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The Only Thing Constant is Change

Current Trends in Sexual Harassment Litigation

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Presented by:

Robin Banck Taylor
Blythe K. Lollar

Continued Media Attention

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Continued Media Attention

- "*Six women accuse filmmaker Brett Ratner of sexual harassment or misconduct.*" – November 1, 2017
- "*Scandal cost three congressmen their jobs this week*" – December 8, 2017
- "*Mario Batali steps away from restaurant empire following sexual misconduct allegations*" – December 11, 2017

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Continued Media Attention

- *"Bank executive departs after misconduct claim"* – January 19, 2018
- *"Arizona Lawmaker Ousted After Harassment Investigation"* – February 2, 2018
- *27 women have come forward saying Charlie Rose sexually harassed them over a period of 30 years.*– May 3, 2018

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Stakes Are Higher When Alleged Harasser Occupies the "C-Suite"

Intensified Legal Risks

Ackel v. National Communications, Inc.

339 F.3d 376, 383-84 (5th Cir. 2003)

- **Employers are automatically vicariously liable when either:**
  - (1) the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment OR
  - (2) the harassing supervisor is "indisputably within that class of an employer organization's officials who may be treated as the organization's proxy"
    - (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)).

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Selected Issues When the Alleged Harasser Occupies the "C-Suite"

Intensified Public Scrutiny/Reputational Consequences

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Increased Scrutiny of Existing Practices

Employment Arbitration Agreements

Ending Forced Arbitration of Sexual Harassment Act – Introduced on December 6, 2017 by Sens. Kirsten Gillibrand, D-NY, and Lindsey Graham, R-SC

- Would make it illegal for businesses to enforce arbitration agreements if the allegations involve sexual harassment or gender discrimination in violation of Title VII and provide employees who signed such agreements the option of pursuing claims in court.

Every attorney general in the U.S. signed a letter to Congress this week demanding lawmakers end the practice of mandatory arbitration in sexual harassment cases.—February 13, 2018

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Increased Scrutiny of Existing Practices

Confidential Settlements or Non-disclosure Agreements (NDAs)

Washington recently banned nondisclosure agreements covering sexual harassment and assault in the workplace.- Signed into law March 21, 2018

"We know we are in the midst of an enormously disruptive, transformative and positive point in time. The national 'Me Too' movement has sparked conversations in every corner of our country and is bringing to light how inadequate our laws, rules and culture are when it comes to sexual harassment and assault."- Washington Governor Jay Inslee.

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EEOC Report of Select Taskforce

- 30 years since U.S. Supreme Court first recognized sexual harassment claims as form of sex discrimination under Title VII
  - Still a prevalent category of charges – nearly one-third of charges in FYs 2015-2017
  - EEOC wanted to know why harassment still happens, what it looks like now, and what can be done to prevent it?
- Proposed enforcement guidance built on findings in report

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Report of Select Taskforce

- EEOC Select Task Force on the Study of Harassment in the Workplace --Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016)
- Followed by proposed enforcement guidance that emphasizes looking at harassment prevention with new lens – proactive and holistic (January 2017).
- *Promising Practices for Preventing Harassment* ("*Although these practices are not legal requirements under federal employment discrimination laws, they may enhance employers' compliance efforts*").

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Sexual Harassment EEOC Charges

- While the percentage of Sexual Harassment Charges of Discrimination has remained steady over the years, the monetary benefits have increased from $41.2 million in 2010 to $46.3 million in 2017.

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Receipts	12,695	12,461	12,569	12,379	12,146	12,573	12,860	12,428

Increased Internal Claims and Lawsuits

Expect sexual harassment complaints to increase.
Expect a possible increase in lawsuits from alleged harassers.

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The Fifth Circuit's Evolving View of Sexual Harassment Claims

- *Stewart v. Miss. Transp. Comm'n*
  - 586 F. 3d 321, 330 (5th Cir. 2009)

Affirming summary judgment on claim for hostile work environment based on sexual harassment where supervisor, over a span of one month, made six sexual advances to employee and told her the pair needed to be "sweet to each other[,]" which conduct the court noted amounted "to one subjectively offensive utterance by [the supervisor] every few days" but did not create a sexually hostile work environment as a matter of law because this conduct [was] "not severe, physically threatening, or humiliating [and was] ... not the kind of conduct that would interfere unreasonably with a reasonable person's work performance or destroy her opportunity to succeed in the workplace"

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The Fifth Circuit's Evolving View of Sexual Harassment Claims

- *E.E.O.C. v. Rite Way Service, Inc.*
  - 819 F.3d 235 (5th Cir. 2016)
    - Held that sexually-fraught comments toward specific employee by person in supervisory role could support "reasonable belief" requirement for Title VII retaliation claim, even though not actionable sexual harassment
    - "[O]pposition clause claims grounded in isolated comments are not always doomed to summary judgment."

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The Fifth Circuit's Evolving View of Sexual Harassment Claims

- *Pullen v. Caddo Parish School Board*
  - 830 F.3d 205 (5th Cir. 2016)
    - Held that employer was not entitled to summary judgment based upon Ellerth/Faragher immunity because there was evidence employees were not trained or told about employer's policy prohibiting sexual harassment and policy was not posted in a conspicuous location.

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The Fifth Circuit's Evolving View of Sexual Harassment Claims

- *Seibert v. Jackson County, Mississippi*
  - 851 F.3d 430 (5th Cir. 2017)
    - Held that reasonable jurors could have found for plaintiff on intentional infliction of emotional distress claim even if it also found defendants were not liable under Title VII
    - Fifth Circuit held jury could have believed plaintiff was subjected to continual, persistent unwelcome sexual harassment, such as would satisfy Mississippi's requirement that an IIED claim be based on "a pattern of deliberate, repeated harassment over a period of time" but that did not "affect a term, condition, or privilege of employment" as required under Title VII

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Most Recent Cases

- *Taliaferro v. Lone Star Implementation & Electric Corp.*
  - 693 F. App'x 307 (5th Cir. 2017)
    - Held that employer's "zero tolerance" policy did not alone give rise to unlawful retaliation claim
    - Affirmed Rule 12(b)(6) dismissal of Title VII retaliation claim where employee failed to demonstrate a "reasonable belief" that a single text-message exchange constituted unlawful sexual harassment

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Most Recent Cases

- *Malin v. Orleans Parish Communications District*
  - 2018 WL 921584 (5th Cir. 2018)
    - Held that no reasonable employee would believe Human Resources Manager's comments describing her sex life were sufficiently severe or pervasive to constitute unlawful harassment
    - Fifth Circuit affirmed Rule 12(b)(6) dismissal of Title VII claims, holding comments detailing HR Manager's sex life made on six occasions over the course of two month period of time did not "provide a reasonable basis" for concluding there was severe or pervasive harassment
    - "[I]t is not plausible that a reasonable person would believe Hobson's conduct was objectively pervasive or severe."

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Most Recent Cases

- *Fulton v. Mississippi State University*
  - 2018 WL 651342 (N.D. Miss. Jan. 31, 2018)
    - Denied employer's motion to dismiss for failure to state a Title VII retaliation claim
    - Held that employee who alleged she was terminated because she associated with coworker who complained of sexual harassment "potentially engaged in protected activity" required to sustain retaliation claim

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Most Recent Cases

- *Moore v. Bolivar County, Mississippi*
  - 2017 WL 5973039 (N.D. Miss. Dec. 1, 2017)
    - Denied summary judgment on quid pro quo sexual harassment claim where, under cat's paw doctrine, genuine issue of material fact existed with regard to whether supervisor's meetings with decision maker were a but-for cause of plaintiff's termination

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- *Moore v. Bolivar County, Mississippi (Cont.)*
  - Granted summary judgment on hostile work environment sexual harassment claim on the basis of *Ellerth/Faragher* affirmative defense
    - Found that a reasonable juror could find sufficiently severe or pervasive harassment
    - However, found that employer was entitled to affirmative defense in part because employee failed to follow employer's harassment reporting procedures

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- *Moore v. Bolivar County, Mississippi (Cont.)*
  - Denied summary judgment on Title VII retaliation claim based on rejection of supervisor's sexual advances
    - Citing *Black v. City and County of Honolulu*, 112 F.Supp.2d 1041, 1049 (D. Haw. 2000), district court found employee's rejection of supervisor's sexual advances constituted protected activity under Title VII
    - *But cf.*, *LeMaire v. Louisiana*, 480 F.3d 383, 389 (5th Cir. 2007) (affirming dismissal of retaliation claim based only on rejection of sexual advances); and
    - *Frank v. Harris County*, 118 F. App'x 799 (5th Cir. 2004) (same)

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- *Moore v. Bolivar County, Mississippi (Cont.)*
  - Granted summary judgment on Title VII retaliation claim based on association with family member who refused to participate in defense of unrelated Title VII suit
    - Citing *Merkel v. Scovill, Inc.*, 787 F.2d 174, 180 (6th Cir. 1986), district court found that "refusal to cooperate in an employer's investigation of a claim is not a protected activity under Title VII."
    - Because family member did not participate in a protected activity, employee's association-based retaliation claim failed

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Questions

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