INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session I: Personnel Law for the Public Employer

Title: Same Sex Sexual Harassment, When and to Whom Liability Attaches

by

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Assistance in compiling this paper was received from Adrian Spears.

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NOTE: **This version of the paper is written with emphasis on Fifth Circuit considerations. Supplemental information is available from IMLA.**

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SAME SEX SEXUAL HARASSMENT, WHEN AND TO WHOM LIABILITY ATTACHES

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I. The Development of Same-Sex Sexual Harassment as a Cause of Action Under Title VII: *Meritor Savings Bank*

42 U.S.C. § 2000e-2. Unlawful employment practices reads in pertinent part:

> (a) Employer practices. It shall be an unlawful employment practice for an employer:
>
> (1) 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 race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In 1983, the United States Supreme Court held Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 77 L. Ed. 2d 89, 103 S. Ct. 2622 (1983). In 1986, the Court found that where sexual harassment is "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment," a claim exists for hostile environment sexual harassment under Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). However, various courts had different interpretations as to whether this statute applied to allow same-sex sexual harassment claims under Title VII. See, e.g., *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-452 (CA5 1994) (same-sex not actionable), *Goluszek v. H. P. Smith*, 697 F. Supp. 1452 (ND Ill. 1988) (same-sex not actionable); *McWilliams v.Fairfax County*

Board of Supervisors, 72 F.3d 1191 (CA4 1996) (whether actionable only if the plaintiff can prove that the harasser is homosexual); *Doe v. Belleville*, 119 F.3d 563 (CA7 1997) (actionable).

In 1998, the Supreme Court determined coverage under Title VII of the Civil Rights Act of 1964 extends to same-sex sexual harassment in cases where a plaintiff can show the conduct occurred because of their sex. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80-82 (1998). In *Oncale*, a roustabout on an oil platform crew quit his job when his supervisors failed to take action after he was subjected to humiliating sex-related actions in the presence of others, assaultive sex-related conduct with a bar of soap, and threatened rape by two of his male co-workers. *Id*. at 77. The Court related its decision to its previous findings in the case of racial discrimination in the workplace which rejected any conclusive presumption that an employer would not discriminate against members of his own race. *Id.* (citing *Castaneda v. Partida*, 430 U.S. 482, 499, 51 L. Ed. 2d 498, 97 S. Ct. 1272 (1977); 430 U.S. 482, 51 L. Ed. 2d 498 at 515-516 n. 6, 97 S. Ct. 1272 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., dissenting)).

II. **Determination of Whether Same-Sex Conduct Occurs "Because of Sex": *Oncale***

In a case of alleged same-sex harassment, the circuit courts are split as to whether or not a court must determine whether the harasser's conduct constitutes sex discrimination prior to moving on to determine whether the harasser's conduct was serious enough to constitute either *quid pro quo* or "hostile environment" harassment. See, e.g., *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir., 2002) (analysis of whether conduct is sex discrimination must occur first in case of reactor technician subjected to sexual remarks and touching); see also, *Trahan v. Rally's Hamburgers*, 696 So.2d 637, 641 (La. App. 1st Cir. 1997); see generally, Thomas I. Queen Jr., Note, Holding the Same-Sex Sexual Harassment Claim at Arm's Length: The Supreme Court's Strict and Correct] Interpretaion of Title VII in *Oncale v. Sundowner Offshore Services, Inc.*, 33 U. Rich. L. Rev. 257, 258-259 (1999); and Thomas A. Strachan, Casenote: Same-Sex Sexual Harassment and Title VII: Innocent Horseplay or Actionable Hostility in the Workplace? A Search for the Truth: *Pfullman v. Texas Department of Transportation*, 42 S. Tex. L. Rev. 207. Even within each circuit, some courts have applied the standards differently. See, e.g., *Pfullman v. Tex. Dep't of Transp*., 24 F. Supp. 2d 707, 711 (W.D. Tex. 1998) (Court did not go through the initial analysis of whether or not discrimination because of sex had occurred).

The Court in *Oncale* stated a plaintiff could show that an incident of same-sex harassment constitutes sex discrimination by offering one of the following:

> (1) evidence the alleged harasser made "explicit or implicit proposals of sexual activity" and was homosexual;
> (2) credible evidence the harasser was "motivated by general hostility to the presence of [members of the same sex] in the workplace"; or
> (3) direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."

Oncale, 523 U.S. at 80; *La Day*, 302 F.3d at 478.

The question of what constitutes proof of homosexuality and whether this question is even relevant has been addressed differently in different circuits. For instance, the Seventh Circuit has held that there was evidence of homosexuality where the harasser remarked a number of times that the victim was a "handsome young man"; "rubbed himself into an erection" and urged him to turn over, lest he "crawl up on top of [him] and f_ _ _ [him] in the a_ _"; stated another time that "[a] man can come if he's f___'d in the a_ _"; and offered to make him feel better by giving him "a nice hot shower." *Shepherd v. Slater Steels Corp*., 168 F.3d 998, 1009-10 (7th Cir. 1999)(citations omitted). Only the sexual orientation of the harasser, not the victim is relevant in cases of same-sex harassment. *La Day*, 302 F.3d at 480; *Rene v. MGM Grand Hotel, Inc*, 305 F.3d 1061 (9th Cir., 2002) (victim was homosexual, and the sexual orientation of the harassers was not disclosed). In finding evidence of homosexual advances where a supervisor expressed jealousy over a girlfriend of an employee and rubbed the employee's anus, the Fifth Circuit stated evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff rather than merely to humiliate him for reasons unrelated to sexual interest and that he made same-sex sexual advances to others are especially convincing types of evidence of homosexuality. *La Day*, 302 F.3d at 480. The Court noted this does not address the difficult case of a bisexual harasser. *Id.* at n.6 (citing *Lack v. Wal-Mart Stores, Inc*., 240 F.3d 255, 261 (4th Cir. 2001) (upholding summary judgment where harasser made vulgar sexual re marks and gestures to male and female employees on an equal basis)).

In *Oncale*, the Court stated harassing conduct need not be motivated by sexual desire to support an inference of discrimination; an inference could be made "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Oncale*, 523 U.S. at 80. The Court determined comparative evidence of treatment of members of both sexes could be used to show the harassment occurred because of the victim's sex. *Id*. at 80-81. The Court further noted, Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discrimination . . . because of . . . sex;" workplace harassment, even harassment between men and women, is not automatically discrimination because of sex merely because the words used have sexual content or connotations. *Id*. The Court found, "(t)he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80; *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 25 (1993).

III. Quid Pro Quo or Hostile Environment Sexual Harassment: *Ellerth/Faragher*

In 1998, the Supreme Court held that an employer may be held liable for a hostile work environment created by a supervisor's sexual harassment if harassment constituting sex based discrimination has occurred. *Burlington Industries, Inc. v. Ellerth*, 534 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (female lifeguards subjected to conduct demeaning to women). The first step in the *Ellerth/Faragher* analysis is to determine whether the complaining employee has suffered a "tangible employment action," which would present a case of *quid pro quo* sexual harassment, or has not, which would be a "hostile environment" case. *Casiano v. AT&T Corp*., 213 F.3d 278, 283-284 (5th Cir., 2000).

A. Quid Pro Quo

For traditional quid pro quo sexual harassment, the prima facie elements of proof include:

(1) the employee belongs to a protected group;
(2) the employee was subject to unwelcome sexual harassment;
(3) the harassment complained of was based on sex; and
(4) the employee's reaction to the unwelcome behavior affected tangible aspects of the employee's compensation, or terms, conditions or privileges of employment.

Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1557 (11th Cir.1987); *Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350, 1361 (11th Cir., 1994).

Tangible employment actions "require an official act of the enterprise, a company act," such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits". See, *Ellerth*, 524 U.S. at 761-62; *Casiano*, 213 F.3d at 284. The tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. *Faragher*, 524 U.S. at 804-05; *Casiano*, 213 F.3d at 284. In a "*quid pro quo*" case, in order for an employer to be held vicariously liable per se for a supervisor's actions, the plaintiff must show a nexus that the tangible employment action suffered by the employee resulted from his acceptance or rejection of his supervisor's alleged sexual harassment. *Casiano*, 213 F.3d at 284.

A municipality should not be held vicariously liable for the conduct of a non-supervisor under a quid pro quo claim. See, *Rosales v. City of San Antonio*, 2001 U.S. Dist. LEXIS 10282; 143 Lab. Cas. (CCH) P34,310. The Rosales case involved allegations by two crew workers that they were groped and fondled by a crew leader who they alleged was their supervisor. *Id*. We argued the conduct was merely horseplay and the crew leader position was not supervisory because it was given to other crew members as well and did not involve actual authority for tasks such as hiring and firing. *Id*. We were able to obtain dismissal of various claims, including the quid pro quo claim prior to trial. *Id.* Plaintiffs survived summary judgment on the hostile environment claim because of concerns regarding the effectiveness of the sexual harassment policy in place. *Id.*

B. Hostile Environment

If no tangible employment action has occurred, the case is one for "hostile environment" sexual harassment. *Casiano*, 213 F.3d at 283-284. In Title VII, the prohibition against employment discrimination runs against "an employer," which is defined to include an individual or firm that is "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and "any agent." 42 U.S.C. §2000e-2(a) and § 2000e(b); see *Meritor*, 477 U.S. at 72. Agency principles apply where courts must determine the extent of a corporation's Title VII liability. *Id.* The employer will be vicariously liable for hostile

environment sexual harassment if the actions complained of are shown to constitute severe or pervasive sexual harassment, unless the employer can prove both prongs of the *Ellerth/Faragher* affirmative defense. *Casiano*, 213 F.3d at 284.

In determining whether conduct rises to the level of same-sex sexual harassment, the Court in *Oncale* emphasized the importance of distinguishing "ordinary socializing in the workplace -- such as simple teasing, roughhousing, male-on-male horseplay or intersexual flirtation from severely hostile or abusive conduct or discriminatory "conditions of employment." *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75, 81-82 (U.S., 1998).

In order to establish a hostile working environment claim, a plaintiff must prove five elements:

(1) the employee belonged to a protected class;
(2) the employee was subject to unwelcome sexual harassment;
(3) the harassment was based on sex;
(4) the harassment affected a "term, condition, or privilege" of employment; and
(5) the employer knew or should have known of the harassment and failed to take prompt remedial action.

Shepherd v. Comptroller of Public Accounts of the State of Texas, 168 F.3d 871, 873 (5th Cir. 1999); *Woods v. Delta Bev. Group, Inc*., 274 F.3d 295, 298-299 (5th Cir., 2001). In *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999), the Court distinguised cases in which an employee asserts a Title VII sexual harassment claim alleging that a supervisor with immediate (or successively higher) authority is the harasser and cases in which the harasser is a co-worker. In the former situation, the employee need only satisfy the first four elements of the aforementioned test. *Id.* In the latter situation, the employee must satisfy all five elements. *Id*. at 509, n.3; *Woods v. Delta Bev. Group, Inc*., 274 F.3d 295, 299 (5th Cir., 2001). The co-worker's "harassment must have created an environment that a reasonable person would find hostile or abusive." *Id*. at 299. See discussion under "Related Claims" below. The employer's only affirmative defense in a supervisor sexual harassment case post *Ellerth/Faragher*, is available only in a hostile environment (no tangible employment action) situation; never in a *quid pro quo* (tangible employment action) case. *Casiano*, 213 F.3d at 284 (involving female supervisor requiring male to perform humiliating duties).

The Supreme Court has stated to be actionable, the hostile environment must be both objectively hostile from the perspective of a reasonable person in the plaintiff's position, and subjectively hostile, but need not cause psychological injury. *Id.; Harris* 510 U.S. at 21-22. The plaintiff in the *Harris* case, a manager for an equipment rental company suffered unwanted sexual innuendoes in front of others, such as a suggestion they go to a Holiday Inn to negotiate a raise, and insults such as: "You're a woman, what do you know;" "We need a man as the rental manager;" and "[you're] a dumb ass woman." *Harris,* 510 U.S. at 19. The Court found whether or not a hostile or abusive environment exists should be determined considering "all the circumstances," by such factors as: (i) the frequency of the conduct; (ii) the severity of the discriminatory conduct; (iii) whether the conduct threatens the employee physically or

humiliates the employee or is a mere "offensive utterance;" (iv) whether the conduct "unreasonably interferes with the employee's work performance; and (v) whether the victim "actually found the environment hostile" or abusive. *Id.* at 23.

In a hostile environment case, for the harassment to be actionable, it must be severe or pervasive; simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Faragher*, 524 U.S. at 788; *Clark County School District v. Breeden*, 532 U.S. 268; 121 S. Ct. 1508; 149 L. Ed. 2d 509 (2001) (one incident of men chuckling over a statement in a job application being reviewed with them by a female involving sexual innuendo not sufficient). *Harris*, 510 U.S. at 23. Further, the Court noted, "(i)n same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81-82. The Court stated that for a professional football player's coach to smack him on the buttocks as he heads onto the field would not be objectively abusive, but the same behavior would reasonably be considered abusive by the coach's secretary. *Id.*

In a same-sex sexual harassment case, the issue of whether the conduct is because of sex is sometimes blurred by the question of whether the conduct was due to sexual preference or actual gender. In a Ninth Circuit case, a gay butler's same-sex supervisor and co-workers were constantly whistling and blowing kisses, calling him "sweetheart" and "muneca" (Spanish for "doll"), telling crude jokes and giving sexually oriented "joke" gifts, showing pictures of naked men having sex, caressing and hugging the victim's "body like they would to a woman," grabbing him in the crotch and poking their fingers in his anus through his clothing. *Rene*, 305 F.3d at 1064. In finding sufficient allegations of sexual harassment to survive summary judgment the Court explained "a hostile environment exists when an employee can show:

> (1) that he or she was subjected to ... physical conduct of a sexual nature,
> (2) that this conduct was unwelcome, and
> (3) that the conduct was sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment."

Rene, 305 F.3d 1061, 1065 (9th Cir., 2002); *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991). The court found the sexual orientation of the victim was irrelevant, noting if status as a lesbian is irrelevant for a female victim of male on female harassment, sexual orientation should be irrelevant for a male victim. *Id.* at 1066.

In the *Pfullman* case involving a second-level supervisor at the Texas Department of Transportation who sat on an employee's lap and "rocked around," while stating, "that sure feels good right here," and another supervisor who made fellatio insinuations along with other conduct, the employee was required by company procedures to report harassment to those supervisors. *Pfullman v. Tex. Dep't of Transp.*, 24 F. Supp. 2d at 711. The employee eventually spoke to a third level supervisor who spoke to the other two supervisors and set up a meeting with the involved parties and the Equal Employment Opportunity Commission ("EEOC") Officer. *Id.* The offenders were verbally warned not to repeat their actions, but TXDOT failed

to conduct any formal investigation into the charges of harassment. *Id.* The Court held the incidents were crude, but did not create a hostile work environment. *Id.* at 713.

The affirmative defense to vicarious liability for a supervisor's sexual harassment, which is only available in a hostile environment sexual harassment case, involves proof that:

> (i) the employer used reasonable care in preventing and promptly correcting any sexually harassing behavior; and
>
> (ii) the plaintiff unreasonably failed to utilize any preventive or corrective opportunities made available by the employer or to otherwise avoid harm.

Ellerth, 534 U.S. at 765; *Faragher*, 524 U.S. at 807 (1998). In the Fifth Circuit, an employer is not entitled to summary judgment on a *Faragher/Ellerth* affirmative defense if the complainant can show that she complied with the employer's own policy on reporting workplace harassment. See *Wyatt v. Hunt Plywood Co., Inc*., 297 F.3d 405, 414 (5th Cir. 2002) (holding that employee's action in reporting alleged harassment to a higher-up was reasonable because "nothing in [the employer's] harassment policy and procedures required [the employee] to take additional steps"); *Williamson v. City of Houston*, 148 F.3d 462, 466-67 (5th Cir. 1998).

Under *Faragher* and *Ellerth*, procedures promulgated for employees to raise sexual harassment complaints which require strict time limitations for reporting and require reports to be made to the immediate supervisor (even when they are the harasser) may not be sufficient to support an affirmative defense. See, *Pfullman*, 24 F. Supp. 2d at 711, note 1.

IV. **Related Claims**

In order to prevail on a claim of retaliation, a plaintiff must establish: "(1) that she engaged in activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that a causal link existed between the protected activity and the adverse employment action." *Zaffuto v. City of Hammond*, 308 F.3d 485, 492 (5th Cir. 2002). In the Fifth Circuit an "adverse employment action" be an "ultimate employment decision[]... such as hiring, granting leave, discharging, promoting, [or] compensating." See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (quoting *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995)) (alteration added). In *Mattern*, the Court held that "hostility from fellow employees, having tools stolen and resulting anxiety, without more, do not constitute ultimate employment decisions." *Id*. The Court noted that it would be "unwarranted" to expand Title VII's retaliation prohibition to "events such as disciplinary filings, supervisor's reprimands and even poor performance by the employee -- anything which might jeopardize employment in the future." 104 F.3d at 708. In the Courts of Appeals, the Fifth Circuit and the Eighth Circuit have adopted the "ultimate employment decision" standard. See *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). Other circuits have held that employment decisions falling short of ultimate employment decisions may suffice. See *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (collecting cases); *Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998) (same). A Fourth Circuit panel noted "that while the Eight Circuit has ostensibly adopted the 'ultimate employment

decision' standard, it has consistently applied a broader standard." *Von Gunten v. Maryland*, 243 F.3d 858, 864 (4th Cir. 2001) (citing *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) and *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997)); *Zaffuto*, 308 F.3d at 492.

Other claims such as state law harassment claims other general civil rights claims under §1983 may be filed as well. A claim for constructive discharge may be successful if the employee demonstrates that the work environment and conditions of employment were so unbearable that a reasonable person in that person's position would be compelled to resign. *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir.1986); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir.1975); *Virgo*, 30 F.3d at 1363. Claims such as negligent hiring, supervision, and retention, as well as for intentional infliction of emotional distress will be barred by sovereign immunity in most cases. See, e.g. Texas Tort Claims Act. In order to state a §1983 claim against a municipality based on the existence of an official policy or custom, a plaintiff must plead facts that: "(1) a policy or custom existed; (2) the governmental policy makers actually or constructively knew of its existence; (3) a constitutional violation occurred; and (4) the [policy or custom] served as the moving force behind the violation." *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532-33 (5th Cir. 1996).

Claims in which the plaintiffs' only grounds for suit rely on the municipalities' hiring or employment of the harasser may be subject to dismissal because they attempt to hold the city liable on a theory of respondeat superior. As stated in *Pembaur v. Cincinnati*, 475 U.S. 469, 479, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986), "while Congress never questioned its power to impose civil liability on municipalities for their own illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of others" (citing *Monell*, 436 U.S. at 665-683). The Supreme Court has a history of refusing to hold municipalities liable under a theory of respondeat superior. *Bd. of the County Comm'Rs v. Brown*, 520 U.S. 397, 404 (U.S., 1997); see *Oklahoma City v. Tuttle*, 471 U.S. 808, 818, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985) (plurality opinion); *Id*., at 828 (opinion of Brennan, J.); Pembaur, 475 U.S. at 478-479; *St. Louis v. Praprotnik*, 485 U.S. 112, 122, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (plurality opinion); id., at 137 (opinion of Brennan, J.); *Canton v. Harris*, 489 U.S. 378, 392, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989). In a § 1983 lawsuit, the Plaintiff will be required to identify a municipal "policy" or "custom" that caused the plaintiff's injury. See *Monell*, 436 U.S. at 694; *Pembaur*, 475 U.S. at 480-481; *Canton*, 489 U.S. at 389. Liability only attaches for decisions made by a city's duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality or for the city's customs which are practiced so widely as to have the force of law. *Bd. of the County Comm'Rs*, 520 U.S. at 404; *Monell*, 436 U.S. at 690-694 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-168, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)).

V. Additional Defenses to Liability and Issues

In accordance with 42 U.S.C. § 2000e-5(e)(1) a plaintiff must file a charge within the statutory time period and serve notice upon the person against whom the charge is made before filing suit. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 39 L. Ed. 2d 147, 94 S. Ct. 1011

(1974). In a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, as in Texas, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days, or the claim is barred. *AMTRAK v. Morgan*, 536 U.S. 101, 109 (U.S., 2002) (claim of racially hostile environment). A charge alleging a hostile work environment claim will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. *Id*. at 122.

Equitable doctrines may toll or limit the time period. *Id.* An employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant. This defense "'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Kansas v. Colorado*, 514 U.S. 673, 687, 131 L. Ed. 2d 759, 115 S. Ct. 1733 (1995) (quoting *Costello v. United States*, 365 U.S. 265, 282, 5 L. Ed. 2d 551, 81 S. Ct. 534, (1961)); *AMTRAK*, 536 U.S. at 121-122. A party not named in the Equal Employment Opportunities Commission (EEOC) charge will normally not be subject to suit in a subsequent civil action unless the purposes of Title VII are met, looking at: (1) the similarity of interest between the named party and the unnamed party; (2) whether the plaintiff could have ascertained the identity of the unnamed party at the time the EEOC charge was filed; (3) whether the unnamed parties received adequate notice of the charges; (4) whether the unnamed parties had an adequate opportunity to participate in the reconciliation process; and (5) whether the unnamed party actually was prejudiced by its exclusion from the EEOC proceedings. *Virgo*, 30 F.3d at 1358.

In a hostile environment case, the affirmative defense can be shown by such proof as procedures for encouraging and facilitating employee complaints of sexual harassment and for thereafter dealing with them swiftly and effectively; personnel manuals articulating the company policy that forbids sexual harassment and encouraging both those who believe they are being harassed and those who witness harassment to notify supervisors; evidence of the plaintiffs' knowledge of these publications and the procedures for lodging complaints and that supervisors reviewed them with him both initially and during the course of his employment. *Casiano*, 213 F.3d at 286. Although an employer need not use the most serious sanction available to punish an offender, it may be considered unreasonable if the employer fails to make a finding of sexual harassment and issue a reprimand or warning, or otherwise follow its procedures for preventing future harassment. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 525 (5th Cir., 2001) (unreasonable where same-sex supervisor of professor was not disciplined).

VI. Conclusion

Same-sex sexual harassment can provide just as many pitfalls for the municipal employer as other types of Title VII liability. This is particularly true for cases involving same-sex harassment by a supervisor. Sexual harassment education and policies should contain information making supervisors aware that sexual conduct directed toward a person of the same sex may result in the same consequences as any other form of sexual harassment.