practicing" the faith.[105] Courts have applied the ministerial exception in cases involving parochial school teachers,[106] church musicians,[107] and other employees who perform religious functions.[108]

In *Our Lady of Guadalupe*, the Court explained that for a private religious school, "educating and forming students in the faith," "inculcating its teachings, and training [students] to live their faith are responsibilities that lie at the very core of the mission" and "the selection and supervision of the teachers" who do this work are necessarily core elements of achieving the mission.[109] The Court declined to "draw a critical distinction between a person who "simply relay[s] religious tenets" and one who relays such tenets while also "minister[ing] to the faithful," but noted that a teacher of "world religions," "who merely provides a description of the beliefs and practices of a religion without making any effort to inculcate those beliefs could not qualify for the exception."[110]

In holding that the ministerial exception barred employment discrimination claims by two elementary school teachers in Roman Catholic schools in *Our Lady of Guadalupe*, the Court found abundant evidence that the teachers "performed vital religious duties," including: their employment contracts required them to carry out the schools' religious mission and specified "that their work would be evaluated to ensure that they were fulfilling that responsibility"; their job duties required them to teach all subjects, including religion; they prepared their students for participation in religious activities, prayed with them, and attended Mass with them; and, they were the staff members "entrusted most directly with the responsibility of educating their students in the faith," which included teaching them about the Catholic faith and guiding them "by word and deed, toward the goal of living their lives in accordance with the faith."[111] Therefore, even though the teachers each lacked a religious title and the religious training possessed by the teacher in *Hosanna-Tabor*, their core responsibilities as teachers of religion were essentially

the same as hers, and "their schools expressly saw them as playing a vital role in carrying out the mission of the church."[112]

The ministerial exception is not just a legal defense that can be raised by religious institutions, but a constitutionally-based guarantee that obligates the government and the courts to refrain from interfering or entangling themselves with religion.[113] As such, it should be resolved at the earliest possible stage before reaching the underlying discrimination claim.[114] Some courts have held that the ministerial exception is not waivable.**[115]**

3. Additional Interaction of Title VII with the First Amendment and the Religious Freedom Restoration Act (RFRA)

As noted above, the ministerial exception is based on the interaction between the workplace and the First Amendment. The applicability and scope of other defenses based on Title VII's interaction with the First Amendment or the Religious Freedom Restoration Act (RFRA) is an evolving area of the law. **[116]** It is not within the scope of this document to define the parameters of the First Amendment or RFRA. However, these provisions are referenced throughout this document to illustrate how they arise in Title VII cases and how courts have analyzed them. For example:

- a private sector employer or a religious organization might argue that its rights under the First Amendment's Free Exercise or Free Speech Clauses, or under RFRA, would be violated if it is compelled by Title VII to grant a particular accommodation or otherwise refrain from enforcing an employment policy; **[117]**
- a government employer might argue that granting a requested religious accommodation would pose an undue hardship because it would violate the Establishment Clause of the First Amendment;**[118]**
- some government employees might argue that their religious expression is protected by the First Amendment, RFRA, and/or Title VII;**[119]** and,
- some government employees raise claims under the First Amendment or RFRA parallel to their Title VII accommodation claims;**[120]** to date, appellate courts have uniformly held that Title VII preempts federal employees from bringing RFRA claims against their agency employer.**[121]**

Courts addressing the overlap between EEO laws and rights under RFRA and the Free Exercise Clause have stressed the importance of a nuanced balancing of potential burdens on religious expression, the governmental interests at issue, and how narrowly tailored the challenged government requirements are.**[122]**

NOTE: EEOC investigators must take great care in situations involving both (a) the statutory rights of employees to be free from discrimination at work, and (b) the rights of employers under the First Amendment and RFRA. Although a resolution satisfactory to all may come from good faith on the part of the employer and employee through mutual efforts to reach a reasonable accommodation, on occasion the religious interests of the employer and employee may be in conflict. EEOC personnel should seek the advice of the EEOC Legal Counsel in such a situation, and on occasion the Legal Counsel may consult as needed with the U.S. Department of Justice.

12-II EMPLOYMENT DECISIONS

A. General

Title VII's prohibition against discrimination based on religion generally functions like its prohibition against discrimination based on race, color, sex, or national origin. Absent a defense, disparate treatment violates the statute whether motivated by bias against or preference toward an applicant or employee due to his religious beliefs, practices, or observances – or lack thereof. Thus, for example, except to the extent an exemption, exception, or defense applies, an employer may not refuse to recruit, hire or promote individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.**[123]** The following subsections address work scenarios that may lead to claims of religious discrimination.

1. Recruitment, Hiring, and Promotion

Employers that are not religious organizations may neither recruit indicating a preference for individuals of a particular religion nor adopt recruitment practices, such as word-of-mouth recruitment, that have the purpose or effect of discriminating based on religion.**[124]** Title VII permits employers that are not religious organizations to recruit, hire and employ employees on the basis of

religion only if religion is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."**[125]**

For example, other than as discussed above with respect to the religious organization and ministerial exceptions discussed above, an employer may not refuse to hire an applicant simply because the applicant does not share the employer's religious beliefs, and conversely may not select one applicant over another based on a preference for employees of a particular religion.**[126]** Similarly, employment agencies may not comply with requests from employers to engage in discriminatory recruitment or referral practices, for example by screening out applicants who have names often associated with a particular religion (e.g., Mohammed).**[127]** Moreover, an employer may not exclude an applicant from hire merely because the applicant may need a reasonable accommodation for his or her religious beliefs, observances, or practices that could be provided absent undue hardship.**[128]**

EXAMPLE 8

Recruitment

Charles, the president of a company that owns several gas stations, needs managers for the new convenience stores he has decided to add to the stations. He posts a job announcement at the Hindu Temple he attends expressing a preference for Hindu employees. In doing so, Charles is engaging in unlawful discrimination.**[129]**

EXAMPLE 9

Hiring

A. Mary is a human resources officer who is filling a vacant administrative position at her company. During the application process, she performs an Internet search on the candidates and learns that one applicant, Jonathan, has written an article in which he describes himself as an Evangelical Christian and discusses how important his Christian faith is to all aspects of his life. Although Mary believes he is the most qualified candidate, she does not hire him because she knows that the company prefers to have a "secular" work

environment and she thinks that most of the company's employees will find working with someone so religious "weird." Therefore, Mary decides that it is best not to hire Jonathan. By not hiring Jonathan because of his religion, the company violated Title VII.

B. Aatma, an applicant for a rental car sales position who is an observant Sikh, wears a dastaar (religious headscarf) to her job interview. The interviewer does not advise her that there is a dress code prohibiting head coverings, and Aatma does not ask whether she would be permitted to wear the headscarf if she were hired. The manager knew or suspected the headscarf was a religious garment, presumed it would be worn at work, and refused to hire her because the company requires sales agents to wear a uniform with no additions or exceptions. Unless the employer can demonstrate that no reasonable accommodation was possible absent undue hardship, this refusal to hire violates Title VII, even though Aatma did not make a request for accommodation at the interview, because the employer believed her practice was religious and that she would need accommodation, and did not hire her for that reason.**[130]**

C. A company's policy bars any employees from working in customer contact positions if they have a beard or wear a headcovering, and requests for religious accommodations are always denied. As a result of this policy and practice, individuals who wear beards or headcoverings pursuant to a religious belief work in lower-paying positions or positions with less opportunity for advancement. This would constitute limiting, segregating, or classifying based on religion in violation of Title VII, and may also have an unlawful disparate impact based on religion if it is not job-related and consistent with business necessity.**[131]**

EXAMPLE 10

Promotion

Darpak, who practices Buddhism, holds a Ph.D. degree in engineering and applied for a managerial position at the research firm where he

has worked for ten years. He was rejected in favor of a non-Buddhist candidate who was less qualified. The company vice president who made the promotion decision advised Darpak that he was not selected because "we decided to go in a different direction." However, the vice president confided to coworkers at a social function that he did not select Darpak because he thought a Christian manager could make better personal connections with the firm's clients, many of whom are Christian. The vice president's statement, combined with the lack of any legitimate non-discriminatory reason for selecting the less qualified candidate, as well as the evidence that Darpak was the best qualified candidate for the position, suggests that the proffered reason was a pretext for discrimination against Darpak because of his religion.**[132]**

2. Discipline and Discharge

Title VII also prohibits employers from disciplining or discharging employees because of their religion.**[133]**

EXAMPLE 11

Discipline

Joanne, a retail store clerk, is frequently 10-15 minutes late for her shift on several days per week when she attends Mass at a Catholic church across town. Her manager, Donald, has never disciplined her for this tardiness, and instead filled in for her at the cash register until she arrived, stating that he understood her situation. On the other hand, Yusef, a newly hired clerk who is Muslim, is disciplined by Donald for arriving 10 minutes late for his shift even though Donald knows it is due to his attendance at services at the local mosque. While Donald can require all similarly situated employees to be punctual, he is engaging in disparate treatment based on religion by disciplining only Yusef and not Joanne absent a legitimate nondiscriminatory reason for treating them differently.

A charge alleging the above facts might involve denial of reasonable accommodation if the employee had requested a schedule adjustment. While the employer may require employees to be punctual and request approval of schedule changes in advance,**[134]** it may have to accommodate an employee who seeks leave or a schedule change to resolve the conflict between religious services and a work schedule, unless the accommodation would pose an undue hardship.

3. Compensation and Other Terms, Conditions, or Privileges of Employment

Title VII prohibits discrimination on a protected basis "with respect to . . . compensation, terms, conditions, or privileges of employment," for example, setting or adjusting wages, granting benefits, and/or providing leave in a discriminatory fashion.**[135]**

EXAMPLE 12

Wages and Benefits

Janet, who practices Native American spirituality, is a newly hired social worker for an agency. As a benefit to its employees, the agency provides tuition reimbursement for professional continuing education courses offered by selected providers. Janet applied for tuition reimbursement for an approved course that was within the permitted cost limit. Janet's supervisor denied her request for tuition reimbursement, stating that since Janet believes in "voodoo" she "won't make a very good caseworker." By refusing, because of Janet's religious beliefs, to provide the tuition reimbursement to which Janet was otherwise entitled as a benefit of her employment, Janet's supervisor has discriminated against Janet on the basis of religion in violation of Title VII.

Title VII's prohibition on disparate treatment based on religious beliefs also can apply to disparate treatment of religious expression in the workplace.**[136]**

EXAMPLE 13

Religious Expression

> Eve is a secretary who displays a Bible on her desk at work. Xavier, a secretary in the same workplace, begins displaying a Quran on his desk at work. Their supervisor allows Eve to retain the Bible but directs Xavier to put the Quran out of view because, he states, coworkers "will think you are making a political statement, and with everything going on in the world right now we don't need that around here." This differential treatment of similarly situated employees with respect to the display of a religious item at work constitutes religious discrimination.**[137]**

Charges involving religious expression may involve not only allegations of differential treatment but also of harassment and/or denial of reasonable accommodation. Investigation of allegations of harassment and denial of reasonable accommodation are addressed respectively in §§ 12-III and 12-IV of this document. As discussed in greater detail in those sections, Title VII requires employers to accommodate expression that is based on a sincerely held religious practice or belief, unless it threatens to constitute harassment**[138]** or poses an "undue hardship" on the conduct of the business.**[139]** An employer can thus restrict religious expression when it would disrupt customer service or the workplace, including when customers or coworkers would reasonably perceive it to express the employer's own message.**[140]** *For further discussion of how to analyze when accommodation of religious expression would pose an undue hardship, refer to the sections on Harassment at* § 12-III-C *and Accommodation at* § 12-IV-C-6.

B. Customer Preference

An employer's action based on the discriminatory preferences of others, including coworkers or customers, is unlawful.**[141]**

EXAMPLE 14

Employment Decision Based on Customer Preference

> Harinder, who wears a turban as part of his Sikh religion, is hired to work at the counter in a coffee shop. A few weeks after Harinder begins working, the manager notices that the work crew from the

construction site near the shop no longer comes in for coffee in the mornings. When he inquires, the crew complains that Harinder, whom they mistakenly believe is Muslim, makes them uncomfortable in light of the September 11th attacks. The manager tells Harinder that he has to let him go because the customers' discomfort is understandable. The manager has subjected Harinder to unlawful religious discrimination by taking an adverse action based on customers' preference not to have a cashier of Harinder's perceived religion. Harinder's termination based on customer preference would violate Title VII regardless of whether he was – or was misperceived to be -- Muslim, Sikh, or any other religion.

C. Security Requirements

In general, an employer may adopt security requirements for its employees or applicants, provided they are adopted for nondiscriminatory reasons and are applied in a nondiscriminatory manner. For example, an employer may not require Muslim applicants to undergo a background investigation or more extensive security procedures because of their religion without imposing the same requirements on similarly situated applicants who are non-Muslim.**[142]**

D. Bona Fide Occupational Qualification

Title VII permits employers to hire and employ employees on the basis of religion if religion is "a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of that particular business or enterprise."**[143]** Religious organizations do not typically need to rely on this BFOQ defense because the "religious organization" exemption in Title VII permits them to prefer employees of a particular religion. *See supra* § 12-I-C-1. But for employers that are not religious organizations and seek to rely on the BFOQ defense to justify a religious preference, the defense is a narrow one and rarely successfully invoked.**[144]**

· Employer Best Practices ·

- Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or

promotion and applying those criteria consistently to all candidates.

- In conducting job interviews, employers can ensure nondiscriminatory treatment by asking the same questions of all applicants for a particular job or category of job and inquiring about matters directly related to the position in question.
- Employers can reduce the risk of religious discrimination claims by carefully and timely recording the accurate business reasons for disciplinary or performance-related actions and sharing these reasons with the affected employees.
- When management decisions require the exercise of subjective judgment, employers can reduce the risk of discriminatory decisions by providing training to inexperienced managers and encouraging them to consult with more experienced managers or human resources personnel when addressing difficult issues.
- If an employer is confronted with customer biases, e.g., an adverse reaction to being served by an employee due to religious garb, the employer should consider engaging with and educating the customers regarding any misperceptions they may have and/or the equal employment opportunity laws.

12-III HARASSMENT

Overview: Religious harassment is analyzed and proved in the same manner as harassment based on other traits protected by Title VII—race, color, sex, and national origin. However, the facts of religious harassment cases may present unique considerations, especially where the alleged harassment is based on another employee's religious practices. Such a situation may require an employer to reconcile its dual obligations to take prompt remedial action in response to alleged harassment and to accommodate certain employee religious expression.

A. Prohibited Conduct

As stated, Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."**[145]** "[A]lthough [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to economic or tangible discrimination" and "covers more than terms and conditions in the narrow contractual sense."**[146]** Title VII covers "environmental claims" as well,**[147]** including "harassment leading to noneconomic injury,"**[148]** but the conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"**[149]**

B. Types of Harassment Claims

The same Title VII principle applies whether the harassment is based on race, color, national origin, religion, or sex.**[150]** Like harassment based on other protected characteristics, religious harassment can take the form of (1) outright coercion, or an economic "quid pro quo," in which the employee is pressured or coerced to abandon, alter, or adopt a religious practice as a condition of employment;**[151]** or of (2) a hostile work environment, in which the employee is subjected to unwelcome, religiously based statements or conduct so severe or pervasive that the employee objectively and subjectively finds the work environment to be hostile or abusive.**[152]** Employer liability for harassment is discussed below in § 12-III-B.

1. Religious Coercion

Title VII is violated when an employer or supervisor explicitly or implicitly coerces an employee to abandon, alter, or adopt a religious practice as a condition of receiving a job benefit or privilege or avoiding an adverse employment action.**[153]**

EXAMPLE 15

Religious Conformance Required for Promotion

> Wamiq was raised as a Muslim but no longer practices Islam. His supervisor, Arif, is a very devout Muslim who tries to persuade Wamiq not to abandon Islam and advises him to follow the teachings of the Quran. Arif also says that if Wamiq expects to advance in the company, he should join Arif and other Muslims for weekly prayer sessions in Arif's office. Notwithstanding this pressure to conform his religious practices in order to be promoted, Wamiq refuses to attend the weekly prayer sessions, and is subsequently denied the promotion for which he applied even though he is the most qualified. Arif's conduct indicates that the promotion would have been granted if Wamiq had participated in the prayer sessions and had become an observant Muslim. Absent contrary evidence, the employer will be liable for harassment for conditioning Wamiq's promotion on his adherence to Arif's views of appropriate religious practice.[154]
>
> Not promoting Wamiq would also be actionable as disparate treatment based on religion, unless the employer could demonstrate a non-religiously based, non-pretextual reason for denying Wamiq the promotion. In addition, if Arif had made the prayer sessions mandatory and Wamiq had asked to be excused on religious grounds, Arif would have been required to excuse Wamiq from the prayer sessions as a reasonable accommodation.

A claim of harassment based on coerced religious participation or non-participation, however, only arises where it was intended to make the employee conform to or abandon a religious belief or practice. By contrast, an employer would not violate Title VII if it required an employee to participate in a workplace activity that conflicts with the employee's sincerely held religious belief if the employee does not request to be excused or if the employer demonstrates that accommodating the employee's request to be excused would pose an undue hardship.[155] The same fact pattern may give rise to allegations of disparate treatment, harassment, and/or denial of accommodation. For example, terminating rather than accommodating an employee may give rise to allegations of both denial of accommodation and discriminatory discharge.[156] For discussion of the accommodation issue, *see* § 12-IV.

2. Hostile Work Environment

Title VII's prohibition against religious discrimination includes prohibiting a hostile work environment because of religion. An unlawful hostile environment based on religion can take the form of physical or verbal harassment, which would include the unwelcome imposition of beliefs or practices contrary to the employee's religion or lack thereof. A hostile work environment is created "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."**[157]** To establish a case of religious hostile work environment harassment, an employee must show: (1) that the harassment was based on his religion; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to alter the conditions of employment by creating an objectively and subjectively hostile or abusive work environment; and (4) that there is a basis for employer liability.**[158]**

a. Based on Religion

To support a religious harassment claim, the adverse treatment must be based on the employee's religion.**[159]** While verbally harassing conduct clearly is based on religion if it has religious content, harassment can also be based on religion even if religion is not explicitly mentioned.**[160]**

EXAMPLE 16

Harassing Conduct Based on Religion – Religion Mentioned

Mohammed is an Indian-born Muslim employed at a car dealership. Because he takes scheduled prayer breaks during the workday and observes Muslim dietary restrictions, his coworkers are aware of his religious beliefs. Upset by the anniversary of the 9/11 terrorist attacks, his coworkers and managers began making mocking comments about his religious dietary restrictions and need to pray during the workday. They repeatedly referred to him as "Taliban" or "Arab" and asked him "why don't you just go back where you came from since you believe what you believe?" When Mohammed questioned why it was mandatory for all employees to attend a United Way meeting, his

supervisor said: "This is America. That's the way things work over here. This is not the Islamic country where you come from." After this confrontation, the supervisor issued Mohammed a written warning stating that he "was acting like a Muslim extremist" and that the supervisor could not work with him because of his "militant stance." This harassment is based on religion and national origin.[161]

EXAMPLE 17

Harassing Conduct Based on Religion – Religion Not Mentioned

Shoshanna is a Seventh-day Adventist whose work schedule was adjusted to accommodate her Sabbath observance, which begins at sundown each Friday. When Nicholas, the new head of Shoshanna's department, was informed that he must accommodate her, he told a colleague that "anybody who cannot work regular hours should work elsewhere." Nicholas then moved the regular Monday morning staff meetings to late Friday afternoon, repeatedly scheduled staff and client meetings on Friday afternoons, and often marked Shoshanna AWOL when she was not scheduled to work. In addition, Nicholas treated her differently than her colleagues by, for example, denying her training opportunities and loudly berating her with little or no provocation. Although Nicholas did not mention Shoshanna's religion, the evidence shows that his conduct was because of Shoshanna's need for religious accommodation, and therefore was based on religion.[162]

b. Unwelcome

Conduct is "unwelcome" when "it is uninvited and offensive or unwanted from the standpoint of the employee."[163] It is not necessary in every case for the harassed employee to explicitly voice objection to the conduct (e.g., to confront the alleged harasser contemporaneously) for the conduct to be deemed unwelcome. In addition, since 1993 when the Supreme Court decided *Harris v. Forklift Systems, Inc.*, and added "subjective hostility" to the hostile work environment analysis, some courts have found that the analysis of "unwelcomeness" and "subjective hostility" overlap.[164] For example, where an employee is visibly upset by repeated mocking

use of derogatory terms or comments about his religious beliefs or observance by a colleague, it may be evident that the conduct is unwelcome and also subjectively hostile.[165] This would stand in contrast to a situation where the same two employees were engaged in a consensual conversation that involves a spirited debate of religious views, but neither employee indicates to the other, or to the employer, that he or she is upset by it. For a discussion on reporting to the employer, see *infra* § 12-III-B.

The distinction between welcome and unwelcome conduct is especially important in the religious context in situations involving proselytizing to employees who have not invited such conduct. Where a religious employee attempts to persuade another employee of the correctness of his or her belief, the conduct may or may not be welcome. When an employee expressly objects to particular religious expression, unwelcomeness is evident.[166]

EXAMPLE 18

Unwelcome Conduct

Beth's colleague, Bill, repeatedly talked to her at work about her prospects for salvation. For several months, she did not object and discussed the matter with him. When he persisted even after she told him that he had "crossed the line" and should stop having non-work-related conversations with her, the conduct was clearly unwelcome.[167]

c. Severe or Pervasive

Harassment is actionable if, as a whole, the conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" As the Supreme Court explained with respect to Title VII in *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to

be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Thus, harassing conduct based on the employee's religion is actionable when it is sufficiently severe or pervasive to create an objectively and subjectively hostile work environment. A hostile work environment claim may encompass any hostile conduct that affects the complainant's work environment, including employer conduct that may be independently actionable. Whether a reasonable person would perceive the conduct as abusive turns on common sense and context, looking at the totality of the circumstances.[168] All of the alleged incidents must be "considered cumulatively in order to obtain a realistic view of the work environment."[169] Relevant factors "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or merely an offensive utterance; and whether it unreasonably interferes with an employee's work performance."[170] But "no single factor is required."[171]

EXAMPLE 19

Reasonable Person Perceives Conduct to Be Hostile

The president of Printing Corp. regularly mocked and berated an employee who asked for Sundays off to attend Mass. Although he granted the time off, the president teased the employee for refusing to look at a Playboy magazine, called him a "religious freak," and used vulgar sexual language when speaking to or about the employee. He mocked him for "following the Pope around" and made sexual comments about the Virgin Mary. A reasonable person could perceive this to be a religiously hostile work environment.[172]

To "alter the conditions of employment," conduct need not cause economic or psychological harm.[173] It also need not impair work performance, discourage employees from remaining on the job, or impede their advancement.[174] The presence of one or more of these factors would buttress the claim, but is not required. **[175]**

However, Title VII is not a "'general civility code,'" and does not render all insensitive or offensive comments, petty slights, and annoyances illegal.[176] Isolated incidents

(unless extremely serious) will not rise to the level of illegality.[177]

EXAMPLE 20

Insensitive Comments Not Enough to Constitute Hostile Environment

Marvin is an Orthodox Jew who was hired as a radio show host. When he started work, a coworker, Stacy, pointed to his yarmulke and asked, "Will your headset fit over that?" On a few occasions, Stacy made other remarks about the yarmulke, such as: "Nice hat. Is that a beanie?" and "Do they come in different colors?" Although the coworker's comments about his yarmulke were insensitive, they were not, standing alone, sufficiently severe or pervasive to create a hostile work environment for Marvin.[178]

EXAMPLE 21

Isolated Comments Not Enough to Constitute Hostile Environment

Bob, a supervisor, occasionally allowed spontaneous and voluntary prayers by employees during office meetings. During one meeting, he referenced Bible passages related to "slothfulness" and "work ethics." Amy complained that Bob's comments and the few instances of allowing voluntary prayers during office meetings created a hostile environment. The comments did not create an actionable harassment claim. They were not severe, and because they occurred infrequently, they were not sufficiently pervasive to state a claim.[179]

Severity and pervasiveness need not both be present, and they operate inversely. The more severe the harassment, the less frequently the incidents need to recur. At the same time, incidents that may not, individually, be severe may become unlawful if they occur frequently or in proximity.[180]

Although a single incident will seldom create an unlawfully hostile environment, it may do so if it is unusually severe, such as where it involves a physical threat.[181]

EXAMPLE 22

One Instance of Physically Threatening Conduct Sufficiently Severe

Ihsaan is a Muslim. Shortly after the terrorist attacks on September 11, 2001, Ihsaan came to work and found the words "I'm tired of you Muslims. You're all terrorists! We will avenge the victims!! Your life is next!" scrawled in red marker on his office door. Because of the timing of the statement and the direct physical threat, this incident, alone, is sufficiently severe to create an objectively hostile and/or abusive work environment.**[182]**

EXAMPLE 23

Isolated Practices Not Enough to Constitute Hostile Environment

Tran owns a restaurant serving Asian-fusion cuisine. The restaurant is decorated with Vietnamese art depicting scenes from traditional religious stories. Tran keeps a shrine of Buddha in the corner by the cash register and likes to play traditional Vietnamese music and chants. Linda has worked as a waitress in the restaurant for a few months and complains that she feels harassed by the religious symbols and music. As long as Tran does not discriminate on the basis of religion in his hiring or supervision of employees, the religious expression would likely not amount to practices that are severe or pervasive enough to constitute a hostile work environment based on religion.

EXAMPLE 24

Persistent Offensive Remarks Constitute Hostile Environment

Betty is a Mormon. During a disagreement regarding a joint project, a coworker, Julian, tells Betty that she doesn't know what she is talking

about and that she should "go back to Salt Lake City." When Betty subsequently proposes a different approach to the project, Julian tells her that her suggestions are as "flaky" as he would expect from "her kind." When Betty tries to resolve the conflict, Julian tells her that if she is uncomfortable working with him, she can either ask to be transferred, or she can "just pray about it." Over the next six months, Julian regularly makes similar negative references to Betty's religion. His persistent offensive remarks create a hostile environment.

Religious expression that is directed at an employee can become severe or pervasive, whether or not the content is intended to be insulting or abusive. Thus, for example, persistently reiterating atheist views to a religious employee who has asked that it stop can create a hostile environment, just as persistently proselytizing to an atheist employee or an employee with different religious beliefs who has asked that it stop can create a hostile work environment. The extent to which the expression is directed at the employee bringing the Title VII claim can be relevant to determining whether or when a reasonable employee would have perceived it to be hostile.[183] That said, even conduct that is not directed at an employee can transform a work environment into a hostile or abusive one.[184]

A coworker having a difference of opinion with an employee's religious views does not establish a hostile work environment when there is no other evidence of harassment. This would include when a coworker disagrees with the religious views that an employee expresses outside of the workplace, for example on social media, when there is no evidence it is linked to the workplace.**[185]**

EXAMPLE 25

No Hostile Environment from Comments That Are Not Abusive and Not Directed at Complaining Employee

While eating lunch in the company cafeteria, Clarence often overhears conversations between his coworkers Dharma and Khema. Dharma, a Buddhist, is discussing meditation techniques with Khema, who is interested in Buddhism. Clarence strongly believes that meditation is an occult practice that offends him, and he complains to their supervisor that Dharma and Khema are creating a hostile

environment for him. Such conversations taking place in the cafeteria do not constitute severe or pervasive religious harassment of Clarence, particularly given that they do not insult other religions and they were not directed at him.

C. Employer Liability

> Overview: An employer is always liable for a supervisor's harassment if it results in a tangible employment action. If the supervisor's harassment does not result in tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. An employer is liable for a coworker's or non-employee's harassment in two circumstances: (a) if it unreasonably failed to prevent the harassment, or (b) if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action.

An employer will be liable for a hostile work environment that an employee endures if vicarious liability under common law agency principles is found to apply.**[186]** As explained more fully below, whether vicarious liability applies depends on the employment status of the harasser (i.e., a manager or coworker), whether a tangible employment action was the result of the harassment, the employer's policies, whether the employer was aware or should have been aware of the harassment, and what action, if any, the employer took when it learned of the harassment.

1. Harassment by Alter-Ego

Under agency-law principles, an employer is automatically liable for religious harassment by an agent, even if it does not result in a tangible employment action, if "the agent's high rank in the company makes him or her the employer's alter ego."**[187]** If the harasser is of a sufficiently high rank to fall "within that class of an employer organization's officials who may be treated as the organization's proxy," which would include officials such as a company president, owner, partner, or

corporate officer, the harassment is automatically imputed to the employer and the employer cannot assert the affirmative defense.[188]

2. Harassment by Supervisors or Managers

Employers are automatically liable for religious harassment by a supervisor with authority over a plaintiff when the harassment results in a tangible employment action such as a denial of promotion, demotion, discharge, or undesirable reassignment.[189] If the harassment by such a supervisor does not result in a tangible employment action, the employer can attempt to prove, as an affirmative defense to liability, that: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.[190]

EXAMPLE 26

Supervisory Harassment with Tangible Employment Action

George, a manager in an accounting firm, is an atheist who has frequently been heard to say that he thinks anyone who is deeply religious is a zealot with his own agenda and cannot be trusted to act in the best interests of the clients. George particularly ridicules Debra, a devoutly observant Jehovah's Witness, and consistently withholds the most desirable assignments from her. He denies her request for a promotion to a more prestigious job in another division, saying that he can't let her "spread that religious poppycock any further." Debra files a religious harassment charge. The firm asserts in its position statement that it is not liable because Debra never made a complaint under its internal anti-harassment policy and complaint procedures. Because the harassment was by a supervisor of Debra's and culminated in a tangible employment action (failure to promote), the employer is liable for the harassment even if it has an effective anti-harassment policy, and even if Debra never complained. If George is a "proxy" of the firm, then the firm is also liable for the harassment even in the absence of a tangible employment action. Additionally, the

denial of promotion would be actionable as disparate treatment based on religion.

EXAMPLE 27

Supervisory Harassment Without Tangible Employment Action

Jennifer's employer, XYZ, had an anti-harassment policy and complaint procedure that covered religious harassment. All employees were aware of it because XYZ widely and regularly publicized it. Despite his knowledge of the policy, Jennifer's supervisor frequently mocked her religious beliefs. When Jennifer told him that his comments bothered her, he told her that he was just kidding and she should not take everything so seriously. Jennifer never reported the supervisor's conduct. When one of Jennifer's coworkers eventually reported the supervisor's harassing conduct under the employer's antiharassment procedure, the employer promptly investigated and acted effectively to stop the supervisor's conduct. Jennifer then filed a religious harassment charge. Because the harassment of Jennifer did not culminate in a tangible employment action, XYZ will not be liable for the harassment if it can show both that Jennifer's failure to utilize XYZ's available complaint mechanisms was unreasonable, and that XYZ exercised reasonable care to prevent and promptly correct the harassment. The employer should be able to make the "promptly correct" showing, because it took prompt and reasonable corrective measures once it did learn of the harassment.[191]

3. Harassment by Coworkers

An employer is liable for harassment by coworkers where the employer: (1) unreasonably failed to prevent the harassment;[192] or (2) knew or should have known about the harassment, and failed to take prompt and appropriate corrective action.[193]

EXAMPLE 28

Harassment by Coworkers

John, who is a Christian Scientist, shares an office with Rick, a Mormon. Rick repeatedly tells John that he is practicing a false religion, and that he should study Mormon literature. Despite John's protestations that he is very happy with his religion and has no desire to convert, Rick regularly leaves religious pamphlets on John's desk and tries to talk to him about religion. After asking Rick to stop the behavior to no avail, John complains to their immediate supervisor, who dismisses John's complaint on the ground that Rick is a nice person who believes that he is just being helpful. If the harassment continues, the employer is liable because it knew, through the supervisor, about Rick's harassing conduct but failed to take prompt and appropriate corrective action.[194]

4. Harassment by Non-Employees

An employer is liable for harassment by non-employees where the employer: (1) unreasonably failed to prevent the harassment; or (2) knew or should have known about the harassment and failed to take prompt and appropriate corrective action.[195]

EXAMPLE 29

Harassment by a Contractor

Tristan works for XYZ, a contractor that manages Crossroads Corporation's mail room. When Tristan delivers the mail to Julia, the Crossroads receptionist, he gives her religious tracts, attempts to convert her to his religion, tells her that her current religious beliefs will lead her to Hell, and persists even after she tells him to stop. Julia reports Tristan's conduct to her supervisor, who tells her that he cannot do anything because Tristan does not work for Crossroads. If the harassment continues, the supervisor's failure to act is likely to subject Crossroads to liability because Tristan's conduct is severe or

pervasive and based on religion, and Crossroads failed to take corrective action within its control after Julia reported the harassment. Options available to Julia's supervisor or the appropriate individual in the supervisor's chain of command might include initiating a meeting with Tristan and XYZ management regarding the harassment and demanding that it cease, that appropriate disciplinary action be taken if it continues, and/or that a different mail carrier be assigned to Julia's route.

D. Special Considerations for Employers When Balancing Anti-Harassment and Accommodation Obligations With Respect to Religious Expression

While some employees believe that religion is intensely personal and private, others are open about sharing or outwardly expressing their religion. In addition, there are employees who may believe that they have a religious obligation to share their views and to try to persuade coworkers of the truth of their religious beliefs, i.e., to proselytize. Certain private employers, too, whether or not they are religious organizations, may wish to express their religious views and share their religion with their employees.[196] As noted above, however, some employees may perceive proselytizing or other religious expression as unwelcome based on their own religious beliefs and observances, or lack thereof. In an increasingly pluralistic society, the mix of divergent beliefs and practices can give rise to conflicts requiring employers to balance the rights of employers and employees who wish to express their religious beliefs with the rights of other employees to be free from religious harassment under the foregoing Title VII harassment standards.

As discussed in more detail in § IV-C-6 of this document, an employer never has to accommodate expression of a religious belief in the workplace where such an accommodation could potentially constitute harassment of coworkers, because that would pose an undue hardship for the employer.[197] Nor does Title VII require an employer to accommodate an employee's desire to impose his religious beliefs upon his coworkers.[198] Therefore, while Title VII requires employers to accommodate an employee's sincerely held religious belief in engaging in religious expression (e.g. proselytizing) in the workplace, an employer does not have to allow such expression if it imposes an undue hardship on the operation of the business. For example, it would be an undue hardship for an employer to accommodate

proselytizing by an employee if the proselytizing had adverse effects on employee morale or workplace productivity.

Because employers are responsible for maintaining a nondiscriminatory work environment, they can be held liable for perpetrating or tolerating religious harassment of their employees. An employer can reduce the chance that employees will engage in conduct that rises to the level of unlawful harassment by implementing an anti-harassment policy and an effective procedure for reporting, investigating, and correcting harassing conduct.[199] Even if the policy does not prevent all such conduct, it could limit the employer's liability where the employee does not report conduct rising to the level of illegal harassment.

However, "[d]iscussion of religion in the workplace is not illegal."[200] In fact, Title VII violations may result if an employer tries to avoid potential coworker objections to employee religious expression by preemptively banning all religious communications in the workplace or discriminating against unpopular religious views, since Title VII requires that employers not discriminate based on religion and that they reasonably accommodate employees' sincerely held religious observances, practices, and beliefs as long as accommodation poses no undue hardship.[201]

· Employer Best Practices ·

- Employers should have a well-publicized and consistently applied anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management's attention; and (4) contains an assurance that complainants will be protected against retaliation. The procedures should include a complaint mechanism that includes multiple avenues for complaint; prompt, thorough, and impartial investigations; and prompt and appropriate corrective action.
- Employers should encourage managers to intervene proactively and discuss whether particular religious expression is welcome if the manager believes the expression is likely to be construed as unwelcome to a reasonable person.
- Employers should allow religious expression among employees at least to the same extent that they allow other types of personal expression that are not harassing or disruptive to the operation of the business.[202]

- Once an employer is on notice that religious expression by an employee is unwelcome to another employee, the employer should investigate and, if appropriate, take steps to ensure that the expression in question does not become sufficiently severe or pervasive to create a hostile work environment.
- If harassment is perpetrated by a non-employee assigned by a contractor, vendor, or client, the supervisor or other appropriate individual in the impacted employee's chain of command should initiate a meeting with the contractor, vendor, or client regarding the harassment and require that it cease, that appropriate disciplinary action be taken if it continues, and/or that a different individual be assigned.
- To prevent conflicts from escalating to the level of a Title VII violation, employers should immediately intervene when they become aware of objectively abusive or insulting conduct, even absent a complaint.
- While supervisors are permitted to engage in certain religious expression, they should avoid expression that might – due to their supervisory authority – reasonably be perceived by subordinates as coercive, even when not so intended.

· Employee Best Practices ·

- Where they feel comfortable doing so, employees who find harassing workplace religious conduct directed at them unwelcome should inform the individual engaging in the conduct that they wish it to stop. If the conduct does not stop, employees should report it to their supervisor or other appropriate company official in accordance with the procedures established in the company's anti-harassment policy.
- Employees who do not wish personally to confront an individual who is engaging in unwelcome religious or anti-religious conduct should report the conduct to their supervisor or other appropriate company official in accordance with the company's anti-harassment policy.

12-IV REASONABLE ACCOMMODATION

Overview: Title VII requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief, practice, or

observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship.[203] The Title VII "undue hardship" defense is defined differently than the "undue hardship" defense for disability accommodation under the Americans with Disabilities Act (ADA). Title VII's undue hardship defense to providing religious accommodation has been defined by the Supreme Court as requiring a showing that the proposed accommodation in a particular case poses "more than a *de minimis*" cost or burden. This is a lower standard for an employer to meet than undue hardship under the ADA, which is defined in that statute as "an action requiring significant difficulty or expense."[204]

"Title VII requires otherwise-neutral policies to give way to the need for an accommodation."[205] An individual alleging the denial of a religious accommodation is generally seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion.[206] "The accommodation requirement is 'plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others.'"[207]

A. Religious Accommodation

A religious accommodation is an adjustment to the work environment that will allow the employee to comply with his or her religious beliefs. An employer need not provide a reasonable accommodation if doing so would cause undue hardship on the conduct of the employer's business, which the Supreme Court has interpreted to mean an accommodation that would require the employer to bear more than a *de minimis* cost or burden.[208] The employer's duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement that creates a conflict so that the employee or applicant will be able to observe or practice his or her religion. Accommodation requests often relate to work schedules, dress and grooming, or religious expression or practice while at work.[209] The Commission's position is that the denial of reasonable religious accommodation absent undue hardship is actionable even if the employee has not separately suffered an independent adverse employment action, such as being disciplined, demoted, or discharged as a consequence of being denied accommodation.[210] This is because requiring him to work without religious accommodation where a work rule conflicts with his religious beliefs necessarily

alters the terms and conditions of his employment for the worse.**[211]** However, the courts are split on this question.[212]

1. Notice of the Conflict Between Religion and Work

Employers need not provide an accommodation unless they are on notice that one is needed for religious purposes.**[213]** Typically, the employer will advise the applicant or employee of its policies or a particular work requirement, and in response the applicant or employee will indicate that an accommodation is needed for religious reasons. In some instances, even absent an applicant's or employee's request, the employer will be on notice that the observance or practice is religious and conflicts with a work policy, and therefore that accommodation is or could be needed.**[214]** In such circumstances, it would violate Title VII for an employer to fail to provide a reasonable accommodation unless it proves that doing so would pose an undue hardship.**[215]**

In addition, even in the absence of any notice that a religious accommodation is needed, an employer violates Title VII if it takes an adverse action against an applicant or employee (such as failing to hire) based on its belief that the applicant or employee might need a reasonable religious accommodation, unless the employer proves that such an accommodation would have imposed an undue hardship.**[216]**

When requesting accommodation, the applicant or employee need not use any "magic words," such as "religious accommodation" or "Title VII." The employer must have enough information to make the employer aware that there exists a conflict between the applicant's or employee's religious observance, practice, or belief and a requirement for applying for or performing the job.[217] If the employer reasonably needs more information, the employer and the applicant or employee should discuss the request. The applicant or employee may need to explain the religious nature of the belief, observance, or practice at issue, and cannot assume that the employer will already know or understand it.[218] Similarly, the employer should not assume that a request is invalid simply because it is based on religious beliefs or practices with which the employer is unfamiliar, but should ask the applicant or employee to explain the religious nature of the practice and the way in which it conflicts with a work requirement. In determining if a conflict exists, it is irrelevant that the employer does not view the work requirement as implicating a

religious belief, or that most people of the applicant's or employee's faith would not; it is the applicant's or employee's own religious beliefs that are relevant.[219]

EXAMPLE 30

Failure to Advise Employer That Request Is Due to Religious Practice or Belief

Jim agreed to take his employer's drug test but was terminated because he refused to sign the accompanying consent form. After his termination, Jim filed a charge alleging that the employer failed to accommodate his religious objection to swearing an oath. Until it received notice of the charge, the employer did not know that Jim's refusal to sign the form was based on his religious beliefs. Because the employer was not notified of the conflict at the time Jim refused to sign the form, or at any time prior to Jim's termination, it did not have an opportunity to offer to accommodate him. The employer has not violated Title VII.[220]

2. Discussion of Request

Although an employer is not required by Title VII to conduct a discussion with an employee before making a determination on an accommodation request, as a practical matter it can be important to do so. Both the employer and the employee have roles to play in resolving an accommodation request. In addition to placing the employer on notice of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted. Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether a reasonable accommodation is available without posing an undue hardship on the operation of the employer's business.[221] This typically involves the employer and employee mutually sharing information necessary to process the accommodation request. Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional

information reasonably needed to evaluate the request, the employee should provide it.

Failure to confer with the employee is not an independent violation of Title VII. But as a practical matter, such failure can have adverse legal consequences. For example, in some cases where an employer has made no effort to act on an accommodation request, courts have found that the employer lacked the evidence needed to meet its burden of proof to establish that the plaintiff's proposed accommodation would actually have posed an undue hardship.[222]

Likewise, employees should cooperate with an employer's requests for reasonable information. For example, if an employee requested a schedule change to accommodate daily prayers, the employer might need to ask for information about the religious observance, such as the time and duration of the daily prayers, in order to determine if accommodation can be granted without posing an undue hardship on the operation of the employer's business. Moreover, even if the employer does not grant the employee's preferred accommodation but instead provides a reasonable alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible.[223]

Where the accommodation request itself does not provide enough information to enable the employer to make a determination, and the employer has a bona fide doubt as to the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and that the belief or practice gives rise to the need for the accommodation.[224] Whether an employer has a reasonable basis for seeking to verify the employee's stated beliefs will depend on the facts of a particular case.

EXAMPLE 31

Sincerity of Religious Belief Questioned

Bob, who had been a dues-paying member of the CDF union for fourteen years, had a work-related dispute with a union official and one week later asserted that union activities were contrary to his religion and that he could no longer pay union dues. The union

> doubted whether Bob's request was based on a sincerely held religious belief, given that it appeared to be precipitated by an unrelated dispute with the union, and he had not sought this accommodation in his prior fourteen years of employment. In this situation, the union can require him to provide additional information to support his assertion that he sincerely holds a religious conviction that precludes him from belonging to – or financially supporting – a union.[225]

When an employer requests additional information, employees should provide information that addresses the employer's reasonable doubts. That information need not, however, take any specific form. For example, written materials or the employee's own first-hand explanation may be sufficient to alleviate the employer's doubts about the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary. Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is requested, it does not have to come from a clergy member or fellow congregant, but rather could be provided by others who are aware of the employee's religious practice or belief.[226]

An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment.

EXAMPLE 32

Clarifying a Request

> Diane requests that her employer schedule her for "fewer hours" so that she can "attend church more frequently." The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice. While Diane's request lacked sufficient detail for the employer to make

a final decision, it was sufficient to constitute a religious accommodation request. Rather than denying the request outright, the employer should have obtained the information from Diane that it needed to make a decision. The employer could have inquired of Diane precisely what schedule change was sought and for what purpose, and how her current schedule conflicted with her religious practices or beliefs. Diane would then have had an obligation to provide sufficient information to permit her employer to make a reasonable assessment of whether her request was based on a sincerely held religious belief, the precise conflict that existed between her work schedule and church schedule, and whether granting an accommodation would pose an undue hardship on the employer's business.

3. What is a "Reasonable" Accommodation?

Although an employer never has to provide an accommodation that would pose an undue hardship, *see infra* § 12-IV-B, it discharges its accommodation duty if it provides a "reasonable" accommodation. An adjustment offered by an employer is not a "reasonable" accommodation if it merely lessens rather than eliminates the conflict between religion and work, provided that eliminating the conflict would not impose an undue hardship.[227] If all accommodations eliminating such a conflict would impose an undue hardship on an employer, the employer must reasonably accommodate the employee's religious practice to the extent that it can without suffering an undue hardship, even though such an accommodation would be "partial" in nature.[228] To qualify as a reasonable accommodation, an adjustment also must not discriminate against the employee or unnecessarily disadvantage the employee's terms, conditions, or privileges of employment.[229]

Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not obliged to provide the accommodation preferred by the employee.[230] However, an employer's proposed accommodation will not be "reasonable" if a more favorable accommodation is provided to other employees for non-religious purposes,[231] or, for example, if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.[232]

Ultimately, reasonableness is a fact-specific determination. "The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another . . . . 'The term "reasonable accommodation" is a relative term and cannot be given a hard and fast meaning. Each case . . . necessarily depends upon its own facts and circumstances, and comes down to a determination of "reasonableness" under the unique circumstances of the individual employer-employee relationship.'"[233]

EXAMPLE 33

Employer Violates Title VII if it Offers Only Partial Accommodation Where Full Accommodation Would Not Pose an Undue Hardship

Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel this time off only every other week. The arena's proposed adjustment does not fully eliminate the religious conflict and therefore cannot be deemed a reasonable accommodation in the absence of a showing that giving Rachel the requested time off every week poses an undue hardship for the arena. If the arena makes that showing, it must still accommodate Rachel's religious practice to the extent it can without suffering an undue hardship, which could include granting some, but not all, Friday evenings and/or Saturdays off.[234]

EXAMPLE 34

Employer Not Obligated to Provide Employee's Preferred Accommodation

Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays. Tina specifically asked to be scheduled to

work Saturdays instead. In response, her employer offered to allow her to work on Thursdays, which she found inconvenient because she takes a college class on that day. Even if Tina preferred a different schedule, the employer is not required to grant Tina's preferred accommodation.[235]

EXAMPLE 35

Accommodation by Transfer

Yvonne, a member of the Pentecostal faith, was employed as a nurse at a hospital. When she was assigned to the Labor and Delivery Unit, she advised the nurse manager that her faith forbids her from participating directly or indirectly in ending a life, and that this proscription prevents her from assisting with abortions. She asked the hospital to accommodate her religious beliefs by allowing her to trade assignments with other nurses in the Labor and Delivery Unit as needed. The hospital concluded that, due to staffing cuts and risks to patients' safety, it could not accommodate Yvonne within the Labor and Delivery Unit because there were not enough staff members able and willing to trade with her. The hospital instead offered to permit Yvonne to transfer, without a reduction in pay or benefits, to a vacant nursing position in the Newborn Intensive Care Unit, which did not perform abortion procedures. As described below,[236] an employee should be accommodated in his or her current position absent an undue hardship. Here, the hospital could not accommodate Yvonne in her current position due to staffing cuts and risks to patient safety, so the hospital's solution of a lateral transfer complies with Title VII.[237] If the hospital is government run or receives federal funds, it could also have obligations to accommodate Yvonne under federal laws protecting conscience rights of its health care employees.[238]

Title VII is violated by an employer's failure to reasonably accommodate even if, to avoid adverse consequences, an employee continues to work after his or her accommodation request is denied. "[A]n employee who temporarily gives up his [or her] religious practice to submit to employment requirements [does not] waive[] his [or her] discrimination claim."[239] Thus, the fact that an employee acquiesces to

the employer's work rule, continuing to work without an accommodation after the employer has denied the request, should not defeat the employee's legal claim.[240]

In addition, the obligation to provide reasonable accommodation absent undue hardship is a continuing obligation. Employers should be aware that an employee's religious beliefs and practices may evolve or change over time, and that this may result in requests for additional or different accommodations.[241] Similarly, the employer has the right to discontinue a previously granted accommodation that is no longer utilized for religious purposes or subsequently poses an undue hardship.

B. Undue Hardship

An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship. The Supreme Court has defined "undue hardship" for purposes of Title VII as imposing "more than a *de minimis* cost" on the operation of the employer's business.[242] The concept of "more than *de minimis* cost" is discussed below in sub-section 2. Although the employer's showing of undue hardship under Title VII is easier than under the ADA, the burden of persuasion is still on the employer.[243] If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

1. Case-by-Case Determination

The determination of whether a particular proposed accommodation imposes an undue hardship "must be made by considering the particular factual context of each case."[244] Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.[245] For example, an employer with multiple facilities might be better able than another employer to accommodate a Muslim employee who seeks a transfer to a location with a nearby mosque that he can attend during his lunch break.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve.[246] An employer cannot rely on hypothetical hardship when faced with an employee's religious obligation that conflicts with scheduled work, but rather should rely on objective information.[247] A mere assumption that many more people with the

same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

2. More than "*De Minimis* Cost"

To establish undue hardship, the employer must demonstrate that the accommodation would require the employer "to bear more than a *de minimis* cost."[248] However, "'[u]ndue hardship is something greater than hardship.'"[249] Factors to be considered include "the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation."[250] Generally, the payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes, or infrequent or temporary payment of premium wages (e.g., overtime rates) while a more permanent accommodation is sought, will not constitute more than a *de minimis* cost, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally require more than *de minimis* cost to the employer.[251]

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs,[252] infringes on other employees' job rights or benefits,[253] impairs workplace safety,[254] or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work.[255] Whether the proposed accommodation conflicts with another law will also be considered.[256]

EXAMPLE 36

Religious Need Can Be Accommodated

David wears long hair pursuant to his Native American religious beliefs. David applies for a job as a server at a restaurant which requires its male employees to wear their hair "short and neat," in order to provide a certain image to its customers. When the restaurant manager informs David that if offered the position he will have to cut his hair, David explains that he keeps his hair long based on his

religious beliefs and offers to wear it held up with a clip or under a hair net. The manager refuses this accommodation and denies David the position based on his long hair. Since the evidence indicated that David could have been accommodated, without undue hardship, by wearing his hair in a ponytail or held up with a clip, the employer will be liable for denial of reasonable accommodation and discriminatory failure to hire.

EXAMPLE 37

Safety Risk Poses Undue Hardship

Patricia alleges she was terminated from her job as a steel mill laborer because of her religion (Pentecostal) after she notified her supervisor that her faith prohibits her from wearing pants, as required by the mill's dress code, and requested as an accommodation to be permitted to wear a skirt. Management contends that the dress code is essential to the safe and efficient operation of the mill and has evidence that it was imposed following several accidents in which skirts worn by employees were caught in the same type of mill machinery that Patricia operates. Because the evidence establishes that wearing pants is truly necessary for safety reasons, the accommodation requested by Patricia poses an undue hardship.**[257]**

3. Seniority Systems and Collectively Bargained Rights

A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA).**[258]** Of course, the mere existence of a conflict between the requested accommodation and a seniority system or CBA does not relieve the employer of the duty to attempt reasonable accommodation of its employees' religious practices; the question is whether an accommodation can be provided without violating the seniority system or CBA.**[259]** Allowing voluntary substitutes and swaps does not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system or CBA.**[260]** Employer and employee arrangements regarding voluntary substitutes and swaps are discussed in more detail in section 12-IV-C-2.

EXAMPLE 38

Schedules Based on a Seniority System or Collectively Bargained Rights

Susan, an employee of Quick Corp., asks not to work on her Sabbath. Quick Corp. and its employees' union have negotiated a CBA which provides that weekend shifts will rotate evenly among employees. If Susan can find qualified coworkers voluntarily willing to swap shifts to accommodate her sincerely held religious beliefs, the employer could be found liable for denial of reasonable accommodation if it refuses to permit the swap to occur. The existence of the collectively bargained system for determining weekend shifts should not result in the denial of accommodation if a voluntary swap can be arranged by the employee without violating the system or otherwise posing an undue hardship. The result would be the same if Quick Corp. had a unilaterally imposed bona fide seniority system (rather than a CBA) pursuant to which weekend shifts are determined.

However, if other employees were unwilling to swap shifts or were otherwise harmed by not requiring Susan to work on the shift in question, or the employer would be subject to other operational costs that were more than *de minimis* by allowing Susan to swap shifts, then the employer can demonstrate undue hardship.[261]

4. Coworker Complaints

Although infringing on coworkers' abilities to perform their duties[262] or subjecting coworkers to a hostile work environment[263] will generally constitute undue hardship, the general disgruntlement, resentment, or jealousy of coworkers will not.[264] Undue hardship requires more than proof that some coworkers complained or are offended by an unpopular religious belief or by alleged "special treatment" afforded to the employee requesting religious accommodation; a showing of undue hardship based on coworker interests generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption of work.[265] Applying this standard, it would be an undue hardship for an employer to accommodate religious expression that is unwelcome potential

harassment based on race, color, sex, national origin, religion, age, disability, or genetic information, or based on its own internal anti-harassment policy, and it may take action consistent with its obligations under Title VII and the other EEO laws. *See also* §§ 12-III-C, *supra*, and 12-IV-C-6, *infra* (discussing complaints regarding proselytizing and other forms of religious expression).

5. Security Considerations

If a religious practice conflicts with a legally mandated federal, state, or local security requirement, an employer need not accommodate the practice because doing so would create an undue hardship. If a security requirement has been unilaterally imposed by the employer and is not required by law or regulation, courts will engage in a fact-specific inquiry to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict.

EXAMPLE 39

Accommodation Implicating Security Concerns

Patrick is employed as a correctional officer at a state prison, and his brother William is employed as a grocery store manager. Both Patrick and William seek permission from their respective employers to wear a fez at work as an act of faith on a particular holy day as part of their religious expression. Both employers deny the request, citing a uniformly applied workplace policy prohibiting employees from wearing any type of head covering. The prison's policy is based on security concerns, supported by evidence, that head coverings may be used to conceal drugs, weapons, or other contraband, and may spark internal violence among prisoners. The grocery store's policy is based on a stated desire that all employees wear uniform clothing so that they can be readily identified by customers. If both brothers file EEOC charges challenging the denials of their accommodation requests, the EEOC likely will not find reasonable cause in Patrick's case because the prison's denial of his request was based on legitimate, evidence-based security considerations posed by the particular religious garb sought to be worn. The EEOC likely will find cause in William's case because

there is no indication it would pose an undue hardship for the grocery store to modify its policy with respect to his request.[266]

EXAMPLE 40

Kirpan

Harvinder, a Sikh who works in a hospital, wears a small sheathed kirpan (religious article of faith resembling a knife) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a coworker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with the Sikh Code of Conduct and gave him literature explaining that the kirpan is a religious article of faith, not a weapon. She also showed him the kirpan, allowing him to see that it was no sharper than scissors, box cutters, cake knives, paper cutters, and other secular objects in the workplace. Nevertheless, Bill told her that she would be terminated if she continued to wear the kirpan at work. Absent evidence that allowing Harvinder to wear the kirpan would pose an undue hardship in the factual circumstances of this case, the hospital is liable for denial of accommodation.

C. Common Methods of Accommodation in the Workplace

Under Title VII, an employer or other covered entity may use a variety of methods to provide reasonable accommodations to its employees. The most common methods are: (1) flexible scheduling; (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfers or changes in job assignment; and (4) modifying workplace practices, policies, or procedures.

1. Scheduling Changes

An employer may be able to reasonably accommodate an employee by allowing flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours, and other means to enable an employee to make up time lost due to the observance of religious practices.[267] However, EEOC's position is that it is insufficient merely to eliminate part of the conflict, unless eliminating the conflict in its entirety poses an undue hardship.[268]

EXAMPLE 41

Break Schedules/Prayer at Work

Rashid, a janitor, tells his employer on his first day of work that he practices Islam and will need to pray at several prescribed times during the workday in order to adhere to his religious practice of praying at five times each day, for several minutes, with hand washing beforehand. The employer objects because its written policy allows one fifteen-minute break in the middle of each morning and afternoon. Rashid's requested change in break schedule will not exceed the 30 minutes of total break time otherwise allotted, nor will it affect his ability to perform his duties or otherwise cause an undue hardship for his employer. Thus, Rashid is entitled to accommodation.[269]

EXAMPLE 42

Blanket Policies Prohibiting Time Off

A large employer operating a fleet of buses had a policy of refusing to accept driver applications unless the applicant agreed that he or she was available to be scheduled to work any shift, seven days a week. This policy would violate Title VII if applied to discriminate against applicants who refrain from work on certain days for religious reasons,

by failing to allow for the provision of religious accommodation absent undue hardship.[270]

2. Voluntary Substitutes and Shift Swaps

The reasonable accommodation requirement can often be satisfied without undue hardship where a volunteer with substantially similar qualifications is available and willing to switch shifts, either for a single absence or multiple absences, including absences occurring over an extended period of time. "[T]he obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which [covered entities] should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, [physical or electronic] bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed."**[271]** The employer's obligation is to make a good faith effort to allow voluntary substitutions and shift-swaps to accommodate a religious conflict.[272] This does not require the employer itself to arrange a substitute or swap, but where it is difficult for employees to arrange shift substitutes or swaps on their own, the employer may have an obligation to do more to facilitate the search for volunteers.[273] Likewise, if the employer is on notice that the employee's religious beliefs preclude him not only from working on his Sabbath but also from inducing others to do so, reasonable accommodation requires more than merely permitting the employee to swap.[274] An employer does not have to permit a substitute or swap if it would pose an undue hardship. As noted above, under the *de minimis* cost standard, if a swap or substitution would result in the employer having to pay premium wages (such as overtime pay), the frequency of the arrangement will be relevant to determining if it poses an undue hardship; "the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation."[275]

If it does not pose an undue hardship, an employer must make an exception to its policy of requiring all employees, regardless of seniority, to work an "equal number of weekend, holiday, and night shifts," and instead permit voluntary shift swaps between qualified coworkers in order to accommodate a particular employee's

sincerely held religious belief that he should not work on his or her Sabbath. Of course, if allowing a swap or other accommodation would not provide the coverage the employer needs for its business operations or otherwise pose an undue hardship, the accommodation does not have to be granted.

3. Change of Job Tasks and Lateral Transfer

When an employee's religious belief or practice conflicts with a particular task, appropriate accommodations may include relieving the employee of the task or transferring the employee to a different position or location that eliminates the conflict with the employee's religion. Whether or not such accommodations pose an undue hardship will depend on factors such as the nature or importance of the duty at issue, the nature of the employer's business, the availability of others to perform the function, the availability of other positions, and the applicability of a collective bargaining agreement or seniority system.

EXAMPLE 43

Restaurant Server Excused from Singing Happy Birthday

Kim, a server at a restaurant, informed her manager that she would not be able to join other waitresses in singing "Happy Birthday" to customers because she is a Jehovah's Witness whose religious beliefs do not allow her to celebrate holidays, including birthdays. There were enough servers on duty at any given time to perform this singing without affecting service. The manager refused any accommodation. If Kim files a Title VII charge alleging denial of religious accommodation, the EEOC will find cause because the restaurant could have accommodated her with little or no expense or disruption.

EXAMPLE 44

Pharmacist Excused from Providing Contraceptives

Neil, a pharmacist, was hired by a large corporation that operates numerous large pharmacies at which more than one pharmacist is on

duty during all hours of operation. Neil informed his employer that he refuses on religious grounds to participate in distributing contraceptives or answering any customer inquiries about contraceptives. The employer reasonably accommodated Neil by offering to allow Neil to signal discreetly to a coworker who would take over servicing any customer who telephoned, faxed, or came to the pharmacy regarding contraceptives.[276]

EXAMPLE 45

Pharmacist Not Permitted to Turn Away Customers

In the above example, assume that instead of facilitating the assistance of such customers by a coworker, Neil leaves on hold indefinitely those who call on the phone about a contraceptive rather than transferring their calls, and walks away from in-store customers who seek to fill a contraceptive prescription rather than signaling a coworker. Neil refuses to signal another employee or inform the customer on the phone that he is placing them on a brief hold while he gets another employee. The employer is not required to accommodate Neil's request to remain in such a position yet avoid all situations where he might even briefly interact with customers who have requested contraceptives, or to accommodate a disruption of business operations. The employer may discipline or terminate Neil if he disrupts business operations.[277]

The employee should generally be accommodated in his or her current position if doing so does not pose an undue hardship.[278] For example, if a pharmacist who has a religious objection to dispensing contraceptives can be accommodated without undue hardship by allowing the pharmacist to signal a coworker to assist customers with such prescriptions, the employer should not choose instead to accommodate by transferring the pharmacist to a different position. If no such accommodation is possible, the employer needs to consider whether lateral transfer is a possible accommodation.[279] The employer cannot transfer the pharmacist to a position that entails less pay, responsibility, or opportunity for advancement unless a lateral transfer is unavailable or would otherwise pose an undue hardship.[280]

EXAMPLE 46

Lateral Transfer Versus Transfer to a Lower-Paying Position

An electrical utility lineman requests accommodation of his Sabbath observance, but because the nature of his position requires being available to handle emergency problems at any time, there is no accommodation that would permit the lineman to remain in his position without posing an undue hardship. The employer can accommodate the lineman by offering a lateral transfer to another assignment at the same pay, if available. If, however, no job at the same pay is readily available, then the employer could satisfy its obligation to reasonably accommodate the lineman by offering to transfer him to a different job, even at lower pay, if one is available. [281]

4. Modifying Workplace Practices, Policies and Procedures

An employer may have to make an exception to its policies, procedures, or practices in order to grant a religious accommodation.[282]

a. Dress and Grooming Standards

When an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee may ask for an exception to the policy as a reasonable accommodation.[283] Religious dress may include clothes, head or face coverings, jewelry, or other items. Religious grooming practices may relate, for example, to shaving or hair length. Absent undue hardship, religious discrimination may be found where an employer fails to reasonably accommodate the employee's religious dress or grooming practices.[284]

EXAMPLE 47

Facial Hair

Prakash, who works for CutX, a surgical instrument manufacturer, does not shave or trim his facial hair because of his Sikh religious observance. When he seeks a promotion to manage the division responsible for sterilizing the instruments, his employer tells him that, to work in that division, he must shave or trim his beard because otherwise his beard may contaminate the sterile field. When Prakash explains that he cannot trim his beard for religious reasons, the employer offers to allow Prakash to wear two face masks instead of trimming his beard. Prakash thinks that wearing two masks is unreasonable (for reasons unrelated to his religious practice) and files a Title VII charge. CutX will prevail because it offered a reasonable accommodation that would eliminate Prakash's religious conflict with the hygiene rule.

Some courts have concluded that it would pose an undue hardship if an employer was required to accommodate a religious dress or grooming practice that conflicts with the public image the employer wishes to convey to customers.[285] While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may in a given case be considered disparate treatment, including because it is tantamount to reliance on customer religious bias (so-called "customer preference") in violation of Title VII.[286]

EXAMPLE 48

Religious Garb

Nasreen, a Muslim ticket agent for a commercial airline, wears a hijab (headscarf) to work at the airport ticket counter. After September 11, 2001, her manager objected, telling Nasreen that the customers might think she was sympathetic to terrorist hijackers. Nasreen explains to her manager that wearing the hijab is her religious practice and continues to wear it. She is terminated for wearing a hijab over her manager's objection. Customer fears or prejudices do not amount to undue hardship. As a result, the airline's refusal to accommodate her and its subsequent decision to terminate her violate Title VII. In

addition, if the commercial airline had denied Nasreen the position due to perceptions of customer preferences about religious attire, that would also be disparate treatment based on religion in violation of Title VII, because it would be the same as refusing to hire Nasreen because she is a Muslim. *See supra* § 12-II-B.[287]

There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship.[288] This issue should be resolved on a case-by-case basis.

b. Use of Employer Facilities

If any employee needs to use a workplace facility as a reasonable accommodation, for example use of a quiet area for prayer during break time, the employer should accommodate the request under Title VII unless it would pose an undue hardship. If the employer allows employees to use the facilities at issue for non-religious activities not related to work, it may be difficult for the employer to demonstrate that allowing the facilities to be used in the same manner for religious activities is not a reasonable accommodation or poses an undue hardship.[289]

EXAMPLE 49

Use of Employer Facilities

An employee whose assigned work area is a factory floor rather than an enclosed office asks his supervisor if he may use one of the company's unoccupied conference rooms to pray during a scheduled break time. The supervisor must grant this request if it would not pose an undue hardship. An undue hardship would exist, for example, if the only conference room is used for work meetings at that time. However, the supervisor is not required to provide the employee with his choice of the available locations and can meet the accommodation obligation by making any appropriate location available that would accommodate the employee's religious needs if this can be done absent undue hardship, for example by offering an unoccupied area of the work space rather than the conference room.

c. Tests and Other Selection Procedures

An employer has an obligation to reasonably accommodate an applicant when scheduling a test or administering other selection procedures, where the applicant has informed the employer of a sincerely held religious belief that conflicts with a pre-employment testing requirement, unless undue hardship would result.[290] An employer may not permit an applicant's presumed or actual need for a religious accommodation to affect its decision whether or not to hire the applicant unless the employer can demonstrate that it cannot reasonably accommodate the applicant's religious observance or practice without undue hardship.[291]

d. Objections to Providing Social Security Numbers or Complying with Employer Identification Procedures

Whether it poses an undue hardship for an employer to provide an alternative means of identification for matters such as government forms, building security, or timekeeping will depend on the facts. It will typically pose an undue hardship for an employer to accommodate an applicant's or employee's asserted religious belief against providing or using a social security number, or identification requirements imposed by another federal law.[292] However, in cases where an alternative method of identification is feasible and does not pose an undue hardship, it may be required as a religious accommodation.[293]

5. Excusing Union Dues or Agency Fees

Absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union.[294] Such an employee can be accommodated, in many cases, by allowing the equivalent of her union dues (payments by union members) or agency fees (payments often required from non-union members in a unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer.[295] Whether a charity-substitute accommodation for payment of union dues would cause an undue hardship is an individualized determination based upon, among other things, the union's size, operational costs, and the number of individuals who need the accommodation.[296]

If an employee's religious objection is not to joining or financially supporting the union, but rather to the union's support of certain political or social causes, the employee may be accommodated if it would not pose an undue hardship by, for

example, reducing the amount owed, allowing the employee to donate to a charitable organization the full amount the employee owes or that portion that is attributable to the union's support of the cause to which the employee has a religious objection, or diverting the amount owed to the national, state, or local union in the event one of those entities does not engage in support of the cause to which the employee has a religious objection.[297]

6. Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

Some employees may seek to display religious icons or messages at their workstations or use a particular religious phrase when greeting others. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs or distributing literature. Still others may seek to engage in prayer at their workstations or to use other areas of the workplace for either individual or group prayer, study, or meeting. In some of these situations, an employee might request accommodation in advance to permit such religious expression. In other situations, the employer will not learn of the situation or be called upon to consider any action unless it receives complaints about the religious expression from either other employees or customers. As noted in §§ 12-II-A-3 and 12-III-C of this document, prayer, proselytizing, and other forms of religious expression do not solely raise a religious accommodation issue but may also raise intentional discrimination or harassment issues.

To determine whether allowing or continuing to permit an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, employers should consider the potential disruption, if any, that will be posed by permitting the expression of religious belief.[298] As explained below, relevant considerations may include the effect the religious expression has had, or can reasonably be expected to have, if permitted to continue, on coworkers, customers, or business operations.

a. Effect on Workplace Rights of Coworkers

Religious expression can create undue hardship if it disrupts the work of other employees or constitutes—or threatens to constitute—unlawful harassment. Conduct that is disruptive can still constitute an undue hardship, even if it does not rise to the level of unlawful harassment. Since an employer has a duty under Title

VII to protect employees from harassment, it would be an undue hardship to accommodate expression that is harassing.**[299]** As explained in § 12-III-A-2-b of this document, religious expression directed toward coworkers, made in coworkers' presence, or that a coworker learns of, might constitute unlawful harassment in some situations, for example where it is facially abusive (i.e., demeans people of other religions) or where, even if not abusive, it persists even though it is clearly unwelcome. However, as with bias from customers, if coworkers' objections are not because the conduct is facially abusive or persistent but rather because of bias of coworkers against religious expression generally or that particular religious expression, it is unlikely that accommodating the religious expression would be an undue hardship. It is necessary to make a case-by-case determination regarding whether the effect on coworkers actually is an undue hardship. Mere subjective offense or disagreement with unpopular religious views or practices by coworkers is not sufficient to rise to the level of unlawful harassment. However, this does not require waiting until the unwelcome behavior becomes severe or pervasive.[300] As with harassment on any basis, it is permitted and advisable for employers to take action to stop alleged harassment *before* it becomes severe or pervasive, because while isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful.[301]

b. Effect on Customers

The determination of whether it is an undue hardship to allow employees to engage in religiously oriented expression toward customers is a fact-specific inquiry and will depend on the nature of the expression, the nature of the employer's business, and the extent of the impact on customer relations. For example, one court found that it was a reasonable accommodation to allow an employee to use the general religious greeting "Have a Blessed Day" with coworkers and with customers who had not objected, rather than using it with everyone, including a customer who objected.[302] However, other courts have found undue hardship where religiously oriented expression was used in the context of a regular business interaction with a client.[303] Whether or not the client objects, religiously oriented expression may create an undue hardship for an employer where the expression could be mistaken as the employer's message, particularly in the instance of government employers.[304] Where the religiously oriented expression is not limited to use of a phrase or greeting, but rather is in the manner of individualized, specific proselytizing, an employer is far more likely to be able to demonstrate that it would constitute an

undue hardship to accommodate an employee's religious expression, regardless of the length or nature of the business interaction.[305]

EXAMPLE 50

Display of Religious Objects by an Employee

Susan and Roger are members of the same church and are both employed at XYZ Corporation. Susan works as an architect in a private office on an upper floor, where she occasionally interacts with coworkers, but not with clients. Roger is a security guard stationed at a desk in the front lobby of the XYZ building through which all employees, clients, and other visitors must enter. At a recent service at Susan and Roger's church, the minister distributed posters with the message "Jesus Saves!" and encouraged parishioners to display the posters at their workplaces in order to "spread the word." Susan and Roger each display the poster on the wall above their respective workstations. XYZ orders both to remove the poster despite the fact that both explained that they felt a religious obligation to display it, and despite the fact that there have been no complaints from coworkers or clients.

Susan and Roger file charges alleging denial of religious accommodation. The employer will probably be unable to show that allowing Susan to display a religious message in her personal workspace posed an undue hardship, unless there was evidence of disruption to the business or the workplace which resulted. By contrast, because Roger sits at the lobby desk and the poster is the first thing that visitors see upon entering the building, it would appear to represent XYZ's views and would therefore likely be shown to pose an undue hardship.[306]

EXAMPLE 51

Undue Hardship to Allow Employee to Discuss Religion with Clients

Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen's employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted. Helen's belief in the need to evangelize to clients cannot be accommodated without undue hardship. The employer has the right to control speech that threatens to impede provision of effective and efficient services. Clients, especially in a mental health setting, may not understand that the religious message represents Helen's beliefs rather than the facility's view of the most beneficial treatment for the patient.[307]

7. Employer-Sponsored Programs

Some employers have integrated their own religious beliefs or practices into the workplace, and they are entitled to do so.[308] However, if an employer holds religious services or programs or includes prayer in business meetings, Title VII requires that the employer accommodate an employee who asks to be excused for religious reasons, including non-belief, absent a showing of undue hardship.[309] Excusing an employee from religious services normally does not create an undue hardship because it does not cost the employer anything and does not disrupt business operations or other workers.[310]

EXAMPLE 52

Prayer at Meetings

Michael's employer requires that the mandatory weekly staff meeting begin with a religious prayer. Michael objects to participating because he believes it conflicts with his own sincerely held religious beliefs. He asks his supervisor to allow him to arrive at the meeting after the prayer. The supervisor must accommodate Michael's religious belief by either granting his request or offering an alternative accommodation that would remove the conflict between Michael's religious belief and the staff meeting prayer, even if other employees

of Michael's religion do not object to being present for the prayer.[311] The outcome would be the same if Michael sought the accommodation based on his lack of religious belief.

EXAMPLE 53

Employer Holiday Decorations

Each December, the president of XYZ corporation directs that several wreaths be placed around the office building and a tree be displayed in the lobby. Several employees complain that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions. Title VII does not require that XYZ corporation remove the wreaths and tree or add holiday decorations associated with other religions.[312] The result under Title VII on these facts would be the same whether in a private or government workplace.[313]

Similarly, an employer is required, absent undue hardship, to excuse an employee from compulsory personal or professional development training or participation in an initiative or celebration where it conflicts with the employee's sincerely held religious beliefs, observances, or practices.[314] There may be cases, however, where an employer can show that it would pose an undue hardship to provide an alternative training or to excuse an employee from any part of a particular training, even if the employee asserts it is contrary to his religious beliefs to attend (e.g., where the training provides information on how to perform the job, on how to comply with equal employment opportunity obligations, or on other workplace policies, procedures, or applicable legal requirements).

EXAMPLE 54

Religious Objection to Training Program – Employee Must Be Excused

As part of its effort to promote employee health and productivity, the new president of a company institutes weekly mandatory on-site meditation classes led by a local spiritualist. Angelina explains to her supervisor that the meditation conflicts with her sincerely held religious beliefs and asks to be excused from participating. Because it would not pose an undue hardship, the company must accommodate Angelina's religious belief by excusing her from the weekly meditation classes, even if the company and other employees believe that this form of meditation does not conflict with any religious beliefs.

EXAMPLE 55

Religious Objection to Training Program – Employee Need Not Be Excused

Employer XYZ holds an annual training for employees on a variety of personnel matters, including compliance with EEO laws and also XYZ's own internal anti-discrimination policy, which includes a prohibition on sexual orientation discrimination. Lucille asks to be excused from the portion of the training on sexual orientation discrimination because she believes that it "promotes the acceptance of homosexuality," which she sincerely believes is immoral and sinful based on her religion. The training does not tell employees to value different sexual orientations but simply discusses and reinforces laws and conduct rules requiring employees not to discriminate against or harass other employees based on sexual orientation and to treat one another professionally. Because an employer needs to make sure that its employees know about and comply with such laws and workplace rules, it would be an undue hardship for XYZ to excuse Lucille from the training.[315]

· NOTE TO EEOC INVESTIGATORS ·

While not all of the following issues will be in dispute in every charge alleging denial of religious accommodation, if CP alleges that R failed to accommodate CP's

religious beliefs, observances, or practices, the investigator should generally follow this line of inquiry, considering these steps:

⇒ Ascertain the nature of the belief, observance, or practice that CP claims R has failed to accommodate (e.g., dress, grooming, holy day observance, etc.) and what accommodation was sought and needed (e.g., exception to dress code, schedule change, leave, etc.).

⇨ If disputed by R, determine what evidence R relies on to support its position that CP's beliefs are not "religious" in nature.

⇨ If disputed by R, determine what evidence R relies on to support its position that CP does not "sincerely hold" the particular religious belief, observance, or practice at issue.

⇒ Ascertain whether R was aware of the need for a religious accommodation, i.e., whether CP informed R that an accommodation was needed and that it was for religious reasons, whether R knew of the need for a religious accommodation through other means, or whether R believed CP needed an accommodation (regardless of whether that belief was accurate). The investigator should seek evidence of when, where, how, and to whom any such notice was given, and the names of any witnesses to the notification, or, absent such notice, evidence regarding whether R believed CP would require accommodation.

⇒ If R claims that it was not aware of CP's need for an accommodation, the investigator should attempt to resolve any discrepancies between R's contention and CP's allegation by gathering additional available evidence corroborating or refuting CP's and R's contentions.

⇒ Determine R's response, if any, to any notification of the need for an accommodation or any belief that an accommodation may be required. Was an accommodation offered, and if so, what? The investigator should obtain R's documentary evidence of all attempts to accommodate CP, if any attempts were made.

⇒ The investigator should seek a specific and complete explanation from R as to the facts on which it relied in making a determination regarding whether to accommodate CP (e.g., why R concluded CP did not have a sincerely held religious belief or practice, what accommodations, if any, R offered, why it chose to offer or not offer an accommodation, or why R concluded that accommodation would have posed an undue hardship in terms of cost, disruption, effect on coworkers, or any other reason). For example, in the event R is a union and the accommodation claim relates to payment of agency fees or

union dues, the investigator should obtain any relevant information regarding how the particular union at issue may have handled payment by this religious objector in order to provide accommodation.

⇒ If R asserts that it did not accommodate CP's request because it would have posed an undue hardship, obtain all available evidence regarding whether and what kind of a hardship would in fact have been posed, i.e., whether the alleged burden would have been more than *de minimis*. If R's undue hardship defense is based on cost, ascertain the cost of the accommodation in relation to R's size, nature of business operations, operating costs, and the impact, if any, of similar accommodations already being provided to other employees. If R's undue hardship defense is based on a factor other than cost (i.e., disruption, production or staffing levels, security, or other factor), similarly ascertain the impact of the accommodation with respect to R's particular workplace and business.

⇒ When there is more than one method of accommodation available that would not cause undue hardship, the investigator should evaluate whether the accommodation offered is reasonable by examining: (1) whether any alternative accommodation that was available was reasonable; (2) whether R considered any alternatives for accommodation; (3) the alternative(s) for accommodation, if any, that R actually offered to CP; (4) whether the alternative(s) the employer offered eliminated the conflict; and (5) whether the alternative(s) the employer offered adversely affected CP's terms, conditions, or privileges of employment or employment opportunities, as compared to other available accommodations (e.g., a loss in pay).[316]

⇒ If R asserts CP failed to cooperate with R in reaching an accommodation, obtain any available evidence regarding the relevant communications between R and CP, including any evidence documenting CP's refusal of any offer of reasonable accommodation.

⇒ If it appears, or if CP claims, that R based an adverse action (e.g., refusal to hire) in part on its belief that CP would need a religious accommodation, obtain any available evidence bearing on the employer's motivations for the action.

• Employer Best Practices •

Reasonable Accommodation - Generally.

- Employers should inform employees and applicants that they will make reasonable efforts to accommodate religious practices.
- Employers should train managers and supervisors on how to recognize religious accommodation requests from employees.
- Employers should consider developing internal procedures for processing religious accommodation requests. Where the employer relies on a staffing firm or other entity for any of its staffing needs, the employer and the staffing entity should coordinate in advance how they will handle accommodating applicants' or employees' religious beliefs or practices, consistent with these best practices.
- Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.
- Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options.
- An employer is not required to provide an employee's preferred accommodation if there is more than one reasonable alternative. An employer should, however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.
- Managers and supervisors should be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.
- When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

Undue Hardship – Generally

- The undue hardship standard refers to the legal requirement. Employers should be flexible in evaluating whether or not an accommodation is feasible, in light of that legal requirement. As with all aspects of employee relations, employers are free to go beyond the requirements of the law.
- An employer should not assume that an accommodation will conflict with the terms of a seniority system or collective bargaining agreement (CBA) without first checking if there are any exceptions for religious accommodation or other avenues to allow an accommodation consistent with the seniority system or CBA.
- An employer should not automatically reject a request for religious accommodation just because the accommodation would interfere with the existing seniority system or terms of a CBA. Although an employer may not upset coworkers' settled expectations, an employer is free to seek a voluntary modification to a CBA in order to accommodate an employee's religious needs.
- Employers should train managers that, if the requested accommodation would violate the CBA or seniority system, they should confer with the employee to determine if an alternative accommodation is available.
- Employers should ensure that managers are aware that reasonable accommodation may require making exceptions to policies or procedures that are not part of a CBA or seniority system, where it would not infringe on other employees' legitimate expectations.

Schedule Changes

- Employers should work with employees who need an adjustment to their work schedules to accommodate their religious practices.
- Notwithstanding that the legal standard for undue hardship is "more than a *de minimis* cost," employers may choose voluntarily to incur whatever additional operational or financial costs they deem appropriate to accommodate an employee's religious need for scheduling flexibility.
- Employers should consider adopting flexible leave and scheduling policies and procedures that will often allow employees to meet their religious and

other personal needs. Such policies can reduce individual requests for exceptions. For example, some employers have policies allowing alternative work schedules or a certain number of "floating" holidays for each employee. While such policies may not cover every eventuality and some individual accommodations may still be needed, the number of such individual accommodations may be substantially reduced.

Voluntary Substitutes or Swaps

- Employers should facilitate and encourage voluntary substitutions and swaps with employees of substantially similar qualifications by publicizing policies permitting such arrangements, promoting an atmosphere in which substitutes are favorably regarded, and providing a central file, bulletin board, group e-mail, or other means to help an employee with a religious conflict find a volunteer to substitute or swap.

Change of Job Assignments and Lateral Transfers

- An employer should consider a lateral transfer when no accommodation which would keep the employee in his or her position is possible absent undue hardship. However, an employer should only resort to transfer, whether lateral or otherwise, after fully exploring accommodations that would permit the employee to remain in his or her position.
- Where a lateral transfer is unavailable, an employer should not assume that an employee would not be interested in a lower-paying position if that position would enable the employee to abide by his or her religious beliefs. If there is no accommodation available that would permit the employee to remain in his or her current position or an equivalent, the employer should offer the next best available position as an accommodation and permit the employee to decide whether or not to take it.

Modifying Workplace Practices, Policies, and Procedures

- Employers should make efforts to accommodate an employee's religious practice of wearing a beard or religious garb such as a yarmulke, hijab, long skirts (as opposed to pants), or turban.

- Managers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices and should not assume that atypical dress will create an undue hardship.
- Employers should be flexible and creative regarding work schedules, work duties, and selection procedures to the extent practicable.
- Employers should be sensitive to the risk of unintentionally pressuring or coercing employees to attend social gatherings if an employee has indicated a religious objection to attending.

Permitting Prayer, Proselytizing, and Other Forms of Religious Expression

- Employers should train managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to identify alternatives that might be offered to avoid actual disruption (e.g., designating an unused or private location in the workplace where a prayer session, study, or meeting can occur if it is disrupting other workers in a different location).
- Employers should incorporate a discussion of religious expression, and the need for all employees to treat each other professionally, regardless of actual or perceived religious or lack of religious beliefs, into any anti-harassment training provided to managers and employees.

· Employee Best Practices ·

- Employees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules.
- Employees should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious observance, practice, or belief.
- Employees who seek to proselytize in the workplace should cease doing so with respect to any individual who indicates that the communications are unwelcome.

12-V RELATED FORMS OF DISCRIMINATION

A. National Origin, Race, and Color

Title VII's prohibition against religious discrimination may overlap with Title VII's prohibitions against discrimination based on national origin, race, and color. Where a given religion is strongly associated – or perceived to be associated – with a certain national origin, the same facts may state a claim of both religious and national origin discrimination.[317] All four bases might be implicated where, for example, coworkers target a dark-skinned Muslim employee from Saudi Arabia for harassment because of his color, religion, national origin, and/or race.[318]

B. Retaliation

Title VII prohibits retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity.[319] Protected activity consists of opposing a practice the employee reasonably believes is made unlawful by one of the employment discrimination statutes or filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII.[320] EEOC has taken the position that requesting a religious accommodation is a protected activity under this provision of Title VII.[321] Retaliation in this context means taking an action against the employee because of her protected activity that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[322]

EXAMPLE 56

Retaliation for Requesting Accommodation

Jenny requests that she be excused from daily employer-sponsored Christian prayer meetings because she is an atheist. Her supervisor insists that she attend, but she persists in her request that she should be excused and explains that requiring her to attend is offensive to her religious beliefs. She takes her request to human resources and informs them that requiring her to attend these prayer meetings is offensive to her religious beliefs. Despite her supervisor's objections, the human resources department instructs the supervisor that in the

circumstances no undue hardship is posed and he must grant the request. Motivated by reprisal, her supervisor shortly thereafter gives her an unjustified poor performance rating and denies her requests to attend training that is approved for similarly situated employees. This retaliation violates Title VII.

· Employer Best Practices ·

Retaliation

- Employers can reduce the risk of retaliation claims by training managers and supervisors to be aware of their anti-retaliation obligations under Title VII, including specific actions that may constitute retaliation.
- Employers can help reduce the risk of retaliation claims by carefully and timely recording the accurate business reasons for disciplinary or performance-related actions and sharing these reasons with the employee.

Addendum on Executive Order Compliance

Guidance Procedures

Executive Order 13891

The definition of "guidance" in Executive Order 13891 encompasses this interpretive guidance. *See* Exec. Order No. 13891, 84 Fed. Reg. 155235, 155235 (defining "guidance document"); Memorandum from Dominic J. Mancini, Acting Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, to Regulatory Policy Officers at Executive Departments and Agencies and Managing Directors of Certain Agencies and Commissions (Oct. 31, 2019), **https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf (https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf)** (explaining the exclusions under E.O. 13891).

Because the Commission is issuing this document as interpretive guidance, within the recognized constraints of its authority, the Commission concludes that the guidance procedures under Executive Order 13891, as codified in EEOC regulations at 29 CFR 1695.01-.10, apply. Accordingly, the Commission states that:

> The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. Any final document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

The EEOC and the Office of Management and Budget (OMB) have determined that the guidance raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. In consequence, it is "significant guidance" within the meaning of Section 2(c) of Executive Order 13891. Pursuant to Section 4(a)(iii)(D) of Executive Order 13891, an agency submitting a significant guidance document to OIRA for review should demonstrate how the guidance document complies with Executive Orders 12866, 13563, 13609,[323] 13771, and 13777.

Executive Order 12866

The EEOC has coordinated issuance of the guidance with OMB. Pursuant to Section 3(f) of Executive Order 12866, the EEOC and OMB have determined that the guidance will not have an annual effect on the economy of $100 million or more. It will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. It will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, nor will they materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. It will, however, raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. In consequence, it is "significant regulatory action" within the meaning of section 3(f) of Executive Order 12866.

Executive Order 13563

The guidance will maximize net benefits and reduce the burden on the public by clarifying the legal standards applicable to religious discrimination claims, presenting typical scenarios in which religious discrimination may arise, and providing guidance to employers on how to balance the needs of individuals in a diverse religious climate. The guidance is not being issued because of any retrospective review.

Executive Orders 13771

The guidance will reduce the burden on the public by clarifying the legal standards the EEOC will apply to religious discrimination claims. The guidance will be an Executive Order 13771 deregulatory action.

Executive Orders 13777

Providing clear, accurate guidance that is up to date with current law is part of the Commission's regulatory reform agenda. Therefore, this guidance is being issued as part of the Commission's regulatory reform agenda.

Congressional Review Act

Pursuant to 29 C.F.R. § 1695.6(e), the Commission will submit this significant guidance document to Congress under the procedures described in 5 U.S.C. § 801. This guidance is not a "major rule" as defined in 5 U.S.C. § 804(2).

Addendum Pursuant to 29 C.FR. §1695.6(c) on Major Comments on Proposed Compliance Manual on Religious Discrimination and EEOC Responses

The EEOC received 71 unique comments[324] from individuals, organizations, and members of Congress on the proposed Compliance Manual on Religious Discrimination, which was posted for public input on **www.regulations.gov**

(http://www.regulations.gov) on November 17, 2020. A number of these comments were submitted on behalf of multiple organizations or officeholders, including one on behalf of 51 organizations and another on behalf of 44 organizations. The major comments and the Commission's responses to those comments are summarized below.

Process

Comment: Numerous organizational and Congressional commenters asserted that there was insufficient opportunity for stakeholder consultation and inadequate time allotted for Commissioner and public input. These commenters requested that the Commission withdraw rather than finalize the proposed guidance. Several commenters also expressed concerns with listening sessions that the General Counsel held and the commenters felt that they undermined the comment period.

> Response: The Commission engaged in an internal process and inter-agency consultation before issuing the proposal, and then provided a standard 30-day public input period. This is the first significant guidance that the Commission has issued under the regulations found at 29 CFR 1695.01-.10, which call for a public comment period and other procedural measures. In 2008, the public was not given an opportunity to comment on a proposed draft of the guidance. The comment period yielded many detailed comments from a wide range of stakeholders representing many differing perspectives. Moreover, issuance of both the proposal and of the final guidance was subject to review and clearance by the Office of Management and Budget. Many public commenters noted that the update is needed and timely. Regarding the General Counsel's listening sessions, these sessions were not organized to receive comments on the proposed guidance. Instead, they were an opportunity for the General Counsel to hear organizations' perspectives on the Commission's enforcement efforts. The General Counsel did not seek comments on the proposed guidance and instead encouraged participants to submit comments through the formal process, if they were interested. Furthermore, the listening sessions in no way prevented the public from having the opportunity to comment.

Definition of Religion

Comment: Some commenters expressed concern that the draft did not make sufficiently clear that Title VII protects against discrimination based on a lack of religious faith.

> Response: The Commission has made additions to reference repeatedly that discrimination based on a lack of religious faith is prohibited.

Religious Organization Exemption

Comment: Various commenters took issue with the draft's statement that it was an "open question" whether a for-profit corporation can constitute a "religious corporation" within the meaning of section 702(a) of Title VII, 42 U.S.C. § 2000e(1)(a).

> Response: The final guidance has deleted this language. Instead, the final guidance observes that although courts have historically relied on for-profit status to indicate that an entity is not a "religious corporation" under § 702(a), the plain text of the statute does not reference for-profit and nonprofit status, and that it is possible courts may be more receptive to finding a for-profit corporation can qualify given language from the Supreme Court's decision in *Hobby Lobby.*

Comment: Many organizational and Congressional commenters asked for clarification or revision of the proposal's interpretation of the scope of the statutory exemption permitting employment of individuals "of a particular religion" by religious corporations under § 702(a) or religious educational institutions under § 703(e)(2). Some commenters asked the Commission to state that religious organizations are barred from discrimination based on race, color, sex, national origin, or other bases, even if motivated by a religious belief. By contrast, others asked for greater clarity that religious organizations are shielded from such claims by the statutory permission to hire individuals "of a particular religion." Additionally, some commenters discussed how the Commission should proceed if a respondent entity invokes the religious organization exception.

> Response: The final guidance clearly states that religious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, national origin (as well as the anti-

discrimination provisions of the ADEA, ADA, and GINA), and related retaliation, but are permitted to assert the statutory exemption as an affirmative defense.

The guidance further notes that "[c]ourts have held that the religious organization's assertion that the challenged employment decision was made on the basis of religion is subject to a pretext inquiry, where the employee has the burden to prove pretext." The guidance discusses a case where the court found if the religious organization presented "'convincing evidence' that the challenged employment practice resulted from discrimination on the basis of religion," then the religious organization exemption "deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."

Ministerial Exception

Comment: Some commenters objected to the nature or extent of the Commission's treatment of the ministerial exception. Others discussed the draft's handling of procedural matters relating to adjudication of the ministerial exception when asserted as a defense.

Response: The final guidance has streamlined the discussion of the ministerial exception and has clarified how the Commission will procedurally address assertions of the defense.

Interaction of Title VII with the First Amendment and the Religious Freedom Restoration Act (RFRA)

Comment: Numerous commenters asked the Commission to delete or modify references to RFRA as a potential defense to Title VII enforcement by the government. Some noted the holdings in particular Title VII decisions addressing RFRA defenses, and cited RFRA's legislative history stating it was not intended to modify Title VII.

Response: The final guidance refines treatment of the cited authorities in this section, including explanations of the outcome in cases in which RFRA was raised as a defense to EEO enforcement.

Comment: The National Federation of Independent Business recommended insertion of language guiding EEOC staff to confer with the EEOC Office of Legal Counsel, which may as needed consult with the Department of Justice's Office of Legal Counsel, when matters raise the interaction of the First Amendment or RFRA with statutes enforced by the EEOC.

> Response: The final guidance includes this type of instruction to EEOC staff.

Employment Decisions

Comment: The Sikh Coalition requested that an example in this section be revised to illustrate a claim of unlawful segregation of those who wear religious garb, and also requested various descriptions of ritual practices in this and other sections to improve accuracy and reduce rather than reinforce bias or stereotypes.

> Response: The final guidance incorporates these recommended changes.

Harassment

Comment: Numerous commenters asked the Commission to clarify and further emphasize that consensual non-harassing conversations about religious topics are not potential harassment of coworkers.

> Response: The final guidance includes additional statements and examples illustrating instances of non-harassing, non-disruptive religious expression.

Comment: Some commenters recommended that the Commission address whether or when employee statements on private social media may implicate the EEO laws with respect to discrimination, including harassment, either by or against religious employees.

> Response: The final guidance adds additional authority to the discussion of social media and harassment.

Interaction of Harassment and Accommodation of Religious Expression

Comment: With respect to balancing harassment and accommodation obligations, numerous commenters asked the Commission to make clear that employers are permitted to, and should, take remedial action once on notice of unwelcome potential harassment on any basis, even if the harassing conduct is not yet severe or pervasive.

> Response: The final guidance includes additional language explicitly reiterating an employer's rights and responsibilities under Title VII with respect to coworker complaints about unwelcome harassing conduct.

Reasonable Accommodation and Undue Hardship

Comment: Various commenters addressed the Commission's statement in the draft that a denial of religious accommodation absent undue hardship is actionable even if there was not an additional, independent adverse employment action taken against the employee. Some commenters agreed with the Commission's position and others opposed it.

> Response: The final guidance maintains the Commission's position, which is also articulated in the existing 2008 document, and has been the subject of past and current litigation brought by the Commission on behalf of applicants and employees who were unlawfully denied religious accommodation. Requiring an employee to work without religious accommodation where a work rule conflicts with his religious beliefs necessarily alters the terms and conditions of his employment for the worse.

Comment: Numerous commenters expressed concerns that the Commission's citation to laws enforced by the U.S. Department of Health and Human Services regarding rights of those with objections to participating in certain health care duties could be misleading with respect to the requirements under either those laws or Title VII.

> Response: The final guidance includes a clear statement that the Commission is referencing these laws for informational purposes and is not opining on any of their requirements or whether they would require

additional burdens on employers beyond Title VII's analysis for reasonable accommodation.

Comment: Commenters offered a range of perspectives on the Supreme Court's 1977 holding that the Title VII undue hardship defense permits an employer to deny any religious accommodation that would impose more than a *de minimis* burden on the operation of the employer's business. Some commenters believed the Commission's inclusion of a citation to Justice Alito's concurring opinion in the denial of certiorari in *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020), expressing that the Court should reconsider this definition, was potentially confusing or misleading.

Response: The final guidance deletes this citation to ensure clarity regarding the current legal standard.

---

[1] This document uses examples that refer to practices and beliefs of various religions. These examples are intended to clarify the legal principles for which they are used and do not purport to represent the religious beliefs or practices of all members of the cited religions. Unless otherwise noted, cases are cited in this document for their holdings under Title VII of the Civil Rights Act of 1964 (Title VII). In some instances, links to non-EEOC internet sites are provided for the reader's convenience in obtaining additional information; EEOC assumes no responsibility for their content and does not endorse their organizations or guarantee the accuracy of these sites. Use of the term "employee" in this document should be presumed to include an applicant and, as appropriate, a former employee.

[2] *See* 42 U.S.C. § 2000e(k) (Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (holding that Title VII's prohibition of discrimination based on sex, 42 U.S.C. § 2000e-2(a), includes a prohibition of discrimination because of sexual orientation or transgender status).

[3] 42 U.S.C. § 2000e-2(a)(1), (2).

[4] 42 U.S.C. § 2000e(j).

[5] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

[6] *Compare Hardison*, 432 U.S. at 84 (interpreting Title VII "undue hardship" standard), *with* 42 U.S.C. § 12111(10)(A) (defining ADA "undue hardship" standard). *Note:* Various state and local laws extend beyond Title VII in terms of the protected bases covered, the discrimination prohibited, the accommodation required, and the legal standards and defenses that apply.

[7] *See, e.g.*, *Cooper v. Gen. Dynamics, Convair Aerospace Div.*, 533 F.2d 163, 168 (5th Cir. 1976) (stating "*all* forms and aspects of religion, however eccentric, are protected").

[8] This common formulation derives from the seminal Supreme Court decisions interpreting the conscience exemption in the Military Selective Service Act, 50 U.S.C. § 3806(j). *See, e.g.*, *Redmond v. GAF Corp*., 574 F.2d 897, 901 n.12 (7th Cir. 1978) ("We believe the proper test to be applied to the determination of what is 'religious' under § 2000e(j) can be derived from the Supreme Court decisions in *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163 (1969), i.e., (1) is the 'belief' for which protection is sought 'religious' in person's own scheme of things, and (2) is it 'sincerely held.'" (quoting those decisions)); *Fallon v. Mercy Cath. Med. Ctr.*, 877 F.3d 487, 490-91 (3d Cir. 2017) (applying same test to Title VII claim of religious discrimination); *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014) (same); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (same); *EEOC v. Union Independiente de la Autoridad de Acueductos*, 279 F.3d 49, 56 (1st Cir. 2002) (same); *see also, e.g.*, EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (stating that EEOC has "consistently applied" this standard to Title VII).

[9] *Fallon*, 877 F.3d at 491 (quoting *Welsh*, 398 U.S. at 340 (quoting *Seeger*, 380 U.S. at 176)).

[10] *See, e.g.*, *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168 (9th Cir. 2007) (addressing "non-adherence or reverse religious discrimination claim"); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 933-34 (7th Cir. 2003) ("[F]or these purposes, . . . 'religion' includes antipathy to religion. And so an atheist . . . cannot be fired because his employer dislikes atheists."); *Shapolia v. Los Alamos Nat'l Lab'y,* 992 F.2d 1033, 1037 (10th Cir. 1993) (plaintiff claimed he was fired "because he did not hold the same religious beliefs as his supervisors"); *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (finding Title VII violated by requiring atheist employee to attend prayer portion of business meeting).

[11] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018) (holding that a state administrative agency's consideration of baker's First Amendment free exercise claim opposing alleged violation of public accommodations nondiscrimination law "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint" and apply laws "in a manner that is neutral toward religion"); *Epperson v. Ark.*, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *see also Bd. of Educ. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring) ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.").

[12] In fiscal year 2019, EEOC received 2,725 religious discrimination charges, accounting for 3.7% of all charges filed with the Commission that year. In fiscal year 1997, EEOC received 1,709 religious discrimination charges, accounting for 2.1% of all charges filed with the Commission that year. Statistics regarding the number of religious discrimination charges filed with the Commission and dispositions can be found at **https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0)** .

[13] In general, the principles discussed in this Section apply to Title VII claims against private employers as well as to federal, state, and local public sector employers, unless otherwise noted. *See* 42 U.S.C. §§ 2000e(a)-(b), 2000e-16(a) *et seq*. *See, e.g.*, *infra* § 12-I-C-3 ("Additional Interaction of Title VII with the First Amendment and the Religious Freedom Restoration Act (RFRA)"). Claims under various state or local laws may be analyzed under different standards. Investigators should contact the Office of Legal Counsel if questions arise about how to appropriately analyze charges brought against government entities.

[14] 42 U.S.C. § 2000e-2. To determine whether an entity is covered by Title VII, *see* EEOC, Compliance Manual: Threshold Issues (2000), https://www.eeoc.gov/laws/guidance/section-2-threshold-issues [hereinafter Threshold Issues]. Although this document concerns Title VII, employers and employees should note that there may be state and local laws in their jurisdiction

prohibiting religious discrimination in employment, some of which may be parallel to Title VII and some of which may afford broader coverage.

[15] See, e.g., *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1120 (10th Cir. 2013) ("A religious accommodation claim is distinct from a disparate treatment claim." (quoting EEOC, Compliance Manual: Religious Discrimination § 12-IV (2008)), discussing case law describing disparate treatment and reasonable accommodation as different theories of discrimination), *rev'd and remanded*, 575 U.S. 768, 135 S. Ct. 2028 (2015).

[16] *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2031-32.

[17] *Id.* at 2032-33. Since the *Abercrombie* decision was issued, some lower courts have nevertheless continued to characterize denial of accommodation as a distinct cause of action.

[18] 42 U.S.C. § 2000e(j); *see Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) (observing that "the very words of the statute . . . leave little room for such a limited interpretation"; "to restrict the act to those practices which are mandated or prohibited by a tenet of the religion, would involve the court in determining not only what are the tenets of a particular religion, which by itself perhaps would not be beyond the province of the court, but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion," a determination that would be "irreconcilable with the warning issued by the Supreme Court" that "'[i]t is no business of courts to say . . . what is a religious practice or activity'" (quoting *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953))); *see also Emp't Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 887 (1990) (explaining in Free Exercise Clause case that "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"). However, as discussed in this section, Title VII does not cover all beliefs; for example, social, political, or economic philosophies, and mere personal preferences, are not "religious" beliefs within the meaning of the statute.

[19] *See Thomas v. Rev. Bd.*, 450 U.S. 707, 714 (1981) (ruling that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (holding that although animal sacrifice may seem "abhorrent" to some, Santeria belief is religious in nature and is protected by

the First Amendment); *Toronka v. Cont'l Airlines*, 649 F. Supp. 2d 608, 612 (S.D. Tex. 2009) (holding in Title VII case that a moral and ethical belief in the power of dreams that is based on religious convictions and traditions of African descent is a religious belief, and that this determination does not turn on veracity but rather is based on a theory of "'man's nature or his place in the Universe,'" even if considered by others to be "nonsensical" (quoting *Brown v. Dade Christian Schs., Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (Roney, J., dissenting))); *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) (relying on First Amendment jurisprudence to observe in Religious Freedom Restoration Act case that "one man's religion will always be another man's heresy").

[20] *Welsh v. United States*, 398 U.S. 333, 339 (1970) (interpreting what is now the Military Selective Service Act, 50 U.S.C. § 3806(j)); *see also Thomas*, 450 U.S. at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or [another practitioner] . . . more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.") (First Amendment).

[21] *United States v. Seeger*, 380 U.S. 163, 166, 176 (1965). Although *Seeger* arose under what is now the Military Selective Service Act, 50 U.S.C. § 3806(j), the EEOC has "consistently applied this standard" to Title VII, *see Commission Guidelines*, 29 C.F.R. § 1605.1. The courts have as well. *See supra* note 8.

[22] *Thomas*, 450 U.S. at 714 ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) ("[I]t is not for us to say that the line [employee] drew [between work that was consistent with religious beliefs and work that was morally objectionable] was an unreasonable one." (quoting Thomas,* 450 U.S. at 715)*).*

[23] *Commission Guidelines*, 29 C.F.R. § 1605.1 ("The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."); *Welsh*, 398 U.S. at 343 (finding that petitioner's beliefs were religious in nature although the church to which he belonged did not teach those beliefs) (Military Selective Service

Act); *accord Africa v. Pennsylvania*, 662 F.2d 1025, 1032-33 (3d Cir. 1981) (First Amendment); *Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Am.*, 164 F. Supp. 2d 1066, 1076 n.15 (N.D. Ind. 2001) ("Title VII's intention is to provide protection and accommodation for a broad spectrum of religious practices and belief not merely those beliefs based upon organized or recognized teachings of a particular sect.").

[24] *Commission Guidelines*, 29 C.F.R. § 1605.1 ("This standard was developed in [*Seeger*] and [*Welsh*]. The Commission has consistently applied this standard in its decisions."); *see Torcaso v. Watkins*, 367 U.S. 488, 489-90 (1961) (ruling that government may not favor theism over pantheism or atheism) (First and Fourteenth Amendments); *Welsh*, 398 U.S. at 339-340 (reiterating that a belief in God or divine beings is not necessary to qualify as a religion; nontheistic beliefs can be religious within the meaning of the statute as long as they "occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons.").

[25] *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) (observing that the threshold for establishing the religious nature of beliefs is low; under the First Amendment, "if there is any doubt about whether a particular set of beliefs constitutes a religion, the Court will err on the side of freedom and find that the beliefs are a religion . . . [because the country's] founders were animated in large part by a desire for religious liberty"), *aff'd*, 95 F.3d 1475, 1482-83 (10th Cir. 1996); *see also Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 887, 887 (1990) (explaining in Free Exercise Clause case that "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim").

[26] *Meyers*, 906 F. Supp. at 1502 (ruling that religions address "ultimate ideas," i.e., "fundamental questions about life, purpose, and death," and that single-faceted worship of marijuana was not a religion for First Amendment purposes), *aff'd*, 95 F.3d at 1483. "Thus, a genuinely held belief that involves matters of the afterlife, spirituality, or the soul, among other possibilities, qualifies as religion under Title VII." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013).

[27] *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 491 (3d Cir. 2017) (quoting *Africa*, 662 F.2d at 1032). Although "religion" is often marked by external manifestations such as ceremonies, rituals or clergy, such manifestations are not

required for a belief to be "religious." *See, e.g.*, *Malnak v. Yogi*, 592 F.2d 197, 209-10 (3d Cir. 1979).

[28] *See Fallon*, 877 F.3d at 492 (employee's objection to flu vaccine did not qualify as a religious belief protected by Title VII because his beliefs that "one should not harm their own body and . . . that the flu vaccine may do more harm than good" did not "address fundamental and ultimate questions having to do with deep and imponderable matters" and were not "comprehensive in nature"). Similarly, EEOC and courts have found that the Ku Klux Klan is not a religion within the meaning of Title VII because its philosophy has a narrow, temporal, and political character. *See* Commission Decision No. 79-06, CCH EEOC Decisions ¶ 6737 (1983); *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1026 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974); *Slater v. King Soopers*, 809 F. Supp. 809, 810 (D. Colo. 1992) (dismissing religious discrimination claim by a member of the Ku Klux Klan who allegedly was fired for participating in a Hitler rally because the Ku Klux Klan is "political and social in nature" and is not a religion for Title VII purposes); *see also Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (holding that plaintiff's belief that eating cat food contributes to his well-being is a personal preference and not a religion). In a related context, the Supreme Court has held that, unlike religious beliefs, philosophical and personal beliefs "do[] not rise to the demands of the Religion Clauses." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). When evaluating whether the belief qualifies as religious, courts should consider whether the belief is merely focused on an "isolated moral teaching" or rather is part of a "comprehensive system of beliefs about fundamental or ultimate matters." *Fallon*, 877 F.3d at 492.

[29] *Fallon*, 877 F.3d at 492. *See also Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 225 (3d Cir. 2000) (addressing merits of Title VII religious accommodation claim based on plaintiff's refusal to participate in medical procedures that terminate a pregnancy); *cf*. *Gadling-Cole v. W. Chester Univ.*, 868 F. Supp. 2d 390, 396-97 (E.D. Pa. 2012)(emphasizing that Title VII religious discrimination claims have been held cognizable as to topics that "overlap both the religious and political spectrum, such as abortion, so long as the claims are based on a plaintiff's bona fide religious belief").

[30] *See Yoder*, 406 U.S. at 216 (explaining that "if the Amish asserted their [free exercise] claims [against a compulsory education law] because of their subjective evaluation and rejection of the contemporary secular values accepted by the

majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis").

[31] *See Davis v. Fort Bend Cnty*., 765 F.3d 480, 485, 486-87 (5th Cir. 2014) (holding that whether a practice is religious turns not on the nature of the activity itself, but rather whether the plaintiff "sincerely believed it to be religious in her own scheme of things," and finding the lower court erred in characterizing plaintiff's attendance at service and event breaking ground for a new church and feeding community as "a personal commitment, not religious conviction"); *Redmond v. GAF Corp*., 574 F.2d 897, 901 (7th Cir. 1978) (finding the employer liable for failing to accommodate employee's participation in Saturday Bible classes pursuant to a sincerely held religious belief given that he was appointed to be lifetime leader of his church Bible study class many years earlier, time of meeting was scheduled by church elders, and employee felt that his participation was at dictate of his elders and constituted a "religious obligation"); *see also Dachman v. Shalala*, 9 F. App'x 186, 191-93 (4th Cir. 2003) (ruling that plaintiff's accommodation request to be home by time of Sabbath observance was covered by Title VII, but time off sought for tasks that could be performed at another time, such as purchasing ritual foods, cooking, and cleaning in preparation for the observance, was a personal preference that the employer was not required to accommodate); *Jiglov v. Hotel Peabody, GP*, 719 F. Supp. 2d 918, 929-30 (W.D. Tenn. 2010) (holding that a scheduling accommodation request could be covered by Title VII where employee's religious dictates for observance of Russian Orthodox Easter included not only attendance at church service but also a priest's blessing of the family meal, the sharing of the meal, and prayer with family members); *Duran v. Select Med. Corp.*, No. 08-cv-2328-JPM-tmp, 2010 WL 11493117, at *5-6 (W.D. Tenn. Mar. 19, 2010) (holding that a scheduling accommodation request to be able to attend Christmas Mass was covered by Title VII, but not the family meal and gift exchange that followed).

[32] *Cf. Spies v. Voinovich*, 173 F.3d 398, 406-07 (6th Cir. 1999) (ruling there was no obligation to accommodate a vegan diet that an individual conceded was unrelated to his Zen Buddhist religious beliefs); *LaFevers v. Saffle*, 936 F.2d 1117 (10th Cir. 1991) (holding that although not all Seventh-day Adventists are vegetarian, an individual adherent's genuine religious belief in such a dietary practice warrants constitutional protection under the First Amendment).

[33] *Compare Fallon*, 877 F.3d at 492-93 (recognizing that anti-vaccination beliefs such as those held by Christian Scientists can be part of a "broader religious faith"

and therefore subject to Title VII religious accommodation in some circumstances, but concluding that plaintiff's beliefs did not qualify as religious because he "simply worries about the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid this vaccine."), *with Chenzira v. Cincinnati Child.'s Hosp. Med. Ctr.*, No. 1:11–CV–00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (holding that Title VII could cover a request to be excused from hospital mandatory vaccination policy due to vegan opposition to a vaccine that was animal-tested or contains animal byproducts if plaintiff "subscribe[d] to veganism with a sincerity equating that of traditional religious views," noting her citation to essays about veganism and to Biblical excerpts).

[34] *Davis*, 765 F.3d at 486 (quoting *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)); *see also Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 452 (7th Cir. 2013) (emphasizing that Title VII has a "broad and intentionally hands-off definition of religion").

[35] *See Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) (rejecting argument that witchcraft was a "conglomeration" of "various aspects of the occult" rather than a religion, because religious beliefs need not be "acceptable, logical, consistent or comprehensible to others" to be protected under the First Amendment); *Wash. Ethical Soc'y v. Dist. of Columbia*, 249 F.2d 127, 128 (D.C. Cir. 1957) (holding that ethical society qualifies as a "religious corporation or society" under District of Columbia Tax Statute, and its building is entitled to tax exemption; belief in a Supreme Being or supernatural power is not essential to qualify for tax exemption accorded to "religious corporations," "churches," or "religious societies"). *Compare EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 402 (E.D.N.Y. 2016) (holding, where plaintiff alleged harassment or denial of religious accommodation, that employer's use of conflict resolution program known as "Onionhead" or "Harnessing Happiness" was a "religion" within the meaning of Title VII, since program's system of beliefs and practices was more than intellectual and involved ultimate concerns signifying religiosity, including chants, prayers, and mentions of God, transcendence, and souls), *with Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829-30 (D. Neb. 2016) (ruling that allegation one is a "Pastafarian," a believer in the divine "Flying Spaghetti Monster" who practices the religion of "FSMism," was not a religion within the meaning of Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 1983, or Constitution, but instead "a parody, intended to advance an argument about science, the evolution of life, and the place of religion in public education"), *aff'd*, No. 16-2105 (8th Cir. Sept. 7, 2016).

[36] *See EEOC v. Red Robin Gourmet Burgers, Inc.*, No. C04–1291JLR, 2005 WL 2090677, at *3 (W.D. Wash. Aug. 29, 2005) (denying employer's motion for summary judgment on religious accommodation claim arising from employee's refusal to cover his Kemetic religious tattoos to comply with employer's dress code).

[37] *See Fallon*, 877 F.3d at 491.

[38] *Dockery v. Maryville Acad.*, 379 F. Supp. 3d 704, 718 n.18 (N.D. Ill. 2019) (ruling that "while the 'validity' of a religious belief cannot be questioned, 'the threshold question of sincerity . . . must be resolved in every case'" (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)**)**
(https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965125037&pubNum=0000780&originatingDoc=I9cf9b910544c11e987fd8441446aa305&refType=RP&fi=co_pp_sp_780_185&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_185)).

[39] *See Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 443 (5th Cir. 2011) (reciting prima facie case for harassment because of religion without reference to inquiry into sincerity of religious belief); *Dixon v. Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010) (analyzing sincerity of religious belief only with respect to failure-to-accommodate claim, not with respect to discriminatory termination claim).

[40] *Cf. Moussazadeh v. Tx. Dep't of Crim. Just.*, 703 F.3d 781, 790 (5th Cir. 2012) (case arising under Religious Land Use and Institutionalized Persons Act (RLUIPA)).

[41] *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 452 (7th Cir. 2013) (holding that inquiring into sincerity is limited to determining if the asserted belief or practice is in fact the employee's own religious belief; it should not entail considering any matters such as whether employee had a true conversion experience or whether the practices are embedded in his cultural and family upbringing); *see also Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981) ("Particularly in this sensitive area [where employee had quit job producing armaments citing religious objections and claimed that state's denial of unemployment compensation violated the First Amendment], it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker [another Jehovah's Witness who was willing to take the same job] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

[42] *Davis v. Ft. Bend Cnty.*, 765 F.3d 480, 486 (5th Cir. 2014) (quoting *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)).

[43] *Grayson v. Schuler*, 666 F.3d 450, 454-55 (7th Cir. 2012) (finding in RLUIPA case that Nazirite prisoner's asserted belief in not cutting his hair was sincerely held).

[44] *EEOC v. Union Independiente De La Autoridad De Acueductos*, 279 F.3d 49, 57 (1st Cir. 2002).

[45] *See, e.g.*, *id*. (holding that evidence the employee had violated a number of tenets of his professed Seventh Day Adventist faith was sufficient to create a triable issue of fact for jury); *Hansard v. Johns-Manville Prods. Corp*., No. 1902, 1973 WL 129, at *2 (E.D. Tex. Feb. 16, 1973) (employee's contention that he objected to Sunday work for religious reasons was undermined by his very recent history of Sunday work); *see also Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591, 596 (S.D.N.Y. 2001) (employer had a good faith basis to doubt sincerity of employee's professed religious need to wear a beard because he had not worn a beard at any time in his fourteen years of employment, had never mentioned his religious beliefs to anyone at the hotel, and simply showed up for work one night and asked for an on-the-spot exception to the no-beard policy), *aff'd*, 2002 WL 390437 (2d Cir. Mar. 13, 2002).

[46] *See, e.g.*, *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) ("[42 U.S.C.] § 2000e-2(a)(1) does not require an employer to reasonably accommodate the purely personal preferences of its employees" and thus would not have required the employer in this case to bear the costs of "excusing vast numbers of employees who wish to have Friday night off for secular reasons"); *Dachman v. Shalala*, 9 F. App'x 186, 192 (4th Cir. 2001) (holding that employer not required to accommodate Jewish employee's desire to leave work earlier on Friday afternoon to pick up Challah bread instead of doing it on Thursday evening; "Title VII does not protect secular preferences" (quoting *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998))).

[47] *See, e.g.*, *Union Independiente*, 279 F.3d at 57 (fact that employee initially "objected only to certain membership requirements" and "voiced his opposition to any form of union membership after UIA agreed to accommodate him with respect to each practice he had identified" gave rise to jury issue on sincerity).

[48] *See, e.g.*, *EEOC v. Ilona of Hungary, Inc*., 108 F.3d 1569, 1575 (7th Cir. 1997) (en banc) (finding that Jewish employee proved her request for leave to observe Yom

Kippur was based on a sincerely held religious belief even though she had never in her prior eight-year tenure sought leave from work for a religious observance, and conceded that she generally was not a very religious person, where the evidence showed that certain events in her life, including the birth of her son and the death of her father, had strengthened her religious beliefs over the years); *Cooper v. Oak Rubber Co*., 15 F.3d 1375 (6th Cir. 1994) (holding that employee held sincere religious belief against working on Saturdays, despite having worked the Friday night shift at plant for approximately seven months after her baptism, where seventeen months intervened before employee was next required to work on Saturday and employee's undisputed testimony was that her faith and commitment to her religion grew during this time); *Cunningham v. City of Shreveport*, 407 F. Supp. 3d 595, 609-10 (W.D. La. 2019) (holding that disputed material facts precluded summary judgment on sincerity where employee who previously grew beard during vacations and extended weekends asserted new religious adherence prompted wearing beard full-time); *EEOC v. IBP, Inc.*, 824 F. Supp. 147, 151 (C.D. Ill. 1993) (holding that Seventh-day Adventist employee's previous absence of faith and subsequent loss of faith did not prove that his religious beliefs were insincere at the time that he refused to work on the Sabbath); *see also Union Independiente*, 279 F.3d at 57 & n.8 (noting the fact that the alleged conflict between plaintiff's beliefs and union membership kept changing might call into question the sincerity of the beliefs or "might simply reflect an evolution in plaintiff's religious views toward a more steadfast opposition to union membership").

[49] *See EEOC v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d 1006, 1012 (D. Ariz. 2006) (finding that it was Muslim employee's sincerely held religious observance to wear headscarf during Ramadan, even though she did not wear it the rest of the year).

[50] *See EEOC v. Triangle Catering, LLC*, No. 5:15-CV-00016-FL, 2017 WL 818261, at *9 (E.D.N.C. Mar. 1, 2017) (holding that reasonable factfinder could conclude employee had sincerely held religious belief in wearing religious garb if it credited his explanation for not having worn it to job interview for fear of hiring discrimination).

[51] *See Commission Guidelines*, 29 C.F.R. § 1605.1; *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 452-54 (7th Cir. 2013) (holding that employee presented sufficient evidence to show that his request to attend his father's funeral in Nigeria to perform specific rites, traditions, and customs "was borne from his own personally and sincerely held religious beliefs" because "participating in the rites and traditions identified by his father is a necessary part of [the employee's]

religious observance" even though employee's religious practices "were not identical to the religious practices his family observes in Nigeria").

[52] *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 475 (7th Cir. 2001) (finding that employee's belief that she needed to use the phrase "Have a Blessed Day" was a religious practice covered by Title VII even though using the phrase was not a requirement of her religion); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *see also Adeyeye*, 721 F.3d at 452 ("It is not within our province to evaluate whether particular religious practices or observances are necessarily orthodox or even mandated by an organized religious hierarchy.").

[53] Title 42 U.S.C. § 2000e-2(a) applies to employers with fifteen or more employees. *See* 42 U.S.C. § 2000e(b). Section 2000e-2(b) applies to employment agencies, stating it is unlawful for employment agencies to "fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his . . . religion . . . or to classify or refer for employment any individual on the basis of his . . . religion . . . ." Section 2000e-2(c) applies to unions, stating it is unlawful for unions to "(1) to exclude or expel from membership, or otherwise to discriminate against, any individual because of his . . . religion . . . ; (2) to limit, segregate or classify its membership or applicants . . . or to refuse to refer for employment any individual . . . because of such individual's . . . religion . . . ; or (3) to cause or attempt to cause an employer to discriminate . . . in violation of this section."

[54] *See* Threshold Issues, *supra* note 14.

[55] *See, e.g.*, *EEOC v. Union Independiente De La Autoridad De Acueductos*, 279 F.3d 49 (1st Cir. 2002); *Bushouse v. Local Union 2209*, 164 F. Supp. 2d 1066 (N.D. Ind. 2001). For further discussion see *infra* §§ 12-II, 12-III, and 12-IV, including 12-IV-C-5.

[56] *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (holding that unions violated "§ 703(c)(1) [of Title VII, which] makes it an unlawful practice for a Union to 'exclude or to expel from its membership, or otherwise to discriminate against, any individual'" when they "ignored [racial] discrimination claims . . . , knowing that the employer was discriminating in violation of the contract"); *Rainey v. Town of Warren*, 80 F. Supp. 2d 5, 17 (D.R.I. 2000) ("It is axiomatic that a union's failure to adequately represent union members in the face of employer discrimination may subject the union to liability under either Title VII or its duty of fair representation."). To the extent it has been held that a union cannot be held liable where it knowingly acquiesces in discrimination, the EEOC disagrees. *See*

EEOC v. Pipefitters Ass'n Local Union 597, 334 F.3d 656 (7th Cir. 2003); *see also Burton v. Freescale Semiconductor, Inc.*, 789 F.3d 222, 229 (5th Cir. 2015) ("A staffing agency is liable for the discriminatory conduct of its joint-employer client if it participates in the discrimination, or if it knows or should have known of the client's discrimination and fails to take corrective measures within its control.").

[57] Section 702(a) of Title VII, 42 U.S.C. § 2000e-1(a), provides:

> [Title VII] shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2) provides:

> [I]t shall not be an unlawful employment practice for a school, college, university, or educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

The Americans with Disabilities Act (ADA) also provides religious entities with two defenses to claims of discrimination that arise under Title I, the ADA's employment provisions. The first provides that "[t]his subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. § 12113(d)(1). The second provides that "[u]nder this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. § 12113(d)(2).

[58] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019) ("In applying the [religious organization exemption], we determine whether an institution's 'purpose

and character are primarily religious' by weighing '[a]ll significant religious and secular characteristics.'" (quoting *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)) (second alteration in original)); *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007) (applying similar "primarily religious" standard); *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997) (looking at specific facts to determine whether university was "religious" or "secular").

[59] *LeBoon*, 503 F.3d at 226; *but see Spencer v. World Vision, Inc.*, 633 F.3d 723, 730-33 (O'Scannlain, J. concurring) (expressing concern that "several of the *LeBoon* factors could be constitutionally troublesome if applied to this case").

[60] In *Hall*, 215 F.3d at 624-25, the Sixth Circuit, looking to "all the facts," found that a college of health sciences was a Title VII religious organization because it was an affiliated institution of a church-affiliated hospital, it had a direct relationship with the Baptist church, and the college atmosphere was permeated with religious overtones. In *Spencer v. World Vision, Inc*., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam), the Ninth Circuit held that an entity is "eligible" for the exemption, at least, if the entity (1) is organized for a religious purpose; (2) is engaged primarily in carrying out that religious purpose; (3) holds itself out to the public as an entity for carrying out that religious purpose; and (4) does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts. One judge in *Spencer* took the view that the exemption is met if the entity is a non-profit and satisfies the first three factors, *id.* at 734 (O'Scannlain, J., concurring), and another judge took the view that the Salvation Army, for example, would satisfy the "nominal amounts" standard of the fourth factor, notwithstanding that it generates a large-dollar amount of sales revenue, because it "gives its homeless shelter and soup kitchen services away, or charges nominal fees." *Id.* at 747 (Kleinfeld, J., concurring). In *Garcia*, 918 F.3d at 1003-04, the Ninth Circuit held that the Salvation Army is a religious organization under Title VII by applying the *Spencer* test under either judge's formulation. In *LeBoon*, 503 F.3d at 226-29, the Third Circuit found that a Jewish community center was a Title VII religious organization where, among other factors, the center "identified itself as Jewish," relied on coreligionists for financial support, offered instructional programs with Jewish content, began its Board of Trustees meetings with biblical readings, and involved rabbis from three local synagogues in its management). *See also Killinger*, 113 F.3d at 199-200 (university founded as a theological institution by the Alabama Baptist State Convention qualified as a "religious educational institution" under Title VII; the court noted that all Trustees must be Baptist, the Convention is the

university's largest single source of funding, and the school's charter designates its chief purpose as "the promotion of the Christian Religion throughout the world by maintaining and operating … institutions dedicated to the development of Christian character in high scholastic standing.").

[61] *LeBoon*, 503 F.3d at 229 (holding that a Jewish community center was a religious organization under Title VII, despite engaging in secular activities such as secular lectures and instruction with no religious content, employing overwhelmingly Gentile employees, and failing to ban non-kosher foods, and noting that a religiously affiliated newspaper and a religious college had also been found covered by the exemption). However, in *LeBoon*, the court did state that "the religious organization exemption would not extend to an enterprise involved in a wholly secular and for-profit activity." *LeBoon*, 503 F.3d at 229; *see also Townley Eng'g & Mfg. Co.*, 859 F.2d at 619 (holding that evidence the company was for profit, produced a secular product, was not affiliated with a church, and did not mention a religious purpose in its formation documents, indicated that the business was not "primarily religious" and therefore did not qualify for the religious organization exemption). In *Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019), the court cited *Townley* as the governing precedent for defining a religious organization.

[62] In *Hobby Lobby*, a case interpreting the term "person" under RFRA, the Supreme Court briefly referenced Title VII's religious organization exemption in response to the U.S. Department of Health and Human Services' (HHS) argument that "statutes like Title VII . . . expressly exempt churches and other nonprofit religious institutions but not-for-profit corporations." 573 U.S. at 716. The Court did not expressly agree with HHS's characterization but noted that other statutes "*do* exempt categories of entities that include for-profit corporations from laws that otherwise require these entities to engage in activities to which they object on grounds of conscience." *Id*. "If Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations." *Id.* at 717. It should be noted that, despite HHS's assertion in its *Hobby Lobby* brief, section 702(a) does not expressly distinguish "religious" entities based on for-profit or nonprofit status.

[63] *Cf. id.* at 702, 708 (in a non-Title VII case, rejecting the argument that "'for-profit, secular corporations cannot engage in religious exercise' within the meaning of [the Religious Freedom Restoration Act (RFRA)] or the First Amendment," and holding that RFRA's protections for any "person" whose religious free exercise is

substantially burdened by the government is not limited to nonprofits and includes for-profit closely held corporations providing secular goods or services because "no conceivable definition of the term ['person'] includes natural persons and nonprofit corporations, but not for-profit corporations"); *see Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring) (recognizing that it is an open question regarding application of Title VII's religious organizations exemption under section 702 to for-profit organizations, specifically mentioning possible Establishment Clause issues with respect to for-profit organizations).

[64] 42 U.S.C. § 2000e-1(a). The Supreme Court, in dicta in a case focused on religious discrimination, has characterized section 702 by stating it "exempts religious organizations from Title VII's prohibition against discrimination on the basis of religion." *Amos*, 483 U.S. at 329. Section 703(e)(2) states, "it shall not be an unlawful employment practice" for certain schools, colleges, universities, or other educational institutions "to hire or employ employees of a particular religion." 42 U.S.C. § 2000e-2(e)(2).

[65] *See Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (holding that exemption "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin"); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that the exemption "does not … exempt religious educational institutions with respect to all discrimination"); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) ("religious institutions that otherwise qualify as 'employer[s]' are subject to Title VII provisions relating to discrimination based on race, gender and national origin"); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."); *cf. Garcia*, 918 F.3d at 1004-5 (holding that Title VII retaliation and hostile work environment claims related to religious discrimination were barred by religious organization exception, but adjudicating disability discrimination claim on the merits).

[66] 42 U.S.C. § 2000e-2(e) ("Notwithstanding any other provision of [Title VII], it shall not be an unlawful employment practice for [certain religious educational organizations] . . . to hire and employ employees of a particular religion . . . .").

[67] Courts take varying approaches regarding the causation standard and proof frameworks to be applied in assessing this defense. *See Kennedy*, 657 F.3d 189 at 193-94 (holding that plaintiff's claims of discharge, harassment, and retaliation based on religion were covered by section 702(a) religious exemption and thus barred); *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) ("Thus, we will not apply Title VII to [plaintiff's sex discrimination] claim because Congress has not demonstrated a clear expression of an affirmative intention that we do so in situations where it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision."); *DeMarco*, 4 F.3d at 170-71 ("[T]he [*McDonnell Douglas*] inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action."); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (holding race and sex discrimination claims barred by section 702 exemption where religious employer presents "convincing evidence" that employment practice was based on the employee's religion).

[68] "For the purposes of this subchapter … [t]he term "religion" includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j).

[69] *See Curay-Cramer*, 450 F.3d at 141 (distinguishing the case "from one in which a plaintiff avers that truly comparable employees were treated differently following substantially similar conduct"); *DeMarco*, 4 F.3d at 171 (stating pretext inquiry "focuses on . . . whether the rule applied to the plaintiff has been applied uniformly"); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1368 n.1 (9th Cir. 1986) (finding that Title VII's exemption did not apply when the religious employer's practice and justification were "conclusive[ly]" a pretext for sex discrimination).

[70] *See Curay-Cramer*, 450 F.3d at 141 ("[T]he existence of [section 702(a)] and our interpretation of its scope prevent us from finding a clear expression of an affirmative intention on the part of Congress to have Title VII apply when its application would involve the court in evaluating violations of [Catholic] Church doctrine."); *DeMarco*, 4 F.3d at 170-71 ("The district court reasoned that, where employers proffered religious reasons for challenged employment actions, application of the *McDonnell Douglas* test would require 'recurrent inquiry as to the value or truthfulness of church doctrine,' thus giving rise to constitutional concerns. However, in applying the *McDonnell Douglas* test to determine whether an employer's putative purpose is a pretext, a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable.

Rather, the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action." (citations omitted)); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (in determining whether an agency rule contravened a closely held corporation's rights under the Religious Freedom Restoration Act, "it is not for the Court to say that . . . religious beliefs are mistaken or unreasonable"; rather the Court's "'narrow function . . . is to determine' whether the plaintiffs' asserted religious belief reflects 'an honest conviction'").

[71] *Fremont Christian Sch.*, 781 F.2d at 1367 n.1; *see also Miss. Coll.*, 626 F.2d at 486 (if evidence disclosed that the college "in fact" did not consider its religious preference policy in determining which applicant to hire, section 702 did not bar EEOC investigation into applicant's sex discrimination claim).

[72] *Fremont Christian Sch.*, 781 F.2d at 1366 (quoting *Miss. Coll.*, 626 F.2d at 485).

[73] *See Garcia v. Salvation Army*, 918 F.3d 997, 1007 (9th Cir. 2019) (holding that Title VII's religious organizations exemption is not jurisdictional and can be waived if not timely raised in litigation). "Because Congress did not rank the religious exemption as jurisdictional, this Court will 'treat the restriction as nonjurisdictional in character.'" *Smith v. Angel Food Ministries, Inc.*, 611 F. Supp. 2d 1346, 1351 (M.D. Ga. 2009) (quoting *Arbaugh*, 546 U.S. 500, 515 (2006)).

[74] *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (addressing the issue of whether the § 702 exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause of the First Amendment, the Court held that "as applied to the nonprofit activities of religious employers, § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions"); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) ("The revised [religious organization exemption] provision, adopted in 1972, broadens the exemption to include any activities of religious organizations, regardless of whether those activities are religious or secular in nature.").

[75] *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding religious organization exemption barred religious discrimination claim by parochial school teacher who was discharged for failing to follow church canonical procedures with respect to annulment of a first marriage before remarrying).

[76] *See* 42 U.S.C. § 2000e(j) (defining religion to include "all aspects of religious observance and practice, as well as belief"); *see also Little*, 929 F.2d at 951 (concluding that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts").

[77] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *see, e.g.*, *Killinger v. Samford Univ*., 113 F.3d 196, 200 (11th Cir. 1997) (holding that under religious organization exemption School of Divinity need not employ professor who did not adhere to the theology advanced by its leadership); *Little*, 929 F.2d at 951 (holding that religious organization exemption barred religious discrimination claim challenging parochial school's termination of teacher who had failed to validate her second marriage by first seeking an annulment of her previous marriage through the canonical procedures of the Catholic church).

[78] *See Hall*, 215 F.3d at 625 (finding that Title VII's religious organization exemption was not waived by the employer's receipt of federal funding or holding itself out as an equal employment opportunity employer); *Little*, 929 F.3d at 951 (finding that Title VII's religious organization exemption was not waived by Catholic school knowingly hiring a Lutheran teacher); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1007 (9th Cir. 2019) (holding that Title VII's religious organization exemption is not jurisdictional and can be waived).

[79] "In this context, there are circumstances, like those presented here, where a religious institution's ability to 'create and maintain communities composed solely of individuals faithful to their doctrinal practices' will be jeopardized by a plaintiff's claim of gender discrimination." *Curay-Cramer,* 450 F.3d at 140-42 (affirming dismissal under the religious organization exemption and First Amendment grounds of Catholic school teacher's claim that her termination for signing pro-choice newspaper advertisement constituted sex discrimination under Title VII; evaluating the plaintiff's claim that male employees were treated less harshly for different conduct that violated church doctrine (e.g., opposition to the Iraq war) would require the court to "measure the degree of severity of various violations of Church doctrine" in violation of the First Amendment); *see also Miss. College*, 626 F.2d at 485 (holding that a plaintiff is barred from proceeding with a Title VII suit if a religious employer presents "convincing evidence" that the employment practice was based on a religious preference).

[80] *Id.* at 141 ("We distinguish this case from one in which a plaintiff avers that truly comparable employees were treated differently following substantially similar conduct . . . Requiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer's ability to create and maintain communities of the faithful.")

[81] 565 U.S. 171 (2012).

[82] *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020).

[83] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012).

[84] *Our Lady of Guadalupe,* 140 S. Ct. at 2060.

[85] *Hosanna-Tabor*, 565 U.S, at 195 n.4 ("We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."); *Our Lady of Guadalupe*, 140 S. Ct. at 2055.

[86] *Id.*; *see also Hosanna-Tabor*, 565 U.S. at 188 (agreeing that the ministerial exception "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers").

There is a split in the courts on whether ministerial employees can bring EEO harassment claims. *Compare Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 953 (9th Cir. 2004) (holding that the ministerial exception does not bar sexual harassment and retaliation claims that do not "implicate the Church's ministerial employment decisions"), *and Clement v. Roman Catholic Diocese of Erie*, No. 16-117, 2017 WL 2619134, at *4 n.3 (W.D. Pa. June 16, 2017) (ruling that sexual harassment claim by ministerial employee was not barred because *Hosanna-Tabor* expressly limited its holding to employment discrimination claims based on hiring and termination decisions and left open whether the ministerial exception bars other types of claims), *with Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1246 (10th Cir. 2010) (holding that minister's hostile work environment claim was barred under ministerial exception), *and Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 WL 1826231, at *7 (D. Neb. Apr. 22, 2015) (holding that the ministerial exception barred sexual harassment claim because it "clearly implicate[d] an internal church decision and management"). The Court in *Our Lady of Guadalupe* did not address this precise question. On one hand, the Court emphasized that "*the selection and supervision* of the teachers upon whom the

schools rely to do this work lie at the core of their mission." 140 S. Ct. at 2055 (emphasis added); *see also id.* at 2060 ("at a component of [a religious institution's] autonomy is the selection of the individuals who play certain key roles"); *id.* ("a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities."). On the other hand, the Court stated broadly, "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, *judicial intervention into disputes between the school and the teacher* threatens the school's independence in a way that the First Amendment does not allow." *Id*. at 2069 (emphasis added); *see also id.* at 2060 ("Under [the ministerial exception] rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.").

[87] *Id*. at 2061.

[88] *Id.*

[89] *Id.* at 2060; *see also Hosanna-Tabor*, 565 U.S. at 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.").

[90] *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

[91] *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (Fair Labor Standards Act ("FLSA")).

[92] *See Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (holding that to invoke the ministerial exception "an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization"); *see, e.g.*, *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 424-25 (2d Cir. 2018) (although it was a "close question," the district court did not err in finding that hospital, which was no longer affiliated with the United Methodist Church and took steps to distance itself from its religious heritage, was "a 'religious group,' at least with respect to its Department of Pastoral Care," because the Department's operations were "marked by clear or obvious religious characteristics"); *Grussgott v. Milwaukee Jewish Day Sch., Inc*., 882 F.3d 655 (7th Cir. 2018) (Jewish day school was religious institution for purposes of

applying the ministerial exception where school had a rabbi on staff and maintained its own chapel and Torah scrolls, and students were taught Jewish studies and Hebrew and engaged in daily prayer); *Conlon*, 777 F.3d at 829, 833-34 (parachurch campus student organization "whose purpose is to advance the understanding and practice of Christianity in colleges and universities" was a religious organization); *Shaliehsabou*, 363 F.3d 299 (Hebrew nursing home is a religious institution for purposes of applying the ministerial exception to the FLSA where its bylaws define it as a religious and charitable nonprofit and declare that its mission is to provide elder care to "aged of the Jewish faith in accordance with the precepts of Jewish law and customs"; pursuant to that mission, the nursing home maintained a rabbi on staff, employed mashgichim to ensure compliance with Jewish dietary laws, and placed a mezuzah on every resident's doorpost); *Yin v. Columbia Int'l Univ*., 335 F. Supp. 3d 803 (D.S.C. 2018) (religious university that "trains Christians for global missions, full-time vocational Christian ministry in a variety of strategic professions, and marketplace ministry" and "educates people from a biblical worldview" could invoke exception).

[93] *See Our Lady of Guadalupe*, 140 S. Ct. at 2058-59 (the schools maintained that their decisions were based on "classroom performance—specifically, [the teacher's] difficulty in administering a new reading and writing program"—and "poor performance—namely, a failure to observe the planned curriculum and keep an orderly classroom").

[94] 140 S. Ct. at 2066.

[95] *Hosanna-Tabor*, 565 U.S. at 190.

[96] *Our Lady of Guadalupe*, 140 S. Ct. at 2055, 2062; *Hosanna-Tabor*, 565 U.S. at 190-92 (holding that the ministerial exception applied to a parochial school teacher, because she pursued a rigorous religious course of study to become a "called" teacher, which included being ordained and receiving the title of "minister," she held herself out as a minister of the church, she led daily prayers and occasional chapel services, and she provided religious instruction).

[97] *Hosanna-Tabor*, 565 U.S. at 193.

[98] *Our Lady of Guadalupe*, 140 S. Ct. at 2064.

[99] *Id.* at 2064, 2068.

[100] *Hosanna-Tabor*, 565 U.S. at 193-94 (pointing out that the "heads of congregations themselves often have a mix of duties, including secular ones").

[101] 140 S. Ct. at 2063.

[102] *Id.* at 2067.

[103] *Id.* at 2064; *see also Hosanna-Tabor*, 565 U.S. at 194 (explaining that, while relevant, the considerations "cannot be considered in isolation, without regard to the nature of the religious functions performed").

[104] *Id.*

[105] *See id*. at 2056, 2060, 2067 n.26, 2068-69; *Hosanna-Tabor*, 565 U.S. at 190.

[106] *Grussgott v. Milwaukee Jewish Day Sch., Inc*., 882 F.3d 655, 655 (7th Cir. 2018) (finding claims by parochial school Hebrew and Jewish studies teacher barred); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (finding claims by parochial school principal barred); *Lishu Lin v. Columbia Int'l Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (finding claims by faculty member with secular titles barred where she trained Christians for ministry and educated students from a biblical worldview to spread religious message).

[107] *Sterlinski v. Cath. Bishop of Chi.*, 934 F.3d 568 (7th Cir. 2019) (finding claim by church organist barred); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (finding claims by church music director barred).

[108] *Penn v. N.Y. Methodist Hosp*., 884 F.3d 416 (2d Cir. 2018) (finding claims by hospital chaplain barred, viewing chaplaincy department as a religious organization though hospital was not); *Conlon*, 777 F.3d 829 (finding claim by staff spiritual director of fellowship organization barred); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309 (4th Cir. 2004) (given "the importance of dietary laws to the Jewish religion," "mashgiach" (kosher supervisor) at Hebrew Home was ministerial employee for purposes of FLSA).

[109] 140 S. Ct. at 2055, 2065, 2069.

[110] *Id.* at 2067 n.26.

[111] *Id.* at 2066.

[112] *Id.*

[113] *See Conlon*, 777 F.3d at 836 (explaining that "[t]he ministerial exception is a structural limitation imposed on the government by the Religion Clauses").

[114] *See Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 198 (2d Cir. 2017) (stating that "the district court appropriately ordered discovery limited to whether [plaintiff] was a minister within the meaning of the exception" when it found that it could not determine whether the ministerial exception applied on a motion to dismiss).

[115] *See Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (noting that although the district court first raised the ministerial exception, "the Church [wa]s not deemed to have waived it because the exception is rooted in constitutional limits on judicial authority"); *Conlon*, 777 F.3d at 836 ("The Court's clear language [in *Hosanna-Tabor*] recognizes that the Constitution does not permit private parties to waive the First Amendment's ministerial exception."); *but see Hamilton v. Southland Christian School, Inc.,* 680 F.3d 1316, 1318 (11th Cir. 2012) (finding that the school had waived its ministerial exception defense on appeal by not sufficiently arguing it in its brief).

[116] The First Amendment religion and speech clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." RFRA, 42 U.S.C. § 2000bb-1(a) and (b), provides: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." RFRA defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id*. § 2000bb-2(1). "Although the claim is statutory, RFRA protects First Amendment free-exercise rights," *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013), because it was enacted in response to *Employment Division v. Smith*, 494 U.S. 872, 887 (1990), and designed to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The First Amendment applies only to restrictions imposed by the government—federal or state—not by private parties. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). RFRA applies only to restrictions imposed by the federal government, not by state

governments or private parties. *See* 42 U.S.C. § 2000bb-2(1); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001).

[117] *See e.g., Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 138 (3d Cir. 2006) (claim that Catholic school engaged in gender discrimination in violation of Title VII could raise "serious constitutional questions" because it required more than limited inquiry into pretext); *cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases.").

Some courts have examined an employer's defense to an EEOC action that a nondiscrimination requirement would conflict with their exercise of religion under RFRA, although unsuccessfully thus far. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (considering but rejecting employer's defense that application of Title VII sex nondiscrimination requirement to its hiring decisions would substantially burden its exercise of religion under RFRA); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002) (same for Title VII religious nondiscrimination and non-harassment requirements). Other courts have held that a RFRA defense does not apply in suits involving only private parties. *See, e.g.*, *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736-37 (7th Cir. 2015) (RFRA inapplicable where the government is not a party, in part because if the government is not a party, it cannot demonstrate a "compelling government interest" as RFRA requires); *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010) (finding RFRA inapplicable in trademark infringement case). The Second Circuit has held that an employer could raise RFRA as defense to an employee's Age Discrimination in Employment Act (ADEA) claim, because the ADEA is enforceable both by the EEOC and private litigants, but a number of other circuits have disagreed with that reasoning. *Compare Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006) *with General Conference Corp. of Seventh Day Adventists v. McGill*, 617 F.3d 402, 411 (6th Cir. 2006) (declining to follow *Hankins* based on the text in RFRA), *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) ("The [*Hankins*] decision is unsound. RFRA is applicable only in suits to which the government is a party."), *abrogated on other grounds by Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012), *and Mathis v. Christian Heating Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 326 (E.D. Pa. 2016) (disagreeing with *Hankins* and finding that RFRA does not apply if the government is not a party).

One circuit court has found that RFRA's broad definition of "government" to include any branch of the federal government might allow a court to find sufficient government involvement in lawsuits between private parties to allow for a RFRA defense to apply. *See In re Young,* 82 F.3d 1407, 1417 (8th Cir. 1996) ("The bankruptcy code is federal law, the federal courts are a branch of the United States, and our decision in the present case would involve the implementation of federal bankruptcy law."), *vacated on other grounds*, 117 S. Ct. 2502 (1997), *aff'd on remand*, 141 F.3d 854 (1998). *See also Tanzin v. Tanzir*, 141 S. Ct. 486, 493 (2020) ("We conclude that RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities.").

[118] *See, e.g.*, *Brown v. Polk Cnty.*, 61 F.3d 650, 659 (8th Cir. 1995) (en banc) (rejecting county employers' argument in Title VII religious discrimination case that they were allowed to prohibit religious expression altogether in the workplace to avoid Establishment Clause claims against them).

[119] *See Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (Aug. 14, 1997), **https://clintonwhitehouse4.archives.gov/WH/New/html/19970819-3275.html (https://clintonwhitehouse4.archives.gov/WH/New/html/19970819-3275.html)** (last visited Jan. 8, 2021) [hereinafter *Federal Workplace Guidelines*]. Although the *Federal Workplace Guidelines* are directed at federal employers, they provide useful guidance for state and local government employers, as well as private employers in some circumstances. In addition, the U.S. Department of Justice maintains a website, **www.firstfreedom.gov (http://www.firstfreedom.gov)** , which provides information on a variety of constitutional and statutory religious discrimination issues.

[120] *See, e.g.*, *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 164-65 (2d Cir. 2001) (holding that state agency did not violate either Title VII or the First Amendment Free Exercise Clause by refusing to allow employee to evangelize clients of state agency while performing job duties; in addition, employer would have risked First Amendment Establishment Clause violation by permitting the accommodation); *cf. Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) (holding that police department violated Sunni Muslim officer's First Amendment free exercise rights by refusing to make a religious exception to its "no beard" policy to accommodate his beliefs, while exempting other officers for

medical reasons); *Draper v. Logan Cnty. Pub. Lib.*, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (holding that public library violated an employee's First Amendment free speech and free exercise rights by prohibiting her from wearing a necklace with a cross ornament).

[121] *See Harrell v. Donahue*, 638 F.3d 975, 984 (8th Cir. 2011) (holding RFRA claims alleging religious discrimination in federal employment are barred because "Title VII provides the exclusive remedy for [] claims of religious discrimination"); *Francis v. Mineta*, 505 F.3d 266, 272 (3d Cir. 2007) (stating that "[i]t is equally clear that Title VII provides the exclusive remedy for job-related claims of federal religious discrimination, despite [plaintiff's] attempt to rely upon the provisions of RFRA"). *But see Lister v. Def. Logistics Agency*, No. 2:05-CV-495, 2006 WL 162534, at *3 (S.D. Ohio Jan. 20, 2006) (denying defendants' motion to dismiss as to RFRA claim and finding that "Title VII does not preclude Plaintiff from pursuing claims under the Fifth Amendment to the United States Constitution and RFRA" because "[a]lthough the claims arise from the same factual circumstance as the Title VII claim, the claims are distinct from Plaintiff's claim for employment discrimination and therefore are not precluded by Title VII"). In addition, one appellate court has held that a federal employee is not preempted from bringing a RFRA claim against another agency (not his employer) to challenge that agency's action interfering with employment. *See, e.g.*, *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013) (allowing employee's RFRA claim to proceed against agency that enforced building security regulations and denied her permission to enter building while wearing a kirpan).

[122] *See, e.g.*, *Hobby Lobby*, 573 U.S. at 733 (rejecting "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction" under RFRA, and stating that the decision "provides no such shield"); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 589-97 (6th Cir. 2018) (holding that EEOC's enforcement of Title VII did not violate RFRA), *aff'd on other grounds sub nom. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020); ***EEOC v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 810-11 (S.D. Ind. 2002)*** **(https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002160113&pubNum=0004637&originatingDoc=I553accf0223811e8a5e6889af90df30f&refType=RP&fi=co_pp_sp_4637_810&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_4637_810)** (holding under RFRA that "even if the EEOC *had* substantially burdened [the employer's] religious beliefs or practices in prosecuting this matter, its conduct still comports with the RFRA's mandates

[because] [t]here is a 'compelling government interest' in creating such a burden [–] the eradication of employment discrimination based on the criteria identified in Title VII, including religion" – and "the intrusion is the least restrictive means that Congress could have used to effectuate its purpose"); *see also Bostock*, 140 S. Ct. at 1753-54 (holding that discrimination based on sexual orientation or transgender status is actionable under Title VII's sex discrimination prohibition, but declining to address how an employer's religious convictions about sexual orientation or transgender status are protected under Title VII's statutory religious organization exception, RFRA, or the First Amendment's ministerial exception, noting that how doctrines "protecting religious liberty interact with Title VII are questions for future cases"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that the compelling governmental interest in eradicating racial discrimination in education substantially outweighed the burden of denying tax exempt status under 26 U.S.C. § 501(c)(3) to a religious university that engage in race discrimination).

[123] *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 281 (3d Cir. 2001) (explaining that prima facie case and evidentiary burdens of an employee alleging religious discrimination mirror those of an employee alleging race or sex discrimination). A disparate impact analysis could also apply in the religion context, particularly in the area of recruitment and hiring, or with respect to dress codes or other facially neutral rules. *See, e.g.*, *Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377 (5th Cir. 2007) (affirming summary judgment, citing lack of statistical evidence for employer on Title VII claim brought by teacher who asserted policy favoring teachers whose children attended the public schools had a disparate impact on those whose children attended private school for religious rather than secular reasons); *Muhammad v. N.Y. City Transit Auth.*, 52 F. Supp. 3d 468, 485-88 (E.D.N.Y. 2014) (holding that disparate impact religious discrimination claim could proceed where policy of transferring to non-driver positions those with objections to the headwear portion of employer's uniform policy disproportionately affected Muslim employees, employer's desire to maintain customer comfort and boost employee morale did not amount to a legitimate business necessity for its transfer practice, and availability of a less restrictive alternative could be proven from employer's own prior practice of permitting drivers to wear khimars as long as they matched their uniforms); *Jenkins v. N.Y. City Transit Auth.*, 646 F. Supp. 2d 464, 470-71 (S.D.N.Y. 2009) (holding that Pentecostal employee stated a claim under Title VII for disparate impact based on religion challenging dress code requiring female bus operators to wear pants rather than long skirts). However, because the reasonable accommodation/undue hardship analysis is usually used when a neutral work rule

adversely affects an employee's religious practice, *see infra* § 12-IV, disparate impact analysis is seldom used in religion cases.

[124] *See* 42 U.S.C. § 2000e-3(b).

[125] *Id.*; 42 U.S.C. § 2000e-2(e)(1); *see also infra* §§ 12-I-C, 12-II-D.

[126] *See, e.g.*, *Patterson v. Ind. Newspapers Inc.*, 589 F.3d 357, 365 (7th Cir. 2009) (ruling that plaintiff may proceed on a claim that "her supervisors, though also Christian, did not like her brand of Christianity," because "[t]he issue is whether plaintiff's specific religious beliefs were a ground for" an adverse employment action); *Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 813 (finding evidence raised a reasonable inference that failure to hire was based on religion where applicant was told "[y]ou damned humanists are ruining the world" and will "burn in hell forever").

[127] It is not an unlawful employment practice for an employment agency to comply with an employer's request for applicants of a particular religion "in those relatively rare instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). i); *see also supra* §§ 12-I-C-1, 12-I-C-2 (discussing religious organization exemption and ministerial exception), 12-II-D (discussing BFOQ).

[128] *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) ("An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. . . . If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII" absent an available defense or exemption); *see also Commission Guidelines*, 29 C.F.R. § 1605.3.

[129] *See* 42 U.S.C. § 2000e-3(b).

[130] *See Abercrombie & Fitch Stores, Inc*., 135 S. Ct. at 2033 (holding Title VII prohibits failing to hire an applicant in order to avoid accommodating the applicant's religious practice, whether or not the applicant informed the employer of the need for an accommodation).

[131] *See, e.g.*, *Muhammad v. N.Y. City Transit Auth.*, 52 F. Supp. 3d 468, 485-87 (E.D.N.Y. 2014) (analyzing disparate impact claim arising from disproportionate effect of employer's dress code provision on those wearing certain types of religious garb); *Jenkins v. N.Y. City Transit Auth.*, 646 F. Supp. 2d 464, 470-71 (S.D.N.Y. 2009) (holding that Pentecostal employee stated a claim under Title VII for religion-based disparate impact when challenging dress code requiring female bus operators to wear pants rather than long skirts).

[132] In *Noyes v. Kelly Servs. Inc*., 488 F.3d 1163, 1165 (9th Cir. 2007), the plaintiff alleged "reverse religious discrimination" when she was not promoted because she did not follow the religious beliefs of her supervisor and management, who were members of a small religious group and favored and promoted other members of the religious group. The court ruled that while the employee did not adhere to a particular religion, the fact that she did not share the employer's religious beliefs was the basis for the alleged discrimination against her, and the evidence was sufficient to create an issue for trial on whether the employer's decision to promote another employee was a pretext for religious discrimination. *Id*. at 1168-69.

[133] *See, e.g.*, *Campos v. City of Blue Springs*, 289 F.3d 546 (8th Cir. 2002) (holding that evidence supported finding of religiously motivated constructive discharge based on plaintiff's Native American spiritual beliefs); *EEOC v. Univ. of Chi. Hosp.*, 276 F.3d 326 (7th Cir. 2002) (holding that evidence was sufficient to proceed to trial in case brought on behalf of recruiter alleging constructive discharge based on her evangelical religious beliefs); *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199, 1203 (8th Cir. 2001) (holding, in case raising both Title VII and First Amendment claims, that an employer may not discipline employees for conduct because it is religious in nature if it permits such conduct by other employees when not motivated by religious beliefs); *Tincher v. Wal-Mart Stores*, 118 F.3d 1125, 1131 (7th Cir. 1997) (holding a reasonable jury could conclude that employer's articulated reason for the discharge of a Seventh-day Adventist was pretextual and that the real reason was religious discrimination because of the inconvenience caused by employee's inability to work on Saturdays). However, not all employer decisions affect a term, condition, or privilege of employment as required to be actionable as disparate treatment. *See, e.g.*, *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629 (6th Cir. 2003) (holding a resignation 53 days prior to the effective date of an employer's policy that would have posed conflict with employees' religious beliefs did not constitute constructive discharge).

[134] *See Haji v. Columbus City Sch*., 621 F. App'x 309 (6th Cir. 2015) (in case involving a school employee who violated the employer's attendance policy by leaving early to attend a local mosque without signing out or obtaining permission to leave, holding that the plaintiff failed to present evidence that non-Muslims were treated more favorably, or other evidence supporting an inference of discrimination).

[135] *Cf. Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986) (holding that a benefit "that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all" (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984))). However, at least one court has held that a private employer providing company resources to recognized employee "affinity groups" does not violate Title VII by denying this privilege to any group promoting or advocating any religious or political position, where the company excluded not only groups advocating a particular religious position but also those espousing religious indifference or opposition. *See Moranski v. Gen. Motors Corp.*, 433 F.3d 537 (7th Cir. 2005).

[136] *See Delelegne v. Kinney Sys., Inc.*, No. 02–11657–RGS, 2004 WL 1281071 (D. Mass. June 10, 2004) (holding that Ethiopian Christian parking garage cashier could proceed to trial on claims of religious harassment and discriminatory termination where he was not allowed to bring a Bible to work, pray, or display religious pictures in his booth, while Somali Muslim employees were permitted to take prayer breaks and to display religious materials in their booths).

[137] This type of fact pattern also arises where there is no comparator. *See, e.g*., *Dixon v. Hallmark Cos*., 627 F.3d 849 (11th Cir. 2010) (ruling that apartment complex property manager could proceed to trial on claim challenging termination for violating the employer's religious displays policy by refusing to remove a poster of flowers with the words "Remember the Lilies . . . Matthew 6:28" she had hung in the on-site management office, where the employer also terminated the manager's husband, telling him, "You're fired too. You're too religious." This fact pattern may also give rise to a denial of accommodation issue. *See infra* § 12-IV-C-6.

[138] *See infra* § 12-III.

[139] *See infra* § 12-IV. As explained above, Title VII defines "religion" as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or

prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

[140] Determining whether religious expression disrupts coworkers or customers is discussed in §§ 12-III-C and 12-IV-C-6, *infra*. Additionally, in a government workplace, the First Amendment Free Exercise Clause and Establishment Clause may affect the employer's or employee's ability to restrict or engage in religious expression. *See supra* § 12-I-C-3 ("Interaction of Title VII with the First Amendment and the Religious Freedom Restoration Act (RFRA)"); *see also Federal Workplace Guidelines*, *supra* note 119, §§ 2-B, 2-E (noting implications of RFRA for neutral rules that burden religion in the federal workplace).

[141] However, there may be special circumstances where religion can be a bona fide occupational qualification for a particular position. *See infra* § 12-II-D (discussing when religion can be a bona fide occupational qualification).

[142] *Cf.* 42 U.S.C. § 2000e-2(g) (permitting covered entities to discharge or refuse to "hire and employ" or refer an individual who does not meet federal security requirements). *See infra* § 12-IV-B-5 (discussing security requirements and Title VII's accommodation obligation).

[143] 42 U.S.C. § 2000e-2(e)(1).

[144] *Compare Abrams v. Baylor Coll. of Med.*, 805 F.2d 528 (5th Cir. 1986) (holding that being non-Jewish was not a BFOQ for a university which had a contract to supply physicians on rotation at a Saudi Arabian hospital when the hospital presented no evidence to support its contention that Saudi Arabia would actually have refused an entry visa to a Jewish faculty member), *and Rasul v. Dist. of Columbia*, 680 F. Supp. 436 (D.D.C. 1988) (holding that Department of Corrections failed to demonstrate that Protestant religious affiliation was a BFOQ for position as prison chaplain because chaplains were recruited and hired on a facility-wide basis and were entrusted with the job of planning, directing, and maintaining a total religious program for all inmates, whatever their respective denominations), *with Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983) (holding that requirement that pilot convert to Islam was a BFOQ, where not based on a preference of contractor performing work in Saudi Arabia, but on the fact that non-Muslim employees caught flying into Mecca would, under Saudi Arabian law, be beheaded), *aff'd*, 746 F.2d 810 (5th Cir. 1984).

[145] 42 U.S.C. § 2000e-2(a)(1).

[146] *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998) (quotation marks and citations omitted).

[147] *Id*.

[148] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

[149] *Meritor Sav. Bank*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (alteration in *Meritor*)).

[150] *Meritor Sav. Bank*, 477 U.S. at 66; *see also Faragher*, 524 U.S. at 786-88.

[151] *Meritor Sav. Bank*, 477 U.S. at 65.

[152] *Id*. at 66; *see, e.g.*, *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997) (holding that an employee who was terminated after she disagreed with supervisor's religious beliefs raised a triable Title VII harassment claim based on two separate theories of harassment liability: that a supervisor conditioned a "tangible employment benefit" upon "adher[ing] to [her supervisor's set of religious values," and that the employer created a hostile work environment).

[153] *See Martin v. Stoops Buick, Inc*., No. 1:14-cv-00298-RLY-DKL, 2016 WL 2989037, at *6 (S.D. Ind. May 24, 2016) (denying summary judgment for employer where a reasonable juror could find that plaintiff's termination was motivated by her refusal to continue reading the Bible with her manager); *Scott v. Montgomery Cnty. Sch. Bd*., 963 F. Supp. 2d 544, 553-57 (W.D. Va. 2013) (holding that a reasonable jury could find plaintiff's rejection of her supervisor's overtures, including declining her requests to join Bible study group, attend religious retreat, or begin each day with prayer before work, resulted in negative performance evaluations and then the non-renewal of her contract, even though the allegations did not establish a hostile work environment claim); *Rice v. City of Kendallville*, No. 1:07–CV–180–TS, 2009 WL 857463, at *8-9 (N.D. Ind. Mar. 31, 2009) (holding that discrimination could be found where plaintiff was terminated but her coworker, who engaged in same misconduct but attended their supervisor's church, was not); *see also Venters*, 123 F.3d at 964 (holding that employee established that she was discharged on the basis of her religion after supervisor, among other things, repeatedly called her "evil" and stated that she had to share his Christian beliefs in order to be a good employee).

[154] Many of the example's facts are taken from *Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1998). However, in *Sattar* the plaintiff alleged only discriminatory discharge, not harassment. The court of appeals upheld summary judgment in favor of the employer, ruling that the employer had supplied sufficient evidence that it had discharged the plaintiff for deficient performance and poor leadership skills, and that the plaintiff had not supplied evidence that these reasons were pretext for religious discrimination.

[155] Courts may come to different conclusions regarding whether job duties and religious beliefs conflict and, in turn, whether there is a duty to accommodate at all. *Compare Summers v. Whitis*, No. 4:15-cv-00093-RLY-DML, 2016 WL 7242483, at *5-7 (S.D. Ind. Dec. 15, 2016) (holding that deputy county clerk terminated for refusing on religious grounds to process same-sex marriage licenses did not prove failure to accommodate because there was no conflict between her religious beliefs and her job duties, where the duties were purely administrative, and she was not required to perform or attend marriage ceremonies, personally issue licenses or certificates, say congratulations, offer a blessing, or express religious approval), *with Slater v. Douglas Cnty.*, 743 F. Supp. 2d 1188, 1193-95 (D. Or. 2010) (holding that county clerk's office employee could proceed with denial of accommodation and discriminatory termination claim arising from her religious refusal to process same-sex domestic partnership registration paperwork).

[156] *See Pedersen v. Casey's Gen. Stores, Inc.*, 978 F. Supp. 926, 929 (D. Neb. 1997) (awarding relief following jury finding that employer's refusal to accommodate employee's need to have Easter day off, while knowing that she could not compromise her religious needs and where it would not have posed an undue hardship, amounted to constructive discharge in violation of Title VII); *see also Venters*, 123 F.3d at 972 (ruling that "the accommodation framework . . . has no application when the employee alleges that he was fired because he did not share or follow his employer's religious beliefs").

[157] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal quotation marks and citation omitted).

[158] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *see also Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 443 (7th Cir. 2011) (stating the prima facie case of hostile work environment based on religion).

[159] *See Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 189-91 (1st Cir. 2003) ("A constellation of factors led to the friction between Rosario and her coworkers, but no reasonable fact finder could conclude on the basis of the incidents we have described or the general atmosphere in the office that one of these factors was an antipathy towards Rosario"s underlying religious convictions."); *Marcus v. West*, No. 99 C 0261, 2002 WL 1263999, at *11 (N.D. Ill. June 3, 2002) (finding that mistreatment of Sanctified Pentecostal Christian employee was not because of religion, where supervisor mistreated all of her employees and had poor management and interpersonal skills).

[160] *See Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 387-88 & n.34 (2d Cir. 2020); *Turner v. Barr*, 811 F. Supp. 1, 3-4 (D.D.C. 1993) (finding that hostile environment was created where Jewish employee was subjected to a "joke" about the Holocaust, denied opportunity to work overtime, and ridiculed as a "turnkey," even though the latter two incidents did not refer to religion, because the facts showed that he was singled out for such treatment because of his religion).

[161] *See EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315-19 (4th Cir. 2008) (reversing summary judgment for the employer and remanding the case for trial because a reasonable fact finder could conclude that a Muslim employee who wore a kufi as part of his religious observance was subjected to hostile work environment religious harassment when fellow employees repeatedly called him "Taliban" and "towel head," made fun of his appearance, questioned his allegiance to the United States, suggested he was a terrorist, and made comments associating all Muslims with senseless violence); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 398-401 (5th Cir. 2007) (reversing summary judgment for the employer and remanding the case for trial because a reasonable fact finder could conclude that harassment initiated after September 11, 2001, against a car salesman who was born in India and was a practicing Muslim, was severe or pervasive and motivated by his national origin and religion); *EEOC v. T-N-T Carports, Inc.*, No. 1:09–CV–27, 2011 WL 1769352, at *4 (M.D.N.C. May 9, 2011) (holding that evidence could show harassment was motivated by religious animosity where coworkers suggested employee, a devout Christian, belonged to a cult and was a devil worshipper; physically intimidated her while simultaneously using derogatory words about her religion; called her "crazy" about her religious beliefs; drew devil horns, a devil tail, and a pitchfork on her Christmas photo; used profanity followed by mock apologies; and cursed the Bible and teased about Bible reading). In *Sunbelt*, the Fourth Circuit held: "we cannot regard as 'merely offensive,' and thus 'beyond Title VII's purview,' *Harris*, 510 U.S. at

21, constant and repetitive abuse founded upon misperceptions that all Muslims possess hostile designs against the United States, that all Muslims support jihad, that all Muslims were sympathetic to the 9/11 attack, and that all Muslims are proponents of radical Islam." 521 F.3d at 318.

[162] *See Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 279 (3d Cir. 2001) (holding that supervisor criticizing professor's refusal to work on her Sabbath, scheduling meetings on Jewish holidays, and charging her for leave on those holidays could be found to have "infected [professor's] work experience" because of her religion).

[163] *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); *see Mahler v. First Dakota Title Ltd. P'ship*, 931 F.3d 799, 806 (8th Cir. 2019) ("Harassing conduct is considered unwelcome if it was uninvited and offensive.").

[164] In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993), the Court clarified that a complainant alleging a hostile work environment must establish not only that the alleged harassment was objectively hostile but also that she subjectively viewed the conduct as hostile. Some courts continue to identify unwelcomeness as a separate element of a hostile work environment claim, *see, e.g.*, *Maldonado-Cátala v. Municipality of Naranjito*, 876 F.3d 1, 10 (1st Cir. 2017); *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 445 (5th Cir. 2017), and other courts address unwelcomeness as part of assessing subjective hostility, stating that conduct that is subjectively hostile must also logically be unwelcome, *see, e.g.*, *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 904 (7th Cir. 2018) (holding that because a reasonable jury could find that the conduct was unwelcome, there was an issue of material fact regarding subjective hostility); *Kokinchak v. Postmaster Gen. of the U.S.*, 677 F. App'x 764, 767 (3d Cir. 2017) (treating unwelcomeness and subjective hostility as the same issue).

[165] *See WC&M Enters.*, 496 F.3d at 400-01 (finding religious and national origin harassment claim could be based on having been referred to as a "Muslim extremist" and constantly called "Taliban," among other terms); *Khan v. United Recovery Sys., Inc.*, No. H-03-2292, 2005 WL 469603, at *16-17 (S.D. Tex. Feb. 28, 2005) (finding religious harassment claim could be based on (1) alleged comments by coworker that court characterized as "malicious and vitriolic," including that all Muslims are terrorists who should be killed, that he wished "all these Muslims were wiped off the face of the earth," and that plaintiff might get shot for wearing an "Allah" pendant; (2) additional comments questioning plaintiff about what was being taught at her mosque and whether it was "connected with terrorists"; and

(3) allegation that plaintiff's supervisor placed newspaper articles on her desk about mosques in Afghanistan that taught terrorism, along with a note telling her to come into his office and justify such activity).

[166] *See Venters v. City of Delphi*, 123 F.3d 956, 976 (7th Cir. 1997) (holding that employee established comments were unwelcome where she made clear her objection to the comments once she told her supervisor he had "crossed the line"). Complaints to family, friends, or coworkers may also indicate subjective hostility. *See, e.g.*, *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1454 (7th Cir. 1994).

[167] *See Venters*, 123 F.3d at 976.

[168] *See Faragher*, 524 U.S. at 787-88; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82-83 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."); *Harris*, 510 U.S. at 23; *see also EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (evidence that coworkers repeatedly called the employee "Taliban" and "towel head" and made other negative comments related to being a Muslim was enough to overcome summary judgment on both the objective and subjective elements of the severe-or-pervasive test).

[169] *Aulicino v. N.Y.C. Dep't of Homeless Servs*., 580 F.3d 73, 83 (2d Cir. 2009).

[170] *Harris*, 510 U.S. at 23.

[171] *Id.*; *see also Rasmy v. Marriott Int'l, Inc*., 952 F.3d 379, 390 (2d Cir. 2020) ("Although the presence of physical threats or impact on job performance are relevant to finding a hostile work environment, their absence is by no means dispositive.").

[172] *See Johnson v. Spencer Press of Me., Inc*., 364 F.3d 368 (1st Cir. 2004) (ruling that jury properly found hostile work environment where supervisor repeatedly insulted plaintiff, mocked his religious beliefs, and threatened him with violence); *cf. Sattar v. Motorola, Inc*., 138 F.3d 1164, 1167 (7th Cir. 1998) (Muslim supervisor barraged former Muslim employee with e-mails containing dire warnings of the divine punishments that awaited those who refuse to follow Islam).

[173] *Harris*, 510 U.S. at 21; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

[174] *Harris*, 510 U.S. at 22 ("[E]ven without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality . . . . Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct."); *see also Dey v. Colt Constr. & Dev. Co*., 28 F.3d 1446, 1454-55 (7th Cir. 1994) ("[T]he mention in *Harris* of an unreasonable interference with work performance was not intended to penalize the employee who possesses the dedication and fortitude to complete her assigned tasks even in the face of offensive and abusive [conduct] . . . . As Justice Scalia separately explained in *Harris*, the test under Title VII 'is not whether work has been impaired, but whether working conditions have been discriminatorily altered.'").

[175] *See Harris*, 510 U.S. at 23 ("Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances . . . . [N]o single factor is required.").

[176] *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998) (citing *Oncale*, 523 U.S. at 80); *see also* (finding coworker's conduct did not create a hostile work environment where coworker sang religious songs, quoted religious scripture, preached and spoke about Church and the Bible, referred to plaintiff as the devil an unspecified number of times over a six-month period, and informed plaintiff that she would go to Hell for not believing in Jesus Christ); *Walker v. McCarthy*, 582 F. App'x 6 (D.C. Cir. 2014) (ruling that plaintiff did not state a hostile work environment religion claim based on receipt of an invitation and emails regarding a coworker's same-sex marriage); *Sheikh v. Indep. Sch. Dist. 535*, No. 00–1896DWFSRN, 2001 WL 1636504 (D. Minn. Oct. 18, 2001) (holding that a Muslim employee who was ostracized by colleagues because he refused to shake hands with female colleagues did not suffer a materially adverse change in the terms and conditions of employment).

[177] *Compare Garcimonde-Fisher v. Area203 Marketing, LLC*, 105 F. Supp. 3d 825, 838-41 (E.D. Tenn. 2015) (ruling that owner's cumulative actions may have amounted to "[o]verwhelming pressure to conform to a particular religion or sect," where he decorated walls with Judeo-Christian artwork, biblical posters and Ten Commandments placards; distributed to employees materials with religious messages and solicitations for donations to overtly religious charities; played Christian movies on breakroom TV all day; employed a staff chaplain who hosted

prayer meetings and Bible studies during work; and made comments to one plaintiff that being Catholic was not "the right kind of Christian"), *with* ***Alansari v. Tropic Star Seafood Inc., 388 F. App'x 902, 905 (11th Cir. 2010)*** **(https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022583008&pubNum=0006538&originatingDoc=I99411220225211e68cefc52a15cd8e9f&refType=RP&fi=co_pp_sp_6538_905&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_6538_905)** (per curiam) (finding that solicitations to go to church because "Jesus would save" plaintiff, other comments about the plaintiff's Muslim religion, and the playing of Christian music on the radio did not amount to hostile work environment), ***DeFrietas v. Horizon Inv. & Mgmt. Corp., No. 2:06-cv-926, 2008 WL 204473, at *6 (D. Utah Jan. 24, 2008)*** **(https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2014886196&pubNum=0000999&originatingDoc=I99411220225211e68cefc52a15cd8e9f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))** ("Sporadic invitations to attend church with a coworker, while uncomfortable, do not constitute a hostile work environment."), *aff'd in part and rev'd in part on other grounds*, 577 F.3d 1151 (10th Cir. 2009), *Marcus v. West*, No. 99 C 0261, 2002 WL 1263999, at *11 (N.D. Ill. June 3, 2002) (finding that asking a very religious employee to swear on a Bible to resolve differences with a colleague and telling her that people did not like her "church lady act" were isolated incidents that were not severe or pervasive enough to create a hostile work environment), *and Sublett v. Edgewood Universal Cabling Sys., Inc.*, 194 F. Supp. 2d 692, 703 (S.D. Ohio 2002) (finding supervisor's single comment to Rastafarian employee that those "dread things" made him look too "radical" was not sufficiently severe to create a hostile environment).

[178] *Cf. Tessler v. KHOW Radio, Inc.*, No. 95–B–2414, 1997 WL 458489, at *8 (D. Colo. Apr. 21, 1997).

[179] *Cf. Brown v. Polk Cnty.*, 61 F.3d 650, 656-57 (8th Cir. 1995) (en banc) (holding that it did not pose an undue hardship for employer to accommodate supervisor's sporadic and voluntary prayers during workplace meetings).

[180] *See, e.g.*, *EEOC v. Prospect Airport Servs., Inc*., 621 F.3d 991, 1000 (9th Cir. 2010) (explaining that "[t]he "required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct" (alteration in original)); *Pucino v.*

Verizon Wireless Commc'ns, Inc., 618 F.3d 112, 119 (2d Cir. 2010) ("[A] plaintiff need not show that her [work] environment was both severe *and* pervasive; only that it was sufficiently severe *or* sufficiently pervasive, or a sufficient combination of these elements, to have altered her working conditions."); *Williams v. Gen. Motors Corp*., 187 F.3d 553, 563 (6th Cir. 1999) (explaining that in determining whether the alleged conduct rises to the level of severe or pervasive, a court should consider the factual "totality of the circumstances," and that using a "holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, the impact of the separate incidents may accumulate, and the work environment created thereby may exceed the sum of the individual episodes"); *see also, e.g.*, *Shanoff v. Ill. Dep't of Hum. Servs*., 258 F.3d 696, 705 (7th Cir. 2001) (six instances of "rather severe" harassment over four months were sufficient to allow a reasonable jury to rule in favor of plaintiff).

[181] *See Hall v. City of Chi.*, 713 F.3d 325, 330 (7th Cir. 2013) (stating that "one extremely serious act of harassment could rise to an actionable level as could a series of less severe acts" (quoting *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 693 (7th Cir. 2001)); *cf*. *Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368 (1st Cir. 2004) (in affirming the jury verdict for plaintiff on a religious harassment claim, court noted plaintiff's testimony that a supervisor who made ongoing derogatory remarks about plaintiff's religion also once put the point of a knife under plaintiff's chin, in addition to threatening to kill him with a hand grenade, run him over with a car, and shoot him with a bow and arrow).

[182] *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("As several courts have recognized, . . . a single *verbal* (or visual) incident can . . . be sufficiently severe to justify a finding of a hostile work environment.").

[183] *See Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 (7th Cir. 2002) (holding that the combined impact of the comments directed at the employee and at others was not severe or pervasive enough to create a hostile work environment; "[M]any of the actions that [the employee] identifies were not directed at him . . . . As 'second-hand' harassment, the impact of these incidents are 'obviously not as great as the impact of harassment directed at the plaintiff.'" (quoting *Russell v. Bd. of Trs. of Univ. of Ill. at Chi.*, 243 F.3d 336, 343 (7th Cir. 2001))).

[184] *See, e.g.*, *Rasmy v. Marriott Int'l, Inc*., 952 F.3d 379, 389 & n.44 (2d Cir. 2020) (reaching this conclusion and noting that the EEOC has long taken this position);

Ellis v. Houston, 742 F.3d 307, 320-21 (8th Cir. 2014) (explaining that when offensive comments not directly made to plaintiff become known to plaintiff, "their relevance to claims of a hostile work environment is clear"); *Reeves v. C.H. Robinson Worldwide, Inc*., 594 F.3d 798, 811 (11th Cir. 2010) (en banc) ("[W]ords and conduct . . . may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff."); *Williams v. Gen. Motors Corp*., 187 F.3d 553, 563 (6th Cir. 1999) (overhearing "I'm sick and tired of these fucking women" could be "humiliating and fundamentally offensive to any woman in that work environment").

[185] *Cf. Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 276 (4th Cir. 2000) (stating that "a routine difference of opinion" cannot support a hostile work environment claim); *Sunbelt Rentals, Inc.*, 521 F.3d at 315 (4th Cir. 2008) ("[E]ven incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard."); *see also Chinery v. American Airlines*, 778 F. App'x 142, 145-46 (3d Cir. 2019) (examining whether social media posts about workplace issues and the plaintiff created a hostile work environment, but determined that the conduct was not objectively severe or pervasive). Social media posts that do involve the workplace can become part of a hostile work environment claim. *See Roy v. Correct Care Sols*., LLC, 914 F.3d 52, 63 n.4 (1st Cir. 2019) ("Furthermore, it is not clear at all that Facebook messages should be considered non-workplace conduct where, as here, they were about workplace conduct, including Dever's reports and rumors, and were sent over social media by an officer who worked in Roy's workplace."). In addition, an employee's wearing religious garb in the workplace, or workplace religious decorations that do not demean or degrade other employees, or their religious views generally, would not, standing alone, constitute a hostile work environment.

[186] *See Faragher v. Boca Raton*, 524 U.S. 775, 802-03 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759-60 (1998).

[187] *Ellerth*, 524 U.S. at 758.

[188] *Faragher*, 524 U.S. at 789-90.

[189] For strict liability to apply to a constructive discharge claim, a supervisor's tangible employment action must have precipitated the decision to quit. Otherwise, the employer is entitled to raise the affirmative defense described above. *See Pa. State Police v. Suders*, 542 U.S. 129, 146-50 (2004).

[190] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

[191] *See, e.g.*, *Chavez v. Colo. Dep't of Educ.*, 244 F. Supp. 3d 1106, 1128 (D. Colo. 2017) (ruling that because employer took adequate action to address plaintiff's complaints that she was being pressured and treated unfairly by her supervisor for refusing to continue attending the supervisor's Bible study and other church activities, plaintiff could not prevail on harassment claim).

[192] *See Vance v. Ball State Univ.*, 570 U.S. 421, 448-49 (2013) (noting that a complainant can establish employer liability, even when "a harasser is not a supervisor," "by showing that [the] employer was negligent in failing to prevent harassment from taking place").

[193] *See Ellerth*, 524 U.S. at 762; *Faragher*, 524 U.S. at 788; *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999); *cf. Guidelines on Discrimination Because of National Origin*, 29 C.F.R. § 1606.8(d) (stating employer is liable for coworker harassment on the basis of national origin when it knew or should have known of the conduct and failed to take immediate and appropriate corrective action); *id.* § 1604.11(e) (sexual harassment).

[194] *Cf. Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1078 (8th Cir. 2006) (finding that employer was not liable for religious harassment of plaintiff because, upon learning of her complaints about a coworker's proselytizing, the employer promptly held a meeting and told the coworker to stop discussing religion matters with plaintiff, and there was evidence that the company continued to monitor the situation to ensure that the coworker did not resume her proselytizing).

[195] *Compare Erickson v. Wisconsin Dep't of Corr.*, 469 F.3d 600, 608 (7th Cir. 2006) (discussing female employee's Title VII action against prison employer based on harassment by male inmates; ruling that "a reasonable jury could have found that, after [the employee's] discussion with her supervisors . . . , [prison] had enough information to make a reasonable employer think there was some probability that [the employee] was being sexually harassed, yet took no remedial action as it was obligated to do under Title VII" (quotation marks and citations omitted)), *with Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001) (finding that employer was not liable for alleged sexual harassment of its female employee by a male contractor because it promptly investigated the allegations, requested a change in the contractor's shift so that he would not have contact with the employee, and asked

that all contractors be required to view sexual harassment training video). *Cf. Commission Guidelines*, 29 C.F.R. § 1604.11(e), 1606.8(e).

[196] *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988) ("Where the religious practices of employers . . . and employees conflict, Title VII does not, and could not, require individual employers to abandon their religion. Rather, Title VII attempts to reach a mutual accommodation of the conflicting religious practices."); *cf. Burwell v. Hobby Lobby*, *Stores, Inc.*, 573 U.S. 682, 702 (2014) (rejecting court's holding below that, unlike nonprofit corporations, "for-profit, secular corporations cannot engage in religious exercise") (RFRA).

[197] *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004) ("[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his coworkers or deprive them of contractual or other statutory rights.").

[198] *Id.*

[199] *See Ervington v. LTD Commodities, LLC*, 555 F. App'x 615, 618 (7th Cir. 2014) (upholding discharge for employee's continuing, after warning, to violate company's anti-harassment policy by distributing religious pamphlets that denigrated other religions); *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 745-46 (9th Cir. 2004) (ruling that supervisor's harassment of subordinate in violation of employer's anti-harassment policy was a legitimate nondiscriminatory reason for termination, even if the violations were motivated by the supervisor's religious beliefs).

[200] *Smith v. City of Phila.*, 285 F. Supp. 3d 846, 854 (E.D. Pa. 2018).

[201] *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004) ("Under Title VII, an employer must offer a reasonable accommodation to resolve a conflict between an employee's sincerely held religious belief and a condition of employment, unless such an accommodation would create an undue hardship for the employer's business."); *Weathers v. FedEx Corp. Servs., Inc.*, No. 09 C 5493, 2011 WL 5184406, at *11 (N.D. Ill. Nov. 1, 2011) (ruling that employee's request for clarification of an employer "letter of counseling" instructing that his discussions of religion with coworkers "must cease" was a request for accommodation, and holding that an ongoing broad instruction not to discuss religion could be found to be an adverse action, because it left him "unable to exercise his religious belief and

unable to discuss a subject of broad scope and of great importance to him" even if the conversation was initiated by others).

[202] *Cf. EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015) ("Title VII does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual. . . because of such individual's' 'religious observance and practice.'" (alteration in original)).

[203] 42 U.S.C. § 2000e(j); *Commission Guidelines*, 29 C.F.R. § 1605.2(b).

[204] *Compare Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (interpreting Title VII "undue hardship" standard), *with* 42 U.S.C. § 12111(10)(A) (defining ADA "undue hardship" standard). *See infra* § 12-IV-B.

[205] *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2034.

[206] *See id.* ("An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an 'aspec[t] of religious . . . practice,' it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise-neutral policy." (alterations in original)).

[207] *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3d Cir. 1986) (citation omitted); *see also id.* ("This is . . . part of our 'happy tradition' of avoiding unnecessary clashes with the dictates of conscience.") (citation omitted); *cf. Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 146 (1987) (explaining that, under the Free Exercise Clause of the First Amendment, the government "may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion in order to accept work'" (citation omitted) (alteration in original)).

[208] *Hardison*, 432 U.S. at 84.

[209] Furthermore, if companies are interested in expressing their views on social issues and having their employees convey the company's views, the issue of religious accommodation could arise to the extent an employee believes that a message the employer would like the employee to convey violates the employee's religious beliefs. For example, if a company has a policy that all employees in its retail stores must wear shirts conveying messages celebrating LGBTQ Pride in the

month of June, or that requires employees to say "Jesus is our Savior" when answering the phone during the Christmas season, the company may have an obligation to accommodate employees who cannot convey these messages because of religious beliefs.

[210] *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1980) ("The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.'"); *Hardison*, 432 U.S. at 74 ("[T]he employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear."); *cf. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2033-34 ("[R]eligious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.").

[211] *See* 42 U.S.C. § 2000e-2(a)(1) (making it unlawful "to discriminate against any individual with respect to his. . . terms, conditions, or privileges of employment, because of such individual's . . . religion").

[212] *Compare Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 765 (3d Cir. 2004) ("An employer's failure to reasonably accommodate an employee's sincerely held religious belief that conflicts with a job requirement can also amount to an adverse employment action unless the employer can demonstrate that such an accommodation would result in 'undue hardship.'"), *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988) ("The threat of discharge (or other adverse employment practices) is a sufficient penalty. An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy." (internal citation omitted)), *and Rodriguez v. City of Chi.*, No. 95-C-5371, 1996 WL 22964, at *3 (N.D. Ill. Jan. 12, 1986) ("It is nonsensical to suggest that an employee who, when forced by his employer to choose between his job and his faith, elects to avoid potential financial and/or professional damage by acceding to his employer's religiously objectionable demands has not been the victim of religious discrimination."), *with Brooks v. City of Utica*, 275 F. Supp. 3d 370, 378 (N.D.N.Y. 2017) ("[U]nrealized threats do not constitute adverse employment actions."). *See generally Reed v. UAW*, 569 F.3d 576, 580 (6th Cir. 2009) (stating that because plaintiff has not shown any material adverse action, his reasonable accommodation claim fails, however, "an employee who believes that he is being treated less favorably because of his religion or some

other protected ground has the right to bring a disparate treatment claim."); *Mohammed v. Schneider Nat'l Carriers, Inc.*, No. 18-0642, 2018 WL 5634897, at *2-4 (W.D. Pa. Oct. 12, 2018) (magistrate judge report and recommendation) (reviewing cases), *adopted*, 2018 WL 5633994 (W.D. Pa. Oct. 31, 2018).

[213] *See Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) ("[A] prima facie case under the accommodation theory requires evidence that [the employee] informed her employer that her religious needs conflicted with an employment requirement and asked the employer to accommodate her religious needs."); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) ("Implicit within plaintiff's prima facie case is the requirement that plaintiff inform his employer of both his religious needs and his need for an accommodation.").

[214] *See, e.g.*, *Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010) (holding that employer was incorrect in arguing that employees' accommodation claim failed because they did not expressly tell employer that they did not want to take down religious artwork because of their religion, reasoning that evidence of the employer's awareness of the tension between its order to remove the artwork and the employees' religious beliefs was sufficient to establish notice); *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc) (where plaintiff alleged that he was terminated based on his known religious activities, court held that employer had obligation to accommodate absent undue hardship even though plaintiff had never explicitly asked for a religious accommodation because employer's "first reprimand related directly to religious activities by" plaintiff); *id.* ("An employer need have only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." (internal quotation marks and citation omitted)); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1363-64 (S.D. Fla. 1999) (ruling that notice was sufficient where employer learned of applicant's religious objection to a particular practice when he contacted applicant's former supervisor for a reference).

[215] *See supra* note 210.

[216] *Abercrombie & Fitch Stores, Inc*., 135 S. Ct. at 2033-34 (holding that decision not to hire Muslim applicant because of assumed conflict between headscarf and company "Look Policy" violated Title VII's prohibition that actions are not taken "with the *motive* of avoiding the need for accommodating a religious practice").

[217] *See Xodus v. Wackenhut Corp*., 619 F.3d 683, 686-87 (7th Cir. 2010) (finding that district court did not clearly err in determining that employee had failed to put employer on sufficient notice because he only referenced his "beliefs" but did not say they were religious); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (employee's request for leave to participate in his wife's religious conversion ceremony was sufficient to place employer on notice that this was pursuant to a religious practice or belief; an employer need have "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements").

[218] *Cf. LaFevers v. Saffle,* 936 F.2d 1117 (10th Cir. 1991) (holding that although not all Seventh-day Adventists are vegetarian, an individual adherent's genuine religious belief in such a dietary practice warrants constitutional protection under the First Amendment); *see Seshadri v. Kasraian*, 130 F.3d 798, 800 (7th Cir. 1997) (holding that employee who seeks accommodation need not belong to an established church, "but a person who seeks to obtain a privileged legal status by virtue of his religion cannot preclude inquiry designed to determine whether he has in fact a religion"); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977) (observing that the plaintiff "did little to acquaint Chrysler with his religion and its potential impact upon his ability to perform his job"); s*ee also Redmond*, 574 F.2d at 902 (noting that "an employee who is disinterested in informing his employer of his religious needs 'may forego the right to have his beliefs accommodated by his employer'" (citation omitted)).

[219] *See, e.g.*, *Toronka v. Cont'l Airlines, Inc.*, 649 F. Supp. 2d 608, 611-12 (S.D. Tex. 2009) (holding in Title VII case that a moral and ethical belief in the power of dreams that is based on religious convictions and traditions of African descent is a religious belief, and that this determination does not turn on veracity but rather is based on a theory of "'man's nature or his place in the Universe,'" even if considered by others to be "eccentric" (quoting *Brown v. Dade Christian Schs., Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (Roney, J., dissenting); *Cooper v. Gen. Dynamics*, 533 F.2d 163, 168-69 (5th Cir. 1976))); *cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (holding that although animal sacrifice may seem "abhorrent" to some, Santeria is religious in nature and is protected by the First Amendment); *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (ruling that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *United States v. Meyers*, 906 F. Supp. 1494, 1499

(D. Wyo. 1995) (relying on First Amendment jurisprudence to observe in Religious Freedom Restoration Act case that "one man's religion will always be another man's heresy").

[220] *See Cary v. Carmichael*, 908 F. Supp. 1334, 1344 (E.D. Va. 1995) (holding no religious discrimination where employee failed to give employer proper notice so that it could attempt an accommodation of his religious objection to signing consent form for a drug test), *aff'd sub nom*, 116 F.3d 472 (4th Cir. 1997) (unpublished table decision); *see also Elmenayer v. ABF Freight Sys.*, No. 98-CV-4061 (JG), 2001 WL 1152815, at *5 (E.D.N.Y. Sept. 20, 2001) (holding that employer was not liable for disciplining an employee for tardiness where the employee failed – until after his discharge – to explain that tardiness was because he attended a prayer service), *aff'd on other grounds*, 318 F.3d 130 (2d Cir. 2003).

[221] Notwithstanding the different legal standards for determining when a failure to accommodate poses an undue hardship under Title VII and the ADA, *see supra* notes 5 and 6, courts have endorsed a cooperative information-sharing process between employer and employee for religious accommodation requests, similar to the "interactive process" used for disability accommodation requests under the ADA. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (explaining that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." (internal quotation marks and citation omitted)); *see also Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 n.5 (10th Cir. 2000) (stating that "[t]he [ADA] 'interactive process' rationale is equally applicable to the obligation to offer a reasonable accommodation to an individual whose religious beliefs conflict with an employment requirement").

[222] *See, e.g.*, *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991) ("After failing to pursue [a voluntary waiver of seniority rights] or any other reasonable accommodation, the company is in no position to argue that it was unable to accommodate reasonably [plaintiff's] religious needs without undue hardship on the conduct of its business."); *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 118-19 (4th Cir. 1988) (finding that employer's failure to attempt to accommodate, absent any showing of undue hardship, violated Title VII).

[223] *Ansonia Bd. of Educ.*, 479 U.S. at 68-69 (holding that an employer could satisfy its obligation by offering an alternative reasonable accommodation to the particular one proposed by the employee); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146

(5th Cir. 1982) (explaining that an "employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer" and that a "reasonable accommodation need not be on the employee's terms only" before concluding that the employee failed to fully explore shift swaps proposed by his employer); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977) (where employee "will not attempt to accommodate his own beliefs through the means already available to him or cooperate with his employer in its conciliatory efforts, he may forego the right to have his beliefs accommodated").

[224] *See supra* §§ 12-I-A-2 ("Sincerely Held"), 12-I-A-3 ("Employer Inquiries into Religious Nature or Sincerity of Belief"); *see also Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 451 (7th Cir. 2013) ("If the managers who considered the request had questions about whether the request was religious, nothing would have prevented them from asking [the employee] to explain a little more about the nature of his request . . . . [The] law leaves ample room for dialogue on these matters."); *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011) (noting, in a prison religious accommodation case, that where asserted religious belief differed significantly "from the orthodox beliefs of [prisoner's] faith, . . . [s]uch a belief isn't impossible, but it is sufficiently rare that a prison's chaplain could be skeptical and conduct an inquiry to determine whether the claim was nonetheless sincere"); *Dockery v. Maryville Acad.*, 379 F. Supp. 3d 704, 718-19 (N.D. Ill. 2019) (holding that employer had objective basis for questioning whether employee sincerely believed that it was against his religion to work during Sabbath, where employee previously was willing to do so, employee himself testified that he told employer he could not work on Friday and Saturdays "because he was 'used to' and 'accustomed to' having those days off 'to be able to worship with [his] family and do different things with [his] family,'" and employee failed to explain or provide more information to employer as requested).

[225] *See Bushouse v. Loc. Union 2209*, 164 F. Supp. 2d 1066, 1078 & n.18 (N.D. Ind. 2001) (holding that union's refusal to provide accommodation unless employee produced independent corroboration that his accommodation request was motivated by a sincerely held religious belief did not violate Title VII's religious accommodation provision, but cautioning that the holding was limited to "the facts and circumstances of the present case" and that "[t]he inquiry [into sincerity] and the scope of that inquiry will necessarily vary based upon the individual requesting corroboration and the facts and circumstances of the request").

[226] *See United States v. Broyles*, 423 F.2d 1299, 1302 (4th Cir. 1970) (letter from retired Army officer who had known conscientious objector for more than twenty years, and letter from college president who had known him for more than ten years, were "[i]mpressive backing" for his claims of sincere religious belief).

[227] *See Ansonia Bd. of Educ.*, 479 U.S. at 70 (referring to reasonable accommodation as one that "eliminates the conflict between employment requirements and religious practices"); *see also, e.g.*, *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997) (ruling that employer did not satisfy reasonable accommodation requirement by offering to let Jewish employees take off a day other than Yom Kippur, because that would not eliminate the conflict between religion and work); *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996) (if negotiations between employer and employee "do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so"); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994) ("If the employer's efforts fail to eliminate the employee's religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's beliefs without incurring undue hardship."); *EEOC v. Universal Mfg. Corp.*, 914 F.2d 71, 72 (5th Cir. 1990) (per curiam) (district court "erred in ruling that, absent a showing of undue hardship by an employer, accommodating only one of the two practices of the employee's religion, both of which conflicted with the employee's work duties, satisfied as a matter of law the duty of 'reasonable accommodation'"); *Baker v. Home Depot*, 445 F.3d 541, 547-48 (2d Cir. 2006) ("[T]he shift change offered to Baker was no accommodation at all because, although it would allow him to attend morning church services, it would not permit him to observe his religious requirement to abstain from work *totally* on Sundays."); *cf. US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (in context of Americans with Disabilities Act, "the word 'accommodation' . . . conveys the need for effectiveness").

Some courts of appeals have appeared to suggest that a reasonable accommodation need only lessen the conflict between religion and work, even in the absence of a showing that other accommodations would impose undue hardship. But, in practice, even those courts have not applied a standard that is materially different from the one described above, and they take into account facts that the Commission and other courts would analyze as relevant only to undue hardship. *See, e.g.*, *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008)

(analyzing reasonableness of proposed accommodation based in part on facts typically considered as part of undue hardship analysis); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1030-33 (8th Cir. 2008) (rejecting jury instruction that described a reasonable accommodation as one must eliminate any work-religion conflict because "[w]hat is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict"). The Commission believes its approach to this issue is straightforward and in keeping with the purpose of Title VII's accommodation requirement. Concerns about issues such as conflicts with a union contract or burdens on other employees' settled expectations can and should be addressed in the context of evaluating whether an accommodation would impose an undue hardship. Moreover, the employer need not grant an employee's requested accommodation if the employer wishes instead to offer an alternative reasonable accommodation of its own choosing that also would eliminate the work-religion conflict and would not adversely affect the employee's terms, conditions, or privileges of employment.

[228] *See, e.g.*, *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 168 (2d Cir. 2001) (holding that employer complied with Title VII when it granted partial accommodation—allowing proselytizing at certain times, not at all times, as requested—where employer could not allow additional proselytizing without "jeopardiz[ing] the state's ability to provide services in a religion-neutral manner," which the court apparently concluded would pose an undue hardship); *Ilona of Hungary, Inc*., 108 F.3d at 1576 (suggesting that if employer would suffer undue hardship from eliminating a religious conflict by granting a full day of leave to observe a religious holiday, the employer should still "offer a partial day off").;

[229] *See Ansonia Bd. of Educ.*, 479 U.S. at 70 (explaining that the accommodation of unpaid leave generally has "*no direct effect upon either employment opportunities or job status*" in the course of concluding that it would generally be reasonable, but emphasizing that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones" (first emphasis added) (internal quotation marks and citation omitted)); *Adeyeye*, 721 F.3d at 455 (not a reasonable accommodation to offer "voluntary self-termination with the possibility of being rehired"); *Cosme v. Henderson*, 287 F.3d 152, 160 (2d Cir. 2002) (stating that "an accommodation might be unreasonable if it imposes a significant work-related burden on the employee without justification"); *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993) (explaining that the question whether an accommodation is reasonable requires a "more searching inquiry" if an employee, "in order to

accommodate his religious practices, had to accept a reduction in pay or some other loss of benefits"); *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776-77 (9th Cir. 1986) (holding employers must offer accommodations that "reasonably preserve th[e] employee's . . . compensation, terms, conditions, or privileges of employment"); *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 519-20 (6th Cir. 1975) (ruling that where a transfer would adversely affect employee because, *inter alia*, it would involve a substantial reduction in pay, employer "first must attempt to accommodate the employee within his current job classification," and transfer may be considered "as a last resort" only if "no such accommodation is possible, or if it would impose an undue hardship upon the employer"); *see also Commission Guidelines*, 29 C.F.R. § 1605.2(c)(2)(ii) ("[W]hen there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.").

[230] *See Ansonia Bd. of Educ.*, 479 U.S. at 68 ("[W]here the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship."); *Rodriguez v. City of Chi.*, 156 F.3d 771, 776 (7th Cir. 1998) (employee is not entitled to his choice of reasonable accommodation); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) (same); *cf. Opuku-Boateng*, 95 F.3d at 1475 (ruling that employer violated Title VII because it offered no accommodation, such as employee's suggestions of scheduling him instead for other equally undesirable shifts, and employer did not show undue hardship).

[231] *See Ansonia Bd. of Educ.*, 479 U.S. at 70-71 ("unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones . . . [because] [s]uch an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness"). In cases involving requests for leave as an accommodation, an employer does not have to provide paid leave as an accommodation beyond that otherwise available to the employee but may have to provide unpaid leave as an accommodation if doing so would not pose an undue hardship.

[232] *See Commission Guidelines*, 29 C.F.R. § 1605.2(c)(2)(ii) ("[W]hen there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages

the individual with respect to his or her employment opportunities."). This principle is consistent with the Supreme Court's holding in *Ansonia Board of Education* that an employer discharges its accommodation obligation by offering *any* accommodation that is reasonable. 479 U.S. at 68-69. In reaching this conclusion, the Court observed that the EEOC guideline calling for employers to offer the accommodation that least disadvantages an individual's employment opportunities (without undue hardship) is different from requiring an "employer to accept any alternative favored by the employee short of undue hardship." *See id.* at 69 n.6 (referring to 29 C.F.R. § 1605.2(c)(2)(ii)). The Court emphasized that the guideline "contains a significant limitation," calling for comparative analysis of accommodations only when an accommodation offered by an employer disadvantages employment opportunities. *Id*. In the wake of *Ansonia*, many courts have, consistent with the Commission's guidelines, evaluated whether employer accommodations had a negative impact on the individual's employment opportunities as part of the analysis into whether the accommodations were "reasonable." *See supra* note 229 (citing cases).

[233] *Pyro Mining Co.*, 827 F.2d at 1085 (quoting *Redmond v. GAF Corp.*, 574 F.2d 897, 902-03 (7th Cir. 1978)).

[234] *Cf. Baker v. Home Depot*, 445 F.3d 541, 547-48 (2d Cir. 2006) (finding that employer's offer to schedule employee to work in the afternoon or evenings on Sundays, rather than the mornings, was not a "reasonable" accommodation under Title VII where employee's religious views required not only attending Sunday church services but also refraining from work on Sundays).

[235] *See Ansonia*, 479 U.S. at 69 (employer is not required to offer employee's preferred reasonable accommodation); *Porter v. City of Chi.*, 700 F.3d 944, 951 (7th Cir. 2012) (same).

[236] *See infra* note 278.

[237] *See Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 226 (3d Cir. 2000) (finding that state hospital's offer to transfer nurse laterally to newborn intensive care unit was reasonable accommodation for her religious beliefs which prevented her from assisting in emergency abortions of live fetuses," where hospital had staffing cuts and concerns about risks to patients' safety and nurse presented no evidence that transfer would affect her salary or benefits); *see also Rodriguez v. City of Chi.*, 156 F.3d 771, 774 (7th Cir. 1998) (holding that city's offer to allow police

officer to exercise his right under collective bargaining agreement to transfer to a district with no abortion clinics, which would resolve his religious objection to being assigned to guard such facilities and would result in "no reduction in pay or benefits," was a reasonable accommodation and observing that Title VII did not compel the employer to grant the officer's preferred accommodation of remaining in his district but being relieved of such assignments); *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993) (finding that employer reasonably accommodated employee by suggesting he exercise his rights under collective bargaining agreement to bid on jobs that he would have been entitled to, that were "essentially equivalent" to his current position, and that would have eliminated the conflict between work and religion).

[238] Federal conscience laws provide protections related to abortion and sterilization and include the Church Amendments (42 U.S.C. § 300a-7 et seq.), the Coats-Snowe Amendment (Section 245 of the Public Health Service Act, 42 U.S.C. § 238n), the Weldon Amendment (part of every HHS appropriations act since 2005), and Section 1553 of the Affordable Care Act (42 U.S.C. § 18113). These laws are enforced by the Department of Health and Human Services (HHS). For example, in 2019, HHS found that a university hospital violated the Church Amendments by discriminating against health care personnel who have religious or moral objections to participating in abortions when it scheduled and pressured them to assist with elective abortions despite specific and repeated requests not to be assigned to those procedures due to religious and moral objections. *See* Letter from Roger T. Severino, Dir., Off. of Civ. Rts., Dep't of Health & Hum. Svcs. & Luis E. Perez, Deputy Dir., Off. of Civ. Rts., Dep't of Health & Hum. Svcs. (Aug. 28, 2019), (finding that the University of Vermont Medical Center unlawfully forced health care personnel, including nurses, to assist in abortions), **https://www.hhs.gov/sites/default/files/uvmmc-nov-letter_508.pdf (https://www.hhs.gov/sites/default/files/uvmmc-nov-letter_508.pdf)** . The Commission is referencing these laws for informational purposes and is not opining on any of their requirements or whether they would require additional burdens on employers beyond Title VII's analysis for reasonable accommodation.

[239] *Lawson v. Washington*, 296 F.3d 799, 805 n.5 (9th Cir. 2002).

[240] *See supra* notes 210-212 and accompanying text.

[241] *See Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994) (holding that employer was obligated to accommodate a Seventh-day Adventist employee whose

need for accommodation to observe Sabbath had changed in the 17 months since employer had last scheduled her to work on a Friday night or Saturday, where her "undisputed testimony was that her faith and commitment to her religion grew during this time").

[242] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). The "more than a *de minimis* cost" Title VII undue hardship standard is lower than the ADA undue hardship standard, which requires employers to show that the accommodation would cause "significant difficulty or expense," 42 U.S.C. § 12111(10)(A).

[243] The statute, at 42 U.S.C. § 2000e(j), and the *Commission Guidelines*, at 29 C.F.R. § 1605.2(b), require an employer to reasonably accommodate an employee's or applicant's religious beliefs and practices unless the "employer demonstrates" that doing so would pose an undue hardship. Even when courts have focused on reasonableness before looking at undue hardship, the employer still has the burden of persuasion on the undue hardship issue. *See, e.g.*, *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 315 (4th Cir. 2008); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 n.4 (8th Cir. 2008).

[244] *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (internal quotation marks and citation omitted).

[245] *See Commission Guidelines*, 29 C.F.R. § 1605.2(e).

[246] *Compare Cooper*, 15 F.3d at 1380 (finding that employee's request not to be scheduled for Saturday work due to Sabbath observance posed undue hardship for employer because it would have required either hiring an additional worker or risking the loss of production), *and Beadle v. Tampa*, 42 F.3d 633, 637-38 (11th Cir. 1995) (finding that requiring police department to alter training program schedule to accommodate employee's religious needs amounted to more than *de minimis* cost and thus an undue hardship because employee "would not have experienced the educational benefits of working with different training officers"), *with Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133-34 (3d Cir. 1986) (finding that employee's request not to be scheduled for Saturday work due to Sabbath observance did not pose undue hardship where district court found that that efficiency, production, and quality would be not affected and entire assembly line remained intact notwithstanding employee's Saturday absences).

[247] *See Tabura v. Kellogg USA*, 880 F.3d 544, 558 (10th Cir. 2018) (reversing summary judgment for employer where it "did not . . . cite to any evidence to support its assertions" that accommodating plaintiffs' need to observe their Sabbath would impose an undue hardship "in the form of unauthorized overtime, quality control issues, and even forcing entire lines to shut down"); *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) (holding that "projected 'theoretical' future effects cannot outweigh the undisputed fact that no monetary costs and *de minimis* efficiency problems were actually incurred during the three month period in which [employee] was accommodated"); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (undue hardship requires "proof of actual imposition on coworkers or disruption of the work routine" rather than "conceivable or hypothetical hardships" (internal quotation marks and citation omitted)); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989) ("Any proffered hardship . . . must be actual," not speculative).

[248] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); *see also Commission Guidelines*, 29 C.F.R. § 1605.2(e)(1).

[249] *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 616 (9th Cir. 1988) (quoting *Anderson v. Gen. Dynamic*, 589 F.2d 397, 402 (9th Cir. 1978)) (alteration in original).

[250] *Commission Guidelines*, 29 C.F.R. § 1605.2(e)(1).

[251] *Id.* For example, in *Hardison*, the payment of overtime (or premium pay) to another employee so that plaintiff could be off for weekly religious observance was an undue hardship. 432 U.S. at 68-69, 84. By contrast, infrequent payment of premium wages for an occasional religious observance is not "more than *de minimis*." *See, e.g.*, *EEOC v. Sw. Bell Tel. LP*, No. 3:06CV00176 JLH, 2007 WL 2891379, at *4 (E.D. Ark. Oct. 3, 2007) (denying summary judgment for employer on claim by two employees that they were improperly denied leave for annual religious observance that would have required company to pay overtime wages of approximately $220 each to two replacements, where facility routinely paid technicians overtime, employer failed to contact union about possible accommodation, and policy providing for only one technician on leave per day was not always observed, and there was no evidence that customer service needs actually went unmet on day at issue) (jury verdict for plaintiffs subsequently entered), *appeal dismissed*, 550 F.3d 704 (8th Cir. 2008); *see also Redmond v. GAF Corp.*, 574 F.2d 897, 904 (7th Cir. 1987) (ruling that employer could not demonstrate

that paying replacement worker premium wages would cause undue hardship because plaintiff would have been paid premium wages for hours at issue).

[252] *See, e.g.*, *Brown v. Polk Cnty.*, 61 F.3d 650, 655 (8th Cir. 1995) (en banc) (holding that allowing employee to assign secretary to type his Bible study notes posed more than *de minimis* cost because secretary would otherwise have been performing employer's work during that time); *see also Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134-35 (3d Cir. 1986) (no undue hardship where "efficiency, production, quality and morale … remained intact during [employee's] absence").

[253] *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004) ("[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his coworkers or deprive them of contractual or other statutory rights."); *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 517-18 (6th Cir. 2002) (holding that trucking firm had no obligation under Title VII to accommodate a driver's religious request for only male driving partners, where making assignments in this manner would have violated collective bargaining agreement).

[254] *See, e.g.*, *EEOC v. GEO Grp., Inc.*, 616 F.3d 265, 273 (3d Cir. 2010) ("A religious accommodation that creates a genuine safety or security risk can undoubtedly constitute an undue hardship for an employer-prison."). However, an employer should not assume that it would pose an undue hardship to accommodate a religious practice that appears to conflict with a generally applicable safety requirement, but rather should assess whether an undue hardship is actually posed. For example, there are existing religious exemptions to the government enforcement procedures of some safety requirements. *See, e.g.*, Occupational Safety & Health Admin., U.S. Dep't of Lab., STD 1-6.5: Exemption for Religious Reason from Wearing Hard Hats (June 20, 1994), **https://www.osha.gov/enforcement/directives/std-01-06-005 (https://www.osha.gov/enforcement/directives/std-01-06-005)** (exempting employers from citations for certain violations based on religious objection of employee, but providing for various reporting requirements).

[255] *See, e.g.*, *Bruff v. N. Miss. Health Serv., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001) (requiring coworkers of plaintiff mental health counselor to assume disproportionate workload to accommodate plaintiff's request not to counsel certain clients on religious grounds would involve more than *de minimis* cost); *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam) (holding

that it would be undue hardship to reassign plaintiff's share of potentially hazardous work to coworkers); *EEOC v. BJ Servs. Co.*, 921 F. Supp. 1509, 1514 (N.D. Tex. 1995) (stating employer "was not required to deny other employees their vacation days so that they could work in place of [plaintiff]" and that cost of hiring an additional worker was more than *de minimis*).

[256] *See, e.g.*, *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830-31 (9th Cir. 1999) (holding that employer was not required to accommodate job applicant's religiously based refusal to provide his social security number where employer sought it to comply with Internal Revenue Service and Immigration and Naturalization Service requirements).

[257] *See infra* note 266.

[258] *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 (1977) (holding employer "was not required by Title VII to carve out a special exception to its seniority system in order to help [employee] to meet his religious obligations" of observing the Sabbath and not working on certain specified religious holidays); *Virts*, 285 F.3d at 517-18 (holding trucking firm had no obligation under Title VII to accommodate a driver's religious request for only male driving partners, where making assignments in this manner would have violated CBA); *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1153, 1156 (10th Cir. 2000) (holding that because seniority system in the CBA gave more senior employees first choice for job assignments, it would be an undue hardship for employer to grant employee's accommodation request not to be scheduled to work on Saturdays); *Mann v. Frank*, 7 F.3d 1365, 1369-70 (8th Cir. 1993) (finding no violation of the duty to accommodate where the union refused the employer's request to assign another worker to take plaintiff's Saturday shift, which would have violated CBA's provisions governing overtime).

[259] *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999) (holding that "the existence of a neutral seniority system does not relieve the employer of its duty to reasonably accommodate the religious beliefs of its employees, so long as the accommodation can be accomplished without disruption of the seniority system and without more than a de minimis cost to the employer"); *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991) ("At a minimum, Arlington had an obligation to explore a voluntary waiver of seniority rights before terminating Taylor. After failing to pursue this or any other reasonable accommodation, the company is in no position to argue that it was unable to accommodate reasonably his religious needs without undue hardship on the conduct of its business.").

[260] *See Commission Guidelines*, 29 C.F.R. § 1605.2(e)(2); *Antoine v. First Student, Inc.*, 713 F.3d 824, 840 (5th Cir. 2013) (holding that allowing employee to voluntarily swap shifts was not an undue hardship where CBA authorized employer-facilitated voluntary route changes).

[261] *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023-24 (10th Cir. 1994) (holding that the employer satisfied its Title VII obligation when it suggested method by which driver would usually be able to work the number of trips each week required under the union contract prior to the Sabbath, and could often use vacation time on other occasions; employer was not required to grant driver's request to skip assignments, which would then have to be worked by other drivers; his request to work less than other full-time drivers and reimburse employer for additional costs; or his request to transfer with no loss of seniority, which would violate its CBA, where the employer had sought but could not obtain a waiver from the union).

[262] *See Brown v. Polk Cnty.*, 61 F.3d 650, 655 (8th Cir. 1995) (en banc) (holding that allowing employee to assign secretary to type his Bible study notes posed more than *de minimis* cost because secretary would otherwise have been performing employer's work during that time); *see also Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134-35 (3d Cir. 1986) (no undue hardship where "efficiency, production, quality and morale . . . remained intact during [employee's] absence").

[263] *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607-08 (9th Cir. 2004) (undue hardship for employer to accommodate employee's religiously motivated posting of large signs in his cubicle which he "intended to be hurtful" and to demean and harass his coworkers); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996) (undue hardship to accommodate "religious need" to send "personal, disturbing letters to [coworkers] accusing them of immorality").

[264] *See Opuku-Boateng v. California*, 95 F.3d 1461, 1473 (9th Cir. 1996) (holding that mere complaints by other employees did not constitute undue hardship where employer failed to establish that accommodating employee's religious holidays would have required more than *de minimis* cost or burden on coworkers).

[265] *Brown*, 61 F.3d at 655 ("Undue hardship requires more than proof of some fellow-worker's grumbling. . . . An employer . . . would have to show . . . actual imposition on coworkers or disruption of the work routine." (quoting *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (alterations in original)).

[266] There may be different results depending on the specific setting and the religious garb at issue. *See, e.g.*, *United States v. Essex Cnty.*, No. 09–2772 (KSH), 2010 WL 551393 (D.N.J. Feb. 16, 2010) (denying motion to dismiss, the court allowed the United States to proceed with denial-of-accommodation claim on behalf of Muslim employee of Essex County Department of Corrections who was denied accommodation of wearing her religious headscarf and terminated). *But see EEOC v. GEO Group, Inc.*, 616 F.3d 265, 273 (3d Cir. 2010) (rejecting EEOC's claim that prison officials should have accommodated female Muslim employees by granting an exception to the dress code that would permit them to wear their khimars, but agreeing that there is no "per se rule of law about religious head coverings or safety," even for police or paramilitary groups); *Webb v. City of Phila.*, 562 F.3d 256, 260-62 (3d Cir. 2009) (ruling that it would have posed an undue hardship to allow accommodation for a police officer who sought dress code exception to wear khimar); *Finnie v. Lee Cnty.*, 907 F. Supp. 2d 750, 780-81 (N.D. Miss. 2012) (ruling that evidence-supported safety concerns met burden of proving undue hardship would be posed by allowing religious exception to pants-only uniform policy for detention officers).

[267] The *Commission Guidelines*, 29 C.F.R. § 1605.2(d), set forth suggested methods of accommodating scheduling conflicts, but those methods are not intended to comprise an exhaustive list. Different factual circumstances will require different solutions. State wage and hour laws may provide certain limitations that affect an employer's potential flexibility.

[268] *See supra* notes 227-229 and accompanying text.

[269] *See EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135, 1182-83 (D. Colo. 2018) (not undue hardship to allow short unscheduled prayer breaks because "the preponderance of the evidence showed that allowing unscheduled prayer breaks would not have more than a de minimis effect on productivity or safety"); *Mohamed v. 1st Class Staffing, LLC*, 286 F. Supp. 3d 884, 910 (S.D. Ohio 2017) (suggesting that allowing employees to take break either 15 minutes early or 15 minutes late so that they could have the break room to themselves to pray would not be an undue hardship).

[270] *Cf. Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 135 (3d Cir. 1986) (employer would not incur undue hardship from granting exception to mandatory Saturday overtime work for employee whose religious beliefs prevented her from working on

her Sabbath, because employer did not have to pay higher wages to fill the vacancy).

[271] *Commission Guidelines*, 29 C.F.R. 1605.2(d)(i),

[272] *See, e.g.*, *Beadle v. Hillsborough Cty. Sheriff's Dep't*, 29 F.3d 589, 593 (11th Cir. 1994) (finding that employer satisfied its accommodation obligation by providing employee a roster with his coworkers' schedules and allowing employee to make announcement on bulletin board and at employee meeting to seek out coworkers willing to swap).

[273] *See Tabura v. Kellogg USA*, 880 F.3d 544, 555-57 (10th Cir. 2018) (remanding to determine whether employer satisfied its accommodation obligation by allowing employees to use paid leave and to seek volunteers to swap shifts to avoid working on their Sabbath, where employees had insufficient paid leave and plaintiffs had difficulty arranging voluntary swaps); *McGuire v. Gen. Motors Corp.*, 956 F.2d 607, 608-10 (6th Cir. 1992) (per curiam) (remanding to determine whether employer satisfied its accommodation obligation by allowing employee to swap shifts to avoid working on his Sabbath where employee found it "virtually impossible" to arrange voluntary swaps).

[274] *See, e.g.*, *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1088-89 (6th Cir. 1987) (where plaintiff believed it was morally wrong to work on the Sabbath and that it was a sin to induce another employee to do so, it was not a reasonable accommodation for employer simply to be amenable to a shift swap; employer would not have incurred undue hardship by soliciting a replacement).

[275] *Commission Guidelines*, 29 C.F.R. § 1605.2(e)(1); *see also Redmond v. GAF Corp.*, 574 F.2d 897, 904 (7th Cir. 1978) (holding that employer could not demonstrate paying replacement worker premium wages would cause undue hardship because plaintiff would have been paid premium wages for the hours at issue); *EEOC v. Sw. Bell Tel. LP*, No. 3:06CV00176 JLH, 2007 WL 2891379, at *4 (E.D. Ark. Oct. 3, 2007) (finding that payment of premium wages for one day to allow two employees to attend yearly Jehovah's Witness convention as part of their religious practice, at alleged cost of $220.72 per person in facility that routinely paid overtime, was not an undue hardship as a matter of law, where there was no evidence that customer service needs actually went unmet on the day at issue) (jury verdict for plaintiffs subsequently entered), *appeal dismissed*, 550 F.3d 704 (8th Cir. 2008).

[276] *See Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 584-85 (7th Cir. 2007) (holding that employee's proposed accommodation of assigning responsibility for all initial customer contact to lower-paid technicians, even if it could be done, would impose an undue hardship because it would divert technicians from their assigned data input and insurance verification duties, resulting in uncompleted data work); *see also supra* note 238 (discussing potential application of federal conscience protection laws to health care employees).

[277] *See Noesen*, 232 F. App'x at 584.

[278] *Commission Guidelines*, 29 C.F.R. § 1605.2(d)(iii) ("When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer."); *see Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 519-20 (6th Cir. 1975) (holding that transfer involving substantial reduction in pay and that would have "wasted [plaintiff's] skills" would not be reasonable accommodation where plaintiff could have been accommodated in his original position without undue hardship). *But see Rodriguez v. City of Chi.*, 156 F.3d 771, 775 (7th Cir. 1998) (city's offer of lateral transfer was a reasonable accommodation, and therefore court need not consider whether it would have been an undue hardship for city to accommodate plaintiff in his original position).

[279] *Commission Guidelines*, 29 C.F.R. § 1605.2(d)(iii).

[280] *See Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) (holding, under state law parallel to Title VII, that transfer of employee to a lower-level position was reasonable where no equivalent position was available after employer attempted to find one and where employee would make more money overall because employee would work five shifts rather than four); *Draper*, 527 F.2d at 519-20 (holding that transfer involving substantial reduction in pay and that would have "wasted [plaintiff's] skills" would not be reasonable accommodation where plaintiff could have been accommodated in his original position without undue hardship).

[281] *See Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998) ("An employer may reassign an employee to a lower grade and paid position if the employee cannot be accommodated in the current position and a comparable position is not available.") (ADA). At least one court has ruled that it is unreasonable

for public protectors such as police officers or fire fighters to seek to be relieved from certain assignments as a religious accommodation. *See Endres v. Ind. State Police*, 349 F.3d 922, 927 (7th Cir. 2003) (holding that state police officer's requested religious accommodation not to be assigned to full-time, permanent work at a casino was unreasonable, because police and fire departments "need the cooperation of all members" and need them to perform their duties "without favoritism"). However, Title VII does not distinguish between public protectors and other employees; it is not per se unreasonable for public protectors to obtain changes in job assignments, schedule changes, or transfers in situations where a conflict between their job duties and their religious beliefs could be eliminated or reduced. Title VII requires a fact-specific inquiry to determine whether granting a particular accommodation request would pose an undue hardship. *See Rodriguez*, 156 F.3d at 775 (city provided reasonable accommodation by giving police officer with religious objection to guarding abortion clinic opportunity to seek lateral transfer to district without abortion clinics); .

[282] *See, e.g.*, *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 477 (7th Cir. 2001) ("In many cases, a company must modify its stated policies in practice to reasonably accommodate a religious practice." (citing *Minkus v. Metro. Sanitary Dist.*, 600 F.2d 80 (7th Cir. 1979) (holding that municipal employer failed to accommodate a Jewish applicant when it followed its stated policy and scheduled civil service examinations only on Saturdays)).

[283] *See, e.g.*, *EEOC v. United Parcel Serv.*, 94 F.3d 314, 320 (7th Cir. 1996) (reversing grant of summary judgment for employer because genuine issue of material fact existed regarding whether employer reasonably accommodated employee's religious practice of wearing beard). *See generally* EEOC, Religious Garb and Grooming in the Workplace: Rights and Responsibilities (2014), **www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (https://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm)** .

[284] *See United Parcel Serv.*, 94 F.3d at 318-20; *cf. Daniels v. City of Arlington*, 246 F.3d 500, 505-06 (5th Cir. 2001) (finding no Title VII violations when it would be an unreasonable accommodation and undue hardship for the police to be forced to let individual officers add religious symbols to their uniforms, and the plaintiff failed to respond to reasonable offers of accommodation).

[285] *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004) (holding that it would pose an undue hardship to require Costco to grant an

exemption "because it would adversely affect the employer's public image," given Costco's "determination that facial piercings . . . detract from the 'neat, clean and professional image' that it aims to cultivate"); *cf. Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 17 (D. Mass. 2006) (stating it was bound to follow *Cloutier* as the law of the circuit and holding that no Title VII violation occurred when employer transferred lube technician whose Rastafarian religious beliefs prohibited him from shaving or cutting his hair to a location with limited customer contact because he could not comply with a new grooming policy, but observing in dicta: "If *Cloutier*'s language approving employer prerogatives regarding 'public image' is read broadly, the implications for persons asserting claims for religious discrimination in the workplace may be grave. One has to wonder how often an employer will be inclined to cite this expansive language to terminate or restrict from customer contact, on image grounds, an employee wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics. More likely, and more ominously, considerations of 'public image' might persuade an employer to tolerate the religious practices of predominant groups, while arguing 'undue hardship' and 'image' in forbidding practices that are less widespread or well known.").

[286] *See EEOC v. Abercrombie & Fitch Stores, Inc*., 135 S. Ct. 2028, 2031, 2034 (2015) (recognizing, in case where the employer's grooming policy prohibited "caps" as "too informal for [its] desired image," that "Title VII requires otherwise-neutral policies," such as a no-headwear dress code, "to give way to the need for an accommodation"). Denying the employer's motion for summary judgment in *EEOC v. Red Robin Gourmet Burgers, Inc.*, No. C04–1291JLR, 2005 WL 2090677, at *5 (W.D. Wash. Aug. 29, 2005), the court ruled that notwithstanding the employer's purported reliance on a company profile and customer study suggesting that it seeks to present a family-oriented and kid-friendly image, the company failed to demonstrate that allowing an employee to have visible religious tattoos was inconsistent with these goals. "Hypothetical hardships based on unproven assumptions typically fail to constitute undue hardship. . . . [The employer] must provide evidence of 'actual imposition on coworkers or disruption of the work routine' to demonstrate undue hardship." *Id.*

[287] *See United States v. N.Y. City Trans. Auth*., No. 04–CV–4237, 2010 WL 3855191, at *22 (E.D.N.Y. Sept. 28, 2010) (holding that pattern-or-practice claim could proceed on behalf of Muslim and Sikh bus drivers, train operators, and subway station agents alleging selective enforcement of city's headwear policies and failure to accommodate Muslim and Sikh employees who could not comply for religious

reasons); *see also EEOC v. Am. Airlines*, Civil Action No. 02-C-6172 (N.D. Ill.) (Order of Resolution filed September 3, 2002) (resolving claim on behalf of employee who was not hired as passenger service agent because she wore a hijab for religious reasons in violation of the airline's since-changed uniform policy; the airline's current uniform policy specifically contemplates exceptions for religious accommodation of employees); *see also EEOC v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d 1006, 1015-17 (D. Ariz. 2006) (holding employer violated Title VII by instructing employee she would have to remove her religious garb whenever interacting with customers, and work in the back office when she wore it).

[288] *See Webb v. City of Phila.*, 562 F.3d 256, 260-62 (3d Cir. 2009) (holding that municipal employer established as a matter of law that it would pose an undue hardship to accommodate wearing of traditional religious headpiece called a khimar by Muslim police officer while in uniform, in contravention of the department's dress code directive). *But cf. Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (explaining that police department's interests in "fostering a uniform appearance through its 'no-beard' policy" and in security were undermined when it allowed officers to wear beards for medical reasons and holding that department's refusal to allow officers also to wear beards for religious reasons violated the Free Exercise Clause).

[289] *Cf. Federal Workplace Guidelines*, *supra* note 119 § 1.C ("Accommodation of Religious Exercise"), example (d) (government workplaces that allow employees to use facilities for non-work-related secular activities generally are required to allow the privilege on equal terms for employee religious activities).

[290] *See, e.g.*, *Minkus v. Metro. Sanitary Dist.*, 600 F.2d 80, 81-82 (7th Cir. 1979); *Cary v. Carmichael*, 908 F. Supp. 1334, 1343-46 (E.D. Va. 1995) (holding that employee failed to give employer proper notice so that it could attempt an accommodation of his religious objection to signing consent form for a drug test), *aff'd sub nom*, 116 F.3d 472 (4th Cir. 1997).

[291] *See, e.g.*, *Minkus*, 600 F.2d at 82-84 (holding that employer must demonstrate it would pose undue hardship to allow applicant to take exam at different time than others as a religious accommodation).

[292] *See, e.g.*, *Yeager v. FirstEnergy Generation Corp*., 777 F.3d 362, 363-64 (6th Cir. 2015) (per curiam) (holding that excusing employee from providing social security number was not required under Title VII because it would require employer to

violate another federal law, without reaching issue of whether it constituted an undue hardship); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830-31 (9th Cir. 1999) (holding that excusing employee from providing social security number would cause undue hardship because it would require violation of another federal law); *Cherry v. Sunoco, Inc*., No. 07–cv–2235, 2009 WL 2518221, at *7 (E.D. Pa. Aug. 17, 2009) (holding that it would have posed undue hardship on refinery operator to excuse photo identification requirement imposed on employer by U.S. Coast Guard regulations after exemption was denied); *cf. Lizalek v. Invivo Corp*., 314 F. App'x 881, 882 (7th Cir. 2009) (holding that it would pose an undue hardship to accommodate employee's religious belief that he was exempt from any tax liability and could use multiple names on forms, in part because it would expose employer to potential IRS issues).

[293] *See, e.g.*, *EEOC v. Consol Energy, Inc*., 860 F.3d 131, 143 (4th Cir. 2017) (affirming judgment against employer that denied coal mine employee's requested religious accommodation of alternative means to clock in and out when the company adopted a "biometric hand scanner" system that conflicted with his Christian faith, where the evidence showed employer had available an alternative clock-in system for miners who were physically incapable of scanning their hands, but failed to provide it as a religious accommodation), *cert. denied*, 138 S. Ct. 976 (2018).

[294] *See Commission Guidelines*, 29 C.F.R. § 1605.2(d)(2); *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239, 1242-44 (9th Cir. 1981) (holding that a union could not force an employer, under a contractual union security clause, to terminate three Seventh-day Adventists who offered to pay an amount equivalent to dues to a nonreligious charity because union failed to show that such an accommodation would deprive it of funds needed for its maintenance and operation); *EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990) (remanding for determination whether employer could reasonably accommodate without undue hardship employee's religious objection to associating with certain organizations); *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978) (holding that allowing an equivalent charitable contribution in lieu of dues did not constitute undue hardship notwithstanding administrative cost to union and "grumblings" by other employees); *Cooper v. Gen. Dynamics*, 533 F.2d 163 (5th Cir. 1976) (holding that religious belief that supporting labor union violated the precept "to love" one's neighbor, i.e., employers, was subject to reasonable accommodation absent undue hardship).

[295] *See McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37-38 (6th Cir. 1982) (finding that employee's proposal to donate amount equivalent to dues to a "mutually agreeable" charity was reasonable accommodation that would not have posed undue hardship); *EEOC v. Am. Fed'n of State, Cty. & Mun. E'ees*, 937 F. Supp. 166, 168 (N.D.N.Y. 1996) (holding that donation of shop fee to agreed-upon charity was reasonable accommodation for employee's religious belief). Some collective bargaining agreements have charities listed in them, pursuant to the requirements of section 19 of the National Labor Relations Act. *See* 29 U.S.C. § 169. At least one court has held that it may be inappropriate to require the religious objector to pay the full amount of the union dues to a charitable organization, however, if non-religious objectors are permitted to pay a reduced amount. *See O'Brien v. City of Springfield*, 319 F. Supp. 2d 90 (D. Mass. 2003) (holding, in part, it was not a reasonable accommodation to require religious objector to pay full union dues where state statute permitted non-union members to pay a lower amount in form of agency fee). *But see Madsen v. Associated Chino Teachers*, 317 F. Supp. 2d 1175, 1179 (C.D. Cal. 2004) (holding it was not disparate treatment under Title VII to require religious objectors to pay full amount of dues to charity where non-religious objectors were only paying agency fee to union).

[296] *See Commission Guidelines*, 29 C.F.R. § 1605.2(e); *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 450-51 (7th Cir. 1981) (holding that charity-substitute religious accommodation for union dues did not pose undue hardship to union where loss of plaintiff's dues represented only .02% of union's annual budget, and union presented no evidence that the loss of receipts from plaintiff would necessitate an increase in dues of his coworkers, that other workers would seem similar accommodations, or that the accommodation would lead to labor strife); *see also Burns*, 589 F.2d at 407 (holding that excusing employee from paying his monthly $19 union dues did not pose undue hardship, where one union officer testified that the loss "wouldn't affect us at all" and union's asserted fear of many religious objectors was based on mere speculation, but noting that if "in the future, the expressed fear of widespread refusal to pay union dues on religious grounds should become a reality, undue hardship could be proved").

[297] *See Univ. of Detroit*, 904 F.2d at 335.

[298] *See Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341-42 (8th Cir. 1995) (given disruption actually caused among coworkers in workplace, employer reasonably accommodated employee's request to wear at all times a button containing a

graphic photograph of a fetus with anti-abortion message by requiring her to cover up the photograph portion when she was at work); *cf. EEOC v. Red Robin Gourmet Burgers, Inc.*, No. C04–1291JLR, 2005 WL 2090677, at *4-5 (W.D. Wash. Aug. 29, 2005) (denying employer's motion for summary judgment because issue of whether employee's Kemetic religious wrist tattoos would disrupt work or otherwise pose an undue hardship raised a disputed factual question to be decided by jury).

[299] *Faragher v. Boca Raton*, 524 U.S. 775, 802-03 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759-60 (1998); *see Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004) ("[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his coworkers or deprive them of contractual or other statutory rights.").

[300] *See Ervington v. LTD Commodities, LLC*, 555 F. App'x 615, 616-18 (7th Cir. 2014) (in suit challenging discharge where plaintiff's proselytizing violated the company's anti-harassment policy because the religious pamphlets she distributed were offensive to her coworkers, ruling that the employer was not required to accommodate distribution of pamphlets that were offensive to other employees, and rejecting plaintiff's argument that the harassment was not "unlawful" by noting that the statute "does not prohibit employers from enforcing an antiharassment policy that defines harassment more broadly than does Title VII"); *Wilson*, 58 F.3d at 1341-42 (holding that employer did not violate Title VII when it fired employee who refused to cover up a "graphic anti-abortion button" while at work; the court reasoned that plaintiff's requested accommodation that the employer "simply instruct [her] coworkers that they must accept [the plaintiff]'s insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation" denied certain accommodation options because of demonstrated disruption to coworkers because it had provided a reasonable option that would not be disruptive); *Brown v. Polk Cnty.*, 61 F.3d 650, 656-57 (8th Cir. 1995) (en banc) (ruling employer did not establish that supervisor's "occasional spontaneous prayers and isolated references to Christian beliefs" posed an undue hardship because, although the employer asserted that the supervisor's conduct had polarized employees along religious lines, it provided no evidence of "actual imposition on coworkers or disruption of the work routine"); *Rightnour v. Tiffany & Co.*, 354 F. Supp. 3d 511, 525 (S.D.N.Y. 2019) (in suit challenging the plaintiff's termination for poor performance and offensive religion-related comments she had made, explaining that "it does not constitute discrimination to discipline employees for making offensive comments in the workplace, even when

those comments are tied to religion"); *Averett v. Honda of Am. Mfg., Inc.*, No. 2:07–cv–1167, 2010 WL 522826, at *8-10 (S.D. Ohio Feb. 9, 2010) (in suit challenging discipline and eventual termination of plaintiff for repeatedly making written and oral statements that her coworkers were sinful and evil people whom God would punish, explaining "Title VII does not require employer to allow an employee to impose her religious views on others" (internal quotation marks and citation omitted)).

[301] *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

[302] *See Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 476 (7th Cir. 2001) (holding that employer reasonably accommodated plaintiff's religious practice of sporadically using the phrase "Have a Blessed Day" when it permitted her to use the phrase with coworkers and supervisors who did not object, but prohibited her from using the phrase with customers where at least one regular client objected; allowing her to use the phrase with customers who objected would have posed an undue hardship); *see also Banks v. Serv. Am. Corp.*, 952 F. Supp. 703, 710-11 (D. Kan. 1996) (holding that plaintiff food service employees at company cafeteria, who were terminated when they refused to stop greeting customers with phrases such as "God Bless You" and "Praise the Lord," presented a triable issue of fact regarding whether they could have been accommodated without undue hardship, because in the absence of employer proof that permitting the statements was disruptive or that it had any legitimate reason to fear losing business, a reasonable jury could conclude that no undue hardship was posed).

[303] *See, e.g., Lizalek v. Invivo Corp*., 314 F. App'x 881, at *2 (7th Cir. 2009) (holding that it would have posed undue hardship to accommodate employee's need to alternate among different identities pursuant to his religious belief that he was three separate beings, where evidence showed employee's practice of alternating between identities in e-mail correspondence endangered the company's customer relationships and made it difficult for him to communicate with coworkers, and required management to devote "an inordinate amount of time to [the plaintiff's] various requests"); *Johnson v. Halls Merch., Inc.*, No. 87–1042–CV–W–9, 1989 WL 23201 (W.D. Mo. Jan. 17, 1989) (holding that it would have posed undue hardship on employer to permit retail employee's regular statement to customers "in the name of Jesus Christ of Nazareth," because it offended the beliefs of some customers and therefore cost the company business); *see also infra* notes 304-07.

[304] *See Mial v. Foxhoven*, 305 F. Supp. 3d 984 (N.D. Iowa 2018) (holding that employer had not presented sufficient evidence to show as a mater of law that it

would suffer undue hardship if required to accommodate employee who began signing internal business emails to coworkers "In Christ," because fact issues existed regarding whether the communications would cause anyone to perceive that the employer government agency was endorsing Christianity, or that the communications caused disruption in the workplace or violated any neutral, generally applicable rules or procedures).

[305] *See Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 164-65 (2d Cir. 2001) (holding that allowing an employee to evangelize clients would not be reasonable because it would jeopardize the state employer's ability to provide services in a religion-neutral manner); *Rivera v. Choice Courier Sys., Inc.*, No. 01 Civ.2096 (CBM), 2004 WL 1444852, at *10 (S.D.N.Y. June 25, 2004) (holding that genuine issue of material fact existed as to whether courier was denied reasonable accommodation where courier alleged that employer could have accommodated courier's need to evangelize by transferring him to a position with a less stringent dress code that would have allowed employee to continue wearing a patch stating "Jesus is Lord").

[306] *Cf. Dixon v. Hallmark Cos*., 627 F.3d 849, 855-56 (11th Cir. 2010) (ruling that apartment complex property manager could proceed to trial on claim challenging termination for violating the employer's religious displays policy by refusing to remove a poster of flowers with the words "Remember the Lilies . . . Matthew 6:28" she had hung in the on-site management office, where the employer also terminated the plaintiff's husband, telling him, "You're fired too. You're too religious."); *Johnson*, 1989 WL 23201 (holding that it would have posed undue hardship on employer to permit retail employee's regular statement to customers "in the name of Jesus Christ of Nazareth," because it offended the beliefs of some customers). Moreover, a private employer's own rights under the First Amendment Free Speech Clause may provide a defense to a Title VII accommodation claim, if the proposed accommodation would require the private employer involuntarily to display a religious message that could be construed as its own. *See also infra* § 12-IV-C-7.

[307] *See Knight*, 275 F.3d at 168; *Grant v. Fairview Hosp. & Healthcare Servs.*, 02–4232JNEJGL, 2004 WL 326694, at *5 (D. Minn. Feb. 18, 2004) (finding that an ultrasound technician whose religious beliefs required him to dissuade women from having abortions was offered a reasonable accommodation when hospital restricted him from doing so but gave permission for him to be excused from performing ultrasounds on women it knew were contemplating abortions); *see also Grossman v.*

S. Shore Pub. Sch. Dist., 507 F.3d 1097, 1100 (7th Cir. 2007) (affirming summary judgment for school district on terminated guidance counselor's First Amendment free exercise and Title VII claims, the court ruled that the school district was permitted to terminate counselor for conduct, even if her actions of praying with students who approached her for guidance and throwing away school contraceptive education materials were motivated by her religious beliefs; there was insufficient evidence that her termination was based on her religious views alone as opposed to these actions, which the school district was entitled to prohibit.

[308] *See Townley*, 859 F.2d at 619-21 (noting private employer has First Amendment free exercise right to express its religion in the workplace). *Cf., e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 703 (2014) (describing how family-owned company has statement of purpose to "[h]onor[] the Lord in all [they] do by operating the company in a manner consistent with Biblical principles"; "[e]ach family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries"; their stores are closed on Sundays, despite the loss of millions in sales annually; "[t]he businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior'" (first and third alteration in original)).

[309] *See Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140, 144-45 (5th Cir. 1975); *see, e.g.*, *EEOC v. United Health Programs of Am., Inc.*, 350 F. Supp. 3d 199, 240-41 (E.D.N.Y. 2018) (awarding attorney's fees, injunctive relief, and costs in addition to the jury's award of compensatory and punitive damages to plaintiff where the employer coerced employees to engage in religious practices at work, creating a hostile work environment based on religion, and terminated an employee who opposed those practices). Alternatively, an employee may argue simply that mandating attendance in a religious service, without exception, adversely affects the terms and conditions of employment based on religion.

[310] *See Mathis v. Christian Heating & Air Conditioning, Inc*., 158 F. Supp. 3d 317, 333 (E.D. Pa. 2016) (denying summary judgment for the employer where plaintiff, an atheist, sought to refrain from wearing an employee ID badge with the employer's Christian message, because although the employer's message was intended to communicate "what we believe and how we want to be perceived by the public," a reasonable jury could find no harm to the company if its message was not displayed

on plaintiff's badge); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614-21 (9th Cir. 1988) (employer must accommodate an employee's atheism; no undue hardship because excusing employee from services would not have cost anything nor caused a disruption).

[311] *See Young*, 509 F.2d at 144-45 (ruling that employee was constructively discharged based on her religion in violation of Title VII where her superior advised her that she had obligation to attend monthly staff meetings in their entirety and advised her that she could simply "close her ears" during religious exercises with which meetings began).

[312] *See Garry H. v. Dep't of Transp.*, EEOC Appeal No. 0120181570, 2019 WL 4945081, at *2 (Sept. 24, 2019) (recognizing that holiday decorations such as a sign stating "Santa Claus[] is coming in [x number] of days" and Christmas lights are "secular symbols rather than an expression of a religion," and concluding that "displaying them in the federal workplace does not violate the establishment clause of the First Amendment," and does not constitute disparate treatment or hostile work environment harassment based on religion; noting the employer is not required by Title VII either to take them down or to add decorations representing other religions); *see also Federal Workplace Guidelines*, *supra* note 119 at Section D, example (b) (a government workplace does not violate the Establishment Clause by hanging a wreath or other secular Christmas decorations).

[313] Although it is beyond the scope of Title VII enforcement, we note for the sake of completeness that the U.S. Supreme Court has held that wreaths and Christmas trees are "secular" symbols, akin to items such as lights, Santa Claus, and reindeer, and thus that government display of these items does not violate the Establishment Clause of the First Amendment. *See Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 616-17 (1989) (holding that stand-alone crèche on county courthouse steps violated Establishment Clause, but display elsewhere of Christmas tree next to a menorah and a sign proclaiming "liberty" did not), *abrogated on other grounds Town of Greece v. Galloway*, 572 U.S. 565 (2014); *cf. Lynch v. Donnelly*, 465 U.S. 668, 670, 683-87 (1984) (holding that government-sponsored display of crèche did not violate Establishment Clause because it was surrounded by various secular symbols as part of holiday display) ; *Federal Workplace Guidelines*, *supra* note 119 at Section D (example (b)). For a discussion of both Title VII and Establishment Clause claims arising from holiday decorations in federal government employment context, *see,*

e.g., *Spohn v. West*, No. 00 CIV. 0735 AJP, 2000 WL 1459981, at *4-5 (S.D.N.Y. Oct. 2, 2000). In the private sector, Establishment Clause constraints would not apply.

[314] An employer may accommodate the employee's religious belief by substituting an alternative technique or method that does not conflict with the employee's religious belief or by excusing the employee from that part of the training program that poses a conflict, if doing so would not pose an undue hardship.

[315] Many employers have policies that require employees to treat each other with "courtesy, dignity and respect." This terminology fits within the ambit of treating others "professionally" as used in the example. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606-08 (9th Cir. 2004) (holding that it would have constituted undue hardship for employer to accommodate employee by eliminating portions of its diversity program to which employee raised religious objections; to do so would have "infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce"). If training conflicts with an employee's religious beliefs, the content of the training materials may be determinative in deciding whether it would pose an undue hardship to accommodate an employee by excusing him or her from the training or a portion thereof. If the training required or encouraged employees to affirmatively support or agree with conduct that conflicts with the employee's religious beliefs, or signal their support of certain values that conflict with the employee's religious beliefs, it would be more difficult for an employer to establish that it would pose an undue hardship to accommodate an employee who objects to participating on religious grounds. *See Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069, 1081-83 (D. Colo. 2004) (holding that a company could require and instruct employees to treat coworkers with respect in accordance with corporate diversity policy, but that a violation of Title VII occurred where the company did not accommodate employee's refusal on religious grounds to sign diversity policy asking him to "value the differences among all of us," which he believed required him to ascribe worth to a certain behaviors or beliefs he believed were repudiated by Scripture rather than simply agree to treat his coworkers appropriately).

[316] *See Commission Guidelines*, 29 C.F.R. § 1605.2(c).

[317] *See EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (holding that evidence was sufficient for employee to proceed to trial on claim that he was subjected to hostile work environment harassment based on both religion and

national origin where harassment was motivated both by his being a practicing Muslim and by his having been born in India); *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 515 (7th Cir. 1996) (holding that Catholic Filipino employee made out a prima facie case of national origin and religious discrimination).

[318] *See Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1196 (9th Cir. 2003) (denying employer's summary judgment motion on Lebanese Muslim substitute school teacher's discrimination claim because a reasonable jury could conclude that preconceptions about her religion and national origin caused school officials to misinterpret her comment that she was angry but did not want to "blow up"); *Tolani v. Upper Southampton Twp.*, 158 F. Supp. 2d 593, 596-97 (E.D. Pa. 2001) (ruling that employee from India who was Asian stated a claim of discriminatory discharge based on race, religion, and national origin sufficient to survive summary judgment because employer mocked the way Indian people worship).

[319] 42 U.S.C. § 2000e-3(a); *see also Burlington N. v. Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[320] 42 U.S.C. § 2000e-3(a); *see, e.g.*, *Magden v. Easterday Farms*, No. 2:16-CV-00068-JLQ, 2017 WL 1731705, at *8 (E.D. Wash. May 3, 2017) (holding plaintiff could proceed with retaliatory termination claim when he was fired for alleged poor performance two days after he complained to management about supervisor's proselytizing, management took no steps to investigate, and supervisor confronted him about complaint).

[321] *See* EEOC, Enforcement Guidance on Retaliation & Related Issues II.A.2(e) (Aug. 25, 2016), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues)** . In a related context, most courts have assumed or held that requests for disability accommodation are protected activity. *See Solomon v. Vilsack*, 763 F.3d 1, 15 n.6 (D.C. Cir. 2014) (collecting cases); *see also* 9 Lex K. Larson, Employment Discrimination § 154.10, at 154-105 & n.25 (2d ed. 2014) ("In addition to the activities specifically protected by the statute, courts have found that requesting reasonable accommodation is a protected activity."). One circuit has held that requesting a religious accommodation, in contrast to opposing the denial of such a request, is not a protected activity under 42 U.S.C. § 2000e-3(a), and thus that a claim that a prospective employer had wrongfully denied a Seventh-day Adventist's request not to work during her Sabbath (Friday sundown to Saturday sundown) should have

been brought as a disparate treatment claim under 42 U.S.C. § 2000e-2(a) instead. *See EEOC v. N. Mem'l Health Care*, 908 F.3d 1098, 1102–04 (8th Cir. 2019). The Commission disagrees with that decision and believes the better interpretation of Title VII's antiretaliation provision is that requests for religious accommodations are protected activity under that provision as well.

[322] *Burlington N.*, 548 U.S. at 68 (quotations omitted).

[323] Executive Order 13609 is inapplicable because the interpretive guidelines are nonbinding and have no impact on international regulatory cooperation or on interactions with other countries.

[324] Although **www.regulations.gov (http://www.regulations.gov)** numbers comments received as 74, the numbering excludes one and ten, and document number 54 is a duplicate. Therefore, there were 71 unique comments.

EXHIBIT 2

Section 1557 Final Rule: Frequently Asked Questions

Pursuant to decisions by various district courts regarding the 2024 Final Rule implementing Section 1557, entitled Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) ("2024 Final Rule"), provisions are stayed or enjoined as indicated below:

1. In *Florida v. Department of Health and Human Services*, No. 8:24-cv-1080-WFJ-TGW (M.D. Fla.), the court stayed 45 C.F.R. 92.101(a)(2)(iv), 92.206(b), 92.207(b)(3)-(5), and 42 C.F.R. 438.3(d)(4), in Florida. OCR also may not enforce the interpretation of discrimination "on the basis of sex" in 45 C.F.R. 92.101(a)(2)(iv), 92.206(b), or 92.207(b)(3)-(5) in Florida.

2. In *Tennessee v. Becerra*, No. 1:24cv161-LG-BWR (S.D. Miss.), the court stayed nationwide the following regulations to the extent they "extend discrimination on the basis of sex to include discrimination on the basis of gender identity": 42 C.F.R. 438.3, 438.206, 440.262, 460.98, 460.112; 45 C.F.R. 92.5, 92.6, 92.7, 92.8, 92.9, 92.10, 92.101, 92.206-211, 92.301, 92.303, 92.304; and enjoined HHS from enforcing the 2024 Final Rule "to the extent that the final rule provides that 'sex' discrimination encompasses gender identity."

3. In *Texas v. Becerra*, the court stayed nationwide the following regulations: 42 C.F.R. 438.3(d)(4), 438.206(c)(2), 440.262, 460.98(b)(3), 460.112(a); 45 C.F.R. 92.101(a)(2) (and all references to this subsection), 92.206(b), 92.207(b)(3)–(5).

Notices of appeal have been filed in all three cases.

The following provides summarized information, not any independent interpretation of Section 1557; readers are directed to the final rule itself for a full and complete recitation of its contents.

1. What is Section 1557?

Section 1557 is the non-discrimination provision of the Affordable Care Act (ACA). Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in specified health programs or activities, including those that receive Federal financial assistance.

2. In what ways does Section 1557 protect patients?

Section 1557 makes it unlawful for health care providers, including doctors' practices and hospitals that receive Federal financial assistance, to refuse to treat—or to otherwise discriminate against—an individual on the basis on their race, color, national origin, sex, age, or disability.

Section 1557 imposes similar requirements on health insurance issuers that receive Federal financial assistance and the health insurance Marketplaces. The rule applies to both in-person and telehealth care.

3. Is Section 1557 currently being enforced?

Yes, Section 1557 has been in effect since the enactment of the ACA in 2010. Since that time, the Office for Civil Rights (OCR) </ocr/about-us/index.html> has been receiving and investigating discrimination complaints under Section 1557.

4. What is the effective date for the final rule?

The final rule is effective 60 days after publication in the Federal Register.

Once the final rule is in effect, those covered should follow the timetable below for the applicability of certain provisions.

Section 1557 Requirement and Provision	**Date by which covered entities must comply**
§ 92.7 Section 1557 Coordinator	Within 120 days of effective date.
§ 92.8 Policies and Procedures	Within one year of effective date.
§ 92.9 Training	Following a covered entity's implementation of the policies and procedures required by § 92.8, and no later than 300 days of effective date.

Section 1557 Requirement and Provision	Date by which covered entities must comply
§ 92.10 Notice of Nondiscrimination	Within 120 days of effective date.
§ 92.11 Notice of Availability of Language Assistance Services and Auxiliary Aids and Services	Within one year of effective date.
§ 92.207(b)(1)-(5) Nondiscrimination in health insurance coverage and other health-related coverage (benefit design changes)	For health insurance coverage or other health-related coverage that was not subject to this part as of the date of publication of this rule, by the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2025.
§ 92.207(b)(6) Nondiscrimination in health insurance coverage and other health-related coverage (benefit design changes)	By the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2025.
§ 92.210(b), (c) Use of patient care decision support tools	Within 300 days of effective date.

5. Why is OCR issuing a new final rule addressing Section 1557?

OCR is issuing this final rule to restore and strengthen civil rights protections for individuals consistent with the plain meaning of the statutory text. The previous version of this rule, issued in 2020, covers fewer programs and services and limited nondiscrimination protections for individuals.

Notably, this updated rule recognizes the growing importance of telehealth and patient care decision support tools in the health care marketplace —including artificial intelligence and machine learning— and applies nondiscrimination protections to the use of these technologies. In addition, the final rule recognizes that protections against discrimination on the basis of sex include sexual orientation and gender identity, consistent with the U.S. Supreme Court's holding in *Bostock v. Clayton County*.

6. Whom does the final rule apply to?

The final rule applies to health programs or activities that receive HHS funding, health programs or activities administered by HHS (such as the Medicare Part D program), and the health insurance Marketplace (and all plans offered by issuers that participate in those Marketplaces that receive Federal financial assistance).

Those covered by the rule may include hospitals, health clinics, health insurance issuers, state Medicaid agencies, community health centers, physicians' practices, and home health care agencies.

7. Does the final rule apply to the Marketplaces?

Yes, Section 1557 covers both the Federally-facilitated Marketplaces and the State-based Marketplaces.

8. Are those covered by the rule required to provide notice to let patients and consumers know about

their rights under Section 1557?

The final rule requires all those covered to provide and post notice informing individuals of their civil rights under Section 1557. Covered entities with 15 or more employees are also required to have a civil rights grievance procedure and an employee designated to coordinate compliance for the final rule.

Those covered by the rule must also provide a notice informing individuals that free language assistance services and auxiliary aids and services are available to protect individuals with limited English proficiency (LEP) and individuals with disabilities. The notice must be provided in the top 15 languages spoken by individuals with LEP in the relevant State or States where the entity operates. To minimize burden, OCR has prepared sample notices in English and 47 other languages </civil-rights/for-individuals/section-1557/translated-resources/index.html> that can be used if providers choose to do so; they are also free to create their own notices if they wish.

9. What does the final rule require for individuals with limited English proficiency?

The final rule adopts the longstanding interpretation of civil rights laws that Federal financial assistance recipients must take reasonable steps to provide meaningful access to each individual with limited English proficiency. Those covered are required to provide notice that language assistance services will be provided free of charge when necessary to comply with this rule. Those covered must also adopt language access procedures describing their process for providing language assistance services to individuals with limited English proficiency when required. Those covered have flexibility in adopting procedures to comply with the final rule, which accounts for factors such as the nature and importance of the health program and the communication at issue. The rule also accounts for other relevant considerations, such as whether an entity has developed and implemented effective language access procedures appropriate to its circumstances.

10. What does the final rule require concerning individuals with disabilities?

The final rule requires effective communication, including through the provision of appropriate auxiliary aids and services; establishes standards for accessibility of buildings and facilities; requires that health programs provided through electronic and information technology be accessible; requires those covered to make reasonable modifications to their policies, procedures, and practices to provide individuals with disabilities access to health programs and activities; and requires health insurance coverage and other health-related coverage to be provided in the most integrated setting appropriate to the needs of qualified individuals with disabilities. Those covered are required to provide notice that auxiliary aids and services will be provided free of charge when necessary to comply with this rule. Those covered must also adopt effective communications procedures describing their process for ensuring effective communication for individuals with disabilities when required.

11. Does the final rule prevent covered providers from using algorithms, devices, or tools in a way that results in discrimination?

Yes, the final rule codifies the existing prohibition on discrimination against individuals based on race, color, national origin, sex, age, or disability through the use of patient care decision support tools, which include any automated or non-automated tool, mechanism, method, or technology (such as AI or clinical algorithms) used to support decision-making to provide care for patients. Under the

final rule, covered providers have an ongoing responsibility to identify their use of patient care decision support tools that directly measure race, color, national origin, sex, age, or disability, and to make reasonable efforts to mitigate the risk of discrimination from their use of these tools.

12. What types of discrimination constitute discrimination on the basis of sex?

The final rule provides that sex discrimination includes, but is not limited to, discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), pregnancy or related conditions, and sex stereotypes.[1] In June of 2020, the U.S. Supreme Court held that the prohibition of sex discrimination in Title VII of the Civil Rights Act of 1964 includes discrimination on the basis of sexual orientation and gender identity. OCR's final rule is consistent with this ruling.

13. What does the provision regarding nondiscrimination in health insurance and other health coverage prohibit?

The final rule prohibits insurers from discriminating on the basis of race, color, national origin, sex, age, or disability. This prohibition applies to all health insurance issuers that are recipients of Federal financial assistance, which includes Medicare Parts C and D payments, as well as state Medicaid agencies.

14. Does the final rule cover employment discrimination?

The final rule does not apply to employment practices, including the provision of employee health benefits.

15. Does the final rule include a religious freedom and conscience exemption?

Yes. The final rule reiterates that a recipient may rely on applicable Federal protections for religious freedom and conscience, and a particular application of a provision(s) of this final rule is not required when such protections apply. It also includes an administrative process for recipients to seek an assurance of exemption in writing from the application of a provision of Section 1557 under existing Federal religious freedom and conscience laws. The recipient will receive a temporary exemption while OCR decides the request. If the request is denied, the recipient can file an administrative appeal of that decision with HHS. OCR enforces a range of civil rights and conscience and religious freedom statutes and takes seriously the responsibility to effectively enforce each one. The final rule does not change or displace the rights already afforded under those statutes.

16. Does the final rule require the coverage or provision of treatment (e.g., hormone therapy, surgery, etc.)

for children and/or adults with gender dysphoria if prescribed by a doctor?

The rule does not require a specific standard of care or course of treatment for any individual, minor or adult. Providers do not have an affirmative obligation to offer any health care, including gender-affirming care, that they do not think is clinically appropriate or if religious freedom and conscience protections apply. HHS has a general practice of deferring to a clinician's judgment about whether a particular service is medically appropriate for an individual.

The final rule does not require those covered, including state Medicaid agencies, to cover a particular health service for the treatment of gender dysphoria for any individual, minor or adult. Rather, it prohibits health insurance issuers, state Medicaid agencies, and other covered entities from excluding categories of services in a discriminatory way. Coverage must be provided in a neutral and nondiscriminatory manner.

17. What can I do if I believe my civil rights under Section 1557 have been violated?

If you believe that you or someone else has been subject to discrimination in health care or health coverage, you may file a complaint with OCR under Section 1557. Learn how to file a complaint </civil-rights/filing-a-complaint/complaint-process/index.html> and request a complaint package, or call OCR's toll-free number at (800) 368-1019 or (800) 537-7697 (TDD) to speak with someone who can answer your questions and guide you through the process. OCR's complaint forms are available in a variety of languages. Individuals can file a complaint online via OCR's Complaint Portal <https://ocrportal.hhs.gov/ocr/smartscreen/main.jsf>.

18. Can I review the final regulation?

Yes. You can review an unofficial copy of the final regulation at HHS.gov/1557. OCR will provide a link to the official version of the final rule when it is published in the Federal Register.

19. Can I get a copy of the regulation in large print, Braille, or some other alternative format?

Yes. To get a copy in an alternative format, please contact the Office for Civil Rights and provide the specifications for the format. To contact us, call our toll-free number at (800) 368 1019 or (800) 537-7697 (TDD) for assistance.

Endnotes

[1] A covered provider, including a pharmacy, does not engage in discrimination prohibited by Section 1557 if it declines to provide abortions based on religious or conscience objections to performing the procedure, based on a professional or business judgment about the scope of the services it wishes to offer, or for any other nondiscriminatory reason.

Content created by Office for Civil Rights (OCR)
Content last reviewed October 9, 2024

EXHIBIT 3

U.S. Equal Employment Opportunity Commission

Questions and Answers for Respondents on EEOC's Position Statement Procedures

The EEOC has implemented nationwide procedures that provide for the release of Respondent position statements and non-confidential attachments to a Charging Party or Charging Party's representative upon request during the investigation of the charge of discrimination.

The procedures provide for a consistent approach to be followed in all of EEOC's offices, which enhances service to the public. The procedures will also provide the EEOC with better information from the parties to strengthen our investigations.

Summary of Position Statement Procedures

During the investigation of a charge, the EEOC may request that the Respondent submit a position statement and documents supporting its position. EEOC's resource guide for Respondents, "**Effective Position Staements (https://www.eeoc.gov/employers/effective-position-statements)** ," advises Respondents to focus their position statements on the facts relevant to the charge of discrimination, identify the specific documents and evidence supporting its position, and raise any defenses that the Respondent believes are applicable. A position statement focused on the allegations of the charge and any defenses helps

the EEOC accelerate the investigation and tailor its requests for additional information.

A Respondent generally has 30 days to gather the information requested and to submit its position statement and attachments to the EEOC. If the Respondent relies on confidential information in its position statement, it should provide such information in separately labeled attachments. With the EEOC's **Digital Charge System (https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed)** , Respondents can upload their position statement and attachments into the Respondent Portal rather than faxing or mailing the documents.

After the EEOC reviews the Respondent's position statement and attachments on a specific charge, the EEOC staff may redact confidential information as necessary prior to releasing the information to a Charging Party or Charging Party's representative.

The EEOC will provide the Respondent's position statement and non-confidential attachments to Charging Parties upon request and provide them an opportunity to respond within 20 days. The Charging Party's response will not be provided to Respondent during the investigation.

Questions and Answers for Respondents

1. What do Respondents need to do to comply with these procedures?
   It is in the Respondent's interest to provide an effective position statement that focuses on the Charging Party's allegations and any factual or legal defenses that the Respondent believes are applicable. An effective position statement is clear, concise, complete and responsive. It should clearly explain the Respondent's version of the facts and identify the specific documents and evidence supporting its position. The EEOC encourages the Respondent to raise in its position statement any factual or legal defenses that it believes are applicable and will carefully evaluate all asserted defenses. A position statement that addresses all the allegations in the charge, provides relevant evidence to support the Respondent's position, and asserts any defenses that the Respondent believes are applicable can help EEOC accelerate the investigation and tailor its requests for additional information.

2. What if the Respondent is a religious employer or otherwise claims that it had a right under the U.S. Constitution or other federal laws to take the employment action the Charging Party is challenging?
   The EEOC takes religious defenses seriously and carefully evaluates such defenses when they are raised. If the Respondent is a religious organization or otherwise claims that it had a right under the U.S. Constitution or other federal laws to take the employment action the Charging Party is challenging, the Respondent should provide that information and supporting evidence to the EEOC in its position statement or at the earliest possible time.
   The Respondent may request that the EEOC prioritize consideration of the religious defense before investigating the merits of the charge. Respondents that make such a request should submit sufficient information for the EEOC to evaluate the applicability of the religious defense in order to avoid delaying the charge investigation process. The EEOC may contact the Respondent and/or the Charging Party and request additional information if needed to evaluate the applicability of the religious defense.

3. How should Respondent handle confidential information when submitting the position statement and attachments to the EEOC?
   The position statement should refer to, but not identify, information the Respondent asserts is sensitive medical information, or confidential commercial or confidential financial information. If the Respondent relies on confidential information in its position statement, it should provide such information in separate attachments to the position statement labeled "Sensitive Medical Information," "Confidential Commercial Information" or "Confidential Financial Information," or "Trade Secret Information" as applicable. Respondent should provide an explanation justifying the confidential nature of the information contained in the attachments. Medical information about the Charging Party must not be deemed sensitive or confidential medical information in relation to the investigation.

4. What type of information is "confidential" that should be put into separately labeled attachments?
   Respondent should segregate the following information into separate attachments and designate them as follows:

   - *Sensitive medical information (except for the Charging Party's medical information).*

- *Social Security Numbers.*
- *Confidential commercial or confidential financial information.*
- *Trade secrets information.*
- *Non-relevant personally identifiable information of witnesses, comparators or third parties, for example, social security numbers, dates of birth (in non-age cases), home addresses, personal phone numbers, personal email addresses, etc.*
- *Any reference to charges filed against the Respondent by other charging parties.EEOC will review attachments designated as confidential and consider the justification provided, as the agency will not accept blanket or unsupported assertions of confidentiality.*

5. Who should sign the position statement?
   The position statement should be signed by an officer, agent or representative of Respondent authorized to speak officially on its behalf.

6. What if Respondent needs additional time to submit its position statement?
   If Respondent believes it requires more than 30 days to submit its position statement, it must, at the earliest possible time, make a request for an extension, setting forth good cause for the extension and the amount of additional time requested. Submitting a request for extension of time does not automatically extend the deadline for providing the position statement.

7. Can I call the investigator and request an extension of time for submission of the position statement?
   Yes. We encourage you to contact the investigator as early as possible and also request that you follow up in writing (by letter or email) confirming your request for an extension and the agreed upon due date.

8. Under what circumstances would EEOC grant an extension of time?
   *A brief extension of time **may** be allowed in particular cases, but only when it is clear that the Respondent is working with due diligence to supply all of the necessary information. Evidence of due diligence would include a partial submission of information related to the allegations in the charge.*

9. How should the position statement and attachments be submitted?
   *Respondents should upload the position statement and attachments into the Respondent Portal using the **+ Upload Documents** button. Select the "Position*

*Statement" Document Type and click the **Save Upload** button to send the Position Statement and attachments to EEOC. Once the Position Statement has been submitted, you will not be able to retract it via the Portal.*

10. Will Respondents receive a copy of the Charging Party's response to its position statement?

    No, the Charging Party's response will not be provided to Respondent during the investigation. The Commission is releasing the first formal document received from the Charging Party, the Charge, and the first formal document received from the Respondent, the Position Statement. No other disclosures are contemplated at this time. If during the course of the investigation, EEOC determines that it needs additional evidence from the Respondent, including information to address the Charging Party's rebuttal to the position statement or additional information to evaluate a defense the Respondent has raised, the Investigator will contact the Respondent. This supports effective and efficient management of the charge workload to focus the agency's resources where government enforcement can have the greatest impact.

EXHIBIT 4

U.S. Equal Employment Opportunity Commission

Enforcement Guidance on Harassment in the Workplace

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:	EEOC-CVG-2024-1
Concise Display Name:	Enforcement Guidance on Harassment in the Workplace
Issue Date:	04-29-2024
General Topics:	Harassment, Race, Color, Religion, Sex, National Origin, Age, Disability, Genetic Information
Summary:	This document addresses how harassment based on race, color, religion, sex, national origin, age, disability, or genetic information is defined under EEOC-enforced statutes and the analysis for determining whether employer liability is established.
Citation:	Title VII, ADEA, ADA, GINA, 29 CFR Part 1601, 29 CFR Part 1604, 29 CFR Part 1605, 29 CFR Part 1606, 29 CFR Part 1625, 29 CFR Part 1626, 29 CFR Part 1630, 29 CFR Part 1635
Document Applicant:	Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff
Previous Revision:	Yes. This document replaced Compliance Manual Section 615: Harassment (1987); Policy Guidance on Current Issues

of Sexual Harassment (1990); Policy Guidance on Employer Liability under Title VII for Sexual Favoritism (1990); Enforcement Guidance on Harris v. Forklift Sys., Inc. (1994); and Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999).

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

	NOTICE	Number
EEOC		915.064
		Date
		4/29/24

SUBJECT: Enforcement Guidance on Harassment in the Workplace

PURPOSE: This transmittal issues the Commission's guidance on harassment in the workplace under EEOC-enforced laws. It communicates the Commission's position on important legal issues.

EFFECTIVE DATE: Upon issuance.

EXPIRATION DATE: This Notice will remain in effect until rescinded or superseded.

OBSOLETE DATA: This Enforcement Guidance supersedes *Compliance Manual Section 615: Harassment* (1987); *Policy Guidance on Current Issues of Sexual Harassment* (1990); *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism* (1990); *Enforcement Guidance on* Harris v. Forklift Sys., Inc. (1994); and

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999).

ORIGINATOR: Office of Legal Counsel

Charlotte A. Burrows
Chair

TABLE OF CONTENTS

I. Introduction

A. Background

In 1986, the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank, FSB v. Vinson*[1] that workplace harassment can constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). Decades later, harassing conduct remains a serious workplace problem. For the five fiscal years (FY) ending with FY 2023, over one-third of the charges of employment discrimination received by the Equal Employment Opportunity Commission ("the Commission" or "the EEOC") included an allegation of unlawful harassment based on race, sex, disability, or another statutorily protected characteristic.[2] The actual cases behind these numbers reveal that many people experience harassing conduct at work that may be unlawful.[3]

This Commission-approved enforcement guidance presents a legal analysis of standards for harassment and employer liability applicable to claims of harassment under the equal employment opportunity (EEO) statutes enforced by the Commission, which prohibit work-related harassment based on race, color, religion, sex (including pregnancy, childbirth, or related medical conditions; sexual orientation; and gender identity), national origin, disability, genetic information, and age (40 or over).[4] This guidance also consolidates and supersedes several earlier EEOC guidance documents: *Compliance Manual Section 615: Harassment* (1987); *Policy Guidance on Current Issues of Sexual Harassment* (1990); *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism* (1990);

Enforcement Guidance on Harris v. Forklift Sys., Inc. (1994); and *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999).

This guidance serves as a resource for employers, employees, and practitioners; for EEOC staff and the staff of other agencies that investigate, adjudicate, or litigate harassment claims or conduct outreach on the topic of workplace harassment; and for courts deciding harassment issues. This document is not intended to be a survey of all legal principles that might be appropriate in a particular case.[5] The contents of this document do not have the force and effect of law, are not meant to bind the public in any way,[6] and do not obviate the need for the EEOC and its staff to consider the facts of each case and applicable legal principles when exercising their enforcement discretion. Nothing in this document should be understood to prejudge the outcome of a specific set of facts presented in a charge filed with the EEOC. In some cases, the application of the EEO statutes enforced by the EEOC may implicate other rights or requirements including those under the United States Constitution; other federal laws, such as the Religious Freedom Restoration Act (RFRA); or sections 702(a) and 703(e)(2) of Title VII.[7] The EEOC will consider the implication of such rights and requirements on a case-by-case basis.

B. Structure of this Guidance

In explaining how to evaluate whether harassment violates federal EEO law, this enforcement guidance focuses on the three components of a harassment claim. Each of these must be satisfied for harassment to be unlawful under federal EEO laws.

- Covered Bases and Causation: Was the harassing conduct based on the individual's **legally protected characteristic** under the federal EEO statutes?
- Discrimination with Respect to a Term, Condition, or Privilege of Employment: Did the harassing conduct constitute or result in **discrimination with respect to a term, condition, or privilege of employment**?
- Liability: Is there a basis for holding the employer **liable** for the conduct?

This guidance also addresses systemic harassment and provides links to other EEOC harassment-related resources.[8]

II. Covered Bases and Causation

Harassment must be based on an employee's legally protected characteristic.

Under the first part of a harassment claim, harassment (or harassing conduct) is only covered by federal EEO laws if it is based on one (or more) of the individual's characteristics that are protected by these laws. In this document, the terms "harassment" and "harassing conduct" are generally used interchangeably. The terms refer to conduct that can, but does not necessarily always, constitute or contribute to unlawful harassment, including a hostile work environment. Not all harassing conduct violates the law, even if it is because of a legally protected characteristic. As discussed throughout this guidance, whether specific harassing conduct violates the law must be assessed on a case-by-case basis.

Section II.A of this guidance identifies the **legally protected characteristics** covered by the federal EEO laws enforced by the EEOC.

Section II.B of this guidance explains how to determine whether harassing conduct is **because of** a legally protected characteristic.

Taken together, these two sections address whether conduct is based on a protected characteristic and, therefore, whether it can contribute to creating a hostile work environment. S**ection II** does not address whether such conduct reaches the point of creating a hostile work environment. The next section of this guidance, **section III**, discusses how to determine whether harassing conduct rises to the level of a hostile work environment.

A. Covered Bases

1. Race

Title VII prohibits discrimination, including unlawful harassment, based on race. Harassment is based on a complainant's race if it is because the complainant is

Black, Asian, White, multiracial, or another race. Examples of harassing conduct based on race include racial epithets or offensive comments about members of a particular race, or harassment based on stereotypes about the complainant's race.[9] It also can include harassment based on traits or characteristics linked to an individual's race, such as the complainant's name, cultural dress, accent or manner of speech, and physical characteristics, including appearance standards (e.g., harassment based on hair textures and hairstyles commonly associated with specific racial groups).[10]

Example 1: Race-Based Harassment. Mia, a personal trainer at a large fitness center chain, is multiracial (Asian, Black, and Pacific Islander). Some coworkers refer to Mia using epithets directed at her mixed-race status, including "mutt." These coworkers also call Mia slurs based on her separate racial attributes. Other coworkers make comments that they don't consider to be insulting,[11] such as telling Mia how "exotic" she looks; calling her "cute nicknames," such as "panda" and "Moana"; and commenting that Mia inherited the "best traits," such as being strong because she is part Pacific Islander, athletic because she is part Black, and smart and articulate because she is part Asian. Based on these facts, the coworkers' harassing conduct toward Mia is based on race.

Example 2: Race-Based Harassment. Chelsea, a hostess at an upscale restaurant, is a Black woman who wears her hair in locs for both cultural reasons and to reflect the natural texture of her hair. Chelsea's manager, Gregor, periodically tries to touch Chelsea's hair while asking questions about it, such as "why does Black people's hair look like that?" and "what does it feel like?" Gregor says that Chelsea could go from "savage to stunning" if she relaxed her hair. On other occasions, Gregor criticizes her hair as "messy," "untamed," and "unprofessional." Based on these facts, Gregor's harassing conduct toward Chelsea is based on her race.

2. Color

Although sometimes related to harassment based on race or national origin, color-based harassment due to an individual's pigmentation, complexion, or skin shade or tone is independently covered by Title VII.[12] For example, if a supervisor harasses Black employees with darker complexions but does not harass Black employees with lighter skin tones, this may be evidence that the harassment was due to color.

> **Example 3: Color-Based Harassment.** Shawn, an inspector at a medical equipment manufacturing facility, is a Pakistani-American with brown skin. Two of Shawn's supervisors make comments to him that suggest his skin is the color of human feces. Based on these facts, the supervisors' harassing conduct toward Shawn is based on his color.[13]

3. National Origin

Title VII prohibits employment discrimination, including unlawful harassment, based on national origin—meaning discrimination due to a complainant's, or the complainant's ancestors', place of origin. Harassment based on national origin includes ethnic epithets, derogatory comments about individuals of a particular nationality, and use of stereotypes about the complainant's national origin.[14] It also can include harassment regarding traits or characteristics linked to an individual's national origin, such as physical characteristics, ancestry, or ethnic or cultural characteristics (e.g., attire or diet), and linguistic characteristics (e.g., non-English language accent or a lack of fluency in English).[15]

> **Example 4: Harassment Based on National Origin.** Antonio is an immigrant from Mexico who works at a butcher shop. Over the course of several months, his Mexican-American and White managers subject him to slurs about his Mexican origin such as "wetback" and other vulgar and derogatory epithets in Spanish. They also mock and ridicule Antonio's accent and limited English proficiency. Based on these facts, the managers' harassing conduct toward Antonio is based on his national origin.

4. Religion

Title VII prohibits employment discrimination, including unlawful harassment, based on religion. Religion is broadly defined under Title VII.[16] Harassment based on religion includes the use of religious epithets or offensive comments based on a complainant's religion (including atheism or lack of religious belief[17]), religious practices, or religious dress.[18] It also includes harassment based on religious stereotypes[19] and harassment because of a request for a religious accommodation or receipt of a religious accommodation.[20]

> **Example 5:[21] Religion-Based Harassment.** Thiago, a fraud investigator at a property and casualty insurer, is agnostic and rejects organized religion. After Thiago's sister died unexpectedly, Thiago is despondent. He is approached by a coworker, Laney, who says that she can communicate with the dead and has received the following messages from Thiago's sister: the sister is suffering in Hell, and Thiago will go to Hell as well if he does not "find God." Thiago becomes upset and asks Laney to never bring up the topic again. Nevertheless, Laney repeatedly encourages Thiago to find religion so Thiago will not "go to Hell like his sister," despite Thiago's ongoing requests for Laney to "drop it." Based on these facts, Laney's harassing conduct toward Thiago is based on religion.[22]

> **Example 6: Harassment Based on Religious Accommodation.** Harpreet is an observant Sikh who, because of his religious beliefs, does not cut his beard. He works as an emergency medical technician (EMT) for an ambulance services provider. Harpreet's employer has a policy that requires all EMTs to be able to wear a tight-fitting respirator, which requires a clean-shaven face where the respirator touches the skin. When Harpreet's employer learns that he cannot meet the respirator requirement due to his beard, the employer grants Harpreet a religious accommodation by permitting Harpreet to use a loose-fitting powered

air purifying respirator (PAPR) instead of a tight-fitting respirator. Harpreet's supervisor, Jessie, has expressed disdain for Harpreet's accommodation, including by telling colleagues that PAPRs scare patients and saying, "Anybody who can't wear a basic respirator shouldn't be working here." Jessie also refers to Harpreet as "looking unprofessional" or "shabby." Based on these facts, Jessie's harassing conduct is targeted at Harpreet's religious accommodation and therefore is based on Harpreet's religion.

Religious harassment also encompasses explicitly or implicitly coercing employees to engage in religious practices at work.[23]

Example 7: Harassment Based on Religious Coercion. Sandra, an exterminator for a pest control service, is a Christian. The owner of the pest control service, Fabian, is a self-described "spiritual guru" who believes he is called by the universe to help people transcend the Judeo-Christian belief system. Fabian regularly makes comments to Sandra denigrating Judeo-Christian tenets; asks Sandra probing questions about her faith; distributes tracts arguing that "traditional religion" is the cause of all ills in modern society; and states a "strong hope" that Sandra will attend his lunchtime lectures, which consistently focus on Fabian's religious beliefs. While Fabian claims he would never require employees to share his beliefs, attend his lectures, or read the material he distributes, he also keeps track of which employees do and do not participate in his religious activities and tends to act with favoritism toward employees who agree with or are receptive to his religious messages. Sandra feels she must feign interest in Fabian's beliefs or else she will be subject to ostracism or possibly even termination. Based on these facts, Fabian's harassing conduct toward Sandra is based on religion.[24]

5. Sex

Title VII prohibits employment discrimination, including unlawful harassment based on sex. Under Title VII, "sex" includes "pregnancy, childbirth, and related medical conditions" and sexual orientation and gender identity, as discussed in this section.

a. Harassing Conduct of a Sexualized Nature or Otherwise Based on Sex

Harassing conduct based on sex includes conduct of a sexualized nature, such as unwanted conduct expressing sexual attraction or involving sexual activity (e.g., "sexual conduct"); sexual attention or sexual coercion, such as demands or pressure for sexual favors; rape, sexual assault, or other acts of sexual violence; or discussing or displaying visual depictions of sex acts or sexual remarks.[25]

Harassment based on sex under Title VII[26] also includes non-sexual conduct based on sex,[27] such as sex-based epithets; sexist comments (such as remarks that women do not belong in management or that men do not belong in the nursing profession); or facially sex-neutral offensive conduct motivated by sex (such as bullying directed toward employees of one sex).[28]

> **Example 8: Sex-Based Harassment.** John, an employee in a supermarket bakery department, works with a coworker, Laverne, who rubs up against him in a sexual manner, tells sexual jokes, and displays dolls made from dough in sexual positions. Based on these facts, Laverne's harassing conduct toward John is based on his sex.

> **Example 9: Sex-Based Harassment.** Aiko, a construction worker on a road crew, is subjected to sex-based epithets and other demeaning sex-based language by her supervisor, such as "sandwich-maker" and "baby." This supervisor also disparages women's participation in the construction industry, for example by stating that road construction is "a man's job." Based on these facts, the supervisor's harassing conduct toward Aiko is based on sex.

Example 10: Sex-Based Harassment. Ferguson, a millwright at a cabinet manufacturer, has just returned from a short period of medical leave taken to recover from a vasectomy. Immediately upon his return, some of Ferguson's coworkers repeatedly ridicule Ferguson for the vasectomy, calling him "gelding," "eunuch," and "numb nuts," and saying things such as "why did you neuter yourself like a dog?" and "a real man would never get a vasectomy." Based on these facts, the coworkers' harassing conduct toward Ferguson is based on sex.

b. Pregnancy, Childbirth, or Related Medical Conditions Under Title VII[29]

Sex-based harassment under Title VII includes harassment based on pregnancy,[30] childbirth, or related medical conditions.[31] This can include issues such as lactation;[32] using or not using contraception;[33] or deciding to have, or not to have, an abortion.[34] Harassment based on these issues generally would be covered if it is linked to a targeted individual's sex including pregnancy, childbirth, or related medical conditions.

Example 11: Pregnancy-Based Harassment. Kendall, a veterinary assistant at a nationwide veterinary clinic chain, recently announced to coworkers that she is pregnant. After Kendall's announcement, one of her supervisors, Veronica, begins berating Kendall's work as slow, shoddy, and scatter-brained, and accuses Kendall of focusing more on getting ready for her new baby than doing her job. Veronica also begins to scrutinize Kendall's bathroom usage and, on at least one occasion, yelled at Kendall for "always" being in the bathroom. As Kendall's pregnancy progresses, Veronica refers to Kendall as a "heifer," and makes the comment, "We don't treat livestock at this office." Based on these facts, Veronica's harassing conduct toward Kendall is based on sex (pregnancy).

Example 12: Harassment Based on Pregnancy-Related Medical Condition (Lactation). Lisbet, a software engineer for a video game publisher, recently returned to work after giving birth. Lisbet uses a lactation room at work as needed in order to express breastmilk. Lisbet's coworker, Nathaniel, knocks loudly on the lactation room door while Lisbet is inside and pretends that he is going to enter. Nathaniel also refers to Lisbet's breasts as "milk jugs," makes suckling noises when Lisbet enters and exits the lactation room, and asks Lisbet if he can have a squirt of milk for his coffee.[35] Nathaniel also refers to the lactation room as "Lisbet's getaway" and asks why he is not allowed to take breaks in private rooms. Based on these facts, Nathaniel's harassing conduct toward Lisbet is based on a pregnancy-related medical condition (lactation).

Example 13: Harassment Based on Pregnancy-Related Medical Condition (Morning Sickness). Kristina, a graphic designer at a marketing firm, is experiencing pregnancy-related morning sickness. Kristina's employer accommodates her limitations due to morning sickness by permitting Kristina to telework up to three days per week and utilize flexible scheduling on the days she comes into the office. Kristina's colleagues complain that pregnant women always get special perks and privileges and accuse Kristina of getting pregnant "just so she can kick back, relax at home on the couch, and collect a paycheck." During a team meeting to discuss staffing a new, high-priority portfolio, when Kristina requests to be considered, her coworkers scoff that "if Kristina is so sick that she cannot come into the office, how can she be well enough to work on such an important account?" Based on these facts, the coworkers' harassing conduct toward Kristina is based on a pregnancy-related medical condition (morning sickness).

c. Sexual Orientation and Gender Identity

Sex-based discrimination under Title VII includes employment discrimination based on sexual orientation or gender identity.[36] Accordingly, sex-based harassment includes harassment based on sexual orientation or gender identity, including how that identity is expressed.[37] Harassing conduct based on sexual orientation or gender identity includes epithets regarding sexual orientation or gender identity;[38] physical assault due to sexual orientation or gender identity;[39] outing (disclosure of an individual's sexual orientation or gender identity without permission);[40] harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex;[41] repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering);[42] or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.[43]

> **Example 14: Harassment Based on Sexual Orientation.** Heidi, a staff journalist at a media conglomerate, recently attended a company award ceremony with her wife, Naomi. After the ceremony, one of Heidi's coworkers, Trevor, approaches Heidi and says, "I did not know you were a d*ke, that's so hot." Trevor asks Heidi questions such as, "because you are both girly-girls, who is the man in your marriage?" and "who wears the pants at home?"[44] Trevor also repeatedly sends the scissor emoji and images of scissors to Heidi, which Trevor intends as a euphemism for Heidi having sex with her wife. Based on these facts, Trevor's harassing conduct toward Heidi is based on her sexual orientation.

> **Example 15: Harassment Based on Gender Identity.** Chloe, a purchase order coordinator at a retail store warehouse, is approached by her supervisor, Alton, who asks whether she was "born a man" because he had heard a rumor that "there was a transvestite in the department." Chloe disclosed to Alton that she is transgender and asked him to keep this information confidential. After this conversation, Alton instructed

Chloe to wear pants to work because a dress would be "inappropriate," despite other purchase order coordinators being permitted to wear dresses and skirts. Alton also asks inappropriate questions about Chloe's anatomy and sexual relationships. Further, whenever Alton is frustrated with Chloe, he misgenders her by using, with emphasis, "he/him" pronouns, sometimes in front of Chloe's coworkers. Based on these facts, Alton's harassing conduct toward Chloe is based on her gender identity.[45]

6. Age

The Age Discrimination in Employment Act (ADEA)[46] prohibits age-based discrimination, including unlawful harassment, of employees forty or older because of their age.[47] This includes harassment based on negative perceptions about older workers.[48] It also includes harassment based on stereotypes about older workers, even if they are not motivated by animus, such as pressuring an older employee to transfer to a job that is less technology-focused because of the perception that older workers are not well-suited to such work or encouraging an older employee to retire.[49]

Example 16: Age-Based Harassment. Lulu, age sixty-eight, is a makeup artist and salesperson at a department store. Lulu's manager repeatedly asks Lulu about her retirement plans, despite Lulu expressing that she has no interest in retiring. Lulu's manager also tells her that the brand needs "fresh faces" and "high energy." When Lulu makes even a minor mistake, her manager disparages Lulu for having "senior moments." Further, on one occasion, the manager snapped at Lulu, "Nobody wants makeup advice from their granny." Based on these facts, the manager's harassing conduct toward Lulu is based on her age.

7. Disability[50]

Title I of the Americans with Disabilities Act (ADA)[51] prohibits employment discrimination, including unlawful harassment, based on an individual's physical or mental disability,[52] including harassment based on stereotypes about individuals with disabilities in general or about an individual's particular disability. It also can include harassment based on traits or characteristics linked to an individual's disability, such as how an individual speaks, looks, or moves.[53]

> **Example 17: Disability-Based Harassment.** Abdul, a financial advisor at a private wealth management firm, has a pronounced stutter resulting from anxiety. Abdul's coworkers mockingly imitate his stutter[54] and ask Abdul to repeat himself, even though the coworkers understood what Abdul said. Based on these facts, the coworkers' harassing conduct toward Abdul is based on disability.

Disability-based harassment also includes:

- Harassment because of an individual's request for, or receipt of, reasonable accommodation;[55]

> **Example 18: Harassment Based on Disability Accommodation.** Charlie, a seasonal cashier at a garden supply store, has psoriatic arthritis, which affects his knees and ankles and makes standing for prolonged periods of time painful. Charlie's employer has a rule that prohibits cashiers from using fatigue standing mats or chairs while at the cash register, but grants Charlie a reasonable accommodation under the ADA to use a mat or chair as needed. Charlie's coworkers berate him for getting "special treatment." They also hide Charlie's mat and chair, which prevents Charlie from starting his work on time, because it's "unfair" that he gets to be "more comfortable" than them. Based on these facts, the coworkers' harassing conduct toward Charlie is based on

disability (receipt of a reasonable accommodation).

- harassment because an individual is regarded as having an impairment, even if the individual does not have an actual disability, or a record of disability, under the ADA;[56]
- harassment because an individual has a record of a disability, even if the individual currently does not have a disability;[57] and
- harassment based on the disability of an individual with whom they are associated.[58]

Example 19: Harassment Based on Disability of Person with Whom the Employee Is Associated. Karl's husband, Jamal, has long COVID that meets the ADA's definition of disability. Karl's employer, a business consulting firm, has a policy that allows employees to telework three days each week. One of Karl's coworkers, Lenny, posts a statement on the shared team communication platform that reads in part, "Keep Karl Home Every Day! If Karl's husband is so sick, then Karl needs to stay at home, otherwise he is going to infect us all!" Karl periodically uses his accrued paid time off to take Jamal to doctor's appointments, which often coincide with team meetings. Sometimes during these meetings, a different coworker, Barry, questions Karl's professional competence and dedication given his recent focus on taking care of Jamal, stating that Karl seems more interested in helping Jamal "get over a cold" than doing his job. Based on these facts, Lenny's and Barry's harassing conduct toward Karl is based on disability (association with a person with a disability).

8. Genetic Information[59]

The Genetic Information Nondiscrimination Act (GINA)[60] prohibits employment discrimination, including unlawful harassment, on the basis of genetic information, which includes harassment based on an individual's, or an individual's family member's, genetic test or on the basis of an individual's family medical history.[61] For example, harassment based on genetic information includes harassing an employee because the employee carries the BRCA gene, which is linked to an increased risk of breast and ovarian cancer, or because the employee's mother recently experienced a severe case of norovirus, which resulted in overnight hospitalization.[62]

> **Example 20: Harassment Based on Genetic Information.** Manuella, a web developer at a university, joined in on a lively conversation between coworkers who recently used DNA ancestry testing to learn more about their extended families. Some mentioned finding unknown cousins, and others said that they had extended family from countries that surprised them. Manuella, taking part in the conversation, mentioned that although she had not taken a DNA ancestry test, a cousin recently took a genetic test that revealed that they had inherited the gene mutation that would put them at a higher risk of developing Hypertrichosis, a condition also known as Werewolf Syndrome. Soon after this discussion, coworkers began to refer to Manuella as "the werewoman," to make howling noises when they passed her office, and to leave dog treats on her desk. Based on these facts, the coworkers' harassing conduct toward Manuella is based on her genetic information.

9. Retaliation

The EEO statutes prohibit employers from retaliating against employees and applicants for employment because of their "protected activity"—opposing an employer's unlawful discrimination under the EEO statutes or participating in an investigation, hearing, or proceeding under the EEO statutes.[63]

Sometimes, retaliatory conduct is characterized as "retaliatory harassment." The threshold for establishing unlawful retaliatory harassment is different than that for a discriminatory hostile work environment. As the Supreme Court explained in *Burlington Northern & Santa Fe Railway Co. v. White*, the EEO laws' antiretaliation provisions complement their antidiscrimination provisions but protect against a broader range of behaviors—they forbid anything that might deter a reasonable person from engaging in protected activity.[64] Thus, retaliatory harassing conduct can be challenged under the *Burlington Northern* standard even if it is not sufficiently severe or pervasive to alter the terms and conditions of employment by creating a hostile work environment.[65]

If an employee has been subjected both to harassment based on race, sex, or another protected characteristic and to retaliation, then the legal standard or standards that apply to particular harassing conduct will depend on whether the conduct is being challenged as part of a harassment claim, a retaliation claim, or both.

For a more detailed discussion of retaliation, see EEOC, *Enforcement Guidance on Retaliation and Related Issues* (2016), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues)** .

10. Cross-Bases Issues

Discussed below are some issues that apply to all of the covered bases.

Harassment based on the perception that an individual has a particular protected characteristic—for example, the belief that a person has a particular national origin, religion, or sexual orientation—is covered by federal EEO law even if the perception is incorrect.[66] Thus, harassment of a Hispanic person because the harasser believes the individual is Pakistani is national origin-based harassment, and harassment of a Sikh man wearing a turban because the harasser thinks he is Muslim is religious harassment, even if the perception in both instances is incorrect.

The EEO laws also cover "associational discrimination." This includes harassment because the complainant associates with someone in a different protected class[67] or harassment because the complainant associates with someone in the same protected class.[68] For example, the EEO laws apply to harassment of a White

employee because his spouse is Black[69] or harassment of a Black employee because she has a biracial child.[70] Although the association often involves a close relationship, such as with a close relative or friend, the degree of closeness is irrelevant to whether the association is covered.[71]

Harassment that is based on the complainant's protected characteristic is covered even if the harasser is a member of the same protected class (intraclass harassment).[72]

> **Example 21: Intraclass Harassment Based on Age.** Pedro, age sixty-five, is a salesperson at a furniture store. Pedro's supervisor, Simon, age fifty-two, has recently become dismissive of Pedro. After Pedro asks to use some personal leave, Simon denies Pedro's request, stating, "You old motherf**ker, you are not taking a day off." After that, Simon stops referring to Pedro by name, and instead calls him "old man" and "pops."[73] Simon also refers to Pedro as "over the hill." Based on these facts, Simon's harassing conduct toward Pedro is based on Pedro's age even though Simon also is within the ADEA's protected class (40 or older).

> **Example 22: Intraclass Harassment Based on National Origin.** Mei, a flight attendant at a global airline, is of Chinese ancestry. Her supervisor, Hua, is also of Chinese ancestry. Hua frequently berates Mei for not living up to Hua's conception of an ideal Chinese worker. For example, Hua calls Mei lazy, useless, and spoiled; says that Mei's ancestors would be ashamed of her; and says that Mei "wouldn't last a day in China." Hua also says Mei should be proud to come from such an industrious and responsible culture, and that Mei "might as well be Caucasian" based on her mediocre performance. Based on these facts, Hua's harassing conduct toward Mei is based on Mei's national origin even though they are both of Chinese ancestry.[74]

Example 23: Intraclass Harassment Based on Sex. Dara and Sloane are lab technicians at a pharmaceutical research laboratory. On multiple occasions, one of their coworkers, Rose, makes dismissive comments to Dara, who has three children, such as, "shouldn't mothers stay at home with their kids?" and "don't expect to move up the career ladder with all of those children." Rose also makes dismissive comments to Sloane, who has no children and intends to remain childfree, on a handful of occasions, such as, "women who don't want children are frigid," "it is sad to watch you choose a career over a family," and "are you sure you don't want a baby? Every woman should want a baby!" Based on these facts, Rose's harassing conduct toward Dara and Sloane is based on their sex even though they all are women.

Harassment may be based on more than one protected characteristic of an employee, either under a single EEO statute, such as Title VII, or under multiple EEO statutes, such as Title VII and the ADEA. For example, a Black woman might be harassed both because she is Black and because she is a woman, or alternatively, because she is a Black woman. This last example is sometimes referred to as intersectional harassment, or harassment based on the intersection of two or more protected characteristics, which may, in fact, compound the harm.[75] If a Black woman is harassed based on stereotypes about Black women, such harassment is covered as both race and sex discrimination. Similarly, if a woman who is age forty or older is harassed based on stereotypes about older women, this harassment is covered as both age and sex discrimination.[76]

Example 24: Intersectional Harassment Based on Age and Sex. Janet, age fifty-one, works as a sales associate for a pet supplies store. One day at work, Janet quickly removed her jacket and began fanning herself. An assistant manager, Truman, stated when he observed her behavior, "Oh, you're having a hot flash! You must be menopausal." Truman then added, "You know your husband will start looking for younger women." Janet covered her ears and said, "I don't want

to hear you talking about any of this." On another occasion when Janet mixed up a customer order, Truman yelled at her and asked if the mistake was because she was having a "menopausal moment" or because she was just getting too old to get the orders right. Janet was visibly flustered by his yelling, which prompted Truman to add, "Don't get so emotional. Isn't there something you can take for your hormones?" Based on these facts, Truman's harassing conduct toward Janet is based on her status as an older woman.

Harassment based on one protected characteristic, such as national origin, also may overlap with harassment based on another characteristic, such as religion, because of the close association (actual or perceived) between two protected groups. For example, harassment against an individual who is Middle Eastern and Muslim may be based on both national origin and religion.[77]

Harassment based on protected characteristics includes harassment based on social or cultural stereotypes regarding how persons of a particular protected group, such as persons of a particular race, national origin, or sex, may act, appear, or behave.[78] This includes, but is not limited to, harassment based on stereotypes about racial, ethnic, or other protected characteristics, or sex-based stereotypes about family responsibilities,[79] suitability for leadership,[80] or gender roles.[81]

Example 25: Harassment Based on Stereotype About Race. Sydney, who is Black, is a sales associate at a jewelry store. One of Sydney's coworkers, Mackenzie, repeatedly admonishes Sydney not to steal anything from the store.[82] Mackenzie frequently brings up news stories and social media videos depicting Black people engaging in theft, and suggests that all Black people, including Sydney, have a propensity to steal. Based on these facts, Mackenzie's harassing conduct toward Sydney is based on race.

Example 26: Harassment Based on Stereotypes About National Origin. Mirlande, a Haitian-American, is an esthetician at a luxury resort and spa. One of

Mirlande's coworkers, Celine, believes that all Haitians practice voodoo and, based on this cultural assumption about Haitians, repeatedly makes voodoo-related remarks, such as that Mirlande will curse staff members and clients, knows a witch doctor, and has voodoo dolls at home. Based on these facts, Celine's harassing conduct toward Mirlande is based on national origin.

As discussed below in section II.B, harassing conduct need not explicitly refer to a protected characteristic to be based on that characteristic where there is other evidence establishing causation.

B. Establishing Causation

1. Generally

Causation is established if the evidence shows that the complainant was subjected to harassment *because of* the complainant's protected characteristic, whether or not the harasser explicitly refers to that characteristic or targets a particular employee.[83] If an employee experiences harassment in the workplace but the evidence does not show that the harassment was based on a protected characteristic, the EEO statutes do not apply.[84]

Example 27: Insufficient Evidence That Harassment Was Based on a Protected Characteristic. Isaiah, a customer service representative at a financial services firm, alleges he was subjected to harassment based on his national origin and color by his coworker, Zach. Isaiah asserts that last winter Zach became increasingly hostile and rude, throwing paper at Isaiah, shoving him in the hall, and threatening to physically harm him. Zach's misconduct started shortly after a disagreement during a league basketball game during which Isaiah, captain of the firm's basketball team, benched Zach. No evidence was found during the investigation to link Zach's threats and harassment to Isaiah's national origin or color; therefore, Isaiah

cannot establish that Zach's misconduct subjected him to harassment because of a protected characteristic.[85]

Example 28: Sufficient Evidence That Harassment Was Based on a Protected Characteristic. Julius, who is Black, works on a line operation crew for a pharmaceutical manufacturer. All line crew members are Black, and they are supervised by Murphy, who is White. Murphy frequently refers to himself as a "zookeeper" and to the crew, including Julius, as "my animals." Murphy does not refer to members of other line crews, which are comprised of non-Black employees, as "animals"; likewise, Murphy does not refer to supervisors of those other line crews as "zookeepers." Following an investigation, evidence shows that Murphy calls Julius and crew members "animals" because of their race, even though Murphy does not directly refer to race. Based on these facts, Julius can establish that Murphy subjected him to harassment because of race, a protected characteristic.[86]

The determination of whether hostile-work-environment harassment is based on a protected characteristic will depend on the totality of the circumstances.[87] Although causation must be evaluated based on the specific facts in a case, the principles discussed below will generally apply in determining causation. Not all principles will necessarily apply in every case.

2. Facially Discriminatory[88] Conduct

Conduct that explicitly insults or threatens an individual based on a protected characteristic—such as racial epithets or graffiti, sex-based epithets, offensive comments about an individual's disability, or targeted physical assaults based on a protected characteristic—discriminates on that basis.[89] The motive of the individual engaging in such conduct is not relevant to whether the conduct is facially discriminatory. Such conduct also need not be directed at a particular worker based on that worker's protected characteristic, nor must all workers with the protected characteristic be exposed to the conduct. For example, degrading

workplace comments about women in general, even if they are not related to a specific female employee, show anti-female animus on their face, so no other evidence is needed to show that the comments are based on sex.[90] Further, derogatory comments about women are sex-based even if all employees are exposed to the comments.[91]

> **Example 29: Causation Established Where Harassment Is Facially Discriminatory.** Kiran, an archivist at a non-profit foundation, is an individual with a neuropathic condition that causes his muscles to atrophy and degenerate. As a result of his condition, Kiran walks with a limp and must wear leg braces. On a near-daily basis his coworkers make fun of his limp and leg braces by mimicking his gait and calling him names like "Forrest Gump" and "cr*pple." Based on these facts, Kiran has been subjected to harassment based on disability that is facially discriminatory.[92]

3. Stereotyping

Harassment is based on a protected characteristic if it is based on social or cultural expectations—be they intended as positive, negative, or neutral—regarding how persons of a particular protected group may act or appear.[93] This includes harassment based on sex-based assumptions about family responsibilities,[94] suitability for leadership,[95] gender roles,[96] weight and body types,[97] the expression of sexual orientation or gender identity,[98] or being a survivor of gender-based violence. Similarly, harassment based on race includes derogatory comments involving racial stereotypes, such as referring to Black employees as drug dealers[99] or suggesting that Black employees have the propensity to commit theft.[100]

Such stereotyping need not be motivated by animus or hostility toward that group.[101] For example, age-based harassment might include comments that an older employee should consider retirement so that the employee can enjoy the "golden years."[102] Likewise, sex-based harassment might include comments that a female worker with young children should switch to a part-time schedule so that she can spend more time with her children.[103]

Example 30: Causation Established Based on Sex Stereotyping. After Eric, an iron worker, made a remark that his foreman, Josh, considered "feminine," Josh began calling Eric "Erica," "princess," and "f*ggot." Several times a week, Josh approached Eric from behind and simulated intercourse with him. More than once, Josh exposed himself to Eric. Based on these facts, Josh targeted Eric based on his perception that Eric did not conform to traditional male stereotypes and subjected Eric to harassment based on sex.[104]

Example 31: Causation Established Based on Sex Stereotyping. Maria, a receptionist, has recently experienced domestic violence. Because Maria must attend court dates related to the domestic violence, she discloses her situation to her supervisor, Nolan. Nolan warns Maria that she should not take "too much" leave and should not bring "drama" into the workplace because "women can be histrionic and unreliable." Nolan also comments that "women think everything is domestic violence" and that "a good wife doesn't have to worry about anything in her marriage." Nolan begins to criticize Maria's decision-making skills, stating that Maria can't be relied on to make good choices because she can't even manage her personal problems. Based on these facts, Nolan targeted Maria based on his sex-based perception of victims of gender-based violence and subjected Maria to harassment based on sex.

4. Context

Conduct must be evaluated within the context in which it arises.[105] In some cases, the discriminatory character of conduct that is not facially discriminatory becomes clear when examined within the specific context in which the conduct takes place or within a larger social context. For example, the Supreme Court observed that use of the term "boy" to refer to a Black man may reflect racial animus depending on such

factors as "context, inflection, tone of voice, local custom, and historical usage."[106] In some contexts, terms that may not be facially discriminatory when viewed in isolation, such as "you people," may operate as "code words" that contribute to a hostile work environment based on a protected characteristic.[107]

> **Example 32: Causation Established by Social Context.** Ron, a Black truck driver, finds banana peels on his truck on multiple occasions. After the third of these occasions, Ron sees two White coworkers watching his reaction to the banana peels. There is no evidence that banana peels were found on any other truck or that Ron found any trash on his truck besides the banana peels. Based on these facts, the appearance of banana peels on Ron's truck is likely not coincidental. Further, because banana peels are used to invoke "monkey imagery," it would be reasonable to conclude, given the history of racial stereotypes against Black individuals, that the banana peels were intended as a racial insult. Therefore, the conduct under these circumstances constitutes harassment based on race.[108]

5. Link Between Conduct That Is Not Explicitly Connected to a Protected Basis and Facially Discriminatory Conduct

Conduct that is neutral on its face may be linked to other conduct that is facially discriminatory, such as race-based epithets or derogatory comments about individuals with disabilities. Facially neutral conduct therefore should not be separated from facially discriminatory conduct and then discounted as non-discriminatory.[109] In some instances, however, facially discriminatory conduct may not be sufficiently related to facially neutral conduct to establish that the latter also was discriminatory.[110]

> **Example 33: Facially Neutral Conduct Sufficiently Related to Religious Bias.** Imani, a devout Christian employed as a customer service representative, alleges that coworkers made offensive comments or engaged in other hostile conduct related to her religious beliefs

and practices, including suggesting that Imani belonged to a cult; calling her religious beliefs "crazy"; drawing devil horns, a devil tail, and a pitchfork on her Christmas photo; and cursing the Bible and teasing her about Bible reading. In addition, the same coworkers excluded Imani from office parties and subjected her to curse words that the coworkers knew Imani regarded as offensive because of her religion. Although some of the coworkers' conduct was facially neutral with respect to religion, that conduct was closely related to the religious harassment and thus the entire pattern of harassment was based on Imani's religion.[111]

6. Timing

If harassment began or escalated shortly after the harasser learned of the complainant's protected status, including religion, pregnancy, sexual orientation, or gender identity, the timing may suggest that the harassment was discriminatory.[112]

Example 34: Timing as Evidence of Causation. Sami, a security guard at an electronics store, discloses his Egyptian ancestry to coworkers during a conversation about turmoil in the Middle East. Following this disclosure, Sami's colleagues, who had made offensive comments about Middle Eastern people during the conversation, begin to avoid and ostracize him. Approximately one week after Sami disclosed his national origin, Sami arrives late for his shift, and a coworker asks, "Did your camel break down?" Another coworker begins to hum the Bangles' "Walk Like an Egyptian" and mime the music video's dance moves when Sami walks by. The timing of the coworkers' conduct, in addition to the content of the conduct, provides evidence that Sami has been subjected to discrimination based on national origin.

7. Comparative Evidence

Evidence showing qualitative and/or quantitative differences in the conduct directed against individuals in different groups can support an inference that the harassment of workers subjected to more, or more severe, harassment was based on their protected status.[113]

> **Example 35: Comparative Evidence Gives Rise to Inference that Harassment Is Based on a Protected Characteristic.** Tyler is a manager for an educational services firm. Tyler directly supervises two women, Kailey and Anu, and two men, Sandeep and Levi. Tyler regularly hovers over Kailey and Anu as they work to make sure they don't "mess up." Tyler yells and shakes his fist at Kailey and Anu when he is angry at them. In addition, although Tyler is occasionally irritable, he generally engages in friendly banter with Sandeep and Levi that is different from the aggressiveness that he displays toward female employees. Tyler sometimes even allows Sandeep and Levi to relax in his office in the afternoons, doing little or no work. Tyler permits Sandeep and Levi to leave the office early on Fridays and does not monitor their work performance. Tyler's different treatment of women and men who are similarly situated would support the conclusion that Tyler's treatment of Kailey and Anu was based on their sex.[114]

8. Causation Issues Related to Sex-Based Harassment

A claim of sex-based harassment may rely on any of the causation theories described in the preceding sections and in this document. The Supreme Court has addressed three non-exclusive evidentiary routes for establishing causation in a sex-based harassment claim: (1) explicit or implicit proposals of sexual activity; (2) general hostility toward members of the complainant's sex; and (3) comparative evidence showing how the harasser treated persons who shared the complainant's sex compared to the harasser's treatment of those who did not.[115] As noted, these three routes are not exclusive; they are examples of ways in which it may be

established that harassment is based on sex.[116] For example, harassment is sex-based if it occurs because of sex stereotyping[117] or if members of one sex are routinely sexualized.

III. Harassment Resulting in Discrimination with Respect to a Term, Condition, or Privilege of Employment

For workplace harassment to violate the law, not only must it be based on a protected characteristic, as discussed in the preceding section, it also must affect a "term, condition, or privilege" of employment.[118]

A. Background: Distinguishing an Explicit Change to the Terms, Conditions, or Privileges of Employment from a Hostile Work Environment

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court discussed two examples of unlawful harassment: (1) an explicit change to the terms or conditions of employment that is linked to harassment based on a protected characteristic, e.g., firing an employee because the employee rejected sexual advances; and (2) conduct that constructively[119] changes the terms or conditions of employment through creation of a hostile work environment.[120]

The first type of claim was initially described as "quid pro quo" harassment in the context of sexual harassment.[121] In early sexual harassment cases, quid pro quo described a claim in which a supervisor carried out an adverse change to an employee's compensation, terms, conditions, or privileges of employment because the employee rejected the supervisor's sexual advances.[122]

However, citing the Supreme Court's 1998 decision in *Burlington Industries, Inc. v. Ellerth*, the Second Circuit later explained that a quid pro quo allegation now only "makes a factual claim about the particular mechanism by which a plaintiff's sex became the basis for an adverse alteration of the terms or conditions of [the plaintiff's] employment."[123] The underlying issue in a quid pro quo allegation is the same as in any claim of disparate treatment (i.e., intentional discrimination): whether the claimant has satisfied the statutory requirement of establishing "discriminat[ion] . . . because of . . . sex" affecting the "terms [or] conditions of

employment."[124] For example, if a supervisor denies an employee a promotion or other job benefit for rejecting sexual advances, the denial of the job benefit itself is an explicit change to the terms and conditions of employment and thus constitutes unlawful sex discrimination.[125]

To be actionable absent such an explicit change to the terms or conditions of employment, the harassment must change the terms or conditions of employment by creating a hostile work environment. The Supreme Court explained in 1993 in *Harris v. Forklift Systems, Inc.* that to establish a hostile work environment, offensive conduct must be both subjectively hostile and objectively hostile.[126]

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.[127]

The EEO statutes are therefore not limited to discriminatory conduct that has tangible or economic effects and instead "strike at the entire spectrum of disparate treatment."[128] However, these statutes do not impose a general civility code that covers "run-of-the-mill boorish, juvenile, or annoying behavior."[129] As discussed below in section III.B.3, the standard established in *Harris* takes a "middle path" that requires the conduct to be more than merely offensive but does not require that the conduct cause psychological harm.[130]

B. Hostile Work Environment

These are key questions that typically arise in evaluating a hostile work environment claim and whether it amounts to unlawful harassment:

- **Was the conduct both objectively and subjectively hostile?**
  - Objective hostility: was the conduct sufficiently severe or pervasive to create a hostile work environment from the perspective of a reasonable person?

- Subjective hostility: did the complainant actually find the conduct hostile?

- **What conduct is part of the hostile work environment claim?**
  - Can conduct that occurred outside the workplace be considered?
  - Can conduct that was not specifically directed at the complainant be considered?

A wide variety of conduct by supervisors, coworkers, or non-employees that affects the workplace can contribute to a hostile work environment, including physical or sexual assaults or threats; offensive jokes, slurs, epithets, or name calling; intimidation, bullying, ridicule, or mockery; insults or put-downs; ostracism; offensive objects or pictures; and interference with work performance.

A hostile work environment claim also can include conduct that is independently actionable as disparate treatment. For example, if a woman was subjected to offensive sex-based comments and demoted because she refused to submit to unwanted sexual advances, the demotion would be independently actionable as sex discrimination (disparate treatment) and also actionable as part of a hostile work environment.[131]

The EEO laws prohibit harassment resulting in a work environment that is both subjectively and objectively hostile.

> **Example 36: Employee Was Subjected to Both Subjectively and Objectively Hostile Work Environment.** Chadwick, who is Black, was recently hired as a sommelier and wine program director at an upscale restaurant. The restaurant is co-owned by Mark, who comes to check in on his investment approximately every three months. Mark arrives for a visit as the staff is preparing to open for evening service. Upon seeing Chadwick, whom Mark has not met before, Mark loudly asks, “Which dumbass manager is hiring n****rs for customer service positions now?” Mark continues on a racist diatribe that the entire staff can hear, leaving Chadwick

> humiliated and in tears. Based on these facts, Chadwick has been subjected to conduct that creates both a subjectively hostile work environment and an objectively hostile work environment and therefore the conduct has resulted in a hostile work environment that violates Title VII.

1. Unwelcomeness

a. Conduct That Is Subjectively and Objectively Hostile Is Also Necessarily Unwelcome

Although a complainant alleging a hostile work environment must show that the harassment was unwelcome, conduct that is subjectively and objectively hostile also is necessarily unwelcome. In the Commission's view, demonstrating unwelcomeness is logically part of demonstrating subjective hostility. If, for example, a complainant establishes that a series of lewd, sexist, and derogatory comments based on sex were subjectively hostile, then those comments also would be, by definition, unwelcome. In some circumstances, evidence of unwelcomeness also may be relevant to the showing of objective hostility.[132]

b. Derivation of Unwelcomeness Inquiry

The unwelcomeness inquiry derives from the Supreme Court's 1986 decision in *Meritor Savings Bank, FSB v. Vinson*, where the Court stated that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome,'"[133] and from the 1980 EEOC Guidelines upon which the Court relied.[134] In *Meritor*, the Court distinguished the concept of unwelcomeness from the concept of voluntariness, noting that the complainant's participation in the challenged conduct did not necessarily mean that she found it welcome.[135] When the Supreme Court refined the hostile work environment analysis in 1993, in *Harris v. Forklift Systems, Inc.*, to require a showing that the conduct was both subjectively and objectively hostile,[136] the Court did not explicitly eliminate unwelcomeness as the gravamen of a harassment claim.

Following *Harris*, a number of courts have addressed unwelcomeness as part of determining subjective hostility, because conduct that is subjectively hostile will also, necessarily, be unwelcome.[137] Other courts continue to analyze "unwelcomeness" as a separate element in a plaintiff's prima facie harassment

case, in addition to the "subjectively and objectively hostile work environment" analysis.[138] In the Commission's view, this latter approach incorporates an unnecessary step in a court's legal analysis of workplace harassment.

2. Subjectively Hostile Work Environment

In general, the complainant's own statement that the complainant perceived conduct as hostile is sufficient to establish subjective hostility.[139] A subjectively hostile work environment also may be established if there is evidence that an individual made a complaint about the conduct, as it follows logically that the individual found it hostile.[140] Similarly, if there is evidence that the individual complained to family, friends, or coworkers about the conduct, it is likely that the individual found it subjectively hostile.[141] To be clear, although evidence of contemporaneous complaints may be sufficient to show subjective hostility, such evidence is not necessary.

Whether conduct is subjectively hostile depends on the perspective of the complainant. Thus, if a male complainant does not welcome sexual advances from a female supervisor, it is irrelevant for the subjectivity analysis whether other men in the workplace would welcome these advances.[142] In addition, the fact that a complainant tolerated or even participated in the conduct does not necessarily mean that he did not find it hostile; for example, an employee might have experienced derogatory comments or other conduct targeted at the employee's racial or national origin group as hostile but felt that there was no other choice but to "go along to get along."[143] By contrast, if there is evidence that the complainant did not find the harassment to be hostile, such as the complainant's statement that the complainant did not feel harassed by the challenged conduct, then subjective hostility may be at issue.[144]

A complainant's subjective perception can change over time. For example, a complainant who did not perceive certain conduct as unwelcome in the past might subsequently perceive similar conduct as hostile after a certain point in time, such as after the end of a romantic relationship,[145] or where a colleague's race-based jokes are initially dismissed as poor attempts at humor, but become unwelcome when they persist or are later accompanied by additional race-based conduct. Moreover, although the complainant may welcome certain conduct, such as sexually tinged conduct, from a particular employee, that does not mean that the complainant also would welcome it from other employees.[146] Nor does

acceptance of one form of sexually tinged conduct mean that the complainant would welcome all sexually tinged conduct, particularly conduct of a more severe nature.[147]

3. Objectively Hostile Work Environment

a. In General

Even if a complainant subjectively finds conduct based on a protected characteristic to be hostile, the conduct does not constitute a violation of federal EEO law unless it is also sufficiently severe or pervasive to create an objectively hostile work environment.[148]

Conduct need not be both severe and pervasive to establish a hostile work environment: the legal standard is severe *or* pervasive. The more severe the harassment, the less pervasive it must be, and vice versa.[149] There is neither a "magic number" of harassing incidents that automatically establishes a hostile work environment nor a minimum threshold for severity.[150] Whether a series of incidents is sufficiently severe or pervasive to create a hostile work environment depends on the specific facts of each case, viewed in light of the totality of the circumstances.[151]

The issue of whether conduct creates a hostile work environment depends on the totality of the circumstances, as viewed from the perspective of a reasonable person, and no single factor is determinative.[152] Some relevant factors are the frequency and severity of the conduct; the degree to which the conduct was physically threatening or humiliating; the degree to which the conduct interfered with an employee's work performance; and the degree to which it caused an employee psychological harm.[153] Another relevant factor is whether there is a power disparity—and its extent—between the harasser and the person harassed.[154] These factors are not exhaustive, and "no single factor is required" to establish an objectively hostile work environment.[155]

If harassing acts are based on multiple protected characteristics, and the acts are sufficiently related to be considered part of the same hostile work environment, then all the acts should be considered together in determining whether the conduct created a hostile work environment.[156] For example, if an employee alleges that her supervisor subjected her to harassing conduct based on both race and sex, then the combined effect of the alleged race-based and sex-based harassment should be

considered, even if the employee cannot establish that either the race-based harassment or sex-based harassment, standing alone, is sufficiently severe or pervasive.[157]

> **Example 37: Sex-Based Remark Does Not Create Hostile Work Environment.** Roxana and Liam, both audio and video technicians at a broadcast news station, are in a heated meeting about upcoming holiday programming. After Roxana makes a suggestion with which Liam disagrees, Liam says to Roxana, "It must be your time of the month, are you on the rag?" Although harassment based on menstruation can constitute or contribute to a hostile work environment based on sex,[158] Liam's lone remark is insufficient to create an objectively hostile work environment, despite being offensive.

> **Example 38: Age-Based Harassment Creates Hostile Work Environment.** Henry, age sixty-two, is a consultant at a professional services company. Ryan, his supervisor, calls him "old man" on a periodic basis. Since Henry's sixtieth birthday, Ryan has repeatedly asked him when he plans to retire, saying he can't wait to bring in "young blood" and "fresh ideas." During a recent staff meeting, Ryan reminded staff to get their flu shots, then looked at Henry and said, "Although I wouldn't be heartbroken if the flu took out some of the old timers." Henry asked Ryan if he was referring to him, and Ryan replied, "Absolutely, old man." Henry reports feeling targeted and ashamed by Ryan's comments. Based on these facts, Ryan has subjected Henry to an objectively hostile work environment based on age.[159]

A complainant need not show that discriminatory conduct harmed the complainant's work performance to prove an objectively hostile work environment if the evidence otherwise establishes that the conduct was sufficiently severe or pervasive to alter the terms or conditions of the complainant's employment.[160]

Similarly, actionable harassment can be established in the absence of psychological injury, though evidence of psychological harm from the harassment may be relevant to demonstrating a hostile work environment.[161]

> **Example 39: Hostile Work Environment Created Even Though Complainant Continued to Perform Well.** Irina works as a sales representative for a freight transportation company. She and her coworkers sit in adjacent cubicles. Her coworkers, both men and women, often discuss their sexual liaisons; use sex-based epithets when describing women; and look at pornographic materials. Irina was horrified by the loudness and vulgarity of the conduct, and she frequently left the office to sit in her car and decompress from her coworkers' conduct. Despite this conduct, however, Irina could meet her daily and weekly quotas, and her work continued to be rated in her performance review as above average. Based on these facts, Irina was subjected to a hostile work environment. Although the harassing conduct did not result in a decline in her work performance or in psychological injury, the nature of the conduct and Irina's reactions to it were sufficient to establish that the ongoing sexual conduct created a hostile work environment because the conduct made it more difficult for a reasonable person in Irina's situation to do her job.[162]

b. Severity

i. In General

Because a "supervisor's power and authority invests his or her harassing conduct with a particular threatening character,"[163] harassment by a supervisor or other individual with authority over the complainant typically has more impact on a complainant's work environment than similar misconduct by an individual lacking such authority.[164] Moreover, the severity of the harassment may be heightened if

the complainant reasonably believes that the harasser has authority over her, even if that belief is mistaken.[165]

The more directly harassment affects the complainant, the more likely it is to negatively affect the complainant's work environment. Thus, harassment is generally more probative of a hostile work environment if it occurs in the complainant's presence than if the complainant learns about it secondhand. Nevertheless, a complainant's knowledge of harassing conduct that other employees have separately experienced may be relevant to determining the severity of the harassment in the complainant's work environment.[166]

Some conduct may be more severe if it occurs in the presence of others, such as the complainant's coequals, subordinates, or clients. For example, a worker's sexually degrading comments may be more severe if made in the presence of the complainant and the complainant's subordinates rather than solely in the complainant's presence, due to the humiliating nature of the interaction.[167] Conversely, some conduct may be more severe when the complainant is alone with the offending individual because the isolation may enhance the threatening nature of the discriminatory conduct.[168]

Because the severity of harassment depends on all of the circumstances, the considerations discussed above are not exclusive. Other factors may be relevant in evaluating the severity of alleged harassment. For example, harassment may be more severe if a complainant has reason to believe that the harasser is insulated from corrective action. This could arise if the harasser is a highly valued employee, or the employer has previously failed to take appropriate corrective action in similar circumstances.[169]

ii. Hostile Work Environment Based on a Single Incident of Harassment

In limited circumstances, a single incident of harassment can result in a hostile work environment. The following is a non-exhaustive list of examples of conduct that courts have found sufficiently severe to establish a hostile work environment based on a single incident:

- Sexual assault,[170]
- Sexual touching of an intimate body part,[171]
- Physical violence or the threat of physical violence,[172]

- The display of symbols of violence or hatred, such as a swastika, an image of a Klansman's hood, or a noose,[173]
- The use of denigrating animal imagery, such as comparing the employee to a monkey, ape, or other animal,[174]
- A threat to deny job benefits for rejecting sexual advances,[175] and
- The use of the "n-word" by a supervisor in the presence of a Black subordinate.[176]

Using epithets based on protected characteristics is a serious form of workplace harassment. As stated by one court, epithets are "intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.'"[177]

c. Pervasiveness

More frequent but less serious incidents can create a hostile work environment, and most hostile work environment claims involve a series of acts.[178] The focus is on the cumulative effect of these acts, rather than on the individual acts themselves. As noted above, there is not a "magic number" of harassing incidents that automatically establishes a hostile work environment.[179] Whether a series of events is sufficiently severe or pervasive to create a hostile work environment depends on the specific facts of each case.[180] Relevant considerations may include the frequency of the conduct[181] and the relationship between the number of incidents and the time period over which they occurred.[182]

> **Example 40: Hostile Work Environment Created by Pervasive Sexual Harassment.** Juan, who works as a passenger service assistant for an airline, alleges that Lydia, a female coworker who shares the same schedule, sexually harassed him for several weeks. The evidence shows that Lydia directed sexual overtures and other sex-based conduct at Juan as often as several times a week, despite his repeated statements that he was not interested. For example, Lydia gave Juan revealing photographs of herself, sent him notes asking for a date, described fantasies about him, and persistently told him how attractive he was and how

much she loved him. Based on these facts, the conduct was sufficiently pervasive to create a hostile work environment.[183]

Example 41: Sexual Favoritism Creating a Hostile Work Environment. Tasanee, an employee at a government agency, alleges that she has been subjected to a hostile work environment based on her sex. The evidence shows that supervisors engaged in consensual sexual relationships with female subordinates that were publicly known and behaved in sexually charged ways with other agency employees in public. Supervisors rewarded the subordinates who were in relationships or who acceded without objection to the behavior by granting them promotions, awards, and other benefits. Because the conduct was pervasive and could reasonably affect the work performance and motivation of other women workers who found the favoritism offensive, the evidence is sufficient to show that Tasanee was subjected to a sex-based hostile work environment.[184]

d. Context

The harassment being challenged must create an objectively hostile work environment from the perspective of a reasonable person in the complainant's position.[185] The impact of harassment must be evaluated in the context of "surrounding circumstances, expectations, and relationships."[186] Discussed below are some significant aspects of context that can be relevant in determining whether harassment was sufficiently severe or pervasive to create a hostile work environment. Other considerations also may be relevant in evaluating harassment in light of the totality of the circumstances.

The determination of whether harassment was objectively hostile requires "an appropriate sensitivity to social context"[187] and should be made from the perspective of a reasonable person of the complainant's protected class.[188] Thus, if a Black individual alleges racial harassment, the harassment should be evaluated from the perspective of a reasonable Black individual in the same circumstances as

the complainant. Conduct can establish a hostile work environment as to the complainant even if some members of the complainant's protected class did not or would not find it to be hostile.[189]

In addition to protected status, other personal or situational[190] characteristics of a particular complainant may affect whether the complainant reasonably perceives certain conduct as creating a hostile work environment. For example, if a teenager was harassed by a substantially older individual, then the age difference may intensify the perceived hostility of the behavior.[191] Similarly, if an undocumented worker is targeted by harassment, then the heightened risk of deportation may contribute to objective hostility.[192]

> **Example 42: Religion-Based Harassment Creates an Objectively Hostile Work Environment.** Josephine, an IT support specialist at a regional medical facility, attends an employee appreciation barbecue lunch hosted by her employer. When asked by colleagues why she is not eating any of the barbecued pork, Josephine explains that she is Jewish and her religion's dietary laws prohibit eating pork. After the barbecue, a few coworkers begin making comments to or within earshot of Josephine, such as calling Josephine "Jew-sephine," questioning why Josephine even works because she must have a lot of "Jew money"[193] in the bank, and stating that "Jews control the media." Based on these facts, this conduct, viewed from the perspective of a reasonable Jewish person, created an objectively hostile work environment based on religion.

> **Example 43: Disability-Based Harassment Creates an Objectively Hostile Work Environment.** Jin, a cook, has Post-Traumatic Stress Disorder (PTSD). He tells his coworkers that he served in Iraq on active duty, has PTSD, and, as a result, is uncomfortable with sudden loud noises and unanticipated physical contact. He asks them to tell him in advance about any anticipated loud noises, and requests that they avoid

approaching him from behind without warning. Lila, a server, regularly drops or bangs on metal trash cans and sneaks up behind Jin while he is working, because she thinks his response is funny. Jin is so rattled after these encounters that he sometimes mixes up orders or fails to cook the food properly. Jin repeatedly tells Lila to stop, to no avail, and the conduct continues. Based on these facts, Lila's harassment, viewed from the perspective of a reasonable person with PTSD, has created an objectively hostile work environment based on disability.

Example 44: National-Origin-Based Harassment Creates an Objectively Hostile Work Environment. Somchai, a Thai national, performs seasonal agriculture work at a sweet potato farm and has an H-2B visa. Somchai is told that his employer specifically recruits individuals from Thailand because they are obedient and submissive and have a good work ethic. At the worksite, Somchai is subject to frequent physical and verbal abuse, including epithets such as "slant eyes" and "rice eater." Further, if Somchai's supervisor observes Somchai pausing in his work, even to use the bathroom or eat lunch, the supervisor threatens to have Somchai's visa revoked, saying, "That will turn you into an 'illegal' so I can call ICE and have you arrested and deported."[194] Based on these facts, the national-origin-based harassment experienced by Somchai, which is compounded by Somchai's vulnerability as a migrant worker and visa holder, is sufficiently severe or pervasive to create an objectively hostile work environment.

Example 45: Sex-Based Harassment Creates an Objectively Hostile Work Environment. Velma, a technician at a metal fabrication company, has recently been subjected to dating violence by her long-term intimate partner, which resulted in Velma moving

out of their shared residence and into a shelter. Velma's coworker, Dan, learns about Velma's current living situation and, viewing her as vulnerable, asks Velma out on a date. Despite Velma declining his request, during each shift that they work together, Dan continues to say things like, "Is living in a shelter really worse than cuddling me at night?"; "I'll let you live with me free of charge on one condition: that you clean my house while naked"; and "the only thing that I would ever hit is that ass." Based on these facts, the sex-based harassment experienced by Velma, which must be viewed in the context of her vulnerability as a survivor of dating violence, is sufficiently severe or pervasive to create an objectively hostile work environment.

Example 46: Harassment Based on Gender Identity Creates an Objectively Hostile Work Environment. Jennifer, a female cashier who is transgender and works at a fast-food restaurant, is regularly and intentionally misgendered by supervisors, coworkers, and customers over a period of several weeks. One of her supervisors, Allison, intentionally and frequently uses Jennifer's prior male name, male pronouns, and "dude" when referring to Jennifer, despite Jennifer's requests for Allison to use her correct name and pronouns. Other managers also intentionally refer to Jennifer as "he" whenever they work together. In the presence of customers, coworkers ask Jennifer questions about her sexual orientation and anatomy and assert that she is not female. After hearing these remarks by employees, customers also intentionally misgender Jennifer and make offensive comments about her transgender status. Based on these facts, which must be viewed in the context of Jennifer's perspective as a transgender individual, Jennifer has been subjected to an objectively hostile work

environment based on her gender identity that includes repeated and intentional misgendering.[195]

Conduct also must be evaluated in the context of the specific work environment in which it occurred. For example, in some instances, conduct may be more likely to create a hostile work environment if the complainant works in a remote location alone with the harasser.[196] There is, however, no "crude environment" exception to Title VII.[197] Prevailing workplace culture, likewise, does not excuse discriminatory conduct.[198] Thus, public displays of pornography or sexually suggestive imagery demeaning women can contribute to an objectively hostile work environment for female employees, even if it is a long-standing practice.[199]

As discussed above in section III.B.1, in the Commission's view, demonstrating unwelcomeness is logically an inherent part of demonstrating subjective hostility. In some circumstances, evidence of unwelcomeness also may be relevant to the showing of objective hostility.[200] When analyzing whether conduct is objectively hostile, some courts have focused on whether the harasser had notice that the conduct was unwelcome—either because the complainant had communicated as much or the harasser otherwise had reason to know.[201] Such notice may be relevant in determining whether it is objectively reasonable for a person in the complainant's position to have perceived the ongoing conduct as hostile.[202] For example, flirtatious behavior or asking an individual out on a date may, or may not, be facially offensive, depending on the circumstances. An individual's continued flirting or asking for a date after notice that this conduct was unwelcome can support a determination that a reasonable person in the complainant's position would perceive the conduct as hostile.[203]

The same may be true in the context of religious expression. If a religious employee attempts to persuade another employee of the correctness of his beliefs, the conduct is not necessarily objectively hostile. If, however, the employee objects to the discussion but the other employee nonetheless continues, a reasonable person in the complainant's position may find it to be hostile.[204]

> **Example 47: Religious Expression Does Not Create an Objectively Hostile Work Environment.** Ellen, an observant Lutheran, works as a nurse in a retirement community where the majority of staff are Muslim. Some of Ellen's Muslim colleagues pray in accordance with their religious beliefs in a designated room

observable from the nurse's station, which Ellen sometimes finds distracting. Ellen's Muslim colleagues also coordinate an optional lunchtime Qur'an study group, which all employees are invited to join. After Ellen declines the group's invitation, stating that she studies the Bible at home, she is not invited to the Qur'an study group again. On occasion, and sometimes within Ellen's earshot, Ellen's Muslim colleagues openly discuss their religious beliefs in a manner that does not disparage others. Ellen tells her supervisor that she finds these discussions of religion in the workplace to be "disruptive." Based on these facts, the religious expression of Ellen's Muslim colleagues does not create an objectively hostile work environment for Ellen.

Example 48: Religious Expression Creates an Objectively Hostile Work Environment. Same facts as above, however, after Ellen declines the invitation to attend the optional lunchtime Qur'an study group, Sayiddah, a colleague, openly admonishes Ellen for not believing in Allah and repeatedly warns her that she is "on the wrong spiritual path."[205] Ellen asks Sayiddah to stop discussing religion with her; however, Sayiddah says she will not, explaining that her prayers come from a place of love and that she has a religious obligation to spread the word of Islam to non-believers. Based on these facts, Sayiddah's religious expression creates an objectively hostile work environment for Ellen.

C. The Scope of Hostile Work Environment Claims

1. Conduct Must Be Sufficiently Related

Because separate incidents that make up a hostile work environment claim constitute a single unlawful employment practice, the complainant can challenge an entire pattern of conduct, as long as at least one incident that contributed to the

hostile work environment is timely.[206] The earlier conduct, however, must be sufficiently related to the later conduct to be "part of the same actionable hostile work environment practice" claim.[207] Relevant considerations depend on the specific facts but may include the similarity of the actions involved, the frequency of the conduct, and whether the same individuals engaged in the conduct.[208]

A hostile work environment claim may include hostile conduct that affects the complainant's work environment, even conduct that may be independently actionable as unlawful discrimination (disparate treatment), as long as it is part of an overall pattern of harassing conduct. For example, a racially discriminatory transfer to a less desirable position that is separately actionable also may contribute to a racially hostile work environment if the action was taken by a supervisor who frequently used racial slurs.[209] Under such circumstances, the transfer could be challenged as part of a hostile work environment claim and would be considered in determining whether the entire course of conduct, including both the transfer and the repeated racial slurs, was sufficiently severe or pervasive to create a hostile work environment. In addition, if the transfer occurred within the filing period, then the complainant could also bring a separate claim alleging discriminatory transfer. For more information on the timeliness of hostile work environment claims, see EEOC, *Compliance Manual Section 2: Threshold Issues* § 2-IV.C.1.b (2009), **https://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-b (https://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-b)** .

> **Example 49: Earlier Harassment Was Sufficiently Related to Later Harassment.** Rabia, a Muslim with Palestinian family ties, was subjected to offensive comments about her religion and ethnicity by her team leader in the packaging department, Josiah. Rabia complained to the plant manager, who did not take any action, and Josiah's harassment continued. At her own request, Rabia was transferred to the stretch wrap department. Soon after, she saw Josiah speaking with Franklin, a stretch wrap employee, while pointing at Rabia and laughing. Starting the next day, Franklin regularly referred to Rabia using religious and ethnic slurs, including "m*zzie," and "terrorist." Franklin also refused to fill in for her when she needed to take a break. Rabia complained to the plant manager about

Franklin's conduct, but again the plant manager did not take any action. Here, Rabia experienced harassment in two different departments by different harassers, but the conduct was similar in nature. The harassment in the second department occurred shortly after the harassment in the first department; the harassment in the second department started after the two harassers met; and the plant manager was responsible for addressing harassment in both departments. Based on these facts, the harassment based on religion and national origin experienced by Rabia in the two departments constitutes part of the same hostile work environment claim.[210]

Example 50: Earlier Harassment Was Insufficiently Related to Later Harassment. Cassandra, who works for a printing company, was exposed to sexually explicit discussions, jokes, and vulgar language when she worked in the company's production department. After Cassandra was transferred to the estimating department, she was no longer exposed to the harassing conduct she had experienced in the production department. However, while working in the estimating department, Cassandra overheard a male worker on the other side of her cubicle wall tell someone that if a weekend trip with one of his female friends "was not a sleepover, then she wasn't worth the trip." The sleepover comment was made nearly a year after Cassandra's transfer and was not directed at Cassandra or made for her to hear. Other than that comment, Cassandra did not experience any alleged harassment after her transfer to the estimating department, which did not interact with the production department. Based on these facts the alleged harassment experienced by Cassandra in the production department was not part of the same hostile work environment claim as the alleged harassing conduct in the estimating department.[211]

2. Types of Conduct

a. Conduct That Is Not Directed at the Complainant

Harassing conduct can affect an employee's work environment even if it is not directed at that employee, although the more directly it affects the complainant, the more probative it will be of a hostile work environment.[212] For instance, the use of sex-based epithets may contribute to a hostile work environment for women even if the epithets are not directed at them.[213] Similarly, anonymous harassment, such as racist or anti-Semitic graffiti or the display of a noose or a swastika, may create or contribute to a hostile work environment, even if it is not clearly directed at any particular employees.[214] Offensive conduct that is directed at other individuals of the complainant's protected class also may contribute to a hostile work environment for the complainant. Such conduct may even occur outside of the complainant's presence as long as the complainant becomes aware of the conduct during the complainant's employment and it is sufficiently related to the complainant's work environment.[215]

> **Example 51: Conduct Not Directed Against Complainant Contributes to a Hostile Work Environment.** Peter is an Assistant District Manager for an insurance company. Peter, who is Black, oversees four sales representatives who also are Black. Peter reports to the District Manager, Lilliana, who is White. Over the two years that Peter has worked for the insurance company, Lilliana has used the term "n****r" when talking to Peter's subordinates; she also told Peter that his "Black sales representatives are too dumb to be insurance agents"; and on another occasion she called the corporate office to ask them to stop hiring Black sales representatives. Some of the comments were made in Peter's presence, and Peter learned about other comments secondhand, when sales representatives complained to him about them. Based on these facts, Lilliana's conduct toward Peter's subordinates contributed to a hostile work environment for Peter because the comments either

occurred in Peter's presence or he learned about them from others.[216]

In some circumstances, an individual who has not personally been subjected to unlawful harassment based on their protected status may be able to file an EEOC charge and a lawsuit alleging that they have been harmed by unlawful harassment of a third party.[217]

Example 52: Individual Harmed by Unlawful Harassment of Third Party. Sophie works in an accounting office with her coworker Eitan, who is Jewish and the son of Israelis, and their mutual supervisor, Jordan. Jordan makes frequent offensive comments about Jews and Israel, asking Eitan repeatedly when he was going to "go home and start fighting." One day, after referring to Eitan with an epithet used for Jews, Jordan tells Sophie to hide Eitan's work files on the office server to "make his life difficult" and to reschedule a series of important team meetings so that they will conflict with Eitan's scheduled time off, effectively excluding him from the meetings. Sophie objects, but Jordan tells her that "if you want a future here, you better do what I tell you." Fearing workplace repercussions if she fails to comply, Sophie reluctantly participates in the ongoing national origin- and religion-based harassment of Eitan.

Sophie and Eitan both file EEOC charges. Eitan's allegation is that he faced a hostile work environment based on national origin and religion; Sophie's allegation is that Eitan faced a hostile work environment based on his national origin and religion and she was forced to participate in it. Based on evidence that the harassment occurred on a regular basis and included serious and offensive conduct, including harassment designed to interfere with Eitan's work performance and ostracize him, the investigator

concludes that Eitan was subjected to a hostile work environment based on his race and religion.

The investigator further concludes that, although Sophie was not personally subjected to unlawful harassment based on her race, religion, or other protected status, she had standing to file a charge and obtain relief for any harm she suffered as a result of the unlawful harassment of Eitan because she was required, as part of her job duties, to participate in the harassment.[218]

b. Conduct That Occurs in Work-Related Context Outside of Regular Place of Work

A hostile work environment claim may include conduct that occurs in a work-related context outside an employee's regular workplace.[219] For instance, harassment directed at an employee during the course of offsite employer-required training occurs within the "work environment," even if the training is not conducted at the employer's facility.[220]

Example 53: Harassment During Off-Site Employer-Hosted Party Was Within Work Environment. Fatima's employer hosts its annual holiday party in a private restaurant. One of her coworkers, Tony, drinks to excess, and at the end of the evening attempts to grope and kiss Fatima. Although Tony's behavior occurred outside Fatima's regular workplace and at a private restaurant unaffiliated with her employer, it occurred in a work-related context, the company-sponsored holiday party. Therefore, based on these facts, the harassment occurred in Fatima's work environment for purposes of a Title VII sexual harassment claim.

Example 54: Harassment During Non-Work Hours at Employer-Provided Housing Was Within Work Environment. Rosa is a seasonal farmworker who resides in employer-provided housing a few miles away from the farm where she works. Rosa's employer

requires all seasonal farmworkers to live in employer-provided housing, which is a converted former motel, and deducts "rent" from their paychecks. Another seasonal worker, Lucas, follows Rosa around the housing complex, waiting for her outside of her room and in the parking lot. Rosa reports Lucas's behavior to management and complains that she feels unsafe, but no action is taken. Lucas's behavior escalates, and he sexually assaults Rosa during non-working hours at the housing complex. Although Lucas's conduct occurred outside of the workplace, it occurred in a work-related context. Therefore, based on these facts, the harassment occurred in Rosa's work environment.

Conduct also occurs within the work environment if it is conveyed using work-related communications systems, accounts, devices, or platforms, such as an employer's email system, electronic bulletin board, instant message system, videoconferencing technology, intranet, public website, official social media accounts, or other equivalent services or technologies.[221] As with a physical work environment, conduct within a virtual work environment can contribute to a hostile work environment. This can include, for instance, sexist comments made during a video meeting, ageist or ableist comments typed in a group chat, racist imagery that is visible in an employee's workspace while the employee participates in a video meeting, or sexual comments made during a video meeting about a bed being near an employee in the video image.

Example 55: Conduct on Employer's Email System Was Within the Work Environment. Ted and Perry are coworkers in an architectural firm. Ted is White, and Perry is Black. Every Monday morning, Ted sends jokes from his work computer and work email account to colleagues, including Perry. Many of the jokes involve racial stereotypes, including stereotypes about Black individuals. Perry complains to Ted and their mutual supervisor after several weeks of Ted's emails, but Ted is not instructed to stop and continues to send such emails. Based on these facts, the racial jokes sent by Ted occurred within Perry's work environment

because, among other reasons, they were sent using Ted's work computer and work email account and were sent to Perry and other colleagues in the workplace.

c. Conduct That Occurs in a Non-Work-Related Context, But with Impact on the Workplace

Although employers generally are not responsible for conduct that occurs in a non-work-related context, they may be liable when the conduct has consequences in the workplace and therefore contributes to a hostile work environment.[222] For instance, if a Black employee is subjected to racist slurs and physically assaulted by White coworkers who encounter him on a city street, the presence of those same coworkers in the Black employee's workplace can result in a hostile work environment.[223]

Conduct that can affect the terms and conditions of employment, even if it does not occur in a work-related context, includes electronic communications using private phones, computers, or social media accounts, if it impacts the workplace.[224] For example, if an Arab American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a hostile work environment based on national origin. However, postings on a social media account generally will not, standing alone, contribute to a hostile work environment if they do not target the employer or its employees.

Example 56: Conduct on Social Media Platform Outside Workplace Contributes to Hostile Work Environment. Rochelle, a Black woman born in the United States, works at a tax firm. She alleges that two Black coworkers of Caribbean descent, Martina and Terri, subjected her to a hostile work environment based on national origin. The investigation reveals that Martina's and Terri's harassing conduct included mocking Rochelle, blocking doorways, and interfering with her work, and that it culminated in an offensive post on a popular social media service that they all

use. In the post, Martina and Terri included two images of Rochelle juxtaposed with an image of the fictional ape Cornelius from the movie *The Planet of the Apes*, along with text explicitly comparing Rochelle to Cornelius. Rochelle learned about the post from another coworker, Jenna. Based on these facts, the combined conduct, including the social media post, was sufficient to create a hostile work environment.[225]

Example 57: Conduct on Social Media Platform Outside Workplace Does Not Contribute to Hostile Work Environment. Michael, a courier for a management consulting firm, believes that women should dress conservatively on romantic dates and limit their food intake to appear lady-like. Michael shares these beliefs in posts on his private social media accounts. He also shares posts criticizing women's sexual behavior, such as stating, "Why would a man buy a cow when you can get the milk for free?" Michael's coworker Donna finds some of Michael's posts online and is deeply offended even though there is no connection between the posts and the firm or any of its employees, and Michael has never spoken to Donna about these views. These posts, on their own, do not contribute to a hostile work environment based on sex because they do not have an impact on Donna's work environment.

Given the proliferation of technology, it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images, such as through social media, messaging applications, or other electronic means, can contribute to a hostile work environment, if it impacts the workplace.

Example 58: Conduct on Social Media Platform Outside Workplace Contributes to Hostile Work Environment. Max, a line cook at a restaurant, begins dating Anne, a server who works at the same restaurant. During their relationship, Max obtains

> sexually explicit images of Anne. After Anne breaks up with Max, he threatens to share the images on social media unless she gives him a second chance. When she refuses, he posts the images on a picture-sharing social media application and tags some of their coworkers. Anne overhears her coworkers making fun of the images and talking about how Anne must have poor judgment. Anne is humiliated and finds it difficult to continue to return to work. Based on these facts, the combined conduct, including the social media post, was sufficient to create a hostile work environment.[226]

Finally, harassment by a supervisor that occurs outside the workplace is more likely to contribute to a hostile work environment than similar conduct by coworkers, given a supervisor's ability to affect a subordinate's employment status.[227]

IV. Liability

A. Overview of Liability Standards in Harassment Cases

When a complainant establishes that the employer made an explicit change to a term, condition, or privilege of employment linked to harassment based on a protected characteristic (sometimes described as "quid pro quo," as explained in section III.A), the employer is liable and there is no defense.[228]

In cases alleging a hostile work environment, one or more standards of liability will apply. Which standards apply to any given situation depends on the relationship of the harasser to the employer and the nature of the hostile work environment. Each standard is discussed in detail in sections IV.B and IV.C, below. To summarize:

- If the harasser is a proxy or alter ego of the employer, the employer is automatically liable for the hostile work environment created by the harasser's conduct. The actions of the harasser are considered the actions of the employer, and there is no defense to liability.
- If the harasser is a supervisor and the hostile work environment includes a tangible employment action against the victim, the employer is vicariously liable for the harasser's conduct and there is no defense to liability. This is true even if the supervisor is not a proxy or alter ego.

- If the harasser is a supervisor (but not a proxy or alter ego) and the hostile work environment does *not* include a tangible employment action, the employer is vicariously liable for the actions of the harasser, but the employer may limit its liability or damages if it can prove the *Faragher-Ellerth* affirmative defense, which is explained below at section IV.C.2.b.

- If the harasser is any person other than a proxy, alter ego, or supervisor, the employer is only liable for the hostile work environment created by the harasser's conduct if the employer was negligent in that it failed to act reasonably to prevent the harassment or to take reasonable corrective action in response to the harassment when the employer was aware, or should have been aware, of it.

Negligence provides a minimum standard for employer liability,[229] regardless of the status of the harasser.[230] Other theories of employer liability—automatic liability (for proxies and alter egos) and vicarious liability (for supervisors)—are additional bases for employer liability that supplement[231] and do not replace the negligence standard.[232]

If the complainant challenges harassment by one or more supervisors and one or more coworkers or non-employees and the harassment is part of the same hostile work environment claim,[233] separate analyses of employer liability should be conducted in accordance with each harasser's classification.[234]

B. Liability Standard for a Hostile Work Environment Depends on the Role of the Harasser

The liability standard for a hostile work environment depends on whether the harasser is a:

- **Proxy or alter ego of the employer;**
- **Supervisor; or**
- **Non-supervisory employee, coworker, or non-employee.**

The applicable standards of liability depend on the level and kind of authority that the employer afforded the harasser to act on its behalf.

1. Proxy or Alter Ego of the Employer

An individual is considered an alter ego or proxy of the employer if the individual possesses such high rank or authority that his or her actions can be said to speak for the employer.[235] Individuals who might be considered proxies include sole proprietors and other owners; partners; corporate officers; and high-level managers whose authority or influence within the organization is such that their actions could be said to "speak for" the employer.[236] By contrast, a supervisor does not qualify as the employer's alter ego merely because the supervisor exercises significant control over the complaining employee.[237]

2. Supervisor

In the context of employer liability for a hostile work environment, an employee is considered a "supervisor" if the individual is "empowered by the employer to take tangible employment actions against the victim."[238] An employee may, of course, have more than one supervisor.

A "tangible employment action" means a "significant change in employment status" that requires an "official act" of the employer.[239] Examples of tangible employment actions include hiring and firing, failure to promote, demotion, reassignment with significantly different responsibilities, a compensation decision, and a decision causing a significant change in benefits.[240] In some cases, a decision may constitute a tangible employment action even though it does not have immediate direct or economic consequences, such as a demotion with a substantial reduction in job responsibilities but without a loss in pay.[241]

Even if an individual is not the final decision maker as to tangible employment actions affecting the complainant, the individual would still be considered a supervisor if the individual has the "power to *recommend* or otherwise substantially influence tangible employment actions."[242]

Finally, an employee who does not have actual authority to take a tangible employment action with respect to the complainant can still be considered a supervisor if, based on the employer's actions, the harassed employee reasonably believes that the harasser has such power.[243] The complainant might have such a

reasonable belief where, for example, the chain of command is unclear or the harasser has broad delegated powers.[244] In these circumstances, the harasser is said to have "apparent authority."[245]

3. Non-Supervisory Employees, Coworkers, and Non-Employees

Federal EEO laws protect employees against unlawful harassment by other employees who do not qualify as proxies/alter egos or "supervisors," i.e., other employees without actual or apparent authority to take tangible employment actions against the employee(s) subjected to the harassment. These other employees may include coworkers with no authority over the complainant as well as shift leads or other workers with limited authority over the complainant. Employees are further protected against unlawful harassment by non-employees, such as independent contractors;[246] customers,[247] including hotel guests, airline passengers, and shoppers; students;[248] hospital patients and nursing home residents;[249] and clients of the employer.[250]

> **Example 59: Harassment by a Non-Employee.** Howard works as a stocker for a company that sells snacks and beverages in vending machines on customers' premises. At a hospital where Howard is assigned to stock the vending machines, he is harassed daily by a hospital employee who knows Howard's schedule and waits at the vending machines for him to arrive. The hospital employee calls him "H*mo Howard," propositions him, and makes lewd and vulgar sexual comments to him every time the hospital employee sees him. Howard reports this harassment to his employer. Although the harasser is not employed by Howard's employer, because Howard's employer is aware of the sex-based harassment, it has a legal obligation to correct the harassment.[251]

> **Example 60: Harassment by a Non-Employee.** While cleaning a guest room, Paloma, a housekeeper at a hotel, is cornered by a naked guest who propositions her for sex. Paloma immediately reports this conduct to her supervisor. Although the guest is not an

employee of the hotel, because Paloma's employer is aware of the sex-based harassment, it has a legal obligation to correct the harassment.

C. Applying the Appropriate Standard of Liability in a Hostile Work Environment Case

Once the status of the harasser is determined, the appropriate standard can be applied to assess employer liability for a hostile work environment.

1. Alter Ego or Proxy - Automatic Liability

If the harasser is an alter ego or proxy of the employer, the employer is automatically liable for unlawful harassment and has no defense.[252] Thus, a finding that the harasser is an alter ego or proxy is the end of the liability analysis. This is true whether or not the harassment includes a tangible employment action.

Example 61: Harasser Was Employer's Alter Ego.
Gina, who is Peruvian-American, alleges that she was subjected to unlawful harassment because of her national origin by the company Vice President, Walter. Walter is the only corporate Vice President in the organization, answers only to the company's President, and exercises managerial responsibility over the company's operations. Based on these facts, given Walter's high rank within the company and his significant control over the company's operations, Walter is an alter ego of the company, subjecting it to automatic liability for a hostile work environment resulting from his harassment.

2. Supervisor - Vicarious Liability

An employer is vicariously liable for a hostile work environment created by a supervisor.[253] Under this standard, liability for the supervisor's harassment is attributed to the employer. As discussed below, unlike situations where the harasser is an alter ego or proxy of the employer, an employer may have an affirmative defense, known as the *Faragher-Ellerth* defense, when the harasser is a supervisor.

The availability of the *Faragher-Ellerth* defense is dependent on whether the supervisor took a tangible employment action against the complainant as part of the hostile work environment. If the *Faragher-Ellerth* defense is available, the employer bears the burden of proof with respect to the elements of that defense.

If the supervisor took a *tangible employment action* as part of the hostile work environment, then the employer is automatically liable for the hostile work environment and does not have a defense.

If the supervisor *did not take a tangible employment action*, then the employer can raise the *Faragher-Ellerth* affirmative defense to vicarious liability by proving both of the following:

- **The employer acted reasonably to prevent and promptly correct harassment; and**
- **The complaining employee unreasonably failed to use the employer's complaint procedure or to take other steps to avoid or minimize harm from the harassment.**

a. Hostile Work Environment Includes a Tangible Employment Action: No Employer Defense

An employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.[254] As previously noted, agency principles generally govern employer liability for a hostile work environment. The Supreme Court stated in *Ellerth* that "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation."[255] Therefore, when a hostile work environment includes a tangible employment action, the "action taken by the supervisor becomes for Title VII purposes the act of the employer,"[256] and the employer is liable.[257]

The tangible employment action may occur at any time during the course of the hostile work environment, and need not occur at the end of employment or serve as the culmination of the harassing conduct.[258] For example, if a supervisor subjects

an employee to a hostile work environment by making frequent sexual comments and denying pay increases because the employee rejects the sexual advances,[259] then the employer is liable for the hostile work environment created by the supervisor and there is no defense.[260] This is true even though the supervisor's tangible employment action, here denial of pay increases, did not occur at the end of the employee's employment.

An unfulfilled threat to take a tangible employment action does not itself constitute a tangible employment action, but it may contribute to a hostile work environment.[261] By contrast, fulfilling a threat of a tangible employment action because a complainant rejects sexual demands (e.g., denying a promotion) constitutes a tangible employment action. Finally, fulfilling a promise to provide a benefit because the complainant submits to sexual demands (e.g., granting a promotion or not terminating the complainant after the complainant submits to sexual demands) constitutes a tangible employment action.[262]

b. Hostile Work Environment Without a Tangible Employment Action: Establishing the *Faragher-Ellerth* Affirmative Defense

If harassment by a supervisor creates a hostile work environment that did not include a tangible employment action, the employer can raise an affirmative defense to liability or damages. In *Faragher* and *Ellerth*, the Supreme Court explained that the defense requires the employer to prove that:

- the employer exercised reasonable care to prevent and correct promptly any harassment; and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm from the harassment.[263]

In establishing this affirmative defense, the Supreme Court sought "to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees."[264] The Court held that this carefully balanced defense contains "two *necessary* elements:"[265] (1) the employer's exercise of reasonable care to prevent and correct promptly any harassing behavior, and (2) the employee's unreasonable failure to take advantage of any preventive or corrective opportunities provided by the employer or to avoid

harm otherwise.[266] Thus, in circumstances in which an employer fails to establish one or both prongs of the affirmative defense, the employer will be liable for the unlawful harassment. For example, if the employer is able to show that it exercised reasonable care but cannot show that the employee unreasonably failed to take advantage of preventive or corrective opportunities, the employer will not be able to establish the defense.

Example 62: Employer Fails to Establish Affirmative Defense. Chidi, who is of Nigerian heritage, was subjected to national origin and racial harassment by his supervisor, Ang. The employer does not have a written anti-harassment policy and does not offer comprehensive anti-harassment training. Instead, employees are told to "follow the chain of command" if they have any complaints, which would require Chidi to report to Ang. During meetings with Chidi and his coworkers, Ang repeatedly directed egregious racial and national origin-based epithets at Chidi, and Ang's conduct was sufficient to create a hostile work environment. Chidi reported Ang's harassment to his manager (who was also Ang's supervisor) on at least two separate occasions. Each time, the manager simply responded, "That's just Ang—don't take it seriously." Based on these facts, the employer cannot establish either prong of the affirmative defense. The employer did not exercise reasonable care to prevent or to promptly correct the harassment. Further, the employer cannot establish that Chidi unreasonably failed to take advantage of the employer's complaint process. Based on these facts, the employer is liable for Ang's harassment of Chidi.

Example 63: Employer Avoids Liability by Establishing Affirmative Defense. Kit was subjected to a hostile work environment by their supervisor because of race. The supervisor's harassment was not severe at first but grew progressively worse over a period of months. The employer had an effective anti-

harassment policy and procedure, which it prominently displayed on its employee website and provided to all employees through a variety of other means. In addition, the employer was not aware of any harassment by this supervisor in the past.[267] Kit never complained to the employer about the harassment or took steps to avoid harm from the harassment. The employer learned of the supervisor's conduct from Kit's coworker, who observed the harassment. After learning about it, the employer took immediate corrective action that stopped the harassment. Based on these facts, the employer is not liable for the supervisor's harassment of Kit, because the employer had an effective policy and procedure and took prompt corrective action upon receiving notice of the harassment *and* Kit could have used the effective procedure offered by the employer or taken other appropriate steps to avoid further harm from the harassment but did not do so.

i. First Prong of the Affirmative Defense: Employer's Duty of Reasonable Care

The first prong of the affirmative defense requires an employer to show that it exercised reasonable care *both* to prevent harassment *and* to correct harassment. To do so, an employer must show both that it took reasonable steps to prevent harassment *in general*, as discussed immediately below, and that it took reasonable steps to prevent and to correct the *specific* harassment raised by a particular complainant. Because the questions of whether the employer acted reasonably to prevent and to correct the specific harassment alleged by the complainant also arise when analyzing employer liability for non-supervisor harassment, those issues are discussed in detail at section IV.C.3.a (addressing unreasonable failure to prevent harassment) and section IV.C.3.b (addressing unreasonable failure to correct harassment). The principles discussed in those sections also apply when determining whether the employer has shown under the first prong of the affirmative defense that it acted reasonably to prevent and correct the harassment alleged by the complainant.

Federal EEO law does not specify particular steps an employer must take to establish that it exercised reasonable care to prevent and correct harassment; instead, as discussed below, the employer will satisfy its obligations if, as a whole, its efforts are reasonable.[268] In assessing whether the employer has taken adequate steps, the inquiry typically begins by identifying the policies and practices an employer has instituted to prevent harassment and to respond to complaints of harassment. These steps usually consist of promulgating a policy against harassment, establishing a process for addressing harassment complaints, providing training to ensure employees understand their rights and responsibilities, and monitoring the workplace to ensure adherence to the employer's policy.[269]

For an anti-harassment *policy* to be effective, it should generally have the following features:

- the policy defines what conduct is prohibited;
- the policy is widely disseminated;[270]
- the policy is comprehensible to workers,[271] including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English;[272]
- the policy requires that supervisors report harassment when they are aware of it;[273]
- the policy offers multiple avenues for reporting harassment, thereby allowing employees to contact someone other than their harassers;[274]
- the policy clearly identifies accessible[275] points of contact to whom reports of harassment should be made and includes contact information;[276] and
- the policy explains the employer's complaint process, including the process's anti-retaliation and confidentiality protections.

For a complaint *process* to be effective, it should generally have the following features:

- the process provides for prompt and effective investigations and corrective action;[277]
- the process provides adequate confidentiality protections;[278] and
- the process provides adequate anti-retaliation protections.[279]

For *training* to be effective, it should generally have the following features:[280]

- it explains the employer's anti-harassment policy and complaint process, including any alternative dispute resolution process, and confidentiality and anti-retaliation protections;
- it describes and provides examples of prohibited conduct under the policy;
- it provides information about employees' rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited;
- it provides supervisors and managers with information about how to prevent, identify, stop, report, and correct harassment, such as actions that can be taken to minimize the risk of harassment, and with clear instructions for addressing and reporting harassment that they observe, that is reported to them, or that they otherwise become aware of;
- it is tailored to the workplace and workforce;
- it is provided on a regular basis to all employees; and
- it is provided in a clear, easy-to-understand style and format.[281]

However, even the best anti-harassment policy, complaint procedure, and training will not necessarily establish that the employer has exercised reasonable care to prevent harassment—the employer must also implement these elements effectively.[282] Thus, evidence that an employer has a comprehensive anti-harassment policy and complaint procedure will be insufficient standing alone to establish the first prong of the defense if the employer fails to implement these policies and procedures or to appropriately train employees.[283] Similarly, the first prong of the defense would not be established if evidence shows that the employer adopted or administered the policy in bad faith or that the policy was otherwise defective or dysfunctional.[284] Considerations that may be relevant to determining whether an employer unreasonably failed to prevent harassment are discussed in detail at section IV.C.3.a, below.

Likewise, the existence of an adequate anti-harassment policy, complaint procedure, and training is not dispositive of the issue of whether an employer exercised reasonable care to correct harassing behavior of which it knew or should have known.[285] For example, if a supervisor witnesses harassment by a subordinate, the supervisor's knowledge of the harassment is imputed to the

employer, and the duty to take corrective action will be triggered.[286] If the employer fails to exercise reasonable care to correct the harassing behavior, it will be unable to satisfy prong one of the *Faragher-Ellerth* defense, regardless of any policy, complaint procedure, or training. The duty to exercise reasonable care to correct harassment for which an employer had notice is discussed in detail at section IV.C.3.b, below.

Example 64: Employer Liable Because It Failed to Exercise Reasonable Care in Responding to Harassment—Employee Reported to a Supervisor. Aisha, who works as a cashier in a fast-food restaurant, was sexually harassed by one of her supervisors, Pax, an assistant manager. Aisha initially responded to Pax's sexual advances and other sexual conduct by telling him that she was not interested and that his conduct made her uncomfortable. Pax's conduct persisted, however, so Aisha spoke to the restaurant's other assistant manager, Mallory. Like Pax, Mallory was designated as Aisha's direct supervisor. The employer has an anti-harassment policy, which it distributes to all employees. The policy states that all supervisors are required to report and address potentially harassing conduct when they become aware of such conduct. Mallory, however, did not report Pax's conduct or take any action because she felt Aisha was being overly sensitive. Pax continued to sexually harass Aisha, and a few weeks after speaking with Mallory, Aisha contacted the Human Resources Director. The following day, the employer placed Pax on paid administrative leave, and a week later, after concluding its investigation of Aisha's allegations, the employer terminated Pax. The employer contends that it took reasonable corrective action by promptly responding to Aisha's complaint to Human Resources. However, because Mallory was one of Aisha's supervisors, and was therefore responsible for reporting and addressing potential harassment, the employer cannot establish the affirmative defense,

having failed to act reasonably to address the harassment after Aisha spoke with Mallory.

Example 65: Employer Liable Because It Failed to Exercise Reasonable Care in Responding to Harassment—Supervisor Witnessed Harassment. Claudia works as an overnight stocker in the housewares department of a big box store. Her employer has an anti-harassment policy. The policy is, on its face, effective: for example, it describes harassment; provides multiple avenues for reporting harassment, including a 1-800 number operated by a third-party vendor; and contains an anti-retaliation provision. The policy is distributed to all employees at the time of their hire and can be accessed any time via computer terminals that all employees can use. Further, the employer ensures that all employees receive annual anti-harassment training that reminds them of the policy, including their rights and obligations under it.

Claudia is directly supervised by Dustin, the housewares department manager. On an almost nightly basis, Dustin likes to "play a game" in which he hides between store aisles and jumps out with his penis exposed to Claudia. Ravi, who manages the employer's produce section, has witnessed Dustin expose his penis to Claudia on a few occasions. Ravi once admonished Dustin for being a "child" and told him "acting like that will lead to you getting fired," but took no further action to address the harassment. Claudia was embarrassed by the harassment and was afraid that complaining would jeopardize her job, so she never reported the harassment, either to the employer or the 1-800 number.

Under these facts, the employer cannot establish the affirmative defense. While the employer appears to

have acted reasonably in its efforts to prevent harassment by adopting a comprehensive and effective anti-harassment policy and providing training, it did not act reasonably to correct harassment that it knew about through Ravi's direct observation.

ii. Second Prong of the Affirmative Defense: Employee's Failure to Take Advantage of Preventive or Corrective Opportunities

The second prong of the *Faragher-Ellerth* affirmative defense requires the employer to show that the complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[287] If an employer has exercised reasonable care, it will not be liable if the complainant could have avoided all harm from unlawful harassment but unreasonably failed to do so.[288] In addition, if the employee unreasonably delayed complaining and an earlier complaint could have avoided some but not all of the harm from the harassment, then the employer might be able to use the affirmative defense to reduce damages, even if it could not eliminate liability altogether.[289]

Example 66: Employer Limits Damages by Establishing Affirmative Defense. Nina was subjected to a hostile work environment based on national origin harassment by her supervisor, Samantha. The evidence shows that the harassment began when Samantha used egregious epithets to refer to Nina's national origin during an informal meeting Samantha held only with Nina and her coworkers, conduct that was sufficient standing alone to create a hostile work environment. The employer has an accessible anti-harassment policy, distributes the policy broadly, and holds anti-harassment training periodically. Although Samantha's harassment of Nina continues, Nina does not complain until four months later, when she accepts a position with another employer. Then, Nina states she did not complain during her employment because she did not want to "rock the boat" or cause Samantha to be fired. The employer has established both

elements of the affirmative defense with respect to the continuing harassment after the meeting because the employer acted reasonably to prevent and correct harassment and Nina could have avoided this harm by complaining promptly. However, the employer is liable for the hostile work environment created by Samantha's initial use of the egregious epithets because Nina could not have avoided this harm by complaining earlier. As a result, Nina is entitled to damages for the hostile work environment arising from the informal meeting but not for any subsequent harassment.

Proof that the employee failed to use the employer's complaint procedure will normally establish the second prong of the affirmative defense if following the procedure could have avoided the harm.[290] In some circumstances, however, there will be evidence of a reasonable explanation for an employee's delay in complaining or failure to utilize the employer's complaint process.[291] In addition, there will be instances when an employee's use of mechanisms other than the employer's official complaint process will be sufficient to demonstrate that the employee took reasonable steps to avoid harm from the harassment.

The reasonableness of an employee's decision not to use the employer's complaint procedure, or timing in doing so, depends on the particular circumstances and information available to the employee *at that time*.[292] An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. An employee might reasonably ignore a small number of minor incidents, hoping that the harassment will stop without resorting to the complaint process.[293] The employee also may choose to tell the harasser directly to stop the harassment and then wait to see if the harasser stops before complaining to management. If the harassment persists or worsens, however, then further delay in complaining might be unreasonable.

Even if the employee uses the employer's official complaint process, the employer may still be able to establish the second prong of the *Faragher-Ellerth* affirmative defense where the employee failed to act reasonably in using the process. If, for example, the complainant unreasonably failed to cooperate in the investigation, the complaint by itself would not constitute a reasonable effort to avoid harm.[294]

a) Reasonable Delay in Complaining or in Failing to Use the Employer's Complaint Procedure

There may be reasonable explanations for an employee's delay in complaining or failure to utilize the employer's complaint process.[295] For example:

- Employer-created obstacles to filing complaints: An employee's failure to use the employer's complaint procedure could be reasonable if that failure was based on employer-created obstacles to filing complaints. For example, if the process entailed undue expense by the employee,[296] inaccessible points of contact for making complaints,[297] or intimidating or burdensome requirements, failure to use the process could be reasonable.

- Ineffective complaint mechanism: As a general matter, an employee's subjective belief that reporting harassment will be futile, without more, will not constitute a reasonable basis for failing to take advantage of preventive or corrective opportunities provided by an employer.[298] However, an employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on a *reasonable* belief that the complaint process was ineffective. For example, an employee might have a reasonable belief that the complaint process would be ineffective if the persons designated to receive complaints were all close friends of the harasser.[299] A failure to complain also might be reasonable if the complainant was aware of instances in which the employer had failed to take appropriate corrective action in response to prior complaints filed by the complainant or by coworkers.[300]

- Risk of retaliation: A generalized fear of retaliation, standing alone, generally will not constitute a reasonable basis for failing to take advantage of preventive or corrective opportunities provided by an employer.[301] However, an employee's failure to use the employer's complaint procedure would be reasonable if the employee *reasonably* feared retaliation as a result of complaining about harassment.[302] An employer's complaint procedure should provide assurances that complainants will not be subjected to retaliation. Even in the face of such assurances, however, an employee might reasonably fear retaliation in some instances. For example, if the harasser threatened the employee with reprisal for complaining, then the employee's decision not to report or to delay reporting the harasser would likely be reasonable.[303] Similarly, an employee's failure to complain could be reasonable if the employee or another employee had previously been subjected to retaliation for complaining about harassment.[304] By contrast,

because it may not be possible for an employer to completely eliminate all unpleasantness that an employee may experience in reporting harassment, a failure to report or delay in reporting will not be considered reasonable if based merely on concerns about ordinary discomfort or embarrassment.[305]

These examples are not exclusive, and there may be other reasonable explanations for why an employee fails to report, or delays in reporting, harassment. For instance, an employee's delay in reporting might be reasonable if linked to psychological trauma resulting from the underlying harassment.[306]

b) Reasonable Efforts to Avoid Harm Other than by Using the Employer's Complaint Process

Even if an employee failed to use the employer's complaint process, the employer will not be able to establish the *Faragher-Ellerth* affirmative defense if the employee took other reasonable steps to avoid harm from the harassment. A promptly filed union grievance while the harassment is ongoing, for example, could qualify as a reasonable effort to avoid harm.[307] Similarly, a temporary employee who is harassed at the client's workplace generally would be free to report the harassment to either the employment agency or the client, reasonably expecting that the entity she notified would act to correct the problem.[308]

3. Non-Supervisory Employees (E.g., Coworkers) and Non-Employees—Negligence[309]

An employer is liable for a hostile work environment created by non-supervisory employees or by non-employees if it was negligent because:

- **it unreasonably failed to prevent the harassment;**
  OR
- **it failed to take reasonable corrective action in response to harassment about which it knew or should have known.**

Although the negligence standard is principally applied in cases involving harassment by a non-supervisory employee or non-employee, it also can be applied in cases of harassment by a supervisor or an alter ego/proxy.[310]

a. Unreasonable Failure to Prevent Unlawful Harassment

An employer is liable for a hostile work environment created by non-supervisory employees or non-employees where the employer was negligent by failing to act reasonably to prevent the unlawful harassment from occurring.[311] Although the relevant considerations will vary from case to case, some of the considerations may include:

1) **Adequacy of the employer's anti-harassment policy, complaint procedures, and training:** As with the first prong of the *Faragher-Ellerth* affirmative defense (which only applies to unlawful harassment by a supervisor), assessing negligence on the part of an employer starts with whether the employer had an adequate anti-harassment policy, complaint procedure, and training program to ensure employees understand their rights and responsibilities pursuant to the policy.[312] The elements described in section IV.C.2.b.i, above, with regard to an effective policy and complaint procedure, apply here as well.

2) **Nature and degree of authority, if any, that the alleged harasser exercised over the complainant:**[313] Employers have a heightened responsibility to protect employees against harassment by other employees whom they have "armed with authority"[314] even if the other employees are not "supervisors."[315]

3) **Adequacy of the employer's efforts to monitor the workplace**,[316] such as by training supervisors and other appropriate officials on how to recognize potential harassment and by requiring them to report or address harassment that they either are aware of or reasonably should have known about.

4) **Adequacy of the employer's steps to minimize known or obvious risks of harassment**, such as harassment by inmates incarcerated in a maximum-security prison;[317] in workspaces that are isolated, decentralized, lack a diverse workforce, or rely on customer service or client satisfaction; and against employees who are vulnerable, young, do not conform to workplace norms based on societal stereotypes, or who are assigned to complete monotonous or low-intensity tasks.[318]

Example 67: Employer Unreasonably Failed to Prevent Unlawful Harassment. Willie, a man with intellectual and developmental disabilities, works for a

janitorial company. The other members of Willie's cleaning crew also are individuals with intellectual and/or developmental disabilities, except for the team lead, Bobby. (As a team lead, Bobby is responsible for ensuring all crew members have access to cleaning supplies and the spaces that the crew will be cleaning; Bobby does not have the ability to hire, fire, demote, promote, transfer, or discipline Willie or any other crew member.) At the time of hire, each new employee is required to watch a one-hour anti-harassment training video focusing on legal standards and is required to sign a training acknowledgment form without the opportunity to ask questions. Although Willie watched the module, he did not understand it because of his disabilities. No one from the company discussed the training with Willie. While at worksites, Bobby frequently berates Willie and other team members by calling them "dummy" or "ret*rd," and asks demeaning questions, such as "did your mom drop you on your head when you were a baby?" Bobby also mimics the crew members' disabilities. No one else from the janitorial company ever comes to Willie's worksites to check in with him or the other crew members, and because Willie and the other crew members, other than Bobby, do not understand how the anti-harassment policy works, they do not complain and are subjected to continued disability-based harassment. Based on these facts, the employer has not acted reasonably to prevent Willie and the other crew members from being subjected to unlawful harassment.

Example 68: Employer Acted Reasonably to Prevent Unlawful Harassment. Danielle, a pulmonary and respiratory care nurse at a large hospital system, is responsible for caring for patients recovering from respiratory conditions at the hospital, such as Lewis, a patient recovering from pneumonia. At the time Lewis

was admitted, his son stated, "I hope your staff is prepared because dad has some 'old-timey' attitudes toward women and wandering hands." The hospital is understaffed, which often requires Danielle and other nurses to work in isolated conditions, such as by entering patients' rooms alone. Given Lewis's son's statement and knowing that employees who work in isolated conditions are at a higher risk of harassment, when Danielle is assigned to care for Lewis, her supervisor warns her about Lewis's potential conduct; offers to reassign Lewis to another nurse, if one is available; and, if another nurse is not available or if Danielle wants to keep the assignment, offers to assign another staff member to accompany Danielle into Lewis's room. Based on these facts, the employer has acted reasonably to prevent Danielle from being subjected to unlawful harassment.

b. Unreasonable Failure to Correct Harassment of Which the Employer Had Notice

Even if an employer acted reasonably to prevent unlawful harassment by coworkers or non-employees, it is still liable for a hostile work environment if it was negligent because it did not act reasonably to correct harassment about which it knew or should have known.[319]

Notice

- **An employer has notice of harassment if an individual responsible for reporting or taking corrective action with respect to the harassment is aware of it or if such an individual reasonably should have known about the harassment.**

Corrective Action

- **Once an employer has actual or constructive notice of potential harassment, it is required to take reasonable corrective action to prevent the conduct from continuing.**

i. Notice

The first element that triggers an employer's duty to take reasonable corrective action in response to harassment is having notice of the harassment.[320]

An employer has actual notice of harassment if an individual responsible for reporting or taking corrective action with respect to the harassment is aware of it.[321] Thus, if harassment is observed by or reported to any individual responsible for reporting harassment to management or taking corrective action, then the employer has actual notice of the harassment. For example, an employer has actual notice of harassment if an employee with a general duty to respond to harassment under the employer's anti-harassment policy, such as the EEO Director, a manager, or a supervisor who does not directly supervise either the harasser or the target of the harassment but who does have a duty to report harassment, is aware of the harassment.[322] In addition, an employer has notice if someone qualifying as the employer's proxy or alter ego, such as an owner or high-ranking officer, has knowledge of the harassment.[323]

> **Example 69: Employer Had Notice of Harassment.** Lawrence, a Black man in his sixties, was employed as a laborer in a distribution yard where he was subjected to race- and age-based harassment by coworkers. Although Lawrence's employer contends that it was never notified of the harassment until Lawrence made a complaint after being fired for misconduct, a "yard lead," who was responsible for instructing and organizing teams of yard workers, acknowledges that Lawrence complained to him about the harassment before Lawrence was fired. According to the employer's policy, the yard lead was expected to report problems to the yard manager, who had authority to take disciplinary action against employees. Because the yard lead was responsible for referring Lawrence's

complaint to an appropriate official authorized to take corrective action, the employer had actual notice of the alleged harassment.[324]

A complaint can be made by a third party, such as a friend, relative, or coworker, and need not be made by the target of the harassment. For example, if an employee witnesses a coworker being subjected to racial epithets by a person at work, and that employee reports it to the appropriate personnel in Human Resources, the employer is on notice of potentially harassing behavior. Similarly, even if no one complains, the employer still has notice if someone responsible for correcting or reporting harassment becomes aware of the harassment, such as by personally witnessing it.[325]

The employer's duty to take corrective action is triggered if the notice it has received is sufficient to make a reasonable employer aware of the possibility that an individual is being subjected to harassment on a protected basis. While no "magic words" are required to initiate a harassment complaint, the complaint (or other vehicle for notice) must identify potentially harassing conduct in some way.[326] Therefore, a complaint simply that a coworker's conduct was "rude" and "aggravating" might not provide sufficient notice depending on the circumstances. Conversely, evidence that an employee had engaged in "unwanted touching" of another employee likely would be sufficient to alert the employer of a reasonable probability that the second employee was being sexually harassed and that it should investigate the conduct and take corrective action.[327]

Example 70: Employer Had Notice of Harassment.
Susan was subjected to sex-based harassment by her coworker, Jim. Although Susan's employer contends that it did not have notice of the conduct, evidence shows that Susan requested a schedule change when she was scheduled to work alone with Jim, and that Susan's coworkers told her supervisor, Barb, that Susan wanted to avoid working with Jim. Also, Jim told Barb that he may have "done something or said something that [he] should not have to Susan." When Barb asked Susan about working with Jim, Susan became teary and red and said, "I can't talk about it." Barb responded by saying, "That's good because I

don't want to know what happened." Under the circumstances, Barb had enough information to suspect that Jim was harassing Susan. As Susan's supervisor, Barb had the responsibility to take corrective action, if she had the authority, or to notify another official who did have the authority to take corrective action.[328]

Although an employer cannot be found liable for conduct that does not violate federal EEO law, the duty to take corrective action may be triggered by notice of harassing conduct that has not yet risen to the level of a hostile work environment, but may reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken.[329]

Notice of harassing conduct directed at one employee might serve as notice not only of the harasser's potential for further harassment of the same employee but also of the harasser's potential to harass others. Factors in assessing the relevance of the employer's knowledge of prior harassment can include the "extent and seriousness of the earlier harassment and the similarity and nearness in time to the later harassment."[330]

An employer has constructive notice of harassing conduct if, under the circumstances presented, a reasonable employer should know about the conduct.[331] Most commonly, an employer is deemed to have constructive notice if harassing conduct is severe, widespread, or pervasive so that individuals responsible for taking action with respect to the harassment reasonably should know about it.[332] An employer also may be deemed to have constructive notice of harassment if it did not have reasonable procedures for reporting harassment.[333]

Example 71: Employer Had Constructive Notice of Harassment. Joe, who is Mexican American, works as an automotive parts salesman for a car dealership. Joe's job requires him to frequently enter the dealership's service department. The service department is managed by Aseel, who is onsite in the service department all day when he supervises a team of five mechanics. At least once per day while Joe is in the service department, a mechanic, Tanner, yells at Joe across the room, calling him "wetback" and "sp*c,"

> among other epithets. The other mechanics sometimes talk amongst themselves about how Tanner's conduct toward Joe never stops in the service department, that Tanner seems to enjoy having an audience, and how they are surprised that Tanner's conduct continues even after their employer provided anti-harassment training to all of the employees working at the dealership. Based on this evidence, the employer had constructive notice of the hostile work environment because Service Manager Aseel knew or should have known about Tanner's conduct.[334]

ii. Reasonable Corrective Action

Once an employer has notice of potentially harassing conduct, it is responsible for taking reasonable corrective action to prevent the conduct from continuing. This includes conducting a prompt and adequate investigation and taking appropriate action based on the findings of that investigation.

a) Prompt and Adequate Investigation

An investigation is prompt[335] if it is conducted reasonably soon after the employee complains or the employer otherwise has notice of possible harassment. Clearly, an employer that opens an investigation into a complaint one day after it is made has acted promptly.[336] By contrast, an employer that waits two months to open an investigation, absent any mitigating facts, very likely has not acted promptly.[337] In many instances, what is "reasonably soon" is fact-sensitive and depends on such considerations as the nature and severity of the alleged harassment and the reasons for delay.[338] For example, when faced with allegations of physical touching, an employer that, without explanation, does nothing for two weeks likely has not acted promptly.[339]

An investigation is adequate if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth."[340] The investigation need not entail a trial-type investigation, but it should be conducted by an impartial party and seek information about the conduct from all parties involved. The alleged harasser therefore should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the

investigation. If there are conflicting versions of relevant events, it may be necessary for the investigator to make credibility assessments to determine whether the alleged harassment in fact occurred.[341] Accordingly, whoever conducts the investigation should be well-trained in the skills required for interviewing witnesses and evaluating credibility.

> **Example 72: Employer Failed to Conduct Adequate Investigation.** George, a construction worker, repeatedly complains to the superintendent that he is being harassed because of his disability by Phil, a coworker. After about two weeks, the superintendent asks a friend of his to conduct an investigation, even though this individual is not familiar with EEO law and has no experience conducting harassment investigations. The investigator meets with George and Phil individually for about ten minutes, and asks only a few perfunctory questions. From these interviews, the investigator issues a single-page memorandum concluding, without further explanation, that there is no basis for finding that George was harassed. Based on these facts, the employer has not conducted an adequate investigation.[342]

Upon completing its investigation, the employer should inform the complainant and alleged harasser of its determination and any corrective action that it will be taking, subject to applicable privacy laws.[343]

Employers should retain records of all harassment complaints and investigations.[344] These records can help employers identify patterns of harassment, which can be useful for improving preventive measures, including training. These records also can be relevant to credibility assessments and disciplinary measures.

In some cases, it may be necessary, given the seriousness of the alleged harassment, for the employer to take intermediate steps to address the situation while it investigates the complaint.[345] Examples of such measures include making scheduling changes to avoid contact between the parties; temporarily transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. As a rule, an employer should make every reasonable effort to minimize the burden or negative consequences to an

employee who complains of harassment, both during and after the employer's investigation.[346]

Corrective action that leaves the complainant worse off could constitute unlawful retaliation.[347] The employer should take measures to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliation.

b) Appropriate Corrective Action

To avoid liability, an employer must take corrective action that is "reasonably calculated to prevent further harassment" under the particular circumstances at that time.[348] Corrective action should be designed to stop the harassment and prevent it from continuing.[349] The reasonableness of the employer's corrective action depends on the particular facts and circumstances at the time the action is taken.[350]

Considerations that will be relevant in evaluating the reasonableness of an employer's corrective action include the following:

1) **Proportionality of the corrective action**: Corrective action should be proportionate to the seriousness of the offense.[351] If the harassment was comparatively minor and involved an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. In other circumstances, separating the harasser and the complainant may be adequate. On the other hand, if the harassment was severe or persistent despite prior corrective action, then suspension or discharge of the harasser may be necessary.[352]

2) **Authority granted harasser**: Employers have a heightened responsibility to protect employees against abuse of official power. To that end, employers must take steps to prevent employees who have been granted authority over others from using it to further harassment, even if that authority is insufficient to establish vicarious liability.[353] Thus, the nature and degree of the

harasser's authority should be considered in evaluating the adequacy of corrective action.[354]

3) **Whether harassment stops**: After taking corrective action, an employer should monitor the situation to ensure that the harassment has stopped. Whether the harassment stopped is a key factor indicating whether the corrective action was appropriate. However, the continuation of harassment despite an employer's corrective action does not necessarily mean that the corrective action was inadequate.[355] For example, if an employer takes appropriate proportionate corrective action against a first-time harasser who engaged in a mildly offensive series of jokes and innuendos, yet the same employee subsequently engages in further harassment, then the employer may not be liable if it also responded appropriately to the subsequent misconduct by taking further corrective action appropriate to the pattern of harassment. On the other hand, an employer who takes no action in response to a complaint of harassment may not be shielded from liability by the fact that the harassment "fortuitously stops."[356]

4) **Effect on complainant**: An employee who in good faith complains of harassment should ideally face no burden because of the corrective action the employer takes to stop harassment or prevent it from occurring; for example, corrective action generally should not involve involuntarily transferring the complaining employee while leaving the alleged harasser in place.[357] However, the employer may place some burdens on the complaining employee as part of the corrective action it imposes on the harasser if it makes every reasonable effort to minimize those burdens or adverse consequences.[358]

5) **Options available to the employer**:[359] Employers have an "arsenal of incentives and sanctions" available to them to address harassment.[360] However, an employer's options for corrective actions may vary depending on who engages in the conduct and where it occurs, among other considerations.

6) **The extent to which the harassment was substantiated**: Where an employer conducts a thorough investigation but is unable to determine with sufficient confidence that the alleged harassment occurred, its response may be more limited. An employer is not required to impose discipline if, after a thorough investigation, it concludes that the alleged harassment did not occur, or if it has inconclusive findings.[361] Nonetheless, if the employer is

unable to determine whether the alleged harassment occurred, the employer may wish to consider preventive measures, such as counseling, training, monitoring, or issuing general workforce reminders about the employer's anti-harassment policy.[362]

Example 73: Employer failed to take reasonable corrective action. Malak, a server at a sports bar, is visibly pregnant. Every Sunday, Kevin and Troy spend the afternoon at the bar cheering on their favorite teams, and they usually sit in Malak's section. They repeatedly ask if they can rub her belly "for luck" before games, and berate her when she refuses, calling her a "mean mama." They also frequently make beeping sounds and yell, "Careful! Wide load!" when Malak serves other tables. In addition, they ask if she plans to breastfeed and offer to "help out with practice sessions." Sven, a manager, overhears Kevin and Troy, laughs, and says halfheartedly, "C'mon guys, give her a break." They ignore him and continue to comment about Malak's pregnancy. Malak complains to Sven, who throws up his hands and says, "Hey, I did what I could. What else do you want me to do? If I barred everyone who made a few dumb comments when they were drunk, we'd have no customers at all." Based on these facts, the employer has failed to take reasonable corrective action to address Kevin and Troy's pregnancy-based harassment of Malak.

Example 74: Employer took reasonable corrective action. Same facts as above, but instead of laughing and making a halfhearted request that Kevin and Troy stop harassing Malak, Sven tells Kevin and Troy that they must stop making comments about Malak's pregnancy and warns them that they will be barred from the

establishment if they persist. Sven tells Malak to notify him or another manager immediately if the comments continue. Sven also asks Malak if she would like Kevin and Troy reseated in another section, but she declines, and he asks other managers to keep an eye on Kevin and Troy to make sure the two men do not continue to harass Malak. Three weeks later, Kevin and Troy resume making offensive pregnancy-related comments to Malak. Before Malak can notify Sven, another manager does so, and Sven promptly gives Kevin and Troy their checks, directs them to pay their bills, and notifies them they are no longer welcome at the bar. Based on these facts, the employer has taken adequate corrective action to address Kevin and Troy's pregnancy-based harassment of Malak.

7) Special considerations when balancing anti-harassment and accommodation obligations with respect to religious expression:[363] Title VII requires that employers accommodate employees' sincerely held religious beliefs, practices, and observances unless doing so would impose an undue hardship.[364] Employers also are responsible for protecting workers against unlawful harassment, including harassment motivated by religion or created by religious expression. To address these dual obligations, an employer should accommodate an employee's sincerely held religious practice of engaging in religious expression in the workplace, unless doing so would create, or reasonably threatens to create, a hostile work environment. Thus, while an employer may need to provide a religious accommodation that disrupts "[c]omplete harmony in the workplace,"[365] the employer should take corrective action to address religious expression that creates, or threatens to create, a hostile work environment, or otherwise would result in undue hardship.[366] As with other forms of harassment, an employer should take corrective action before the conduct becomes sufficiently severe or pervasive to create a hostile work environment.

Corrective action in response to a harassment complaint must be taken without regard to the complainant's protected characteristics. Thus, employers should

follow consistent processes to investigate harassment claims, and to determine what corrective action, if any, is appropriate. For example, it would violate Title VII if an employer assumed that a male employee accused of sexual harassment by a female coworker had engaged in the alleged conduct based on stereotypes about the "propensity of men to harass sexually their female colleagues"[367] and therefore fired him.

In some circumstances, an employee may report harassment but ask that the employer keep the matter confidential and take no action. Although it may be reasonable in some circumstances to honor the employee's request when the conduct is relatively mild, it may not be reasonable to do so in all circumstances,[368] including, for instance, if it appears likely that the harassment was severe[369] or if employees other than the complainant are vulnerable.[370] One mechanism to help minimize such conflicts could be for the employer to set up an informational phone line or website that allows employees to ask questions or share concerns about harassment anonymously.[371] In such circumstances, the employer also may be required to take general corrective action to reduce the likelihood of harassment in the future, such as recirculating its anti-harassment policy.

c) Assessing the Liability of Joint Employers

If an individual has been assigned by an employment agency to work for a client, then both the agency and the client may jointly employ the individual during the period when the individual works for the client.[372] If a worker is jointly employed by two or more employers, then each of the worker's employers is responsible for taking corrective action to address any alleged harassment about which it has notice.[373] An employer has the same responsibility to prevent and correct harassment of non-direct hire employees as harassment of permanent employees.[374] Therefore, under such circumstances, if the worker complains about harassment to both the client and the employment agency, then both entities would be responsible for taking corrective action.[375] Joint employers are not required to take duplicative corrective action, but each has an obligation to respond to potential harassment, either independently or in cooperation. Once the employee complains to either entity, that entity is responsible to take reasonable steps within its control to address the harassment and to work with the other entity, if necessary, to resolve the situation.[376]

As with an employer, an employment agency is responsible for taking reasonable corrective action within its own control. This is true regardless of whether the employment agency's client is also a joint employer. Corrective action may include, but is not limited to: ensuring that the client is aware of the alleged harassment; insisting that the client conduct an investigation and take appropriate corrective measures on its own; working with the client to jointly conduct an investigation and/or identify appropriate corrective measures; following up and monitoring to ensure that corrective measures have been taken; and providing the worker with the opportunity to take another job assignment at the same pay rate, if such an assignment is available and the worker chooses to do so.

Example 75: Temporary Agency Takes Adequate Corrective Action, But Client Does Not. Yousef is a Muslim software engineer of Arab American heritage. He is assigned by an employment agency to work for a technology company on a software development project. The evidence establishes that the agency and technology company are joint employers of Yousef. Soon after Yousef starts working, Eddie, one of his coworkers, begins making frequent comments about his religion and ethnicity. For example, Eddie says that Middle Easterners and Muslims "prefer to solve problems with their guns and bombs, rather than their brains." He also says that "the Middle East's number one export is terrorism," and recommends that Yousef's work be reviewed carefully "to make sure he's not embedding bugs on behalf of terrorists." Yousef tells Eddie to stop, but he refuses. Yousef complains to the employment agency, which promptly notifies the technology company and requests that it take corrective action. The technology company refuses to take any action, explaining that Eddie is one of its most experienced programmers, that his assistance is crucial to the project's satisfactory completion, and that his reputation in the tech industry has attracted numerous prestigious clients to the company. The employment agency promptly reassigns Yousef to a different client at the same pay rate.[377] The employment agency also

declines to assign other workers to the technology company until the company takes appropriate corrective action to address Eddie's conduct. Based on these facts, the agency took appropriate corrective action as to Yousef, while the technology company did not.

V. Systemic Harassment

A. Harassment Affecting Multiple Complainants

Like other forms of discrimination, harassment can be systemic, subjecting multiple individuals to a similar form of discrimination. If harassment is systemic, then the harassing conduct could subject many, or possibly all, of the employees of a protected group to the same circumstances. For example, evidence might show that the Black employees working on a particular shift were subjected to, or otherwise knew about, the same racial epithets, racial imagery, and other offensive race-based conduct.[378] In such a situation, evidence of widespread race-based harassment could be used to establish that Black employees working on that shift were individually subjected to an objectively hostile work environment. Similarly, evidence that a group of individuals with intellectual disabilities had been physically abused, financially exploited, and subjected to verbal abuse including frequently being called "ret*rded," "dumb ass," and "stupid"[379] could establish a disability-based hostile work environment for all of the impacted individuals.

Example 76: Same Evidence of Racial Harassment Establishes Objectively Hostile Work Environment for Multiple Employees. A group of five Black correctional officers, who are the only Black officers on their shift, experienced racial mistreatment and jokes, including aggressive treatment by dog handlers stationed at the entrance and racial references and epithets, such as the n-word, "back of the bus," and "the hood." Much of the conduct occurred in a communal setting, such as the cafeteria, in which supervisors participated or laughed at the conduct without objecting. This conduct occurred regularly,

despite the Black officers' repeated objections. Although none of the Black officers were personally subjected to every harassing incident, they each were subjected to some of the similar conduct because the harassers treated them as a cohesive group. Further, each became aware of harassment experienced by the others, even if they were not present when every discriminatory comment was made. Based on these facts, given the totality of circumstances, each of the Black officers was subjected to an objectively hostile work environment based on race.[380]

B. Pattern or Practice of Harassment

In some situations involving systemic harassment, the evidence may establish that the employer engaged in a "pattern or practice" of discrimination, meaning that the employer's "standard operating procedure" was to engage in or tolerate harassment creating a hostile work environment.[381] An allegation of a pattern or practice of harassment focuses on the "landscape of the total work environment, rather than the subjective experiences of each individual claimant"[382]—in other words, whether the work environment, as a whole, was hostile.[383] For instance, in one case, the court concluded that evidence of widespread abuse, including physical assault, threats of deportation, denial of medical care, and limiting contact with the "outside world," was sufficient to establish that it was the employer's standard operating procedure to subject Thai nationals employed on the defendant's farms to a hostile work environment.[384]

An employer's efforts to prevent or correct systemic harassment must be adequate to fully address the nature and scope of the harassment the employer knows (or reasonably should know) was or is occurring. For example, an employer cannot simply correct the harassment as to a particular subset of individuals known to be affected. Moreover, if there have been frequent individual incidents of harassment, then the employer must take steps to determine whether that conduct reflects the existence of a wider problem requiring a systemic response, such as developing comprehensive company-wide procedures.[385]

Example 77: Evidence Establishes Pattern or Practice of Sex Harassment. Zoe alleges that she has

been subjected to ongoing sex-based harassment at the soap manufacturing plant where she works. An investigation reveals that female employees throughout the same plant have been frequently subjected to physically invasive conduct by male coworkers, including the touching of women's breasts and buttocks; that women have been targeted by repeated sexual comments and conduct; and that there are open displays of sexually offensive materials throughout the plant, including pornographic magazines and calendars. The investigation further reveals that the employer either knew or should have known about the widespread sexual harassment. In particular, much of the harassment occurred openly in public places, such as the display of pornography, and many incidents, such as sexual comments, occurred in the presence of supervisors who were required by the employer's anti-harassment policy to report sexual harassment to the Human Resources Department. Finally, although management has taken some corrective action in isolated cases, there is no evidence that management has taken steps to determine whether the harassment is part of a systemic problem requiring appropriate plant-wide corrective action. Based on these facts, the employer has subjected female employees at the plant to a pattern or practice of sexual harassment.[386]

VI. Selected EEOC Harassment Resources

A. EEOC Harassment Home Page: **https://www.eeoc.gov/harassment (https://www.eeoc.gov/harassment)**

B. EEOC Sexual Harassment Home Page: **https://www.eeoc.gov/sexual-harassment (https://www.eeoc.gov/sexual-harassment)**

C. EEOC Select Task Force on the Study of Harassment in the Workplace: **https://www.eeoc.gov/eeoc-select-task-force-study-harassment-workplace**

(https://www.eeoc.gov/eeoc-select-task-force-study-harassment-workplace)

D. Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), **https://www.eeoc.gov/june-2016-report-co-chairs-select-task-force-study-harassment-workplace (https://www.eeoc.gov/june-2016-report-co-chairs-select-task-force-study-harassment-workplace)**

E. Promising Practices for Preventing Harassment: **https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment (https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment)**

F. Promising Practices for Preventing Harassment in the Federal Sector: **https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector (https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector)**

G. EEOC Retaliation Home Page: **https://www.eeoc.gov/retaliation (https://www.eeoc.gov/retaliation)**

H. Enforcement Guidance on Retaliation and Related Issues: **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues)**

Addendum Pursuant to 29 C.F.R. § 1695.6(c) on EEOC Responses to Major Comments Received on the Proposed Enforcement Guidance on Harassment in the Workplace

The Equal Employment Opportunity Commission (Commission or EEOC) published a Notice in the *Federal Register* on October 2, 2023, inviting the public to submit comments on its proposed Enforcement Guidance on Harassment in the Workplace and including a hyperlink to the federal website with the proposed guidance.**[387]** The comment period ended on November 2, 2023. During this period, the EEOC received over 37,000 comments from private individuals, organizations, and

legislators. The majority of comments from private individuals were identical form (standardized) comments or slightly altered form comments. The comments from organizations addressed a range of issues and some requested that the Commission add additional hypothetical examples.

The Commission carefully considered all the comments it received in the process of revising the draft and preparing the final guidance. The major issues raised in the comments and the Commission's responses are listed, summarized, and addressed below.

EEOC Authority

EEOC Authority to Address Harassment Based on Gender Identity Related to Sex-Segregated Facilities and Pronouns

Comment: Some commenters contended that the Commission exceeded its statutory authority under Title VII of the Civil Rights Act of 1964 (Title VII) because, they asserted, the proposed guidance exceeded the scope of Title VII as interpreted by the Supreme Court in *Bostock v. Clayton County*, 590 U.S. 644 (2020). These commenters stated that the decision in *Bostock* was limited in scope and did not address, among other things, sex-segregated bathrooms.

Response:

The proposed guidance did not attempt to—nor does the final guidance attempt to—impose new legal obligations on employers with respect to any aspect of workplace harassment law, including gender identity discrimination. Nor does the guidance exceed the scope of the Supreme Court's decision in *Bostock.*

Section 703(a)(1) of Title VII makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]" At least since 1986, the Supreme Court has been unequivocal that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment," including discriminatory harassment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

The Court in *Bostock* explained that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," and therefore held that discharging an employee because of sexual orientation or gender identity is unlawful sex discrimination that violates section 703(a)(1). *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 660, 683 (2020). As a form of sex discrimination, discrimination on the basis of sexual orientation or gender identity therefore violates section 703(a)(1) on the same terms as any other form of sex discrimination, including failing or refusing to hire, or otherwise discriminating against an individual with respect to compensation, terms, conditions, or privileges of employment. Any other interpretation would be inconsistent with the statutory text and with *Bostock*, and would introduce an inconsistent and textually unsupported asymmetry under which an employee could not be terminated because of their sexual orientation or gender identity but could be harassed or otherwise discriminated against in the terms and conditions of employment based on those same characteristics.

For these reasons, as stated in the final guidance, federal courts interpreting *Bostock* have readily found that unlawful workplace harassment based on sexual orientation or gender identity that constructively changes the terms and conditions of employment under section 703(a)(1) constitutes sex discrimination. *See* the cases cited in footnote 37 of the final Enforcement Guidance on Harassment in the Workplace.

Bostock stated that it did not address "bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. Nothing in the guidance suggests that *Bostock* addressed those issues. Because the EEOC is statutorily required to investigate all private sector Title VII charges of discrimination presented to it in the administrative process, and also to decide administrative appeals by federal employees raising Title VII claims, the EEOC must sometimes take a position on whether an alleged type of conduct violates Title VII even in the absence of binding Supreme Court precedent. In fulfilling its statutory duties, the EEOC considers applicable legal authority and arguments advanced by affected parties when determining whether a violation has occurred in the context of a particular charge or federal sector EEO appeal. As noted in the final guidance, by the time *Bostock* was decided the Commission had been presented with the federal sector administrative appeal in *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015), involving a

transgender employee. On the facts presented in that administrative appeal, the Commission decided that Title VII's prohibition on sex discrimination requires employers to provide transgender employees access to sex-segregated facilities consistent with their gender identity. *See also Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 135 (E.D. Pa. 2020) (listing allegations that plaintiff was prevented from using a bathroom that was consistent with her gender identity as among the allegations that supported her Title VII and ADA hostile work environment claims). The Commission also decided in *Lusardi* that the repeated and intentional use of pronouns inconsistent with an employee's gender identity could contribute to a hostile work environment. As described in footnote 42 of the guidance, even before *Bostock*, courts have considered evidence of intentional and repeated misgendering, viewed in light of the totality of circumstances, as potentially supportive of a hostile work environment claim.

Substance of the Guidance

Adding More Hypothetical Examples to the Final Guidance that Address Harassment in More Contexts

Comment: Numerous commenters urged the Commission to add additional examples illustrating how the EEO laws apply to potential harassment in a variety of contexts.

Response: The final guidance has many examples involving a broad range of circumstances. The new examples provide more comprehensive guidance on the EEOC's views as to the application of federal EEO laws to potential harassment scenarios. They also highlight how harassment can affect various vulnerable populations and underserved communities, including teen workers and survivors of gender-based violence. Discrimination against vulnerable populations and underserved communities is among the Commission's subject-matter priorities for fiscal years 2024-2028. *See* EEOC, Strategic Enforcement Plan Fiscal Years 2024-2028, **https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028 (https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028)** (last visited Apr. 12, 2024).

Ultimately, however, because of the fact-specific nature of these cases, the guidance necessarily cannot be exhaustive, and the guidance is not intended to

illustrate every possible factual situation that might involve unlawful harassment. Rather, the guidance presents the overarching legal standards that are applied to particular circumstances in evaluating whether the EEO laws have been violated and the employer is liable. The examples are intended to be merely a small representative sample to illustrate how the legal principles apply in certain circumstances.

Totality-of-Circumstances Test

Comment: Multiple commenters requested that the Commission clarify its discussion of how to determine whether harassment is actionable based on the totality of circumstances. Some contended that the proposed guidance places too much emphasis on severity and pervasiveness and fails to properly incorporate those considerations into the broader examination of the totality of circumstances.

Response: The final guidance has been restructured, and the discussion of objective hostility in section III.B has been revised to more clearly illustrate how to evaluate whether harassment creates a hostile work environment based on the totality of circumstances. As the Supreme Court has explained, harassment based on a protected trait violates EEO law when it is sufficiently severe or pervasive to alter the conditions of employment by creating a hostile work environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The Court has further explained that whether the work environment is hostile "can be determined only by looking at all the circumstances." *Id.* at 23. Consistent with this Supreme Court precedent, the Commission has retained separate discussions of severity and pervasiveness in the final guidance but further illustrated how they are evaluated, along with other considerations, in the context of the totality of the circumstances.

Interplay Between Statutory Harassment Prohibitions and Other Rights

Free Speech and Religion-Based Rights

Many of the individual comments addressed free speech and religion-based rights issues. Some addressed only free speech, and many addressed both free speech and religion-based rights. However, because the constitutional analysis of free

speech and religion-based rights is different, the Commission addresses them separately.

Free Speech

Comment: Numerous commenters, including the majority of private individuals who submitted form comments, contended that the draft guidance unconstitutionally infringes on the free-speech rights of employees or employers either by restricting their speech on certain issues, including abortion, or by requiring that they engage in certain speech, such as requiring the use of pronouns based on another individual's gender identity. Some commenters further requested clarification on the application of federal EEO laws to speech and expressive conduct that occurs outside the workplace, such as on personal social media accounts.

Response: The Commission fully recognizes the importance of protecting free speech and has added to the guidance specific language about the potential interaction between statutory harassment prohibitions and other legal doctrines, including the U.S. Constitution, at section I.A and footnote 363. The interplay between free speech protections and statutory harassment prohibitions in particular matters can be highly fact-specific, and the Commission will carefully consider these issues as presented on a case-by-case basis. A detailed discussion of free speech principles, however, is beyond the scope of this final guidance.

Some commenters also expressed concern that, as they understood the guidance, *any* workplace discussion of religious perspectives on certain issues, such as abortion or gender identity, would be unlawful harassment. That interpretation is not correct and is not the Commission's intent. As discussed in the final guidance, whether conduct constitutes unlawful harassment depends on all the circumstances and is only unlawful under federal EEO law if it creates a hostile work environment. To help clarify that potentially offensive conduct based on a protected characteristic does not necessarily constitute unlawful harassment, the final guidance includes language in section I.B and at the beginning of section II to emphasize that conduct is not necessarily unlawful merely because it is based on a protected characteristic and that conduct also must alter a term, condition, or privilege of employment, typically by creating a hostile work environment.

Finally, the Commission revised the draft to respond to requests that it clarify its position with respect to conduct that occurs outside the workplace. Section III.C.2.c of the final guidance explains that conduct that occurs outside the workplace, including on social media accounts, and that does not target the employer or its employees and is not brought into the workplace generally will not have an impact on the workplace and therefore will not contribute to a hostile work environment.

Religion-Based Rights

Religious Accommodation Under Title VII

Comment: Many commenters urged the EEOC to address the interplay between an employer's Title VII obligation to provide a reasonable accommodation for an employee's sincerely held religious beliefs, practices, and observances and its obligation to prevent and correct unlawful harassment in the workplace. Most of these comments focused on religious expression with regard to pronouns and cited the decision in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2020), which held that a public university violated a professor's constitutional right to free speech by refusing to accommodate his request not to refer to a transgender student using pronouns consistent with the student's gender identity, a practice that conflicted with his religious beliefs.

Response: Section IV.C.3.b.ii(b)(7) of the guidance addresses the interaction between statutory harassment prohibitions and Title VII religious accommodation requirements with respect to expression in the workplace. The Commission revised this section of the guidance by providing more detail about the Title VII precedent as well as new examples. The Commission also added language about the Supreme Court's recent decision in *Groff v. DeJoy*, 600 U.S. 447 (2023), which clarified the undue hardship standard in Title VII religious accommodation cases.

The Commission acknowledges that in some cases, the application of the EEO statutes enforced by the EEOC may implicate other rights or requirements including those under the United States Constitution, other federal laws such as the Religious Freedom Restoration Act (RFRA), or sections 702(a) and 703(e)(2) of Title VII. When the Commission is presented with individualized facts in an EEOC administrative harassment charge, the agency works with great care

to analyze the interaction of Title VII harassment law and the rights to free speech and free exercise of religion. For further information, see the relevant sections of EEOC's Compliance Manual Section on Religious Discrimination. EEOC, *Compliance Manual Section 12: Religious Discrimination*, No. 915.063, at §§ 12-I.C, 12-III.D, and Addendum (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination)** .

Similarly, the Commission fully recognizes the importance of the constitutional right to free speech, which was analyzed by the court in *Meriwether v. Hartop, supra*, a case cited by many commenters. While the plaintiff in that case did not plead a cause of action under Title VII, if a charge is filed with the EEOC raising similar issues, the EEOC will give the decision appropriate consideration. The Commission carefully considers the facts presented in EEOC charges alleging a failure to provide a reasonable accommodation for a religious belief, practice, or observance, and takes into consideration the employer, employment context, and other relevant facts.

Although cited in a few comments, the Commission did not cite or address in the final guidance the decision in *Kluge v. Brownsburg Community School Corp.*, 64 F.4th 861 (7th Cir. 2023). *Kluge* involves a Title VII religious accommodation claim related to pronoun and first-name use, but the Seventh Circuit vacated and remanded the case after the Supreme Court issued *Groff*. 2023 WL 4842324 (7th Cir. July 28, 2023). Once the courts have completed adjudication of *Kluge*, the Commission will give the final decision appropriate consideration when considering charges alleging these issues.

To assist employers with potential defenses, including religious defenses, in the context of individual charge investigations, the Commission is enhancing its administrative procedures and webpages. Specifically, the Commission will revise materials accompanying the Notice of Charge of Discrimination letter and related webpages to identify how employers can raise defenses in response to a charge. This information will be public and viewable by any employer with questions or concerns about how to raise a defense, including a religious defense, in the event that one of its employees files a charge of discrimination. The Commission also will update the Respondent Portal to encourage an employer to raise in its position statement (or as soon as possible after a charge

is filed) any factual or legal defenses it believes apply, including defenses based on religion.

As appropriate, the Commission will resolve a charge based on the information submitted in support of asserted defenses, including religious defenses, in order to minimize the burden on the employer and the charging party. Regardless of whether the Commission agrees with the employer's asserted defenses, those defenses are entitled to de novo review by a court in any subsequent litigation.

Interplay Between Statutory Harassment Prohibitions and the U.S. Constitution, Sections 702(a) and 703(e)(2) of Title VII, and RFRA

Comment: Numerous commenters expressed concern about the potential interaction of statutory prohibitions against discrimination, including unlawful harassment, with the religion-based rights of employees and employers, and they urged the Commission to clarify the interplay between statutory harassment prohibitions and religion-based rights protected under the U.S. Constitution, Title VII (the religious organization exceptions), and the Religious Freedom Restoration Act (RFRA).

Response: The Commission recognizes the importance of protecting religion-based rights. Because the interplay between religion-based rights and statutory harassment prohibitions can be highly fact-specific, the Commission will consider these issues as presented on a case-by-case basis. The Commission added language at section I.A. and footnote 363, which highlight the potential interaction between statutory harassment prohibitions and other legal doctrines, including the U.S. Constitution, RFRA, and sections 702(a) and 703(e)(2) of Title VII. The Commission also added more discussion, legal citations, and examples to section IV.C.3.b.ii(b)(7), which addresses balancing antiharassment and accommodation obligations with respect to religious expression. Readers seeking to learn more about the interplay between statutory harassment prohibitions and religion-based rights should consult relevant portions of the EEOC's Compliance Manual Section on Religious Discrimination. *See* EEOC, *Compliance Manual Section 12: Religious Discrimination*, No. 915.063, at §§ 12-I.C, 12-III.D, and Addendum (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination)** .

Finally, as noted above, to assist employers seeking to assert potential defenses, including religious defenses, in the context of individual charge investigations, the Commission is enhancing its administrative procedures and providing information to employers and respondents to charges.

National Labor Relations Act

Comment: Multiple commenters requested the Commission clarify the interplay between an employers' obligations to address workplace harassment under federal employment discrimination laws and to comply with the National Labor Relations Act.

Response: A discussion of the interaction of EEO laws with the National Labor Relations Act (NLRA), 29 U.S.C. § 157 et seq., is beyond the scope of this guidance, which is focused only on statutes enforced by the Commission. The National Labor Relations Board (NLRB) has the sole authority to enforce the NLRA. The EEOC consults with the NLRB's Office of General Counsel as needed to help ensure workable application of the statutory protections for both workers' civil rights and the NLRA.

---

[1] 477 U.S. 57 (1986).

[2] *See* EEOC, *Enforcement and Litigation Statistics*, **https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0)** (last visited Apr. 25, 2024).

[3] *See, e.g.*, *EEOC v. Sandia Transp., LLC*, No. 1:23-cv-00274 (D.N.M. consent decree entered Mar. 14, 2024) (settlement on behalf of four women subjected to sex harassment that included the owner repeatedly using various epithets and stating he hated "f*ckin' dealing with women"); *EEOC v. Schuff Steel Co.*, No. 2:22-cv-01653 (D. Ariz. consent decree entered Dec. 19, 2023) (settlement on behalf of a class of aggrieved Black and Latino employees alleging race- and national-origin-based harassment, including use of the N-word; calling Latino employees "beaners;" and ridiculing Latino employees who did not speak English well); *EEOC v. UFP Ranson, LLC*, No. 3:21-CV-00149 (N.D.W. Va. consent decree entered Sept. 28, 2023) (settlement of lawsuit alleging harassment based on race and religion on behalf of a Black Muslim worker who was repeatedly called race- and religion-based epithets;

told that members of the Ku Klux Klan worked at the facility; had objects thrown at him while he was praying; was physically intimidated and shoulder-checked; and was required to perform tasks by means that were unnecessarily onerous); *EEOC v. Chipotle Servs., LLC*, No. 2:22-cv-00279 (W.D. Wash. consent decree entered Sept. 14, 2023) (settlement on behalf of three female employees, including a teenager, subjected to a sexually hostile work environment that included touching, unwelcome sexual comments, and requests for sex); *EEOC v. T.M.F Mooresville, LLC*, No. 5:21-cv-00128 (W.D.N.C. consent decree entered Aug. 24, 2022) (settlement on behalf of a class of White housekeeping employees allegedly subjected to harassment based on race, which included use of racially derogatory terms such as "white trash"); *EEOC v. CCC Grp.,* 1:20-cv-00610 (N.D.N.Y. consent decree entered Aug. 9, 2021) (settlement on behalf of seven Black employees at an industrial construction site allegedly subjected to repeated racist slurs, displays of nooses, and comments about lynchings by White supervisors and coworkers); *EEOC v. Nabors Corp. Servs., Inc.*, No. 5:16-cv-00758 (W.D. Tex. consent decree entered Nov. 12, 2019) (settlement on behalf of nine Black employees and one White employee based on alleged racial harassment, which included employees being addressed as "n****r" and being referred to as the "colored crew," and retaliation, among other allegations).

[4] 42 U.S.C. § 2000e-5 (Title VII); 29 U.S.C. § 626 (Age Discrimination in Employment Act (ADEA)); 42 U.S.C. § 12117(a) (Americans with Disabilities Act (ADA)); 42 U.S.C. § 2000ff-6(a) (Genetic Information Nondiscrimination Act (GINA)). *This guidance addresses harassment claims under provisions of the federal EEO laws that prohibit discrimination by employers, including section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) (private sector and state and local government) and section 717 of Title VII, 42 U.S.C. § 2000e-16(a) (federal agencies). It does not address potential claims of unlawful harassment under provisions that prohibit discrimination by other entities covered under Title VII, such as employment agencies and labor organizations, including sections 703(b) and 703(c) of Title VII, 42 U.S.C. §§ 2000e-2(b) and 2000e-2(c). See, e.g.*, *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 84-85 (1st Cir. 2007) (upholding a jury verdict finding a union liable for sexual harassment that occurred during a union-sponsored bus trip).

The standards discussed here under EEOC-enforced laws will not necessarily apply to claims alleging unlawful harassment under other federal laws or under state or local laws.

[5] We note, for instance, that a discussion of the interaction of EEO laws with the National Labor Relations Act (NLRA), 29 U.S.C. § 157 et seq., is beyond the scope of this guidance, which is focused only on statutes enforced by the Commission. The National Labor Relations Board (NLRB) has the sole authority to enforce the NLRA. The EEOC consults with the NLRB's Office of General Counsel as needed to help ensure workable application of the statutory protections for both workers' civil rights and the NLRA.

[6] *See* 29 C.F.R. § 1695.2(c)(7)(i).

[7] For further information, see the relevant sections of EEOC's Compliance Manual Section on Religious Discrimination. EEOC, *Compliance Manual Section 12: Religious Discrimination*, No. 915.063, §§ 12-I.C, 12-III.D, and Addendum (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination)** .

[8] *See* section VI, *infra* (providing links to EEOC harassment-related resources).

[9] *See, e.g.*, *Laurent-Workman v. Wormuth*, 54 F.4th 201, 212 (4th Cir. 2022) (holding that the plaintiff established at least a plausible claim of race-based harassment where a White coworker's statements that she "could not understand African Americans because they cannot speak properly communicated racial enmity by summoning an odious trope about African American speech patterns"); *Gates v. Bd. of Educ.*, 916 F.3d 631, 633-34, 640-41 (7th Cir. 2019) (concluding that a reasonable jury could find that the plaintiff was subjected to a racially hostile work environment based on three incidents with his supervisor, specifically that his supervisor made a joke in which he referred to the plaintiff as a "sh*t-sniffing n****r," threatened to write up the plaintiff's "black ass," and stated he was "tired of you people" and again referred to the plaintiff as "n****r"); *Ellis v. Houston*, 742 F.3d 307, 314, 320-21 (8th Cir. 2014) (reversing a grant of summary judgment for the defendants on the plaintiffs' racial harassment claims under 42 U.S.C. §§ 1981 and 1983 where there was evidence of a widespread pattern of racial harassment that included racial stereotyping, such as referring to the African American plaintiffs as "the gang" or "the back of the bus" and addressing them with comments about the "hood" or fried chicken and watermelon); *Boone v. Old Colony Young Men's Christian Ass'n*, No. 13-13131, 2015 WL 7253676, at *3 (D. Mass. Nov. 17, 2015) (concluding that a reasonable jury could find that a reference to a pornographic movie with a title based on racial stereotypes constituted race-based harassment); *Chambers v. Walmart Stores, Inc.*, No. 1:14CV996, 2015 WL 4479100, at *1, *3 (M.D.N.C. July 22,

2015) (recommending denial of a motion to dismiss a racial harassment claim alleging that a manager used racial slurs and negative racial stereotypes, such as referring to Black people as "Blackie" and using the term "ghetto" to describe the appearance of the store), *report and recommendation adopted*, 2015 WL 5147056 (Sept, 1, 2015).

[10] *See* EEOC, *Compliance Manual Section 15: Race & Color Discrimination* § 15-II (2006), **https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#II (https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#II)** ; *see also, e.g.*, *Ellis*, 742 F.3d at 314 (noting "[o]ffensive comments . . . about the qualities of black hair and black hairstyles" when describing a pattern of race-based harassment); *Fuller v. Fiber Glass Sys., LP*, 618 F.3d 858, 864 (8th Cir. 2010) (concluding that the evidence was sufficient to establish that the plaintiff's work environment was hostile where, among other things, the plaintiff alleged that she was admonished for answering the phones because "customers weren't used to hearing a black voice").

[11] *See, e.g.*, § II.B.3, *infra* (explaining that harassment based on stereotypes about a protected group need not be motivated by animus or hostility toward that group).

[12] *See* EEOC, *Compliance Manual Section 15: Race & Color Discrimination* § 15-III (2006), **https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#III (https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#III)** ; *see also, e.g.*, *EEOC v. Pioneer Hotel, Inc.*, No. 2:11-CV-01588, 2013 WL 3716447, at *3 (D. Nev. July 15, 2013) (denying a motion to dismiss a claim of harassment against a class of Latino and/or dark-skinned employees based on national origin and/or skin color); *Wiltz v. Christus Hosp. St. Mary*, No. 1:09-CV-925, 2011 WL 1576932, at *8 (E.D. Tex. Mar. 10, 2011) (stating harassment is based on color when the complained-of conduct has a color-related character or purpose and collecting cases supporting the same); *Brack v. Shoney's, Inc.*, 249 F. Supp. 2d 938, 953-55 (W.D. Tenn. 2003) (holding there was sufficient evidence of color-based harassment to survive the employer's summary judgment motion where the plaintiff's supervisor called him "little black sheep" and expressed a preference for a "fair skinned" manager, among other things); *cf. Etienne v. Spanish Lake Truck & Casino Plaza, LLC*, 778 F.3d 473, 477 (5th Cir. 2015) (vacating summary judgment for the employer regarding its failure to promote the plaintiff to a managerial position where the plaintiff offered evidence that she was qualified for the position and provided direct evidence that she was not considered for the position because of

her skin color); *Arrocha v. City Univ. of N.Y.,* No. CV-02-1868, 2004 WL 594981, at *6 (E.D.N.Y. Feb. 9, 2004) (concluding that the plaintiff had alleged color, not race, discrimination where the plaintiff claimed light-skinned Hispanics were favored over dark-skinned Hispanics); *Walker v. Sec'y of the Treasury*, 713 F. Supp. 403, 405-08 (N.D. Ga. 1989) (concluding that the plaintiff stated a claim for relief under Title VII where she alleged that her supervisor, a Black woman with dark skin, terminated the plaintiff, also a Black woman, because of her light skin color), *aff'd without opinion*, 953 F.2d 650 (11th Cir. 1992).

13 This example is adapted from the facts in *EEOC v. Rugo Stone, LLC*, No. 1:11-cv-915 (E.D. Va. consent decree entered Mar. 6, 2012).

14 *See, e.g.*, *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (concluding that the plaintiff could establish that he was harassed based on his national origin, Korean, where his supervisor allegedly subjected Korean workers to abuse based on their failure to "live up" to the stereotype that Korean workers are "better than the rest").

15 *See* 29 C.F.R. § 1606.1 ("The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity . . . because an individual has the physical, cultural or linguistic characteristics of a national origin group."); EEOC, *Enforcement Guidance on National Origin Discrimination* § II.B (2016)https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm#_Toc451518801 (stating that national origin discrimination includes discrimination based on physical, linguistic, or cultural traits); *see also, e.g.*, *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 799-801 (8th Cir. 2003) (holding that evidence of frequent harassment, including taunts about a Hispanic employee's accent and statements that "Hispanics should be cleaning" and that "Hispanics are 'stupid,'" was sufficient to show that an employee was subjected to pervasive harassment that created a hostile work environment); *Gonzales v. Eagle Leasing Co.*, No. 3:13-CV-1565, 2015 WL 4886489, at *5 (D. Conn. Aug. 14, 2015) (holding that a reasonable jury could find that the plaintiff was subjected to a hostile work environment based on race, national origin, and ethnicity where the harassment included derogatory comments about traditional Cuban food); *Garcia v. Garland Indep. Sch. Dist.,* No. 3:11-CV-502, 2013 WL 5299264, at *4-6 (N.D. Tex. Sept. 20, 2013) (declining to grant summary judgment where a hostile work environment claim included an allegation that the defendant's employees mocked the plaintiff's mispronunciation of words

and ridiculed her for lack of English fluency); *Syed v. YWCA of Hanover*, 906 F. Supp. 2d 345, 355-56 (M.D. Pa. 2012) (holding that a fact finder could infer that harassment was based on race or national origin where the plaintiff's supervisor criticized her "awful" Pakistani-styled dress, called her a "brown b*tch," suggested she did not know how to open a door due to her national origin, and told her she needed to learn to drive because "we don't ride camel[s] here").

[16] Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). This term is broad and is not limited to traditional or organized religions. However, social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII. EEOC, *Compliance Manual Section 12: Religious Discrimination*, No. 915.063, § 12-I.A.1 (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_95936825968216107486470 76 (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_95936825968216107486470 76)** .

[17] *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 613-17 (9th Cir. 1988) (applying Title VII to religious discrimination claim based on atheism); *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140, 143-44 (5th Cir. 1975) (same); *Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 329 ("Under Title VII, atheists are entitled to the exact same protection as members of other religions.") (E.D. Pa. 2016); *see also Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (noting that firing someone for being an atheist violates Title VII's prohibition against religious discrimination); *Scott v. Montgomery Cnty. Sch. Bd.*, 963 F. Supp. 2d 544, 559 n.11 (W.D. Va. 2013) ("Title VII's definition of 'religion' includes 'all aspects of religious observance and practice, as well as belief . . . .' and . . . protects persons who are not members of organized religious groups as well as atheists." (internal citation omitted)).

[18] *See, e.g.*, *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 443-44 (5th Cir. 2011) (holding that a fact finder could conclude that the plaintiff was subjected to unlawful religious harassment, which included disparaging comments about his religious beliefs); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 314 (4th Cir. 2008) (reversing summary judgment for the employer on a religious harassment claim that included evidence that the employee was harassed, in part, because of his religious headwear).

[19] *See, e.g.*, *Sunbelt Rentals, Inc.*, 521 F.3d at 316-18 (reversing summary judgment for the employer where there was evidence that a Muslim employee was subjected to persistent religious harassment, which included repeatedly referring to the employee as "Taliban" or "towel head," challenging the employee's allegiance to the United States, and stereotyping Muslims as terrorists).

[20] *See, e.g.*, *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 279 (3d Cir. 2001) (holding that a reasonable jury could find that hostility directed toward an Orthodox Jewish college professor regarding her insistence that she not work during the Sabbath constituted harassment based on religion); *Ibraheem v. Wackenhut Servs., Inc.*, 29 F. Supp. 3d 196, 203, 214 (E.D.N.Y. 2014) (holding that a reasonable jury could conclude that the plaintiff was subjected to unlawful religious harassment after he received an exception to the employer's no-beard policy as a reasonable accommodation when, for example, supervisors asked the plaintiff to see the letter documenting his religion and disciplined him for various infractions shortly thereafter).

For more information on religious discrimination, see **https://www.eeoc.gov/religious-discrimination (https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.eeoc.gov%2Freligious-discrimination&data=05%7C02%7CERNEST.HAFFNER%40EEOC.GOV%7C0397ed2e83794acef8b508dc649c0eaf%7C3ba5b9434e564a2f9b91b1f1c37d645b%7C0%7C0%7C638495868628661952%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=Aph0elAVg7%2Bkn4u4%2BCImcHiV1wCoakEee52omKzX45A%3D&reserved=0)** (last visited Apr. 24, 2024) (discussing religious discrimination and providing links to other EEOC resources).

[21] For a detailed discussion and additional examples of Title VII's prohibition against harassment because of religion, see section 12-III.B of EEOC's Compliance Manual Section on Religious Discrimination. EEOC, *Compliance Manual Section 12: Religious Discrimination*, No. 915.063, §12-III.B (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_399804943246016107488776 28 (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_399804943246016107488776 28)** .

[22] *See Winspear v. Cmty. Dev., Inc.*, 574 F.3d 604, 608 (8th Cir. 2009) (remanding hostile work environment claim to the district court in order to address summary judgment motion in the first instance where the district court had noted that the plaintiff "'may have raised a genuine issue of material fact as to whether [] repeated comments about [the plaintiff's] brother suffering in Hell and . . . needing to find God constituted a hostile work environment'" but also had erroneously analyzed the hostile work environment claim as a constructive discharge claim).

[23] *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620-21 (9th Cir. 1988) ("Protecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination."); *see also Garcimonde-Fisher v. Area203 Mktg., LLC*, 105 F. Supp. 3d 825, 840 (E.D. Tenn. 2015) ("Title VII forbids employers from forcing employees to make [the] choice ["My religion or my job?"] whether overtly or covertly. Hostile work environment claims prevent employers from creating conditions that are inhospitable to any but those who share their beliefs."); *EEOC v. United Health Programs of Am., Inc.*, No. 1:14-cv-3673, 2020 WL 1083771, at *5-11 (E.D.N.Y. Mar. 6, 2020) (affirming jury verdict concerning a hostile work environment based on religion where employees were forced to participate in "new age" religious activities at work against their wishes).

[24] *See Tillery v. ATSI, Inc.*, 242 F. Supp. 2d 1051, 1058 (N.D. Ala. 2003) (summary judgment to employer denied where the owner "repeatedly subjected plaintiff to lectures about her prospects for salvation during working hours, made highly personal inquiries into her private life (e.g., the legitimacy of her children, and whether a prior marriage had been terminated by divorce versus the doctrine of annulment sanctioned by the Catholic Church), and 'strongly suggested [she] talk with God'"); *see also EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 837 (S.D. Ind. 2002) (discussing how employers' "expectations" regarding alleged voluntary participation in religious activities can amount to coercion).

[25] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (stating that sex-based harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" (alteration in original) (quoting 29 C.F.R. § 1604.11(a))); *see also, e.g.*, *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475 (5th Cir. 2002) (holding that the district court erred in granting judgment as a matter of law for the employer where sex-based harassment consisted of repeated touching, vulgar comments, propositions, and physical aggression).

[26] Harassment based on sex is often referred to interchangeably as sex-based harassment or sexual harassment, without regard to whether the harassment at issue involves what this document refers to as "sexual conduct."

[27] *See, e.g.*, *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 815 (6th Cir. 2013) (explaining that non-sexual conduct can be based on sex and therefore contribute to a sex-based hostile work environment); *Rosario v. Dep't of the Army*, 607 F.3d 241, 248 (1st Cir. 2010) (stating that conduct that does not have sexual connotations can contribute to a sex-based hostile work environment).

[28] *See infra* Example 35: Comparative Evidence Gives Rise to Inference that Harassment Is Based on a Protected Characteristic (providing an example of facially sex-neutral offensive conduct motivated by sex, such as bullying directed toward employees of one sex).

[29] This document does not analyze application of the Pregnant Workers Fairness Act to harassment based on an employee's request for, or receipt of, an accommodation.

[30] *See Walsh v. Nat'l Comput. Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) (upholding jury verdict finding the plaintiff was subjected to a hostile work environment based on pregnancy where the plaintiff's supervisor made numerous derogatory comments about her pregnancy and required the plaintiff to provide advance notice and documentation of doctor's appointments, even though the plaintiff's coworkers were not required to provide such information for appointments); *Fugarino v. Milling, Benson, Woodward LLP*, No. 21-594, 2022 WL 6743191, at *3 (E.D. La. Oct. 11, 2022) (denying summary judgment to the employer on the plaintiff's claim of pregnancy-based harassment alleging, among other things, that she was subjected to comments about the size of her breasts, the "shape and curves of her body" as an Italian pregnant woman, and how her "'milk' would come in" and make her breasts even larger); *Young v. AlaTrade Foods, LLC*, 2:18-CV-00455, 2019 WL 4245688, at *2 (N.D. Ala. Sept. 6, 2019) (denying summary judgment to the employer on the plaintiff's sexual harassment claim alleging that she was subjected to conduct that included comments from the plaintiff's supervisor who, upon learning she was pregnant, told her "he was upset because he did not want anyone else to have her," "made sexual hand gestures with his smock in front of her and told her that she had 'nice breasts' that were 'a nice size for sucking,'" said she had a "fine sexy ass," touched her, whispered in her ear, touched/grazed her buttocks, and showed her pictures of himself partially undressed).

[31] 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions ....").

[32] *See Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1260 (11th Cir. 2017) (concluding that Title VII prohibits discrimination based on breastfeeding); *EEOC v. Hous. Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (holding that Title VII prohibits discharging an employee because she is lactating).

[33] *See* EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* § I.A.3.d (2015), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA3d (https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA3d)** (stating that Title VII prohibits discrimination against a woman because she uses contraceptives and citing cases).

[34] *See id.* § I.A.4.c, **https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4c (https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4c)** ; *see also, e.g.*, *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that Title VII prohibits discrimination against a female employee because she has had an abortion); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (same). Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion. *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 267 (S.D.N.Y. 2007) (concluding that a declaration by a female employee that she was encouraged by a manager to get an abortion was anecdotal evidence supporting a class claim of pregnancy discrimination).

[35] *See Zuckerman v. GW Acquisition LLC*, No. 20-CV-8742, 2021 WL 4267815, at *2 (S.D.N.Y. Sept. 20, 2021) (denying the defendant's motion for summary judgment where two owners made a series of offensive comments about the plaintiff's decision to breastfeed and to pump breastmilk at the office, including one owner asking "'if he could 'have some milk in [his] coffee' and whether [the plaintiff] could 'just squirt it in there,'" and another owner "frequently yell[ing] 'pump station' or 'pumper' when he would pass the designated pumping area in the office").

[36] *See Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020); *Copeland v. Ga. Dep't of Corr.*, ___ F.4th ___, No. 22-13073, 2024 WL 1316677, at *5 (11th Cir. Mar. 28, 2024) (citing

Bostock and stating that "discrimination against transgender individuals like [the plaintiff] is discrimination 'because of sex'"); *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 995 (8th Cir. 2022) ("*Bostock* held that the statute's prohibition on employment discrimination 'because of sex' encompasses discrimination on the basis of sexual orientation and gender identity."); *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 598 (5th Cir. 2021) ("Under *Bostock v. Clayton County*, discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination under Title VII.").

In its decisions regarding federal employees' EEO claims, the Commission has concluded that discrimination on the basis of sexual orientation or gender identity violates Title VII. *See, e.g.*, *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *10-13 (Apr. 1, 2015) (finding that harassment violated section 717 of Title VII, which prohibits federal agencies from engaging in employment discrimination on the basis of sex, because the harassment was based on the plaintiff's gender identity); *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 15, 2015) (concluding as a matter of law that sexual orientation is inherently "a 'sex-based consideration,'" and that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under section 717 of Title VII).

[37] *Bostock* itself concerned allegations of discriminatory discharge, but the Supreme Court's reasoning in the decision about the nature of discrimination based on sex logically extends to claims of harassment that change the terms, conditions, or privileges of employment under section 703(a)(1) of Title VII. As a result, courts have readily found post-*Bostock* that claims of harassment based on one's sexual orientation or gender identity are cognizable under Title VII. *See, e.g.*, *Copeland*, 2024 WL 1316677, at *5 (citing *Bostock* and stating that "a transgender man who was harassed about his gender after coming out at work" was subjected to ""discrimination 'because of sex'"); *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 121 (4th Cir. 2021) ("[T]he Supreme Court's holding in *Bostock* makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes."); *Doe v. City of Det.*, 3 F.4th 294, 300 n.1 (6th Cir. 2021) (stating that harassment on the basis of transgender identity is sex discrimination under Title VII because "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex"); *Simmons v. Starved Rock Casework LLC*, No. 20-CV-1684, 2021 WL 5359017, at *2 (E.D. Wis. Nov. 17, 2021) (finding that the plaintiff had stated a claim for relief by alleging a hostile work environment based

on his heterosexual status); *Boney v. Tex. A&M Univ.*, No. 4:19-CV-2594, 2021 WL 3640714, at *4 n.5 (S.D. Tex. July 19, 2021) ("The Fifth Circuit has construed the Supreme Court's recent decision in *Bostock* as holding that Title VII prohibits workplace discrimination based on homosexuality[; therefore] a plaintiff may establish a Title VII violation by showing a hostile work environment based on sexual orientation discrimination." (citing *Newbury v. City of Windcrest*, 991 F.3d 672, 676-77 (5th Cir. 2021))); *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018) (Title VII covers both failure to conform to sex stereotypes and transgender or transitioning status), *aff'd sub nom. Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) ("It naturally follows [from *Bostock*] that discrimination based on gender stereotyping falls within Title VII's prohibitions."). In addition, in the context of federal sector cases, the Commission has concluded that sex-based harassment includes harassment based on sexual orientation or gender identity. *See, e.g.*, *Lusardi*, 2015 WL 1607756, at *10-13 (finding that harassment based on the plaintiff's transgender status violates section 717); *Baldwin*, 2015 WL 4397641, at *7-8 (stating that discrimination, including harassment, that is based on sexual orientation violates section 717).

[38] *See, e.g.*, *Eller v. Prince George's Cnty. Pub. Sch.*, 580 F. Supp. 3d 154, 173 (D. Md. 2022) (concluding that a reasonable jury could find that the plaintiff was subjected to gender identity-based harassment that was objectively severe or pervasive, including derogatory terms referring to her transgender status); *Brooks v. Temple Univ. Health Sys., Inc.*, No. 21-1803, 2022 WL 1062981, at *12 (E.D. Pa. Apr. 8, 2022) (denying summary judgment to the employer on the plaintiff sex-based hostile work environment claim where the plaintiff alleged, among other things, that he was called a "f*ggot").

[39] *See, e.g.*, *Roberts*, 998 F. 3d at 121 (stating that alleged physical assaults may be part of a pattern of objectionable, sex-based discriminatory behavior that supports a hostile environment claim); *Eller*, 580 F. Supp. 3d at 173 (holding that a reasonable jury could find that alleged harassment, which included "multiple physical assaults, including one incident when [a transgender teacher] was shoved out of a door, and two incidents . . . when students who had used slurs about her transgender status stepped and pressed down hard on her foot," was objectively severe or pervasive).

[40] *See, e.g.*, *Doe v. Arizona*, No. CV-18-00348, 2019 WL 2929953, at *3 (D. Ariz. July 8, 2019) (denying summary judgment to the employer on the plaintiff's sex-based

harassment claim where the plaintiff, a corrections officer, presented evidence including that "supervisors regularly disregarded his requests to conceal his status for the purpose of protecting his safety, and repeatedly engaged in behavior that may be considered harassment by a jury"); *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1017 (D. Nev. 2016) (denying summary judgment to the employer on a school police officer's sex-based harassment claim where the employee was "blindsided" by emails that the school district sent to every police department employee disclosing sensitive information about the plaintiff's sexual identity and invited coworkers to ask questions about his transition).

[41] *See, e.g.*, *Brooks*, 2022 WL 1062981, at *12 (stating that comments that included "being picked on for his feminine presentation" may be "severe enough to alter the conditions of one's work environment").

[42] *See Copeland*, 2024 WL 1316677, at *5-9 (concluding that a reasonable jury could find that a male transgender corrections officer was subjected to a sex-based hostile work environment where, among other things, supervisors, coworkers, and inmates intentionally and repeatedly referred to him using feminine pronouns or called him "ma'am"). Courts—even prior to the Supreme Court's *Bostock* decision—have viewed evidence of intentional misgendering of transgender persons as supportive of a hostile work environment claim under Title VII. *See, e.g.*, *Houlb v. Saber Healthcare Grp.*, No. 1:16CV02130, 2018 WL 1151566, at *2 (N.D. Ohio Mar. 2, 2018) (holding that the alleged misgendering, together with the other alleged offensive conduct, was sufficiently severe or pervasive to constitute a violation of Title VII for purposes of summary judgment); *Tudor v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2017 WL 4849118, at *1 (W.D. Okla. Oct. 26, 2017) (same); *Versace v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 6:14-cv-1003-Orl-31KRS, 2015 WL 12820072, at *7 (M.D. Fla. Dec. 3, 2015) (considering alleged misgendering to support the plaintiff's hostile environment claim, but finding the alleged incidents to be insufficiently frequent or severe to constitute a violation); *see also Triangle Doughnuts, LLC*, 472 F. Supp. 3d at 129-30 (holding that the employee plausibly alleged sex-based harassment based in part on being regularly misgendered); *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 758 (S.D. Ohio 2018) (same).

In federal sector EEO appeals, the Commission has concluded that misgendering and denial of access to a bathroom consistent with the individual's gender identity may constitute sex discrimination in violation of Title VII. *See, e.g.*, *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013)

(stating that repeated, intentional misuse of the name or pronoun with which a transgender employee identifies may constitute sex-based harassment); *Lusardi*, 2015 WL 1607756, at *10-13 (holding that a supervisor's repeated and intentional use of the incorrect name and pronouns for the complainant, in addition to the agency's refusal to allow the complainant to use the restroom consistent with her gender identity, were actions sufficiently severe or pervasive to subject the complainant to a hostile work environment based on her sex).

[43] *See, e.g.*, *Triangle Doughnuts*, 472 F. Supp. 3d at 129, 135 (listing allegations that plaintiff was prevented from using a bathroom that was consistent with her gender identity as among the allegations that supported her Title VII and ADA hostile work environment claims). In addition to being part of a harassment claim, denial of access to a bathroom consistent with one's gender identity may be a discriminatory action in its own right and should be evaluated accordingly. *See, e.g.*, *Lusardi*, 2015 WL 1607756, at *6-10 (finding that the agency subjected a transgender employee to disparate treatment when it restricted her access to the women's restroom on account of her gender identity).

[44] *See Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1217 (D. Or. 2002) (denying summary judgment to the employer where the alleged harassment included "questions such as, 'Do you wear the dick in the relationship?' and, 'Are you the man?'").

[45] This example is adapted from the facts in *Cunningham v. Burlington Coat Factory Warehouse Corp.*, No. 1:18-cv-11266, 2024 WL 863236 (D.N.J. Feb. 29, 2024).

Additional cases involving harassment based on gender identity include *Copeland*, 2024 WL 1316677; *Eller v. Prince George's Cnty. Pub. Sch.*, 580 F. Supp. 3d 154 (D. Md. 2022); *Grimes v. Cnty. of Cook*, 19-cv-6091, 2022 WL 1641887 (N.D. Ill. May 24, 2022); *Triangle Doughnuts*, 472 F. Supp. 3d 115; *Doe v. Arizona*, 2019 WL 2929953; and *Drew v. U.S. Dep't of Veterans Affs.*, No. CV H-16-3523, 2023 WL 186881 (S.D. Tex. Jan. 12, 2023).

[46] 29 U.S.C. § 623(a)(1) ("It shall be unlawful for an employer to . . . otherwise discriminate against any individual with respect to . . . [the] terms, conditions, or privileges of employment, because of such individual's age.").

[47] The ADEA does not apply to discrimination or harassment based on workers being younger than others, such as harassment based on the belief that someone is

too young for a certain position, even if the targeted individual is forty or over. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding that the ADEA does not prohibit favoring older workers over younger workers, even if the younger workers are within the protected class of individuals forty or older).

[48] *See, e.g.*, *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 442-43 (5th Cir. 2011) (holding that a fact finder could conclude that the plaintiff, a used car salesperson, was subjected to a hostile work environment based on his age where the plaintiff's supervisor had made profane, age-based references to the plaintiff up to half a dozen times a day, the supervisor had engaged in physically threatening behavior toward the plaintiff, and the supervisor had "steered" sales away from the plaintiff and toward younger salespersons).

[49] *See, e.g.*, *Davis-Garett v. Urb. Outfitters, Inc.*, 921 F.3d 30, 42 (2d Cir. 2019) (the plaintiff adduced sufficient evidence of age-based hostile work environment where, in addition to age-based remarks, "from the start of her employment . . ., [she was] denied the training given to younger sales associates and relegated to work almost exclusively in the fitting room, and later [] assigned the most unpleasant and arduous duties"); *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 208 (5th Cir. 1986) (repeated inquiries into the plaintiff's retirement plans constituted evidence of "intentional harassment" sufficient to support claim of age-based constructive discharge); *see also Written Testimony of Patrick Button, Assistant Professor, Department of Economics, Tulane University*, EEOC Meeting of June 14, 2017 - The ADEA @ 50 - More Relevant Than Ever, **https://www.eeoc.gov/meetings/meeting-june-14-2017-adea-50-more-relevant-ever/button (https://www.eeoc.gov/meetings/meeting-june-14-2017-adea-50-more-relevant-ever/button)** (discussing evidence of age discrimination in hiring).

[50] Under Title I of the Americans with Disabilities Act, a disability is "a physical or mental impairment that substantially limits one or more [of an individual's] major life activities"; a "record of such an impairment"; or "being regarded as having such an impairment," if the individual establishes that he or she has been subjected to an adverse employment action, such as harassment, because of an actual or perceived physical or mental impairment and that impairment is not both transitory and minor. *Id.* § 12102(1), (3).

[51] 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment."). Section 501 of the Rehabilitation Act of 1973 prohibits

employment discrimination against applicants or employees of the federal government who are individuals with disabilities. 29 U.S.C. § 791. The Rehabilitation Act Amendments of 1992 made clear that the standards applied under Title I of the ADA also apply to Section 501 employment discrimination claims. 29 U.S.C. § 791(g).

[52] *See, e.g.*, *Quiles-Quiles v. Henderson*, 439 F.3d 1, 4, 7-8 (1st Cir. 2006) (affirming a jury verdict finding that a Postal Service employee was subjected to a hostile work environment based on his mental disability (depression) when supervisors mocked him on a daily basis about his mental impairment and commented to other employees that he was a "great risk" because he was receiving psychiatric treatment); *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 178-79 (4th Cir. 2001) (upholding a jury finding that the plaintiff, who suffered from chronic back issues, was subjected to a hostile work environment based on disability where two supervisors constantly berated him and other workers with disabilities and encouraged other employees to ostracize workers with disabilities and refuse to give them materials they needed to do their jobs).

[53] *See, e.g.*, *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 75-76 (2d Cir. 2019) (concluding that an employee with Tourette's Syndrome and obsessive compulsive disorder had raised a material issue of fact as to whether he was subjected to ongoing and pervasive discriminatory conduct based on disability when coworkers mocked his verbal and physical tics); *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 446 (5th Cir. 2017) (concluding that a reasonable jury could find that the plaintiff was subjected to severe or pervasive disability-based harassment where he had presented evidence that coworkers repeatedly mocked his stutter and his supervisor mocked him in a department-wide meeting); *Martsolf v. United Airlines, Inc.*, No. 13-1581, 2015 WL 4255636, at *13 (W.D. Pa. July 14, 2015) (rejecting the employer's motion for summary judgment on the disability-based harassment claim of a plaintiff with a hearing and speech disability where there was evidence that employees screamed at the plaintiff when she could not hear them and mocked the way she spoke); *cf. EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 733 (5th Cir. 2007) (affirming jury verdict finding intentional discrimination where, among other things, a supervisor "stated that he no longer wanted to see [the plaintiff's] 'cr*ppled crooked self, going down the hall hugging the walls'").

[54] *See Patton*, 874 F.3d at 446 (concluding that repeated mocking of a stutter "rises above simple teasing and offhand comments" and can support a hostile work environment claim); *see also Salas v. N.Y.C. City Dep't of Investigation*, 298 F. Supp. 3d

676, 684-85 (S.D.N.Y. 2018) (concluding that daily mimicking of a stutter by a coworker is "a very specific and self-explanatory form of bullying" that is sufficient to survive a motion to dismiss).

[55] *See, e.g.*, *Fox v. Gen. Motors Corp.*, 247 F.3d at 174 (upholding a jury verdict on a disability harassment claim based in part on evidence that a supervisor made disparaging comments about employees with disabilities assigned light duty, including calling them "hospital people," supervising their work more closely, and segregating them from other employees); *Pantazes v. Jackson*, 366 F. Supp. 2d 57, 71 (D.D.C. 2005) (holding that a jury could find that unreasonably lengthy delays in responding to the plaintiff's accommodation requests, combined with other harassing acts, were sufficient to establish a hostile work environment).

Harassment based on an individual's request for, or receipt of, a reasonable accommodation also could violate the ADA's interference provision, *see* 42 U.S.C. § 12203(b); 29 C.F.R. § 1630.12(b), and/or the ADA's retaliation provision, *see* 42 U.S.C. § 12203(a); EEOC, *Enforcement Guidance on Retaliation and Related Issues* § II.A.2.e (2016), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#e._Example (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#e._Example)** s.

[56] 42 U.S.C. § 12102(1)(C), (3) (providing that an individual has a disability if the individual is "regarded as having . . . an impairment"; and that an individual meets this requirement if the individual has been "subjected to an action prohibited [under the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity"); 29 C.F.R. § 1630.2(g)(1)(iii) (noting that the ADA's protections apply where an "individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor'"); *see, e.g.*, *Quiles-Quiles*, 439 F.3d at 5-8 (concluding with respect to the plaintiff's disability harassment claim that the evidence supported the jury's finding that the plaintiff was discriminated against because he was either actually disabled or perceived as such by his employer).

[57] 42 U.S.C. § 12102(1)(A)-(B) (including within the definition of disability a record of a physical or mental impairment).

[58] The ADA expressly prohibits associational discrimination. *See* 42 U.S.C. § 12112(b)(4) (stating that discrimination against a qualified individual with a disability includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association"); 29 C.F.R. § 1630.8 ("It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or *otherwise discriminate against*, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association." (emphasis added)); *see, e.g.*, *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 467-70 (2d Cir. 2019) (ruling that the plaintiff stated a claim of associational discrimination under the ADA where he alleged that he was qualified to perform his job but was discriminated against based on his employer's perception that he was unavailable or distracted due to his daughter's medical condition).

Harassment based on association under other EEO statutes also is discussed below at notes 67 -71 and accompanying text.

[59] Genetic information is defined to include an "individual's genetic test," "genetic tests of family members," and "the manifestation of a disease or disorder in family members." 42 U.S.C. § 2000ff(4)(A). The definition of genetic information also includes "any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by [an] individual or any family member of such individual." 42 U.S.C. § 2000ff(4)(B). Genetic information is further defined to include, "with respect to [] an individual or family member of an individual who is a pregnant woman, [the] genetic information of any fetus carried by such pregnant woman," and "with respect to an individual or family member utilizing an assisted reproductive technology, [the] genetic information of any embryo legally held by the individual or family member." 42 U.S.C. § 2000ff-8(b).

[60] 42 U.S.C. § 2000ff-1(a)(1) ("It shall be an unlawful employment practice for an employer to . . . discriminate against any employee with respect to the . . . terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee.").

[61] 42 U.S.C. § 2000ff(4)(A).

[62] Cases alleging harassment under GINA based on the manifestation of a disease or disorder in a family member likely will also be covered by the ADA's prohibition

against associational discrimination. *See supra* note 58 (discussing associational discrimination under the ADA). For example, if an employee is harassed because the employee's mother has cancer, then the employee may raise claims under GINA, as well as under the ADA for associational discrimination.

[63] *E.g.*, 42 U.S.C. § 2000e-3(a); *see also* EEOC, *Enforcement Guidance on Retaliation and Related Issues*, § II.A (2016), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues)** (discussing participation and opposition as protected activity).

[64] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006); *see also Laster v. City of Kalamazoo*, 746 F.3d 714, 731 (6th Cir. 2014) (applying the *Burlington Northern* standard).

[65] *See, e.g.*, *Carr v. NYC Transit Auth.*, 76 F.4th 172, 181 (2d Cir. 2023) ("[W]hen analyzing a retaliation claim, the sole inquiry regarding the third element of the prima facie case is whether the allegedly retaliatory actions were materially adverse. Even if a plaintiff labels her retaliation claim as a 'retaliatory hostile work environment' claim, courts should not consider whether the allegedly retaliatory actions meet the higher 'severe and [sic] pervasive' standard. All that is relevant is whether the actions, taken in the aggregate, are materially adverse and would dissuade a reasonable employee from making a complaint of discrimination."); *Chambers v. Dist. of Columbia*, 35 F.4th 870, 876 (D.C. Cir. 2022) (en banc) ("[T]here are fundamental differences between the antidiscrimination and the antiretaliation provisions. . . . Unlike the antidiscrimination provision, the antiretaliation provision is not expressly limited to actions affecting the terms, conditions, or privileges of employment."); *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862 (11th Cir. 2020) ("[T]he standard applicable to all Title VII retaliation claims is the *Burlington Northern* 'well might have dissuaded' standard."); *Moore v. City of Phila.*, 461 F.3d 331, 341-42 (3d Cir. 2006).

[66] *See, e.g.*, *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1299 (11th Cir. 2012) ("[A] harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment."); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (concluding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers repeatedly referred to an employee of

Indian descent as "Taliban" or "Arab" and stated that "[t]his is America . . . not the Islamic country where you came from," even though the harassing comments did not accurately describe the employee's actual country of origin); *Goings v. Lopinto*, No. 22-2549, 2023 WL 2709826, at *5 (E.D. La. Mar. 30, 2023) (stating that "[d]iscrimination on the basis of sexual orientation, including perceived sexual orientation, is prohibited under Title VII" and denying the employer's motion to dismiss where the plaintiff alleged he was called slurs and derogatory terms targeting homosexual individuals by his supervisor, who perceived the plaintiff as gay after seeing a photograph of the plaintiff shirtless and wrestling another male coworker); *Kallabat v. Mich. Bell Tel. Co.*, No. 12-CV-15470, 2015 WL 5358093, at *3-4 (E.D. Mich. June 18, 2015) (denying summary judgment to the employer on the plaintiff's claim that he was harassed based on the mistaken perception that he was Muslim); *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 844, 849 (D. Md. 2015) (holding that an employee of Persian descent stated a valid claim of national origin discrimination and harassment even though her employer mistakenly believed her to be a member of the Parsee ethnic group, which the plaintiff researched and believed originated in India and was a lower caste). *But see, e.g.*, *Yousif v. Landers McClarty Olathe KS, LLC*, No. 12-2788, 2013 WL 5819703, at *3-4 (D. Kan. Oct. 29, 2013) (stating that "perceived" discrimination claims are not cognizable under Title VII); *El v. Max Daetwyler Corp.*, No. 3:09-CV-415, 2011 WL 1769805, at *5-6 (W.D.N.C. May 9, 2011) (rejecting the proposition that Title VII provides a claim for discrimination based on misperception), *aff'd*, 451 F. App'x 257 (4th Cir. 2011).

67 *See, e.g.*, *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263, 272 (1st Cir. 2022) (concluding that claims alleging discrimination based on interracial association "are fundamentally consistent with *Bostock v. Clayton County*, 590 U.S. 644 (2020)] and Title VII's plain language prohibiting action 'because of such individual[ ]' plaintiff's race"); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009) (observing that "Title VII protects individuals who . . . are 'victims of discriminatory animus toward [protected] third persons with whom the individuals associate'" and that a complainant may be discriminated against based on his own race because the difference between his race and the race of the individual with whom he associated was the cause of the discrimination (quoting *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999))); *Holcomb v. Iona Coll.*, 521 F.3d 130, 138-39 (2d Cir. 2008) (holding that Title VII prohibits discrimination based on interracial association and observing that multiple other circuits agree); *cf. Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175-78 (2011)

(holding that the plaintiff had standing to sue under Title VII where he alleged that his employer terminated him in order to retaliate against his fiancée for a sex discrimination charge she filed against their mutual employer; in authorizing a "person aggrieved" to file a charge or bring a lawsuit, Title VII provides a cause of action to those within the "zone of interests" "arguably [sought] to be protected by the statute"); *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 467-70 (2d Cir. 2019) (ruling that the plaintiff had stated a claim of associational discrimination under the ADA where he alleged that he was qualified to perform his job but was discriminated against based on his employer's perception that he was unavailable or distracted due to his daughter's medical condition).

[68] *See, e.g.*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 128 (2d Cir. 2018) (en banc) ("[W]e hold that sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes and thereby discriminates against an employee based on their own sex, constitutes discrimination 'because of . . . sex.'"), *aff'd on other grounds sub nom. Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

[69] *Holcomb*, 521 F.3d at 131.

[70] *Tetro*, 173 F.3d at 994 ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child.").

[71] *See, e.g.*, *Barrett*, 556 F.3d at 513 (concluding that the district court erred in rejecting two White employees' claim of associational discrimination on the grounds that they failed to show the "requisite degree of association" with Black coworkers and explaining that the degree of association is irrelevant in assessing whether a plaintiff has a valid claim of associational discrimination (citing *Drake v. 3M*, 134 F.3d 878, 884 (7th Cir. 1998)); *cf. Kengerski v. Harper,* 6 F.4th 531, 534-35, 539 (3d Cir. 2021) (noting that associational discrimination is not limited to close or substantial relationships and ruling that the complainant could pursue his retaliation claim for making a complaint regarding harassment based on his association with his biracial grand-niece).

[72] *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77-79 (1998) (involving male employees sexually harassing a male coworker); *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 908 (7th Cir. 2018) (rejecting "entirely" the view that it "strains credulity" that African Americans might be subjected to

unlawful race-based harassment where many managers in the same workplace were also African American and explaining that there are many reasons why women and minorities might tolerate discrimination against members of their own class or might participate in the discrimination themselves).

[73] *See Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 438 (5th Cir. 2011).

[74] This example is adapted from the facts in *Kang v. U. Lim Am., Inc.*, 296 F.3d 810 (9th Cir. 2002).

[75] *See, e.g.*, *Masud v. Rohr-Grove Motors, Inc.*, No. 13 C 6419, 2015 WL 5950712, at *3-5 (N.D. Ill. Oct. 13, 2015) (denying summary judgment for the employer on the plaintiff's harassment claim based on "evidence, viewed in the light most favorable to plaintiff, support[ing] a pervasive pattern of discriminatory harassment based on not one but various protected characteristics all at once"); *see also Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (recognizing a claim of intersectional discrimination against an Asian woman, despite favorable consideration of an Asian man and a White woman, noting that "when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex" (emphasis in the original)); *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032-34 (5th Cir. 1980) (recognizing that "discrimination against black females can exist even in the absence of discrimination against black men or white women").

[76] *See, e.g.*, *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1048 (10th Cir. 2020) (recognizing Title VII claim alleging discrimination against older women).

[77] *E.g.*, *Ahmed v. Astoria Bank*, 690 F. App'x 49, 51 (2d Cir. 2017) (holding that a reasonable jury could find that the plaintiff was subjected to unlawful harassment based on race, national origin, and religion, based in part on a senior supervisor's comments that she should remove her hijab, which he called a "rag," and his comment on September 11, 2013, that the plaintiff and two other Muslim employees were "suspicious" and that he was thankful he was "in the other side of the building in case you guys do anything").

[78] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the

basis of gender."); *Tang v. Citizens Bank*, 821 F.3d 206 (1st Cir. 2016) (reversing summary judgment for the employer where harassment of an Asian woman included a discussion of the purported obedience of Asian women); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459 (5th Cir. 2013) (en banc) (upholding a jury verdict on the grounds that a claim that a male employee was harassed because of sex could be established by evidence showing that the male harasser targeted the employee for not conforming to the harasser's "manly-man" stereotype); *Waldo v. Consumers Energy Co.*, 726 F.3d 802 (6th Cir. 2013) (harassment of a female employee in a heavily male environment included telling her to "pee like a man" and ridiculing her for carrying a purse); *Rosario v. Dep't of Army*, 607 F.3d 241, 244 (1st Cir. 2010) (harassment included a supervisor constantly complaining about the plaintiff's work attire and bringing coworkers to look at her clothes); *Prowel v. Wise Bus. Forms, Inc*., 579 F.3d 285 (3d Cir. 2009) (denying summary judgment for employer where the plaintiff was harassed based on gender stereotypes of how a man should look, speak, and act because the plaintiff had a high voice; walked in a certain manner; did not curse; was very well groomed; crossed his legs; and discussed topics like art, music, and interior design); *Kang*, 296 F.3d 810 (hostile work environment claim based on supervisor's stereotypical notions that Korean workers were better than others and that the plaintiff failed to live up to his supervisor's expectations); *Nichols v. Azteca Rest. Enters*., 256 F.3d 864 (9th Cir. 2001) (systemic abuse of a male restaurant employee for failing to conform to male stereotypes); *Eller v. Prince George's Cnty. Pub. Sch.*, 580 F. Supp. 3d 154 (D. Md. 2022) (employer's response to harassment of transgender teacher included trying to hide plaintiff's gender identity by restricting her clothes, footwear, make-up, and nail polish); *Membreno v. Atlanta*, 517 F. Supp. 3d 425 (D. Md. 2021) (harassment of transgender worker included questioning how a man could be attracted to her and ridiculing and demeaning her when she used the ladies' bathroom to the point that she would avoid relieving herself); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (harassment of transgender worker included being subjected to a stricter dress code than other female employees); *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018) (denying motion to dismiss transgender woman's hostile work environment claim, which included allegations that she was told to "just dress like a man," that she made an "ugly woman," and that after the worker complained of several years of harassment, she was told to "be like a man" and "act like a man"); *Salinas v. Kroger Tex., L.P.*, 163 F. Supp. 3d 419 (S.D. Tex. 2016) (harassment of male coworker was based on the harasser's perception that the plaintiff was effeminate and had "a body like a woman"); *Barrett v. Pa. Steel*

Co., No. 2:14-CV-01103, 2014 WL 3572888 (E.D. Pa. July 21, 2014) (male plaintiff who worked in "office" portion of facility stated claim of sex harassment where he alleged that he was "made fun of and sexually harassed because he did not participate in cursing or engage in crude banter as did his male co-workers from the 'shop' portion of the facility"); *Zhao v. State Univ. of New York.*, 472 F. Supp. 2d 289, 313 (E.D.N.Y 2007) (denying the employer's motion for summary judgment where evidence included "facially neutral incidents [that] could be consistent with an employer [] punishing an employee for not achieving a standard of performance that has been improperly inflated due to impermissible ethnic stereotyping" where supervisor allegedly made comments suggesting "Chinese employees should work longer and harder than anyone else"); *Rubin v. Kirkland Chrysler-Jeep, Inc.*, 98 Fair Empl. Prac. Cas. (BNA) 159, 2006 WL 1009338 (W.D. Wash. Apr. 13, 2006) (harassment included references to stereotypes of Jews as both cheap and unduly interested in money).

[79] *See Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089, 2004 WL 2066770, at *6 (D. Minn. Aug. 13, 2004) (concluding that the plaintiff had presented sufficient evidence to send her harassment claim to a jury where she experienced repeated comments and other conduct implying or stating that she was unqualified and could be fired at any time because she was a woman and because she spent too much time caring for her children); *see also Chadwick v. Wellpoint*, *Inc.*, 561 F.3d 38, 42, 47-48 (1st Cir. 2009) (holding that a reasonable jury could find that the plaintiff, the mother of an eleven-year-old and six-year-old triplets, was denied a promotion based on the "common stereotype about the job performance of women with children").

[80] *See Burns v. Johnson*, 829 F.3d 1, 13-14, 17 (1st Cir. 2016) (holding that a reasonable jury could conclude that a male supervisor's harassment of a female subordinate was based, in part, on the gender stereotype that women do not belong in positions of leadership).

[81] *See, e.g.*, *Price Waterhouse*, 490 U.S. at 250.

[82] *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (describing insults directed at Black employees based on negative stereotyping such as "don't touch anything" and "don't steal" as "inherently racist").

[83] The causation principles discussed in this enforcement guidance focus on hostile work environment claims. As discussed below in section III.A, however, unlawful harassment can also involve an explicit change to a term, condition, or privilege of

employment, such as the denial of a promotion for rejecting sexual advances. For more guidance on how to evaluate an allegation involving an explicit change to employment, refer to EEOC guidance that discusses discriminatory employment decisions. *See, e.g.*, EEOC, *Enforcement Guidance on National Origin Discrimination* § III (2016), **https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518806 (https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518806)** ; EEOC, *Compliance Manual Section 15: Race & Color Discrimination* § 15-V.A (2006), **https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VA (https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VA)** .

[84] *See, e.g.*, *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 991 (8th Cir. 2003) (holding that the employer was entitled to summary judgment where evidence showed that harassment was based on inter-departmental politics and personality conflicts).

[85] In this example, there was no evidence that the harassment was based on color, national origin, or any another legally protected characteristic. By contrast, harassment based on a legally protected characteristic is covered under EEO law even if it also is based on non-protected reasons.

[86] This example is adapted from the facts in *Webb v. Merck & Co.*, 450 F. Supp. 2d 582 (E.D. Penn. 2006). "A reasonable jury could find that statements such as 'my animals' and 'zookeeper,' when used in referring solely to African-American employees, 'send a clear message and carry the distinct tone of racial motivations and implications. They could be seen as conveying the message that members of a particular race are disfavored and that members of that race are, therefore, not full and equal members of the workplace.'" *Id.* at 597 (quoting *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1083 (3d Cir. 1996)); *see also Galdamez v. Potter*, 415 F.3d 1015, 1024 n.6 (9th Cir. 2005) ("[T]here are no 'talismanic expressions' of racial animus necessary to sustain a harassment claim, and . . . racially charged 'code words' may provide evidence of discriminatory intent by 'sending a clear message and carrying the distinct tone of racial motivations and implications.'" (quoting *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1117 (9th Cir. 2004))).

For a discussion of how the link between harassment and a protected basis can be established by context, see section II.B.4.

[87] *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986) (citing 29 C.F.R. § 1604.11(b) for the proposition that "the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of the circumstances'").

[88] In this document, use of the term "discriminatory" to describe conduct means only that the conduct was based on a protected characteristic and does not indicate that conduct necessarily satisfies other legal requirements to establish that the conduct violates federal EEO laws, such as creating a hostile work environment.

[89] *See, e.g.*, *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 63 (1st Cir. 2019) (stating that "the use of sexually degrading, gender-specific epithets, such as . . . 'b*tch,' . . . constitute[s] harassment based upon sex" (omissions and second alteration in original) (quoting *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007))); *Arrieta-Colon v. Wal-Mart P.R., Inc.*, 434 F.3d 75, 80, 89 (1st Cir. 2006) (agreeing with the lower court that there was sufficient evidence to support the jury verdict on the plaintiff's ADA hostile work environment claim where the plaintiff had a medical condition relating to sexual dysfunction and was subjected to "constant mockery and harassment . . . by fellow coworkers and supervisors alike due to his condition," including comments about impotence, his "pump," and his sexual functioning); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185-86 (4th Cir. 2001) (holding that a workplace where a supervisor constantly referred to African Americans as "monkeys" and "n****rs" was a racially hostile work environment, noting that "the word 'n****r' is pure anathema to African-Americans" and that calling someone a "monkey" "goes far beyond the merely unflattering; it is degrading and humiliating in the extreme").

[90] *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 271 (6th Cir. 2009) (concluding that women were subjected to sex discrimination by conduct that was patently degrading to women, even though members of both sexes were exposed to the conduct, and concluding that such conduct discriminates against women, irrespective of the harasser's motive); *see also Roy*, 914 F.3d at 63 (noting that gender-specific epithets can ground a harassment claim "[r]egardless of [the harasser's] particular and subjective motives"); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1001 (10th Cir. 1996) (concluding that sex-based epithets discriminated against the plaintiff based on her sex even if they were motivated by gender-neutral reasons); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (concluding that use of the terms "n****r-rigged" and "black ass" supported a race-based hostile

work environment claim even though, the employer asserted, they were not "intended to carry racial overtones"); *cf. Int'l Union, United Auto., Aerospace & Agric. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1228-31 (10th Cir. 2015) (concluding that the district court erred in discounting the environmental effect of offensive race-based conduct when the court focused on the "ostensibly benign motivation or intent" of the alleged harassers).

[91] *Sharp v. S&S Activewear, LLC*, 69 F.4th 974, 981 (9th Cir. 2023) (concluding that "sexually graphic, violently misogynistic" music can give rise to a sex-based hostile work environment claim and that even if the music was not directed toward a particular woman, "female employees allegedly experienced the content in a unique and especially offensive way"); *Gallagher*, 567 F.3d at 271 (concluding that women were subjected to sex discrimination by conduct that was patently degrading to women, even though members of both sexes were exposed to the conduct).

[92] This example is adapted from the facts in *Mangel v. Graham Packaging Co.*, No. 14-CV-0147, 2016 WL 1266257 (W.D. Pa. Apr. 1, 2016).

[93] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 303 (4th Cir. 2019) (concluding that the plaintiff's allegation that male coworkers started a rumor that she had sex with her boss to obtain a promotion invoked the "deeply rooted perception—one that unfortunately still persists—that generally women, not men, use sex to achieve success"); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459 (5th Cir. 2013) (en banc) (upholding a jury verdict on the grounds that a claim that a male employee was harassed because of sex could be established by evidence showing that the male harasser targeted the employee for not conforming to the harasser's "manly-man" stereotype).

[94] *See Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089, 2004 WL 2066770, at *6 (D. Minn. Aug. 13, 2004) (concluding that the plaintiff had presented sufficient evidence

to send her harassment claim to a jury where she experienced repeated comments and other conduct implying or stating that she was unqualified and could be fired at any time because she was a woman and because she spent too much time caring for her children); *see also Chadwick v. Wellpoint*, *Inc.*, 561 F.3d 38, 42, 47-48 (1st Cir. 2009) (holding that a reasonable jury could find that the plaintiff, the mother of an eleven-year-old and six-year-old triplets, was denied a promotion based on the "common stereotype about the job performance of women with children").

95 *See Burns v. Johnson*, 829 F.3d 1, 13-14, 17 (1st Cir. 2016) (holding that a reasonable jury could conclude that a male supervisor's harassment of a female subordinate was based, in part, on the gender stereotype that women do not belong in positions of leadership).

96 *See, e.g.*, *Price Waterhouse*, 490 U.S. at 250.

97 *See King v. Aramark Servs., Inc.*, 96 F.4th 546, 564 (2d Cir. 2024) ("[A] reasonable jury could conclude that Thomas's singling out of King for weight-related remarks and conduct—remarks and conduct that he did not direct toward her male peers—reflected not only a bias against individuals with certain body types, but also a gender-based bias.").

98 *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (observing that a person is considered transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes" (citing *Price Waterhouse*, 490 U.S. at 251)); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (stating that "discrimination against a plaintiff who is trans[gender]—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman"); *see also supra* note 78.

99 *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1117 (9th Cir. 2004) (referring to a Black employee as a "drug dealer" "might certainly be deemed to be a [racial] code word or phrase" (citing *Daniels v. Essex Grp., Inc.*, 937 F.2d 1264, 1273 (7th Cir. 1991))).

100 *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (describing insults directed at Black employees based on negative stereotyping such as "don't touch anything" and "don't steal" as "inherently racist").

[101] *See, e.g.*, *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (concluding that the plaintiff could establish that he was harassed based on his national origin, Korean, where his supervisor allegedly subjected Korean workers to abuse based, in part, on their failure to "live up" to the stereotype that Korean workers are "better than the rest").

[102] *See, e.g.*, *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 116 (2d Cir. 2007) (holding that "the relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class," and observing that a supervisor's assertion that an employee, who was in her sixties, was well suited to work with seniors was not offensive but nevertheless had a strong tendency in the circumstances to show that the supervisor believed the employee, because of her age, was not well-suited to deal with younger clientele), *abrogated on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

[103] *See, e.g.*, *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-45 (7th Cir. 1999) (upholding a jury verdict where a reasonable jury could conclude that "a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend more time at home with her children' reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake").

[104] This example is adapted from the facts in *EEOC v. Boh Bros. Construction Co.*, 731 F.3d 444, 449-50, 457-60 (5th Cir. 2013) (en banc) (applying *Oncale v. Sundowner Offshore Services,, Inc.*, 523 U.S. 75 (1998), which recognized that same-sex sexual harassment can violate Title VII).

[105] *See, e.g.*, *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 63 (1st Cir. 2019) (noting that "a reasonable jury could infer that" a comment about the plaintiff's body "was made in part because of her sex, given the context" that included evidence that her coworkers regularly "sexualiz[ed]" her and "emphasiz[ed] aspects of her appearance, such as her blonde hair"); *Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 216-17 (1st Cir. 2016) (considering the context, use of the word "ass" was based on sex); *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 85 (2d Cir. 2010) (Calabresi, J., concurring) (viewing comment by male coworker about the plaintiff's "big fat ass" to be based on sex).

[106] *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam); *see also Paasewe v. Action Grp., Inc.*, 530 F. App'x 412, 416 (6th Cir. 2013) (per curiam) (holding that a reasonable jury could find that the plaintiff was subjected to race-based harassment where the plaintiff's coworker called him "boy" and threatened his life).

[107] *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082-83 (3d Cir. 1996) (stating that racial harassment could be based on "code words," which referred to Black employees as "another one," "one of them," "that one in there," and "all of you"); *cf. Martin v. Brondum*, 535 F. App'x 242, 244 (4th Cir. 2013) (explaining in a case involving an alleged violation of the Fair Housing Act that "[r]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications" (alteration in original) (quoting *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 974 (8th Cir. 2012))); *Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 579 (8th Cir. 1999) (characterizing a supervisor's use of the phrase, "your kind" as "offensive and racially tinged").

[108] This example is adapted from the facts in *Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012).

[109] *See, e.g.*, *Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 388 (2d Cir. 2020) ("Our case law is clear that when the same individuals engage in some harassment that is explicitly discriminatory and some that is not, the entire course of conduct is relevant to a hostile work environment claim."); *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547-48 (2d Cir. 2010) (stating that circumstantial evidence that facially sex-neutral acts were part of a pattern of sex discrimination may include evidence that the same individual engaged in multiple acts of harassment, some facially sex-based and some not); *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005) (stating that conduct that appears sex-neutral in isolation may appear sex-based when viewed in the context of the broader work environment); *Shanoff v. Ill. Dep't of Hum. Servs.*, 258 F.3d 696, 705 (7th Cir. 2001) (stating that a reasonable person could conclude that comments that were not facially discriminatory were "sufficiently intertwined" with facially discriminatory remarks to establish that the former were motivated by hostility to the plaintiff's race and religion); *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) (stating that "[c]ourts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category").

[110] *See, e.g.*, *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1085 (8th Cir. 2010) (concluding that instances of facially neutral harassment were not connected to overtly racial conduct as they "lack[ed] any congruency of person or incident"), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc).

[111] This example is adapted from the facts in *EEOC v. T-N-T Carports, Inc.*, No. 1:09-CV-27, 2011 WL 1769352 (M.D.N.C. May 9, 2011).

[112] *See, e.g.*, *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 236-37 (5th Cir. 2001) (upholding a jury verdict and concluding that the jury could have found that harassment, which began "almost immediately" after a supervisor learned that the plaintiff was HIV-positive, was based on disability).

[113] *See EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 842 (9th Cir. 2005) (holding that "offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees").

[114] This example is adapted from the facts in *National Education Ass'n, Alaska*, 422 F.3d at 842-44.

[115] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998).

[116] *See EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 455-56 (5th Cir. 2013) (en banc) (agreeing with sister circuits that the three evidentiary paths in *Oncale* are not exclusive); *see also, e.g.*, *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("These routes, however, are not exhaustive."); *Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1068 (8th Cir. 2005) (describing *Oncale*'s list as "non-exhaustive").

[117] *Boh Bros.*, 731 F.3d at 456.

[118] *See, e.g.*, 42 U.S.C. 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[119] With respect to harassment claims, the Supreme Court has referred to two types of changes to the terms, conditions, or privileges of employment as "explicit" and "constructive" changes. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

The terms are used in this document to facilitate discussion of the standards attached to each type of change to the terms or conditions of employment.

[120] *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986); *see also Ellerth*, 524 U.S. at 752 (stating that "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment").

[121] *Quid pro quo harassment also has arisen in the context of religious harassment where a supervisor denies a job benefit to an employee who refuses to adhere to the supervisor's religious principles. See Venters v. City of Delphi, 123 F.3d 956, 976-77 (7th Cir. 1997) (concluding that a jury could find that a radio dispatcher was subjected to quid pro quo religious harassment when she was discharged by the police chief for not adhering to his religious beliefs).*

[122] *See, e.g.*, *Barnes v. Costle*, 561 F.2d 983, 989-90 (D.C. Cir. 1977) (holding that the plaintiff had alleged discrimination based on her sex when she rejected her supervisor's advances and her position was abolished; the plaintiff alleged that, as a woman, she had been the target of her supervisor's sexual desires and no male had been subjected to similar conduct); *cf. Meritor Sav. Bank, FSB*, 477 U.S. at 65 (distinguishing between a sexual harassment claim linked to the "grant or denial of an economic *quid pro quo*" and a hostile work environment claim).

[123] *Gregory v. Daly*, 243 F.3d 687, 698 (2d Cir. 2001).

[124] Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Respondent at 16, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No.97-569), 1998 WL 151472, at *16 (alterations in original) (quoting 42U.S.C. §2000e-2(a)(1)); *see also Ellerth*, 524 U.S. at 752 (noting that the terms "quid pro quo" and "hostile work environment" do not appear in the text of Title VII).

[125] *Ellerth*, 524 U.S. at 753-54; *see also Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022) (en banc) ("Once it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete.").

[126] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

[127] *Id*.

[128] *Id.* at 21 (quoting *Meritor Sav. Bank, FSB, v. Vinson*, 477 U.S. 57, 64 (1986).

[129] *Morris v. City of Colo. Springs*, 666 F.3d 654, 664 (10th Cir. 2012) (citing, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (stating that the requirement of severity or pervasiveness "prevents Title VII from expanding into a general civility code"); *Ziskie v. Mineta*, 547 F.3d 220, 228 (4th Cir. 2008) (stating that an employee must "accommodate the normal run of aggravations that are part of holding a job").

[130] *Harris*, 510 U.S. at 21.

[131] Section III.C.1, below, discusses how to determine whether conduct is sufficiently related to be part of the same hostile work environment claim.

[132] *See infra* notes 200-204 and accompanying text.

[133] *Meritor Savings Bank, FSB*, 477 U.S. at 68 (citation omitted).

[134] 29 C.F.R. § 1604.11(a) (defining sexual harassment as including "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature").

[135] *Meritor Sav. Bank, FSB*, 477 U.S. at 68.

[136] *Harris*, 510 U.S. at 21-22.

[137] *See, e.g.*, *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 904 (7th Cir. 2018) (holding that, because a reasonable jury could find that the conduct was unwelcome, there was an issue of material fact regarding subjective hostility); *Kokinchak v. Postmaster Gen. of the U.S*, 677 F. App'x 764, 767 (3d Cir. 2017) (treating unwelcomeness and subjective hostility as the same issue); *Horney v. Westfield Gage Co., Inc.*, 77 F. App'x 24, 29 (1st Cir. 2003) (treating unwelcomeness and subjective hostility as the same issue); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001) (explaining that the issue of subjective hostility turns on whether conduct was unwelcome to the plaintiff).

[138] *See, e.g.*, *Blomker v. Jewell*, 831 F.3d 1051, 1056 (8th Cir. 2016) (stating that unwelcomeness is one of the requirements in establishing a hostile work environment based on sex); *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 307 (6th Cir. 2016) (same); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc) (stating that unwelcomeness is one of the requirements in establishing a

hostile work environment based on race); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1248 (11th Cir. 2014) (same).

[139] *See, e.g.*, *Smelter v. S. Home Care Servs. Inc.*, 904 F.3d 1276, 1285 (11th Cir. 2018) (concluding that the plaintiff's testimony about the impact that the alleged racial harassment had on her was sufficient for a jury to find that the plaintiff subjectively perceived the conduct as hostile, notwithstanding her failure to report the conduct to supervisors); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004) (concluding that subjective hostility was established through the plaintiff's unrebutted testimony and his complaints to supervisors and the EEOC); *Horney*, 77 F. App'x at 29 (concluding that subjective hostility/unwelcomeness was established by the plaintiff's testimony that the conduct she complained about made her feel offended and humiliated); *Nichols*, 256 F.3d at 873 (concluding that subjective hostility/unwelcomeness was established by the plaintiff's complaints and his unrebutted testimony that conduct was unwelcome); *Davis v. U.S. Postal Serv.*, 142 F.3d 1334, 1341-42 (10th Cir. 1998) (concluding that evidence established a jury issue as to subjective hostility where the plaintiff testified that harassment made her "more and more stressed out and pretty cracked," that she "hated" the conduct, that she was "pretty shocked," and that she "just wanted to avoid the whole situation").

[140] *See, e.g.*, *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209, 223 (5th Cir. 2023) (concluding that the plaintiff presented sufficient evidence that she subjectively viewed the alleged harassment as hostile where she "complained about the harassment, reported it to her supervisors, and suffered psychological harm"); *EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 433 (7th Cir. 2012) (concluding that there was sufficient evidence in the record showing that a teenage server at a restaurant found her supervisor's comments and conduct subjectively offensive because she repeatedly informed him that his conduct was unwelcome and complained to two other restaurant managers about the conduct).

[141] *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1454 (7th Cir. 1994) (concluding that the plaintiff established harassment was subjectively hostile where, among other things, she told a friend about the conduct and then complained to her supervisor after learning from the friend that she had some legal recourse).

[142] *See EEOC v. Prospect Airport Servs.*, 621 F.3d 991, 997-98 (9th Cir. 2011) (explaining that whether the male complainant welcomed his female coworker's

sexual propositions depended on his "individual circumstances and feelings" and that it did not matter whether other men would have welcomed the propositions).

[143] *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) (explaining that the correct inquiry is whether the complainant experienced the conduct as unwelcome, not whether she voluntarily participated in it); *Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 754-55 (10th Cir. 2014) (concluding that the issue of whether sexual conduct was unwelcome was a matter for the jury to decide, regardless of whether the plaintiff's participation in it was voluntary).

[144] *See, e.g.*, *Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1047-48 (8th Cir. 2005) (concluding that the complainant failed to establish a prima facie case of sexual harassment where she stated that she did not feel harassed by the conduct); Newman v. Fed. Express Corp.*, 266 F.3d 401, 405-06 (6th Cir. 2001) (concluding that the plaintiff did not subjectively perceive conduct as hostile where he testified during a deposition that he did not consider a racially charged hate letter a "big deal," that he was not surprised, shocked, or disturbed by it, and that he would lose no sleep over it).

[145] *See, e.g.*, *Williams v. Herron*, 687 F.3d 971, 975 (8th Cir. 2012) (concluding that the complainant adequately communicated to the harasser, with whom she had been having a sexual relationship, that his conduct was no longer welcome).

[146] *Cf. Kramer*, 743 F.3d at 749 n.16 (stating that the complainant's private consensual sexual relationship with another county employee was unrelated to her claim of sexual harassment by the sergeant).

[147] *See Gerald v. Univ. of P.R.*, 707 F.3d 7, 17 (1st Cir. 2013) (stating that telling risqué jokes did not signal that the plaintiff was amenable to being groped at work); *Pérez-Cordero v. Wal-Mart P.R., Inc.*, 656 F.3d 19, 28 (1st Cir. 2011) (stating that acquiescence to a customary greeting among employees—a kiss on the cheek—was not probative of the complainant's receptiveness to his supervisor's sucking on his neck).

[148] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Hall v. City of Chi.*, 713 F.3d 325, 330 (7th Cir. 2013) (stating that harassment is actionable if it is severe *or* pervasive and that, thus, "one extremely serious act of harassment could rise to an actionable level as could a series of less severe acts" (quoting *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 693 (7th Cir. 2001))).

[149] *See, e.g.*, *Alamo v. Bliss*, 864 F.3d 541, 550 (7th Cir. 2017) (explaining that in determining whether offensive language created a hostile work environment, the court "look[s] to the 'pervasiveness and severity' of language used, which [the court has] described as being 'inversely related'" (quoting *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 951 (7th Cir. 2005))); *Flood v. Bank of Am. Corp*., 780 F.3d 1, 11-12 (1st Cir. 2015) (explaining that harassment may be actionable without being both severe and pervasive and that the "severity . . . may vary inversely with its pervasiveness" (quoting *Nadeau v. Rainbow Rugs, Inc.*, 675 A.2d 973, 976 (Me. 1996))); *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 1000 (9th Cir. 2010) (stating that the "required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct" (quoting *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872 (9th Cir. 2001))).

[150] *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) ("Within the totality of circumstances, there is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."); *see also Harris*, 510 U.S. at 22 (explaining that the determination of whether harassment creates a hostile work environment "is not, and by its very nature cannot be, a mathematically precise test").

[151] A hostile work environment may be so intolerable that an employee is compelled to resign employment. Under these circumstances, the employee is said to have been subjected to a constructive discharge. *Pa. State Police v. Suders*, 542 U.S. 129, 134 (2004). To establish a constructive discharge claim under such circumstances, the employee must both establish a hostile work environment and show that "working conditions [became] so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Id.* at 141; *see also id.* at 149 ("Creation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge case."); *Green v. Brennan*, 578 U.S. 547, 559 (2016) (observing that *Suders*'s holding that a hostile work environment claim is a "lesser included component" of the "graver claim" of constructive discharge was "no mere dictum" (emphasis omitted)). "[H]arassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts." *Suders*, 542 U.S. at 148.

[152] *See, e.g.*, *Harris*, 510 U.S. at 23 ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.").

[153] *Id.*

[154] *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 28 (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** .

[155] *Harris*, 510 U.S. at 23.

[156] *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 400-01 (5th Cir. 2007) (concluding that the evidence was sufficient to show that harassment based on an employee's Muslim faith and national origin (Indian) resulted in a hostile work environment); *see also Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 335-36 (4th Cir. 2010) (concluding that race-based conduct could be considered cumulatively with sex-based conduct, which would allow a reasonable jury to find that the plaintiff was subjected to a hostile work environment); *Hafford v. Seidner*, 183 F.3d 506, 515-16 (6th Cir. 1999) ("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.").

Refer to section III.C.1 for a discussion of how to determine whether conduct is sufficiently related to be considered part of the same hostile work environment claim.

[157] *See Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987) (determining that although the plaintiff's evidence of a race-based hostile work environment was insufficient to establish a hostile work environment, this evidence should be considered with the plaintiff's evidence of sexual harassment "to determine whether there was a pervasive discriminatory atmosphere . . . so that a hostile work environment harassment claim may have been established"); *cf. Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 572 (2d Cir. 2000) (stating that the "interplay between the two forms of harassment" alleged by the plaintiff could lead a jury to conclude that the "racial harassment exacerbated the effect of [the] sexually threatening behavior and vice versa").

[158] *See, e.g.*, *Petrosino v. Bell Atl.*, 385 F.3d 210, 215 (2d Cir. 2004) (reversing summary judgment for the employer where the hostile work environment included disparaging remarks about the plaintiff's menstrual cycle, including "dismissing her job concerns as attributable to her menstrual cycle ('He accused me several times of being 'on the rag' . . . whenever I had a dispute with him . . . .") (internal citation omitted)).

[159] This example is adapted from the facts in *Preuss v. Kolmar Labs., Inc.*, 970 F. Supp. 2d 171 (S.D.N.Y. 2013).

[160] *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 752 (1998) (reiterating that that an employer's sexually demeaning behavior alters the terms or conditions of employment in violation of Title VII if it is severe or pervasive); *see also Ford v. Jackson Nat'l Life Ins. Co.,* 45 F.4th 1202, 1231 (10th Cir. 2022) (stating that if "the condition of Ford's employment was altered for the worse" because of the alleged sexual harassment, then the fact that she "continued to proceed through the ranks" provided "no reason" for the court to dismiss her hostile work environment claim); *EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 330 (4th Cir. 2010) (stating that the issue is not whether work has been impaired but whether the work environment has been discriminatorily altered and that the "fact that a plaintiff continued to work under difficult conditions is to her credit, not the harasser's"); *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 274 (6th Cir. 2009) (concluding that the district court erred in requiring evidence that the complainant's work performance suffered measurably as a result of harassment rather than merely evidence that harassment made it more difficult to do the job); *Dawson v. Cnty. of Westchester, 373 F.3d 265, 274 (2d Cir. 2004) (stating that the crucial question is "whether* the workplace atmosphere, considered as a whole, undermined plaintiffs' ability to perform their jobs, compromising their status as equals to men in the workplace").

[161] *Harris,* 510 U.S. at 22-23 (explaining that "Title VII comes into play before the harassing conduct leads to a nervous breakdown" as "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance").

[162] This example is adapted from the facts in *Gallagher*, 567 F.3d at 266-69.

[163] *Ellerth,* 524 U.S. at 763; Boyer-Liberto v. Fountainebleau Corp., 786 F.3d 264, 278 (4th Cir. 2015) (en banc) (quoting Ellerth, 524 U.S. at 763); *see also Copeland v. Ga.*

Dep't of Corr., ___ F.4th ___, No. 22-13073, 2024 WL 1316677, at *7 (11th Cir. Mar. 28, 2024) *(noting that harassment is "more severe when it involves*participation of supervisors rather than solely peers or subordinates").

[164] *See Gates v. Bd. of Educ.,* 916 F.3d 631, 638 (7th Cir. 2019) (stating that the circuit has "repeatedly treated a supervisor's use of racially toxic language in the workplace as much more serious than a coworker's"); *Zetwick v. Cnty. of Yolo,* 850 F.3d 436, 445 (9th Cir. 2017) (concluding that a reasonable jury could find that the alleged sexual harassment was actionable, in part, because of the harasser's status as a supervisor); *Steck v. Francis,* 365 F. Supp. 2d 951, 971-72 (N.D. Iowa 2005) (stating that a supervisor's agency relation increases the impact of harassment by the supervisor); *see also Fairbrook Med. Clinic, P.A.,* 609 F.3d at 329 (stating that the severity of the harasser's conduct was exacerbated by his significant authority over the complainant); *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (stating that a supervisor's use of the word "n****r" has a more severe impact on the work environment than its use by coworkers); *cf. Chapman v. Oakland Living Ctr., Inc.,* 48 F.4th 222, 231 (4th Cir. 2022) (stating that although the repeated use of the n-word was by a six-year-old, "the boy who uttered the slurs was not just any 'young child,' but the grandson of OLC's owners and the son of a supervisor being groomed to take over the family business . . . and [t]hus, a reasonable person in Chapman's position could 'fear that the child had his relative's ear and could make life difficult for her'" (citation omitted)).

[165] *See Boyer-Liberto,* 786 F.3d at 279-80 (explaining that, regardless of whether the harasser was the complainant's supervisor for purposes of employer vicarious liability, the determination of objective severity required the court to consider how the harasser portrayed the harasser's authority and what the complainant reasonably believed the harasser's actual power to be).

[166] *See, e.g.*, *Warf v. U.S. Dep't of Veterans Affs.*, 713 F.3d 874, 878 (6th Cir. 2013) ("Evidence of other sexual harassment claims may help support a hostile work environment claim, but evidence of harassment to others does not weigh as heavily as evidence directed against the plaintiff."); *Ziskie v. Mineta*, 547 F.3d 220, 224-25 (4th Cir. 2008) (stating that conduct personally experienced by the plaintiff may be more probative of a hostile work environment than conduct she did not witness, but all the evidence should be considered: "[h]ostile conduct directed toward a plaintiff that might of itself be interpreted as isolated or unrelated to gender might look

different in light of evidence that a number of women experienced similar treatment"); *see also infra* notes 212-216 and accompanying text.

[167] *See, e.g.*, *Copeland*, 2024 WL 1316677, at *8 (stating that the intentional misgendering and other harassment that a male transgender correctional officer experienced was humiliating where it occurred over the prison radio system, which allowed the whole institution to hear); *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000) (concluding that a fire lieutenant could establish a hostile work environment based on a single incident in which a coworker loudly made obscene and sexist comments at a meeting where the lieutenant was the only woman and many of the men were her subordinates); *Delozier v. Bradley Cnty. Bd. of Educ.*, 44 F. Supp. 3d 748, 759 (E.D. Tenn. 2014) (concluding that a male band leader's sexual comments about a female assistant band leader were sufficient to create a hostile work environment where they were made in front of the assistant band leader's students, thereby undermining her authority and stature in her students' eyes); *Hanna v. Boys & Girls Home & Fam. Servs., Inc.*, 212 F. Supp. 2d 1049, 1061 (N.D. Iowa 2002) (noting the significance of the fact that sexually harassing conduct was directed at the female complainant in the presence of male clients).

[168] *See, e.g.*, *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 945-46 (8th Cir. 2016) ("Actions that might not rise to the level of severe or pervasive in an office setting take on a different character when the two people involved are stuck together for twenty-four hours a day with no other people—or means of escape—for miles around.").

[169] *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 24-25 (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** (discussing "superstar" harassers).

[170] *See, e.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 982-84 (7th Cir. 2008) (concluding that, in the case of a complainant who alleged that her coworker raped her, the severity of the sexual assault alleged would be sufficient to establish an objectively hostile work environment).

[171] *See, e.g., Turner v. Saloon, Ltd.,* 595 F.3d 679, 686 (7th Cir. 2010) (concluding that the plaintiff's claim that his female supervisor grabbed his penis through his

pockets was probably severe enough on its own to create a genuine issue of material fact as to the plaintiff's sexual harassment claim).

[172] *See, e.g.*, *Banks v. Gen. Motors, LLC*, 81 F.4th 242, 263-64 (2d Cir. 2023) (concluding that a reasonable jury could find that the plaintiff was subjected to unlawful harassment based on race and sex when a colleague "shook a rolled-up document in her face and started yelling at her in a loud and aggressive manner," alarming other employees, and leading her to take disability leave); *Patterson v. Cnty. of Oneida*, 375 F.3d 206, 230 (2d Cir. 2004) (concluding that a hostile work environment based on race could be established by a single incident in which the plaintiff was allegedly punched in the ribs and temporarily blinded by having mace sprayed in his eyes because of his race); *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 1999) (concluding that harassing a female employee based on her sex by damaging her wrist to the point that surgery was required "easily qualifies as a severe enough isolated occurrence to alter the conditions of her employment"); *cf. Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 496-97 (4th Cir. 2015) (concluding that a reasonable jury could find that two anonymous notes placed in the plaintiff's mailbox, although not pervasive, were sufficiently severe to create hostile work environment where the notes referred to lynching and were in the form of a mock hunting license for African Americans).

[173] *E.g.*, *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1145 (10th Cir. 2008) (concluding that a "jury could easily find that the noose was an egregious act of discrimination calculated to intimidate African-Americans"); *Rosemond v. Stop & Shop Supermarket Co.*, 456 F. Supp. 2d 204, 213 (D. Mass. 2006) (holding that a reasonable jury could conclude that display of a noose in an African American employee's work area was sufficient to create a hostile work environment); *Williams v. N.Y.C. Hous. Auth.*, 154 F. Supp. 2d 820, 824 (S.D.N.Y. 2001) (stating that a "noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence" and that the "effect of such violence on the psyche of African-Americans cannot be exaggerated"); *Yudovich v. Stone*, 839 F. Supp. 382, 391 (E.D. Va. 1993) (finding that one of the plaintiffs' supervisors expressed hostility toward the plaintiffs' religion by, among other things, keeping a coffee mug displaying a swastika on his desk).

[174] *See, e.g.*, *Boyer-Liberto v. Fountainebleau Corp.,* 786 F.3d 264, 280 (4th Cir. 2015) (en banc) (stating that calling an African American employee "porch monkey" was "about as odious as the use of the word 'n****r'"); *Henry v. CorpCar Servs. Hous., Ltd.*, 625 F. App'x 607, 611, 613 (5th Cir. 2015) (concluding that although the alleged

harassment was brief as it had occurred over only two days, a jury could find that it was sufficiently severe to create a hostile work environment where, among other things, African American employees were compared to gorillas); *see also Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006) (agreeing with the plaintiff that using the term "monkey" to refer to African Americans was "roughly equivalent" to using the term "n****r"); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (stating that use of "monkey" to describe African Americans was "degrading and humiliating in the extreme").

175 In *Burlington Industries, Inc. v. Ellerth,* the Court explained that unfulfilled threats are actionable if they create a hostile work environment. *524 U.S. 742, 754 (1998)*. A sufficiently serious threat, even if unfulfilled, could meet the necessary level of severity. *See Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 607 (2d Cir. 2006) ("Threats or insinuations that employment benefits will be denied based on sexual favors are, in most circumstances, quintessential grounds for sexual harassment claims, and their characterization as 'occasional' will not necessarily exempt them from the scope of Title VII."); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 500 (7th Cir. 1997) (en banc) (Flaum, J., concurring) (stating that a supervisor's unambiguous communication that an adverse job action will follow if sexual favors are denied may cause "real emotional strife," including "anxiety, distress, and loss of productivity regardless of whether the threat is carried out").

176 *See Woods v. Cantrell*, 29 F.4th 284, 285 (5th Cir. 2022) ("The incident Woods has pleaded—that his supervisor directly called him a 'Lazy Monkey A__ N___' in front of his fellow employees—states an actionable claim of hostile work environment."); *Castleberry v. STI Grp.*, 863 F.3d 259, 264 (3d Cir. 2017); *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly 'alter the conditions of employment . . .' than the use of an unambiguously racial epithet such as 'n****r' by a supervisor in the presence of his subordinates." (citation omitted)); *see also Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[I]n my view, being called the n-word by a supervisor . . . suffices by itself to establish a racially hostile work environment. That epithet has been labeled, variously, a term that 'sums up . . . all the bitter years of insult and struggle in America,' 'pure anathema to African-Americans,' and 'probably the most offensive word in English.'" (citations omitted)).

177 *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 965 (8th Cir. 1993) (quoting *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983)); *see also, e.g.*, *Johnson v. PRIDE Indus.*, 7

F.4th 392, 403-04 (5th Cir. 2021) (holding that the plaintiff could establish a hostile work environment based on harassment that included the use of "mayate," which the plaintiff knew was Spanish for the n-word, by a fellow employee who outranked him); *Passananti v. Cook Cnty.*, 689 F.3d 655, 665 (7th Cir. 2012) ("A raft of case law . . . establishes that the use of sexually degrading, gender-specific epithets, such as 'sl*t,' 'c*nt,' 'wh*re,' and 'b*tch,' . . . has been consistently held to constitute harassment based upon sex." (quoting *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229-30 (1st Cir. 2007))); *Hawkins v. City of Phila.*, 571 F. Supp. 3d 455, 464 (E.D. Pa. 2021) ("The term 'f***ot' is so replete with homophobic animus that, if used, instantly separates an individual who identifies as gay from everyone else in the workplace."); *Johnson v. Earth Angels*, 125 F. Supp. 3d 562, 569 (M.D.N.C. 2015) (stating that racial epithets used by supervisors went "far beyond the merely unflattering" and were "degrading and humiliating in the extreme" (quoting *Boyer-Liberto*, 786 F.3d at 280)).

178 *See, e.g.*, *Zetwick v. Cnty. of Yolo,* 850 F.3d 436, 439, 442-46 (9th Cir. 2017) (concluding that a reasonable jury could find that the plaintiff was subjected to a hostile work environment where her supervisor greeted her with "at least a hundred" "unwelcome hugs and at least one unwelcome kiss" over a twelve-year period); *Hall v. City of Chi.*, 713 F.3d 325, 332 (7th Cir. 2013) ("[I]ncidents, which viewed in isolation seem relatively minor, that consistently or systematically burden women throughout their employment are sufficiently pervasive to make out a [sex-based] hostile work environment claim."); *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 998-1001 (9th Cir. 2010) (determining that a genuine issue of material fact existed as to the abusiveness of the complainant's work environment where, after the complainant twice rejected his coworker's advances, this coworker and other coworkers subjected the complainant to six months of constant sexual pressure and humiliation); *Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 163-64 (5th Cir. 2007) (concluding that a reasonable jury could find that the supervisor engaged in "pervasive harassment" where, among other things, he called the plaintiff "ten to fifteen times a night for almost four months").

179 *See supra* note 150 and accompanying text.

180 *See, e.g.*, *Rodgers*, 12 F.3d at 674 (stating that liability is evaluated "on a case-by-case basis after considering the totality of the circumstances" (quoting *Nazaire v. Trans World Airlines, Inc.*, 807 F.2d 1372, 1380-81 (7th Cir. 1986))); *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010) (stating that "flexibility is useful in a

context as fact-specific and sensitive as employment discrimination and as amorphous as hostile work environment").

[181] *See, e.g.*, *El-Hakem v. BJY, Inc.*, 415 F.3d 1068, 1073-74 (9th Cir. 2005) (upholding jury verdict for the plaintiff, noting that the CEO's intentional and repeated use of a "Westernized" version of the plaintiff's name, despite his objections, may not have been severe but was frequent and pervasive).

[182] *See Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 103 (2d Cir. 2010) (concluding that, given the short time frame and number of incidents involved, the plaintiff established a genuine issue as to whether she was subjected to a hostile work environment).

[183] This example is adapted from the facts in *EEOC v. Prospect Airport Services, Inc.*, 621 F.3d 991 (9th Cir. 2010).

[184] This example is adapted from the facts in *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988) (holding that the plaintiff stated a prima facie case of sexual harassment based on evidence that managers harassed female employees by bestowing preferential treatment on those who submitted to sexual advances).

[185] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[186] *Id.* at 81-82; *see also Reeves v. C.H. Robinson Worldwide*, *Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) (en banc) (stating that the analysis requires proceeding with "'[c]ommon sense, and an appropriate sensitivity to social context,' to distinguish between general office vulgarity and the 'conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive'" (quoting *Oncale*, 523 U.S. at 82)); *Hood v. Nat'l R.R. Passenger Corp.*, 72 F. Supp. 3d 888, 893 (N.D. Ill. 2014) (stating that the joking manner in which the challenged comments were made was a relevant consideration in evaluating the severity of Hispanic employees' use of "gringo" to refer to the White complainant).

[187] *Oncale,* 523 U.S. at 82.

[188] *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) ("Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group. . . . By considering both the existence and the severity of

discrimination from the perspective of a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff."); *see also Caver v. City of Trenton*, 420 F.3d 243, 262 (3d Cir. 2005) (stating that a hostile work environment requires evidence establishing that the harassment would have adversely affected a reasonable person of the same protected class in the plaintiff's position), *abrogated on other grounds by Jensen v. Potter*, 435 F.3d 444, 449 n.3 (3d Cir. 2006); *Brennan v. Metro. Opera Ass'n, Inc.*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part) (noting that the failure to adopt the perspective of the complainant's protected class might result in applying the stereotypical views that Title VII was designed to outlaw); *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997) (evaluating the sexual harassment claim of a female plaintiff from the viewpoint of a "reasonable woman"); *cf. Baugham v. Battered Women, Inc.*, 211 F. App'x 432, 438 (6th Cir. 2006) (stating that the severity of harassment is evaluated from the "perspective of a reasonable person in the employee's shoes, considering the totality of the circumstances" (citing *Oncale*, 523 U.S. at 81)).

189 *See McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 85 (2d Cir. 2010) (Calabresi, J., concurring) (stating that the female complainant could base her hostile work environment claim on sexually derogatory conduct that was the product of locker room culture that some other women participated in); *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 272 n.2 (6th Cir. 2009) (concluding that the plaintiff established that she experienced sex-based harassment, even though some women participated in the conduct); *Jenson v. Eveleth Taconite Co*., 824 F. Supp. 847, 886 (D. Minn. 1993) (concluding that expert testimony and testimony of female mine workers established that the work environment affected the psychological well-being of a reasonable woman working there, and this conclusion was not affected by the fact that some women did not find the work environment objectionable); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1525 (M.D. Fla. 1991) (stating that the fact that some women did not find the conduct offensive did not mean that the conduct was not objectively hostile).

190 *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 946 (8th Cir. 2016) (doctoral candidate's physical well-being in a remote location and academic future was dependent on a leading expert in the candidate's field of study who harassed her on a research trip).

[191] *See EEOC v. Mgmt. Hosp. of Racine, Inc.,* 666 F.3d 422, 429, 433 (7th Cir. 2012) (stating that the ten-year age disparity between the teenage complainant and the older harasser, coupled with his authority over her, could have led a rational jury to conclude that the harassment resulted in a hostile work environment).

[192] *Cf. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064-65 (9th Cir. 2004) (*"While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to [immigration authorities] and they will be subjected to deportation proceedings or criminal prosecution. . . . As a result, most undocumented workers are reluctant to report abusive or discriminatory employment practices.").

[193] *Prettyman v. LTF Club Opers. Co.*, No. 1:18-cv-122, 2018 WL 5980512, at *6 (E.D. Va. Nov. 13, 2018) ("Much of this historical antipathy toward Jews was grounded in economic antisemitism, which makes comments about 'Jewish money' all the more objectionable and offensive. These words and phrases about Jews, like the n-word, are so serious and severe that they instantly signal to an employee that he or she is unwelcome in the work place because of his or her religion.").

[194] *See EEOC v. Glob. Horizons, Inc.*, 7 F. Supp. 3d 1053, 1061 (D. Haw. 2014) (threats of deportation contributed to a hostile work environment); *Chellen v. John Pickle Co., Inc.*, 446 F. Supp. 2d 1247, 1265 (N.D. Okla. 2006) ("The threat of deportation was especially significant in defendants' creation of a hostile working environment. The Chellen plaintiffs feared . . . the harm he could inflict on [them] or their families if they were made to return to India.").

[195] This example is adapted from the facts in *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020).

[196] *See, e.g.*, *Copeland v. Ga. Dep't of Corr.*, ___ F.4th ___, No. 22-13073, 2024 WL 1316677, at *8 (11th Cir. Mar. 28, 2024) (concluding that working as a corrections officer, which is a "dangerous and sometimes" violent context, made the intentional misgendering and other harassment that a transgender male correctional officer experienced more severe than it would have been in other contexts); *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 946 (8th Cir. 2016) (concluding that the alleged harassment was sufficient to establish a hostile work environment where, among other things, the plaintiff and the alleged harasser worked in a remote region where they had been dropped by plane).

[197] *See EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008) (rejecting the district court's suggestion that harassment might be discounted in an environment that was "inherently coarse"; "Title VII contains no such 'crude environment' exception, and to read one into it might vitiate statutory safeguards for those who need them most"); *see also Reeves v. C.H. Robinson Worldwide*, 594 F.3d 798, 810 (11th Cir. 2010) (en banc) (stating that a "member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct"); *Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999) ("[W]e squarely denounce the notion that the increasing regularity of racial slurs and graffiti renders such conduct acceptable, normal, or part of 'conventional conditions on the factory floor.'"); *Vollmar v. SPS Techs., LLC*, No. 15-2087, 2016 WL 7034696, at *6 (E.D. Pa. Dec. 2, 2016) (concluding that even in a work environment in which foul language and joking are commonplace, the employer can be liable for fostering a hostile work environment for female employees).

[198] *Smith v. Sheahan,* 189 F.3d 529, 535 (7th Cir. 1999); *see also Reeves*, 594 F.3d at 803, 812-13 (holding that the plaintiff, the only woman working on the sales floor, could establish a sexually hostile work environment based on vulgar, sex-based conduct, even though the conduct had begun before she entered the workplace); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) ("We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment . . . ."); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part) (stating that a female employee should not have to assume the risk of a hostile work environment by voluntarily entering a workplace in which sexual conduct abounds); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (rejecting the contention that racial epithets that were common in the defendant's industry could not establish a hostile work environment based on race).

[199] *See, e.g.*, *Reeves*, 594 F.3d at 811-12 (concluding that a reasonable jury could find that the conduct in the plaintiff's office, including use of the terms "wh*re," "b*tch," and "c*nt,; vulgar discussions of women's body parts; and the pornographic image of a woman in the office, contributed to conditions that were humiliating and degrading to women on account of their sex and thus could have created an abusive working environment).

[200] Although evidence of unwelcomeness may be relevant, the Commission does not believe that a plaintiff needs to prove "unwelcomeness" as a separate element of the prima facie case. *See supra* section III.B.1.

[201] *Compare Souther v. Posen Constr., Inc.*, 523 F. App'x 352, 355 (6th Cir. 2013) (concluding that a jury could not find that the alleged harasser's sexual advances were unwelcome where, among other things, the plaintiff and alleged harasser were engaged in an on-and-off sexual relationship for five years, she never complained to the alleged harasser or anyone else that his conduct was unwelcome, and the plaintiff and alleged harasser remained friends during the period when the affair was dormant), *with Williams v. Herron*, 687 F.3d 971, 975 (8th Cir. 2012) (concluding that a correctional officer presented sufficient evidence to show that she adequately communicated to the chief deputy that his conduct was unwelcome where she told him that she was uncomfortable continuing their relationship and that she was concerned that she would lose her job if she ended their relationship, given that she knew that other female employees were fired after ending their relationships with him), *Pérez-Cordero v. Wal-Mart P.R., Inc.*, 656 F.3d 19, 28 (1st Cir. 2011) (concluding that the plaintiff established that his supervisor's conduct was unwelcome where, among other things, the plaintiff twice unequivocally rejected his supervisor's sexual propositions), *and EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 998 (9th Cir. 2010) (concluding that the plaintiff established a fact issue regarding whether conduct was unwelcome where he repeatedly told his coworker, "I'm not interested," yet she continued to make sexual overtures).

[202] *See Webb-Edwards v. Orange Cnty. Sheriff's Off.*, 525 F.3d 1013, 1027-28 (11th Cir. 2008) (concluding that the plaintiff failed to demonstrate that the harasser's conduct was severe or pervasive, in part because the conduct ended after the plaintiff told the harasser that it made her uncomfortable); *Shanoff v. Ill. Dep't of Hum. Servs.*, 258 F.3d 696, 704 (7th Cir. 2001) (stating that repeated harassment that continues despite an employee's objections is indicative of a hostile work environment); *Moore v. Pool Corp*., 304 F. Supp. 3d 1148, 1160 (N.D. Ala. 2018) (concluding that a jury could conclude that alleged racial harassment by a customer was objectively hostile, where the customer not only called the plaintiff a "n****r" five to seven times a year over several years, but the customer continued the harassment even after the plaintiff objected and asked the customer to stop using the racial epithet).

[203] *See, e.g.*, *Christian v. Umpqua Bank*, 984 F.3d 801, 806-07, 811 (9th Cir. 2020) (concluding that the evidence created a triable issue as to whether a customer's harassment of the complainant was sufficiently severe or pervasive where the customer persisted in asking the complainant on dates, sending her notes and letters, and repeatedly "pester[ing] her" for months after the complainant asked him to stop).

[204] *See* EEOC, *Compliance Manual Section 12: Religious Discrimination* § 12-III.B.2.b (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_Toc203359509 (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_Toc203359509)** ; *Venters v. City of Delphi*, 123 F.3d 956, 976 (7th Cir. 1997) (concluding that a reasonable person in the plaintiff's position could have found the work environment hostile where the supervisor's remarks were uninvited, intrusive, and continued even after the employee informed her supervisor that his comments were inappropriate).

[205] *See Garcimonde-Fisher v. Area203 Mktg., LLC*, 105 F. Supp. 3d 825, 840 (E.D. Tenn. 2015) ("The references to the King James Bible as the proper Bible and to Catholicism as not the 'right kind' of Christianity could fairly be described as derogatory. While these comments may not be as overtly hostile as depicting a coworker as a satanic figure, they do serve to reinforce the omnipresent message of the workplace that [one] religion is the only religion that will be tolerated.").

[206] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002) (explaining that because a hostile work environment is a single unlawful employment action, a court should not separate individual acts that are part of the broader claim when analyzing timeliness or liability).

[207] *Morgan*, 536 U.S. at 120. *Compare Ford v. Jackson Nat'l Life Ins. Co.,* 45 F.4th 1202, 1228-29 (10th Cir. 2022) (holding that a pre-filing-period incident in which a manager had engaged in sexually suggestive conduct with a vodka bottle was part of the same hostile work environment as subsequent conduct by other workers that demonstrated "the same type of sex-based hostility that [the plaintiff] ha[d] repeatedly complained of"), *Maliniak v. City of Tucson*, 607 F. App'x 626, 628 (9th Cir. 2015) (concluding that an offensive sign posted within the 300-day charge-filing time period was sufficiently related to the offensive signs that pre-dated the charge-filing period to be considered part of the same actionable hostile work environment claim, where both sets of signs denigrated women), *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 165-67 (3d Cir. 2013) (concluding that the plaintiff could proceed

with her hostile work environment claim under *Morgan*'s single unlawful employment practice theory where at least one incident—being called a "b*tch" during a meeting—occurred within the charge-filing period and many of the acts that fell outside the filing period involved similar conduct by the same individuals), *and EEOC v. Fred Meyer Stores, Inc.*, 954 F. Supp. 2d 1104, 1121-23 (D. Or. 2013) (concluding that sexual harassment of a retail store employee by a customer that occurred before the employee's six-month absence could be considered along with harassment that occurred after she returned in determining whether she was subjected to a hostile work environment, where the conduct involved the same customer engaging in similar physical harassment before and after the employee's absence from the workplace, and despite the employee's complaint, the harasser was allowed to continue frequenting the store before he sexually harassed her again), *with Martinez v. Sw. Cheese Co., LLC*, 618 F. App'x 349, 354 (10th Cir. 2015) (holding that pre-filing period conduct was not sufficiently related to filing period conduct so as to be part of the same hostile work environment where it did not involve the same type of conduct, it occurred infrequently, and it involved different harassers), *and Lucas v. Chi. Transit Auth.*, 367 F.3d 714, 727 (7th Cir. 2004) (holding that an incident that occurred within the charge-filing time period was not part of the same hostile work environment as the earlier incidents where there was a three-year gap and the last incident involved a chance encounter on a commuter train).

208 *See Morgan*, 536 U.S. at 120-21 (affirming lower court's ruling that acts were part of the same actionable hostile environment claim where they involved "the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers"); *see also McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010) (stating that "*Morgan* requires courts to make an individualized assessment of whether incidents and episodes are related" without limiting the relevant criteria or imposing particular factors, and stating that "[t]his flexibility is useful in a context as fact-specific and sensitive as employment discrimination and as amorphous as hostile work environment").

209 *See King v. Aramark Servs., Inc.*, 96 F.4th 546, 561 (2d Cir. 2024) ("A discrete discriminatory act, such as termination, within the limitations period may not only support a claim for damages, it may also render a hostile work environment claim timely *if it is shown to be part of the course of discriminatory conduct that underlies the hostile work environment claim*." (emphasis in original)); *Baird v. Gotbaum*, 662 F.3d 1246, 1251-52 (D.C. Cir. 2011) (holding that the district court erred in concluding that the plaintiff's hostile work environment claim could not include discrete acts

that also were actionable on their own); *Chambless v. La.-Pac. Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007) (concluding that, although a timely discrete act can provide a basis for considering untimely, non-discrete acts as part of the same hostile work environment claim, the timely failure to promote and retaliation were not sufficiently similar to untimely allegations so as to be part of the same hostile work environment claim); *Royal v. Potter*, 416 F. Supp. 2d 442, 453-54 (S.D. W. Va. 2006) (concluding that the plaintiff's actionable hostile work environment claim included termination of a temporary position and failure to promote). *But see Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 892-93 (9th Cir. 2005) (stating that timely acts offered in support of a hostile work environment claim must be non-discrete acts because basing a hostile work environment claim on timely discrete and untimely non-discrete acts would "blur to the point of oblivion the dichotomy between discrete acts and a hostile environment").

As discussed in the EEOC's *Compliance Manual* section on threshold issues: "[A] discrete act of discrimination [an official act that is independently actionable] may be part of a hostile work environment only if it is related to abusive conduct or language, i.e., a pattern of discriminatory intimidation, ridicule, and insult. A discrete act that is unrelated to abusive conduct or language ordinarily would not support a hostile work environment claim." EEOC, *Compliance Manual Section 2: Threshold Issues* § 2-IV.C.1.b (2009), **https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-IV-C-1-b (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-IV-C-1-b)** https://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-b; *see also Bearer v. Teva Pharms. USA, Inc.*, No. 19-5415, 2021 WL 4145053, at *24 (E.D. Pa. Sept. 8, 2021) (stating that "failure to be promoted, without any indication that it is connected to hostile or abusive behavior, is simply not a form of harassment that can contribute to a hostile work environment").

210 This example is adapted from the facts in *Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383, 385-87 (7th Cir. 2007).

211 This example is adapted from the facts in *McGullam*, 609 F.3d at 72-74.

212 *See* note 166 and accompanying text.

213 *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 803, 811-12 (11th Cir. 2010) (en banc) (concluding that a jury could find that the conduct of male sales floor employee that was sex-specific, derogatory, and humiliating—including vulgar

sexual comments, pornographic images of women, and sex-based epithets—created a hostile work environment for the complainant, who was the only woman on the sales floor, even though the conduct was not specifically directed at her); *cf. Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (stating that pornography "sexualizes the work environment to the detriment of all female employees").

[214] *See, e.g.*, *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1144-46 (10th Cir. 2008) (holding that a reasonable jury could conclude that the plaintiff was subjected to a racially hostile work environment, which included anonymous bathroom graffiti and the display of a noose); *see also Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 388-89 (2d Cir. 2020) (concluding that the complainant raised disputed issues of material fact as to whether a coworker's comments about religion and the complainant's national origin, which were not directed at the complainant but made to others in his presence, contributed to a hostile work environment).

[215] *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307, 320-21 (8th Cir. 2014) (concluding that the district court erred in evaluating the plaintiffs' § 1981 and § 1983 racial harassment claims by examining in isolation harassment personally experienced by each plaintiff, rather than also considering conduct directed at others, where every plaintiff did not hear every remark but each plaintiff became aware of all of the conduct); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1257-58 (11th Cir. 2014) (stating that employees could base their racial harassment claims on conduct that they were aware of); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 335-36 (6th Cir. 2008) (concluding that evidence of a hostile work environment may include acts of harassment that the plaintiff becomes aware of during her employment that were directed at others and occurred outside her presence).

[216] This example is adapted from the facts in *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 670-72 (7th Cir. 1993).

[217] *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177-78 (2011) (holding that Title VII does not merely authorize suit by someone who was allegedly discriminated against but instead more broadly authorizes suit by anyone who falls within the zone of interests protected by Title VII, meaning "any plaintiff with an interest 'arguably [sought] to be protected by the statute'" (quoting *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 495 (1998)); and further holding that, pursuant to that test, Thompson could bring a lawsuit alleging North American Stainless (NAS) fired him to retaliate against his fiancée, who had filed a

sex discrimination charge against NAS, because "the purpose of Title VII is to protect employees from their employers' unlawful actions[, and] injuring him was the employer's intended means of harming [his fiancée]"); *cf. Finn v. Kent Sec. Servs., Inc.*, 981 F. Supp. 2d 1293, 1300 (S.D. Fla. 2013) (concluding that a plaintiff might have standing to pursue a claim if the Defendant "required her, as part of her duties, to serve as the delivery vehicle of Defendant's discrimination against other employees based on their race, sex, or color").

[218] Sophie also could file an EEOC charge alleging that she was subjected to unlawful retaliation based on Jordan's threats in response to her objection to the harassment. For more information on what constitutes unlawful retaliation, see EEOC, *Enforcement Guidance on Retaliation and Related Issues* § II.A.2 (2016), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#2._Opposition (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#2._Opposition)** .

[219] *See, e.g.*, *Nichols v. Tri-Nat'l Logistics, Inc.*, 809 F.3d 981, 985-86 (8th Cir. 2016) (holding that the district court erred in analyzing a hostile work environment claim by the plaintiff, a truck driver, by excluding alleged sexual harassment of the plaintiff by her driving partner during a mandatory rest period); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002) (concluding that a potential client's rape of a female manager at a business meeting outside her workplace was sufficient to establish a hostile work environment since having out-of-office meetings with potential clients was a job requirement); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001) (concluding that the "work environment" included a short layover for flight attendants in a foreign country where the employer provided a block of hotel rooms and ground transportation).

[220] *See Lapka v. Chertoff*, 517 F.3d 974, 979, 983 (7th Cir. 2008) (concluding that Title VII covered sexual harassment that occurred while attending employer-mandated training at an out-of-state training center).

[221] *See Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 543 (N.J. 2000) (concluding that, although the electronic bulletin board did not have a physical location at the employee's worksite, evidence might show it was so closely related to the workplace environment and beneficial to the employer that continuation of harassment on it should be regarded as occurring in the workplace).

[222] *See Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 60 (1986) (noting that an employee had alleged harassment by her supervisor, which included conduct both inside and outside the workplace and conduct both during and after business hours).

[223] *See, e.g.*, *Lapka*, 517 F.3d at 983 (explaining that, to be actionable, harassment need only have consequences in the workplace); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir. 2002) (stating that the harasser's intimidating conduct outside the workplace helped show why the complainant feared him and why his presence around her at work created a hostile work environment); *Duggins v. Steak 'n Shake, Inc.*, 3 F. App'x 302, 311 (6th Cir. 2001) (stating that an employee may reasonably perceive her work environment as hostile if forced to work for, or in close proximity to, someone who harassed her outside the workplace); *cf. Andersen v. Rochester City Sch. Dist.*, 481 F. App'x 628, 630 (2d Cir. 2012) (concluding that alleged harassment of a teacher by a student outside of school did not create a hostile work environment where the student was not in the teacher's class and they did not interact at school).

[224] *See, e.g., Strickland v. City of Detroit*, 995 F.3d 495, 506-07 (6th Cir. 2021) (considering social media posts by police department personnel referring to Detroit residents as "garbage" and characterizing Black Lives Matter supporters as "racist terrorists" in assessing whether the plaintiff's work environment was sufficiently racially hostile to be actionable); *Fisher v. Mermaid Manor Home for Adults, LLC*, 192 F. Supp. 3d 323, 326, 329 (E.D.N.Y. 2016) (determining that a reasonable jury could find that a coworker's Instagram post, brought to the plaintiff's attention by two other coworkers, which compared the plaintiff to a chimpanzee character in the Planet of the Apes movie, created a hostile work environment); *Tammy S. v. Dep't of Def.,* EEOC Appeal No. 0120084008, 2014 WL 2647178, at *12 (June 6, 2014) (concluding that the complainant was subjected to sex-based harassment creating a hostile work environment, including by way of postings on the harasser's personal website, which were announced during a training class at work and were viewed and discussed by many employees in the workplace); *Knowlton v. Dep't of Transp.,* EEOC Appeal No. 0120121642, 2012 WL 2356829, at *1-3 (June 15, 2012) (reversing dismissal of a harassment claim that included a race-related comment posted by a coworker on Facebook).

[225] This example is adapted from the facts in *Fisher*, 192 F. Supp. 3d at 326-27.

[226] *See Abbt v. City of Hous.*, 28 F.4th 601, 609 (5th Cir. 2022) (concluding that a reasonable jury could find that the plaintiff, a firefighter, was subjected to a sex-

based hostile work environment arising from her colleagues' repeated viewing of a private, nude, intimate video that she had made for her husband).

[227] *See, e.g.*, *EEOC v. Fairbrook Med. Clinic, P.A., 609 F.3d 320, 329 (4th Cir. 2010)* (stating that the severity of the harasser's conduct was exacerbated by his significant authority over the complainant).

[228] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760-62 (1998) (noting "[a]s a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury").

[229] *Id.* at 759 ("Negligence sets a minimum standard for employer liability under Title VII.").

[230] *Id.* at 758 (stating that negligence and vicarious liability, as set forth in provisions of the Restatement (Second) of Agency, "are possible grounds for imposing employer liability on account of a supervisor's acts and must be considered"); *see also id.* at 759 ("Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment."); *Debord v. Mercy Health Sys. of Kansas, Inc.*, 737 F.3d 642, 650-55 (10th Cir. 2013) (analyzing harassment by a supervisor under both negligence and vicarious liability standards); *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 421-22 (11th Cir. 1999) (same).

[231] *Sharp v. City of Hous.*, 164 F.3d 923, 929 (5th Cir. 1999) ("The concept of negligence thus imposes a minimum standard for employer liability—direct liability—under title VII, a standard that is supplemented by the agency-based standards for vicarious liability as articulated in *Faragher* and [*Ellerth*]." (internal quotation marks and citation omitted)); *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 540 n.4 (10th Cir. 1998) ("The Supreme Court recognized in [*Ellerth*] and *Faragher* the continuing validity of negligence as a separate basis for employer liability.").

[232] Although negligence and vicarious liability are distinct grounds for employer liability for unlawful harassment by a supervisor, both standards look at the reasonableness of the employer's actions. The D.C. Circuit has explained: "While the reasonableness of an employer's response to sexual harassment is at issue under both standards, the plaintiff must clear a higher hurdle under the negligence standard, where she bears the burden of establishing her employer's negligence,

than under the vicarious liability standard, where the burden shifts to the employer to prove its own reasonableness and the plaintiff's negligence." *Curry v. D.C.*, 195 F.3d 654, 660 (D.C. Cir. 1999) (citing *Shaw v. AutoZone, Inc.*,180 F.3d 806, 812 n.2 (7th Cir. 1999)).

[233] For a discussion of how to determine whether conduct is part of the same hostile work environment claim, refer to section III.C.1, *supra*.

[234] *See Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562-63 (6th Cir. 1999); *O'Rourke v. City of Providence*, 235 F.3d 713, 736 (1st Cir. 2001).

[235] *See, e.g.*, *O'Brien v. Middle E. Forum*, 57 F.4th 110, 120 (3d Cir. 2023); *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 54 (2d Cir. 2012); *Helm v. Kansas*, 656 F.3d 1277, 1286 (10th Cir. 2011); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 383 (5th Cir. 2003); *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000).

[236] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 789-90 (1998) (citing circuit court decisions recognizing appropriateness of proxy liability for harassment by individuals occupying such positions); *Townsend*, 679 F.3d at 54 (recognizing that employer liability is appropriate for harassment by individuals occupying these positions); *Johnson*, 218 F.3d at 730 (same); *see also O'Brien*, 54 F.4th at 121 ("We recognize, of course, that 'only individuals with exceptional authority and control within an organization can meet' this standard." (quoting *Helm*, 656 F.3d at 1286)).

[237] *See Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1376 (10th Cir. 1998) (stating that *Faragher* and *Ellerth* do not suggest that a supervisor can be considered the employer's alter ego merely because he possesses a high degree of control over a subordinate); *see also O'Brien*, 57 F.4th at 121 (stating that "merely serving as a supervisor with some amount of control over a subordinate does not establish proxy status"); *Townsend*, 679 F.3d at 55-56 (concluding that a jury instruction was erroneous because it gave the misleading impression that mere status as a supervisor with power to hire and fire is sufficient to render the harasser the employer's alter ego); *Johnson*, 218 F.3d at 730 (concluding that alter-ego liability did not apply where the supervisor was not a high-level manager whose actions spoke for the defendant).

[238] *Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).*

An employer cannot shield itself from liability by "concentrat[ing] all decisionmaking authority in a few individuals." *Id. at 446-47.* As the Supreme Court

has explained, when an employer attempts to "confine decisionmaking power to a small number of individuals," those decisionmakers will likely still need to rely on input from "other workers who actually interact with the affected employee" and will have "a limited ability to exercise independent discretion when making decisions." *Id. at 447.* Under those conditions, the employer has effectively delegated the authority to take tangible employment actions to the lower-level employees on whose input the formal decisionmakers must rely. *Id.* As a result, those lower-level employees will qualify as "supervisors." *See Velázquez-Pérez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 272 (1st Cir. 2014) ("As *Vance* recognizes, at some point the ability to provide advice and feedback may rise to the level of delegated authority sufficient to make someone a supervisor. . ."); *see also Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 416 (6th Cir. 2021) (concluding that a reasonable jury could find that the harasser was the plaintiff's supervisor where there were genuine issues about whether the plaintiff's formal supervisor effectively delegated supervisory power to and relied on recommendations from the harasser); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc) (concluding that an individual whose recommendations "would be rubber-stamped" was the plaintiff's supervisor).

239 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998).

As the Supreme Court has explained, *Ellerth* invoked the "tangible employment action" concept "only to 'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (alteration in original) (quoting *Ellerth*, 524 U.S. at 760); *see also Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004) (describing *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), as delineating two categories of hostile work environment claims distinguished by the presence or absence of a tangible employment action). *Ellerth* does not address the scope of either Title VII's general antidiscrimination provision or Title VII's anti-retaliation provision. *Burlington N.*, 548 U.S. at 65; *see also Chambers v. District of Columbia*, 35 F.4th 870, 875-76 (D.C. Cir. 2022) (en banc) (concluding that *Ellerth* did not provide grounds for an "objectively tangible harm" requirement under the general antidiscrimination provision).

240 *E.g.*, *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 790.

241 *See Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 654-55 (5th Cir. 2002).

[242] *Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 738 (10th Cir. 2014) (emphasis in original); *id.* at 741 ("Even if the [formal decision maker] undertook *some* independent analysis when considering employment decisions recommended by [the alleged harasser], [the alleged harasser] would qualify as a supervisor so long as his recommendations were among the proximate causes of the [formal decision maker's] decision-making." (emphasis in original)).

[243] *See Ellerth*, 524 U.S. at 759 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1247 n.20 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action."). *But see EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 685 (8th Cir. 2012) (stating that apparent authority is insufficient to establish supervisor status and the imposition of vicarious liability).

[244] In *Kramer v. Wasatch County Sheriff's Off.*, the Tenth Circuit concluded that apparent-authority principles also might apply where an employer has vested an employee with some limited authority over the complainant and the complainant reasonably but mistakenly believes that the employee also has related powers, which, in some circumstances, might include the power to undertake or substantially influence tangible employment actions. 743 F.3d at 742-43.

[245] *See generally Kramer, 743 F.3d at 742 (*"Apparent authority exists where an entity 'has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first [party].'" (quoting *Bridgeport Firemen's Sick & Death Benefits Ass'n v. Deseret Fed. Sav. & Loan Ass'n*, 735 F.2d 383, 388 (10th Cir. 1984))); *see also* Restatement (Third) of Agency § 2.03 (2006) (defining "apparent authority" as the "power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations"); *id.* § 3.03 ("Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.").

[246] *See, e.g.*, *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).

[247] *See, e.g.*, *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003).

[248] *See, e.g.*, *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1017 (9th Cir. 2018).

[249] *See, e.g.*, *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 914-15 (7th Cir. 2010).

[250] *See, e.g.*, *EEOC v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 606-07 (4th Cir. 2011) (collecting cases in which circuit courts have held employers may be liable for acts of harassment committed against employees by non-employees).

[251] An employer's duty to take reasonable corrective action to prevent harassment from continuing is discussed *supra* at section IV.C.3.b.

[252] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (noting that employer liability for a hostile work environment has not been disputed when the harasser was "indisputably within that class of an employer organization's officials who may be treated as the organization's proxy"); *O'Brien v. Middle E. Forum*, 57 F.4th 110, 117 (3d Cir. 2023) (concluding that, pursuant to *Faragher* and *Ellerth*, the affirmative defense is unavailable when the individual who engaged in the alleged harassment was the employer's proxy or alter ego); *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 52-53 (2d Cir. 2012) (same); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 383-84 (5th Cir. 2003) (same); *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000) (same).

[253] As discussed in section IV.A, *supra*, an employer also may be liable for harassment by a supervisor pursuant to negligence principles.

[254] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998). A "tangible employment action" means a "significant change in employment status" that requires an "official act" of the employer. *Id*.; *see also supra* section IV.B.2 (discussing the definition of "tangible employment action").

[255] *Ellerth*, 524 U.S. at 761-62.

[256] *Id.* at 762; *see also id.* at 762-63 (explaining that requirements of the "aided in the agency" relation standard "will always be met when a supervisor takes a tangible employment action against a subordinate").

[257] As discussed in section III.C.1, *supra*, a discriminatory employment practice that occurred within the charge-filing period may be independently actionable regardless of whether it is also part of a hostile work environment claim.

[258] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (holding no affirmative defense is available where a supervisor's harassment culminates in a tangible employment action and providing examples of non-career-ending tangible employment actions to include demotion and undesirable reassignment); *Ellerth*, 524 U.S. at 761-63 (holding that vicarious liability will always be imputed to an employer when a supervisor takes a tangible employment action, which could include non-career-ending actions such as denial of raise or promotion); *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) (stating an inference arises that there is a causal link between the harasser's discriminatory animus and the employment decision "*any time* the harasser makes a tangible employment decision that adversely affects the plaintiff," such as a demotion (emphasis added)); *see also Ferraro v. Kellwood Co.*, 440 F.3d 96, 101-02 (2d Cir. 2006) (stating that the affirmative defense is not available if a tangible employment action was taken against an employee as part of a supervisor's discriminatory harassment and that harassment culminates in a tangible employment action if the action is "linked" to the harassment); *cf. Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1232 (11th Cir. 2006) (stating that there must be a causal link between the tangible employment action, in this case an alleged reduction in hours, and the sexual harassment, which can be shown by temporal proximity).

[259] Under such circumstances, the employee also would have a claim that the denial of a raise was because of sex. *See supra* section III.C.1 (noting that conduct that is separately actionable also may be part of a hostile work environment claim).

[260] *See Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1303 (11th Cir. 2007) (stating that the affirmative defense is not available where "the discrimination the employee has suffered included a tangible employment action").

[261] *See Ellerth*, 524 U.S. at 754 (analyzing harassment claim as a hostile work environment claim because it involved only unfulfilled threats); *Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1027 (8th Cir. 2004) (analyzing an unfulfilled implied threat as a factor in determining whether the plaintiff was subjected to a hostile work environment).

[262] *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1169 (9th Cir. 2003) (concluding that "determining not to fire an employee who has been threatened with discharge constitutes a 'tangible employment action,' at least where the reason for the change in the employment decision is that the employee has submitted to coercive sexual demands"); *Jin v. Metro. Life Ins. Co., 310 F.3d 84, 98 (2d Cir. 2002) (finding prejudicial*

error where the lower court failed to instruct the jury to consider the supervisor's conditioning of the plaintiff's continued employment on her submission to his sexual demands as a possible tangible employment action). *But see Santiero v. Denny's Rest. Store*, 786 F. Supp. 2d 1228, 1235 (S.D. Tex. 2011) (concluding that the employee was not subjected to a tangible employment action where she acceded to sexual demands and thereby *avoided* a tangible employment action); *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1224-26 (M.D. Fla. 2004) (rejecting the *Jin* analysis as inconsistent with Supreme Court and Eleventh Circuit precedent).

263 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

264 *Ellerth*, 524 U.S. at 764.

265 *Id*. at 765 (emphasis added); *Faragher*, 524 U.S. at 807 (emphasis added); *see also, e.g.*, *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1313 (11th Cir. 2001) ("Both elements must be satisfied for the defendant-employer to avoid liability, and the defendant bears the burden of proof on both elements.").

266 *Ellerth*, 524 U.S. at 765.

267 If the employer had been aware of previous harassment by the same supervisor, then the employer would not be able to establish the affirmative defense if it had failed to take appropriate corrective action in the past to address harassment by that supervisor. *See Minarsky v. Susquehanna Cnty*., 895 F.3d 303, 312-13 (3d Cir. 2018) (holding that a jury could find that the employer did not act reasonably to prevent harassment by the plaintiff's supervisor where county officials were aware that the supervisor's conduct "formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward [the supervisor's] harassment").

268 *See Faragher*, 524 U.S. at 809 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1177 (9th Cir. 2003) ("The legal standard for evaluating an employer's efforts to prevent and correct harassment, however, is not whether any additional steps or measures would have been reasonable if employed, but whether the employer's actions as a whole established a reasonable mechanism for prevention and correction."); *see*

also EEOC, *Promising Practices for Preventing Harassment* (2017), **https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment (https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment)** ; EEOC, *Promising Practices for Preventing Harassment in the Federal Sector*, **https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector (https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector)** (last visited Apr. 12, 2024).

269 For further guidance on what constitutes reasonable care to prevent harassment, refer to sectionIV.C.3.a, *infra*. An employer also may reduce the likelihood of unlawful harassment by conducting climate surveys of employees to determine whether employees believe that harassment exists in the workplace and is tolerated, and by repeating the surveys to ensure that changes to address potential harassment have been implemented. Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** (discussing steps an organization may take to convey a sense of urgency about preventing harassment).

270 *See, e.g.*, *Agusty-Reyes v. Dep't of Educ.*, 601 F.3d 45, 55 (1st Cir. 2010) (holding that a reasonable jury could conclude that the failure to disseminate the harassment policy and complaint procedure precluded the employer from establishing the first prong of the defense); *Ortiz v. Sch. Bd.*, 780 F. App'x 780, 786 (11th Cir. 2019) (per curiam) (denying summary judgment to the employer on the *Faragher-Ellerth* affirmative defense where there was evidence that the employer had failed to take reasonable steps to disseminate its anti-harassment policy).

271 *See EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007) (explaining that, although an employer need not tailor its complaint procedure to the competence of each employee, "the known vulnerability of a protected class has legal significance"). In *V & J Foods*, the victims of harassment were teenage girls working part-time, and often as their first job, in a small retail outlet. *Id.* The court criticized the defendant's complaint procedures as "likely to confuse even adult employees,"

and stated, "[k]nowing that it has many teenage employees, the company was obligated to suit its procedures to the understanding of the average teenager." *Id.*

[272] *EEOC v. Spud Seller, Inc.*, 899 F. Supp. 2d 1081, 1095 (D. Colo. 2012) (determining a trial was required on the issue of whether the employer, which employed some individuals who spoke only Spanish, could satisfy the *Faragher-Ellerth* affirmative defense where the employer's handbook contained an anti-harassment policy in English, but there was no evidence that its provisions were translated into Spanish or that written translations were supplied to Spanish-speaking employees).

[273] *See Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir. 2005) ("While there is no exact formula for what constitutes a 'reasonable' sexual harassment policy, an effective policy should at least . . . require supervisors to report incidents of sexual harassment."); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (criticizing employer's putative sexual harassment policy where the policy, *inter alia*, failed to place any duty on supervisors to report incidents of sexual harassment to their superiors); *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541 (10th Cir. 1998) (criticizing employer policy for failing to "provide instruction on the responsibilities, if any, of a supervisor who learns of an incident of harassment through informal means"); *Varner v. Nat'l Super Mkts.*, 94 F.3d 1209, 1214 (8th Cir. 1996) (holding employer liable where the company's policy "in effect required [the plaintiff's] supervisor to remain silent notwithstanding his knowledge of the incidents"); *cf. Ridley v. Costco Wholesale Corp.*, 217 F. App'x 130, 138 (3d Cir. 2007) (declining to impose punitive damages where defendant provided new supervisors with detailed materials regarding supervisors' obligation to address discrimination issues).

[274] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (holding as a matter of law that the city did not exercise reasonable care to prevent the supervisors' harassment where, among other defects, the city's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (stating that it was "not altogether surprising" that the complainant did not follow a grievance procedure that apparently required her to complain first to her supervisor, who was the alleged harasser); *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App'x 587, 596 (6th Cir. 2009) (reversing grant of summary judgment on a hostile work environment claim where the employer's policy failed to provide a mechanism for bypassing a harassing supervisor when making a complaint, *inter alia*); *Clark*, 400 F.3d at 349-50 (stating that a reasonable sexual harassment

procedure should provide a mechanism for bypassing a harassing supervisor when making a complaint); *Stewart v. Trans-Acc, Inc.*, No. 1:09-cv-607, 2011 WL 1560623, at *11 (S.D. Ohio Apr. 25, 2011) (noting the employer's policy "[c]rucially . . . does not contain a reporting procedure, much less a mechanism for bypassing a harassing supervisor"); *see also* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** ("Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.").

275 *See Wilson*, 164 F.3d at 541 (noting deficiencies with the employer's policy, including a supervisor-bypass option that "is located in a separate facility and is not accessible during the evening or weekend hours when many employees and students are on the various campuses"); *Lamarr–Arruz v. CVS Pharm., Inc.*, 271 F. Supp. 3d 646, 661 (S.D.N.Y. 2017) (the employee's testimony that complaints to the ethics hotline were ignored raises questions regarding the reasonableness of the employer's purported available corrective measures); *Spud Seller*, 899 F. Supp. 2d at 1095 (questioning whether the employer's anti-harassment policy was sufficient where employees who spoke only Spanish could not bring complaints directly to the individuals identified in the policy because the points of contact did not speak Spanish); *Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274, 1300 (M.D. Ala. 2010) (criticizing the employer's complaint reporting procedure where employees were directed to file complaints with one person at an address located in a different city, the point of contact never visited the location where the harassed employee worked, and the harassed employee was not provided with any other contact information for the point of contact); *Escalante v. IBP, Inc.*, 199 F. Supp. 2d 1093, 1103 (D. Kan. 2002) (determining the employer failed to show it exercised reasonable care by promulgating and implementing an anti-harassment policy where it "has a confusing number of contradicting policies, each stating a different reporting mechanism, the specific policy dealing with discrimination claims only provides the employee one person to report such claims to[, and] [t]his person is located in another state, is only accessible by telephone, and the policy does not state the hours or days in which this person may be reached"); *Dinkins v. Charoen*

Pokphand USA, Inc., 133 F. Supp. 2d 1254, 1269 n.22 (M.D. Ala. 2001) (noting "mid-level supervisors may have blocked Plaintiffs' attempts to contact higher-ranking supervisors" thereby rendering the complaint process inaccessible and deficient); *cf. Ocheltree*, 335 F.3d at 334 (finding the employer's "open door" reporting policy deficient where the two points of contact were either always unavailable or refused to speak with the employee when the employee attempted to complain); *Madray v. Publix Supermarkets, Inc*., 208 F.3d 1290, 1298 (11th Cir. 2000) (noting the employer's policy designated several additional company representatives to whom an employee could complain regarding harassment and that these individuals were accessible to employees). Accessibility of points of contact can also be relevant when addressing the second prong of the *Faragher-Ellerth* affirmative defense, which considers whether the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *See infra* sectionIV.C.2.b.ii and note 297.

276 *See EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 436 (7th Cir. 2012) (stating "an employer's complaint mechanism must provide a clear path for reporting harassment" and criticizing the defendant for, *inter alia*, failing to provide any point of contact or contact information for employees to make harassment complaints); *cf. Helm v. Kansas*, 656 F.3d 1277, 1288 (10th Cir. 2011) (finding the employer's policy, which included "a complaint procedure and list of personnel to whom harassment may be reported" reasonable).

277 *See Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 954 (7th Cir. 2005) (describing a prompt investigation as a "hallmark of reasonable corrective action").

278 *See Thomas v. BET Soundstage Rest.*, 104 F. Supp. 2d 558, 565-66 (D. Md. 2000) (stating that the failure to provide confidentiality or protection from retaliation where there is evidence of prevalent hostility can support a finding that the policy was defective and dysfunctional); *cf. AutoZone, Inc. v. EEOC*, 421 F. App'x 740, 741-42 (9th Cir. 2011) ("The EEOC introduced evidence that despite AutoZone policy requiring managers to 'thoroughly investigate each reported allegation as confidentially as possible,' Anderson interviewed Wing about her complaint in a semi-public part of her own store."). An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the

allegation of harassment should be shared only with those who need to know about it. *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** . Records relating to harassment complaints should be kept confidential on the same basis.

279 *See Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139, 1145 (8th Cir. 2007) (holding that the employer demonstrated that it exercised reasonable care to prevent sexual harassment where the employer had and effectively deployed a facially valid anti-harassment policy, which included a non-retaliation provision and a flexible reporting procedure that listed four individuals who may be contacted in the case of harassment); *Ferraro v. Kellwood Co.*, 440 F.3d 96, 102-03 (2d Cir. 2006) (concluding that the employer satisfied the first element of the affirmative defense to disability-based harassment where, among other things, it had an anti-harassment policy that prohibited harassment on account of disability, promised that complaints would be handled promptly and confidentially, and contained an anti-retaliation provision); *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1029 (N.D. Iowa 2000) (stating the gravamen of an effective anti-harassment policy includes three provisions: (1) training for supervisors, (2) an express anti-retaliation provision, and (3) multiple complaint channels for reporting the harassing conduct) (collecting cases supporting inclusion of each provision), *aff'd*, 248 F.3d 1165 (8th Cir. 2001); *see also Jaros v. LodgeNet Entm't Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) (upholding a sexual harassment jury verdict for the plaintiff where she resigned instead of cooperating with her employer's investigation because, among other things, the Human Resources Director did nothing to assure her that she would not be subjected to retaliation).

280 This is a non-exhaustive list. *See, e.g.*, Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 44-60 (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** ; EEOC, *Promising Practices for Preventing Harassment* (2017),

https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment (https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment) .

[281] For a detailed discussion of promising practices for anti-harassment training, see EEOC, *Promising Practices for Preventing Harassment* (2017), **https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment (https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment)** , and EEOC, *Promising Practices for Preventing Harassment in the Federal Sector*, **https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector (https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector)** (last visited Apr. 12, 2024).

[282] *See Ferraro v. Kellwood Co.*, 440 F.3d 96, 102 (2d Cir. 2006) ("An employer may demonstrate the exercise of reasonable care, required by the first element, by showing the existence of an antiharassment policy during the period of the plaintiff's employment, although that fact alone is not always dispositive.").

[283] *See, e.g.*, *Wallace v. Performance Contractors, Inc*., 57 F.4th 209, 223 (5th Cir. 2023) (determining the "evidence indicates that [the defendant] had a policy in theory but not one in practice" where both the plaintiff and her husband tried to contact the human resources office several times to no avail and harassment occurred in front of other employees and was never reported, despite the defendant's policy requiring any person witnessing harassment to report it); *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005) ("While there is no exact formula for what constitutes a 'reasonable' sexual harassment policy, an effective policy should at least . . . provide for training regarding the policy.").

[284] *See Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) ("But where, as here, there is no evidence that an employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional, the existence of such a policy militates strongly in favor of a conclusion that the employer 'exercised reasonable care to prevent' and promptly correct sexual harassment."); *see also Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1299 (11th Cir. 2000) ("[B]ecause we find no inherent defect in the complaint procedures established by Publix's sexual harassment policy, nor any evidence that the policy was administered in bad faith, we conclude that Publix exercised reasonable care to prevent sexual harassment.").

[285] *MacCluskey v. Univ. of Conn. Health Ctr.*, 707 F. App'x 44, 47-48 (2d Cir. 2017) ("Even where an employer provides a reasonable avenue for complaint, it may be liable if it knew or should have known about the harassment and failed to take appropriate action." (citing *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009))).

[286] *Duch*, 588 F.3d at 764-66 (imputing the supervisor's actual or constructive knowledge of the harassment to the employer).

[287] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

[288] *See Faragher*, 524 U.S. at 807 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.").

[289] *Cf. Savino v. C.P. Hall Co.*, 199 F.3d 925, 935 (7th Cir. 1999) (stating that the employee's "unreasonable foot-dragging will result in at least a partial reduction of damages, and may completely foreclose liability").

[290] *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765; *see also Roby v. CWI, Inc.*, 579 F.3d 779, 786 (7th Cir. 2009) (second prong of affirmative defense satisfied where the plaintiff was aware that the anti-harassment policy required immediate reporting of sexual harassment, yet she failed to say anything for at least five months); *Taylor v. Solis*, 571 F.3d 1313, 1318 (D.C. Cir. 2009) (second prong of affirmative defense satisfied where a reasonable employee in the plaintiff's position would have used the employer's complaint procedure yet the plaintiff instead posted the sexual harassment policy on her office door and told her friend that she was being harassed).

[291] *Minarsky v. Susquehanna Cnty*., 895 F.3d 303, 314-16 (3d Cir. 2018) (concluding that a jury could find that the plaintiff's failure to report harassment by her supervisor was not unreasonable where, among other things, her working conditions worsened after she asserted herself in the past, the supervisor warned her that she could not trust the individuals to whom she was required to report the harassment, and the employer had known of the supervisor's prior misconduct but "merely slapped him on the wrist"); *Johnson v. West*, 218 F.3d 725, 732 (7th Cir. 2000) (holding that whether the plaintiff's failure to complain was unreasonable was a factual issue where evidence showed the harasser threatened the plaintiff, verbally

abused her, and threw mail in her face); *Meza-Perez v. Sbarro LLC*, No. 2:19-cv-00373, 2020 WL 12752817, at *8 (D. Nev. Dec. 16, 2020) (concluding a reasonable jury could find the plaintiff's delay in reporting was not unreasonable where the harasser repeatedly threatened the plaintiff and her family members with physical harm, termination, and deportation).

[292] The employee is not required to have chosen "the course that events later show to have been the best." Restatement (Second) of Torts § 918, comment c (1979); *see also Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 754 (10th Cir. 2014) (noting that the employee's response to harassment was not necessarily unreasonable even if "20/20 hindsight" suggests that she "could have avoided" some of the harm).

[293] *See Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009) (stating that an employee should not necessarily be expected to complain after the first or second incident of relatively minor harassment and that an employee is not required to report "individual incidents that are revealed to be harassment only in the context of additional, later incidents, and that only in the aggregate come to constitute a pervasively hostile work environment"); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 36-37 (1st Cir. 2003) (noting that "sometimes inaction is reasonable" and concluding that the failure to report relatively minor incidents of harassment was not unreasonable).

[294] *See Crockett v. Mission Hosp., Inc.*, 717 F.3d 348, 357-58 (4th Cir. 2013) (concluding that the second prong of the defense was established by uncontradicted evidence that the employer counseled the complainant on how to file a formal complaint, provided her with a copy of the sexual harassment policy, and repeatedly met with her in an effort to learn what had happened so it could correct the situation, but the complainant refused, for a month, to provide any details or information about the conduct that had prompted her complaint).

[295] *Cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998) (stating that employers can establish a defense only if the plaintiff *unreasonably* failed to make use of "a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense").

[296] *See id.* (referencing a proven, effective complaint process that was available "without undue risk or expense").

[297] *See Derry v. EDM Enters., Inc.*, No. 09-CV-6187, 2010 WL 3586739, at *3 (D. Or. Sept. 13, 2010) (concluding that the employee's failure to take advantage of the employer's corrective opportunities was not unreasonable where the only contact persons for reporting harassment were her supervisor, who was the alleged harasser, and the CEO, whose phone number was not readily available and whom the employee was discouraged from contacting without going through her supervisor); *see also supra* note 275.

[298] *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001) (holding that the employee's failure to report harassment based on speculation that complaints would be ignored was not reasonable).

[299] *See Monteagudo v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164, 171-72 (1st Cir. 2009) (concluding that a jury could have determined that the plaintiff's failure to report sexual harassment by her supervisor was not unreasonable, in part, because of the evidence of a close relationship between the harasser and officials designated to accept complaints); *Shields v. Fed. Express Customer Info. Servs. Inc.*, 499 F. App'x. 473, 482 (6th Cir. 2012) (concluding that a reasonable jury could find that the plaintiffs did not act unreasonably in failing to report the operations manager's sexual harassment to other managers where the harasser repeatedly told them that other managers were his friends and would not believe the plaintiffs if they complained).

[300] *See Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (stating evidence that the employer has ignored or resisted similar complaints could be sufficient to excuse an employee's failure to use the employer's complaint procedure); *Mancuso v. City of Atlantic City*, 193 F. Supp. 2d 789, 806 (D.N.J. 2002) (concluding jury could reasonably find that the plaintiff's failure to complain of harassment was not unreasonable where the plaintiff repeatedly witnessed the employer's failure to respond to coworkers' and her own complaints); *Sullivan v. Hanover Foods Corp.*, No. 18-803 (MN), 2020 WL 211216, at *17 (D. Del. Jan. 14, 2020) (evidence that human resources and management frequently ignored complaints regarding race discrimination raised a genuine issue of material fact as to whether the plaintiff was unreasonable in failing to take advantage of preventive or corrective opportunities provided by the defendant); *Baker v. Int'l Longshoremen's Ass'n, Local 1423*, No. CV205-162, 2009 WL 368650 at *8 (S.D. Ga. Feb. 13, 2009) (holding that the plaintiff could introduce evidence of ignored harassment complaints to show that her failure to use the union grievance process was reasonable); *see also Minarsky v.*

Susquehanna Cnty., 895 F.3d 303, 313 n.12 (3d Cir. 2018) ("While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it this way.").

[301] *Barrett*, 240 F.3d at 267 (holding that employee's failure to report harassment based on a speculative fear of retaliation was not reasonable).

[302] *See Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 416 (6th Cir. 2021) (denying summary judgment and concluding the plaintiff's proffered evidence demonstrated she "was under a credible threat of retaliation" that alleviated her duty to report the harassment); *Minarsky*, 895 F.3d at 314 ("If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law."); *EEOC v. U.S. Bell, Link Techs., Corp.*, No. 2:03-CV-237, 2005 WL 1683979, at *19 (N.D. Ind. July 19, 2005) (determining that female employees were not unreasonable when they failed to report harassment as a result of the harasser's threats of retaliation and intimidation).

[303] *See Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 37 (1st Cir. 2003) (concluding that a jury could find that the seventeen-year-old complainant did not act unreasonably in failing to report a sexual assault where her supervisor threatened to have her fired if she complained and he boasted that his father was "really good friends" with the owner); *Mota v. Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 525-26 (5th Cir. 2001) (concluding that, in light of the supervisor's repeated threats of retaliation, a jury could infer that the employee's nine-month delay in filing a complaint was not unreasonable); *O'Brien v. Middle E. Forum*, No. 2:19-cv-06078, 2021 WL 2186434, at *9 (E.D. Pa. May 28, 2021) (concluding that a reasonable jury could find that the employee's fear of retaliation was objectively reasonable based on evidence that the harasser "frequently threatened female employees by telling them that he could hack their computers, view their communications, and that he had cameras throughout the office"; asked female employees to spy on one another and had his sister eavesdrop on them; and had told other female employees he would have them fired for being a "walking lawsuit"); *Kanish v. Crawford Area Transp. Auth.*, No.

1:19-cv-00338 (Erie), 2021 WL 1520516, at *8 (W.D. Pa. Mar. 26, 2021) (holding that there were material issues of fact regarding whether the plaintiff unreasonably failed to avail herself of preventive or corrective opportunities, where she feared being fired if she complained about her supervisor; the harasser viewed himself as "untouchable" because he was a supervisor and cop; and the human resources manager was already aware of the harassment but did not take any action, leading the plaintiff to believe that a complaint would be futile).

304 *See EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 437 (7th Cir. 2012) (stating that the employee may have been justified in not reporting the assistant manager's harassment to the district manager because she had previously been treated harshly by a different harasser after reporting his conduct to the district manager); *Still v. Cummins Power Sys.*, No. 07-5235, 2009 WL 57021, at *13 (E.D. Pa. Jan. 8, 2009) (concluding that a trier of fact could find the plaintiff's failure to report the supervisor's racial harassment reasonable, given the plaintiff's testimony that two other employees suffered retaliation after complaining about harassment by the same supervisor).

305 *See, e.g.*, *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (explaining that imposing vicarious liability on an employer is a compromise requiring more than "ordinary fear or embarrassment" to justify delay in complaining (quoting *Reed*, 333 F.3d at 35)).

306 *See Minarsky,* 895 F.3d at 316 (concluding that a reasonable jury could find that an employee's delay in reporting sexual harassment by her supervisor was reasonable, in part, because of the psychological impact the harassment had on her); *see also* Brianna Messina, *Redefining Reasonableness: Supervisory Harassment Claims in the Era of #MeToo*, 168 U. Pa. L. Rev. 1061, 1084 and accompanying notes (2020) (citing studies analyzing psychological effects of sexual harassment).

307 *See, e.g.*, *Agusty-Reyes v. Dep't of Educ.*, 601 F.3d 45, 56 (1st Cir. 2010) (stating that a jury could find that the employee exercised reasonable care to avoid harm by filing union complaints, at least one of which was copied to the employer); *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (concluding that the employee made an effort "to avoid harm otherwise" where she filed a union grievance and did not utilize the employer's harassment complaint process since both the employer and union procedures were corrective mechanisms designed to avoid harm).

[308] *Cf. EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631, 641-42 (9th Cir. 2019) (explaining that where a client was aware of discrimination and could have taken corrective action to stop it, the client may be liable); *Mullis v. Mechanics & Farmers Bank*, 994 F. Supp. 680, 686 (M.D.N.C. 1997) (holding that a temporary agency may be liable for harassment at a client's workplace where the employee complained to the temporary agency and the temporary agency made no investigation into or attempt to remedy the situation). Depending upon the facts and specific nature of the employment relationship, the staffing firm, the client, or both may be legally responsible under the federal EEO laws for undertaking corrective action. *See generally* EEOC, Notice No. 515.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment A*gencies *and Other Staffing Firms* (1997), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary (https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary)** .

[309] As noted earlier in section IV.C.2.b.i, the principles discussed in this section (section IV.C.3) also apply in determining whether the employer has satisfied the first prong of the *Faragher-Ellerth* affirmative defense.

[310] For further discussion of the general application of the negligence standard, see notes 229 to 232 and accompanying text.

[311] *See Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). The Supreme Court stressed in *Vance* that a complainant could "prevail simply by showing that the employer was negligent in permitting…harassment to occur." *Id.* at 445; *see also id.* at 448-49 (explaining that an employee can establish employer liability for nonsupervisory harassment "by showing that his or her employer was negligent in failing to prevent harassment from taking place").

[312] *See id.* at 449 (stating that evidence relevant in determining whether the employer unreasonably failed to prevent harassment would include evidence that the employer did not monitor the workplace, that it failed to respond to complaints, that it failed to provide a system for registering complaints, or that it effectively discouraged complaints from being filed); *see also Doe v. Oberweis Dairy*, 456 F.3d 704, 716 (7th Cir. 2006) (stating that the employer is liable for coworker harassment if "it failed to have and enforce a reasonable policy for preventing harassment, or in short only if it was negligent in failing to protect the plaintiff from predatory coworkers"); *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005) (stating that

implementation of a harassment policy training session was relevant to whether the employer exercised reasonable care to prevent harassment, but adding that "[t]he mere existence of such a policy . . . does not necessarily establish that the employer acted reasonably in remedying the harassment after it has occurred or in preventing future misconduct"); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334-35 (4th Cir. 2003) (concluding that a jury could find that the employer had constructive knowledge of harassment where the employer failed to provide adequate avenues to complain about harassment); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1279-80 (11th Cir. 2002) (concluding that an anti-harassment policy was not effective where it was not aggressively or thoroughly disseminated, it was not posted in the workplace, managers were not familiar with it, it was not in the complainant's personnel file, and the employer's actual practice indicated a tolerance of harassment or discrimination); *Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001) (stating that the employer's adoption of a harassment policy that encouraged employees to report harassment to a supervisor or the EEO Director was relevant in evaluating employer liability for coworker harassment).

313 *Vance*, 570 U.S. at 445-46 (stating that the "nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent").

314 *Oberweis Dairy*, 456 F.3d at 717.

315 *See supra* section IV.B.2 (addressing the definition of "supervisor").

316 *Vance*, 570 U.S. at 449.

317 *See Freitag v. Ayers*, 468 F.3d 528, 539-40 (9th Cir. 2006) (rejecting the defendant's argument that prisons are uniquely exempt from liability for sexual harassment under Title VII and affirming that prisons must implement and enforce policies reasonably calculated to minimize the risk of inmates harassing staff).

318 Risk factors for harassment are identified and discussed in an EEOC report published by the Select Task Force on the Study of Harassment in the Workplace. *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, § E (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf**

(https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) .

[319] *See* 29 C.F.R. §§ 1604.11(d), (e); *see also, e.g.*, *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010); *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957-58 (11th Cir. 2010); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir. 2008); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1257 (11th Cir. 2003).

[320] *See, e.g.*, *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 931 (7th Cir. 2017) (holding that the employer could be liable if it knew or should have known of the non-supervisor's harassing conduct yet failed to act).

[321] *See, e.g.*, *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009) (stating that an employer has "actual notice of harassment when sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it"); *see also West v. Tyson Foods, Inc.*, 374 F. App'x 624, 634 (6th Cir. 2010) (determining it was reasonable for the jury to conclude that the employer had actual knowledge of harassment where the aggrieved employee reported harassment to her supervisor in compliance with the employer's anti-harassment policy); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1363-64 (11th Cir. 1999) (per curiam) (addressing the question of whether the employer had adequate notice of the harassment, the court stated, "[t]his inquiry is made easy by the fact that Sundor's own promulgated sexual harassment policy" directs employees to report harassment to their line manager, personnel, or any other manager with whom the employee is comfortable and that "[w]ith this policy, Sundor itself answered the question of when it would be deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures"); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998) ("Actual knowledge will be demonstrable in most cases where the plaintiff has reported harassment to management-level employees.").

[322] *See Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 107-08 (3d Cir. 2009) (stating that an employee's knowledge of harassment is imputed to the employer if the employee is specifically charged with addressing harassment, such as a human resources manager designated to receive complaints); *Nischan*, 865 F.3d at 932 (7th Cir. 2017) (concluding that because the employee handbook required any employee with supervisory or managerial responsibility to report any possible harassment he or she is aware of, the employer had notice if a low-level supervisor

was aware of harassment directed at a coworker with the same low-level supervisor title); *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350-51 (6th Cir. 2005) (applying Title VII standards to hold that the employer could be liable for the failure to prevent and correct harassment where the company's policy imposed the duty on all supervisors to report harassment, and multiple supervisors allegedly witnessed harassment but failed to report it to management); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 403 (1st Cir. 2002) (concluding that a team leader's knowledge was imputed to the employer where it had a policy allowing employees to report sexual harassment to team leaders).

323 *See Torres v. Pisano*, 116 F.3d 625, 636-47 (2d Cir. 1997).

324 This example is adapted from the facts in *Lambert v. Peri Formworks Systems, Inc.*, 723 F.3d 863 (7th Cir. 2013).

325 *See Clark*, 400 F.3d at 350 (concluding that the employer had notice of harassment that was witnessed by supervisors with a duty to report it to management, where the employer's anti-harassment policy required "*all* supervisors and managers" to report such harassment to the appropriate management personnel) (emphasis in original).

326 *See*, *e.g.*, *Okoli v. City of Balt.*, 648 F.3d 216, 224 n.8 (4th Cir. 2011) (determining that, although the employee's complaint did not explicitly mention sexual harassment, the employer "surely should have known" that the plaintiff's complaints, which contained the word harassment and addressed "unethical" and "degrading and dehumanizing" conduct, likely encompassed sexual harassment).

327 *See Valentine v. City of Chi.*, 452 F.3d 670, 680-81 (7th Cir. 2006) (determining that a question of material fact existed as to whether the plaintiff's complaints about unwanted touching provided the employer with sufficient notice of harassment); *Burke v. Villa*, No. 19-CV-2957, 2021 WL 5591711, at *9 (E.D.N.Y. Nov. 30, 2021) (concluding a rational juror could find the plaintiff's complaint of continuous touching by an assistant manager to the point of aggravation was sufficiently clear to place the employer on notice of potential harassment).

328 This example is adapted from the facts in *Duch v. Jakubek*, 588 F.3d 757 (2d Cir. 2009).

329 *See Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605-06 (7th Cir. 2006) (stating that Title VII's "'primary objective' . . . is 'not to provide redress but to avoid harm'" and

that the duty to prevent unlawful harassment may require an employer to take reasonable steps to prevent harassment once informed of a reasonable probability that it will occur (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998))); *id.* at 606 ("[A]n employer who receives notice that some probability of sexual harassment exists must adequately respond to that information within a reasonable amount of time."); *see also Vance v. Ball State Univ.*, 570 U.S. 421, 448-49 (2013) (stating that the employer is liable for harassment if it failed to act reasonably to prevent the harassment); *cf. Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (explaining that Title VII's deterrent purpose would be served by encouraging employees to report harassment at an early stage *before* it is severe or pervasive). *But see Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010) (subdividing the course of harassment into separate periods: one during which it was neither severe nor pervasive and a second during which it was severe or pervasive, but at which point the court determined the employer took reasonable corrective measures).

330 *Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 756 (10th Cir. 2014) (quoting *Hirase-Doi v. U.S. W. Commc'ns, Inc.*, 61 F.3d 777, 783-84 (10th Cir. 1995)).

331 *See e.g.*, *Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008) (quoting *Weger v. City of Ladue*, 500 F.3d 710, 721 (8th Cir. 2007)).

332 *See, e.g.*, *id.*; *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009) (quoting *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003)); *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 105 n.4 (3d Cir. 2009) (quoting *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 294 (3d Cir. 1999)); *see also Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (stating that the employer cannot adopt a "see no evil, hear no evil" strategy and that notice of harassment is imputed to the employer if a "'reasonable [person], intent on complying with Title VII,' would have known about the harassment" (quoting *Spicer v. Va. Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir. 1995))).

333 *Chapman v. Oakland Living Ctr.*, 48 F.4th 222, 232 (4th Cir. 2022) (concluding that a reasonable jury could find that the employer had constructive notice of harassment where the employer failed to produce evidence that it had a harassment reporting policy when the harassment occurred and, although the employer had an employee handbook, the only copy was kept in a desk where the plaintiff may never have seen it).

[334] This example is adapted from the facts in *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002).

[335] *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 814 (6th Cir. 2013) (stating that a base level of reasonable corrective action may include, among other things, prompt initiation of an investigation); *Dawson v. Entek Int'l*, 630 F.3d 928, 940 (9th Cir. 2011) (stating that an adequate remedy requires the employer to intervene promptly).

[336] *See Crawford v. BNSF Ry. Co*., 665 F.3d 978, 985 (8th Cir. 2012) (concluding that the defendant exercised reasonable care to prevent and correct harassment when it initiated an investigation upon receiving a harassment complaint, placed the alleged perpetrator on administrative leave within two days, and terminated him within two weeks); *Pantoja v. Dep't of Air Force*, EEOC Appeal No. 01995176, 2001 WL 1526459, at *1 (Nov. 21, 2001) (affirming administrative judge's decision that the agency was not liable for alleged sexual harassment where the agency immediately investigated the allegations and within one day moved the alleged harasser to another building).

[337] *See EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 436 (7th Cir. 2012) (stating that a two-month delay in initiating an investigation was not the type of response "reasonably likely to prevent the harassment from recurring" (quoting *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 954 (7th Cir. 2005))).

[338] *See Hafford v. Seidner*, 183 F.3d 506, 514 (6th Cir. 1999) (denying the employer's motion for summary judgment where the employer failed to investigate racially abusive phone calls that were known to the employer, noting that "[e]arlier action may have discouraged the later calls and other conduct toward [the employee]"). For federal employers, EEOC Management Directive 715 (MD-715), which is the policy guidance the EEOC provides to federal agencies for their use in establishing and maintaining effective EEO programs, at Part G (Agency Self-Assessment Checklist) asks, in the context of receiving a harassment allegation, whether the agency conducted a prompt inquiry "beginning within 10 days of notification" of alleged harassment. *See* EEOC, MD-715 - PART G Agency Self-Assessment Checklist, at C.2.a.5, **https://www.eeoc.gov/federal-sector/management-directive/md-715-part-g-agency-self-assessment-checklist (https://www.eeoc.gov/federal-sector/management-directive/md-715-part-g-agency-self-assessment-checklist)** (last visited Apr. 12, 2024).

[339] *See Rockymore v. U.S. Postal Serv.*, EEOC Appeal No. 0120110311, 2012 WL 424237, at *5 (Jan. 31, 2012) (finding that the agency failed to take prompt corrective action where it did not provide any justification for its two-week delay in responding to the complainant's sexual harassment complaint, particularly considering the complainant's indication that the alleged harasser had touched her).

[340] *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1304 (11th Cir. 2007); *see also EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 465-66 (5th Cir. 2013) (en banc) (holding that a reasonable jury could conclude that the employer failed to take reasonable measures to prevent and correct harassment where, among other things, the harassment complaint resulted in a belated and cursory 20-minute investigation in which the investigator did not take any notes or ask any questions during his meeting with the complainant, and he never contacted the employer's EEO Officer or sought advice about how to handle the matter); *Shields v. Fed. Express Customer Info. Servs. Inc.*, 499 F. App'x 473, 480 (6th Cir. 2012) (concluding that a jury could find that the employer might have uncovered evidence of harassment if it had conducted a thorough investigation); *Ross v. City of Dublin,* No. 2:14-CV-02724, 2016 WL 7117389, at *18 (S.D. Ohio Dec. 7, 2016) ("A reasonable jury could find that [the employer's] failure to interview [the complainant] . . . manifests indifference or unreasonableness."); *Lightbody v. Wal-Mart Stores E., L.P.*, No. 13-cv-10984, 2014 WL 5313873, at *5 (D. Mass. Oct. 17, 2014) (concluding that a reasonable jury could find that the employer was liable for sexual harassment of the plaintiff because, in investigating the plaintiff's complaint, it failed to follow leads that bore on the alleged harasser's credibility); *Grimmett v. Ala. Dep't of Corr.*, No. CV-11-BE-3594-S, 2013 WL 3242751, at *13 (N.D. Ala. June 25, 2013) (concluding that the employer failed to show that it exercised reasonable care where it presented general evidence that it had initiated an investigation but no specific evidence that would enable the court to evaluate the adequacy of the investigation and the employer's conclusory finding that the harassment complaint was unfounded).

[341] *See Hathaway v. Runyon*, 132 F.3d 1214, 1224 (8th Cir. 1997) ("It is not a remedy for the employer to do nothing simply because the coworker denies that the harassment occurred, and an employer may take remedial action even where a complaint is uncorroborated." (citations omitted)).

[342] This example is adapted from the facts in *EEOC v. Boh Brothers Construction Company, LLC*, 731 F.3d 444 (5th Cir. 2013) (en banc).

[343] In the context of federal sector employment, federal agencies should consult with legal counsel to address potential Privacy Act concerns.

[344] At a minimum, pursuant to EEOC regulation, employers are required to keep records for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. If an EEOC charge is filed, the employer is required to preserve all records relevant to the charge until its final disposition. The date of final disposition is when the statutory period for filing a lawsuit expires or, where a lawsuit has been filed by an aggrieved person, the EEOC, or the Department of Justice, the date when the litigation is terminated. 29 C.F.R. § 1602.14.

[345] *See Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001) (stating the obligation to take prompt corrective action is comprised of two parts, of which "[t]he first part consists of the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified").

[346] *See Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (agreeing that a "remedial measure that makes the victim of sexual harassment worse off is ineffective per se" and that, thus, a transfer that reduces a complainant's wages or impairs her prospects for promotion is not adequate corrective action); *see also EEOC v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 608 (4th Cir. 2011) (stating that the offer to transfer the complainant to another shift that would have made him worse off was not an acceptable remedial measure); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (concluding that remedial action was not adequate where the employer twice changed the complainant's schedule to separate her from the harasser, rather than changing the harasser's shift or work area or firing the harasser); *Taylor v. CSX Transp.*, 418 F. Supp. 2d 1284, 1307-08 (M.D. Ala. 2006) (agreeing with the plaintiff that evidence that an employer's remedy placed the plaintiff in a worse position than prior to complaining about harassment is evidence that the employer did not take appropriate corrective action); *cf. Hostetler v. Quality Dining, Inc.,* 218 F.3d 798, 812 (7th Cir. 2000) (concluding that, where the employer transferred a harassed employee in response to a harassment complaint to a position that left her materially worse off, the employer could be held liable for the transfer because it "breache[d] the duty of care it owe[d] to the harassed employee").

[347] *Cf.* EEOC, *Enforcement Guidance on Retaliation and Related Issues* § II.C (2016), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-**

related-issues#C._Causal (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#C._Causal) ; *id.* at Example 31 (providing example of preliminary relief granted to prohibit retaliation against alleged harassment victims during pendency of investigation (citing *EEOC v. Evans Fruit Co.*, No. CV-10-3033, 2010 WL 2594960, at *1-2 (E.D. Wash. June 24, 2010))).

348 *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004) (quoting *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001)).

349 *See, e.g.*, *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 814 (6th Cir. 2013) (stating that the employer's response is generally adequate "if it is reasonably calculated to end the harassment" (quoting *Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999))); *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 335 (4th Cir. 2011) (holding that a reasonable jury could find that the employer was liable for harassment where it failed to promptly and effectively enforce its anti-harassment policies, which called for a "firm response designed to end the harassment"); *Dawson v. Entek Int'l*, 630 F.3d 928, 940 (9th Cir. 2011) (explaining that the reasonableness of a remedy depends on its ability to stop the harasser from continuing his conduct and to persuade potential harassers to refrain from engaging in unlawful conduct); *cf. Vance v. Ball State Univ.*, 646 F.3d 461, 473 (7th Cir. 2011) (concluding that the employer was not liable where it took reasonable steps to prevent the harassment from continuing), *aff'd*, 570 U.S. 421 (2013).

350 *See, e.g.*, *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1018 (9th Cir. 2018) (stating that the reasonableness of corrective action is evaluated from the perspective of what the employer knew or should have known when it took the action); *McCombs v. Meijer, Inc.*, 395 F.3d 346, 358 (6th Cir. 2005) (concluding that the jury was properly instructed to consider the reasonableness of the employer's response to harassment in light of what it knew at the time that the harassment occurred); *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005) (stating that the reasonableness of the employer's response turns on the facts and circumstances when harassment is alleged).

351 *See, e.g.*, *Pryor v. United Air Lines, Inc*., 791 F.3d 488, 498 (4th Cir. 2015) (collecting cases) ("It is only in light of the nature of the harassment that we can see whether a company's response was proportional by examining the promptness of any investigation, the specific remedial measures taken, and the effectiveness of those measures."); *Scarberry v. Exxonmobil Oil Corp., 328 F.3d 1255, 1259-60 (10th Cir. 2003) (stating that the* "test is whether the employer's response to each incident of

harassment is proportional to the incident and reasonably calculated to end the harassment and prevent future harassing behavior"). *But see Tutman v. WBBM–TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1049 (7th Cir. 2000) ("[T]he question is not whether the punishment was proportionate to [the] offense but whether [the employer] responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring.").

352 *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 342 (6th Cir. 2008) (concluding that, although separating the harasser and complainant may be adequate in some cases, it was not sufficient in this case where the wrongdoer was a serial harasser and management repeatedly transferred the harasser's victims instead of taking other corrective action aimed at stopping the harasser's misconduct, such as training, warning, or monitoring the harasser).

353 *See Vance*, 570 U.S. at 445-46; *Doe v. Oberweis Dairy*, 456 F.3d 704, 717 (7th Cir. 2006). For a discussion of when vicarious liability applies, refer to section IV.B.2, *supra*.

354 *See Vance*, 570 U.S. at 445-46.

355 *See, e.g.*, *May v. Chrysler Grp., LLC*, 716 F.3d 963, 971 (7th Cir. 2012) (stating that the success or failure of corrective action in stopping harassment is not determinative as to employer liability but is nevertheless material in determining whether corrective action was reasonably likely to prevent the harassment from recurring); *Wilson v. Moulison N. Corp.*, 639 F.3d 1, 8 (1st Cir. 2011) (rejecting the argument that corrective action must have been inadequate because it failed to stop the harassment as "nothing more than a post hoc rationalization"); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998) ("Because there is no strict liability and an employer must only respond reasonably, a response may be so calculated even though the perpetrator might persist.").

356 *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) ("Just as an employer may escape liability even if harassment recurs despite its best efforts, so it can also be liable if the harassment fortuitously stops, but a jury deems its response to have fallen below the level of due care."); *see Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (stating that an employer that fails to take any corrective action is liable for ratifying unlawful harassment even if the harasser voluntarily stops); *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1123-24 (8th Cir. 2007) (stating that an employer that fails to take proper remedial action in response to harassment is

liable because the "combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy" (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998))).

[357] *See* discussion of prompt and adequate investigation at section IV.C.3.b.ii(a).

[358] *See* cases cited in note 346.

[359] *See Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) (enumerating factors to be assessed in evaluating the reasonableness of remedial measures and listing potential corrective actions).

[360] *Dunn v. Washington Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).

[361] *See Swenson v. Potter*, 271 F.3d 1184, 1196 (9th Cir. 2001) ("As a matter of policy, it makes no sense to tell employers that they act at their legal peril if they fail to impose discipline even if they do not find what they consider to be sufficient evidence of harassment. . . . Employees are no better served by a wrongful determination that harassment occurred than by a wrongful determination that no harassment occurred.").

[362] *Shields v. Fed. Express Customer Info. Servs. Inc.*, 499 F. App'x 473, 479-80 (6th Cir. 2012) (explaining that, even if the employer's investigation did not substantiate sexual harassment claim, the employer still had the responsibility to ensure that the accused harasser did not engage in harassment in the future, such as by monitoring the accused harasser's conduct); *cf. Christian v. AHS Tulsa Reg'l Med. Ctr., LLC*, 430 F. App'x 694, 698-99 (10th Cir. 2011) (affirming lower court conclusion that the employer took reasonable corrective action where, despite a "reasonably thorough investigation," its findings were inconclusive but it nevertheless counseled the alleged harasser as to its antidiscrimination policy, and he remained subject to more serious sanctions if he was again accused of misconduct).

[363] In some cases, the application of the EEO statutes enforced by the EEOC may implicate other rights or requirements including those under the United States Constitution; other federal laws, such as the Religious Freedom Restoration Act (RFRA); or sections 702(a) and 703(e)(2) of Title VII. Whether enforcement of federal workplace anti-harassment laws implicates other legal requirements, and if so, the interplay between federal workplace antidiscrimination laws and any such other legal doctrine, is beyond the scope of this document. For further information, see

the relevant sections of EEOC's Compliance Manual Section on Religious Discrimination. EEOC, *Compliance Manual Section 12: Religious Discrimination*, No. 915.063, §§ 12-I.C, 12-III.D, and Addendum (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination)** and EEOC, *Compliance Manual Section 2: Threshold Issue*s, No. 915.003, § 2-III.B.4.b.I (2000), **https://www.eeoc.gov/laws/guidance/section-2-threshold-issues (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues)** . As with all investigations, charges raising any of these arguments must be considered as presented on a case-by-case basis.

364 Under Title VII, "undue hardship is shown when a burden is substantial in the overall context of an employer's business," "tak[ing] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer." *Groff v. DeJoy*, 600 U.S. 447, 468, 470-71 (2023). With respect to relevant EEOC guidance on religious accommodation, the Court noted that "[w]e have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today." *Id.* at 472. EEOC's Compliance Manual Section on Religious Discrimination, a guidance document that was issued prior to the *Groff* opinion, explains that "[c]osts to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business," which in appropriate circumstances can include adverse effects on employee morale and other impacts on coworkers, customers, and workplace productivity. EEOC, *Compliance Manual Section 12: Religious Discrimination*, No. 915.063, §§ 12-III.D, 12-IV.B.2 (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_673998317380416107498965 53 (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_673998317380416107498965 53)** . The guidance also explains: "Religious expression can create undue hardship if it disrupts the work of other employees or constitutes — or threatens to constitute — unlawful harassment. Conduct that is disruptive can still constitute an undue hardship, even if it does not rise to the level of unlawful harassment." *Id.* § 12-IV.C.6.a, **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_481760063453916107500588 98 (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_481760063453916107500588 98)** . For more information on

balancing religious expression with anti-harassment measures, refer to EEOC *Compliance Manual Section 12: Religious Discrimination*, No. 915.063, at sections 12-IV.C.6.a. and 12-IV.D. (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_481760063453916107500588 98 (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_481760063453916107500588 98)** .

[365] *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004). Accommodating an employee's religious belief will not impose undue hardship "merely because the employee's co-workers find [the] conduct irritating or unwelcome." *Id.*; *see also Groff*, 600 U.S. at 472 ("[A] coworker's dislike of 'religious practice and expression in the workplace' or 'the mere fact [of] an accommodation' is not 'cognizable to factor into the undue hardship inquiry.'") (citing *TWA v. Hardison*, 432 U.S. 63, 89-90 (1977)); *Brown v. Polk Cnty.*, 61 F.3d 650, 656-57 (8th Cir. 1995) (determining that the employer could be liable for failing to accommodate a department director's "spontaneous" and "entirely voluntary" prayers that "did not occur regularly" and "occasional affirmations of Christianity" with subordinates where the employer offered only speculative concerns about "eventual polarization between born-again Christian employees and other employees" and perceptions of favoritism). While an employer must accept some degree of coworker discomfort when providing an accommodation for religious expression under Title VII, "it need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce." *Peterson*, 358 F.3d at 607-08.

[366] *See, e.g.*, *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1078 (8th Cir. 2006) (concluding that the employer was not liable for religious harassment of the plaintiff because it took prompt and appropriate remedial action after learning of the plaintiff's objections to her coworker's proselytizing); *see also Ervington v. LTD Commodities, LLC*, 555 F. App'x 615, 617-18 (7th Cir. 2014) (concluding that the employer was not required to accommodate an employee by allowing her to distribute pamphlets that were offensive to coworkers, including material that negatively depicted Muslims and Catholics and stated that they would go to hell); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1021 (4th Cir. 1996) (holding that the employer did not have to accommodate an employee who sent proselytizing letters to coworkers invading their privacy and criticizing their personal lives because doing so could subject the employer to possible religious harassment lawsuits).

[367] *Sassaman v. Gamache*, 566 F.3d 307, 311-12 (2d Cir. 2009) (concluding that a male supervisor established a prima facie case of sex discrimination when he presented evidence showing that he was terminated after being accused of sexual harassment by a female employee and was told by his supervisor that "you probably did what she said you did because you're male and nobody would believe you anyway").

[368] As to federal employers, the EEOC's *Promising Practices for Preventing Harassment in the Federal Sector* recommends that agencies promptly, thoroughly, and impartially investigate alleged harassment and take immediate and appropriate corrective action even if the complainant or alleged victim does not want the agency to investigate or correct the alleged harassment. EEOC, *Promising Practices for Preventing Harassment in the Federal Sector*, at Part B n.28, **https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector#_ftn28 (https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector#_ftn28)**

[369] Some courts have suggested that it may be lawful to honor such a request in some circumstances, but that it may be necessary to take corrective action, despite a complainant's wishes, if harassment is severe. *See Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1186 (9th Cir. 2005) (concluding that the employer acted reasonably in not investigating a complaint where the complainant said he wanted to handle the situation himself and failed to indicate the severity of the harassment, though the employer might have a duty to take corrective action in other circumstances, despite a complainant's wishes), *amended by* 433 F.3d 672 (9th Cir. 2006), *amended by* 436 F.3d 1050 (9th Cir. 2006); *Torres v. Pisano***,** 116 F.3d 625, 639 (2d Cir. 1997) (concluding that, although there is a point at which "harassment becomes so severe that a reasonable employer simply cannot stand by, even if requested to do so by a terrified employee," the employer acted reasonably here in honoring an employee's request to keep the matter confidential and not take action until a later date, where the employee had recounted only a few relatively minor incidents of harassment).

[370] *See Torres***,** 116 F.3d at 639 (stating that the employer most likely could not honor a single employee's request not to take action if other workers were also being harassed).

[371] Employers may hesitate to set up such a mechanism due to concern that it may create a duty to investigate anonymous complaints, even if based on mere rumor.

To avoid any confusion as to whether a complaint through such a phone line or website triggers an investigation, the employer should make it clear that the person who receives the inquiry is not a management official and can only answer questions and provide information. An investigation will proceed only if a complaint is made through the internal complaint process or if management otherwise learns about potential harassment.

[372] For a discussion of how to determine whether an individual is an employee of the employment agency, the client, or both, refer to EEOC, Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment A*gencies *and Other Staffing Firms* (1997), 1997 WL 33159161, at *5-6, **https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary (https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary)** .

[373] *See, e.g.*, *EEOC v. Glob. Horizons*, *Inc.*, 915 F.3d 631, 642 (9th Cir. 2019) (stating that a defendant employer may be liable for a joint employer's conduct but only if the defendant knew or should have known about the other employer's conduct and "failed to undertake prompt corrective measures within its control" (quoting EEOC, Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* (1997), 1997 WL 33159161, at *11, **https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary (https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary)**)); *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 414-16 (4th Cir. 2015) (holding that the defendant, an auto parts manufacturer, exercised sufficient control over a temporary worker to be considered her joint employer and therefore the defendant could be held liable for sexual harassment and retaliation experienced by the plaintiff while working at the defendant's facility).

[374] *Glob. Horizons*, 915 F.3d at 641-42 (explaining that where a client was aware of discrimination and could have taken corrective action to stop it, the client may be liable).

[375] *See id.* (holding that two joint employers could be held liable for the same hostile environment if both knew or should have known of it and both had the ability to take corrective action); *Magnuson v. Peak Tech. Servs.*, 808 F. Supp. 500,

511-14 (E.D. Va. 1992) (where the plaintiff was subjected to sexual harassment by her supervisor during a job assignment, three entities could be found liable: the staffing firm that paid her salary and benefits, the automobile company that contracted for her services, and the retail car dealership to which she was assigned; the staffing firm and automobile company were held to the standard for harassment by non-employees, under which an entity is liable if it had actual or constructive knowledge of the harassment and failed to take immediate and appropriate corrective action within its control); *cf. Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 229 (5th Cir. 2015) ("A staffing agency is liable for the discriminatory conduct of its joint-employer client if it participates in the discrimination, or if it knows or should have known of the client's discrimination but fails to take corrective measures within its control.") (ADA discriminatory termination case); *Whitaker v. Milwaukee Cnty.*, 772 F.3d 802, 811-12 (7th Cir. 2014) ("The firm also is liable if it *knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control*." (quoting EEOC, Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment A*gencies *and Other Staffing Firms* (1997))) (emphasis in original).

376 *See Mullis v. Mechs. & Farmers Bank*, 994 F. Supp. 680, 686 (M.D.N.C. 1997) (holding a temporary agency may be liable for harassment at a client's workplace where the employee complained to the temporary agency and the temporary agency made no investigation into or attempt to remedy the situation).

377 As discussed *supra* at section IV.C.3.b.ii(a) and section IV.C.3.b.ii(b), reassigning an employee who complains about harassment will generally not be an appropriate remedial measure and could possibly constitute retaliation. However, reassignment may be the only feasible option in circumstances where a temporary agency lacks control over the alleged harasser or workplace.

378 *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307, 318, 320-22 (8th Cir. 2014) (observing that harassment of Black correctional officers working on the same shift was directed at them as a group and that each of the officers became aware of any harassment experienced by the others).

379 *EEOC v. Hill Country Farms, Inc.*, No. 3:11-cv-00041 (S.D. Iowa May 1, 2013), ECF No. 92; Press Release, EEOC, Jury Awards $240 Million for Long-Term Abuse of Workers with Intellectual Disabilities (May 1, 2013), **https://www.eeoc.gov/newsroom/jury-awards-240-million-long-term-abuse-**

workers-intellectual-disabilities (https://www.eeoc.gov/newsroom/jury-awards-240-million-long-term-abuse-workers-intellectual-disabilities) ; *see also* Dan Barry, *The 'Boys' in the Bunkhouse*, N.Y. Times, Mar. 9, 2014, **https://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html (https://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html)** .

[380] This example is adapted from the facts in *Ellis v. Houston*, 742 F.3d 307 (8th Cir. 2014).

[381] *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (stating that a pattern-or-practice claim required the government to establish that "racial discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice"); *see also EEOC v. Pitre Inc.*, 908 F. Supp. 2d 1165, 1178-79 (D.N.M. 2012) (denying the defendant's motion to dismiss and permitting EEOC to proceed to jury trial under pattern-or-practice method of proof); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1069-70 (C.D. Ill. 1998) (concluding that a pattern or practice of sexual harassment could be established by evidence that the employer regularly tolerated unlawful sexual harassment at its auto assembly plant); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 888 (D. Minn. 1993) (concluding that the employer's tolerance of a sexually hostile environment at a mine and processing plant made sexual harassment of women the "standard operating procedure").

[382] *Mitsubishi*, 990 F. Supp. at 1074; *see also EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 946-47 (N.D. Ill. 2001) (stating that pattern-or-practice liability turns not on the particularized experiences of individual claimants but on the landscape of the total work environment).

[383] *EEOC v. Int'l Profit Assocs., Inc.*, No. 01 C 4427, 2007 WL 3120069, at *17 (N.D. Ill. Oct. 23, 2007) (holding that the EEOC was required to establish that sexual harassment that occurred at the worksite during the relevant time period, taken as a whole, was sufficiently severe or pervasive that a reasonable woman would have found the work environment hostile or abusive).

[384] *EEOC v. Glob. Horizons, Inc.*, 7 F. Supp. 3d 1053, 1058-63 (D. Haw. 2014).

[385] *See generally Mitsubishi*, 990 F. Supp. at 1075.

After an employer's responsibility to take overarching action has been established, employees' entitlement to individual relief is determined on a case-by-case basis. *Id.* at 1077.

[386] This example is adapted from the facts in *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926 (N.D. Ill. 2001).

[387] Proposed Enforcement Guidance on Harassment in the Workplace, 88 Fed. Reg. 67,750 (Oct. 2, 2023), **https://www.federalregister.gov/d/2023-21644 (https://www.federalregister.gov/d/2023-21644)** . The proposed guidance also was posted prominently on the EEOC's website at www.eeoc.gov.

EXHIBIT 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. JAMES DOBSON FAMILY INSTITUTE and USATRANSFORM d/b/a UNITED IN PURPOSE, *Plaintiffs*, v. XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *Defendants*.	)	No. 4:24-cv-00986-O

DECLARATION OF CHRISTOPHER LAGE

Pursuant to 28 U.S.C. § 1746, I, Christopher Lage, declare the following to be a true and correct statement of facts:

1. I have been an employee of the U.S. Equal Employment Opportunity Commission (EEOC or Commission) continuously since 1994. I began my career at EEOC as a Trial Attorney in the San Antonio Field Office and served in that role until 1998. I then became a General Attorney in the Office of Legal Counsel from 1998 to 1999. In 1999, I joined the Office of General Counsel (OGC), serving as a General Attorney from 1999 to 2002, Assistant General Counsel from 2002 to 2021, and Deputy General Counsel from 2021 to the present day.

2. The mission of OGC is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and ensure compliance with the statutes enforced by the Commission (referred to as enforcement actions or enforcement litigation).

3. The Deputy General Counsel is responsible for overseeing all programmatic and administrative functions of OGC, including the litigation program.

4. OGC maintains electronically stored information related to enforcement actions brought by the Commission since at least 2003, including at least 95% of complaints filed since fiscal year 2009.[1] This includes enforcement actions brought under Title VII of the Civil Rights Act of 1964. On November 26, 2024, I personally conducted a search of OGC's electronically stored information concerning enforcement actions (litigation) for cases brought against Dr. James Dobson Family Institute, USATransform d/b/a United in Purpose, and on December 2, 2024, I conducted a search for cases brought against PSQ Holdings d/b/a PublicSquare. After reviewing the search results, I identified no enforcement actions brought by the Commission against these employers under any statutes.

5. On November 26, 2024, I personally conducted a search of OGC's electronically stored information concerning enforcement actions (litigation) under the PWFA brought by the Commission involving abortion and fertility treatments (including, but not limited to in vitro fertilization, surrogacy, or gamete donation). After reviewing the search results, I identified no PWFA enforcement actions brought by the Commission involving any of the above-listed issues.

6. I reviewed the following federal appeal decisions cited in Plaintiffs' motion papers: *Roxanna B. v. Yellen*, EEOC No. 2020004142, 2024 WL 277871 (Jan. 10, 2024), *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013), and *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015). None of these decisions involve any enforcement actions brought by the EEOC. Rather, they are federal sector appeal

[1] This database may omit up to 5% of complaints because data must be uploaded manually, and staff may not have uploaded all the complaints.

decisions for complaints brought against federal employers, which the EEOC handles via a separate process from that which applies to non-federal and private employers.

7. I searched OGC's database to determine if the EEOC brought any of the claims or was a party in the following actions referenced in Plaintiffs' motion papers: *Copeland v. Georgia Dep't of Corrections*, 97 F.4th 766 (11th Cir. 2024); *Houlb v. Saber Healthcare Grp.*, No. 1:16CV02130, 2018 WL 1151566 (N.D. Ohio Mar. 2, 2018); *Tudor v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2017 WL 4849118 (W.D. Okla. Oct. 26, 2017); *Versace v. Starwood Hotels and Resorts Worldwide, Inc.*, No. 6:14-cv-1003, 2015 WL 12820072 (M.D. Fla. Dec. 7, 2015); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020); *Parker v. Strawser Constr., Inc.,* 307 F. Supp. 3d 744 (S.D. Ohio 2018). I confirmed that the EEOC did not bring any of the claims and was not a party in any of these actions.

8. I have searched OGC's database to identify cases brought by EEOC under Title VII involving a transgender charging party. I identified a total of 14 cases. Of these fourteen cases, eight have been closed. With the exception of Harris Funeral Homes (2:14-cv-13710 (EDMI) (September 25, 2014), none of the employers in those cases asserted an affirmative defense, including a religious defense. Harris Funeral Homes did not raise a religious defense until the case was in litigation.

9. In the six open cases, none of the employers has asserted an affirmative defense, religious or otherwise. None of the complaints in these cases allege discrimination based on the denial of health care for gender affirming care.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 4th day of December, 2024.

Christopher Lage

Digitally signed by Christopher Lage
Date: 2024.12.04 10:07:42 -05'00'

Christopher Lage
Deputy General Counsel
Office of General Counsel
U.S. Equal Employment Opportunity Commission

EXHIBIT 6

U.S. Equal Employment Opportunity Commission

Enforcement Guidance on Pregnancy Discrimination and Related Issues

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:	EEOC-CVG-2015-1
Concise Display Name:	Enforcement Guidance on Pregnancy Discrimination and Related Issues
Issue Date:	06-25-2015
General Topics:	Pregnancy, Sex
Summary:	This document addresses the Pregnancy Discrimination Act and the ADA as they apply to pregnant workers.
Citation:	Title VII, 29 CFR Part 1604
Document Applicant:	Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff
Previous Revision:	Yes. This document replaced a 2014 document by the same name.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to

provide clarity to the public regarding existing requirements under the law or agency policies.

	NOTICE	**Numbe**
EEOC		915.003
		Date
		June 25 2015

SUBJECT: EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues

PURPOSE: This transmittal covers the issuance of the Enforcement Guidance on Pregnancy Discrimination and Related Issues. This document provides guidance regarding the Pregnancy Discrimination Act and the Americans with Disabilities Act as they apply to pregnant workers.

EFFECTIVE DATE: Upon receipt.

EXPIRATION DATE: This Notice will remain in effect until rescinded or superseded.

OBSOLETE DATA: This Enforcement Guidance supersedes the Enforcement Guidance on Pregnancy Discrimination and Related Issues dated July 14, 2014. Most of this revised guidance remains the same as the prior version, but changes have been made to Sections I.B.1 (Disparate Treatment), and I.C.1 (Light Duty) in response to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*, --- U.S. ---, 135 S.Ct. 1338 (2015). Section I A.5 of the July 14, 2014 guidance has also been deleted in response to *Young*.

ORIGINATOR: Office of Legal Counsel.

Jenny R. Yang
Chair

ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES

Table of Contents

IV. **BEST PRACTICES**

PREGNANCY DISCRIMINATION AND RELATED ISSUES

OVERVIEW OF STATUTORY PROTECTIONS

Pregnancy Discrimination Act

Congress enacted the Pregnancy Discrimination Act (PDA) in 1978 to make clear that discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII).[1] Thus, the PDA extended to pregnancy Title VII's goals of "'[achieving] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.'"[2]

By enacting the PDA, Congress sought to make clear that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working."[3] The PDA requires that pregnant employees be treated the same as non-pregnant employees who are similar in their ability or inability to work.[4]

Fundamental PDA Requirements

1) An employer[5] may not discriminate against an employee[6] on the basis of pregnancy, childbirth, or related medical conditions; and

2) Women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work.

In the years since the PDA was enacted, charges alleging pregnancy discrimination have increased substantially. In fiscal year (FY) 1997, more than 3,900 such charges were filed with the Equal Employment Opportunity Commission (EEOC) and state

and local Fair Employment Practices Agencies, but in FY 2013, 5,342 charges were filed.

In 2008, a study by the National Partnership for Women & Families found that pregnancy discrimination complaints have risen at a faster rate than the steady influx of women into the workplace.[7] This suggests that pregnant workers continue to face inequality in the workplace.[8] Moreover, the study found that much of the increase in these complaints has been fueled by an increase in charges filed by women of color. Specifically, pregnancy discrimination claims filed by women of color increased by 76% from FY 1996 to FY 2005, while pregnancy discrimination claims overall increased 25% during the same time period.

The issues most commonly alleged in pregnancy discrimination charges have remained relatively consistent over the past decade. The majority of charges include allegations of discharge based on pregnancy. Other charges include allegations of disparate terms and conditions of employment based on pregnancy, such as closer scrutiny and harsher discipline than that administered to non-pregnant employees, suspensions pending receipt of medical releases, medical examinations that are not job related or consistent with business necessity, and forced leave.[9]

Americans with Disabilities Act (ADA)

Title I of the ADA protects individuals from employment discrimination on the basis of disability, limits when and how an employer may make medical inquiries or require medical examinations of employees and applicants for employment, and requires that an employer provide reasonable accommodation for an employee or applicant with a disability.[10] While pregnancy itself is not a disability, pregnant workers and job applicants are not excluded from the protections of the ADA. Changes to the definition of the term "disability" resulting from enactment of the ADA Amendments Act of 2008 (ADAAA) make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA.[11] Reasonable accommodations available to pregnant workers with impairments that constitute disabilities might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position.

Part I of this document provides guidance on Title VII's prohibition against pregnancy discrimination. It describes the individuals to whom the PDA applies, the ways in which violations of the PDA can be demonstrated, and the PDA's requirement that pregnant employees be treated the same as employees who are not pregnant but who are similar in their ability or inability to work (with a particular emphasis on light duty and leave policies). Part II addresses the impact of the ADA's expanded definition of "disability" on employees with pregnancy-related impairments, particularly when employees with pregnancy-related impairments would be entitled to reasonable accommodation, and describes some specific accommodations that may help pregnant workers. Part III briefly describes other requirements unrelated to the PDA and the ADA that affect pregnant workers. Part IV contains best practices for employers.

I. THE PREGNANCY DISCRIMINATION ACT

A. PDA Coverage

In passing the PDA, Congress intended to prohibit discrimination based on "the whole range of matters concerning the childbearing process,"[12] and gave women "the right . . . to be financially and legally protected before, during, and after [their] pregnancies."[13] Thus, the PDA covers all aspects of pregnancy and all aspects of employment, including hiring, firing, promotion, health insurance benefits, and treatment in comparison with non-pregnant persons similar in their ability or inability to work.

Extent of PDA Coverage

Title VII, as amended by the PDA, prohibits discrimination based on the following:

- **Current Pregnancy**
- **Past Pregnancy**
- **Potential or Intended Pregnancy**
- **Medical Conditions Related to Pregnancy or Childbirth**

1. Current Pregnancy

The most familiar form of pregnancy discrimination is discrimination against an employee based on her current pregnancy. Such discrimination occurs when an employer refuses to hire, fires, or takes any other adverse action against a woman because she is pregnant, without regard to her ability to perform the duties of the job.[14]

a. Employer's Knowledge of Pregnancy

If those responsible for taking the adverse action did not know the employee was pregnant, there can be no finding of intentional pregnancy discrimination.[15] However, even if the employee did not inform the decision makers about her pregnancy before they undertook the adverse action, they nevertheless might have been aware of it through, for example, office gossip or because the pregnancy was obvious. Since the obviousness of pregnancy "varies, both temporally and as between different affected individuals,"[16] an issue may arise as to whether the employer knew of the pregnancy.[17]

EXAMPLE 1
Knowledge of Pregnancy

When Germaine learned she was pregnant, she decided not to inform management at that time because of concern that such an announcement would affect her chances of receiving a bonus at the upcoming anniversary of her employment. When she was three months pregnant, Germaine's supervisor told her that she would not receive a bonus. Because the pregnancy was not obvious and the evidence indicated that the decision makers did not know of Germaine's pregnancy at the time of the bonus decision, there is no reasonable cause to believe that Germaine was subjected to pregnancy discrimination.

b. Stereotypes and Assumptions

Adverse treatment of pregnant women often arises from stereotypes and assumptions about their job capabilities and commitment to the job. For example, an employer might refuse to hire a pregnant woman based on an assumption that she will have attendance problems or leave her job after the child is born.

Employment decisions based on such stereotypes or assumptions violate Title VII.[18] As the Supreme Court has explained, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[19] Such decisions are unlawful even when an employer relies on stereotypes unconsciously or with a belief that it is acting in the employee's best interest.

EXAMPLE 2
Stereotypes and Assumptions

Three months after Maria told her supervisor that she was pregnant, she was absent several days due to an illness unrelated to her pregnancy. Soon after, pregnancy complications kept her out of the office for two additional days. When Maria returned to work, her supervisor said her body was trying to tell her something and that he needed someone who would not have attendance problems. The following day, Maria was discharged. The investigation reveals that Maria's attendance record was comparable to, or better than, that of non-pregnant co-workers who remained employed. It is reasonable to conclude that her discharge was attributable to the supervisor's stereotypes about pregnant workers' attendance rather than to Maria's actual attendance record and, therefore, was unlawful.[20]

EXAMPLE 3
Stereotypes and Assumptions

Darlene, who is visibly pregnant, applies for a job as office administrator at a campground. The interviewer tells her that July and August are the busiest months of the year and asks whether she will be available to work during that time period. Darlene replies that she is due to deliver in late September and intends to work right up to the delivery date. The interviewer explains that the campground cannot risk that she will decide to stop working earlier and, therefore, will not hire her. The campground's refusal to hire Darlene on this basis constitutes pregnancy discrimination.

2. Past Pregnancy

An employee may claim she was subjected to discrimination based on past pregnancy, childbirth, or related medical conditions. The language of the PDA does not restrict claims to those based on current pregnancy. As one court stated, "It

would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place."[21]

A causal connection between a claimant's past pregnancy and the challenged action more likely will be found if there is close timing between the two.[22] For example, if an employee was discharged during her pregnancy-related medical leave (i.e., leave provided for pregnancy or recovery from pregnancy) or her parental leave (i.e., leave provided to bond with and/or care for a newborn or adopted child), and if the employer's explanation for the discharge is not believable, a violation of Title VII may be found.[23]

EXAMPLE 4
Unlawful Discharge During Pregnancy or Parental Leave

Shortly after Teresa informed her supervisor of her pregnancy, he met with her to discuss alleged performance problems. Teresa had consistently received outstanding performance reviews during her eight years of employment with the company. However, the supervisor now for the first time accused Teresa of having a bad attitude and providing poor service to clients. Two weeks after Teresa began her pregnancy-related medical leave, her employer discharged her for poor performance. The employer produced no evidence of customer complaints or any other documentation of poor performance. The evidence of outstanding performance reviews preceding notice to the employer of Teresa's pregnancy, the lack of documentation of subsequent poor performance, and the timing of the discharge support a finding of unlawful pregnancy discrimination.

A lengthy time difference between a claimant's pregnancy and the challenged action will not necessarily foreclose a finding of pregnancy discrimination if there is evidence establishing that the pregnancy, childbirth, or related medical conditions motivated that action.[24] It may be difficult to determine whether adverse treatment following an employee's pregnancy was based on the pregnancy as opposed to the employee's new childcare responsibilities. If the challenged action was due to the employee's caregiving responsibilities, a violation of Title VII may be established where there is evidence that the employee's gender or another protected characteristic motivated the employer's action.[25]

3. Potential or Intended Pregnancy

The Supreme Court has held that Title VII "prohibit[s] an employer from discriminating against a woman because of her capacity to become pregnant."[26] Thus, women must not be discriminated against with regard to job opportunities or benefits because they might get pregnant.

a. Discrimination Based on Reproductive Risk

An employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity.[27] This principle led the Supreme Court to conclude that a battery manufacturing company violated Title VII by broadly excluding all fertile women — but not similarly excluding fertile men — from jobs in which lead levels were defined as excessive and which thereby potentially posed hazards to unborn children.[28]

The policy created a facial classification based on sex, according to the Court, since it denied fertile women a choice given to fertile men "as to whether they wish[ed] to risk their reproductive health for a particular job."[29] Accordingly, the policy could only be justified if the employer proved that female infertility was a bona fide occupational qualification (BFOQ).[30] The Court explained that, "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."[31]

b. Discrimination Based on Intention to Become Pregnant

Title VII similarly prohibits an employer from discriminating against an employee because of her intention to become pregnant.[32] As one court has stated, "Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is . . . illegal discrimination."[33] In addition, Title VII prohibits employers from treating men and women differently based on their family status or their intention to have children.

Because Title VII prohibits discrimination based on pregnancy, employers should not make inquiries into whether an applicant or employee intends to become pregnant. The EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.[34]

EXAMPLE 5

Discrimination Based on Intention to Become Pregnant

Anne, a high-level executive who has a two-year-old son, told her manager she was trying to get pregnant. The manager reacted with displeasure, stating that the pregnancy might interfere with her job responsibilities. Two weeks later, Anne was demoted to a lower paid position with no supervisory responsibilities. In response to Anne's EEOC charge, the employer asserts it demoted Anne because of her inability to delegate tasks effectively. Anne's performance evaluations were consistently outstanding, with no mention of such a concern. The timing of the demotion, the manager's reaction to Anne's disclosure, and the documentary evidence refuting the employer's explanation make clear that the employer has engaged in unlawful discrimination.

c. Discrimination Based on Infertility Treatment

Employment decisions related to infertility treatments implicate Title VII under limited circumstances. Because surgical impregnation is intrinsically tied to a woman's childbearing capacity, an inference of unlawful sex discrimination may be raised if, for example, an employee is penalized for taking time off from work to undergo such a procedure.[35] In contrast, with respect to the exclusion of infertility from employer-provided health insurance, courts have generally held that exclusions of all infertility coverage for all employees is gender neutral and does not violate Title VII.[36] Title VII may be implicated by exclusions of particular treatments that apply only to one gender.[37]

d. Discrimination Based on Use of Contraception

Depending on the specific circumstances, employment decisions based on a female employee's use of contraceptives may constitute unlawful discrimination based on gender and/or pregnancy. Contraception is a means by which a woman can control her capacity to become pregnant, and, therefore, Title VII's prohibition of discrimination based on potential pregnancy necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.[38] For example, an employer could not discharge a female employee from her job because she uses contraceptives.[39]

Employers can violate Title VII by providing health insurance that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes.[40] Because prescription contraceptives are available only for women, a health insurance plan facially discriminates against women on the basis of gender if it excludes prescription contraception but otherwise provides comprehensive coverage.[41] To comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.[42] For example, if an employer's health insurance plan covers preventive care for medical conditions other than pregnancy, such as vaccinations, physical examinations, prescription drugs that prevent high blood pressure or to lower cholesterol levels, and/or preventive dental care, then prescription contraceptives also must be covered.

4. Medical Condition Related to Pregnancy or Childbirth

a. In General

Title VII prohibits discrimination based on pregnancy, childbirth, or a related medical condition. Thus, an employer may not discriminate against a woman with a medical condition relating to pregnancy or childbirth and must treat her the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions.[43]

EXAMPLE 6
Uniform Application of Leave Policy

Sherry went on medical leave due to a pregnancy-related condition. The employer's policy provided four weeks of medical leave to employees who had worked less than a year. Sherry had worked for the employer for only six months and was discharged when she did not return to work after four weeks. Although Sherry claims the employer discharged her due to her pregnancy, the evidence showed that the employer applied its leave policy uniformly, regardless of medical condition or sex and, therefore, did not engage in unlawful disparate treatment.[44]

Title VII also requires that an employer provide the same benefits for pregnancy-related medical conditions as it provides for other medical conditions.[45] Courts have held that Title VII's prohibition of discrimination based on sex and pregnancy

does not apply to employment decisions based on costs associated with the medical care of employees' offspring.[46] However, taking an adverse action, such as terminating an employee to avoid insurance costs arising from the pregnancy-related impairment of the employee or the impairment of the employee's child, would violate Title I of the ADA if the employee's or child's impairment constitutes a "disability" within the meaning of the ADA.[47] It also might violate Title II of the Genetic Information Nondiscrimination Act (GINA)[48] and/or the Employee Retirement Income Security Act (ERISA).[49]

b. Discrimination Based on Lactation and Breastfeeding

There are various circumstances in which discrimination against a female employee who is lactating or breastfeeding can implicate Title VII. Lactation, the postpartum production of milk, is a physiological process triggered by hormones.[50] Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination.[51] For example, a manager's statement that an employee was demoted because of her breastfeeding schedule would raise an inference that the demotion was unlawfully based on the pregnancy-related medical condition of lactation.[52]

To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk,[53] a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday.[54] An employee must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions. For example, if an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions,[55] then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances.

Finally, because only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based. For example, it would violate Title VII for an employer to freely permit employees to use break time for personal reasons except to express breast milk.[56]

Aside from protections under Title VII, female employees who are breastfeeding also have rights under other laws, including a provision of the Patient Protection and

Affordable Care Act that requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk.[57] For more information, see Section III C., *infra*.

c. Abortion

Title VII protects women from being fired for having an abortion or contemplating having an abortion.[58] However, Title VII makes clear that an employer that offers health insurance is not required to pay for coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term or medical complications have arisen from an abortion.[59] The statute also makes clear that, although not required to do so, an employer is permitted to provide health insurance coverage for abortion.[60] Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion. For example, it would be unlawful for a manager to pressure an employee to have an abortion, or not to have an abortion, in order to retain her job, get better assignments, or stay on a path for advancement.[61]

B. Evaluating PDA-Covered Employment Decisions

Pregnancy discrimination may take the form of disparate treatment (pregnancy, childbirth, or a related medical condition is a motivating factor in an adverse employment action) or disparate impact (a neutral policy or practice has a significant negative impact on women affected by pregnancy, childbirth, or a related medical condition, and either the policy or practice is not job related and consistent with business necessity or there is a less discriminatory alternative and the employer has refused to adopt it).

1. Disparate Treatment

The PDA defines discrimination because of sex to include discrimination because of or on the basis of pregnancy. As with other claims of discrimination under Title VII, an employer will be found to have discriminated on the basis of pregnancy if an employee's pregnancy, childbirth, or related medical condition was all or part of the motivation for an employment decision. Intentional discrimination under the PDA can be proven using any of the types of evidence used in other sex discrimination cases. Discriminatory motive may be established directly, or it can be inferred from the surrounding facts and circumstances.

The PDA further provides that discrimination on the basis of pregnancy includes failure to treat women affected by pregnancy "the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." Employer policies that do not facially discriminate on the basis of pregnancy may nonetheless violate this provision of the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification.[62]

As with any other charge, investigators faced with a charge alleging disparate treatment based on pregnancy, childbirth, or a related medical condition should examine the totality of evidence to determine whether there is reasonable cause to believe the particular challenged action was unlawfully discriminatory. All evidence should be examined in context, and the presence or absence of any particular kind of evidence is not dispositive.

Evidence indicating disparate treatment based on pregnancy, childbirth, or related medical conditions includes the following:

- An explicit policy[63] or a statement by a decision maker or someone who influenced the challenged decision that on its face demonstrates pregnancy bias and is linked to the challenged action.
    - In *Deneen v. Northwest Airlines, Inc*.,[64] a manager stated the plaintiff would not be rehired "because of her pregnancy complication." This statement directly proved pregnancy discrimination.[65]
- Close timing between the challenged action and the employer's knowledge of the employee's pregnancy, childbirth, or related medical condition.
    - In *Asmo v. Keane, Inc.,*[66] a two-month period between the time the employer learned of the plaintiff's pregnancy and the time it decided to discharge her raised an inference that the plaintiff's pregnancy and discharge were causally linked.[67]
- More favorable treatment of employees of either sex[68] who are not affected by pregnancy, childbirth, or related medical conditions but are similar in their ability or inability to work.
    - In *Wallace v. Methodist Hospital System*,[69] the employer asserted that it discharged the plaintiff,a pregnant nurse, in part because she performed a medical procedure without a physician's knowledge or consent. The

plaintiff produced evidence that this reason was pretextual by showing that the employer merely reprimanded a non-pregnant worker for nearly identical misconduct.[70]

- Evidence casting doubt on the credibility of the employer's explanation for the challenged action.
    - In *Nelson v. Wittern Group*,[71] the defendant asserted it fired the plaintiff not because of her pregnancy but because overstaffing required elimination of her position. The court found a reasonable jury could conclude this reason was pretextual where there was evidence that the plaintiff and her co-workers had plenty of work to do, and the plaintiff's supervisor assured her prior to her parental leave that she would not need to worry about having a job when she got back. [72]
- Evidence that the employer violated or misapplied its own policy in undertaking the challenged action.
    - In *Cumpiano v. Banco Santander Puerto Rico*,[73] the court affirmed a finding of pregnancy discrimination where there was evidence that the employer did not enforce the conduct policy on which it relied to justify the discharge until the plaintiff became pregnant.[74]
- Evidence of an employer policy or practice that, although not facially discriminatory, significantly burdens pregnant employees and cannot be supported by a sufficiently strong justification.
    - In *Young v. United Parcel Serv., Inc.*,[75] the Court said that evidence of an employer policy or practice of providing light duty to a large percentage of nonpregnant employees while failing to provide light duty to a large percentage of pregnant workers might establish that the policy or practice significantly burdens pregnant employees. If the employer's reasons for its actions are not sufficiently strong to justify the burden, that will "give rise to an inference of intentional discrimination." [76]

a. Harassment

Title VII, as amended by the PDA, requires employers to provide a work environment free of harassment based on pregnancy, childbirth, or related medical conditions. An employer's failure to do so violates the statute. Liability can result from the

conduct of a supervisor, co-workers, or non-employees such as customers or business partners over whom the employer has some control.[77]

Examples of pregnancy-based harassment include unwelcome and offensive jokes or name-calling, physical assaults or threats, intimidation, ridicule, insults, offensive objects or pictures, and interference with work performance motivated by pregnancy, childbirth, or related medical conditions such as breastfeeding. Such motivation is often evidenced by the content of the remarks but, even if pregnancy is not explicitly referenced, Title VII is implicated if there is other evidence that pregnancy motivated the conduct. Of course, as with harassment on any other basis, the conduct is unlawful only if the employee perceives it to be hostile or abusive and if it is sufficiently severe or pervasive to alter the terms and conditions of employment from the perspective of a reasonable person in the employee's position.[78]

Harassment must be analyzed on a case-by-case basis, by looking at all the circumstances in context. Relevant factors in evaluating whether harassment creates a work environment sufficiently hostile to violate Title VII may include any of the following (no single factor is determinative):

- The frequency of the discriminatory conduct;
- The severity of the conduct;
- Whether the conduct was physically threatening or humiliating;
- Whether the conduct unreasonably interfered with the employee's work performance; and
- The context in which the conduct occurred, as well as any other relevant factor.

The more severe the harassment, the less pervasive it needs to be, and vice versa. Accordingly, unless the harassment is quite severe, a single incident or isolated incidents of offensive conduct or remarks generally do not create an unlawful hostile working environment. Pregnancy-based comments or other acts that are not sufficiently severe standing alone may become actionable when repeated, although there is no threshold number of harassing incidents that gives rise to liability.

EXAMPLE 7

Hostile Environment Harassment

Binah, a black woman from Nigeria, claims that when she was visibly pregnant with her second child, her supervisors increased her workload and shortened her deadlines so that she could not complete her assignments, ostracized her, repeatedly excluded her from meetings to which she should have been invited, reprimanded her for failing to show up for work due to snow when others were not reprimanded, and subjected her to profanity. Binah asserts the supervisors subjected her to this harassment because of her pregnancy status, race, and national origin. A violation of Title VII would be found if the evidence shows that the actions were causally linked to Binah's pregnancy status, race, and/or national origin.[79]

b. Workers with Caregiving Responsibilities

After an employee's child is born, an employer might treat the employee less favorably not because of the prior pregnancy, but because of the worker's caregiving responsibilities. This situation would fall outside the parameters of the PDA. However, as explained in the Commission's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007),[80] although caregiver status is not a prohibited basis under the federal equal employment opportunity statutes, discrimination against workers with caregiving responsibilities may be actionable when an employer discriminates based on sex or another characteristic protected by federal law. For example, an employer violates Title VII by denying job opportunities to women -- but not men -- with young children, or by reassigning a woman recently returned from pregnancy-related medical leave or parental leave to less desirable work based on the assumption that, as a new mother, she will be less committed to her job. An employer also violates Title VII by denying a male caregiver leave to care for an infant but granting such leave to a female caregiver, or by discriminating against a Latina working mother based on stereotypes about working mothers and hostility towards Latinos generally.[81] An employer violates the ADA by treating a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily because the worker also cares for a child with a disability.[82]

c. Bona Fide Occupational Qualification (BFOQ) Defense

In some instances, employers may claim that excluding pregnant or fertile women from certain jobs is lawful because non-pregnancy is a bona fide occupational qualification (BFOQ).[83] The defense, however, is an extremely narrow exception to the general prohibition of discrimination on the basis of sex. An employer who seeks to prove a BFOQ must show that pregnancy actually interferes with a female employee's ability to perform the job,[84] and the defense must be based on objective, verifiable skills required by the job rather than vague, subjective standards.[85]

Employers rarely have been able to establish a pregnancy-based BFOQ. The defense cannot be based on fears of danger to the employee or her fetus, fears of potential tort liability, assumptions and stereotypes about the employment characteristics of pregnant women such as their turnover rate, or customer preference.[86]

Without showing a BFOQ, an employer may not require that a pregnant worker take leave until her child is born or for a predetermined time thereafter, provided she is able to perform her job.[87]

2. Disparate Impact

Title VII is violated if a facially neutral policy has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical conditions and the employer cannot show that the policy is job related for the position in question and consistent with business necessity.[88] Proving disparate impact ordinarily requires a statistical showing that a specific employment practice has a discriminatory effect on workers in the protected group. However, statistical evidence might not be required if it could be shown that all or substantially all pregnant women would be negatively affected by the challenged policy.[89]

The employer can prove business necessity by showing that the requirement is "necessary to safe and efficient job performance."[90] If the employer makes this showing, a violation still can be found if there is a less discriminatory alternative that meets the business need and the employer refuses to adopt it.[91] The disparate impact provisions of Title VII have been used by pregnant plaintiffs to challenge, for example, weight lifting requirements,[92] light duty limitations,[93] and restrictive leave policies.[94]

EXAMPLE 8

Weight Lifting Requirement

Carol applied for a warehouse job. At the interview, the hiring official told her the job requirements and asked if she would be able to meet them. One of the requirements was the ability to lift up to 50 pounds. Carol said that she could not meet the lifting requirement because she was pregnant but otherwise would be able to meet the job requirements. She was not hired. The employer asserts that it did not select Carol because she could not meet the lifting requirement and produces evidence that it treats all applicants the same with regard to this hiring criterion. If the evidence shows that the lifting requirement disproportionately excludes pregnant applicants, the employer would have to prove that the requirement is job related for the position in question and consistent with business necessity.[95]

C. Equal Access to Benefits

An employer is required under Title VII to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave and leave without pay.[96] In addition to leave, the term "fringe benefits" includes, for example, medical benefits and retirement benefits.

1. Light Duty

a. Disparate Treatment

i. Evidence of Pregnancy-Related Animus

If there is direct evidence that pregnancy-related animus motivated an employer's decision to deny a pregnant employee light duty, it is not necessary for the employee to show that another employee was treated more favorably than she was.

EXAMPLE 9

Evidence of Pregnancy-Related Animus Motivating Denial of Light

Duty

An employee requests light duty because of her pregnancy. The employee's supervisor is aware that the employee is pregnant and knows that there are light duty positions available that the pregnant employee could perform. Nevertheless, the supervisor denies the request, telling the employee that having a pregnant worker in the workplace is just too much of a liability for the company. It is not necessary in this instance that the pregnant worker produce evidence of a non-pregnant worker similar in his or her ability or inability to work who was given a light duty position.

ii. Proof of Discrimination Through *McDonnell Douglas* Burden-Shifting Framework

A plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp. v. Green*[97] in order to establish an intentional violation of the PDA where there is direct evidence that pregnancy-related animus motivated the denial of light duty. Absent such evidence, however, a plaintiff must produce evidence that a similarly situated worker was treated differently or more favorably than the pregnant worker to establish a prima facie case of discrimination.

According to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*,[98] a PDA plaintiff may make out a prima facie case of discrimination by showing "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[99] As the Court noted, "[t]he burden of making this showing is not 'onerous.'"[100] For purposes of the prima facie case, the plaintiff does not need to point to an employee that is "similar in all but the protected ways."[101] For example, the plaintiff could satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment (e.g., an employee with a lifting restriction) and who was provided an accommodation that the pregnant employee sought.

Once the employee has established a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for treating the pregnant worker differently than a non-pregnant worker similar in his or her ability or inability to work. "That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates."[102]

Even if an employer can assert a legitimate non-discriminatory reason for the different treatment, the pregnant worker may still show that the reason is pretextual. *Young* explains that

> [t]he plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather-when considered along with the burden imposed-give rise to an inference of intentional discrimination.[103]

An employer's policy of accommodating a large percentage of nonpregnant employees with limitations while denying accommodations to a large percentage of pregnant employees may result in a significant burden on pregnant employees.[104] For example, in *Young* the Court noted that a policy of accommodating most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations would present a genuine issue of material fact.[105]

b. Disparate Impact

A policy of restricting light duty assignments may also have a disparate impact on pregnant workers.[106] If impact is established, the employer must prove that its policy was job related and consistent with business necessity.[107]

EXAMPLE 10
Light Duty Policy - Disparate Impact

Leslie, who works as a police officer, requested light duty when she was six months pregnant and was advised by her physician not to push or lift over 20 pounds. The request was not granted because the police department had a policy limiting light duty to employees injured on the job. Therefore, Leslie was required to use her accumulated leave for the period during which she could not perform her normal patrol duties. In her subsequent lawsuit, Leslie proved that since substantially all employees denied light duty were pregnant women, the police department's light duty policy had an adverse impact on pregnant officers. The police department claimed that state law required it to pay officers injured on the job regardless of whether they worked and that the light duty policy enabled taxpayers to receive

some benefit from the salaries paid to those officers. However, there was evidence that an officer not injured on the job was assigned to light duty. This evidence contradicted the police department's claim that it truly had a business necessity for its policy.[108]

This policy may also be challenged on the ground that it impermissibly distinguishes between pregnant and non-pregnant workers who are similar in their ability or inability to work based on the cause of their limitations.

2. Leave

a. Disparate Treatment[109]

An employer may not compel an employee to take leave because she is pregnant, as long as she is able to perform her job. Such an action violates Title VII even if the employer believes it is acting in the employee's best interest.[110]

EXAMPLE 11
Forced Leave

Lena worked for a janitorial service that provided after hours cleaning in office spaces. When she advised the site foreman that she was pregnant, the foreman told her that she would no longer be able to work since she could harm herself with the bending and pushing required in the daily tasks. She explained that she felt fine and that her doctor had not mentioned that she should change any of her current activities, including work, and did not indicate any particular concern that she would have to stop working. The foreman placed Lena immediately on unpaid leave for the duration of her pregnancy. Lena's leave was exhausted before she gave birth and she was ultimately discharged from her job. Lena's discharge was due to stereotypes about pregnancy.[111]

A policy requiring workers to take leave during pregnancy or excluding all pregnant or fertile women from a job is illegal except in the unlikely event that an employer can prove that non-pregnancy or non-fertility is a bona fide occupational qualification (BFOQ).[112] To establish a BFOQ, the employer must prove that the challenged qualification is "reasonably necessary to the normal operation of [the] particular business or enterprise."[113]

While employers may not force pregnant workers to take leave, they must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work.[114] Thus, an employer could not fire a pregnant employee for being absent if her absence fell within the provisions of the employer's sick leave policy.[115] An employer may not require employees disabled by pregnancy or related medical conditions to exhaust their sick leave before using other types of accrued leave if it does not impose the same requirement on employees who seek leave for other medical conditions. Similarly, an employer may not impose a shorter maximum period for pregnancy-related leave than for other types of medical or short-term disability leave. Title VII does not, however, require an employer to grant pregnancy-related medical leave or parental leave or to treat pregnancy-related absences more favorably than absences for other medical conditions.[116]

EXAMPLE 12

Pregnancy-Related Medical Leave - Disparate Treatment

Jill submitted a request for two months of leave due to pregnancy- related medical complications. The employer denied her request, although its sick leave policy permitted such leave to be granted. Jill's supervisor had recommended that the company deny the request, arguing that her absence would present staffing problems and noting that this request could turn into additional leave requests if her medical condition did not improve. Jill was unable to report to work due to her medical condition, and was discharged. The evidence shows that the alleged staffing problems were not significant and that the employer had approved requests by non-pregnant employees for extended sick leave under similar circumstances. Moreover, the employer's concern that Jill would likely request additional leave was based on a stereotypical assumption about pregnant workers.[117] This evidence is sufficient to establish that the employer's explanation for its difference in treatment of Jill and her non-pregnant co-workers is a pretext for pregnancy discrimination.[118]

EXAMPLE 13

Medical Leave Policy -- No Disparate Treatment

Michelle requests two months of leave due to pregnancy-related medical complications. Her employer denies the request because its policy providing paid

medical leave requires employees to be employed at least 90 days to be eligible for such leave. Michelle had only been employed for 65 days at the time of her request. There was no evidence that non-pregnant employees with less than 90 days of service were provided medical leave. Because the leave decision was made in accordance with the eligibility rules, and not because of Michelle's pregnancy, there is no evidence of pregnancy discrimination under a disparate treatment analysis. [119] For the same reason, if the employer had granted leave under the Family and Medical Leave Act to another employee with a serious health condition, it would not be required to provide a pregnant worker with the same leave if she had not attained eligibility by working with the employer for the requisite number of hours during the preceding 12 months.[120]

b. Disparate Impact

A policy that restricts leave might disproportionately impact pregnant women. For example, a 10-day ceiling on sick leave and a policy denying sick leave during the first year of employment have been found to disparately impact pregnant women. [121]

If a claimant establishes that such a policy has a disparate impact, an employer must prove that the policy is job related and consistent with business necessity. An employer must have supporting evidence to justify its policy. Business necessity cannot be established by a mere articulation of reasons. Thus, one court refused to find business necessity where the employer argued that it provided no leave to employees who had worked less than one year because it had a high turnover rate and wanted to allow leave only to those who had demonstrated "staying power," but provided no supporting evidence.[122] The court also found that an alternative policy denying leave for a shorter time period might have served the same business goal, since the evidence showed that most of the first year turnover occurred during the first three months of employment.[123]

3. Parental Leave

For purposes of determining Title VII's requirements, employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth (described in this document as pregnancy-related medical leave) and leave for purposes of bonding with a child and/or providing care for a child (described in this document as parental leave).

Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions.[124] However, parental leave must be provided to similarly situated men and women on the same terms.[125] If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth (e.g. to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

EXAMPLE 14
Pregnancy-Related Medical Leave and Parental Leave Policy - No Disparate Treatment

An employer offers pregnant employees up to 10 weeks of paid pregnancy-related medical leave for pregnancy and childbirth as part of its short-term disability insurance. The employer also offers new parents, whether male or female, six weeks of parental leave. A male employee alleges that this policy is discriminatory as it gives up to 16 weeks of leave to women and only six weeks of leave to men. The employer's policy does not violate Title VII. Women and men both receive six weeks of parental leave, and women who give birth receive up to an additional 10 weeks of leave for recovery from pregnancy and childbirth under the short-term disability plan.

EXAMPLE 15
Discriminatory Parental Leave Policy

In addition to providing medical leave for women with pregnancy-related conditions and for new mothers to recover from childbirth, an employer provides six additional months of paid leave for new mothers to bond with and care for their new baby. The employer does not provide any paid parental leave for fathers. The employer's policy violates Title VII because it does not provide paid parental leave on equal terms to women and men.

4. Health Insurance

a. Generally

As with other fringe benefits, employers who offer employees health insurance must include coverage of pregnancy, childbirth, and related medical conditions. [126]

Employers who have health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy.[127] For example:

- If the plan covers pre-existing conditions, then it must cover the costs of an insured employee's pre-existing pregnancy.[128]
- If the plan covers a particular percentage of the medical costs incurred for non-pregnancy-related conditions, it must cover the same percentage of recoverable costs for pregnancy-related conditions.
- If the medical benefits are subject to a deductible, pregnancy-related medical costs may not be subject to a higher deductible.
-
- The plan may not impose limitations applicable only to pregnancy-related medical expenses for any services, such as doctor's office visits, laboratory tests, x-rays, ambulance service, or recovery room use.
- The plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.[129]

The following principles apply to pregnancy-related medical coverage of employees and their dependents:

- Employers must provide the same level of medical coverage to female employees and their dependents as they provide to male employees and their dependents.
- Employers need not provide the same level of medical coverage to their employees' wives as they provide to their female employees.

b. Insurance Coverage of Abortion

The PDA makes clear that if an employer provides health insurance benefits, it is not required to pay for health insurance coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term. If complications arise during the course of an abortion, the health insurance plan is required to pay the costs attributable to those complications.[130]

The statute also makes clear that an employer is not precluded from providing abortion benefits directly or through a collective bargaining agreement. If an employer decides to cover the costs of abortion, it must do so in the same manner and to the same degree as it covers other medical conditions.[131]

5. Retirement Benefits and Seniority

Employers must allow women who are on pregnancy-related medical leave to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy. Therefore, if an employer allows employees who take medical leave to retain their accumulated seniority and to accrue additional service credit during their leaves, the employer must treat women on pregnancy-related medical leave the same way. Similarly, employers must treat pregnancy-related medical leave the same as other medical leave in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement.[132]

II. AMERICANS WITH DISABILITIES ACT[133]

Title I of the ADA protects individuals from employment discrimination on the basis of disability. Disability discrimination occurs when a covered employer or other entity treats an applicant or employee less favorably because she has a disability or a history of a disability, or because she is believed to have a physical or mental impairment.[134] Discrimination under the ADA also includes the application of qualification standards, tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class or individuals with disabilities, unless the standard, test, or other selection criterion is shown to be job related for the position in question and consistent with business necessity.[135] The ADA forbids discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and any other term or condition of employment. Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is limited.[136] The law also requires that an employer provide reasonable accommodation to an employee or job applicant with a disability unless doing so would cause undue hardship, meaning significant difficulty or expense for the employer.[137]

A. Disability Status

The ADA defines the term "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having a disability.[138] Congress made clear in the ADA Amendments Act of 2008 (ADAAA) that the question of whether an individual's impairment is a covered disability should not demand extensive analysis and that the definition of disability should be construed in favor of broad coverage. The determination of whether an individual has a disability must be made without regard to the ameliorative effects of mitigating measures, such as medication or treatment that lessens or eliminates the effects of an impairment.[139] Under the ADAAA, there is no requirement that an impairment last a particular length of time to be considered substantially limiting.[140] In addition to major life activities that may be affected by impairments related to pregnancy, such as walking, standing, and lifting, the ADAAA includes the operation of major bodily functions as major life activities. Major bodily functions include the operation of the neurological, musculoskeletal, endocrine, and reproductive systems, and the operation of an individual organ within a body system.

Prior to the enactment of the ADAAA, some courts held that medical conditions related to pregnancy generally were not impairments within the meaning of the ADA, and so could not be disabilities.[141] Although pregnancy itself is not an impairment within the meaning of the ADA,[142] and thus is never on its own a disability, [143] some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended. An impairment's cause is not relevant in determining whether the impairment is a disability.[144] Moreover, under the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary.[145]

Some impairments of the reproductive system may make a pregnancy more difficult and thus necessitate certain physical restrictions to enable a full term pregnancy, or may result in limitations following childbirth. Disorders of the uterus and cervix may be causes of these complications.[146] For instance, someone with a diagnosis of cervical insufficiency may require bed rest during pregnancy. One court has concluded that multiple physiological impairments of the reproductive system requiring an employee to give birth by cesarean section may be disabilities for which an employee was entitled to a reasonable accommodation.[147]

Impairments involving other major bodily functions can also result in pregnancy-related limitations. Some examples include pregnancy-related anemia (affecting normal cell growth); pregnancy-related sciatica (affecting musculoskeletal function); pregnancy-related carpal tunnel syndrome (affecting neurological function); gestational diabetes (affecting endocrine function); nausea that can cause severe dehydration (affecting digestive or genitourinary function); abnormal heart rhythms that may require treatment (affecting cardiovascular function); swelling, especially in the legs, due to limited circulation (affecting circulatory function); and depression (affecting brain function). [148]

In applying the ADA as amended, a number of courts have concluded that pregnancy-related impairments may be disabilities within the meaning of the ADA, including: pelvic inflammation causing severe pain and difficulty walking and resulting in a doctor's recommendation that an employee have certain work restrictions and take early pregnancy-related medical leave;[149] symphysis pubis dysfunction causing post-partum complications and requiring physical therapy;[150] and complications related to a pregnancy in a breech presentation that required visits to the emergency room and bed rest.[151] In another case, the court concluded that there was a triable issue on the question of whether the plaintiff had a disability within the meaning of the amended ADA, where her doctor characterized the pregnancy as "high risk" and recommended that the plaintiff limit her work hours and not lift heavy objects, even though the doctor did not identify a specific impairment.[152]

EXAMPLE 16

Pregnancy-Related Impairment Constitutes ADA Disability Because It Substantially Limits a Major Life Activity

In Amy's fifth month of pregnancy, she developed high blood pressure, severe headaches, abdominal pain, nausea, and dizziness. Her doctor diagnosed her as having preeclampsia and ordered her to remain on bed rest through the remainder of her pregnancy. This evidence indicates that Amy had a disability within the meaning of the ADA, since she had a physiological disorder that substantially limited her ability to perform major life activities such as standing, sitting, and walking, as well as major bodily functions such as functions of the cardiovascular and circulatory systems. The effects that bed rest may have had on alleviating the symptoms of Amy's preeclampsia may not be considered, since the ADA

Amendments Act requires that the determination of whether someone has a disability be made without regard to mitigating measures.

An employer discriminates against a pregnant worker on the basis of her record of a disability when it takes an adverse action against her because of a past substantially limiting impairment.

EXAMPLE 17

Discrimination Against a Job Applicant Because of Her Record of a Disability

A county police department offers an applicant a job as a police officer. It then asks her to complete a post-offer medical questionnaire and take a medical examination. [153] On the questionnaire, the applicant indicates that she had gestational diabetes during her pregnancy three years ago, but the condition resolved itself following the birth of her child. The police department will violate the ADA if it withdraws the job offer based on this past history of gestational diabetes when the applicant has no current impairment that would affect her ability to perform the job safely.

Finally, an employer regards a pregnant employee as having a disability if it takes a prohibited action against her (e.g., termination or reassignment to a less desirable position) based on an actual or perceived impairment that is not transitory (lasting or expected to last for six months or less) and minor.[154]

EXAMPLE 18

Pregnant Employee Regarded as Having a Disability

An employer reassigns a welder who is pregnant to a job in its factory's tool room, a job that requires her to keep track of tools that are checked out for use and returned at the end of the day, and to complete paperwork for any equipment or tools that need to be repaired. The job pays considerably less than the welding job and is considered by most employees to be "make work." The manager who made the reassignment did so because he believed the employee was experiencing pregnancy-related "complications" that "could very possibly result in a miscarriage" if the employee was allowed to continue working in her job as a welder. The employee was not experiencing pregnancy-related complications, and her doctor said she could have continued to work as a welder. The employer has regarded the employee as having a disability, because it took a prohibited action (reassigning her

to a less desirable job at less pay) based on its belief that she had an impairment that was not both transitory and minor. The employer also is liable for discrimination because there is no evidence that the employee was unable to do the essential functions of her welder position or that she would have posed a direct threat to her own or others' safety in that job. Since the evidence indicated that the employee was able to perform her job, the employer is also liable under the PDA. [155]

B. Reasonable Accommodation

A pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment.[156] A reasonable accommodation is a change in the workplace or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.[157] An employer may only deny a reasonable accommodation to an employee with a disability if it would result in an undue hardship.[158] An undue hardship is defined as an action requiring significant difficulty or expense.[159]

EXAMPLE 19
Conditions Resulting from Interaction of Pregnancy and an Underlying Disability

Jennifer had been successfully managing a neurological disability with medication for several years. Without the medication, Jennifer experienced severe fatigue and had difficulty completing a full work day. However, the combination of medications she had been prescribed allowed her to work with rest during the breaks scheduled for all employees. When she became pregnant, her physician took her off some of these drugs due to risks they posed during pregnancy. Adequate substitutes were not available. She began to experience increased fatigue and found that rest during short breaks in the day and lunch time was insufficient. Jennifer requested that she be allowed more frequent breaks during the day to alleviate her fatigue. Absent undue hardship, the employer would have to grant such an accommodation.

Examples of reasonable accommodations that may be necessary for a disability caused by pregnancy-related impairments include, but are not limited to, the

following:[160]

- Redistributing marginal functions that the employee is unable to perform due to the disability. Marginal functions are the non-fundamental (or non-essential) job duties.

  Example: The manager of an organic market is given a 20-pound lifting restriction for the latter half of her pregnancy due to pregnancy-related sciatica. Usually when a delivery truck arrives with the daily shipment, one of the stockers unloads and takes the produce into the store. The manager may need to unload the produce from the truck if the stocker arrives late or is absent, which may occur two to three times a month. Since one of the cashiers is available to unload merchandise during the period of the manager's lifting restrictions, the employer is able to remove the marginal function of unloading merchandise from the manager's job duties.

- Altering how an essential or marginal job function is performed (e.g., modifying standing, climbing, lifting, or bending requirements).

  Example: A warehouse manager who developed pregnancy-related carpal tunnel syndrome was advised by her physician that she should avoid working at a computer key board. She is responsible for maintaining the inventory records at the site and completing a weekly summary report. The regional manager approved a plan whereby at the end of the week, the employee's assistants input the data required for the summary report into the computer based on the employee's dictated notes, with the employee ensuring that the entries are accurate.

- Modification of workplace policies.

  Example: A clerk responsible for receiving and filing construction plans for development proposals was diagnosed with a pregnancy-related kidney condition that required that she maintain a regular intake of water throughout the work day. She was prohibited from having any liquids at her work station due to the risk of spillage and damage to the documents. Her manager arranged for her to have a table placed just outside the file room where she could easily access water.

- Purchasing or modifying equipment and devices.

Example: A postal clerk was required to stand at a counter to serve customers for most of her eight-hour shift. During her pregnancy she developed severe pelvic pain caused by relaxed joints that required her to be seated most of the time due to instability. Her manager provided her with a stool that allowed her to work comfortably at the height of the counter.

- Modified work schedules.

  Example: An employee with depression found that her condition worsened during her pregnancy because she was taken off her regular medication. Her physician provided documentation indicating that her symptoms could be alleviated by a counseling session each week. Since appointments for the counseling sessions were available only during the day, the employee requested that she be able to work an hour later in the afternoon to cover the time. The manager concluded that, because the schedule change would not adversely affect the employee's ability to meet with customers and clients and that some of the employee's duties, such as sending out shipments and preparing reports, could be done later in the day, the accommodation would not be an undue hardship.

- Granting leave (which may be unpaid leave if the employee does not have accrued paid leave) in addition to what an employer would normally provide under a sick leave policy for reasons related to the disability.

  Example: An account representative at a bank was diagnosed during her pregnancy with a cervical abnormality and was ordered by her physician to remain on bed rest until she delivered the baby. The employee has not worked at the bank long enough to qualify for leave under the Family and Medical Leave Act, and, although she has accrued some sick leave under the employer's policy, it is insufficient to cover the period of her recommended bed rest. The company determines that it would not be an undue hardship to grant her request for sick leave beyond the terms of its unpaid sick leave policy.

- Temporary assignment to a light duty position.[161]

  Example: An employee at a garden shop was assigned duties such as watering, pushing carts, and lifting small pots from carts to bins. Her physician placed her on lifting restrictions and provided her with documentation that

she should not lift or push more than 20 pounds due to her pregnancy-related pelvic girdle pain, which is caused by hormonal changes to pelvic joints. The manager approved her for a light duty position at the cash register.

III. OTHER REQUIREMENTS AFFECTING PREGNANT WORKERS

A. Family and Medical Leave Act (FMLA)

Although Title VII does not require an employer to provide pregnancy-related or child care leave if it provides no leave for other temporary illness or family obligations, the FMLA does require covered employers to provide such leave.[162] The FMLA covers private employers with 50 or more employees in 20 or more workweeks during the current or preceding calendar year, as well as federal, state, and local governments.[163]

Under the FMLA, an eligible employee[164] may take up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:

(1) the birth and care of the employee's newborn child;

(2) the placement of a child with the employee through adoption or foster care;

(3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; or

(4) to take medical leave when the employee is unable to work because of a serious health condition.[165]

The FMLA also specifies that:

- an employer must maintain the employee's existing level of coverage under a group health plan while the employee is on FMLA leave as if the employee had not taken leave;
- after FMLA leave, the employer must restore the employee to the employee's original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment;

- spouses employed by the same employer are not entitled to more than 12 weeks of family leave between them for the birth and care of a healthy newborn child, placement of a healthy child for adoption or foster care, or to care for a parent who has a serious health condition; and
- an employer may not interfere with, restrain, or deny the exercise of any right provided by FMLA; nor may it discriminate against any individual for opposing any practice prohibited by the FMLA, or being involved in any FMLA related proceeding.

B. Executive Order 13152 Prohibiting Discrimination Based on Status as Parent

Executive Order 13152[166] prohibits discrimination in federal employment based on an individual's status as a parent. "Status as a parent" refers to the status of an individual who, with respect to someone under age 18 or someone 18 or older who is incapable of self-care due to a physical or mental disability, is:

(1) a biological parent;

(2) an adoptive parent;

(3) a foster parent;

(4) a stepparent;

(5) a custodian of a legal ward;

(6) in loco parentis over such an individual; or

(7) actively seeking legal custody or adoption of such an individual.

C. Reasonable Break Time for Nursing Mothers[167]

Section 4207 of the Patient Protection and Affordable Care Act[168] provides the following: [169]

- Employers must provide "reasonable break time" for breastfeeding employees to express breast milk until the child's first birthday.
- Employers must provide a private place, other than a bathroom, for this purpose.

- An employer need not pay an employee for any work time spent for this purpose. [170]
- Hourly employees who are not exempt from the overtime pay requirements of the Fair Labor Standards Act are entitled to breaks to express milk.
- Employers with fewer than 50 employees are not subject to these requirements if the requirements "would impose an undue hardship by causing significant difficulty or expense when considered in relation to the size, nature, or structure of the employer's business."
- Nothing in this law preempts a state law that provides greater protections to employees.[171]

D. State Laws

Title VII does not relieve employers of their obligations under state or local laws except where such laws require or permit an act that would violate Title VII.[172] Therefore, employers must comply with state or local provisions regarding pregnant workers unless those provisions require or permit discrimination based on pregnancy, childbirth, or related medical conditions.[173]

In *California Fed. Sav. & Loan Ass'n v. Guerra*,[174] the Supreme Court held that the PDA did not preempt a California law requiring employers in that state to provide up to four months of unpaid pregnancy disability leave. Cal Fed claimed the state law was inconsistent with Title VII because it required preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions. The Court disagreed, concluding that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."[175]

The Court, in *Guerra*, stated that "[i]t is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment."[176] The Court noted that the California statute did not compel employers to treat pregnant women better than employees with disabilities. Rather, the state law merely established benefits that employers were required, at a minimum, to provide pregnant workers. Employers were free, the Court stated, to give comparable benefits to other employees with disabilities, thereby treating women affected by pregnancy no better than others not so affected but similar in their ability or inability to work.[177]

IV. BEST PRACTICES

Legal obligations pertaining to pregnancy discrimination and related issues are set forth above. Below are suggestions for best practices that employers may adopt to reduce the chance of pregnancy-related PDA and ADA violations and to remove barriers to equal employment opportunity.

Best practices are proactive measures that may go beyond federal non-discrimination requirements or that may make it more likely that such requirements will be met. These policies may decrease complaints of unlawful discrimination and enhance employee productivity. They also may aid recruitment and retention efforts.

General

- Develop, disseminate, and enforce a strong policy based on the requirements of the PDA and the ADA.
    - Make sure the policy addresses the types of conduct that could constitute unlawful discrimination based on pregnancy, childbirth, and related medical conditions.
    - Ensure that the policy provides multiple avenues of complaint.
- Train managers and employees regularly about their rights and responsibilities related to pregnancy, childbirth, and related medical conditions.
    - Review relevant federal, state, and local laws and regulations, including Title VII, as amended by the PDA, the ADA, as amended, the FMLA, as well as relevant employer policies.
- Conduct employee surveys and review employment policies and practices to identify and correct any policies or practices that may disadvantage women affected by pregnancy, childbirth, or related medical conditions or that may perpetuate the effects of historical discrimination in the organization.
- Respond to pregnancy discrimination complaints efficiently and effectively. Investigate complaints promptly and thoroughly. Take corrective action and implement corrective and preventive measures as necessary to resolve the situation and prevent problems from arising in the future.

- Protect applicants and employees from retaliation. Provide clear and credible assurances that if applicants or employees internally or externally report discrimination or provide information related to discrimination based on pregnancy, childbirth, or related medical conditions, the employer will protect them from retaliation. Ensure that these anti-retaliation measures are enforced.

Hiring, Promotion, and Other Employment Decisions

- Focus on the applicant's or employee's qualifications for the job in question. Do not ask questions about the applicant's or employee's pregnancy status, children, plans to start a family, or other related issues during interviews or performance reviews.
- Develop specific, job related qualification standards for each position that reflect the duties, functions, and competencies of the position and minimize the potential for gender stereotyping and for discrimination on the basis of pregnancy, childbirth, or related medical conditions. Make sure these standards are consistently applied when choosing among candidates.
- Ensure that job openings, acting positions, and promotions are communicated to all eligible employees.
- Make hiring, promotion, and other employment decisions without regard to stereotypes or assumptions about women affected by pregnancy, childbirth, or related medical conditions.
- When reviewing and comparing applicants' or employees' work histories for hiring or promotional purposes, focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service.
- Make sure employment decisions are well documented and, to the extent feasible, are explained to affected persons. Make sure managers maintain records for at least the statutorily required periods. *See* 29 C.F.R. § 1602.14.
- Disclose information about fetal hazards to applicants and employees and accommodate resulting requests for reassignment if feasible.**[178]**

Leave and Other Fringe Benefits

- Leave related to pregnancy, childbirth, or related conditions can be limited to women affected by those conditions. Parental leave must be provided to similarly situated men and women on the same terms.
- If there is a restrictive leave policy (such as restricted leave during a probationary period), evaluate whether it disproportionately impacts pregnant workers and, if so, whether it is necessary for business operations. Ensure that the policy notes that an employee may qualify for leave as a reasonable accommodation.
- Review workplace policies that limit employee flexibility, such as fixed hours of work and mandatory overtime, to ensure that they are necessary for business operations.
- Consult with employees who plan to take pregnancy and/or parental leave in order to determine how their job responsibilities will be handled in their absence.
- Ensure that employees who are on leaves of absence due to pregnancy, childbirth, or related medical conditions have access to training, if desired, while out of the workplace.**[179]**

Terms and Conditions of Employment

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination based on pregnancy, childbirth, or related medical conditions. Ensure that compensation practices and performance appraisals are based on employees' actual job performance and not on stereotypes about these conditions.
- Review any light duty policies. Ensure light duty policies are structured so as to provide pregnant employees access to light duty equal to that provided to people with similar limitations on their ability to work.
- Temporarily reassign job duties that employees are unable to perform because of pregnancy or related medical conditions if feasible.
- Protect against unlawful harassment. Adopt and disseminate a strong anti-harassment policy that incorporates information about pregnancy-related

harassment; periodically train employees and managers on the policy's contents and procedures; incorporate into the policy and training information about harassment of breastfeeding employees; vigorously enforce the anti-harassment policy.

- Develop the potential of employees, supervisors, and executives without regard to pregnancy, childbirth, or related medical conditions.
- Provide training to all workers, including those affected by pregnancy or related medical conditions, so all have the information necessary to perform their jobs well.**[180]**
- Ensure that employees are given equal opportunity to participate in complex or high-profile work assignments that will enhance their skills and experience and help them ascend to upper-level positions.
- Provide employees with equal access to workplace networks to facilitate the development of professional relationships and the exchange of ideas and information.

Reasonable Accommodation

- Have a process in place for expeditiously considering reasonable accommodation requests made by employees with pregnancy-related disabilities, and for granting accommodations where appropriate.
- State explicitly in any written reasonable accommodation policy that reasonable accommodations may be available to individuals with temporary impairments, including impairments related to pregnancy.
- Make any written reasonable accommodation procedures an employer may have widely available to all employees, and periodically remind employees that the employer will provide reasonable accommodations to employees with disabilities who need them, absent undue hardship.
- Train managers to recognize requests for reasonable accommodation and to respond promptly to all requests. Given the breadth of coverage for pregnancy-related impairments under the ADA, as amended, managers should treat requests for accommodation from pregnant workers as requests for accommodation under the ADA unless it is clear that no impairment exists.

- Make sure that anyone designated to handle requests for reasonable accommodations knows that the definition of the term "disability" is broad and that employees requesting accommodations, including employees with pregnancy-related impairments, should not be required to submit more than reasonable documentation to establish that they have covered disabilities. Reasonable documentation means that the employer may require only the documentation needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. The focus of the process for determining an appropriate accommodation should be on an employee's work-related limitations and whether an accommodation could be provided, absent undue hardship, to assist the employee.
- If a particular accommodation requested by an employee cannot be provided, explain why, and offer to discuss the possibility of providing an alternative accommodation.

---

[1] The text of the PDA is as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k).

[2] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288 (1987) (*quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971)).

[3] S. Rep. No. 95-331, at 4 (1977), *as reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), at 41 (1980). The PDA was enacted to supersede the Supreme Court's decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (excluding pregnancy-related disabilities from disability benefit plans did not constitute discrimination based on sex absent indication that exclusion was pretext for sex discrimination), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (policy of denying sick leave pay to employees disabled by pregnancy while providing such pay to employees disabled by other non-occupational sickness or injury does not violate Title VII unless the exclusion is a pretext for sex discrimination).

[4] *California Fed. Sav. & Loan Ass'n*, 479 U.S. at 290.

[5] The term "employer" in this document refers to any entity covered by Title VII, including labor organizations and employment agencies.

[6] Use of the term "employee" in this document includes applicants for employment or membership in labor organizations and, as appropriate, former employees and members.

[7] Nat'l Partnership for Women & Families, *The Pregnancy Discrimination Act: Where We Stand 30 Years Later* (2008), *available at* **https://nationalpartnership.org/economic-justice/pregnancy-discrimination/ (https://nationalpartnership.org/economic-justice/pregnancy-discrimination/)** (last visited May 5, 2014).

[8] While there is no definitive explanation for the increase in complaints, and there may be several contributing factors, the National Partnership study indicates that women today are more likely than their predecessors to remain in the workplace during pregnancy and that some managers continue to hold negative views of pregnant workers. *Id.* at 11.

[9] Studies have shown how pregnant employees and applicants experience negative reactions in the workplace that can affect hiring, salary, and ability to manage subordinates. *See* Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty,* 59 HASTINGS L.J. 1359 (2008)*; see also* Stephen Benard, *Written Testimony of Dr. Stephen Benard*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, **http://www.eeoc.gov/eeoc/meetings/2-15-12/benard.cfm (http://www.eeoc.gov/eeoc/meetings/2-15-12/benard.cfm)** (last visited April 29,

2014) (discussing studies examining how an identical woman would be treated when pregnant versus when not pregnant);Sharon Terman, *Written Testimony of Sharon Terman*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, **http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm (http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm)** (last visited April 29, 2014)*;* Joan Williams, *Written Testimony of Joan Williams*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, **http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm (http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm)** (last visited April 29, 2014) (discussing the types of experiences reported by pregnant employees seeking assistance from advocacy groups).

[10] 42 U.S.C. § 12112.

[11] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The expanded definition of "disability" under the ADA also may affect the PDA requirement that pregnant workers with limitations be treated the same as employees who are not pregnant but who are similar in their ability or inability to work by expanding the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged.

[12] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5, *reprinted in* 5 U.S.C.C.A.N. 4749, 4753 (1978).

[13] 124 Cong. Rec. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA).

[14] *See, e.g., Asmo v. Keane*, *Inc.*, 471 F.3d 588, 594-95 (6th Cir. 2006) (close timing between employer's knowledge of pregnancy and the discharge decision helped create a material issue of fact as to whether employer's explanation for discharging plaintiff was pretext for pregnancy discrimination); *Palmer v. Pioneer Inn Assocs., Ltd*., 338 F.3d 981, 985 (9th Cir. 2003) (employer not entitled to summary judgment where plaintiff testified that supervisor told her that he withdrew his job offer to plaintiff because the company manager did not want to hire a pregnant woman); *cf. Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 642 (1974) (state rule requiring pregnant teachers to begin taking leave four months before delivery due date and not return until three months after delivery denied due process).

[15] *See, e.g., Prebilich-Holland v. Gaylord Entm't Co*., 297 F.3d 438, 444 (6th Cir. 2002) (no finding of pregnancy discrimination if employer had no knowledge of plaintiff's

pregnancy at time of adverse employment action); *Miller v. Am. Family Mut. Ins. Co*., 203 F.3d 997, 1006 (7th Cir. 2000) (claim of pregnancy discrimination "cannot be based on [a woman's] being pregnant if [the employer] did not know she was"); *Haman v. J.C. Penney Co.,* 904 F.2d 707, 1990 WL 82720, at *5 (6th Cir. 1990) (unpublished) (defendant claimed it could not have discharged plaintiff due to her pregnancy because the decision maker did not know of it, but evidence showed plaintiff's supervisor had knowledge of pregnancy and had significant input into the termination decision).

[16] *Geraci v. Moody-Tottrup, Int'l, Inc*., 82 F.3d 578, 581(3d Cir. 1996).

[17] *See, e.g., Griffin v. Sisters of Saint Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007) (disputed issue as to whether employer knew of plaintiff's pregnancy where she asserted that she was visibly pregnant during the time period relevant to the claim, wore maternity clothes, and could no longer conceal the pregnancy). Similarly, a disputed issue may arise as to whether the employer knew of a past pregnancy or one that was intended. *See Garcia v. Courtesy Ford, Inc.*, 2007 WL 1192681, at *3 (W.D. Wash. Apr. 20, 2007) (unpublished) (although supervisor may not have been aware of plaintiff's pregnancy at time of discharge, his knowledge that she was attempting to get pregnant was sufficient to establish PDA coverage).

[18] *See, e.g., Asmo v. Keane, Inc*., 471 F.3d at 594-95 (manager's silence after employee announced that she was pregnant with twins, in contrast to congratulations by her colleagues, his failure to discuss with her how she planned to manage her heavy business travel schedule after the twins were born, and his failure even to mention her pregnancy during the rest of her employment could be interpreted as evidence of discriminatory animus and, thus, a motive for plaintiff's subsequent discharge); *Laxton v. Gap Inc*., 333 F.3d 572, 584 (5th Cir. 2003) (where supervisor negatively reacted to news of plaintiff's pregnancy and expressed concern about having others fill in around time of the delivery date, it was reasonable to infer that supervisor harbored stereotypical presumption about plaintiff's inability to fulfill job duties as result of her pregnancy); *Wagner v. Dillard Dep't Stores, Inc*., 17 Fed. Appx. 141, 149 (4th Cir. 2001) (unpublished) (evidence did not support defendant's stereotypical assumption that plaintiff could not or would not come to work because of her pregnancy or in the wake of the anticipated childbirth); *Maldonado v. U.S. Bank*, 186 F.3d 759, 768 (7th Cir.1999) (employer could not discharge pregnant employee "simply because it 'anticipated' that she would be unable to fulfill its job expectations"); *Duneen v. Northwest Airlines, Inc*., 132 F.3d

431, 436 (8th Cir. 1998) (evidence of discrimination shown where employer assumed plaintiff had pregnancy-related complication that prevented her from performing her job and therefore decided not to permit her to return to work).

[19] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

[20] These facts were drawn from the case of *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998). The court in *Troy* found the jury was not irrational in concluding that stereotypes about pregnancy and not actual job attendance were the cause of the discharge. *See also* Joan Williams, *Written Testimony of Joan Williams*, *supra* note 9 (discussing examples of statements that may be evidence of stereotyping).

[21] *Donaldson v. Am. Banco Corp., Inc.*, 945 F. Supp. 1456, 1464 (D. Colo. 1996)*; see also Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (rejecting "surprising claim" by defendant that no pregnancy discrimination can be shown where challenged action occurred after birth of plaintiff's baby); *Pacourek v. Inland Steel* Co., 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (quoting Legislative History of the PDA at 124 Cong. Rec. 38574 (1978)) ("[T]he PDA gives a woman 'the right . . . to be financially and legally protected before, during, and after her pregnancy.'").

[22] *See, e.g.*, *Neessen v. Arona Corp.*, 2010 WL 1731652, at *7 (N.D. Iowa Apr. 30, 2010) (plaintiff was in PDA's protected class where defendant allegedly failed to hire her because, at the time of her application, she had recently been pregnant and given birth).

[23] *See, e.g.*, *Shafrir v. Ass'n of Reform Zionists of Am.*, 998 F. Supp. 355, 363 (S.D.N.Y. 1998) (allowing plaintiff to proceed with pregnancy discrimination claim where she was fired during parental leave and replaced by non-pregnant female, supervisor had ordered plaintiff to return to work prior to end of her leave knowing she could not comply, and supervisor allegedly expressed doubts about plaintiff's desire and ability to continue working after having child).

[24] *See Solomen v. Redwood Advisory Co.*, 183 F. Supp. 2d 748, 754 (E.D. Pa. 2002) ("a plaintiff who was not pregnant at or near the time of the adverse employment action has some additional burden in making out a prima facie case").

[25] For a discussion of disparate treatment of workers with caregiving responsibilities, *see* Section I B.1.b., *infra*; the EEOC's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23,

2007), *available at* **http://www.eeoc.gov/policy/docs/caregiving.html (http://www.eeoc.gov/policy/docs/caregiving.html)** (last visited May 5, 2014); and the EEOC's *Employer Best Practices for Workers with Caregiving Responsibilities*, *available at* **http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (http://www.eeoc.gov/policy/docs/caregiver-best-practices.html)** (last visited May 5, 2014).

[26] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 206 (1991); *see also Kocak v. Cmty. Health Partners of Ohio*, 400 F.3d 466, 470 (6th Cir. 2005) (plaintiff "cannot be refused employment on the basis of her potential pregnancy"); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("Potential pregnancy . . . is a medical condition that is sex-related because only women can become pregnant.").

[27] *Johnson Controls*, 499 U.S. at 206.

[28] *Id*. at 209.

[29] *Id.* at 197; *see also Spees v. James Marine, Inc*., 617 F.3d 380, 392-94 (6th Cir. 2010) (finding genuine issue of material fact as to whether employer unlawfully transferred pregnant welder to tool room because of perceived risks of welding while pregnant); *EEOC v. Catholic Healthcare West*, 530 F. Supp. 2d 1096, 1105-07 (C.D. Cal. 2008) (hospital's policy prohibiting pregnant nurses from conducting certain medical procedures was facially discriminatory); *Peralta v. Chromium Plating & Polishing*, 2000 WL 34633645 (E.D.N.Y. Sept. 15, 2000) (unpublished) (employer violated Title VII when it instructed plaintiff that she could not continue to pack and inspect metal parts unless she provided letter from doctor stating that her work would not endanger herself or her fetus).

[30] *Johnson Controls,* 499 U.S. at 200. For a discussion of the BFOQ defense, *see* Section I B.1.c., *infra*.

[31] *Id*. at 206.

[32] For examples of cases finding evidence of discrimination based on an employee's stated or assumed intention to become pregnant, see *Walsh v. National Computer Sys, Inc*., 332 F.3d 1150, 1160 (8th Cir. 2003) (judgment and award for plaintiff claiming pregnancy discrimination upheld where evidence included the following remarks by supervisor after plaintiff returned from parental leave: "I suppose you'll be next," in commenting to plaintiff about a co-worker's pregnancy;

"I suppose we'll have another little Garrett [the name of plaintiff's son] running around," after plaintiff returned from vacation with her husband; and "You better not be pregnant again!" after she fainted at work); *Santiago-Ramos v. Centennial P.R. Wireless Corp*., 217 F.3d 46, 55-6 (1st Cir. 2000) (manager's expressions of concern about the possibility of plaintiff having a second child, along with other evidence of sex bias and lack of evidence supporting the reasons for discharge, raised genuine issue of material fact as to whether explanation for discharge was pretextual).

[33] *Pacourek v. Inland Steel Co.,* 858 F. Supp. 1393, 1401 (N.D. Ill.1994); *see also Batchelor v. Merck & Co., Inc*., 651 F. Supp. 2d 818, 830-31(N.D. Ind. 2008) (plaintiff was member of protected class under PDA where her supervisor allegedly discriminated against her because of her stated intention to start a family); *Cleese v. Hewlett-Packard Co*., 911 F. Supp. 1312, 1317-18 (D. Or. 1995) (plaintiff, who claimed defendant discriminated against her because it knew she planned to become pregnant, fell within PDA's protected class).

[34] See Section II, *infra*, for information about prohibited medical inquiries under the ADA.

[35] *See Hall v. Nalco Co*., 534 F.3d 644, 648-49 (7th Cir. 2008) (employee terminated for taking time off to undergo in vitro fertilization was not fired for gender-neutral condition of infertility but rather for gender-specific quality of childbearing capacity); *Pacourek*, 858 F. Supp. at 1403-04 (plaintiff stated Title VII claim where she alleged that she was undergoing in vitro fertilization and her employer disparately applied its sick leave policy to her).

Employment decisions based on infertility also may implicate the Americans with Disabilities Act, since infertility that is, or results from, an impairment may be found to substantially limit the major life activity of reproduction and thereby qualify as a disability. For further discussion regarding coverage under the ADA, see Section II, *infra*.

[36] *See Saks v. Franklin Covey, Inc.*, 316 F.3d 337, 346 (2d Cir. 2003) ("[i]nfertility is a medical condition that afflicts men and women with equal frequency"); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral," it does not violate Title VII); *cf. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 198 (1991) (finding that employer's policy impermissibly

classified on the basis of gender and childbearing capacity "rather than fertility alone").

In *Krauel*, the Eighth Circuit also rejected the plaintiff's argument that exclusion of benefits for infertility treatments had an unlawful disparate impact on women since the plaintiff did not provide statistical evidence showing that female plan participants were disproportionately harmed by the exclusion. 95 F.3d at 681; *see also Saks*, 316 F.3d at 347 (exclusion of surgical impregnation procedures does not discriminate against female employees since such procedures are used to treat both male and female infertility, and therefore, infertile male and female employees are equally disadvantaged by exclusion).

[37] *See, e.g.*, *Commission Decision on Coverage of Contraception* (Dec. 14, 2000) (because prescription contraceptives are available only for women, employer's explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion), *available at* **https://www.eeoc.gov/commission-decision-coverage-contraception (https://www.eeoc.gov/commission-decision-coverage-contraception)** (last visited May 5, 2014).

[38] *Id.; see also Cooley v. DaimlerChrysler Corp*., 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) ("[A]s only women have the potential to become pregnant, denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion."); *Erickson v. Bartell Drug Co*., 141 F. Supp. 2d 1266, 1271-72 (W.D. Wash. 2001) (exclusion of prescription contraceptives from employer's generally comprehensive prescription drug plan violated PDA). The Eighth Circuit's assertion in *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 942 (2007), that contraception is not "related to pregnancy" because "contraception is a treatment that is only indicated prior to pregnancy" is not persuasive because it is contrary to the *Johnson Controls* holding that the PDA applies to potential pregnancy.

[39] The Religious Freedom Restoration Act (RFRA) provides for religious exemption from a federal law, even if the law is of general applicability and neutral toward religion, if it substantially burdens a religious practice and the government is unable to show that its application would further a compelling government interest and is the least restrictive means of furthering the interest. 42 U.S.C. § 2000bb-1. In a case decided in June 2014, *Burwell v. Hobby Lobby Stores, Inc., et al.*, --- U.S. ---, 134 S. Ct. 2751 (2014), the Supreme Court ruled that the Patient Protection and Affordable Care Act's contraceptive mandate violated the RFRA as applied to closely held family

for-profit corporations whose owners had religious objections to providing certain types of contraceptives. The Supreme Court did not reach the question whether owners of such businesses can assert that the contraceptive mandate violates their rights under the Constitution's Free Exercise Clause. This enforcement guidance explains Title VII's prohibition of pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the First Amendment or the RFRA.

[40] *See, e.g., Commission Decision on Coverage of Contraception, supra* note 37*; see also* Section 2713(a)(4) of the Public Health Service Act, as amended by the Patient Protection and Affordable Care Act, PL 111-148, 124 Stat. 119 (2010) (requiring that non-grandfathered group or individual insurance coverage provide benefits for women's preventive health services without cost sharing). On August 1, 2011, the Health Resources and Services Administration released guidelines requiring that contraceptive services be included as women's preventive health services. These requirements became effective for most new and renewed health plans in August 2012. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1) (plans and insurers must cover a newly recommended preventive service starting with the first plan year that begins on or after the date that is one year after the date on which the new recommendation is issued). The Departments of Treasury, Labor, and Health and Human Services issued regulations clarifying the criteria for the religious employer exemption from contraceptive coverage, accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by eligible organizations (and group health insurance coverage provided in connection with such plans), and student health insurance coverage arranged by eligible organizations that are institutions of higher education. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39869 (July 2, 2013) (to be codified at 26 C.F.R. Part 54; 29 C.F.R. Parts 2510 and 2590; 45 C.F.R. Parts 147 and 1560). *But see supra* note 39.

[41] *See Commission Decision on Coverage of Contraception, supra* note 37; *Erickson*, 141 F. Supp. 2d at 1272 ("In light of the fact that prescription contraceptives are used only by women, [defendant's] choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory.").

[42] *See supra* note 37. The Commission disagrees with the conclusion in *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007), that contraception is gender-neutral because it applies to both men and women. *Id.* at 942. The court

distinguished the EEOC's decision on coverage of contraception by noting that the Commission decision involved a health insurance policy that denied coverage of prescription contraception but included coverage of vasectomies and tubal ligations while the employer in *Union Pacific* excluded all contraception for women and men, both prescription and surgical, when used solely for contraception and not for other medical purposes. However, the EEOC's decision was not based on the fact that the plan at issue covered vasectomies and tubal ligations. Instead, the Commission reasoned that excluding prescription contraception while providing benefits for drugs and devices used to prevent other medical conditions is a sex-based exclusion because prescription contraceptives are available only for women. *See also Union Pacific*, 479 F.3d at 948-49 (Bye, J., dissenting) (contraception is "gender-specific, female issue because of the adverse health consequences of an unplanned pregnancy"; therefore, proper comparison is between preventive health coverage provided to each gender).

[43] *See, e.g., Miranda v. BBII Acquisition*, 120 F. Supp. 2d 157, 167 (D. Puerto Rico 2000) (finding genuine issue of fact as to whether plaintiff's discharge was discriminatory where discharge occurred around one half hour after plaintiff told supervisor she needed to extend her medical leave due to pregnancy-related complications, there was no written documentation of the process used to determine which employees would be terminated, and plaintiff's position was not initially selected for elimination).

[44] The facts in this example were drawn from the case of *Kucharski v. CORT Furniture Rental,* 342 Fed. Appx. 712, 2009 WL 2524041 (2d Cir. Aug. 19, 2009) (unpublished). Although the plaintiff in *Kucharski* did not allege disparate impact, an argument could have been made that the restrictive medical leave policy had a disparate impact on pregnant workers. For a discussion of disparate impact, see Section I B.2., *infra*.

If the employer made exceptions to its policy for non-pregnant workers who were similar to Sherry in their ability or inability to work, denying additional leave to Sherry because she worked for the employer for less than a year would violate the PDA. *See* Section I C., *infra*. Additionally, if the pregnancy-related condition constitutes a disability within the meaning of the ADA, then the employer would have to make a reasonable accommodation of extending the maximum four weeks of leave, absent undue hardship, even though the employee has been working for only six months. *See* Section II B., *infra*.

[45] For a discussion of the PDA's requirements regarding health insurance, see Section I C.4., *infra*.

[46] *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 997 (6th Cir. 1991) ("It seems to us obvious that the reference in the Act to 'women affected by . . . related medical conditions' refers to related medical conditions of the pregnant women, not conditions of the resulting offspring. Both men and women are 'affected by' medical conditions of the resulting offspring."); *Barnes v. Hewlett Packard Co*., 846 F. Supp. 442, 445 (D. Md.1994) ("There is, in sum, a point at which pregnancy and immediate post-partum requirements - clearly gender-based in nature-end and gender-neutral child care activities begin.").

[47] *See* 42 U.S.C. § 12112(b)(3), (4); Appendix to 29 C.F.R. § 1630.15(a) ("The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate non-discriminatory reason justifying disparate treatment of an individual with a disability."); EEOC *Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance* (June 8, 1993), *available at* **http://www.eeoc.gov/policy/docs/health.html (http://www.eeoc.gov/policy/docs/health.html)** (last visited May 5, 2014) ("decisions about the employment of an individual with a disability cannot be motivated by concerns about the impact of the individual's disability on the employer's health insurance plan")*; see also Trujillo v. PacifiCorp*, 524 F.3d 1149, 1156-57 (10th Cir. 2008) (employees raised inference that employer discharged them because of their association with their son whose cancer led to significant healthcare costs); *Larimer v. Int'l Bus. Machs. Corp*., 370 F.3d 698, 700 (7th Cir. 2004) (adverse action against employee due to medical cost arising from disability of person associated with employee falls within scope of associational discrimination section of ADA).

[48] Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff *et seq*., prohibits basing employment decisions on an applicant's or employee's genetic information. Genetic information includes information about the manifestation of a disease or disorder in a family member of the applicant or employee (i.e., family medical history). It also includes genetic tests such as amniocentesis and newborn screening tests for conditions such as Phenylketonuria (PKU). The statute prohibits discriminating against an employee or applicant

because of his or her child's medical condition. *See* 42 U.S.C. §§ 2000ff-(3) (defining "family member"), 2000ff-(4) (defining "genetic information"); 29 C.F.R. § 1635.3(a)-(c) (definitions of "family member," "family medical history," and "genetic information"), 1635.4 (prohibited practices under GINA). Employment decisions based on high health care costs resulting from an employee's current pregnancy-related medical conditions do not violate GINA, though they may violate the ADA and the PDA.

[49] *Fleming*, 948 F.2d at 997 (ERISA makes it unlawful to discharge or otherwise penalize a plan participant or beneficiary for exercising his or her rights under the plan).

[50] *See generally* ARTHUR C. GUYTON, TEXTBOOK OF MED. PHYSIOLOGY 1039-40 (2006) (describing physiological processes by which milk production occurs).

[51] *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (lactation is a related medical condition of pregnancy for purposes of the PDA, and an adverse employment action motivated by the fact that a woman is lactating clearly imposes upon women a burden that male employees need not suffer).

[52] Whether the demotion was ultimately found to be unlawful would depend on whether the employer asserted a legitimate, non-discriminatory reason for it and, if so, whether the evidence revealed that the asserted reason was pretextual.

[53] *Overcoming Breastfeeding Problems*, U.S. NAT'L LIBRARY OF MED., **http://www.nlm.nih.gov/medlineplus/ency/article/002452.htm (http://www.nlm.nih.gov/medlineplus/ency/article/002452.htm)** (last visited May 5, 2014); *see also,* DIANE WIESSINGER, THE WOMANLY ART OF BREASTFEEDING 385 (8th ed. 2010).

[54] *Breastfeeding,* U.S. DEP'T OF HEALTH & HUMAN SERVS., **https://www.womenshealth.gov/breastfeeding/breastfeeding-home-work-and-public/breastfeeding-and-going-back-work (https://www.womenshealth.gov/breastfeeding/breastfeeding-home-work-and-public/breastfeeding-and-going-back-work)** (last visited May 5, 2014).

[55] The Commission disagrees with the conclusion in *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991) (table), that protection of pregnancy-related medical conditions is "limited to incapacitating conditions for which medical care or treatment is usual and normal." The PDA requires that a

woman affected by pregnancy, childbirth, or related medical conditions be treated the same as other workers who are similar in their "ability or inability to work." Nothing limits protection to incapacitating pregnancy-related medical conditions. *See Notter v. North Hand Prot.*, 1996 WL 342008, at *5 (4th Cir. June 21, 1996) (unpublished) (concluding that PDA includes no requirement that "related medical condition" be "incapacitating," and therefore medical condition resulting from caesarian section delivery was covered under PDA even if it was not incapacitating).

[56] *See Houston Funding II, Ltd*., 717 F.3d at 430. The Commission disagrees with the decision in *Wallace v. Pyro Mining Co.*, 789 F. Supp. at 869, which, relying on *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), concluded that denial of personal leave for breastfeeding was not sex-based because it merely removed one situation from those for which leave would be granted. *Cf. Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 310-11 (S.D.N.Y. 1999) (discrimination based on breastfeeding is not cognizable as sex discrimination as there can be no corresponding subclass of men, i.e., men who breastfeed, who are treated more favorably). As explained in *Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669 (1983), when Congress passed the PDA, it rejected not only the holding in *Gilbert* but also the reasoning. Thus, denial of personal leave for breastfeeding discriminates on the basis of sex by limiting the availability of personal leave to women but not to men. *See also Allen v. Totes/Isotoner*, 915 N.E. 2d 622, 629 (Ohio 2009) (O'Connor, J., concurring) (concluding that gender discrimination claims involving lactation are cognizable under Ohio Fair Employment Practices Act and rejecting other courts' reliance on *Gilbert* in evaluating analogous claims under other statutes, given Ohio legislature's "clear and unambiguous" rejection of *Gilbert* analysis).

[57] Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207.

[58] 42 U.S.C. § 2000e(k). *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 34 (1979) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion."); H.R. Conf. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."); *see also, Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 576 (2008) (PDA prohibits employer from discriminating against female employee because she has exercised her right to have

an abortion); *Turic v. Holland Hospitality, Inc*., 85 F.3d 1211, 1214 (6th Cir. 1996) (discharge of pregnant employee because she contemplated having abortion violated PDA).

[59] 42 U.S.C. § 2000e(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.").

[60] *Id.*

[61] *Velez v. Novartis Pharmaceuticals Corp*., 244 F.R.D. 243 (S.D.N.Y. 2007) (declaration by a female employee that she was encouraged by a manager to get an abortion was anecdotal evidence supporting a class claim of pregnancy discrimination).

[62] *See Young v. United Parcel Serv., Inc*., --- U.S. ---, 135 S.Ct. 1338, 1354-55 (2015); *see also* Section I C., *infra*.

[63] *See, e.g*., *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 197-98 (1991) (employer's policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding certain threshold, facially discriminated against women based on their capacity to become pregnant).

[64] 132 F.3d 431, 436 (8th Cir. 1998).

[65] *See also Maldonado v. U.S. Bank*, 186 F.3d 759, 766 (7th Cir.1999) (company vice president's remark to plaintiff that she was being fired "due to her condition" on the day after the plaintiff informed the vice president of her pregnancy directly proved pregnancy discrimination); *Sheehan v. Donlen Corp*., 173 F.3d 1039, 1044-45 (7th Cir. 1999) (supervisor's comment when discharging pregnant plaintiff that the discharge would hopefully give her time at home with her children and his similar comment the following day proved discrimination despite manager's lack of specific statement that plaintiff's pregnancy was reason for discharge); *Flores v. Flying J., Inc*., 2010 WL 785969, at *3 (S.D. Ill. Mar. 4, 2010) (manager's alleged statement to plaintiff on her last day of employment that she could no longer work because she

was pregnant raised material issue of fact as to whether discharge was due to pregnancy discrimination).

[66] 471 F.3d 588, 593-94 (6th Cir. 2006).

[67] *Compare with Gonzalez v. Biovail Corp. Int'l*, 356 F. Supp. 2d 68, 80 (D. Puerto Rico 2005) (temporal link between discharge and plaintiff's pregnancy was too far removed to establish claim where discharge occurred six months after plaintiff's parental leave ended). *See also Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (timing "suspicious" where less than two months after newly hired employee disclosed her pregnancy, defendant issued policy restricting maternity leave to employees who had worked at least one year); *Kalia v. Robert Bosch Corp*., 2008 WL 2858305, at *10 (E.D. Mich. Jul. 22, 2008) (unpublished) (plaintiff showed prima facie link between her pregnancy and discharge where supervisor started keeping written notes of issues with plaintiff the day after disclosure of pregnancy and discharge occurred the following month).

[68] *See EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 948 (10th Cir. 1992) (clear language of PDA requires comparison between pregnant and non-pregnant workers, not between men and women).

[69] 271 F.3d 212, 221 (5th Cir. 2001).

[70] The *Wallace* court nevertheless affirmed judgment as a matter of law for the employer because the plaintiff was unable to rebut the employer's other reason for the discharge, i.e., that she falsified medical records. *Id.* at 221-22; *see also Carreno v. DOJI, Inc.,* 668 F. Supp. 2d 1053, 1062 (M.D. Tenn. 2009) (plaintiff set forth prima facie case of pregnancy discrimination based in part on evidence that she was discharged while similarly situated non-pregnant co-workers were demoted and given opportunities to improve their behavior); *Brockman v. Avaya*, 545 F. Supp. 2d 1248, 1255-56 (M.D. Fla. 2008) (employer's motion for summary judgment denied because plaintiff, who was pregnant when she was discharged, was treated less favorably than non-pregnant female who replaced her).

[71] 140 F. Supp. 2d 1001 (S.D. Iowa 2001).

[72] *Id.* at 1008; *see also Zisumbo v. McLeodUSA Telecomm. Servs., Inc*., 154 Fed. Appx. 715, 724 (10th Cir. 2005) (unpublished) (finding material issue of fact regarding employer's explanation for demoting pregnant worker where explanation it advanced in court was dramatically different than the one it asserted to EEOC);

Kerzer v. Kingly Mfg., 156 F.3d 396, 403-04 (2d Cir. 1998) (evidence of pretext in discriminatory discharge claim under PDA included alleged statement by company president that an employer could easily get away with firing pregnant worker by stating the position was eliminated, president's alleged unfriendliness toward plaintiff following plaintiff's announcement of pregnancy, and plaintiff's discharge shortly before her scheduled return from maternity leave).

[73] 902 F.2d 148, 157-58 (1st Cir. 1990).

[74] *See also DeBoer v. Musashi Auto Parts,* 124 Fed. Appx. 387, 392-93 (6th Cir. 2005) (unpublished) (circumstantial evidence of pregnancy discrimination included employer's alleged failure to follow its disciplinary policy before demoting plaintiff).

[75] --- U.S. ---, 135 S.Ct. 1338 (2015).

[76] *Id.* at 1354-55.

[77] For more detailed guidance on what constitutes unlawful harassment and when employers can be held liable for unlawful harassment, *see* EEOC Enforcement Guidance*: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), *available at* **http://www.eeoc.gov/policy/docs/harassment.html (http://www.eeoc.gov/policy/docs/harassment.html)** (last visited May 5, 2014); *Enforcement Guidance on Harris v. Forklift Sys., Inc.* (Mar, 8, 1994), *available at* **http://www.eeoc.gov/policy/docs/harris.html (http://www.eeoc.gov/policy/docs/harris.html)** (last visited May 5, 2014); EEOC *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19,1990), *available at* **http://www.eeoc.gov/policy/docs/currentissues.html (http://www.eeoc.gov/policy/docs/currentissues.html)** (last visited May 5, 2014); 29 C.F.R. § 1604.11.

[78] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Harassment may also violate Title VII if it results in a tangible employment action. To date, we are aware of no decision in which a court has found that pregnancy based harassment resulted in a tangible employment action.

[79] These facts were drawn from the case of *Iweala v. Operational Technologies Services, Inc.,* 634 F. Supp. 2d 73 (D.D.C. 2009). The court in that case denied the employer's motion for summary judgment on the plaintiff's hostile environment claim. *See also Dantuono v. Davis Vision, Inc*., 2009 WL 5196151, at *9 (E.D.N.Y. Dec. 29, 2009) (unpublished) (finding material issue of fact as to hostile environment

based on pregnancy where plaintiff alleged that manager, after learning of her intention to become pregnant, was "snippy" and "short" with her, "talked down" to her, "scolded" her, "bad mouthed" her to other executives, communicated through email rather than in person, and banished her from the manager's office when the manager was speaking with others); *Zisumbo,* 154 Fed. Appx. at 726-27 (overturning summary judgment for defendant on hostile environment claim where there was evidence that plaintiff's supervisor was increasingly rude and demeaning to her after learning of her pregnancy, frequently referred to her as "prego," told her to quit or "go on disability" if she could not handle the stress of her pregnancy, and demoted her for alleged performance problems despite her positive job evaluations); *Walsh v. National Computer Sys, Inc*., 332 F.3d 1150, 1160 (8th Cir. 2003) (affirming finding that plaintiff was subjected to hostile environment due to her potential to become pregnant where evidence showed supervisor's hostility towards plaintiff immediately following her maternity leave, supervisor made several discriminatory remarks regarding plaintiff's potential future pregnancy, and supervisor set more burdensome requirements for plaintiff as compared to co-workers).

[80] Detailed guidance on this subject is set forth in EEOC's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, *supra,* note 25.

[81] For further discussion of childcare leave issues, *see* Section I C.3., *infra*.

[82] The ADA is violated in these circumstances because the statute prohibits discrimination based on the disability of an individual with whom an employee has a relationship or association, such as the employee's child. For more information, *see* EEOC's *Questions and Answers About the Association Provision of the ADA, available at* **http://www.eeoc.gov/facts/association_ada.html (http://www.eeoc.gov/facts/association_ada.html)** (last visited May 5, 2014).

[83] 42 U.S.C. § 2000e-2(e).

[84] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991).

[85] *Id.* at 201.

[86] *Johnson Controls,* 499 U.S. at 206-07 and 208-211 (no BFOQ based on risk to employee or fetus, nor on fear of tort liability); 29 C.F.R. § 1604.2(a) (1972) (no BFOQ

based on stereotypes or customer preference). One court found that non-pregnancy was a BFOQ for unmarried employees at an organization whose mission included pregnancy prevention. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987). However, the dissent to the order denying rehearing en banc argued that the court should have conducted "a more searching examination of the facts and circumstances . . . ." 840 F.2d at 584-86.

[87] *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Carney v. Martin Luther Home, Inc*., 824 F.2d 643 (8th Cir. 1987).

[88] 42 U.S.C. § 2000e-2(k). *See also* 42 U.S.C. § 2000e-2(a)(2); Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[89] *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) (finding that if all or substantially all pregnant women would be advised by their obstetrician not to lift 150 pounds, then they would certainly be disproportionately affected by this job requirement and statistical evidence would be unnecessary).

[90] *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). By requiring an employer to show that a policy that has a discriminatory effect is job related and consistent with business necessity, Title VII ensures that the policy does not operate as an "artificial, arbitrary, and unnecessary barrier[]" to the employment of pregnant workers. *See Griggs*, 401 U.S. at 431.

[91] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C).

[92] *Garcia*, 97 F.3d at 813.

[93] *Spivey v. Beverly Enters*., 196 F.3d 1309, 1314 (11th Cir. 1999). For a discussion of light duty, see Section I C.1., *infra*.

[94] *Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981). For a discussion of restrictive leave policies, see Section I C.2., *infra*.

[95] The facts in this example were adapted from the case of *Garcia v. Woman's Hospital of Texas*, 97 F.3d 810 (5th Cir. 1996).

[96] 42 U.S.C. § 2000e(k).

[97] 411 U.S. 792, 802 (1973); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-256 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 504-510 (1983); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003).

[98] --- U.S. ---, 135 S.Ct. 1338 (2015).

[99] *Id.* at 1354.

[100] *Id*. (citing *Texas Dep't of Community Affairs v. Burdine*, 430 U.S. 248, 253 (1981)).

[101] *Id*. (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

[102] *Id.*

[103] *Id.* at 1354.

[104] *See id.* at 1354-55.

[105] *Id.* at 1354.

[106] Courts have disagreed as to how disparate impact is established in the context of light duty policies. *Compare Germain*, 2009 WL 1514513, at *4 (to establish a prima facie case of disparate impact, pregnant women must be compared to all others similar in their ability or inability to work, without regard to the cause of the inability to work), *with Woodard v. Rest Haven Christian Servs.*, 2009 WL 703270, at *7 (N.D. Ill. Mar. 16, 2009) (unpublished) (because pregnancy discrimination is sex discrimination, proper comparison would appear to be between the percentage of females who have been disparately affected and the percentage of males, though even if the comparison is between pregnant women and males, plaintiff failed to establish evidence of disparate impact). The EEOC agrees with *Germain's* holding that the appropriate comparison is between pregnant women and all others similar in their ability or inability to work, and disagrees with *Woodard's* holding that all women or all pregnant women should be compared to all men. As the *Germain* court recognized (*Germain*, 2009 WL 1514513, at *4), the Supreme Court has held that, "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated *with respect to their ability to work*." *Int'l Union v. Johnson Controls*, 499 U.S. 187, 204-05 (1991) (emphasis

added). That statutory language applies to disparate impact as well as to disparate treatment claims.

[107] 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See, e.g., Germain*, 2009 WL 1514513, at *4 (denying summary judgment based on genuine issue of material fact as to business necessity).

[108] These facts were adapted from the case of *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996). The court in that case found material issues of fact precluding summary judgment. These facts could also be analyzed as disparate treatment discrimination.

[109] This subsection addresses leave issues that arise under the PDA. For a discussion of the interplay between leave requirements under the PDA and the Family and Medical Leave Act, see Section III A., *infra*.

[110] *See Johnson Controls*, 499 U.S. at 200 ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) ….").

[111] *See* Sharon Terman, *Written Testimony of Sharon Terman*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 9 (citing Stephanie Bornstein, *Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers* (UC Hastings Center for WorkLife Law 2011)).

[112] In the past, airlines justified mandatory maternity leave for flight attendants or mandatory transfer of them to ground positions at a certain stage of pregnancy based on evidence that side effects of pregnancy can impair a flight attendant's ability to perform emergency functions. *See*, *e.g.*, *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (mandatory leave was justified by business necessity as the policy was neither unrelated to airline safety concerns, nor a manifestly unreasonable response to these concerns); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (mandatory leave was justified as a bona fide occupational qualification based on the safety risks posed by pregnancy). These decisions predated, and are inconsistent with, the Supreme Court's decision in *Johnson Controls*, 499 U.S. at 198-205. Moreover, the Commission agrees with the position taken by the Federal Aviation Administration (FAA) that, as long as a flight attendant can perform her duties, no particular stage of pregnancy renders her unfit. *See* Department of Transportation Federal Aviation Administration Memo

(5/5/1980) and confirming e-mail (3/5/2010) (on file with EEOC, Office of Legal Counsel).

[113] 42 U.S.C. § 2000e-2(e)(1). For further discussion of the BFOQ defense, see Section I B.1.c., *supra*.

[114] *See, e.g.*, *Orr v. City of Albuquerque*, 531 F.3d 1210, 1216 (10th Cir. 2008) (reversing summary judgment for defendants where plaintiffs presented evidence that they were required to use sick leave for their maternity leave while others seeking non-pregnancy FMLA leave were routinely allowed to use vacation or compensatory time); *Maddox v. Grandview Care Ctr., Inc*., 780 F.2d 987, 991 (11th Cir. 1986) (affirming finding in favor of plaintiff where employer's policy limited maternity leave to three months while leave of absence for "illness" could be granted for indefinite duration).

[115] *See Byrd v. Lakeshore Hosp*., 30 F.3d 1380, 1383 (11th Cir. 1994) (rejecting employer's argument that plaintiff, who was discharged partly due to her use of accumulated sick leave for pregnancy-related reasons, additionally was required to show that non-pregnant employees with similar records of medical absences were treated more favorably; the court noted that an employer is presumed to customarily follow its own sick leave policy and, if the employer commonly violates the policy, it would have the burden of proving the unusual scenario).

[116] *See Stout v. Baxter Healthcare*, 282 F.3d 856, 859-60 (5th Cir. 2002) (discharge of plaintiff due to pregnancy-related absence did not violate PDA where there was no evidence she would have been treated differently if her absence was unrelated to pregnancy); *Armindo v. Padlocker*, 209 F.3d 1319, 1321 (11th Cir. 2000) (PDA does not require employer to treat pregnant employee who misses work more favorably than non-pregnant employee who misses work due to a different medical condition); *Marshall v. Am. Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998) (upholding summary judgment for employer due to lack of evidence it fired her because of her pregnancy rather than her announced intention to take eight weeks of leave during busiest time of her first year on the job).

Note that although Title VII does not require pregnancy-related leave, the Family and Medical Leave Act does require covered employers to provide such leave under specified circumstances. *See* Section III A., *infra*.

[117] For further information about stereotypes and assumptions regarding pregnancy, *see* Section I A.1.b., *supra*.

[118] These facts were drawn from *EEOC v. Lutheran Family Services in the Carolinas*, 884 F. Supp. 1022 (E.D.N.C. 1994). The court in that case denied the defendant's motion for summary judgment.

[119] If Michelle's pregnancy-related complications are disabilities within the meaning of the ADA, the employer will have to consider whether granting the leave, in spite of its policy, or some other reasonable accommodation is possible without undue hardship. *See* Section II B., *infra*.

[120] See Section III A, *supra* for additional information on the Family and Medical Leave Act.

[121] *See Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (10-day absolute ceiling on sick leave drastically affected female employees of childbearing age, an impact males would not encounter); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (requiring employees to work for a full year before being eligible for sick leave had a disparate impact on pregnant workers and was not justified by business necessity); 29 C.F.R. § 1604.10(c) ("Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."); *cf. Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440, 444 (7th Cir. 1991) (court noted that PDA claimant challenging leave policy on basis of disparate impact might have been able to establish that women disabled by pregnancy accumulated more sick days than men, or than women who have not experienced pregnancy-related disability, but plaintiff never offered such evidence).

The Commission disagrees with *Stout v. Baxter Healthcare*, 282 F.3d 856 (5th Cir. 2002), in which the court refused to find a prima facie case of disparate impact despite the plaintiff's showing that her employer's restrictive leave policy for probationary workers adversely affected all or substantially all pregnant women who gave birth during or near their probationary period, on the ground that "to [allow disparate impact challenges to leave policies] would be to transform the PDA into a guarantee of medical leave for pregnant employees." The Commission believes that the Fifth Circuit erroneously conflated the issue of whether the plaintiff

has made out a prima facie case with the ultimate issue of whether the policy is unlawful. As noted, an employer is not required to eliminate or modify the policy if it is job related and consistent with business necessity and the plaintiff fails to present an equally effective less discriminatory alternative. *See Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) ("[t]he PDA does not mandate preferential treatment for pregnant women"; the plaintiff loses if the employer can justify the policy).

[122] *Warshawsky*, 768 F. Supp. at 655.

[123] *Id.*

[124] *See California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (The state could require employers to provide up to four months of medical leave to pregnant women where "[t]he statute is narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions."); *Johnson v. Univ. of Iowa*, 431 F.3d 325, 328 (8th Cir. 2005) ("If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender.").

[125] *See Johnson*, 431 F.3d at 328 (if leave given to mothers is designed to provide time to care for and bond with newborn, "then there is no legitimate reason for biological fathers to be denied the same benefit"); EEOC Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, supra* note 25. Although Title VII does not require an employer to provide child care leave if it provides no leave for other family obligations, the Family and Medical Leave Act requires covered employers to provide such leave. *See* Section III A., *infra*.

[126] The legislative history of the PDA makes clear that the statute "in no way requires the institution of any new programs where none currently exist." H.R.Rep. No. 95-948, p. 4 (1978), Leg. Hist. 150, U.S. Code Cong. & Admin. News 1978, pp. 4749, 4752. The application of the non-discrimination principle to infertility and contraception is discussed at Section I A.3.c. and I A.3.d., *supra*.

[127] 29 C.F.R. § 1604.10(b) ("Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.").

[128] The Patient Protection and Affordable Care Act (also known as Health Care Reform), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code) contains provisions regarding insurance coverage of pre-existing conditions. Effective January 1, 2014, insurers can no longer exclude coverage for treatments based on such conditions.

[129] For further discussion of discrimination based on use of contraceptives, *see* Section I A.3.d., *supra*; *see also supra* note 39.

[130] *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 36 (1979).

[131] 42 U.S.C. § 2000e(k); *see also Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 37 (1979).

[132] However, prior to the passage of the PDA, it did not violate Title VII for an employer's seniority system to allow women on pregnancy-related medical leave to earn less seniority credit than workers on other forms of short-term medical leave. Because the PDA is not retroactive, an employer is not required to adjust seniority credits for pregnancy-related medical leave that was taken prior to the effective date of the PDA (April 29, 1979), even if pregnancy-related medical leave was treated less favorably than other forms of short-term medical leave. *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009).

[133] The principles set forth in this section also apply to claims arising under Section 501 of the Rehabilitation Act. 29 U.S.C. § 791.

[134] Under the ADA, an "employer" includes a private sector employer, and a state or local government employer, with 15 or more employees. 42 U.S.C. § 12111(5)(A). The term "employer" in this document refers to any entity covered by the ADA including labor organizations and employment agencies.

[135] *See* 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. § 1630.10.

[136] 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.13.

[137] 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.

[138] 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

[139] Pub. L. No. 110-325, §§ 2(b)(5), 4(a), 122 Stat. 3553 (2008); 29 C.F.R. §§ 1630.1(c)(4), 1630.2(j)(1)(vi). Plaintiffs seeking to show that their pregnancy-related impairments are covered disabilities should provide specific evidence of symptoms and impairments and the manner in which they are substantially limiting.

[140] 29 C.F.R. § 1630.2(j)(1)(ix).

[141] *See, e.g., Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002), *aff'd,* 340 F.3d 543 (8th Cir. 2003) (periodic nausea, vomiting, dizziness, severe headaches, and fatigue were not disabilities within the meaning of the ADA because they are "part and parcel of a normal pregnancy"); *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996) (morning sickness, stress, nausea, back pain, swelling, and headaches or physiological changes related to a pregnancy are not impairments unless they exceed normal ranges or are attributable to a disorder); *Tsetseranos v. Tech Prototype, Inc.,* 893 F. Supp. 109, 119 (D.N.H. 1995) ("pregnancy and related medical conditions do not, without unusual circumstances, constitute a 'physical or mental impairment' under the ADA").

[142] 29 C.F.R. pt. 1630 app. § 1630.2(h).

[143] *See, e.g*., *Walker v. Fred Nesbit Distrib. Co*., 331 F. Supp. 2d 780, 790 (S.D. Iowa 2004) (routine pregnancy is not a disability under ADA); *Gover v. Speedway Super America, LLC*, 254 F. Supp. 2d 695, 705 (S.D. Ohio 2002) (same).

[144] The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. 29 C.F.R. pt. 1630 app. §1630.2(j). The ADA includes a functional rather than a medical definition of disability. 136 Cong. Rec. H1920 H1921 (daily ed. May 1, 1990) (Statement of Rep. Bartlett).

[145] *See* 29 C.F.R. § 1630.2(j)(ix) (impairments lasting fewer than six months can be disabilities).

[146] *See Insufficient Cervix,* U.S. NAT'L LIBRARY OF MED., **http://www.nlm.nih.gov/medlineplus/ency/patientinstructions/000595.htm (http://www.nlm.nih.gov/medlineplus/ency/patientinstructions/000595.htm)** (last visited April 30, 2014) (general information about insufficient cervix). Uterine fibroids (non-cancerous tumors that grow in and around the wall of the uterus) may cause severe localized abdominal pain, carry an increased of risk of miscarriage, or

cause preterm or breech birth and may necessitate a cesarean delivery. *See* Hee Joong Lee, MD et al., *Contemporary Management of Fibroids in Pregnancy*, REVIEWS IN OBSTETRICS & GYNECOLOGY (2010), **http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2876319/ (http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2876319/)** (last visited Apr. 30, 2014).

[147] *Price v. UTi, U.S., Inc.*, 2013 WL 798014, at *2 (E.D. Mo. Mar. 5, 2013), *reconsideration denied in Price v. UTi, U.S., Inc.*, 2013 WL 1411547 (E.D. Mo. Apr. 08, 2013) (denying summary judgment to employer who terminated employee three weeks after she gave birth by cesarean section).

[148] Nausea causing severe vomiting resulting in dehydration may be a condition known as hyperemesis gravidarum. Excessive swelling due to fluid retention, edema, may require rest and elevation of legs. Abnormal heart rhythms may require further monitoring. *See Pregnancy*, U.S. DEP'T OF HEALTH & HUMAN SERVS., **http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html (http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html)** (last visited Apr. 30, 2014).

[149] *McKellips v. Franciscan Health Sys.*, 2013 WL 1991103, at *4 (W.D. Wash. May 13, 2013) (plaintiff's allegations that she suffered severe pelvic inflammation and immobilizing pain that necessitated workplace adjustments to reduce walking and early pregnancy-related medical leave were sufficient to allow her to amend her complaint to include an ADA claim).

[150] *Nayak v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (denying defendant's motion to dismiss plaintiff's ADA claim).

[151] *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012) (unpublished) (denying defendant's motion to dismiss where plaintiff claimed impairments related to her pregnancy included premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, and extreme headaches). Several recent district court decisions that have concluded that impairments related to pregnancy are not disabilities have been based either on a lack of any facts describing how the impairment limited major life activities, or on the incorrect application of the more stringent requirements for establishing that an impairment constitutes a disability that existed prior to the effective date of the ADA

Amendments Act (ADAAA). *See Wanamaker v. Westport Board of Education*, 899 F. Supp. 2d 193 (D. Conn. 2012) (plaintiff did not allege facts that would demonstrate that the spinal injury, transverse myelitis, she suffered in childbirth substantially limited a major life activity); *Selkow v. 7-Eleven, Inc*., 2012 WL 2054872 (M.D. Fla. June 7, 2012) (without acknowledging the ADAAA, which applied at the time of plaintiff's termination, the court held that plaintiff presented no evidence to withstand summary judgment on whether her weakened back constituted the type of "severe complication" related to pregnancy required to establish a disability); *Sam-Sekur v. Whitmore Group, LTD*, 2012 WL 2244325 (E.D.N.Y. June 15, 2012) (relying on case law pre-dating the ADAAA, the court held that "temporary impairments, pregnancies, and conditions arising from pregnancy are not typically disabilities," but allowed the *pro se* plaintiff to amend her complaint to allege facts concerning the duration of her chronic cholecystitis, which required removal of her gall bladder, and how the condition was linked to pregnancy).

[152] *Heatherly v. Portillo's Hot Dogs, Inc.,* 2013 WL 3790909, at *6 (N.D. Ill. July 19, 2013).

[153] Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job. After an applicant is given a conditional offer, but before she starts work, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. After employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job related and consistent with business necessity. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.13, 1630.14; EEOC Enforcement Guidance: *Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995), *available at***http://www.eeoc.gov/policy/docs/preemp.html (http://www.eeoc.gov/policy/docs/preemp.html)** (last visited May 5, 2014); *see also EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, at question 1, (July 27, 2000), *available at* **http://www.eeoc.gov/policy/docs/guidance-inquiries.html (http://www.eeoc.gov/policy/docs/guidance-inquiries.html)** (last visited May 5, 2014).

[154] 29 C.F.R. § 1630.2(l)(1).

[155] These facts were drawn from the case of *Spees v. James Marine, Inc.,* 617 F.3d 380, 398 (6th Cir. 2010). The court's decision that the employer regarded the pregnant employee as having a disability because she had complications with previous pregnancies was made under the more stringent "regarded as" standard in place prior to the ADAAA.

[156] *See* Job Accommodation Network, "Accommodation Ideas for Pregnancy," *available at* **https://askjan.org/articles/Getting-Over-the-Bump-Pregnancy-at-Work.cfm (https://askjan.org/articles/Getting-Over-the-Bump-Pregnancy-at-Work.cfm)** (last visited May 5, 2014).

[157] 29 C.F.R. § 1630.2(o); s*ee* EEOC Revised Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), *available at* **http://www.eeoc.gov/policy/docs/accommodation.html (http://www.eeoc.gov/policy/docs/accommodation.html)** (last visited May 5, 2014).

[158] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9.

[159] *See* 29 C.F.R. § 1630.2(p). Factors that may be considered in determining whether an accommodation would impose an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility or entity, and the type of operation of the entity.

[160] *See supra* note 157.

[161] *See EEOC Enforcement Guidance: Workers' Compensation and the ADA*, at Q&A 28, (Sept.10, 1996), available at **http://www.eeoc.gov/policy/docs/workcomp.html (http://www.eeoc.gov/policy/docs/workcomp.html)** (last visited May 5, 2014). For further discussion of light duty issues, see Section I C.1., *supra*.

[162] The Department of Labor (DOL) enforces the FMLA. Recently revised DOL regulations under the FMLA can be found at 29 C.F.R. Part 825. Additional information about the interaction between the FMLA and the laws enforced by the EEOC can be found in the EEOC's *Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, available at*

http://www.eeoc.gov/policy/docs/fmlaada.html (http://www.eeoc.gov/policy/docs/fmlaada.html) (last visited May 5, 2014).

[163] In comparison, Title VII covers employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred. Title VII also covers governmental entities.

[164] Employees are "eligible" for FMLA leave if they: (1) have worked for a covered employer for at least 12 months; (2) had at least 1,250 hours of service during the 12 months immediately preceding the start of leave; and (3) work at a location where the employer employs 50 or more employees within 75 miles. 29 C.F.R. § 825.110. Special hours of service requirements apply to flight crew members. Airline Flight Crew Technical Corrections Act, Pub. L. No. 111-119, 123 Stat. 3476 (codified as amended at 29 U.S.C. § 2611(2)(D)).

[165] The FMLA also provides military family leave entitlements to employees with family members in the armed forces in circumstances not likely to be relevant to pregnancy-related leave, or leave to care for a newborn child, a newly adopted child, or a child newly placed in foster care.

[166] 65 Fed. Reg. 26115 (May 4, 2000). The Office of Personnel Management is charged with issuing guidance pursuant to this order.

[167] For a discussion of discrimination based on lactation and breastfeeding, *see* Section I A.4.b., *supra*.

[168] Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207. Because the Affordable Care Act provides no specific effective date, the new break time law for nursing mothers was effective on the date of enactment - March 23, 2010.

[169] DOL has published a Fact Sheet providing general information on the break time requirement for nursing mothers. The Fact Sheet can be found at **http://www.dol.gov/whd/regs/compliance/whdfs73.htm (http://www.dol.gov/whd/regs/compliance/whdfs73.htm)** (last visited May 5, 2014).

[170] The DOL Fact Sheet explains that, where employers already provide compensated breaks, an employee who uses that break time to express milk must

be compensated in the same way other employees are compensated for break time.

[171] Currently, 24 states, Puerto Rico, and the District of Columbia have legislation setting workplace requirements related to breastfeeding.

[172] Section 708 of Title VII provides: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7.

Section 1104 of Title XI, applicable to all titles of the Civil Rights Act, provides: "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of the Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

[173] Some states, including Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, New Jersey, Texas, Minnesota, and West Virginia, have passed laws requiring that employers provide some reasonable accommodation for a pregnant worker. For instance, in the state of Maryland an employee with a disability contributed to or caused by pregnancy may request reasonable accommodation and the employer must explore "all possible means of providing the reasonable accommodation." The law lists various options to consider such as changing job duties, changing work hours, providing mechanical or electrical aids, transferring employees to less strenuous or less hazardous positions, and providing leave. Md. Code Ann., State Gov't Article, §20-609.

[174] 479 U.S. 272 (1987).

[175] *Id.* at 280 (citation omitted).

[176] *Id.* at 287.

[177] *Id.* at 291.

[178] *See* Section I A.3.a., *supra*.

[179] Employers should consider, however, how the pay provisions of the Fair Labor Standards Act could be implicated by an employee's involvement in training while on leave. Under U.S. Department of Labor regulations, certain training activities outside of working hours need not be treated as compensable time. *See* 29 C.F.R. §§ 785.11-785.32.

[180] *Id.*

EXHIBIT 7

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office for Civil Rights
Headquarters ● Humphrey Building
200 Independence Ave, S.W.
Washington, DC 20201
(800) 368-1019 ● TDD (800) 537-7697
Fax (202) 619-3818 ● www.hhs.gov/ocr

Hospital Attorney
Hospital

Via Email

RE: OCR Transaction Numbers # and #

, 2023

Dear Hospital Attorney :

I write in relation to the complaint Complainant filed with the U.S. Department of Health and Human Services' Office for Civil Rights (OCR) on 2021. The complaint alleged that Hospital , discriminated against Complainant on the basis of sex. Specifically, the complaint alleged that Hospital denied Complainant 's request for PII , pursuant to its policy as a Catholic organization that does not PII PII

OCR enforces federal civil rights laws that prohibit discrimination in the delivery of health and human services based on certain prohibited bases of discrimination and the exercise of conscience, and also enforces the Health Insurance Portability and Accountability Act (HIPAA) Privacy, Security and Breach Notification Rules. The laws that OCR enforces include Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116 (Section 1557), which prohibits discrimination on the basis of race, color, national origin, sex, disability, or age in certain health programs and activities.

OCR conducts a thorough and detailed review of all complaints, data requests, responses to the requests, and seeks and obtains additional relevant documentation as necessary. For this reason, OCR set out to determine all relevant information related to your underlying complaint through our normal investigatory process. During this investigation, OCR exchanged several correspondences with the Complainant as well as with Hospital , including by providing: initial notice of the complaint on , 2021; data and information requests in

U.S Department of Health and Human Services
Office for Civil Rights
Headquarters ● Humphrey Building
200 Independence Ave S.W. ● Washington, DC 20201

connection to the allegations in the complaint; questions involving potential involvement in certain ongoing lawsuits on Section 1557 and PII; and follow-up requests for additional information.

During this process, Hospital's [redacted] 2022, and [redacted] 2022, responses to OCR made clear its status as a Catholic health care institution. Specifically, Hospital confirmed that it is a 501(c)(3) non-profit Catholic health care corporation that adheres to the Ethical and Religious Directives for Catholic Health Care Services (ERDs). Pursuant to the ERDs, the hospital attested that it "does not provide PII to anyone, male or female" because PII is not permitted in a Catholic health care institution." Hospital further informed OCR that, regardless of the sex of the patient, it only PII "when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." Hospital PII [redacted]

Given Hospital's responses, OCR evaluated the complaint in light of its responsibilities under the Religious Freedom Restoration Act (RFRA).[1] Based on our review of the factual record, OCR determined that Hospital has adequately asserted its sincerely held religious beliefs to establish a substantial burden under RFRA as a matter of federal law. RFRA then requires the Department to determine whether applying Section 1557's prohibition on sex discrimination is the least restrictive way of achieving a compelling governmental interest.

Congress charged the Department with ensuring that health programs and activities that receive Federal financial assistance do not discriminate on the basis of sex. Discrimination presents a serious barrier to some patients' ability to access health care. And the Department has a compelling interest in protecting the right of PII patients to access crucial health care, including PII PII. With these allegations, however, the Department was unable to conclude that Section 1557's prohibition on sex discrimination as applied to the facts of this complaint was the least restrictive means of achieving the government's compelling interest.

OCR will therefore close this matter. This determination is based on the specific factual record in this case relative to this complaint and Hospital's responses; it does not impact future complaints OCR may receive involving the same or similar PII policies applied differently to individuals on the basis of any protected category under Section 1557.[2]

[1] *See* Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb *et seq*.
[2] On November 11, 2022, following OCR's communications with the hospital in this matter, the United States District Court for the District of Northern Texas set aside HHS's Notification and Interpretation of Enforcement of May 10, 2021, and issued a declaratory judgment stating that Section 1557 does not prohibit discrimination on the basis of sexual orientation and gender identity, as applied to "all health-care providers subject to Section 1557 of the Affordable Care Act." *Neese v. Becerra, et al.*, No. 2:21-cv-00163-Z, 2022 WL 16902425 (N.D. Tex. Nov. 11, 2022). HHS is currently appealing the district court's decision to the United States Court of Appeals for the Fifth Circuit. *See Neese v. Becerra, et al.*, No. 23-10078 (5th Cir.). In any event, neither Section 1557 nor RFRA are

U.S Department of Health and Human Services
Office for Civil Rights
Headquarters ● Humphrey Building
200 Independence Ave S.W. ● Washington, DC 20201

If you have any questions about this letter, please call or email [redacted] at [redacted]. Thank you for contacting OCR.

Sincerely,

/s/ [redacted]

[redacted]
Office for Civil Rights
U.S. Department of Health and Human Services

jurisdictional; and we have concluded that resolution of this complaint is most appropriate based on the specific facts here and the hospital's RFRA assertion.

EXHIBIT 8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. JAMES DOBSON FAMILY INSTITUTE and USATRANSFORM d/b/a UNITED IN PURPOSE, *Plaintiffs*, v. XAVIER BECERRA, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLOTTE BURROWS, Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *Defendants.*	)	No. 4:24-cv-00986-O

DECLARATION OF TRACY HUDSON[1]

Pursuant to 28 U.S.C. § 1746, I, Tracy Hudson, declare the following to be a true and correct statement of facts:

1. I have been an employee of the U.S. Equal Employment Opportunity Commission (EEOC) continuously since September 1990. In July 2023, I was selected to serve as Acting Field Management Programs Program Analysis Officer in the EEOC's Office of Field Programs. Prior to July 2023, I

[1] Section 709(e) of Title VII, 42 U.S.C. § 2000e-8(e), prohibits any employee of the Commission from making public any information obtained by the Commission pursuant to its statutory investigative authority prior to the institution of a lawsuit involving that information. The PWFA incorporates Section 709. See 42 U.S.C. § 2000gg-2(a)(1). To comply with these requirements, the EEOC's practice is to neither confirm nor deny the existence of any charges subject to Section 709(e). The EEOC thus provides this declaration only to counsel for the Dr. James Dobson Family Institute and USATransform d/b/a/ United in Purpose (and to this Court) to ensure each Plaintiff is provided only the information pertaining to charges to which they are the subject, and charge information is not otherwise made public.

served in a number of positions, including Senior Attorney Advisor, Program Analyst/Attorney Advisor, Acting Washington Field Office Deputy Director, and Supervisory Trial Attorney.

2. Among other responsibilities, the Office of Field Programs, and specifically the Field Management Programs Division of the Office of Field Programs, oversees the EEOC's intake and processing by staff in the agency's 53 field offices of charges of discrimination under laws enforced by the EEOC, including the Pregnant Workers Fairness Act (PWFA) and Title VII of the Civil Rights Act of 1964 (Title VII).

3. The EEOC's administrative process begins when an individual (charging party) files a charge of employment discrimination with the EEOC.[2] Within 10 days of a charge being filed, the EEOC informs the employer (respondent) that a charge has been filed[3] and, if appropriate, requests a position statement from the employer. The EEOC has a robust voluntary mediation program that parties may be invited to participate in. If the parties decline to mediate or if the mediation is unsuccessful, depending upon the information in the charge and the position statement, the EEOC may conduct a further investigation.

4. As part of its evaluation of the charge, the EEOC encourages respondent-employers to raise any factual or legal defenses that they believe are relevant, including religious defenses. The EEOC takes religious defenses seriously and carefully evaluates such defenses whenever they are raised. If the Respondent is a religious organization or otherwise claims that it had a right under the U.S. Constitution or other federal laws to take the employment action the Charging Party is challenging, the EEOC encourages the Respondent to provide such information at the earliest possible time.

[2] *See* 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 2000gg-2(a)(1).
[3] *See id.*

Additionally, the Respondent may request that the EEOC prioritize consideration of the religious defense before investigating the merits of the charge.[4]

5. At any point during the charge process, the parties may settle the charge, or the charging party may ask for the charge to be withdrawn.

6. If the charge is not closed for one of the reasons in ¶ 5, based on the information received during its investigation, the EEOC determines whether there is reasonable cause to believe discrimination occurred or that no further investigation is warranted. If the EEOC determines it has "reasonable cause" to believe discrimination occurred, it endeavors to resolve the charge through conciliation, which is an informal process through which the EEOC works with the parties in an attempt to facilitate a resolution.[5] Participation in conciliation is voluntary.

7. If the EEOC determines that further investigation is not warranted—for example, if EEOC determines the charge was filed outside the statute of limitations, 42 U.S.C. § 2000e-5(e)(1) (providing the time period for filing a charge); 29 C.F.R. § 1601.18(a)—the agency will dismiss the charge and notify the charging party and the respondent. *See* 42 U.S.C. § 2000e-5(b) ("If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action."); *id.* § 2000e-5(f)(1) ("If a charge filed with the Commission…is dismissed by the Commission…the Commission…shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge by the person claiming to be aggrieved"); 29 C.F.R § 1601.18(a) ("Where a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses, or where after investigation the

[4] EEOC, Questions and Answers for Respondents on EEOC's Position Statement Procedures 2, https://perma.cc/ED59-SNKR (explaining respondents may "request that the EEOC prioritize consideration of the religious defense before investigating the merits of the charge").
[5] *See* 42 U.S.C. § 2000e-5(b).

Commission determines, that the charge and every portion thereof is not timely filed, or otherwise fails to state a claim under title VII, the ADA, GINA, or the PWFA, the Commission shall dismiss the charge."). In part, this includes the issuance of a Determination and Notice of Rights ("NRTS") to the charging party, notifying them of their statutory right to choose to file suit in federal court. 29 C.F.R. § 1601.28(b)(3), (e). If the EEOC determines that further investigation is not warranted, the NRTS shall include EEOC's "decision, determination, or dismissal, as appropriate," *id.* § 1601.28(e)(4), but it does not address the substance of the charging party's claims or the respondent's defenses.

8. For example, if the EEOC determines that a defense to the employment practice challenged in a charge, including a religious defense, has been established, the agency dismisses the charge and issues a Determination and Notice of Rights to the charging party. This is true when any employer's defense has been established, whether the defense is religious, jurisdictional, or based on a non-discriminatory reason. *See supra* ¶ 7. Notably, EEOC's determination regarding the claims or defenses raised in a charge are not considered by the court if the charging party or the EEOC files a lawsuit because the court conducts a *de novo* review.

9. On October 17, 2024, EEOC personnel conducted a search for any charges received from October 1, 2017 through September 30, 2024 (FY 2018 through FY 2023)[6] against the following respondents: Dr. James Dobson Family Institute and USATransform d/b/a/ United in Purpose. On December 4, 2024, EEOC personnel conducted a search for any charges received from October 1, 2017 through September 30, 2024 (FY 2018 through FY 2023) against PSQ Holdings, Inc., d/b/a

[6] The search was limited to FY 2018-FY2024 because the EEOC does not have the ability to search charges filed prior to FY 2018 in a similar manner. The search was conducted on verified data for FY 2018-FY 2023 (October 1, 2017 – September 30, 2023) and unverified data (data that EEOC employees may change or update) for FY 2024 (October 1, 2023 – September 30, 2024).

PublicSquare. Search results indicated [redacted]

[redacted].

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 4th day of December, 2024.

TRACY HUDSON

Tracy Hudson

Acting Field Management Programs
Program Analysis Officer
Office of Field Programs
U.S. Equal Employment Opportunity Commission