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Update from Legal Counsel

Developments in Tax-Exemption Issues, Employment Law, Ministers and the Law, and Other Legal Considerations Affecting Religious Organizations

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Tax Exemption Issues

1. PLR 201835012 – *Exempt Activities* - Organization formed to promote sport, recreation, health & fitness through church leagues and tournaments not exempt since it is primarily social and recreational activities for adults and these are not (c)(3) purposes.

2. PLR 201835012 – *Exempt Activities* – Planning high school reunions is not an exempt purpose.

3. PLR 201832013 – *Exempt Activities* – Despite donating meat to food banks and school lunch program, principal activity was running a cattle farm and not exempt activities.

4. PLR 201829022 – *Exempt Activities* – Only operation was a bingo operation with a loosely structured grant program. Not operating for charitable purposes.

5. 201834012, 201833017, 201830014, & 201809009 – *Exempt Activities* – Organizations that cease operations are no longer exempt organizations. In 201830014 activities had ceased for a year and there were no intentions of resuming activities.

6. PLR 201808020 – *Exempt Activities* – Organization formed to renovate a run-down historic hotel (but not one designated as a historical landmark) with plans to operate the hotel to be self-sustaining was not granted exempt status.

7. PLR 201832013 – *Bad Grant Programs* – Organization formed to support the educational and socio-economic well-being of the lineage of specified persons does not meet the organizational test. Articles of incorporation also did not contain dissolution clause.

8. PLR 201831012 – *Bad Grant Programs* – Organization collected funds to provide benefits to the families of the deceased crew of B, but there were only 10 families, and this failed the public test.

9. PLR 201749012 – *Bad Grant Programs* – Organization that failed to exert expenditure responsibility over grants to non-501(c)(3) organizations and to individuals forfeited its exempt status.

10. PLR 201829006 – *Organizational Test* – Articles of incorporation lack mandatory dissolution clause.

11. PLR 201808018 – *Organizational Test* - Organization whose corporate status had been dissolved by court order due to fraud fails the organizational test. (Indicates the forfeiture of corporate status has negative consequences on exempt status.)

12. PLR 201749013 – *Organizational Test* – Organization lost tax exempt status when it dissolution clause left everything to a 501(c)(5) organization.

13. PLR 201831014 – *Organizational Test* – Organized as a for-profit LLC, documents failed to properly state exempt purpose and no dissolution clause. Additionally, organization controlled by president who could not be removed and appointed all board members.

14. PLR 201831015 – *Private Benefit* – Organization is a mutual aid organization and when a member, or one of his family, dies, each of the members contributes a $14 of which $10

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is given to the family and the remaining $4 is for administrative and other assistance. Since created for benefit of members, not exempt.

15. PLR 201833023 – *Private Benefit* – Organization formed to only assist members in the event of tragic disasters is not exempt.

16. PLR 201829023 – *Inurement* – The board of trustees was not involved in the decisions and daily operations. There were no internal controls to ensure that funds are used for exempt purposes and no safeguards to prevent the reoccurrence of assets inuring to the benefit of any private individuals. The president had free reign over the bank account and credit cards. Assets were used to pay household expenses, groceries, clothes, etc.

17. PLR 201830017 – *Inurement* – Organization formed to assist those with breast cancer and operate breast cancer awareness/education programs. Assets uses to provide autos and related expenses without accounting for personal or business use. Credit cards included charges for gym memberships, cell phone plans, college tuition and travel expenses without proof of repayment. Reimbursements, if any, were not required until the end of the year, thus creating short-term, interest free loans to officers, directors & employees.

18. PLRs 201748011 & 201740023 -- *Inurement/Private Benefit* – Providing benevolent assistance with funeral expenses is not tax exempt.

19. PLR 201736025 – *Inurement/Private Benefit* – Form 1023-EZ approval reversed for entity formed to provide benevolent assistance primarily to its members and some to the public. The organization also provided scholarships to children of members who died in the line of duty. Entity's governing documents also failed to limit its purposes to exempt purposes under 501(c)(3).

Foreign Activities

1. PLR 201740022 - Organization lost its tax-exempt status because it could not account for the funds spent on a project where it was the fiscal sponsor. The organization also transferred funds to an organization listed on the suspected terrorist list. Organization's General Counsel advised officers to refuse to answer questions under the 5th Amendment. See PLR 201712014 with same result.

Unrelated Business Income/Commercial Purposes

1. Changes from the 2018 Tax Cuts & Jobs Act

    i. Unrelated business income losses from different lines of business cannot be used to offset income from other lines of businesses creating unrelated business income. Notice 2018-67 provides guidance in this area.

    ii. Transportation fringe benefits (parking, commuting expense reimbursement) will create unrelated business income when paid or incurred by the employer. Likely does not apply if the church does not pay for employee parking spaces, or if the church does not rent its parking spaces (or have others around it that sell parking spaces).

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2. *General Conference of Seventh-Day Adventists vs. Director, Department of Revenue and Taxation for the Government of Guam* – Guam asserts that the operations of a medical clinic and the mission's Simply Food's Restaurant and Grocery Store creates taxable income and assesses $546,212 in territorial income taxes and $208,342 in penalties. (One source states the taxes were assessed as $12.6 million for taxes and $3.1 million for penalties covering 22 years of activity.) Settlement was achieved by moving the operations into taxable corporations.
3. PLR 201806010 – *Substantial Nonexempt Purpose* – Organization loses tax exempt status when its catering operation was its primary operation. Revenues classed as "fundraising" did not change the outcome.
4. **2018 Tax Cuts & Jobs Act – General Information and Resources** https://www.irs.gov/tax-reform

Payroll Issues

1. Changes from the 2018 Tax Cuts & Jobs Act.
   i. Payment of $1 million or more of compensation to non-ministers results in an excise tax.
   ii. Employee achievement awards cannot include cash, or other intangible property.
   iii. Unreimbursed employee business expenses no longer deductible starting 2018. Could be time to review/update the accountable plan.
   iv. Moving expenses no longer deductible and reimbursements are taxable starting 2018. Update payroll reporting to include on 2018 Forms W-2.
2. *Rowe v. United States*, 2018 WL 2234810 (E.D. La. 2018). Summons issued to church valid because the IRS was auditing the pastor and not conducting a church examination.
3. *Czarnecki, Jr. v. U.S.,* Ct Fed Cl, 120 AFTR 2d. Engineer loses deductions associated with doctoral thesis because he failed to show a direct and proximate relationship between doctoral studies and skills the Navy required of him. While the classes assisted in keeping his engineers license, he couldn't show he was required to maintain the license. Also, doctoral studies qualify him for a new job regardless of his lack of any intent to pursue a new career. (Author's note: This case is included as this is a common dilemma in various religious organizations.)
4. *Gaylor v. Mnunchin*, (W.D. Wis. 2017). Court ruled cash housing allowance unconstitutional. Court issued a permanent injunction prohibiting the IRS from allowing a cash housing allowance to ministers, effective 180 days after the decision is final.
5. *Rhea Lana, Inc. v. Department of Labor*, 2017 WL 4286178 (D.D.C. 2017). Volunteers who receive any form of consideration are employees for minimum wage and overtime.

Charitable Contributions

1. Changes from the TCJA

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i. Charitable contribution limit increased from 50% of AGI to 60% of AGI starting 2018.

2. *Darrell Archer v. Commissioner*, TC Memo 2018-111 – Deductions for noncash contributions denied where receipts were self-completed with listings of "bags/boxes" of items.

3. *James C. Platts v. Commissioner*, TC Memo 2018-31. Donation of intact house to church denied because 1) donation claimed in wrong year; 2) value based on intact house, but house was taken apart and the pieces were donated; 3) appraisal didn't meet requirements; 4) appraisal not timely and 5) appraisal for intact house and not building materials.

Employment Cases

1. *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 2018 WL 4212091 (3rd. Cir. 2018). Ministerial exception and ecclesiastical exception prevent lawsuit against church for wrongfully terminating Senior Pastor. Court refused to enforce 20 year employment agreement that provided the Senior Pastor could be terminated only for enumerated reasons.

2. *Sterlinski v. Bishop of the Diocese of Chicago,* 2018 WL 3533313 (N.D. Ill. 2018). Lawsuit for Title VII and Age Discrimination by organist barred by ministerial exception. Instrumentalists are integral to Catholic religious worship.

3. *Kelley v. Decatur Baptist Church*, 2018 WL 2130433 (N.D. Ala. 2018). Pregnant, single maintenance and child care worker, claimed church terminated employment because she was pregnant. Church claimed the termination was because she engaged in sexual conduct outside of marriage, which was a violation of biblical standards. Court: she may sue church for wrongful termination and violation of Title VII, subject to the church proving that the ministerial exception or ecclesiastical exemption applies to the employee. The ministerial exception precludes application of employment laws to claims concerning the employment relationship between a religious institution and its ministers. Case to proceed into discovery.

4. DOL announces changes to the qualifications needed for an intern who is exempt from FLSA. See: https://www.dol.gov/whd/regs/compliance/whdfs71.htm. The new test examines factors to determine whether the company or worker is the primary beneficiary of the relationship. A non-exhaustive set of factors should include:

   1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa.

   2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

   3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

   4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

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5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

5. DOL reinstates 17 FLSA opinion letters that were issued by the Bush administration in January 2009. These letters were withdrawn by the Obama administration in March 2009. They address diverse FLSA issues such as "on call time," salary basis and full day deductions, salary basis and allowable deductions, and the exemption for teacher/coaches. Reissued opinion letters were renumbered FLSA 2018-1 through FLSA 2018-17. See: https://www.dol.gov/whd/opinion/search/index.htm?FLSA.

6. *McCrany v. North American Missions Board of the Southern Baptist Convention*, 2018 WL 1041298 (N.D. Miss. 2018). Does ministerial exception apply only to the minister's "employer", or does it extend to an affiliated religious organization which allegedly influenced or caused the minister's termination of employment? Ministerial exception probably does not apply to non-employee relationships or to non-employment law claims. The ministerial exception is subset of the ecclesiastical exception doctrine.

7. *Schultz v. Congregation Shearith Israel of the City of New York*, 867 F.3d 298 (2d. Cir. 2017). Employee (Program Director) married 6/28/2015. She was pregnant at the time. Before departing on honeymoon, she informed employer (Jewish synagogue) that she was pregnant. Upon return (7/20/2015), she was visibly pregnant. She was informed that her employment would be terminated 8/14/2015 due to position elimination. 7/30/2015, Synagogue learned employee retained a lawyer. 8/5/2015, Synagogue reinstated the position. Court: Synagogue may still be liable for damages and attorneys' fees under Title VII as well as for remedies afforded by the FMLA.

8. *Demkovich v. St. Andrew the Apostle Parish*, 2017 WL 4339817 (N.D. Ill. 2017). Demkovich, a Music Director, married his same-sex partner, a relationship known to the Parish. Parish terminated the employment after the wedding. Demkovich filed suit for sex, sexual orientation, marital status, and disability discrimination. Music Director is covered by ministerial exception.

9. *Nolen v. Diocese of Birmingham in Alabama*, 2017 WL 3840267 (N.D. Ala. 2017). Whistleblowing principal of Catholic school cannot sue the Diocese for retaliatory termination due to the ministerial exception. She was terminated because she complained to the Diocese that the school was wrongfully discriminating against Hispanic students and applicants. Summary judgment for Church granted.

10. *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017). Principal of Catholic school is covered by ministerial exception. Summary judgment granted for Archdiocese.

11. *Grussgott v. Milwaukee Jewish Day School*, 2017 WL 2345573 (E.D. Wis. 2017). First grade teacher at religious school is covered by ministerial exception. Alleged she was

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terminated because of cognitive issues resulting from a brain tumor, in violation of Americans with Disabilities Act. Summary judgment granted for school.

Church Liability

1. *Hubbard v. J. Message Group Corp.,* 2018 WL 3377706 (10th Cir. 2018). During member meeting church described ouster of former meeting by calling her a sexual and financial predator. The leaders then transcribed the remarks and posted them on the member only section of the website. The ecclesiastical exception prevents the former member suing for defamation and related caused of action.

2. *Kell v. Smith*, 2018 WL 3468990 (11th Cir. 2018). Court can order church to engage an attorney to represent it in lawsuit.

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Sexual Harassment

"Issues of sexual abuse and exploitation and gender discrimination are not just for one political party or type of theology."
Kelly Rosati, vice president for child advocacy at Focus on the Family.

"One by one the stories tumbled out, and every single woman at that table of church members had a story to tell."
https://www.washingtonpost.com/news/acts-of-faith/wp/2017/12/01/what-churches-must-do-right-now-to-stop-being-part-of-the-sexual-harassment-problem/?utm_term=.b3379ce565c3

1. Overview.

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII and most state-law counterparts make it an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual regarding his compensation, terms, conditions, or privileges of employment, because of such individual's sex. Harassment may include sexual harassment or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Sexual harassment. The phrase is considered by many as a punch line. When sexual harassment is mentioned, it may conjure memories of years past when smoking in the office was encouraged, and sexism was seemingly a way of life. However, even today, sexual harassment is still a serious matter that every employer and employee should be prepared to identify and manage. The law and good conscience demand as much.

According to the EEOC for 2016, 84% of the complaints were filed by women. U.S. Merit System Protection Board reports that less than 1% of the perpetrators are female when the victim is female. The Defense Department reports that 95% of the time the perpetrator was male. EEOC also claims that surveys show that 80% of the harassment goes unreported. Of those who report, about 75% report retaliatory actions from their employer because of their report.

2. Recent Reports of Sexual Harassment.

While history has proved that the American workplace can and has evolved for the better, sexual harassment in the workplace continues to exist (by the allegation, if nothing else) to the detriment of employers and employees. Below are a few relatively recent news stories which serve as reminders that sexual harassment in the workplace or allegations of same are not extinct and likely never will be so long as two or more humans work together:

- Bill Voge, Chairman of Latham & Watkins, a $3 billion law firm, resigns on March 20, 2018, over emails and text messages of a sexual nature. https://abovethelaw.com/2018/03/latham-chiefs-undoing-began-by-offering-christian-reconciliation-help/

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- Bill Hybels accused of sexual harassment. *https://www.christianpost.com/news/willow-creeks-bill-hybels-denies-sexual-misconduct-allegations-221970/*, March 23, 2018.

- *Second Lawsuit Filed Against Pastors for Sexual Misconduct.* http://lompocrecord.com/news/local/second-lawsuit-filed-against-former-church-for-life-pastors-charges/article_22d090eb-61ec-5a80-98ba-0e112207570f.html. March 23, 2018.

- *Casey Treat's megachurch hit with sexual harassment suit over the founder's son*. http://www.thenewstribune.com/news/local/article181163556.html. October 31, 2017.

- *Youth pastor sues Rancho Bernardo Community Presbyterian Church over sexual harassment*. https://www.sandiegoreader.com/news/2017/aug/08/ticker-youth-pastor-sues-rancho-bernardo-presbyter/#. August 8, 2017.

- *Chopourian vs. Catholic Healthcare West (2012)*. Jury awards $168 million as damages for sexual harassment in the workplace. A judge later reduced the damages to $82 million. http://www.juryverdictalert.com/jury-verdicts/item/employment/chopourian-v-catholic-healthcare-west

- *Alford vs. Aaron's Rents (2011).* Jury awards $95 million as damages for sexual harassment in the workplace. A judge later reduced the damages to $41 million. https://www.reuters.com/article/us-sexharassment-suit/illinois-jury-awards-95-million-in-sex-harassment-suit-idUSTRE7596IS20110610

- Three notable cases:

    - Grace Episcopal Church of Whitestone paid $192,000 to settle the case by the secretary. The rector subjected a secretary and a sexton to unwelcome advances, sexual remarks, and touching, including grabbing their breasts and kissing them.

    - The King's Way Church paid $25,000 to settle a sexual harassment complaint by a kindergarten teacher. The pastor was grabbing, hugging and rubbing against her. The church fired her when she filed a complaint against the pastor with church leaders. The church leaders found she invited or caused the harassment. The pastor plead guilty to two counts of unwanted physical contact (a misdemeanor) related to her claims.

    - Wayman African Methodist Episcopal Church settled a sexual harassment suit brought by an associate pastor on a confidential basis. Senior Pastor forced an associate pastor to see a photo of his genitalia. Senior Pastor also allegedly inappropriately touched associate pastor on several occasions, grabbing her, attempting to kiss her and reaching under her skirt. Church officials found that the Senior Pastor acted inappropriately.

3. Legalities of Sexual Harassment.

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The term "sexual harassment" is generally not used in the federal or state statutes upon which the claims are based. Sexual harassment claims are premised on the prohibition of sex discrimination under Title VII.

Title VII applies to employers that (1) have 15 or more employees and (2) are engaged in *interstate commerce*. Title VII may not apply to some organizations because they may not have 15 or more employees, or because they do not engage in interstate commerce.[1]

Some state-law counterparts, however, have significant differences in coverage from Title VII. One must check the state law counterpart to determine its application if the employer is exempt from the federal law.

4. EEOC and State Agencies.

The Equal Employment Opportunity Commission ("EEOC") is charged with handling charges of sexual discrimination and sexual harassment filed under Title VII. Most states have a state agency that enforces and oversees state-law sexual discrimination claims filed under state law. Or, the EEOC and the applicable state agency will partner when a claim is filed under both Title VII and the state-law counterpart. The general objectives of the EEOC and its state-agency counterparts are to eliminate alleged "unlawful employment practice by informal methods of conference, conciliation, and persuasion."[2] However, if a claim cannot be resolved by conciliation and persuasion, the parties may ultimately duke out the claim in a federal or state court proceeding, which is generally time-consuming, public, expensive and detrimental to all involved.

5. Substantive Elements of a Claim.

Generally, to establish a case of sex discrimination, such as sexual harassment, an employee must show evidence of these elements: (1) that the employee belongs to a protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based on or motivated by the employee's sex; (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew or should have known of the harassment, yet failed to take prompt remedial action. *See Felton v. Polles*, 315 F.3d 470, 483-84 (5th Cir. 2002). Generally, the sex of the complaining party must be a motivating factor for an employment practice, even if other factors also motivated the practice. *See* 42 U.S.C. § 2000e-2(m).

Essentially, it is unlawful for an employer to discriminate in connection with the terms, conditions, or privileges of employment because of the sex of the employee. Also, an employer may be held liable for sex discrimination if its employees commit acts of sexual harassment creating a constructive discharge or a hostile work environment.

6. Quid Pro Quo and Hostile Work Environment.

[1] Most states have adopted a statutory scheme and counterpart similar to the federal Title VII. *See, e.g.*, TEX. LAB. CODE § 21.001(1); MO. REV. STAT. § 213.010; 42 U.S.C. §§ 2000e-2000e-17 (Title VII).
[2] *See, e.g.*, TEX. LAB. CODE § 21.207(a).

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Claims of sexual harassment are generally divided into two basic groups. The first is "quid pro quo" harassment which involves conditioning of employment benefits on sexual favors - - *you scratch my backside, and I'll let you keep your job*, for example. The second involves harassment that, while not affecting economic benefits, creates a hostile or abusive work environment. In 2010, the Texas Supreme Court described the substantive elements of a cognizable sexual harassment claim:

> To make out a statutory sexual-harassment claim, the employee must prove more than that she found the harassment offensive. The [law governing sexual harassment claims] contemplates discrimination affecting the "terms, conditions, or privileges of employment." . . . A constructive discharge qualifies as an adverse personnel action . . ., but requires proof that the employer made the working conditions so intolerable that a reasonable person would feel compelled to resign. Alternatively, the plaintiff can show that she remained in her position and endured a hostile work environment, but must show discriminatory conduct "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."
>
> An abusive environment can arise "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult.'" Courts look to all the circumstances in determining whether a hostile work environment exists, including the frequency of the discriminatory conduct and whether it unreasonably interfered with the employee's work performance.
>
> "All of the sexual hostile environment cases decided by the [United States] Supreme Court have involved patterns or allegations of extensive, long lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment." Accordingly, "single incidents should not be viewed in isolation because it is the cumulative effect of all offensive behavior that creates the work environment."[3]

7. How to Identify Unlawful Sexual Harassment.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. The law rarely prohibits simple teasing, offhand comments, or isolated incidents that are not very serious. However, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision. The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a member or customer.

In determining whether a workplace constitutes a hostile work environment, courts consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[4] For harassment to be actionable, it

[3] *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 805-06 (Tex. 2010) (internal citations omitted).
[4] *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295 (1993).

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generally must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[5]

Every act of harassment, although reprehensible, does not necessarily cause a hostile environment claim. To be actionable, the harassment must be systematically directed to the employee and sufficiently severe or pervasive as to alter the conditions of the claimant's employment and create an abusive, hostile environment.[6] The United States Supreme Court has held that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."[7] Rather, the environment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did perceive to be so." *Id*. (applying the standard to sexual harassment case).

8. Other forms of harassment.

Harassment need not be of a sexual nature. Harassment can include offensive remarks about a person's sex. For example, it may be illegal to harass a woman by making offensive comments about women.

Also, Title VII and most state law counterparts prohibit sexual harassment regardless of the sex of the claimant or the harasser. The laws protect individuals against sexual harassment, a form of sex discrimination, by members of either the same sex or the opposite sex.

In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998), the United States Supreme Court outlined three ways a plaintiff could show that same-sex harassment amounted to sex discrimination: (1) the plaintiff could show the alleged harasser made explicit or implicit proposals of sexual activity and provide credible evidence that the harasser was homosexual; (2) the plaintiff could demonstrate the harasser was motivated by general hostility to members of the same gender in the workplace; and (3) the plaintiff could offer direct comparative evidence of how the alleged harasser treated members of both sexes in a mixed-gender workplace.[8]

9. Employer's Defenses.

The courts have developed unique standards for review of an employer's response to a sexual harassment complaint. Federal courts and most states recognize an affirmative defense available to employers facing hostile work environment claims when the employer (1) exercised reasonable care to prevent and promptly correct the harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[9]

10. Remedies.

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[5] *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).
[6] *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 60 (1986).
[7] *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal citation omitted).
[8] *See Oncale*, 523 U.S. at 80; *see also La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir. 2002); *Gumpert v. ABF Freight Sys.*, 293 S.W.3d 256 (Tex. App.—Dallas 2009, pet. denied).
[9] *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (U.S. 1998); *Waffle House, Inc.*, 313 S.W.3d at 806; *City of Waco v. Lopez*, 259 S.W.3d 147, 151-52 n.3 (Tex. 2008).

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Title VII and most state-law counterparts provide for injunctive relief. In this respect, a court can require an employee to be promoted or restored to union membership, or a court may have the statutory ability to require on-the-job training. Compensatory and punitive damages are also available, but these damages may be capped at amounts which vary based on the number of employees. The damage caps depend on the applicable statutory scheme under which the claim is asserted.

Title VII and most state-law counterparts permit the prevailing party to recover a reasonable attorney's fee and expert fees.[10] Attorney's fee awards in claims brought under Title VII or applicable state law can be significant.[11] However, under some sexual discrimination laws, an employer's ability to recover attorney's fees may be substantially limited. For example, under Texas law, an employer may recover attorney's fees only if the complaining employee's claims were frivolous, meritless, or unreasonable or the employee continued to litigate after it becomes obvious that their claims are frivolous.[12] Attorney's fees are generally not an appropriate remedy for an employer simply because the employee loses the case.

11. Virtual Workplace Harassment.

Many employers allow employees to work from home or other satellite office locations. Work files, staff communications, and projects are available from virtually anywhere and with seamless transition or delay. Questions arise as to if or when workplace harassment can apply when work is performed outside of a physical space controlled by and in the physical presence of an employer.

Courts have found that virtual communications amongst workers, such as on an electronic bulletin board, may be so closely related to the workplace environment and beneficial to the employer that harassment via such communication channels should be part of the workplace.[13] As applied to a hostile environment workplace claim, courts have alluded that if the employer noticed that co-employees were engaged in such work-related forums in a pattern of retaliatory harassment directed at a co-employee, the employer might remedy that harassment.[14]

Factors to consider include whether there is a "substantial workplace benefit" received from the communication forum and whether the forum is "sufficiently integrated" with the workplace to impose on the employer an obligation to respond to allegedly harassing communications.[15]

Essentially, two questions arise in this context: (1) does an employer have a duty to monitor activity to ensure there is no harassment, and (2) when may it be said an employer knew or should have known of allegedly harassing conduct? In *Blakey,* the New Jersey Supreme Court provided this insight on these issues:

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[10] *See, e.g.*, TEX. LAB. CODE at §§ 21.259(a)-(c).
[11] *See, e.g.*, *City of Houston v. Proler*, 373 S.W.3d 748 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (upholding trial court award of $361,770.00 in attorney's fees).
[12] *See, e.g.*, *Playoff Corp. v. Blackwell*, 300 S.W.3d 451 (Tex. App.—Fort Worth 2009, pet. denied); *Elgaghil v. Tarrant County Junior College*, 45 S.W.3d 133, 145 (Tex. App.—Fort Worth 2000, pet. denied).
[13] *See Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 542 (N.J. 2000).
[14] *See id.* at 543.
[15] *See id.* at 545.

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> To repeat, employers do not have a duty to monitor private communications of their employees; employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace. Besides, it may well be in an employer's economic best interests to adopt a proactive stance when it comes to dealing with co-employee harassment. The best defense may be a good offense against sexual harassment. "[W]e have afforded a form of a safe haven for employers who promulgate and support an active, anti-harassment policy." Effective remedial steps reflecting a lack of tolerance for harassment will be "relevant to an employer's affirmative defense that its actions absolve it from all liability." Surely an anti-harassment policy directed at any form of co-employee harassment would bolster that defense.[16]

Other recent cases illustrate how statements on a Facebook page may serve as evidence of a hostile working environment. With *Goring v. Board of Supervisors of Louisiana State University*, a professor used statements from a student's Facebook page as evidence of a racially hostile working environment and claimed that the school failed to promptly remediate the situation by failing to ensure that the postings were removed.[17] The case was disposed of for lack of evidence of race-based hostility. But the *Goring* case illustrates that Facebook and other social media sites will play a role in harassment claims.

12. Conducting an Investigation.

Most churches are ill-equipped to investigate sexual harassment complaints. Emotional connections with the perpetrator (usually in a powerful position) make the investigation difficult. Due to the personal relationships, the investigators have a hard time believing that the accused is capable of such reprehensible behavior. Perpetrators depend on their good reputation and exploit it to maintain their innocence. In many churches, the investigation team only includes men, while most victims are female. This creates, at least, the perception of protectionism and, at worst, discounts the believability of the victim. The investigation team must include both genders.

All organizations should adopt an Anti-Harassment Policy. The policy should:

- Identify what constitutes sexual harassment.
- Guide employees about what to do when an employee experiences or witnesses sexual harassment.
- Require that all employees report every time they suspect/observe harassment of any other employee.
- Identify to whom the report should be directed. The policy may provide an anonymous hotline number (or some other neutral contact) to call or contact for reporting situations of sexual harassment.

[16] *Id.* at 552 (internal citations omitted).
[17] Civil Action No. 08-634-JJB-SCR; 2010 U.S. Dist. LEXIS 37541, *3 (M.D. La. 2010).

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- Prohibit retaliation for reporting.
- Outline steps that the employer or management will undertake to investigate. Consider using an outside investigator.
- Outline steps the employer or management will undertake to conclude an investigation.

See sample policy attached to this paper.

Below is a non-exclusive list of tips for employers to consider when investigating allegations of sexual harassment:

The HR Director may investigate unless the allegations dictate a different approach. For example, the HR Director should not lead the investigation when the alleged perpetrator is the Senior or Executive Pastor. There the investigation should be lead by a Board member.

First, identify potential witnesses. Ask the victim for a list. Ask the supervisor for a list of potential witnesses, unless the supervisor is the alleged perpetrator.

When questioning a witness, *make a general statement about this complaint and ask what they know about it.* Interview witnesses with a witness present. Rather than list the specific allegations, with dates, times, and numbers for interviewees to respond to, say something like "As you may be aware, Jane has complained about some behaviors of a co-worker, John. Do you know what I am talking about? Can you tell me what you know about it?"

By the time an investigation is called for, most people in the workgroup know about the complaint. Employees are usually more than willing to discuss the situation since nearly everyone will have an opinion or be upset about it. If the person you are interviewing knows nothing about the situation, then by making such a general opening, you have not passed on information or helped the grapevine along. Remember that protecting the rights, including reputation and rights to privacy, of the accused and the accuser is critical, so discretion is very important.

If interviewees say they know nothing, you may ask if they have ever had any problem with the people involved, or ask the last question--if they know of anyone they think could help to clear the situation up.

Don't defame. The employer also should know that the transmission of information which later proves to be false and damaging can constitute defamation (libel or slander) and that the transmitter of that information can be sued for engaging in defamation.

Open-ended questions are best. If employees have knowledge, information, or opinions, about the particular complaint, let them talk. Most questions employers should ask will be in the form of "Tell me more about that," "Can you explain that please?," "Can you give me some examples so I'll understand clearly?" etc. Do not worry too much about specific phrasing and wording. This is not a court of law, and you are not an attorney (or acting as an attorney), so talk to them as you would to an acquaintance. Forget about sharing your opinions and ideas; ask open-ended questions and let the employees talk.

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At the close of the interview, instruct interviewees not to discuss this problem further except with the appropriate people. Inform interviewees something such as:

> You must not discuss this situation with anyone, other than your spouse, best friend, or an attorney, but particularly no one here at work. If you must talk with someone, you may talk with_____ (their supervisor if appropriate, the Human Resources Officer, etc.) This will protect the rights and privacy of everyone involved. If anyone asks you about this, you can help by saying, "For the protection of everyone involved, I have been asked not to discuss it." People who continue to talk about it may be disciplined. You can also call me if you think of something you forgot or with additional questions. Thank you for your cooperation. We'll reply at the close of the investigation which will probably be in about ____ days/weeks.

This generally serves its purpose well. Employees generally want to cooperate, and by telling them what to do (i.e., not talk) and what to say to others (i.e., I've been told not to talk to respect everyone involved) the employer empowers the employee with a way to help deal with a difficult situation. Employees who continue to talk and gossip about the situation may and should be disciplined.

Take corrective measures reasonably calculated to prevent future acts. If through an investigation, an employer concludes that sexual harassment may have occurred, the employer should take corrective measures reasonably calculated to prevent future events of sexual harassment. The corrective measures may include sexual harassment training, moving employees to different work areas, terminating guilty parties, suspending guilty parties, and other actions to help prevent future instances. The main objective must be to prevent future acts of sexual harassment.

A church should create a culture that condemns all forms of harassment. When proven, the church must determine whether additional training alone will prevent future instances. If the answer is negative, then it must terminate the perpetrator. It wants a reputation as a safe place and one where victims can trust to be taken seriously and vindicated for reporting the harassment.

Please see: "*Should Churches Handle Sexual Abuse Allegations Internally*?"

http://www.christianitytoday.com/ct/2018/february-web-only/should-churches-handle-sexual-abuse-investigations-internal.html

Closing

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps to prevent sexual harassment from occurring. Employers should have a crisis plan in place to effectively and efficiently receive, investigate and conclude allegations of workplace harassment. The plan can be as simple as a well-crafted Anti-Harassment Policy, with procedures and investigatory steps included.

Employers should communicate to employees that sexual harassment will not be tolerated, and policies should be in place to prepare and educate employees on workplace harassment. Employers can also provide sexual harassment training to employees, and

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establish effective complaint or grievance processes. Finally, employers and employees will benefit from an employer that takes immediate and action when a potential incident of sexual harassment in the workplace comes to light.

Central United Methodist Church won a lawsuit by a church secretary who claimed that a part-time pastor sexually assaulted her and targeted her with obscene telephone calls. The church admitted that the part-time pastor harassed the secretary. When she reported the harassment, the Senior Pastor did not take action against because the victim because she asked for confidentiality. When another employee complained about the part-time pastor, the Senior Pastor immediately terminated the part-time pastor. This action demonstrated that the church would have taken action had the secretary waived her right to confidentiality. The church did not negligently supervise the part-time minister, and it acted appropriately when called upon to do so. http://archive.decaturdaily.com/decaturdaily/news/050226/church.shtml

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Sample Policy

Policy Regarding Sexual Harassment and Other Illegal Harassment

All employees and applicants for employment will be treated according to their experience, talent, and qualifications for the job, without regard to their race, color, national origin, military/veteran status, pregnancy, marital status, sex, age, disability (if otherwise qualified to do the job). The Organization's policy covers all employment decisions, including recruitment, hiring, placement, promotions, transfers, layoffs or terminations, rates of pay, employee benefits and selection for training.

[FOR RELIGIOUS EMPLOYERS WHO MAY ENJOY A RIGHT TO DISCRIMINATE ON RELIGION: As a religious institution, the Organization is permitted and reserves the right to employ persons with a denominational background and philosophy similar to the Organization's and consistent with the Organization's religious principles.]

The Organization prohibits sexual harassment and any other forms of harassment based on race, color, sex, age, national origin, disability, and any other protected status under the law. Sexual harassment and harassment based on race, color, sex, age, national origin, disability, and any other protected status under the law is against policy of the Organization and may violate Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and state law. Sexual harassment or other harassment in the workplace by a manager, supervisor, employee or nonemployee, including any customer or vendor, will not be tolerated. The Organization's objective is to provide a work environment that fosters mutual employee respect and working relationships free of harassment.

Prohibited Conduct

It is a violation of this Organization's policy for a manager, supervisor, employee, or nonemployee, including any customer or vendor, to harass an employee because of the race, color, sex, age, national origin, disability, and any other protected status under the law. For example, the Organization prohibits verbal or physical conduct such as discriminatory, sexist, or racist epithets and jokes. Such conduct debilitates morale, is personally offensive, and interferes with work performance. All forms of sexual harassment are also prohibited.

Sexual harassment refers to the behavior of a sexual nature that is not welcome, is personally offensive, debilitates morale, or interferes with the work performance and effectiveness of its victim. Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature constitute harassment when:

(1) Submission to conduct is made explicitly or implicitly a term or condition of an individual's employment.

(2) Submission to or rejection of such conduct by an individual is used as a basis for an employment decision affecting such individual; and/or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

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If comments or conduct of a sexual nature is unwelcome by an individual, they may constitute harassment. The Company will not accept as an excuse for a complaint of sexual harassment that an offender was “only joking” or “didn’t think the person would object.”

Reporting Complaints

Any individual who believes that he or she is being subjected to sexual or other illegal harassment of any kind by anyone connected with his or her work should report the matter promptly to a supervisor or another member of management. Anyone who observes behavior that violates this policy must also promptly report the behavior to a supervisor or management. It is unnecessary that you follow a chain of command. It is imperative, however, that an individual initiate a complaint to trigger the protection afforded by this policy. The Organization cannot rely on second-hand information or gossip as grounds to investigate. Any supervisor or manager who receives a complaint of harassment must report it to the _____ of the Organization or someone designated to handle such complaints.

Initiating a complaint, in good faith, will not be grounds for discipline. It violates the policy of this Organization and law for an individual to be disciplined or disadvantaged because of a good faith resorting to this complaint procedure. The Organization will take appropriate disciplinary action, up to and including termination, against any employee who retaliates against an employee because the employee made a good faith complaint under this policy.

Investigation

The Organization will carefully investigate each complaint of sexual harassment or any other legally prohibited harassment. The Organization cannot guarantee the confidentiality of complaints of illegal harassment because it may be necessary to divulge information as part of the investigation or under a legal proceeding. The Organization will, nevertheless, protect the confidentiality of harassment allegations to the extent appropriate. Information about a complaint will be shared, to the extent possible, only with persons who need to know.

The Organization will interview the complainant, the individual accused of sexual harassment (or other illegal harassment), and any witnesses identified by either party. Within a reasonable time of concluding the investigation, the person initiating the complaint, and the accused, will be told the results of the investigation and any disciplinary measures that the Organization has taken because of the investigation.

Disciplinary Action

Any individual who violates this policy will be subject to discipline up to and including termination. The Organization may terminate an offender or take any other appropriate disciplinary action, irrespective of whether it is the offender’s first violation of this policy.

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