Protection Against Violence, Bullying, and Sexual Harassment in the Workplace

The following is the report of the United States with respect to the Fourth Study Commission. Virtually all of the references may be accessed via the internet. In addition, below are several general articles and websites that may be of interest:

• Workplace Bullying Institute, http://www.workplacebullying.org/.


I. Laws and Regulations

1. What is the definition of violence, bullying, and sexual harassment in the legislation in your country applicable to the workplace, if any?

Sexual harassment. Sexual harassment is a form of sex discrimination, defined by the U.S. Equal Employment Opportunities Commission (“EEOC” or “Commission”) as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [that] 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.”¹ The harassing conduct must be sufficiently frequent or severe to create a hostile work environment or to result in a “tangible employment action,” such as hiring, firing, promotion, or demotion.² Federal law does not prohibit teasing, offhand comments, or isolated incidents that are not extremely serious.³


² Id. A “tangible employment action” is defined as a significant change in employment status, which includes undesirable reassignment and a decision causing a significant change in benefits, compensation decisions, and work assignment.

Workplace violence. The Occupational Safety and Health Administration ("OSHA"), a wing of the U.S. Department of Labor, defines workplace violence as "any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site." Workplace violence ranges from threats and verbal abuse to physical assaults and homicide.

Workplace bullying. The U.S. Department of Health and Human Services defines bullying as "unwanted aggressive behavior that involves a real or perceived power imbalance and is repeated, or has the potential to be repeated, over time." The power imbalance can be characterized by physical strength, popularity, status, peer support, or access to potentially hurtful information. Repetition reveals intentionality in hurtful conduct or a pattern of behavior that distinguishes it from

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6 Id.

an accident or angry outburst.\textsuperscript{8}

The Workplace Bullying Institute, which states that it is the only U.S. non-governmental organization dedicated to eradicating bullying in the workplace, has a useful website that provides the following definition: “Workplace Bullying is repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is abusive conduct that is:

- Threatening, humiliating, or intimidating, or
- Work interference–sabotage–which prevents work from getting done, or
- Verbal abuse.”\textsuperscript{9}

2. Does your country have specific regulations to guarantee the protection of workers against violence, bullying and sexual harassment in the workplace?

Sexual harassment and workplace violence. Title VII of the Civil Rights Act of 1964 is the main legal vehicle for sexual harassment claims in the United States. Although harassment is not expressly mentioned in its text, Title VII outlaws sexual harassment and intimidation in the workplace as forms of sex

\textsuperscript{8} Id.

\textsuperscript{9} Workplace Bullying Institute, \textit{The WBI Definition of Workplace Bullying}, http://www.workplacebullying.org/individuals/problem/definition/.
discrimination. The statute provides that it is “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.” Thus, to receive protection under Title VII, an employee must qualify as a member of one of these protected classes.

As the United States Supreme Court held in *Harris v. Forklift Systems, Inc.*, “[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,” which includes requiring people to work in a discriminatorily hostile or abusive environment.” The Court explained that Title VII is violated when “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.”

The Ninth Circuit Court of Appeals has stressed that harassment need not be

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13 *Id.* (internal citation and quotation marks omitted).
motivated by sexual desire and that plaintiffs need not show that the harasser “had a specific intent to discriminate against women or to target them ‘as women.’”\footnote{14} Rather, “Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers.”\footnote{15}

**Workplace bullying.** No federal or state laws directly outlaw workplace bullying. Employees therefore historically have had little legal recourse against bullying, unless the employee could tie the behavior to the protected classes prescribed in Title VII. In May 2014, the first state—Tennessee—took a step toward regulating bullying in the workplace. It passed a law “designed to curb verbal abuse at work by making public-sector employers immune to bullying-related lawsuits if they adopt a policy that complies with the law.”\footnote{16} The legislation offers the possibility of immunity in return for compliance but does not ban bullying in the workplace.

Absent “anti-bullying” statutes, employees have pursued other legal means to seek redress for workplace bullying. The primary cause of action raised in

\footnote{14}Christopher v. Nat’l Educ. Ass’n, Alaska, 422 F.3d 840, 844 (9th Cir. 2005).

\footnote{15}Id.

response to workplace bullying is intentional infliction of emotional distress. The biggest hurdle to plaintiffs pursuing this legal theory is proving that the action(s) was “extreme” or “outrageous.” Employees have also asserted the claim of intentional interference with a business relationship regarding coworkers’ bullying behaviors, which relies upon the Restatement (Second) of Torts, as well as negligent infliction of emotional distress, civil assault, civil battery, and whistle blowing.

In the school context, which U.S. courts treat as distinct in evaluating First Amendment free speech rights, actions taken by school officials to respond to bullying, including threats to the safety of the school and its students, have been deemed not to infringe on the free speech and other Constitutional rights of the


18 See, e.g., Turnbull v. Northside Hospital, Inc., 470 S.E.2d 464 (1996) (“The liability for intentional infliction of emotional distress clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to occasional acts that are definitely inconsiderate and unkind.”).

19 Restatement (Second) of Torts 766A (1979); see, e.g., Eserhut v. Heister, 762 P.2d 6 (1988).
student making the threats.\textsuperscript{20} The school bullying cases are instructive as to the type of conduct deemed bullying, ranging from harassing emails, stalking, sexting, to publicly denouncing students for their behavior, sexual orientation, gender, and the like.

\textbf{II. Scope of Application}

\textit{3. Who has a legal obligation to refrain from all acts of violence and moral or sexual harassment at work? (Private and/or public sector—employers, employees, third party?)}

Sexual harassment and workplace violence. Title VII applies to employers with fifteen or more employees, including state and local governments, employment agencies, labor organizations, the federal government, and most unions.\textsuperscript{21} “Employee” includes American citizens working in a foreign country for an American employer.\textsuperscript{22}

OSHA covers private sector employers but generally excludes workers who

\textsuperscript{20} See, e.g., \textit{Wynar v. Douglas Cnty. School Dist.}, 728 F.3d 1062 (9th Cir. 2013) (holding that school officials did not violate student’s First Amendment free speech or Fourteenth Amendment due process rights by suspending him for ten days and then expelling him for ninety days for sending violent and threatening instant messages from his home to his friends about planning a school shooting).


do not fall under a state workplace safety and health program and are self-employed, family farm workers, and government workers.\textsuperscript{23}

State laws banning sexual harassment and violence in the workplace generally apply to all employers and employees in those states.

\textbf{III. The Employer’s Obligation}

4. \textit{Is the employer required to put in place a policy to prevent violence, bullying, and sexual harassment in the workplace?}

Sexual harassment and workplace violence. Under guidance provided by the EEOC, employers are advised to establish, distribute to all employees, and enforce a policy prohibiting harassment and setting out complaint procedures. As the Supreme Court stated in \textit{Burlington Industries, Inc. v. Ellerth}, “Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.”\textsuperscript{24} While the Court noted that these policies and procedures “[are] not necessary in every instance as a matter of law,”\textsuperscript{25} failure to create and follow them makes it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment, which is one of the employer’s


\textsuperscript{24} 524 U.S. 742, 764 (1998).

\textsuperscript{25} \textit{Id.} at 745.
affirmative defenses from liability.

While OSHA provides that employers are responsible for providing a safe and healthful workplace, the Act does not specify that a particular policy must be put in place for compliance purposes.

5. Does the employer have to conduct a risk analysis taking into account the nature of his activities and the size of his business? What are the minimum preventive measures that he has to provide?

Under EEOC guidelines, no risk analysis is required, but employers must take appropriate steps to prevent and correct unlawful harassment. The guidelines suggest affirmatively raising the subject of sexual harassment, making known that it is not acceptable in the workplace, and developing methods for training staff and handling complaints. At a minimum, the EEOC provides that an employer’s anti-harassment policy and complaint procedure should contain the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible
avenues of complaint;

• Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;

• A complaint process that provides a prompt, thorough, and impartial investigation26; and

• Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.27

An employer with a small workforce may not need to implement the type of formal complaint process described above. As the Supreme Court recognized in *Faragher*, if an employer of a small workforce puts in place an effective, informal mechanism to prevent and correct harassment, those actions may demonstrate sufficient care to prevent tortious behavior.28

26 This complaint process should include providing information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies, and an explanation that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved.


28 *Faragher*, 524 U.S. at 808.
6. How are employees informed of the risks, the preventive measures and the procedures applicable to the victims of violence and moral or sexual harassment at work?

The EEOC lists the following measures as steps an employer should take to ensure knowledge of its anti-harassment policy and complaint procedure:

- An employer should provide every employee with a copy of the employer’s anti-harassment policy and complaint procedure, and to redistribute it periodically;
- The policy and complaint procedure should be written in a way that will be understood by all employees in the employer’s workforce;
- The policy and complaint procedure should be posted in central locations and incorporated into employee handbooks; and
- If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.\(^{29}\)

These are suggested methods of dissemination that likely would help an employer defend against liability in a sexual harassment suit, but they are not required under Title VII or elsewhere. Substantively, the policy should include information on the consequences of retaliation, resources for victims, and a victim’s various avenues for recourse, internally and with the EEOC or a state’s department of fair

\(^{29}\) EEOC Vicarious Employer Liability Guidance.
7. Is the employer required to appoint persons with specific skills to deal with cases of violence and moral or sexual harassment at work?

No specific appointments or skill sets are required under Title VII for staff tasked with addressing alleged incidents of sexual harassment or workplace violence. However, the EEOC advises that an employer designate at least one official outside of an employee’s chain of command to receive harassment complaints. Once the employer has been notified of an incident of harassment, it must take prompt investigative action.

8. What are the sanctions against the employer who doesn't adopt policies against violence and moral or sexual harassment at work?

General sanctions are not available against an employer that does not adopt policies against violence and harassment in the workplace; Title VII protections apply regardless of an employer’s particular policy or complaint procedure. However, employers are subject to vicarious liability for unlawful harassment by supervisors, including for a hostile work environment created by a supervisor. In *Vance v. Ball State University*, the Supreme Court explained that an employee is a

\[30\] Id.
“supervisor” if the employer has empowered that employee “to take tangible
employment actions against the victim, i.e., to effect a ‘significant change in
employment status, such as hiring, firing, failing to promote, reassignment with
significantly different responsibilities, or a decision causing a significant change in
benefits.”

An employer is also liable for hostile work environment harassment
by employees who are not supervisors if the employer was “negligent in failing to
prevent harassment from taking place.” In assessing such negligence, “the nature
and degree of authority wielded by the harasser is an important factor to be
considered in determining whether the employer was negligent.”

Also relevant is “[e]vidence that an employer did not monitor the workplace, failed to respond to
complaints, failed to provide a system for registering complaints, or effectively
discouraged complaints from being filed.”

If OSHA inspects an employer due to alleged hazards or violations that
jeopardize workplace safety, and it concludes that such a violation occurred,
OSHA “must issue a citation and proposed penalty within six months of the

32 Id. at 2453.
33 Id. at 2451.
34 Id. at 2453.
violation’s occurrence.” Penalties range from $7,000 for each serious violation and up to $70,000 for each willful or repeated violation.

IV. Remedies Available to Victims

9. What are the ways of actions available to the victims? (Internal procedures in the enterprise? External procedures? Legal remedies before the court? Civil? Criminal?)

Victims are responsible for reporting harassment at an early stage in order to prevent escalation. The substantive statutes administered by the EEOC require that a person claiming discrimination file a charge of discrimination with the EEOC. The EEOC must serve the charge on the respondent within ten days of the filing of the charge. Upon completing an investigation and if there is reasonable cause to believe a violation occurred, the Commission will invite the parties to attempt to resolve the allegedly unlawful practice through conciliation.


36 Id.


If conciliation fails, the EEOC may file suit on behalf of the charging party or issue a notice of right to sue.\textsuperscript{40} Once administrative remedies have been exhausted, a plaintiff may then bring suit in court under Title VII and/or various tort theories of liability. If the plaintiff brings suit and ultimately prevails, compensatory and possibly punitive damages may be awarded.\textsuperscript{41} If sexual harassment rises to the level of assault or battery, criminal charges potentially may be brought as well.

With respect to the Occupational Safety and Health Act, employees may file workplace safety complaints to OSHA alleging hazards or violations. Remedies generally include sanctions levied against the employer, as described above.

\textit{10. Who can take an action (the worker and/or the employer, colleague workers of the victim, others persons in contact with the victim, the union representative or the agent of an organization of employers, etc.)?}

In most instances, the employee who was the alleged victim of harassment or violence is the primary person who may take action in response to the incident(s), both internally with the employer and in raising a claim in court. In

\textsuperscript{40} See 29 C.F.R. § 1601.27, 1601.28(b).

interpreting Title VII sexual harassment claims, for example, the Supreme Court in Faragher and Ellerth emphasized the importance of an employee’s reporting of alleged misconduct and on an employer’s response to those reports.

Supervisors also may report alleged misconduct. Under the employer’s duty of care to prevent and correct harassment, an employer must instruct all supervisors to report complaints of harassment to appropriate officials. The Court in Faragher and Ellerth also emphasized the importance of employers taking prompt, effective action once harassment is reported.

If an employee is represented by a union, the employee also may report sexual discrimination or workplace violence to the union and ask that it investigate and take appropriate action on the employee’s behalf. Unions often play a major role in putting in place workplace policies that prohibit sexual harassment and violence by negotiating collective bargaining agreements with clauses banning sexual discrimination and harassment. Employees may elect to use the grievance

42 EEOC Vicarious Employer Liability Guidance.

procedure detailed in a union’s collective bargaining agreement to report alleged discrimination or violence rather than following the grievance process provided by the employer. These procedures may include alternative dispute resolution methods such as arbitration.

11. Who bears the burden of proof of the violent acts and moral or sexual harassment at work?

If a party files an internal complaint regarding sexual harassment or workplace violence with an employer, neither party bears the initial burden of proof of the alleged harassment or violence. Once an employee complains to management, the employer is obligated to investigate the allegation, regardless of whether it conforms to a particular format or is made in writing. If a fact-finding investigation is necessary, the employer is advised to launch it immediately, including by conducting interviews and making credibility determinations. Once the evidence has been collected and interviews and credibility considerations are finalized, management is tasked with making a determination as to whether harassment occurred. That determination could be made by the investigator or by a management official who reviews the investigator’s report. The parties are then

44 Hodges, Strategies for Combating Sexual Harassment at 213.
45 Id.
informed of the determination.\textsuperscript{46} If the parties contradict each other and a dearth of documentary or eye-witness corroboration make it difficult for management to reach a determination, a credibility assessment may form the basis for a determination. If inconclusive evidence precludes a determination, the employer is still advised to undertake further preventive measures, including training and monitoring.\textsuperscript{47}

In a Title VII action, the plaintiff generally bears the burden of proof, which can be carried in two ways. The plaintiff may “directly” show that discrimination motivated the employment decision\textsuperscript{48} or the plaintiff may rely on the indirect, burden-shifting method set forth in \textit{McDonnell Douglas Corp. v. Green}.\textsuperscript{49} Under the \textit{McDonnell Douglas} framework, the plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence, which then creates a presumption of discrimination. This presumption shifts the burden of production to the defendant, which then must produce a legitimate, nondiscriminatory reason for its action. If the defendant articulates a nondiscriminatory reason, it has

\begin{quote}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
\textsuperscript{49} 411 U.S. 792 (1973).
\end{quote}
satisfied its burden of production. The plaintiff then resumes the burden of proof and must establish by a preponderance of the evidence that the defendant’s proffered reasons are pretextual.\(^{50}\)

When bringing an intentional tort suit, the plaintiff bears the burden of demonstrating all elements of the tort by a preponderance of the evidence.\(^ {51}\)

12. *In order to avoid reprisals at work, is there special protection provided for the victim and the witnesses? Specify the nature and duration of the special protection.*

Employees have a right to be free from retaliation for their opposition to discrimination or their participation in an EEOC proceeding by filing a charge, testifying, assisting, or otherwise participating in an agency proceeding.\(^ {52}\) Most federal employment and discrimination statutes similarly include a prohibition on retaliation.\(^ {53}\)

The EEOC’s enforcement guidance with respect to vicarious employer

\(^{50}\) See, *e.g.*, *Perdomo v. Browner*, 67 F.3d 140, 144 (7th Cir. 1995).

\(^{51}\) See, *e.g.*, *Lime v. United States*, 579 F.3d 79, 94 (1st Cir. 2009).

\(^{52}\) 42 U.S.C. § 2000e-3(a).

liability for unlawful harassment by supervisors provides that “[a]n employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints.”\textsuperscript{54} The guidance also suggests that

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\[m\]anagement should undertake whatever measures are necessary 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 retaliatory motives.\textsuperscript{55}
\end{quote}

Beyond this prohibition on retaliation, no other special protections are provided to victims or witnesses.

\section*{V. Improper Use of the Procedures}

\subsection*{13. What would be the consequences for a worker who has abused the

\textsuperscript{54} EEOC Vicarious Employer Liability Guidance.

\textsuperscript{55} Id.
procedure put in place to combat violence and moral or sexual harassment at work?

The guidelines do not stipulate any consequences that could flow from procedural abuse that does not independently constitute harassment or violence. However, the Supreme Court’s rulings in Ellerth and Faragher create strong incentives for employers to implement and enforce policies prohibiting harassment and ensuring the integrity of its complaint procedures. Some companies may have internal policies that provide that abuse or violation of the policies constitute a ground for termination of employment.

VI. Supervision and Sanctions

14. Who is responsible for monitoring the measures put in place to combat violence and moral or sexual harassment at work?

An employer has a duty to exercise reasonable care to prevent and correct harassment. As the Supreme Court noted in Faragher, “the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.”56 This duty includes instructing all supervisors and managers to address or report to appropriate officials complaints of harassment,

56 Faragher, 524 U.S. at 803.
regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that conforms to the organization’s particular complaint procedures. The duty of care also “requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome.” The EEOC also advises that an employer should designate at least one official outside an employee’s chain of command to receive harassment complaints.

The EEOC also has enforcement responsibilities to prevent and respond to allegations of workplace discrimination. Through its administrative enforcement programs, the Commission receives, investigates, and resolves charges of discrimination filed against private sector employers, employment agencies, labor

57 See Varner v. National Super Markets Inc., 94 F.3d 1209, 1213 (8th Cir. 1996) (holding that a complaint procedure is not effective if it does not require supervisor with knowledge of harassment to report the information to those in position to take appropriate action); accord Wilson v. Tulsa Junior College, 164 F.3d 534, 541 (10th Cir. 1998) (determining complaint process deficient where it permitted employees to bypass the harassing supervisor by complaining to director of personnel services, but the director was inaccessible due to hours of duty and location in separate facility).

58 EEOC Vicarious Employer Liability Guidance.

59 Id.
unions, and state and local governments. If it is unable to resolve charges through informal channels, the EEOC may “pursue litigation against private sector employers, employment agencies and labor unions (and against state and local governments in cases alleging age discrimination or equal pay violations).”

The Occupational Safety and Health Administration may also conduct investigations into workplace safety, including in response to complaints and without notice.

15. What are the sanctions applicable to perpetrators of violence and moral or sexual harassment at work?

The EEOC’s enforcement guidance lists the following examples of measures to stop harassment and to ensure that such conduct does not recur: “oral or written warning or reprimand; transfer or reassignment; demotion; reduction of wages; suspension; discharge; training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer’s anti-harassment


61 Id.

policy; and monitoring of harasser to ensure that harassment stops.”\(^{63}\)

In a Title VII or tort suit, a perpetrator may have to pay compensatory and/or punitive damages, although these claims are often sought against the employer and union, not the individual perpetrator.\(^{64}\)

\(^{63}\) EEOC Vicarious Employer Liability Guidance.

\(^{64}\) See, e.g., Thorn v. Amalgamated Transit Union, 305 F.3d 826 (8th Cir. 2002) (involving an employee suit against her employer and unions in state court, asserting claims for sexual harassment and reprisal discrimination in violation of Title VII and Minnesota Human Rights Act).