Conducting Effective Workplace Investigations

Wednesday, February 22, 2012

Foster Pepper PLLC
Seattle, Washington

Presented by:

FOSTER PEPPER PLLC

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A Practical Guide For Washington Employers

Employment Law Update

The Seattle Times

Feb. 13, 2012

Gregoire signs gay marriage into law

With Gov. Chris Gregoire's signature on Monday, Washington joins six other states and the District of Columbia in allowing same-sex couples to marry.

By Lornet Turnbull

Seattle Times staff reporter

OLYMPIA — Eight years ago, Jane Abbott Lighty and Pete-e Petersen walked into the King County Recorder's Office and applied for a license to marry.

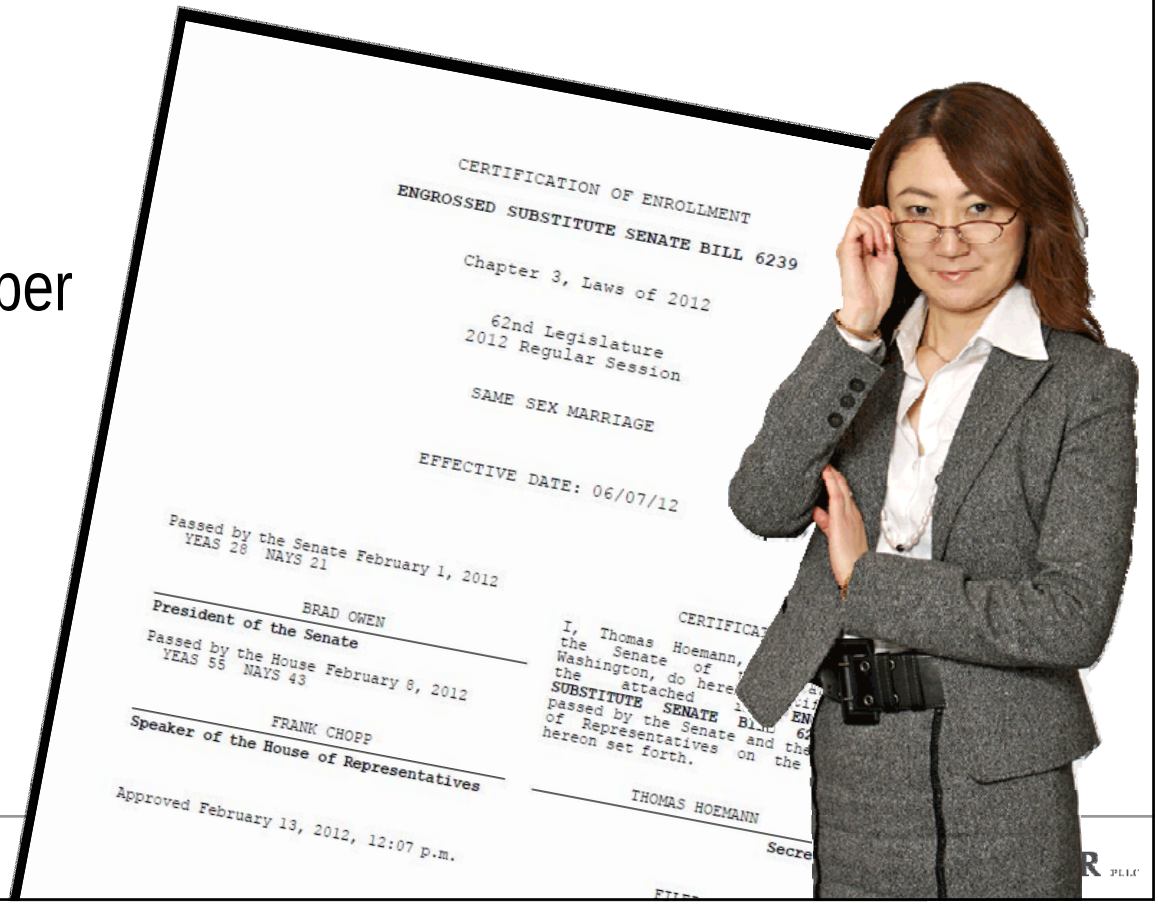
From Boston to San Francisco, gay marriage was in the air and the two women, by then together nearly three decades, were among dozens of gay couples challenging Washington's ban on such unions.

They were denied a license, and as they left, Petersen recalled, "Jane and I turned around and said: 'We'll be back.' "

At the state Capitol Monday, Petersen and Lighty looked on as Gov. Chris Gregoire signed into law landmark legislation making it possible for them to eventually go back for that marriage license — decades after they first met on a blind date in Sacramento, Calif., and fell in love.

How Will it Affect Me?

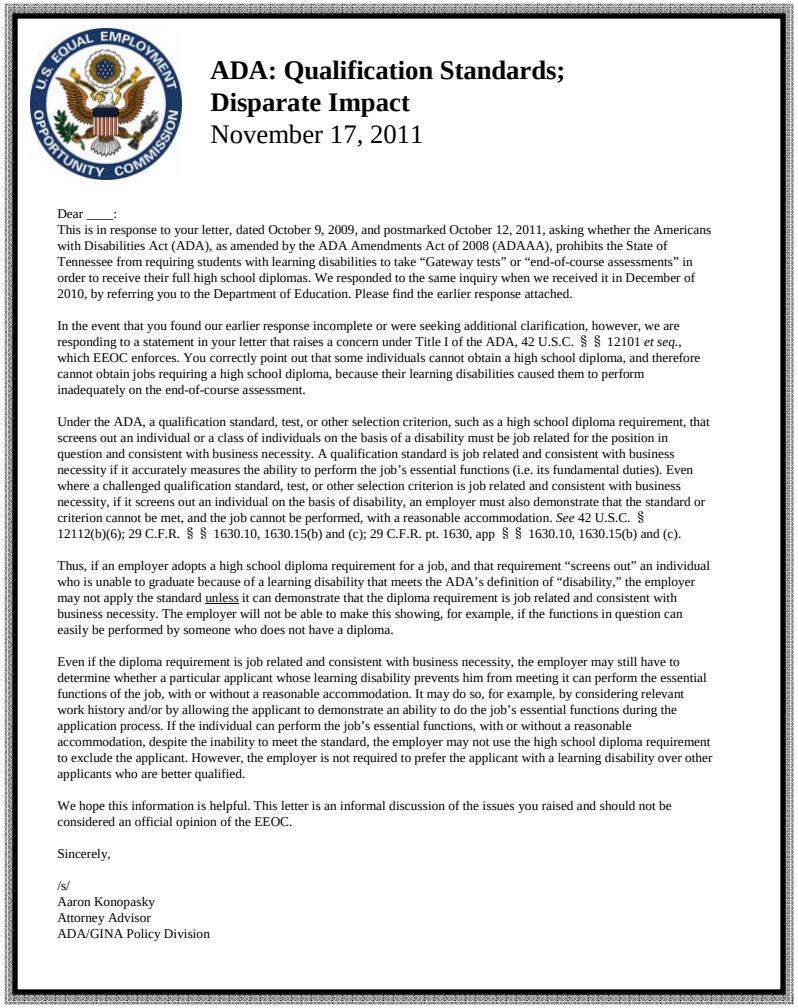
- Directly impacts domestic partnership law
- Changes coming to employment and benefits
- Effective June 7, 2012
- Referendum in November
- Watch the blog!



Washington Imposes New Duties to Protect Health Care Workers From Hazardous Drug Exposure

- Applies to "**health care facilities**"
- Requires **protection** from "hazardous drugs" as defined by 2010 NIOSH report
- Health care facilities **must** develop and implement multifaceted program
- Takes effect in stages beginning **January 1, 2014**
- Take away: health care employers have much work to do

High School Diploma Requirements
May Be Impermissible



ADA: Qualification Standards; Disparate Impact
November 17, 2011

Dear ____:
This is in response to your letter, dated October 9, 2009, and postmarked October 12, 2011, asking whether the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA), prohibits the State of Tennessee from requiring students with learning disabilities to take "Gateway tests" or "end-of-course assessments" in order to receive their full high school diplomas. We responded to the same inquiry when we received it in December of 2010, by referring you to the Department of Education. Please find the earlier response attached.

In the event that you found our earlier response incomplete or were seeking additional clarification, however, we are responding to a statement in your letter that raises a concern under Title I of the ADA, 42 U.S.C. § § 12101 *et seq.*, which EEOC enforces. You correctly point out that some individuals cannot obtain a high school diploma, and therefore cannot obtain jobs requiring a high school diploma, because their learning disabilities caused them to perform inadequately on the end-of-course assessment.

Under the ADA, a qualification standard, test, or other selection criterion, such as a high school diploma requirement, that screens out an individual or a class of individuals on the basis of a disability must be job related for the position in question and consistent with business necessity. A qualification standard is job related and consistent with business necessity if it accurately measures the ability to perform the job's essential functions (i.e. its fundamental duties). Even where a challenged qualification standard, test, or other selection criterion is job related and consistent with business necessity, if it screens out an individual on the basis of disability, an employer must also demonstrate that the standard or criterion cannot be met, and the job cannot be performed, with a reasonable accommodation. *See* 42 U.S.C. § 12112(b)(6); 29 C.F.R. § § 1630.10, 1630.15(b) and (c); 29 C.F.R. pt. 1630, app § § 1630.10, 1630.15(b) and (c).

Thus, if an employer adopts a high school diploma requirement for a job, and that requirement "screens out" an individual who is unable to graduate because of a learning disability that meets the ADA's definition of "disability," the employer may not apply the standard unless it can demonstrate that the diploma requirement is job related and consistent with business necessity. The employer will not be able to make this showing, for example, if the functions in question can easily be performed by someone who does not have a diploma.

Even if the diploma requirement is job related and consistent with business necessity, the employer may still have to determine whether a particular applicant whose learning disability prevents him from meeting it can perform the essential functions of the job, with or without a reasonable accommodation. It may do so, for example, by considering relevant work history and/or by allowing the applicant to demonstrate an ability to do the job's essential functions during the application process. If the individual can perform the job's essential functions, with or without a reasonable accommodation, despite the inability to meet the standard, the employer may not use the high school diploma requirement to exclude the applicant. However, the employer is not required to prefer the applicant with a learning disability over other applicants who are better qualified.

We hope this information is helpful. This letter is an informal discussion of the issues you raised and should not be considered an official opinion of the EEOC.

Sincerely,

/s/
Aaron Konopasky
Attorney Advisor
ADA/GINA Policy Division

"[A] qualification standard, test, or other selection criterion, such as a **high school diploma requirement**, that screens out an individual or a class of individuals on the basis of a **disability** must be job related for the position in question and consistent with business necessity."

How Will it Affect Me?

- Evaluate whether diploma requirement is needed
- Be prepared to demonstrate need
- Consider exceptions

New Training Requirements for Spirits Retailers

- Initiative 1183 **privatized** liquor sales in Washington
- Retailers **must provide** training to clerks and supervisors
- Liquor Control Board will develop “responsible vendor program”

Take away:
Retailers must enhance training

The Seattle Times

Liquor board, retailers gear up to implement I-1183

More than 900 state employees will lose their jobs.

By Melissa Allison
Seattle Times business reporter

People who make a living selling liquor scrambled Wednesday to grasp how voters' resounding approval of Initiative 1183 will affect them, while a Northwest grocery-industry representative speculated about alcohol deregulation spreading to other states.

The passage of I-1183 means the state will stop selling liquor by June 1, when grocery stores will begin legally selling spirits for the first time since Prohibition began. The initiative received 60 percent of the statewide vote.

Everyone from wine-shop owners to distillers to

PREV 1 of 3 NEXT

ELAINE THOMPSON / AP

enlarge

Store manager Dean Doces stocks shelves at a state liquor store Wednesday in Seattle. Such stores will close as a

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Employee Investigations:

A Practical Guide For Washington Employers

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PART 1:
Investigation Basics

When Should an Employer Investigate?

- When required by law
- When required by policy statement or handbook
- When it provides a defense in litigation
- When there is a substantial risk of erroneous decision
- When other interests would be served

What Should Be Done First?

- Stop, think and plan
- But be ready to move promptly
- Consult with counsel

Who Will Investigate?

- EEOC: someone impartial and well-trained
- Special challenges for small businesses and investigations involving high-level employees
- Having a lawyer investigate
- Outside investigators
- Multiple investigators
- Law enforcement participation

What Should the Investigator Do?

- Gather facts only or also make the decision?
- What type of report should be prepared?
- How should information be recorded?

Who Should Be the Decision Maker?

- The investigator?
- More than one person?
- A member of management? The Board of Directors?
- Qualities
  - *Impartial*
  - *A good track record*
  - *A good witness*

What Interim Actions Should Be Taken?

- Temporary transfers or shift or reporting changes
- Administrative leave pending investigation
- Changes for the complainant should be voluntary
- Memorandum to complainant, alleged wrongdoer and witnesses
- Tell everyone that retaliation is prohibited

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PART 2:
Nature of Investigation

Legal Cautions in Investigations

- Union Rights
- Employee Self-Incrimination
- Due Process

Weingarten Rights

- Weingarten Rights stem from a 1975 U.S. Supreme Court decision
- The case involved a lunch counter employee who was questioned about the theft of some minor food items.

NLRB vs. Weingarten, Inc., 420 U.S. 251 (1975)

Weingarten Rights – The Basics

If during an interview or investigation, an employee feels that disciplinary action could result, s/he may request that a union representative be present to assist.

If during an interview or investigation, an interviewer becomes aware that disciplinary action may be taken, s/he must inform the employee of that fact, and what s/he may be charged with.

The Garrity Rule

***Garrity v. New Jersey*, 385 U.S. 493 (1967)**

The Garrity Rule

- The Garrity Rule is **not automatically triggered** simply because questioning is taking place.
- The officer **must announce** that s/he wants the protections under *Garrity*.
- If a written statement is being taken from an officer, the officer **should insist** that the Garrity Warning actually be typed into the statement.
- Invoking *Garrity* **does not mean** that an employee may refuse an order to answer questions; s/he could still face charges for insubordination.

Loudermill Rights

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (U.S. 1985)

Loudermill Rights

"The tenured public employee is **entitled** to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

Loudermill Rights

- Oral or written notice of the charges;
- An explanation of the employer's evidence; and,
- An opportunity to be heard in response to the proposed action.

Attorney-Client Privilege

OR

Work Product?

Attorney-Client Privilege

The core elements of any attorney-client privileged communication **must be present**:

(1) a communication,

(2) among privileged persons,

(3) made in confidence, and

(4) for the purpose of seeking or obtaining legal assistance.

Work Product Privilege

***Soter v. Cowles Publishing*, 162 Wn.2d 716 (2007)**

Work Product Privilege

In *Soter*, the Supreme Court recognized that work product under the Public Disclosure *(now Public Records)* Act is the same as work product under the Civil Rules (citing *Limstrom v. Ladenburg* (1998)).

Work Product Privilege

"Regardless of who the client is…

'The attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears.'"

Soter, 162 Wn.2d at 742

(citing *Port of Seattle v. Rio* (1977))

Investigation: Privileged?

***Morgan v. City of Federal Way*, 166 Wn.2d 747 (2009)**

Investigation: Privileged?

Whether or not hired by legal counsel; or, investigator is lawyer; investigation may be a record prepared in the normal course of business.

Investigation: Disclosure

- Performance evaluations exempt
- Records reflecting misconduct or discipline must be disclosed
- Unsubstantiated allegations: disclose investigation, but redact identifying information

Bellevue John Does v. Bellevue School District, 164 Wn.2d 199 (2008)

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PART 3: Interviews and Gathering Documents

Gathering documents

- Collect from all witnesses in advance
- Secure documents from employer
  - *Personnel files*
  - *Manager documents*
  - *Email and other electronic documents*
- Obtaining documents after witness interviews

Interviewing Witnesses

- Caution witness on seriousness, need for truthfulness and cooperation
- Discuss retaliation and confidentiality, but do not promise complete confidentiality
- Special concerns for attorney interviewers

Interviewing Witnesses (cont.)

- Physical set-up for the interview
- Outline questions for each person, but follow up
- See EEOC Guidance regarding interview questions

Interviewing Witnesses (cont.)

- Document each interview separately
- Seek and document facts, not opinions
- Document observations re demeanor, not conclusions
- Confirm what was said and ask for corrections
- Review and finalize notes promptly

Complainant Interview

- What do you want to have done?
- Identify witnesses
- Did alleged offender believe conduct was welcome?
- Appreciation for voicing concerns
- Ask what should be done for fair evaluation
- Report any concerns about recurrence or retaliation

Interview Alleged Offender

- Address union and due process issues
- Share enough information to allow alleged offender to respond
- Did complainant participate or consent?
- Ask about motive
- Identify witnesses
- Ask what should be done for fair investigation
- Caution regarding retaliation

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PART 4:
Difficult Witnesses and Judging Credibility

The Difficult Witness

- The Scripted Witness
- The Evasive Witness
  - Demand for specific questions
  - Refusal to provide details or name names
- The Scattered Witness
- The Emotional Witness
- The Threatening Witness

Witness Credibility

- Bias
- Corroboration
- Plausibility
- Memory
- Demeanor
- Personal observations
- Employment history & character

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PART 5:
Evaluating The Evidence and Making Decisions

Investigator: Closing Gaps

- Review all notes and documents
- Revisit witnesses as needed to clear up inconsistencies
- Determine if additional witnesses or documents are needed

Decision-Making: Review All Relevant Information

- Investigator's report
- Critically review complainant's and alleged wrongdoer's positions
- Review key policies, documents, statements

Potential Outcomes

- Complainants' allegations **are** supported
- Complainants' allegations **are not** supported
- **Inconclusive:** allegations cannot be proven or disproven

Complainant's Allegations Are Supported

- What is the appropriate discipline for the wrongdoer?
  - *Disciplinary counseling*
  - *Last chance agreement*
  - *Suspension*
  - *Transfer or reassignment*
  - *Demotion*
  - *Discharge*

Complainant's Allegations Are Supported

- Considerations in determining the appropriate level of discipline for the wrongdoer:
  - *Seriousness of actions*
  - *Prior similar behavior*
  - *Remorse*
  - *Harm*
  - *Policies*
  - *Past practices*
  - *Contracts*

Complainant's Allegations Are Supported

- Should any additional remedy be provided to the complainant?
  - *Restore leave*
  - *Correct negative reviews*
  - *Reinstatement*
  - *Apology*
  - *Monitor treatment*

Complainant's Allegations Are ***Not*** Supported

- Ensure that complainant will not be retaliated against for raising employment concern

- Ensure that wrongdoer is not treated differently as a result of the investigation

Investigation Results Are Ambiguous

- If the complainant's allegations cannot be proven or disproven, consider taking the following actions:
  - *Ongoing monitoring of the relationship*
  - *Changing the reporting relationship*
  - *Workplace training on the issue*

Communicating the Investigation Outcome

Notify complainant and alleged wrongdoer of decision, emphasizing company's commitment to policies and compliance with law.

Notice to Complainant

- Explain results and remedial action, if any
- Provide a copy of any applicable policies
- Thank employee for bringing matter to your attention
- Ask him/her to report any additional misconduct or retaliation
- Revisit confidentiality

Notice to Alleged Offender

- Explain results and disciplinary action, if any
- Provide a copy of any applicable policies
- No retaliation against the complainant
- Revisit confidentiality

Other Investigation Follow-Up?

- Documenting the decision
- Memo to employee witnesses
- Communication to other employees
- Communication to outsiders

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PART 6:
Top 10 Elements of a Successful Investigation

Top 10 Elements of a Successful Investigation

1. Act promptly, but plan carefully before beginning.
2. Take necessary interim steps.
3. Respect all interests – managers, complainant, accused, witnesses, coworkers, union.
4. Don’t prejudge or choose sides.
5. Maintain good documentation.

Top 10 Elements of a Successful Investigation

6. Don’t finish until you have the evidence.
7. Focus on facts, not opinions.
8. Take appropriate action – don’t whitewash bad results.
9. Follow up.
10. Avoid retaliation.

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Employee Investigations:

A Practical Guide For Washington Employers

Speaker Bios

Presented by:

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Steven R. Peltin

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Fax: 206-749-2094

Practices

Employment and Labor Relations CHAIR

Industries

Emerging Companies and Venture Capital

Practice Summary

Steve's practice covers the gamut of employment and labor law. His advice practice is dedicated to helping employers solve problems such as employee discipline and discharge, leaves of absence, discrimination and harassment claims, and threats of employee violence. Steve enhances employee handbooks and prepares and negotiates employment, confidentiality and non-compete agreements. He also counsels executives and professionals on employment and separation agreements, and assists with corporate transactions such as purchases and sales of businesses.

On the litigation side, Steve represents public and private employers in lawsuits claiming discrimination, harassment, wrongful discharge and violations of wage and hour, employee benefits, trade secrets and non-compete obligations. He also appears before local, state and federal administrative agencies and arbitrators in employment and labor matters.

Experience

Foster Pepper PLLC
Member, 2010-Present

K&L Gates LLP / Preston Gates & Ellis, LLP
Partner, 1998-2010

Georgia-Pacific Corporation
Senior Counsel, 1996-1998

Altheimer & Gray, Chicago, IL
Associate and Partner, 1986-1996

Isham Lincoln & Beale, Chicago, IL
Associate, 1983-1986

U.S. District Court for the Western District of Wisconsin
Law Clerk for Hon. John C. Shabaz, 1982-1983

Bar Admissions

Washington, 1999

Illinois, 1983

Representative Cases

Won a jury trial for an employer accused of age discrimination by laid-off union employee.

Prevailed in a hearing before the United States Department of Labor brought by a union business agent who claimed that the company conspired with the union to discharge him.

Co-counsel in class action claiming pay for commuting in company vehicle; certification defeated and individual claim resolved promptly.

Co-counsel for large employers in two US Department of Labor collective actions claiming that employees worked off the clock; summary judgment obtained in one case, and the other was settled favorably.

Won summary judgment on discrimination / harassment claim for financial services company.

Obtained temporary restraining orders in two cases where employees removed and refused to return computerized documents and information.

Won summary judgment on sex bias claim by male employee of performing arts client.

Convinced OSHA that a safety whistleblower on a construction site was not subject to a hostile work environment.

Obtained anti–harassment orders against former employees.

Defended company in ERISA case brought by former executive seeking payments under a Supplemental Executive Retirement Plan.

Representative Transactions

Employment and labor counsel in sales of business, including drafting of purchase agreement language, preparation of offer letters, executive employment agreements and employee communications.

Assistance to client in reductions in force.

Counseling of clients facing threat of workplace violence.

Creation of documentation for background investigations, hiring, leaves of absence, requests for disability accommodation, last chance agreement and severance agreements.

Preparation on policies such as travel pay, use of cell phones and blogging.

Management training on employment law topics, including avoiding harassment and discrimination, performance management and hiring.

Activities

Seattle Theatre Group
Board of Directors
Executive Committee

University Preparatory Academy
Board of Directors
Chair of Personnel Committee

Publications

Steve Peltin is a frequent contributor to Foster Pepper's Washington Workplace Law blog.
Check out the latest news in this fast-changing area at: **www.washingtonworkplacelaw.com**.

Back to Basics: Family and Medical Leaves (Part II)
Back to Basics: Family and Medical Leaves (Part 1)
Can't I Require a Job Applicant to Have a High School Diploma?
Not So Fast II: NLRB Again Delays Employer Posting Requirements
Court Rejects Arbitration Award Reinstating Employee Who Hung Noose at Work
Interns & Volunteers: Do We Really Have to Pay Them?
Letting Someone Else Dig for the Dirt: Hiring Vendors to Assist in Social Media Searches
Some Things Don't Have to Be In Writing: Supreme Court Protects Employees Against Retaliation After Making Verbal Complaints of Wage and Hour Violations
Unsafe at Any Speed: Unauthorized Passengers in Employer-Owned Vehicles May Sue Employer for Driver's Negligence

Bad Acts: Smaller Employers Should Confront Threats of On-The-Job Physical Assaults
Author, *Washington Journal*

Telecommuting: Legal and Management Risks For Employers
Author, *Corporate Counsel Magazine*

Reducing Telecommuting Management Risks
Author, *National Underwriter Magazine*

How To Reduce Workplace Violence
Author, *National Underwriter Magazine*

Whose Workforce Is It Anyway? The Worker Adjustment and Retraining Act in the M&A Context
Author, *Preston Gates & Ellis LLP E-Alert*

50-State Survey of Employment Libel and Privacy Law, Washington Chapter
Author, *Media Law & Resource Center*

Hiring Employees: Disability Questions and Medical Exams
Author, *Realty & Building*

Workplace Sexual Harassment
Author, *Realty & Building*

Department of Labor Expands FMLA Leave Rights for Non-traditional Families
Author, *K&L Gates Labor and Employment Alert*

News

It's Not Just Paid Time Off -- It's the Law: Attorneys explain what Seattle's new sick leave ordinance means for employers
Quoted in *Puget Sound Business Journal* - September 2011

Your Office Away from the Office
Quoted in *Utah CEO Magazine*

Keeping violent employees out of the workplace
Quoted in *Risk Management Magazine*

10 Considerations in Developing Telecommuting Policies and Agreements
Quoted in HR.COM

Presentations

Managing the Process of Labor Negotiations
Panelist, WFCA 63rd Annual Conference

Out of Sight but Not Out of Mind: Untangling Employer Obligations under FMLA and Other Leave Statutes
Speaker/Moderator, Foster Pepper Client Briefing

FMLA and Leave Law
Speaker, 14th Annual Labor & Employment Law Conference, The Seminar Group

Social Media in the Workplace
Speaker/Moderator, Foster Pepper Client Briefing

Payroll Management
Speaker, Lorman Educational Services

Time Off: State and Federal Laws on Employee Leave, Vacations and Holidays
Speaker, Lorman Educational Services

When Hand Washing is Not Enough: Legal Challenges Presented By the Flu Pandemic
Speaker, K&L Gates Breakfast briefing

Recent Developments under the Family and Medical Leave Act
Speaker, National Council of State Housing Agencies

10 Scary Issues You Need to Know About Your Employees
Speaker, ASTRA Women's Business Alliance

New Developments in Employment Law
Speaker, Seattle CFO Arts Roundtable

Best Practice in FMLA Administration
Speaker, Council on Education in Management

Conducting Effective Investigations Into Employee Complaints
Speaker, PUD and Municipal Attorneys Association

Cyberstalking: The Washington Employer's Perspective
Speaker, King County Bar Association

Blowing the Whistle: Policies & Procures under Sarbanes-Oxley
Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Workplace Investigations
Speaker, Council on Education in Management

Email and the Internet – Legal Challenges for Employers
Speaker, PUD and Municipal Attorneys Association

Minimizing Risks When Upsizing, Downsizing, and Using Alternative Work Arrangements
Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Negligent Hiring Liability, Pre-Hire Investigations and the Fair Credit Reporting Act
Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Honors & Awards

The Best Lawyers in America® - Labor Law - Management, 2012

Education

Cornell Law School, J.D., *cum laude*, 1983

University of Wisconsin-Madison, B.A., *with distinction*, 1978
Phi Beta Kappa

Personal / Interests

Raised in Milwaukee, Wisconsin

Investor and part-time employee in *Nena*, Steve's wife's gift and vintage shop in Seattle's Madrona neighborhood

Enthusiastic traveler, dog owner, and poker player

FOSTER PEPPER PLLC

Steven W. Block

E-mail: sblock@foster.com

Tel: 206-447-7273 / Seattle

Fax: 206-749-2109

Practices

Litigation and Dispute Resolution
Real Estate
Business
Employment and Labor Relations

Industries

Transportation Industries CO-CHAIR
Infrastructure
Yacht and Aircraft

Practice Summary

Steve is a member with more than 25 years of litigation experience as a trial lawyer in four state jurisdictions. He concentrates his litigation practice on a variety of commercial, personal injury, transportation, regulatory, employment, product liability, and other matters. Steve has represented numerous local and national companies, including commercial property managers, transportation companies and consumers, fishing enterprises, tech industry businesses, and many others.

His transportation and logistics experience extends to all modes (domestic and international maritime, trucking, aviation and railroad). It includes cargo litigation, international trade and border security law, defense of personal injury claims, employment, insurance coverage, and general commercial disputes. Steve represents transportation companies in regulatory matters before various state and local government agencies.

Experience

Foster Pepper PLLC
Member, 2010-Present

Betts, Patterson & Mines, P.S.
Shareholder, 1997-2010

Bar Admissions

Washington

Alaska

New York

District of Columbia

United States District Courts
Western and Eastern Districts of Washington
Southern District of New York
District of Alaska

United States Courts of Appeal
Ninth Circuit

United States Court of International Trade

Activities

Anchorage Bar Association

Association of Transportation Law Professionals
National President, 2005-2006
Puget Sound Chapter President, 1999-2000

Conference of Freight Counsel

Defense Research Institute

Maritime Law Association of the United States
Proctor in Admiralty

National Industrial Transportation League
Associate Member

Seattle Transportation Club

Transportation Club of Tacoma

Transportation Lawyers Association
Co-chair, Admiralty and Maritime Law Committee

Washington Defense Trial Lawyers Association

Washington State Bar Association
Litigation Section

Publications

Steve is a prolific writer. He has authored numerous articles under his monthly column, *Legal Lookout*, as the western United States member of ForwarderLaw (an internet-based repository of legal resources of interest to the shipping community - ***forwarderlaw.com***); and as co-editor of the Motor Column of ATLP Highlights. He is a frequent contributor to *The Transportation Lawyer* (published by the Transportation Lawyers Association).

LEGAL LOOKOUT
(To read articles written before 2010, visit the Legal Lookout ARCHIVES page.)

January 2012 - The Discretionary Function Exception to Uncle Sam's Waiver of Sovereign Immunity shields Coasties from liability.

December 2011 - *Transportation Service Providers Other Than Carriers Limit Their Liability Too!*

November 2011 - *Mitigation of damages: the plaintiff's duty to its wrongdoer*

October 2011 - *The evolution of ocean shipping deregulation continues: FMC considers relaxing its requirement of specified rates in service contracts.*

September 2011 - *The Pennsylvania Rule: Violation of a Safety Regulation Creates Presumption of Fault*

August 2011 - *The Intersection of Admiralty's Limitations – of Liability and Right to a Jury Trial*

July 2011 - *Regal Beloit/Kirby* revisited: The Supreme Court's statutory analysis takes subsequent case law off course.

June 2011 - Charter parties: who's the "carrier" for purposes of COGSA liability?

May 2011 - Two maritime law queries: What constitutes "discharge" and "delivery" commencing the time to give notice of claim; and is a freight forwarder an "agent" in its relationships with ocean carriers and shippers?

April 2011 - Blurred lines: An intermediary's roles as cargo owner, dispatcher, and controller of trucking operations produce huge accident liability.

March 2011 - "It's just not fair": the doctrine of Unjust Enrichment under maritime law

February 2011 - The impact of a complex charter party arrangement on cargo liability.

January 2011 - But what about my attorneys' fees?!?!

November-December 2010 - *The politics of piracy: contemporary U.S. law addresses a timeless issue.*

October 2010 - *"The Shipping Act of 2010": the Evolution Continues...*

September 2010 - Expanding vessel owner liability and the rights of injured seamen: punitive damages are recoverable in vessel unseaworthiness claims.

July-August 2010 - *Regal Beloit: Sompo Japan* and kin step aside – the U.S. Supreme Court strikes back by clarifying that Kirby applies to interstate connecting hauls.

June 2010 - The Outer Continental Shelf Land Act: the law's increasing recognition of land-based, maritime personal injury

May 2010 - NVOCC Tariff Exemption: Deregulation's stepchild continues making progress toward parity with its industry peers.

April 2010 - Saving *Ryan*: vessel owners who utilize employees of other maritime service providers must indemnify their employers for personal injury liability.

March 2010 - Who's an ocean carrier's "agent" for purposes of extension of COGSA to land-based service providers?

February 2010 - A "customary freight unit" can be determined by flat rate a carrier charges for entire load, but the Rotterdam Rules might change the outcome …

January 2010 - Suit in a non-designated forum results in dismissal of case – and sanctions

HOT MOTOR CARRIER LAW

January 2012 - Recent Cases in Motor Carrier Law
November 2011 - Recent Cases in Motor Carrier Law
September 2011 - Recent Cases in Motor Carrier Law
July 2011 - Recent Cases in Motor Carrier Law
May 2011 - Recent Cases in Motor Carrier Law
March 2011 - Recent Cases in Motor Carrier Law
January 2011 - Recent Cases in Motor Carrier Law
November 2010 - Recent Cases in Motor Carrier Law
September 2010 - Recent Cases in Motor Carrier Law
July 2010 - Recent Cases in Motor Carrier Law
May 2010 - Recent Cases in Motor Carrier Law
March 2010 - Recent Cases in Motor Carrier Law

THE INTERMODAL LEAD

Volume 1, Issue 1
Volume 1, Issue 2
Volume 1, Issue 3
Volume 1, Issue 4
Volume 1, Issue 5
Volume 2, Issue 1
Volume 2, Issue 2
Volume 2, Issue 3
Volume 2, Issue 4
Volume 2, Issue 5
Volume 2, Issue 6
Volume 3, Issue 1

ADDITIONAL PUBLICATIONS

What's up on the Washington Wharves? Developments in the U.S. Pacific Northwest's Ports
(presented at the Canadian Transportation Lawyers Association 2010 Conference)

Maritime Modal Update
(presented at the Transportation Lawyers Association 2010 Conference)

By Land or By Sea... A Comparison of the Fundamentals of the Carmack and COGSA Liability Regimes
(presented at the Transportation Lawyers Association 2009 Conference)

Presentations

Kirby-Sompo Japan-Royal Beloit
Speaker, Federal Bar Association Admiralty Committee & WSBA CLE Course, Seattle, WA - October 21, 2011

Evolution from the Sea
Speaker, Transportation Lawyers Association Webinar Series: Brief Survey of Maritime Law's Origins, Impacts and Future - August 11, 2011

The Jones Act: How vessel operators are their employees' *de facto* comprehensive life, health and disability insurers
Speaker, 43rd Transportation Law Institute, Kansas City, MO - October 22, 2010

West Coast Port and Marine Developments
Speaker, 2010 Canadian Transport Lawyers Association Annual Conference, Vancouver, B.C. Canada - September 25-30, 2010

Multimodal Lightning Round
Speaker, 2010 TLA Annual Conference and CTLA Mid-Year Meeting, Hilton Head Island, SC - April 30, 2010

Legal Implications of Insurance Coverages Available to Transportation Intermediaries
Speaker, TIA 32nd Annual Convention and Tradeshow, Tucson, AZ - April 8, 2010

Honors & Awards

Washington Super Lawyers®, 2008-2011

Education

American University, J.D., 1986

Tulane Law School, LL.M. in Admiralty, 1994

Middlebury College, M.A. in Russian studies, 1985

Moscow's Pushkin Institute, Certificate, 1983

University of North Carolina, B.A. in Russian studies, 1982

Personal / Interests

College sports, running, scuba diving, reading, fitness

Languages: Fluent in Russian

FOSTER PEPPER PLLC

P. Stephen DiJulio

E-mail: dijup@foster.com

Tel: 206-447-8971 / Seattle

Fax: 206-749-1927

Practices

Municipal Government
Land Use
Litigation and Dispute Resolution
Employment and Labor Relations
Environmental
Real Estate

Industries

Right-of-Way CHAIR
Energy and Utilities
Infrastructure
Construction
Education and Schools
Sustainable Development / Green Building
Transportation Industries
Sports and Sports Facility

Practice Summary

Areas of Concentration:

Appellate Team
Condemnation and Eminent Domain
Design-Build
Public Disclosure Team
Real Estate Litigation
School Law

Steve's practice focuses on litigation involving state and local governments; civil service and public employment; and, land use and environmental law. His particular experience includes representation of jurisdictions on eminent domain, utilities (water, wastewater, storm water, solid waste systems), local improvement districts, facility siting and contractor litigation.

Experience

Foster Pepper PLLC
Member, 1990-Present
Associate, 1986-1990

City of Kent - Kent, Washington
City Attorney, 1982-1986

City of Seattle - Seattle, Washington
Assistant City Attorney, 1977-1982

Bar Admissions

United States District Court, Eastern District of Washington, 1993

United States Court of Appeals for the Ninth Circuit, 1980

Supreme Court, State of Washington, 1976

United States District Court, Western District of Washington, 1976

Representative Cases

Brower v. State/Football Northwest
137 Wn.2d 44, 969 P.2d 42 (1998) (Successful defense of public-private stadium project and legislative referendum).

Central Puget Sound Regional Transit Authority v. Miller
156 Wn.2d 403, 128 P.3d 588 (2006) (successful defense of Sound Transit eminent domain action)

HTK v. Seattle Popular Monorail
155 Wn.2d 612, 121 P.3d 1166 (2005) (successful defense of municipal condemnation authority)

Servais v. Port of Bellingham
127 Wn.2d 820, __ P.2d __ (1995) (amicus for Washington Public Ports Association in defense of protected public records).

Klickitat Citizens v. Klickitat County
122 Wn.2d 619, 860 P.2d 390 (1993) (Defense of comprehensive plan and environmental impact statement).

Rabanco v. King County
125 Wn.App. 794, 106 P.3d 802 (2005) (successful defense of county solid waste management authority)

Wong, et al. v. City of Long Beach
119 Wn. App. 628, 82 P.3d 259 (2004) rev. denied 152 Wn.2d 1015 (2004) (successful defense of city trail project)

Washington Waste Systems, Inc. v. Clark County
115 Wn.2d 74, 794 P.2d 508 (1990) (Defense of multi-million dollar government contract procurement).

Barnier v. City of Kent
44 Wn. App. 868, 723 P.2d 1167 (1986) (Defense of development assessment process).

Tiffany Family Trust v. City of Kent
119 Wn. App 262, 77 P.3d 354 (2003); affirmed 155 Wash.2d 225, 119 P.3d 325 (2005) (successful defense of assessments and rejection of civil rights claims)

Grant County Fire District No. 5 v. Moses Lake
Supreme Court, 150 Wn.2d 791, 83 P.3d 419 (2004) (Court reconsiders and unanimously reverses earlier ruling; affirms city annexation authority)

Jensen v. Torr
44 Wn. App. 207, 721 P.2d 992 (1986) (Defense of government permit process and immunity of government officials).

Prater v. City of Kent
40 Wn. App. 639, 699 P.2d 1248 (1985) (Defense of claims of discrimination in employment).

Babcock v. Mason County Fire Dist. No. 6
144 Wn.2d 774, 30 P.3d 1261 (2001) (amicus for Fire Commissioners Association regarding public duty doctrine)

Little Deli Marts, Inc. v. City of Kent
108 Wn. App. 1, 32 P.3d 286 (2001); 107 Wash. App. 1011 (2001) rev. denied 145 Wn.2d 1030 (2002) (successful defense of local improvement district process)

City of Seattle v. Auto Sheet Metal Workers Local 387
27 Wn. App. 669, 620 P.2d 119 (1980) (Defense of City charter and personnel system reorganization).

Leonard v. Civil Service Commission of City of Seattle
25 Wn. App. 699, 611 P.2d 1290 (1980) (Judicial review of administrative proceedings).

Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.
103 Wn. App. 411, 12 P.3d 1022 (2000) rev. denied 143 Wn.2d 1013 (2001) (successful defense of connection charges)

Petersen v. City of Seattle
21 Wn. App. 108, 583 P.2d 1259 (1978) (Constitutionality of reckless driving laws upheld).

City of Seattle v. Platt
19 Wn. App. 904, 578 P.2d 873 (1978) (Prosecution and public record defense in criminal proceedings).

City of Seattle v. Shepherd
93 Wn.2d 861, 613 P.2d 1158 (1980) (upholding crime victims' rights to recovery of stolen property)

Activities

Municipal League
Board of Trustees, 2010-Present

Washington State Association of Municipal Attorneys

International Municipal Lawyers Association

American Bar Association
Member, State and Local Government Law and Labor and Employment Law Sections

Washington State Bar Association
Member, Environmental and Land Use Law and Administrative Law Sections
Member, Amicus Brief Committee

Featured in 2009 Foster Pepper Pro Bono Annual Report
Pro Bono in Action - Advocating for Victim's Rights

King County Bar Association
Trustee, 1986-1989

South King County Bar Association
Trustee, 1986-1988

South King County Legal Clinic
Attorney Coordinator, 1985-1986
Volunteer, 1978-1989

University of Washington
Lecturer / Affiliate Professor, Evans Graduate School of Public Affairs
Winter Quarter 2001, "The Law of Public Administration"

Publications

Steve DiJulio is a contributor to Foster Pepper's Local Open Government Blog.
Check out the latest news in this fast-changing area at: http://www.localopengovernment.com.

2011 Washington Real Property Deskbook: Causes of Action, Taxation, Regulation
Editor

Council Meeting Conduct and Citizen Rights under the First Amendment
Author, Municipal Research and Services Center of Washington - November 2009

News

Breaking Down Freedom of Information Laws
The Willis Report, FOX Business News - July 29, 2010

Honors & Awards

The Best Lawyers in America® - Appellate Practice, 2012

Washington Super Lawyers®, 2002-2011

2010 Top Lawyer, *Seattle Metropolitan* magazine

Martindale-Hubbell AV rating

Education

Seattle University, J.D., 1976

University of Washington, B.A., 1973 (Oval Club Scholastic Honorary)

Rebecca Dean

Sole Practitioner | Rebecca Dean PLLC

In January 2006, after 17 years as an employment law litigator and advisor, Rebecca Dean opened her practice performing workplace investigations. She is a sole practitioner with over 30 years of experience in human resources and employment law.

Rebecca conducts independent investigations into workplace and employment issues at the request of employers or their counsel. Her recent assignments include performing factual investigations into sexual harassment complaints; gender, age, and race discrimination; violations of corporate ethical standards and policies; retaliation and identity theft. She also assisted a defense contractor by managing its responses to calls to the corporate ethics hotline. This includes not only conducting investigations, but guiding local human resources staff and evaluating investigations conducted by others.

Before attending law school, she spent 10 years as a human resources and labor relations professional.

Rebecca's litigation experience includes the successful defense of employment discrimination, wrongful termination, wage and hour, Family and Medical Leave Act claims, and other disputes arising out of the employment relationship.

FOSTER PEPPER PLLC

Katie Carder McCoy

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Practices
Litigation and Dispute Resolution
Employment and Labor Relations

Industries
Retail
Transportation Industries

Practice Summary
Areas of Concentration:
Electronically Stored Information - ESI Squad
Emergency Injuction Team
Directors & Officers
Intellectual Property
Appellate Team

Katie's practice is concentrated in Litigation and Dispute Resolution, with an emphasis in commercial and employment litigation. She has broad experience litigating complex commercial disputes in state and federal courts and private arbitration, including contract claims, business torts, trademark and intellectual property claims, fraud claims, partnership disputes, and shareholder derivative actions. Katie has significant trial experience in court and private arbitration.

In her employment practice, Katie has experience in both federal and state courts defending employers and managers in employment litigation involving claims for violation of federal and state anti-discrimination, disability, and family and medical leave laws, wrongful discharge in violation of public policy, and emotional distress claims. She also helps employers enforce non-competition agreements, protect trade secrets and other confidential business information, and prevent unfair competition through negotiation, temporary restraining orders, and other injunctive relief.

Experience

Foster Pepper PLLC
Associate, 2006-Present
Summer Associate, 2005

Lane County Legal Aid - Eugene, OR
Legal Extern, 2005

Oregon Department of Justice, Trial Division - Salem, OR
Law Clerk, 2004-2005

Bar Admissions

Washington, 2006
Admitted to practice

Representative Cases

Defense of Northwest-based global retailer against former supplier's breach of contract, fraud, CPA, and unjust enrichment claims. Fraud claims dismissed on summary judgment. Client deemed the prevailing party after 12-day trial in private arbitration, defeating plaintiff's $23 million damage claim and obtaining attorneys' fees and costs.

Defense of Northwest-based global retailer against claims brought by former supplier's bank involving supplier's sales contract and account. Dismissed on summary judgment in private arbitration, with attorneys' fees and costs awarded.

Defense of Northwest-based global retailer against fraudulent inducement, breach of contract, and unjust enrichment claims brought by former tax vendor. All claims denied following 4-day trial in private arbitration. Obtain temporary restraining order against Snohomish County employer's former employee who violated non-competition agreement and took trade secrets to direct competitor.

Obtain temporary restraining order in Whatcom County against signature gatherers trespassing on client's private property and harassing client's customers.

Defend mortgage company against trademark, breach of contract, false light and similar claims in federal court. Summary judgment dismissal of plaintiff's trademark infringement and dilution, breach of contract, false light, and misappropriation of likeness claims.

Activities

Washington State Bar Association

Featured in 2010 Foster Pepper Pro Bono Annual Report
KCBA Housing Justice Project

Featured in 2009 Foster Pepper Pro Bono Annual Report
Helping Secure Land Rights for the World's Poorest - Bangladesh

Featured in 2006 Foster Pepper Pro Bono Annual Report
Real Change

Star Guild, Children's Hospital Guild Association
Board Member, 2006-2010

Publications

Katie Carder McCoy is a contributor to Foster Pepper's Washington Workplace Law blog.
Check out the latest news in this fast-changing area at: **www.washingtonworkplacelaw.com**.

Presentations

Update on Developments in Employment Law
Speaker, Social Media in the Workplace, Seattle, WA - May 2011

Just Cause
Speaker, Civil Service Conference - October 2010

Compensation Issues under FLSA/Wage and Hour
Speaker, Fundamentals of Employment Law, Seattle, WA - June 2010

Education

University of Oregon School of Law, J.D., 2006
Oregon Law Review, Editor, 2004-2006
Graduate Teaching Assistant, University of Oregon President Dave Frohnmayer, 2006

University of Washington
B.A. Political Science, 2003
B.A. Business Administration, 2003

Personal / Interests

Interests include traveling internationally, cheering for the Huskies, practicing yoga, hiking and enjoying the Great Outdoors.

Born in Santa Ana, CA

Faye Chess-Prentice

Business Partner Manager - Senior Advisor | Swedish Medical Center

Faye Chess-Prentice is Business Partner Manager – Senior Advisor for Swedish Medical Center. She serves as the primary contact for all human resources matters for a specific assigned group of Swedish departments. She provides expert employee relations advice, consultation, and policy and legal analysis to the HR department.

Prior to joining Swedish, she was Deputy General Counsel for Seattle School District. As Deputy General Counsel, she provided legal advice on a full range of employment issues with an emphasis on hiring, employment contracts, preventive counseling, internal investigations, HR policies and practices, workplace disputes, dispute resolution and training. She represented the District in court proceedings, arbitrations and non-renewal hearings relating to claims and lawsuits based on the wrongful termination of employment contracts, civil rights discrimination, FMLA claims, FLSA issues and unfair labor practices.

After receiving her B.A. from Purdue University and her law degree from University of Cincinnati, she worked seven years as a staff attorney at The Public Defender Association in Seattle, WA where she defended hundreds of clients charged with felonies and misdemeanor offenses in jury and bench trials in Seattle Municipal Court, Seattle District Court, King County Juvenile Court and King County Superior Court.

Prior to joining the Seattle School District, she served as Deputy General Counsel for Seattle Housing Authority where she advised management staff on matters related to residential landlord-tenant (public housing and Section 8), employment and labor, contracts, program fraud, immigration, fair housing, civil rights, risk management, insurance-related matters, premises liability, torts, construction, procurement, real estate, and other key legal issues.

Ms. Chess-Prentice has served as Judge Pro Tempore in King Court District Court, State of WA since 1995. She presides over criminal calendars including jury trials, bench trials, pre-trial hearings, motion hearings & arraignments, review hearings, small claim hearings, anti-harassment and infraction hearings. Ms. Chess-Prentice is a member of the Washington Bar Association and Loren Miller Bar Association.

Speaker Materials

Presented by:

FOSTER PEPPER PLLC

Washington Workplace Law

Foster Pepper PLLC

Washington Passes Marriage Equality Act

Posted by Jay Donovan on February 14, 2012

On February 13, 2012, Governor Gregoire signed into law the Marriage Equality Act, which provides "equal protection for all families in Washington by creating equality in civil marriage and changing the domestic partnership laws."

Washington already provides equal rights to unmarried couples (whether gay, lesbian, or heterosexual) who enter into registered domestic partnerships. The Act goes further by permitting gay and lesbian couples to enter into civil marriages.

The Act will go into effect on June 7, 2012, although opponents are expected to gather sufficient valid voter signatures to force a referendum in November and thus delay implementation of the Act.

Foster Pepper will monitor and provide updates on this breaking development, particularly the impact of the Act on Washington employers.

Washington Workplace Law

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Washington Workplace Law

Foster Pepper PLLC

Can't I Require a Job Applicant to Have a High School Diploma?

Posted by Steve Peltin on January 10, 2012

For many jobs, employers require undergraduate or advanced degrees. For lower-level positions, a high school diploma often is expected, regardless of the nature of the job. However, the EEOC recently cautioned that such an educational requirement may be impermissible.

On November 17, the EEOC issued an opinion letter in response to an employer inquiry. The letter noted that some individuals with learning disabilities cannot pass high school exams and therefore don't have a diploma.

An applicant with a learning disability may be protected under the Americans with Disabilities Act (ADA) and under state and local law. Once a condition is determined to be a disability, the employer has a duty not to discriminate and an affirmative obligation to reasonably accommodate.

The ADA specifically regulates preemployment requirements. As the EEOC explained in the November 17 letter:

> [A] qualification standard, test, or other selection criterion, such as a high school diploma requirement, that screens out an individual or a class of individuals on the basis of a disability must be job related for the position in question and consistent with business necessity. A qualification standard is job related and consistent with business necessity if it accurately measures the ability to perform the job's essential functions (i.e. its fundamental duties). Even where a challenged qualification standard, test, or other selection criterion is job related and consistent with business necessity, if it screens out an individual on the basis of disability, an employer must also demonstrate that the standard or criterion cannot be met, and the job cannot be performed, with a reasonable accommodation.

The EEOC then applied these principles to a high school diploma prerequisite. If the prerequisite screens out applicants who could not graduate because of a learning disability, the employer must show that the diploma requirement is "job related and consistent with business necessity." If a person without a diploma can easily perform the essential job duties, the employer can't defend the requirement.

Even if the diploma requirement is demonstrably "job related and consistent with business necessity," the employer may still be unable to automatically exclude applicants with disabilities and without diplomas. Instead, an individualized review may be necessary. The EEOC suggested that the employer may need to consider the applicant's work history or allow the applicant to show that he or she can perform the essential job functions.

Although not discussed in the November 17 letter, a high school diploma requirement also can create potential liability for race or other discrimination. In 1970, the US Supreme Court, in *Griggs v. Duke Power*, invalidated a diploma requirement, finding that it violated Title VII of the Civil Rights Act of 1964. Duke Power required applicants to have either a high school diploma or a specified score on an IQ test. These criteria disqualified African Americans at a substantially higher rate than whites. Since Duke Power could not show that these requirements successfully measured the ability to do the jobs in question, it could not continue to use them.

If an employer would like to set educational requirements, how can it avoid discrimination claims?

1. Carefully evaluate whether the educational prerequisite really is necessary.
Is there a relationship between educational attainment and ability to perform the job? If not, the employer should consider whether to keep the requirement. The employer still can choose the best qualified candidate – including one with superior educational credentials – so long as all who can do the job have the chance to be considered on their merits.

2. If the educational requirement is necessary, be prepared to demonstrate why.
The starting point for the demonstration is the job description. Does it identify the essential job functions? If so, do those functions require a diploma? Are these same functions considered in the performance evaluation process? Will the supervisor – who oversees the performance of the work – support the requirement? If the employer doesn't know the answer to these questions, it isn't ready for the discrimination claim.

3. Even if the educational requirement is permissible, consider making an exception.
If an applicant reports a disability and requests an accommodation, the employer should consider allowing the applicant to prove job proficiency, either through past employment success or through on -site skills demonstration. The applicant may request other accommodations in the selection process, which the employer should consider. The employer should document all of these steps, so it can show that it responded properly to the accommodation request.

If you have questions about the information in this post or about your organization's application and selection process, please feel free to contact the Foster Pepper Employment and Labor Relations Practice Group.

Washington Workplace Law

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Toll Free: (800) 995-5902
Fax:
(206) 447-9700
Spokane office: *US Bank Building*
West 422 Riverside Avenue, Suite 1310Spokane, WA 99201-0302 Ph: (509) 777-1600
Fax:
(509) 777-1616

Washington Workplace Law

Foster Pepper PLLC

New Duties for Health Care Facilities to Protect Workers Against Hazardous Drugs

Posted by Amy Kauppila on January 26, 2012

On January 3, 2012, the Washington Department of Labor and Industries ("L&I") adopted the "Hazardous Drugs Rule" (the "Rule"), which is intended to protect workers from potentially harmful exposure to chemotherapy or other hazardous drugs. Washington is now the first state to require health care employers to take precautions such as installing proper ventilation or using protective equipment to prevent exposure. Without these measures, workers may be at risk for harmful effects such as cancer, reproductive and developmental problems, and allergic reactions. The Rule is consistent with recommendations from the National Institute of Occupational Safety and Health ("NIOSH"), OSHA, and The Joint Commission.

Who must comply with the Rule?

The Rule applies to all "health care facilities" that have employees with occupational exposure to hazardous drugs, including but not limited to hospitals, clinics, nursing homes, laboratories, and pharmacies.

What is a "hazardous drug"?

A "hazardous drug" is any drug that NIOSH identified as hazardous in its 2010 report. Some substances on the list are dangerous cancer-causing agents, while others cause different kinds of irreversible harm to health care workers – even at low exposure levels.

What does the Rule require?

The Rule requires affected employers to develop a hazardous drugs control program that addresses the following elements:

- A written inventory of hazardous drugs in the workplace.
- A current hazard assessment for the hazardous drugs.
- Hazardous drugs policies and procedures that cover among other things:
    - Engineering controls (equipment use and maintenance);
    - Personal protective equipment;
    - Safe handling practices for receiving and storage, labeling, preparing, administering, and disposing of hazardous drugs;
    - Cleaning, housekeeping, and waste handling;
    - Spill control;
    - Personnel issues (such as exposure to pregnant workers); and

- Employee training.

When does the Rule take effect?

The Rule will go into effect in three stages:

- By January 1, 2014, employers must complete and implement a written hazardous drugs control program.
- By July 1, 2014, employee training must be implemented.
- By January 1, 2015, employers must complete installation of required ventilated cabinets.

What should the employer do now?

L&I has not yet provided much guidance regarding developing and implementing a hazardous drugs control program. It has announced a plan to form a Hazardous Drugs Advisory Committee to develop model programs. As described here, L&I will host a public meeting on January 29 for those interested in the formation of the Advisory Committee.

In the meantime, employers subject to the Rule should begin initial assessments of their hazardous drug inventory and policies.

If you have questions about the Rule, please contact the Foster Pepper Employment and Labor Relations Practice Group or the Foster Pepper Health Care Practice Group.

Washington Workplace Law

Seattle office: *1111 Third Avenue, Suite 3400Seattle, WA 98101 Ph: (206) 447-4400*
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(206) 447-9700
Spokane office: *US Bank Building*
West 422 Riverside Avenue, Suite 1310Spokane, WA 99201-0302 Ph: (509) 777-1600
Fax:
(509) 777-1616

Washington Workplace Law

Foster Pepper PLLC

I-1183: New Training Requirements For Spirits Retailers

Posted by Janelle Milodragovich on November 11, 2011

Initiative Measure 1183, approved by voters, privatizes spirit sales in the State of Washington. Spirits retailers will face more stringent training and supervision requirements than previously required for sales of beer and wine.

Training Requirements For Retail Spirits Vendors

Under the new law, businesses seeking or renewing a "retail spirits license" must provide specified training of retail clerks and supervisors before they are permitted to sell spirits. The training must be renewed every five years, and the employer must maintain training records for all retail sales staff.

Although no training program currently exists, the Liquor Control Board is required to develop a "responsible vendor program" and create guidelines for employee training. In addition to the new training requirements, licensees must accept only certain forms of identification for alcohol sales, adopt related policies, post signs in the business, and keep records verifying compliance with the new requirements. We will provide updates as the Board defines the training requirements.

State Liquor Stores to Close by June 1, 2012 -- Stay Tuned

I-1183 takes effect immediately upon certification of the 2011 General Election by the Secretary of State. But, holders of a new spirits distributor license or spirits retail license may not commence distribution earlier than March 1, 2012; or for retailers, June 1, 2012 (the date retail sales by State Liquor Stores cease). Over the next few months the Liquor Control Board will issue regulations to implement I-1183. Sign up here to receive Foster Pepper's e-alerts on this rapidly changing industry. If you have questions about the training requirements for spirit sales licensees, please feel free to contact Foster Pepper's Wineries, Breweries and Distilleries Group.

Washington Workplace Law

Seattle office: *1111 Third Avenue, Suite 3400Seattle, WA 98101 Ph: (206) 447-4400*
Toll Free: (800) 995-5902
Fax:
(206) 447-9700
Spokane office: *US Bank Building*
West 422 Riverside Avenue, Suite 1310Spokane, WA 99201-0302 Ph: (509) 777-1600
Fax:
(509) 777-1616

CONFIDENTIAL

MEMORANDUM

TO: Complaining Employee

FROM: Executive

DATE:

[Employer] will conduct an investigation arising out of your allegations that Accused Employee violated Employer policy or otherwise acted improperly by _____. These allegations may be clarified in the course of the investigation. [Investigator] is conducting the investigation.

You will play an important role in this investigation. You will need to provide an accurate and complete account of any relevant facts and provide candid answers to [Investigator]'s questions. You also should provide any relevant records or files. [Investigator] will contact you to set up a time for an interview.

Based on the investigation, I will reach a conclusion about whether there was conduct that violated policy or otherwise was inappropriate, and, if so, what action should be taken. We will complete this investigation as soon as possible, but we need to make sure that we are thorough.

I ask that you treat this as a confidential matter. To that end, please do not discuss the allegations or the investigation with other employees or outsiders.

[Employer] prohibits retaliation toward anyone who brings a complaint, reports possible violation of our policies or participates in an investigation.

If any questions arise during the investigation, or if you have any concerns about it, please let [Investigator] or me know. Also, please let [Investigator] or me know if there is anything else [Employer] should do to ensure that it conducts a fair and complete investigation.

Thank you for your anticipated cooperation.

CONFIDENTIAL

MEMORANDUM

TO: Accused Employee

FROM: Executive

DATE:

[Employer] will conduct an investigation arising out of allegations by Complaining Employee that you violated Employer policy or otherwise acted improperly by _____. These allegations may be clarified in the course of the investigation. [Investigator] is conducting the investigation.

You will play an important role in this investigation. You will need to provide an accurate and complete account of any relevant facts and provide candid answers to [Investigator]'s questions. You also may be asked to provide records or files. [Investigator] will contact you to arrange for an interview.

Based on the investigation, I will reach a conclusion about whether there was conduct that violated policy or otherwise was inappropriate, and, if so, what action should be taken. We will complete this investigation as soon as possible, but we need to make sure that we are thorough.

I ask that you treat this as a confidential matter. To that end, please do not discuss the allegations or the investigation with employees or outsiders.

[Employer] prohibits retaliation toward anyone who brings a complaint, reports possible violation of our policies or participates in an investigation.

Because of the nature of the allegations, I request that you not delete or transfer any computer files or destroy any paper documents that may be relevant to the investigation.

If any questions arise during the investigation, or if you have any concerns about it, please let [Investigator] or me know. Also, please let [Investigator] or me know if there is anything else [Employer] should do to ensure that it conducts a fair and complete investigation.

Thank you for your anticipated cooperation.

CONFIDENTIAL

MEMORANDUM

TO: Witness

FROM: Executive

DATE:

[Employer] will conduct an investigation arising out of allegations from Complaining Employee about his/her employment with this organization [*or more specific information*]. These allegations may be clarified in the course of the investigation. [Investigator] will conduct the investigation.

You will play an important role in this investigation. You will need to provide an accurate and complete account of any relevant facts and provide candid answers to [Investigator]'s questions. You also should provide any records or files that [Investigator] may request.

I ask that you treat this as a confidential matter. To that end, please do not discuss the allegations or the investigation with other employees or with outsiders.

[Employer] prohibits retaliation toward anyone who brings a complaint, reports possible violation of our policies or participates in an investigation. Please advise me at once if you believe that you are experiencing any retaliation.

If any questions arise during the investigation, or if you have any concerns about it, please let [Investigator] or me know.

Thank you for your anticipated cooperation.

CONFIDENTIAL

MEMORANDUM

TO: Complaining Employee

FROM: Executive

DATE:

[Employer] has completed its investigation arising out of your allegations that Accused Employee violated policy or otherwise acted improperly by _____.

[Investigator] conducted the investigation, speaking with a number of witnesses and reviewing documents. [Investigator] reported that you and the other witnesses fully cooperated with the investigation. Thank you for that cooperation.

Based on [Investigator]'s report, I concluded as follows:

[Describe findings and any next steps or discipline.]

I ask that you continue to treat this as a confidential matter. Employer prohibits retaliation toward anyone who brings a complaint, reports possible violation of our policies or participates in an investigation. Please let me know at once if you become aware of any retaliation against you or any other employees who met with [Investigator].

Thank you again for your assistance, cooperation and discretion.

CONFIDENTIAL

MEMORANDUM

TO: Accused Employee

FROM: Executive

DATE:

[Employer] has completed its investigation arising out of Complaining Employee 's allegations that you violated policy or otherwise acted improperly by _____.

[Investigator] conducted the investigation, speaking with a number of witnesses and reviewing documents. [Investigator] reported that you and the other witnesses fully cooperated with the investigation. Thank you for that cooperation.

Based on [Investigator]'s report, I concluded as follows:

[Describe findings and any next steps or discipline.]

I ask that you continue to treat this as a confidential matter. [Employer] prohibits retaliation toward anyone who brings a complaint, reports possible violation of our policies or participates in an investigation. I caution you not to retaliate against Complaining Employee or any of the other employees who met with [Investigator].

Thank you again for your assistance, cooperation and discretion.

CONFIDENTIAL

MEMORANDUM

TO: Witness

FROM: Executive

DATE:

[Employer] has completed its investigation. [Investigator] spoke with a number of witnesses, including you. [Investigator] reported that you and the other witnesses fully cooperated with the investigation. Thank you for that cooperation.

Because the investigation concerned personnel matters, we cannot disclose [Investigator]'s findings or any action that we may take.

I ask that you continue to treat this as a confidential matter. [Employer] prohibits retaliation toward anyone who brings a complaint, reports possible violation of our policies or participates in an investigation. Please advise me at once if you experience any retaliation.

Thank you again for your assistance, cooperation and discretion.

WPUDA Municipal and PUD Attorney

MANAGING CLIENT CONFIDENCES: ATTORNEY CLIENT PRIVILEGE, DELIBERATIVE PROCESS PRIVILEGE, AND WORK PRODUCT PROTECTION

December 1, 2010
TULALIP RESORT
MARYSVILLE, WASHINGTON

P. Stephen DiJulio
FOSTER PEPPER PLLC
Seattle – Spokane

P. STEPHEN DiJULIO

P. Stephen DiJulio, a partner in the Seattle office of *Foster Pepper PLLC,* focuses his practice on litigation involving state and local governments.

Before joining FP in 1986, Mr. DiJulio was a Seattle Assistant City Attorney. He served in that capacity from 1977 through 1982, concentrating in labor-management relations and land use litigation. Mr. DiJulio was the City Attorney for the City of Kent from 1982 through 1986, serving as City Administrator in 1986.

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Mr. DiJulio has extensive trial experience in environmental and administrative actions. He served as Special Deputy Prosecuting Attorney in the eight lawsuits involving the Klickitat County solid waste management program, and the development of the Roosevelt Regional Landfill. See, e.g., *Klickitat Citizens v. Klickitat County,* 122 Wn.2d 619 (1993); *Waste Management v. Clark County*, 115 Wn.2d 74 (1990) (counsel to Washington State Association of Counties). He successfully defended King County's solid waste program in *Rabanco v. King County*, 125 Wn.App. 794 (2005).

He regularly represents local government in litigation over constitutional disputes and annexation. He successfully argued on behalf of Moses Lake before the Supreme Court in defense of cities' petition annexation authority. *Grant County Fire District No. 5 v. City of Moses Lake*, 150 Wn.2d 791 (2004). In *Brower v. State,* 137 Wn.2d 44 (1998) he represented the Seattle Seahawks in defense of a state-wide referendum election. And, in *City of Port Angeles v. Our Water-Our Choice*, ___ Wn.2d ___; 239 P.3d 589 (No. 82225-5, September 23, 2010), he argued successfully against the use of initiatives for municipal utility management decisions.

The City of Kent's transportation corridor and financing programs were represented by Mr. DiJulio, and were affirmed in *Little Deli Marts, Inc. v. City of Kent*, 108 Wn. App. 1 (2001); rev. denied 145 Wn.2d 1030 (2002) and in *Tiffany Family Trust v. City of Kent*, 119 Wn. App 262 (2003); affirmed 155 Wash.2d 225 (2005).

This paper is updated and modified from one presented previously to the Washington State Association of Municipal Attorneys; and, prepared with Christopher G. Emch, also a partner in Foster Pepper's Seattle office.

**MANAGING CLIENT CONFIDENCES:
ATTORNEY CLIENT PRIVILEGE,
DELIBERATIVE PROCESS PRIVILEGE,
AND WORK PRODUCT PROTECTION**

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1. INTRODUCTION

The attorney-client privilege is the oldest of the privileges — dating back to the 16th century. Marion J. Radson and Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799, 801 (2001). And, at least according to the Supreme Court in 1934, there is "no principle of law . . . more firmly established" than the deliberative process privilege. *Cornelius v. Seattle*, 123 Wash. 550, 559, 213 Pac. 17 (1934). The attorney work product doctrine is of more recent vintage, first appearing in *Hickman v. Taylor*, 329 U.S. 495, 675 S.Ct. 385, 91 L.Ed. 451 (1947). *See Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007).

These privileges, however, are not the only privileges that lawyers must be prepared to assert in challenge to or defense of government actions. The following materials highlight some recent decisions on privileges that may not be as familiar to all lawyers. From an ethical foundation, the application of these privileges must be considered unless waived by the client. RPC, at Preamble 4.

2. THE COMMON INTEREST DOCTRINE

2.1 Overview

The common interest doctrine is grounded in the attorney client-privilege. It is not an independent basis for privilege, but an exception to the general rule that the disclosure of privileged information to third parties waives the attorney-client or the work product privileges. *See generally* Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 196 (ABA, 4th Ed. 2001, as supplemented 2004). The common interest doctrine assumes the existence of a valid underlying attorney-client or work product privilege and a valid basis for exchanging information confidentially. The core elements of any attorney-client privileged communication or work product must therefore be present. *Id.* at 46; *see also Restatement (Third) of the Law Governing Lawyers* § 118 (2000). Likewise, regular exceptions to the privileges also apply in the common interest context. For example, if the legal assistance is knowingly sought or provided in furtherance or a crime or fraud, the communications made under the common interest doctrine would not be protected under the regular crime-fraud exception to the attorney-client privilege. *Epstein* at 416.

Generally, parties with a common legal interest may communicate among themselves and with the separate attorneys on matters of common legal interest for the purpose of preparing a joint strategy, and the attorney-client privilege will protect those communications

to the same extent as it would communications between each client and his own attorney. *See* Paul R. Rice, *Attorney-Client Privilege in the United States* §4:35 (West Group, 2nd Ed. 1999, as supplemented 2006). The common interest extension of the privilege protection typically applies only to communications that were relevant to, or advanced the interests of, the clients possessing the common interest. *Id.*

The common interest doctrine has been broadly applied, but not always uniformly or consistently. It is generally recognized that "[t]here is no clear standard for measuring the community of interests that must exist for the privilege to apply." *Rice* at § 4:36. Courts have applied it in both litigation and non-litigation contexts, as well as in both civil and criminal matters regardless of whether the participants are involved in the same or separate actions. The doctrine is variously referred to as the "common interest," "joint defense," "community of interest," or "allied lawyer" rule. It is more frequently referred to as the "common interest" doctrine in non-litigation contexts, and the "joint defense" rule where there is pending litigation.

In the joint defense context, it is not necessary that all parties actually be defendants in existing litigation. If third parties could reasonably anticipate that they may be sued separately or later joined in the pending action, they generally have a right to join forces with those already sued, or in the same position as themselves, to maximize their efforts in developing a defense strategy to the extent necessary. *Rice* at § 4:36. Thus, the participants in a collective effort to obtain legal advice or assistance can be actual or potential codefendants, or simply interested third parties who have a community of interests with respect to the subject matter of the communications. Common interests have been held applicable to the government and private litigants as well in the context of qui tam actions. *Id.*

Because of its potential application in a variety of circumstances, the common interest doctrine has been criticized by commentators who believe the courts often mangle and confuse common interest concepts and nomenclature, such as mixing up joint defense issues where two clients share the same lawyer, with true common interest cases where parties have common interests but separate lawyers. *Epstein* Supp. at 32. The commentators also criticize the push to expand the doctrine to cover corporate attorneys representing multiple clients, particularly where it could lead to abuses such as a cover for possible antitrust conspiracies. As such, they believe there is need for a Supreme Court decision to

clarify the scope and nature of the common interest doctrine. *Id.* Until then, we use what is available.

The common interest doctrine is largely a product of the common law. Thus, it may be governed by either state or federal law, depending on the nature of the action. Under Federal Rule of Evidence 501, federal courts apply state privilege law in connection with substantive issues that are governed by state law (e.g., diversity cases), but otherwise apply federal privilege law.

Although it has not been universally recognized and followed, The *Restatement (Third) of the Law Governing Lawyers* (2000) ("*Restatement"*) provides one general and fairly broad definition of the common interest doctrine that may be useful in both the state and federal contexts:

> (1) If two or more clients with a common interest in a litigated or a nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the clients have otherwise agreed, a [common interest] communication... is not privileged as between clients... in a subsequent adverse proceeding between them.

Restatement, at § 76.

No written agreement formalizing the common interest or joint defense relationship is generally necessary, although it is advisable as a means to delineate and clarify the common legal interests and joint enterprise. *See, e.g.*, *United States v. Stepney*, 246 F.Supp.2d 1069, 1079-80 n.5 (N.D. Cal. 2003) ("No written agreement is generally required to invoke the joint defense privilege); *Restatement* § 76, Comment (c) ("Exchanging communications may be predicated on an express agreement, but formality is not required). There must be evidence, however, that the parties understood and intended to engage in a cooperative effort to obtain legal assistance. *Rice* at §4.35. If a written agreement recites an operative date, that date probably will be given effect, even if the date predates the written agreement. Communications made after that date may be deemed privileged, while those made before may not. *Epstein* Supplement at 42-43. A written agreement can also be important in defining the mechanics and consequences of a party's withdrawal from the common enterprise.

The following discussion highlights and provides additional context about the common interest doctrine that may be relevant in both the state and federal contexts.

2.2 Washington Law on the Common Interest Doctrine.

Washington has long recognized the common interest rule, but it is not well developed and remains a fact-specific inquiry. State law currently provides no clear standard for measuring the community of interests that must exist for the common interest doctrine to apply. It appears that the only examples of "community of interest" cases thus far in Washington are situations where participants were actual or potential co-parties in litigation. But consistent with federal law, Washington law recognizes that clients with separate counsel may communicate among themselves and with attorneys on matters of common legal interest for the purpose of preparing a joint strategy, and the attorney-client privilege will protect those communications from outside parties. *See State v. Emmanuel,* 42 Wn. 2d 799, 259 P.2d 845, 854-55 (1953).

In *Emmanuel*, two separate parties and their respective counsel were present at a meeting to decide how to defend against a complaint for bribery. Subsequently, one became the prosecution's witness. The Washington Supreme Court concluded that the communications in questions were privileged because "[t]he meeting was held for a common purpose and communications made by either client in the presence of the attorneys were made for the purpose of obtaining legal advice in the preparation of their defense to this lawsuit .... [and] were intended to be confidential at least as to third persons not present at the conference." *Id*. at 815.

Other Washington decisions also generally have recognized a common interest privilege. *See Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 428, 878 P.2d 483 (1994) (noting the general rule that statement made to an attorney in the presence of a third person may ordinarily remain privileged when the third person is a joint client); *Olson v. Hass*, 43 Wn. App. 484, 487- 488, 718 P.2d 1 (1986) (acknowledging joint client common interest rule, and remanding to trial court for determination of facts for application of privilege); *Northern State Const. Co. v. Robbins*, 76 Wn.2d 357, 367, 457 P.2d 187 (1969) (guarantee agreement prepared for one party was not made for the mutual benefit of several parties, and therefore the communications between the requesting party and his attorney regarding the agreement remained privileged and were not waived in subsequent litigation between the various parties); *Halffman v. Halffman*, 113 Wash. 320, 324, 194 P. 371 (1920)

(where an attorney jointly advised both husband and wife regarding mutual quitclaim deeds, communications remained privileged in subsequent action involving third parties); *Hartness v. Brown*, 21 Wash. 655, 664-665, 59 P. 491 (1899) (where two persons having a common interest in pending litigation had a conference with the attorney representing one of them, communications between the attorney and the client were privileged and could not be shown to a third party).

Washington law also recognizes that when an attorney has acted for the mutual benefit of multiple parties, the attorney-client privilege does not apply in litigation between these parties. *Cummings v. Sherman*, 16 Wn. 2d 88, 132 P.2d 998, 1002-03 (1943) ("Thus, if two or more persons consult an attorney at law for their mutual benefit, and make statements in his presence, he may disclose those statements in any controversy between them or their personal representatives or successors in interest."); *Billias v. Panageotou*, 193 Wash. 523, 76 P.2d 987 (1938) ("The rule is uniform that in litigation between the same parties communications that had been made to an attorney for the mutual benefit of such parties are not privileged."); *Seattle Northwest Securities Corp. v. SDG Holding Co*., Inc., 61 Wn. App. 725, 812 P.2d 488 (1991) (same).

2.3 Federal Law on the Common Interest Doctrine.

2.3.1 Ninth Circuit Law.

Ninth Circuit case law analyzing the common interest doctrine also appears thin. However, a number of more recent Western District of Washington decisions help shed light on how the doctrine is currently applied in this federal jurisdiction.

In *Arkema, Inc. v. Asarco, Inc.*, 2006 WL 1789044 (W.D. Wash. June 27, 2006), Judge Leighton ruled against the disclosure of information protected by the common interest doctrine. That case concerned the privilege status of materials prepared for a common purpose by three lumber companies. In 1997, Manke Lumber Company, Weyerhaeuser, and Louisiana-Pacific entered into an agreement for the sharing of costs and information during the investigation and remediation of wood debris contamination of a waterway in Tacoma. The work was done pursuant to an agreed order with Department of Ecology under the Washington Model Toxics Control Act. The parties' agreement contained a confidentiality provision regarding "information developed, generated, or otherwise produced in connection with" this agreement, and noted their efforts were undertaken and were intended to constitute a joint defense in anticipation of litigation with respect to the site. The parties worked

together for over four years investigating wood debris in the area and developing a cleanup study report. However, the parties were unable to agree to on how to allocate their individual shares of the investigation costs and submitted their dispute to arbitration. 2006 WL 1789044 at *1.

Plaintiffs, who were not part of the agreement or the arbitration, sought the common interest material from Weyerhauser (via discovery requests) and Manke (via subpoena) in subsequent litigation. Production was resisted on the grounds of the joint defense privilege and work product immunity, and plaintiffs moved to compel. The Court upheld the privilege and denied plaintiffs' motion to compel. In so ruling, Judge Leighton noted that "[t]he joint defense privilege is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party. This privilege is meant to recognize the advantage of, or even the necessity for, an exchange or pooling of information between attorneys representing parties sharing a common interest in litigation, actual or prospective." *Id* at *2 (internal citations omitted).

In a related decision in which a reconsideration motion was denied, the Court clarified that the joint defense doctrine generally extends to work product. *Arkema, Inc. v. Asarco, Inc.*, 2006 WL 2254478 (W.D. Wash August 7, 2006). Judge Leighton noted that "the Court has already ruled that the arbitration in this case did not waive the work product or attorney client privilege in this case.... [b]ecause the arbitration in this case was in the common interests of the parties as they worked towards dividing environmental clean up costs, the parties maintained their common defense interests and the arbitration itself was essentially internal." *Id*. at *2.

In two more recent decisions, Judge Pechman provided additional guidance on how to protect privileged communications under the common interest and joint defense doctrines. These decisions suggest that, in this jurisdiction, the common interest doctrine and joint defense doctrine will be treated similarly and applied only when parties have agreed to a joint defense strategy, such as those illustrated in the 2006 *Arkema* cases.

In the first case, *Baden Sports, Inc. v. Kabushiki Kaisha Molten*, 2007 WL 1185680 (W.D. Wash. April 20, 2007), Judge Pechman held that the common interest doctrine did not protect privileged communications that were shared with a third party if the evidence failed to establish a sufficient common interest. The court stated that the party claiming protection under the common interest doctrine has the burden of establishing that (1) the communication was made by separate parties in the course of a matter of common interest; (2) the

communication was designed to further that effort; and (3) the privilege has not been waived. *Id.* at *1 (citing *In re Grand Jury Subpoena Duces Tecum* 112 F.3d 910, 922-923 (8th Cir. 1997)). More specifically, Judge Pechman noted that parties share a sufficient common interest when "the interest shared is similar to that shared by allied lawyers and clients who are working together in prosecuting or defending a lawsuit or certain other legal transactions . . . ." *Id.* (internal citations omitted).

The dispute in *Baden* arose from a third party sharing an opinion written by one of its attorneys with the defendant, Kabushiki Kaisha Molten ("Molten"). The opinion evaluated legal issues relating to Molten's new basketball design and Molten's sponsorship agreement with the third party. Because the third party voluntarily disclosed privileged communications to Molten, the plaintiff, Baden Sports, Inc. ("Baden"), argued that the communications were now discoverable in a patent suit relating to the basketball design. Responding to Baden's assertion that privilege had been waived, Molten argued that the common interest doctrine continued to protect the communications. Molten based its common interest argument on a factual claim that Molten initiated the legal inquiry and the third party conducted the inquiry with Molten's materials. However, the court found that the evidence failed to support those facts and held that a common interest between the parties was not sufficiently established. This suggested that something more than a mere shared interest in legal issues must be present before privileged information will be protected under the common interest doctrine.

A few months later, in a different case, Judge Pechman reexamined the common interest doctrine, applied the analysis described in *Baden*, and outlined an additional element. *Avocent Redmond Corp. v. Rose Electronics, Inc.,* 516 F.Supp.2d 1199 (W.D. Wash. Oct. 9, 2007). Treating the common interest doctrine and the joint defense doctrine as one in the same, she stated that the parties must invoke the doctrine by intending and undertaking a joint defense strategy. In *Avocent,* the plaintiff's predecessor Cybex Computer Products Corporation ("Cybex") and the defendant Rose Electronic were previously involved in separate, but related, litigation where both parties argued the invalidity of a specific patent. Although the separate actions were not consolidated, the district court consolidated the pretrial discovery.

Rose Electronic, as the defendant in *Avocent*, argued that the plaintiff's counsel should be disqualified because it previously represented Cybex and was able to access Rose Electronics' privileged communications relating to the patent. However, the court found that the communications accessed by Cybex were no longer privileged because the parties never

invoked the common interest or joint defense doctrine. Specifically, the parties never entered into a joint defense agreement and never met jointly with their respective counsel. Additionally, their respective counsel only met once to take a deposition, litigation costs were never shared, efforts were never made to jointly select experts, and the parties pursued separate strategies. Even though Cybex and Rose Electronic shared a common legal interest in demonstrating the invalidity of the patent, the court stated that it was insufficient to protect privileged communications because the parties did not agree to or engage in a joint strategy.

Like Washington law, the Ninth Circuit does not appear to have a clear and developed body of law on the common interest doctrine. The Ninth Circuit, however, generally recognizes in principle the common interest doctrine. *See, e.g. United States v. Montgomery*, 990 F.2d 1264, 1993 WL 74314, *4 (9th Cir. 1993) (unpublished decision) (recognizing the "exception to the confidentiality requirement of the attorney-client privilege for statements made by a defendant to his attorney in the presence of a codefendant who shares a common interest"); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir.1964) (privilege applied to oil companies' employees' statements about their grand jury testimony shared among their attorneys before return of indictment).

When parties are actually codefendants in the same litigation, the Ninth Circuit generally applies a broader definition of common interest and does not require the parties to have a joint strategy or defense. *See e.g., Hunydee v. United States*, 355 F.2d 183 (9th Cir.1965). In *Hunydee*, the Court held that the attorney-client privilege applied to a defendant's statements because they concerned a matter of common concern, although he and his codefendant generally had adverse interests and the meeting was not for purposes of a common defense. *Id.* at 184. The Court reasoned that whether the meeting was called to prepare a trial strategy or defense was not dispositive because it was the nature of the statements that controlled. *Id.* The Court therefore ruled that "where two or more persons who are subject to possible indictment in connection with the same transaction make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent they concern common issues and are intended to facilitate representation in possible subsequent proceedings." *Id.*

2.3.2 Other Federal Districts.

Federal law about the common interest doctrine from other jurisdictions, although more developed, is also more diffuse and difficult to reconcile. *See, e.g.,* Robert E. Jones and

Gerald E. Rosen et al., *Rutter Group Practice Guide: Federal Civil Trials and Evidence*, Ch. 8H-B.4(5), §8:3505 (2006). Generally, however, it appears that federal law often makes a distinction between "common interest" cases and "common defense" cases. *Id.*

A. Common Interest Cases.

Other federal jurisdictions generally state that to invoke the common interest doctrine, the party asserting the privilege must show that: (1) the common interest is identical, not merely similar, to that of the third party; (2) the nature of the common interest is legal, as opposed to solely commercial; (3) the communications were made in the course of an ongoing common enterprise and intended to further that enterprise. *Federal Civil Trials and Evidence at* §8:3505, *citing In re Grand Jury Subpoena: Under Seal* 415 F3d 333, 341 (4th Cir. 2005) (no evidence corporation and individual employees were pursuing common legal strategy); *In re Lindsey* 158 F.3d 1263, 1282-1283 (D.C. Cir. 1998) (although the President in his personal capacity had some areas of common interest with Office of the Presidency, doctrine did not apply because interests were not identical); *Bank of America, N.A. v. Terra Nova Ins. Co. Ltd.* 211 F.Supp.2d 493, 497 (SD NY 2002) (common commercial goal alone does not invoke common interest doctrine).

The fact that there may be an overlap of a commercial and a legal interest does not negate the effect of the legal interest in establishing a community of interest. *In re Regents of Univ. of Calif.*, 101 F.3d 1386, 1390 (Fed. Cir. 1996). In *Regents*, the Federal Circuit held that the University of California, as patent holder, and Eli Lilly & Company, and licensee, had sufficient common legal interests for the attorney-client privilege to attach to communications between the University and in-house attorneys for Lily about various patent, research and license arrangements concerning recombinant DNA technology. Genetech subsequently challenged the patent and sought communications between the University and Lilly, arguing that the discussion among the University and Lilly's attorneys were not privileged because there were not for a common defense, only the prosecution of patent rights for financial gain. The Court of Appeals disagreed. In so doing, it noted that "the issue is not who employed the attorney, but whether the attorney was acting in a professional relationship to the person asserting the privilege. The professional relationship for purposes of the privilege for attorney-client communications hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal

advice." *Regents*, 101 F.3d at 1390 (internal citations omitted). The Court further stated that anticipated impending litigation is not necessary:

> It is well established that the attorney-client privilege is not limited to actions taken and advice obtained in the shadow of litigation. Persons seek legal advice and assistance in order to meet legal requirements and to plan their conduct; such steps serve the public interest in achieving compliance with law and facilitating the administration of justice, and indeed may avert litigation. When such pre-litigation advice and assistance serve a shared legal interest, the parties to that interest do not lose the privilege when litigation arises.

Id. at 1392 (internal citations omitted). *See also SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2nd Cir. 1976) (The privilege need not be limited to legal consultations between corporations in litigation situations.... Corporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it.").

Other federal decisions, on the other hand, have been less generous and require some palpable threat of litigation in order for the common interest protection to apply. *See, e.g.*, *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) ("the common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation"); *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 19 (E.D.N.Y. 1996) (a "concern about litigation...does not transform [the parties'] common interest and enterprise into a legal, as opposed to commercial matter."

B. Joint Defense Cases.

The joint defense category is more straightforward because the common legal interest is more transparent. To establish the existence of the common or joint defense privilege, the party asserting the privilege must show that: (1) the communications were made in the course of a common defense effort; (2) the statements were designed to further the effort; and (3) the privilege has not been waived. *Federal Civil Trials and Evidence at* §8:3505.10, *citing In re Grand Jury Subpoena Duces Tecum* 112 F.3d 910, 922-923 (8th Cir. 1997) (rejecting joint defense claim because no common interest evident); *Matter of Bevill, Bresler & Schulman Asset Management Corp.* 805 F.2d 120, 126 (3rd Cir. 1986) (rejecting joint defense privilege because party produced no evidence of agreement to pursue joint defense strategy); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Ca. 1995).

A common defense arrangement allows the parties and their respective counsel and agents involved in that defense to disclose privileged information to each other without

defeating the confidential nature of those communications. For example, in *United States v. Schwimmer* 892 F.2d 237, 244 (2nd Cir. 1989), two defendants were prosecuted for receiving illegal payments to influence operations of an employee benefit plan. Both defendants' conversations with the accountant hired by only one of the defendant's attorneys were covered by the joint defense privilege because it was imparted in confidence for the ultimate purpose of assisting attorneys undertaking a joint strategy. In contrast, in *Cavallaro v. United States* 284 F.3d 236, 246- 251 (1st Cir. 2002), the IRS in a tax fraud investigation sought documents created or received by an accountant while working on estate tax and corporate merger issues with taxpayers' attorneys. The court enforced production on the basis that the record did not show that any party had hired the accountant to assist attorneys in providing legal advice. Therefore, neither the attorney-client privilege nor the common interest doctrine applied. *Id*. at 246-251.

There are also mixed decisions on whether one's own attorney needs to be involved in order for the common defense privilege to attach. When a participant does not involve his own attorney until after the disclosure, the privilege may be more difficult to assert. For example, in *United States v. Bay State Ambulance & Hosp. Rental Service, Inc.*, 874 F.2d 20, 29 (1st Cir. 1989), an ambulance company and hospital administrator were prosecuted for conspiring to commit Medicare fraud. The hospital administrator provided the ambulance company's attorney with a memorandum intended to combat the fraud charges. The hospital administrator did not consult his own attorney about preparing the memorandum, or provide the lawyer with a copy until months later. The Court held that because the information was provided to another without first consulting his own attorney, it was not part of a joint defense and therefore not protected. *Id.* at 29.

There are decisions that seem to reach the opposite conclusion, however. For example, in *In re Grand Jury Subpoena*, 406 F.Supp. 381, 391 (S.D.N.Y. 1975), the District Court upheld privilege claims when parties were interviewed by counsel "as implements of a joint defense" without the presence of their own attorneys and in the presence of other prospective codefendants. Similarly, in *Ohio-Sealy Mattress Mfg. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980), the Court noted that '[t]he question in determining whether a document is part of a joint defense effort is not the party to whom the document was directed, but rather whether the document reflects material [that] is part of the joint defense effort." *See also Restatement,* § 76, Comment (d) ("Under the [common defense] privilege, any member of a client set – a client, the client's agent for communication, the client's lawyer, and the

lawyer's agent – can exchange communications with member of a similar client set. However, a communication directly among clients is not privileged unless made for the purpose of communication with a privileged person... A person who is not represented by a lawyer and who is not himself or herself a lawyer cannot participate in a common-interest arrangement.").

Generally, a communication will qualify for protection under the joint or common defense doctrine, even if litigation is not actual or imminent so long, as the parties undertake a joint effort with respect to a common legal interest. *United States v. BDO Seidman, LLP,* 492 F.3d 806 (7th Cir. 2007) (noting that the common defense doctrine, which is similar to the attorney-client privilege, should encourage parties with a shared legal interest to seek shared legal assistance in order to plan their conduct); *see also In re Grand Jury Subpoen*a, 274 F.3d 563, 575 (1st Cir. 2001) (the joint defense doctrine is more appropriately referred to as the common interest doctrine when it is used to protect communications made outside the context of litigation); *see also Gulf Islands Leasing v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 474 (S.D.N.Y. 2003) (although parties shared the same counsel, the joint defense doctrine did not apply because they did not undertake a joint effort with respect to the same legal matters; one party had a commercial concern while the other party had a related litigation concern). However, the 5th Circuit permits communications to qualify under the joint or common defense doctrine only when there is a "palpable threat" of litigation. *In re Santa Fe Int'l Corp*., 272 F.3d 705, 711 (5th Cir. 2001) (documents created nine years in advance of class action litigation did not qualify for joint defense privilege because they were not created in anticipation of litigation but to ensure compliance with antitrust laws and for other legal purposes).

3. PRIVILEGE DOCTRINES AND THE PUBLIC INTEREST

3.1 *Soter v. Cowles Publishing*

Recognizing a public interest in defending civil liability, the Washington Supreme Court applied privilege protections to documentation created by a public entity's legal team during the team's investigation of an incident causing the entity potential liability. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 724, 174 P.3d 60 (2007) ("*Soter*"). The incident in *Soter* occurred when Nathan Walters, a third-grader at Logan Elementary School in Spokane, ate a peanut-butter cookie supplied by the school while on a field trip. Because of a severe allergic reaction, Nathan died later that day. When the School District's associate

superintendent learned of the tragedy, he "immediately anticipated a wrongful death action and contacted the school district's long-standing legal counsel." *Id.* The District's legal counsel then hired an investigator to gather facts and interview witnesses. "At all times during his investigation, [the investigator] understood the purpose of his work was to assist the firm in preparing to defend against civil liability claims involving Nathan's death." *Id.* at 725.

After settling, Nathan's parents and the District agreed that the parties would not disclose further details of the incident, investigation, or settlement to the press. However, Cowles Publishing, owner of the *Spokesman Review*, subsequently requested all related records under the State's Public Records Act ("Act"). In response, Nathan's parents and the District asked the court to declare the records exempt. Agreeing with their request, the trial court held that all attorney-client privileged or work product communications were exempt under the Act and did not have to be disclosed. Division III of the Court of Appeals affirmed the decision. *Soter v. Cowles Publ'g Co.,* 131 Wn. App. 882 (2006). Cowless Publishing sought review by the Supreme Court. In a 5-4 decision affirming Division III's holding, the Court addressed two primary issues relating to privilege: (1) whether the attorney-client privilege and work product doctrines provide an exception under the Act and (2) whether work product includes an attorney or legal team's notes regarding witness interviews.

First, the Court held that the attorney-client privilege and work product doctrines exempt communications from mandatory disclosure requirements under the Act. RCW 42.56.290 provides that a party is not entitled to any more information under the Act as it would be under the rules of pretrial discovery, so long as the requested records relate to a controversy in which the agency is a party. Although the majority acknowledged "the need for liberal access to agency information," it emphasized the School District's "countervailing duty to safeguard the public treasury by aggressively defending itself against civil liability… [and] that lawyers representing our public agencies work with a certain degree of privacy free from unnecessary intrusion." *Id.* at 748. Subsequently, the Court concluded that the attorney-client privilege and work product doctrines protect public records from disclosure if the records relate to an agency controversy. *Soter,* 162 Wn. 2d at 734-5, 745. It also noted that a controversy providing protection under the statute may be "triggered prior to the official initiation of litigation and extends beyond the official termination of litigation." *Id.* at 732 (citing *Dawson v. Daly,* 120 Wn.2d 782, 791, 845 P.2d 995 (1993)). While the dissent

argued that the investigator notes did not relate to the controversy because the investigation commenced before the litigation, the majority disagreed because the District's superintendent anticipated a wrongful death suit immediately after the incident.

Also, the Court addressed the question of whether the documents requested by Cowles Publishing were actually work product that was exempt from disclosure under the Act. A few of the documents were protected by attorney client privilege, but most of the documents were handwritten notes taken by members of the District's legal team regarding witness interviews. Even though the dissent argued that the notes should be disclosed because they contained factual information of public interest, the majority held that the notes were clearly protected as opinion work product. *Id.* at 741. Reiterating the common law foundation for work product found in *Hickman v. Taylor,* 329 U.S. 495 (1947) and *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Court noted that the federal work product rule generally applies heightened protection to an attorney's notes taken during witness interviews, allowing discovery only in "very rare and extraordinary circumstances." *Soter,* 162 Wn. 2d at 738 (quoting *Baker v. Gen. Motors Corp.*, 209 848 (8th Cir. 1973)). Because the Washington and federal rules that codify protection for an attorney's work product are nearly identical, the majority found the federal rule provided persuasive guidance.

To support its general holding that notes taken by legal teams regarding witness interviews are protected as opinion work product, the Court reviewed its earlier decision in *Limstrom v. Ladenburg*, 136 Wn.2d 869, 963 P.2d 869 (1998). There, the Court held that work product includes notes and memoranda. Specifically, *Limstrom* stated that under the work product rule:

> (1) The mental impressions of the attorney and other representatives of a party are absolutely protected, unless their mental impressions are directly at issue.
> (2) *The notes or memoranda prepared by the attorney from oral communications should be absolutely protected, unless the attorney's mental impressions are directly at issue.*
> (3) The factual written statements and other tangible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing that the *party seeking disclosure of the documents* actually has substantial need of the materials and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Mental impressions of the attorney and other representatives embedded in factual statements should be redacted.

Soter, 162 Wn. 2d at 738 (quoting *Limstrom,* 136 Wn.2d 611-612) (emphasis added in *Soter*).

While both the majority and the dissent affirmed the earlier *Limstrom* analysis, the dissent claimed that *Limstrom* required the District to redact the notes and submit them for disclosure under the Act. *Id.* at 742. However, the majority stated that the dissent's argument reflected confusion about the right to access underlying facts (i.e. what happened on the field trip) with the right to access the documents in which those facts are recorded. *Id.* "An attorney's notes regarding a witness's oral statements are permeated with his or her inferences, as well as clues as to the portions of a statement the attorney believed to be important." *Id.* Therefore, the majority held that "all of the notes taken by attorneys or other members of a legal team when interviewing witnesses constitute opinion work product that will be revealed only in rare circumstances, for example, where the attorney's mental impressions are at issue or where there are issues of attorney crime or fraud." *Id.* Because the mental impressions of the District's attorneys were not at issue, the court held that the notes were opinion work product and exempt from mandatory disclosure under the Act.

Moreover, the majority failed to overturn Division III's analysis which also found that the notes taken by the District's legal team were protected as attorney work product. In reaching its holding, the lower appellate court addressed a number of Cowles Publishing's arguments. *Soter v. Cowles Publ'g Co.,* 131 Wn. App. 882, 895-8, 130 P.3d 840 (2006). First, that court rejected an argument regarding the application of the bad faith exception, finding that "bad faith was not an issue" in a Public Records Act case. *Id.* at 895. Second, it rejected the "ordinary course of business" exception that prevents parties from using the work product doctrine to avoid discovery by adopting routine practices where documents appear to be prepared "in anticipation of litigation." *Id.* at 896, (citing *Heidebrink v. Morivaki*, 104 Wn.2d 392, 400, 706 P.2d 212 (1985). By examining the District's conduct in a manner that it would have for a private party, the appellate court affirmed the trial court's earlier finding that "reports prepared by the District's counsel were not routine reports by District personnel." *Soter,* 131 Wn. App. at 898. Third, the appellate court rejected Cowles Publishing's arguments that the documents were not protected because the school district "should have" included such information in routine administrative reports but did not do so. Contrasting *Cowles Publ'g Co. v. City of Spokane*, 69 Wn. App. 678, 849 P.2d 1271 (1993), the appellate court found no basis for finding that a "should have" standard was to be applied to documents that were, in fact, prepared in anticipation of litigation. *See also Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 810 P.2d 507 (1991). Finally, the appellate court

rejected "substantial need;" "agency burden to show irreparable harm;" or other public policy-based rationale for avoiding the work product protections.

3.2 *In re County of Erie*

While the Washington Supreme Court in *Soter* focused on public interests that are protected by the work product rule, the Second Circuit addressed similar public interests that are protected by the attorney-client privilege. *In re County of Erie*, 473 F.3d 413 (2nd Cir. 2007) ("*Erie*"). A class of arrested persons sued Erie County, alleging unconstitutional strip searches. During the course of discovery, the County withheld certain documents and produced a privilege log. The plaintiffs moved to compel production. Following an in camera inspection, the district court judge ordered production of certain e-mails (and e-mail chains) "which (variously) reviewed the law concerning strip searches of detainees, assessed the County's current search policy, recommended alternative policies and monitored the implementation of these policy changes." The e-mails had passed between Assistant Erie County Attorneys and the government client. The court characterized the issue as follows:

> Whether the attorney-client privilege protects communications that pass between a government lawyer having no policy making authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light.

473 F.3d at 417. In addressing the issue, the court highlighted the competing interests, particularly in the government setting.

> The attorney-client privilege accommodates competing values: the competition is sharpened when the privilege is asserted by a government. On the one hand, non-disclosure impinges on open and accessible government. *See Reed v. Baxter*, 134 F.3d 351, 356-57 (6th Cir. 1998). On the other hand, public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest:
>
> > We believe that, if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

473 F.3d at 418-19 (citing *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2nd Cir. 2005). The court found that, at a minimum, a government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or corporate entity. Citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the court found that access to legal advice by public officials responsible for formulating, implementing and monitoring governmental policy is fundamental to "promote[ing] broader public interests to the observance of law and administration of justice."

The court in *Erie* recognized that a party invoking the attorney-client privilege must sustain the burden of showing three elements. Obviously, the communication must be between client and counsel. The communication must be intended to be and was in fact kept confidential. And, the communication was made for the purpose of obtaining or providing legal advice. The court then focused on whether the communication between the Erie County Prosecutor's Office and its client was legal advice, as opposed to advice on policy. The court recognized that

> The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the . . . public interest that the lawyer should regard himself as more than [a] predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant non-legal considerations are expressly stated in the communication which also includes legal advice.

473 F.3d at 420, citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950). The court further emphasized that

> "the complete lawyer" may promote and reinforce the legal advice given, "weight it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise, what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals and appearances."

Id. The court concluded that so long as the predominant purpose of the communication is legal advice, the considerations and caveats that may be expressed by a lawyer are not "severable" from the legal advice. Subsequently, the court remanded the matter to the District Court for consideration of potential issues of waiver of the privilege.

The *Erie* case provides a firm foundation for public officials to assert the attorney-client privilege when communications with their attorney are for the purpose of obtaining or

providing legal advice. The court went out of its way to reemphasize at the end of the decision the major point of its holding.

> To repeat: "The availability of sound legal advice inures to the benefit not only to the client . . . but also of the public which is entitled to compliance with the ever growing and increasingly complex of public law." *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d [1032,] at 1036-37 [(2nd Cir. 1984)]. This observation has added force when the legal advice is sought by officials responsible for law enforcement and corrections policies.

Erie, 473 F.3d at 422.

4. DELIBERATIVE PROCESS PRIVILEGE

4.1 General

Both the Federal Freedom of Information Act (FOIA) and the State Public Records Act permit exemption from disclosure certain information that would not otherwise be available in the litigation process. Exemption 5 of the FOIA protects from disclosure "inter-agency or intra-agency memorandum or letters which would not be available by law to a party . . . in litigation with the agency." 5 USC § 552(b)(5). Under state law, records that are not available to another party under the rules of pretrial discovery for causes pending in the superior courts are not available. RCW 42.56.290. *See Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998) (citing former provisions of the State's Public Disclosure Act, Chapter 42.17 RCW). These sections exempt documents normally privileged in the civil discovery context. *See NLRB v. Sears Roebuck and Co.*, 421 U.S. 132, 95 S. Ct. 1504, 44 L.Ed.2d 29 (1975). Two of the privileges held to be incorporated within this type of exemption are the deliberative process privilege and the attorney-work product privilege. *Id.* In this section we address the deliberative process privilege.

The deliberative process privilege protects from disclosure intra-governmental communications affecting advisory opinions, as well as recommendations and deliberations leading to the formulation of government decisions and policies. *FTC v. Warner Communication, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The rational underlying the privilege was explained by one Court as follows:

> As the Supreme Court has said, disclosure of intra-agency deliberations and advice is injurious to the governments' consultative function because it would intent to inhibit the frank and candid discussion that is necessary for an effective operation of government.

United States v. American Tel. and Tel. Co., 524 F.Supp. 1381 at 1387 (D.D.C. 1981). Thus, the ultimate purpose of the privilege is to protect the quality of government decisions.

FTC v. Warner Communications, Inc., *Supra.* To accomplish this purpose, the courts refrain from inquiring or permitting inquiry into the decision making processes of governmental officials:

> The judiciary . . . is not authorized to "probe the mental processes" of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached. The matters considered, the contributing influences or the role played by the work of others — results demanded by exagencies of the most imperative character. No judge could tolerate an inquisitions into the elements comprising his decision — indeed, "(s)uch an examination of a judge would be destructive of judicial integrity" — and by the same token "the integrity of the administrative process must be equally protected".

Carl Zeiss Stiftung v. VEB Carl Zeiss, Jena, 40 F.R.D. 318 at 325-36 (D.D.C 1966), *aff'd* 384 F.2d 979 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 952 (1967).

4.2 Documentary Evidence

4.2.1 Memoranda

Both testimony and documents are protected by the deliberative process privilege.

> Staff memos, expert reports, preliminary drafts, the oral testimony of the decision makers as to the basis for their opinions—all have been held to be beyond the purview of the contesting parties and the reviewing courts."

Sprague Electric Co. v. United States, 462 F. Supp. 966 at 973 (Cust. Ct. 1978), quoting *KFC National Management Corp. v. NLRB*, 497 F.2d 298 at 305 (2nd Cir. 1974).

The Public Records Act excepts from the deliberative process privilege those records specifically cited by an agency in connection with any agency action. RCW 42.56.280 ("Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action."). However, the balance of the deliberative process privilege remains. Generally, the privilege bars litigants from seeking testimony or disclosure of governmental officials regarding the underlying considerations and reasons "for government decisions." *See e.g. United States v. American Tel. and Tel. Co.*, 524 F. Supp. 1381, 1386-87 (D.D.C. 1981); *Securities and Exchange Commission v. Shasta Minerals and Chemical Co.*, 36 F.R.D. 23, 25 (D. Utah 1964).

However, under the Washington PRA, the purpose of the deliberative process exemption for public records is severely limited by its scope. *PAWS v. University of Washington*, 125 Wn.2d 243, 256, 884 P.2d 592 (1994), citing *Hearst Corp. v. Hoppe*, 90

Wn.2d 123, 580 P.2d 246 (1978). In *PAWS*, the Court set forth the standards for application of the privilege:

> In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based. *Columbian Pub'g Co. v. Vancouver*, 36 Wn. App. 25, 31-32, 671 P.2d 280 (1983) (citing *Hoppe*, at 132-33). Subjective evaluations are not exempt under this provision if they are treated as raw factual data and are not subject to further deliberation and consideration *Hoppe*, 90 Wn.2d at 134. Once the policies or recommendations are implemented, the records cease to be protected under this exemption. *Brouillet*, 114 Wn.2d at 799-800.

PAWS, 125 Wn.2d at 256-57. In *PAWS*, the Court considered the process used for review of proposed research grant proposals. The peer review group was composed of research scientists who completed "pink sheets" that ranked as well as recommended approval or disapproval of grant proposals. The Court found the "pink sheets" to be exempt from disclosure under the privilege.

4.2.2 Drafts

The pink sheets in *PAWS* were treated as memoranda. No published Washington State case has address the first category of documents exempt under this statute — drafts. Nevertheless, the Attorney General has taken the position that a draft can only be exempt if it qualifies under the *PAWS* tests.

Federal authority addressing the parallel federal exemption suggests a different analysis for drafts. Under federal case law, any substantive "draft" is the quintessential deliberative process document, and exempt from disclosure. *See, e.g.*, *Dudman Communications Corp. v. Dep't of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *see also Nat'l Wildlife Fed. v. United States Forest Service*, 861 F.2d 1114 (9th Cir. 1988); *Russell v. Dep't of Air Force*, 682 F.2d 1045 (1982). The Washington Supreme Court looks to federal decisions interpreting the federal deliberative process exemption to interpret Washington's statute. *Hearst v. Hoppe*, 90 Wn.2d 123, 128, 132-33, 580 P.2d 246 (1978).

In *Dudman*, the Court of Appeals for the D.C. Circuit recognized that if a draft document were disclosed, it could be compared to the final document, thus exposing the editorial judgment of the agency. *Dudman*, 815 F.2d at 1568. For example, it would expose "decisions to insert or delete materials or to change a draft's focus or emphasis." *Dudman*,

815 F.2d at 1569. This "would stifle the creative thinking and candid exchange of ideas necessary to produce good [final products]." *Dudman*, 815 F.2d at 1569. Accordingly, federal courts apply the deliberative process exemption any time "disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussions within the agency and thereby undermine the agency's ability to perform its functions." *Dudman*, 815 F.2d 1568. Thus, this more protective analysis would serve the policy behind the Washington statute, even though it differs from the *PAWS* analysis.

4.3 Testimony of Legislators and Others

Limitations on inquiry of legislators' motives behind their legislative and quasi-judicial decisions preclude petitioners from seeking pretrial discovery of a city council (or other municipal legislative authority). Courts have traditionally rejected any attempt to inquire into the motives of legislators and adjudicators. *Goebel v. Elliott*, 178 Wash. 444, 447-448, 35 P.2d 44 (1934); *United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1435 (1941). According to the Court in *Goebel*, "under no consideration or circumstance will the motives of legislators, considered as the moral inducement for their votes on a particular enactment, be inquired into by a judicial tribunal, and no principle of law is more firmly established." *Goebel*, 178 Wn. at 447-448; see also, *Cornelius v. Seattle*, 123 Wash. 550, 213 P. 17 (1923) (rejecting depositions of Seattle City Councilmembers); *Fleming v. City of Tacoma*, 81 Wn.2d 292, 298, 502 P.2d 327 (1972).

In *Goebel*, the Court did not allow inquiry or evidence of any of the motives of the City Council in voting for the passage of an ordinance related to wage scale and hours of labor for contractors and subcontractors of the City of Seattle. *Goebel*, 178 Wn. at 447-448. The Court had earlier applied the same rule in *Cornelius* and concluded that there was "nothing therein which can be considered by the courts." *Id.* *See also*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed. 2d 29 (1986) ("what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork").

The rule in Washington is not dissimilar to holdings in other states. For example, in *City of El Paso v. Madero Development*, 803 S.W.2d 396 (Tex. App. 1991), the court rejected the use of testimony by individual legislators as "incompetent." It is the action of the entire body, not that of an individual, that constitutes a governmental action. *See also Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 299 (Tex. App. 1989) (legislatures should

"not be bound by a possibility of being hauled into court to testify anytime a legislative action is questioned").

In *2BD Associates Limited Partnership v. County Comm'rs for Queen Anne's County*, 896 F. Supp. 528 (D. Md. 1995), a county's denial of zoning change was challenged by property owners. The property owners complained that the county's action denied the opportunity to build a truck stop and travel plaza. The court rejected an effort to compel discovery of the former planning director, county commissioners and county administrator. *See also City of College Park v. Cotter*, 309 Md. 573, 525 A.2d 1059 (1987).

5. MISCELLANEOUS DEVELOPMENTS

5.1 American Bar Association Formal Ethics Opinion 06-443

In August 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion 06-443 ("FEO 06-443"). The Opinion concluded that the Model Rule of Professional Conduct 4.2 generally does not prohibit a lawyer representing a client in a matter involving an organization from communicating with the organization's inside legal counsel about the subject of the representation. The lawyer need not obtain the prior consent of the organization's outside counsel. See Washington RPC 4.2, to same effect.

The Opinion found that inside counsel are generally not within the definition of "represented person" as used in the rule. The sophistication of inside counsel eliminates the need for the protections provided by Model RPC 4.2. The analysis in FEO 06-443 is consistent with the Restatement (Third) of the Law Governing Lawyers, Section 100, Comment c (2000).

There are obvious exceptions. If the inside lawyer is a party, and represented by the organization's outside counsel, contact would be prohibited. Similarly, if the communication with the inside lawyer was to elicit facts (for example if the inside lawyer was involved in activities or decisions giving rise to the dispute), contact may be prohibited. Note, the comment to Model Rule 4.2 was modified by the Washington State Supreme Court in its Comment 10 to Washington RPC 4.2 referencing *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984).

5.2 Federal Rule of Evidence 502 Amended

On September 19, 2008, the President signed S.2450 into law, adopting new evidence Rule 502 to the Federal Rules of Evidence. Fed. R. Evid. 502 protects against the inadvertent

waiver of the attorney-client privilege or the work product protection. Rule 502 will apply to proceedings after September 19, 2008, and "insofar as is just and practicable," in all proceedings pending on September 19, 2008. The complete text of Rule 502 follows.

> **Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**
>
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) **DISCLOSURE MADE IN A FEDERAL PROCEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE OF A WAIVER**.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.
>
> (b) **INADVERTENT DISCLOSURE**.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).
>
> (c) **DISCLOSURE MADE IN A STATE PROCEEDING**.—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:
>
> (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
>
> (2) is not a waiver under the law of the State where the disclosure occurred.
>
> (d) **CONTROLLING EFFECT OF A COURT ORDER**.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.
>
> (e) **CONTROLLING EFFECT OF A PARTY AGREEMENT**.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) **CONTROLLING EFFECT OF THIS RULE**.—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) **DEFINITIONS**.—In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

As of the date of this paper, Washington is not proposing an equivalent to Federal Rule 502. The WSBA Board of Governors have submitted for consideration by the Supreme Court an amendment to CR 26 to address the issue of inadvertently disclosed privileged materials. That proposed amendment, which has not yet been set for consideration by the Supreme Court, reads as follows:

(6) Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

5.3 RPC Amendments Effective September 1, 2006

In addition, it is good to remind all that effective September 1, 2006 the Washington Supreme Court adopted comprehensive amendments to the Rules of Professional Conduct. A more complete article appeared in the September 2006 issue of the WSBA *Bar News*. A synopsis prepared by WSBA assistant general counsel Douglas Ende, *RPC Amendments*

Effective September 1, 2006: What Litigators Need to Know is at WSBA Litigation News, vol. 19, no. 1 (Winter 2006-2007).

6. CONCLUSION

The purpose of this paper was to highlight and refresh lawyers on issues relating to certain privileges that may not regularly come to mind in land use litigation. Obviously this does not constitute a compendium of available privileges. Rather, it is to serve as a reference tool and an additional check when evaluating the lawyer's responsibility under the Rules of Professional Conduct in managing a client's affairs. Testimony (deposition or otherwise) of an elected official regarding a government enactment should be particularly avoided in light of the well established (but often unasserted) deliberative process privilege. The fact that material is known to someone other than your client may not necessarily allow disclosure under the common interest doctrine. Finally, as the 2nd Circuit so eloquently stated in the *Erie* case, the modern lawyer almost invariably advises her client upon not only what is permissible but also what is desirable. The applicable privileges should apply to either.

The U.S. Equal Employment Opportunity Commission

		Number
EEOC	***NOTICE***	915.002
		Date
		6/18/99

1. SUBJECT: Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors

2. PURPOSE: This document provides guidance regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 615 of Volume II of the Compliance Manual.

6/18/99 /s/
Date Ida L. Castro
Chairwoman

Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors

Table of Contents

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

I. Introduction

In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While the *Faragher* and *Ellerth* decisions addressed sexual harassment, the Court's analysis drew upon standards set forth in cases involving harassment on other protected bases. Moreover, the Commission has always taken the position that the same basic standards apply to all types of prohibited harassment.[1] Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment. (See section II, below.)

Harassment remains a pervasive problem in American workplaces. The number of harassment charges filed with the EEOC and state fair employment practices agencies has risen significantly in recent years. For example, the number of sexual harassment charges has increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998. The number of racial harassment charges rose from 4,910 to 9,908 charges in the same time period.

While the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations. The Supreme Court, in *Faragher* and *Ellerth*, relied on Commission guidance which has long advised employers to take all necessary steps to prevent harassment.[2] The new affirmative defense gives credit for such preventive efforts by an employer, thereby "implement[ing] clear statutory policy and complement[ing] the Government's Title VII enforcement efforts."[3]

The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes. Furthermore, the anti-discrimination statutes are not a "general civility code."[4] Thus federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not "extremely serious."[5] Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment."[6] The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment.[7] Existing Commission guidance on the standards for determining whether challenged conduct rises to the level of unlawful harassment remains in effect.

This document supersedes previous Commission guidance on the issue of vicarious liability for harassment by supervisors.[8] The Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect - - an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.[9] The standard is the same in the case of non-employees, but the employer's control over such individuals' misconduct is considered.[10]

II. The Vicarious Liability Rule Applies to Unlawful Harassment on All Covered Bases

The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature[11]), religion, national origin, protected activity,[12] age, or disability.[13] Thus, employers should establish anti-harassment policies and complaint procedures covering *all* forms of unlawful harassment.[14]

III. Who Qualifies as a Supervisor?

A. Harasser in Supervisory Chain of Command

An employer is subject to vicarious liability for unlawful harassment if the harassment was committed by "a supervisor with immediate (or successively higher) authority over the employee."[15] Thus, it is critical to determine whether the person who engaged in unlawful harassment had supervisory authority over the complainant.

The federal employment discrimination statutes do not contain or define the term "supervisor."[16] The statutes make employers liable for the discriminatory acts of their "agents,"[17] and supervisors are agents of their employers. However, agency principles "may not be transferable in all their particulars" to the federal employment discrimination statutes.[18] The determination of whether an individual has sufficient authority to qualify as a "supervisor" for purposes of vicarious liability cannot be resolved by a purely mechanical application of agency law.[19] Rather, the purposes of the anti-discrimination statutes and the reasoning of the Supreme Court decisions on harassment must be considered.

The Supreme Court, in *Faragher* and *Ellerth*, reasoned that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them.[20] Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. The determination as to whether a harasser had such authority is based on his or her job function rather than job title (*e.g.*, "team leader") and must be based on the specific facts.

An individual qualifies as an employee's "supervisor" if:

a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*

b. the individual has authority to direct the employee's daily work activities.

1. Authority to Undertake or Recommend Tangible Employment Actions

An individual qualifies as an employee's "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee. "Tangible employment decisions" are decisions that significantly change another employee's employment status. (For a detailed explanation of what constitutes a tangible employment action, see subsection IV(B), below.) Such actions include, but are not limited to, hiring, firing, promoting, demoting, and reassigning the employee. As the Supreme Court stated,"[t]angible employment actions fall within the special province of the supervisor."[21]

An individual whose job responsibilities include the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have the final say. As the Supreme Court recognized in *Ellerth*, a tangible employment decision "may be subject to review by higher level supervisors."[22] As long as the individual's recommendation is given substantial weight by the final decisionmaker(s), that individual meets the definition of supervisor.

2. Authority to Direct Employee's Daily Work Activities

An individual who is authorized to direct another employee's day-to-day work activities qualifies as his or her supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate to consider such a person a "supervisor" when determining whether the employer is vicariously liable.

In *Faragher*, one of the harassers was authorized to hire, supervise, counsel, and discipline lifeguards, while the other harasser was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training.[23] There was no question that the Court viewed them *both* as "supervisors," even though one of them apparently lacked authority regarding tangible job decisions.[24]

An individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her "supervisor" during that time period. Accordingly, the employer would be subject to vicarious liability if that individual commits unlawful harassment of a subordinate while serving as his or her supervisor.

On the other hand, someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority. Furthermore, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

B. Harasser Outside Supervisory Chain of Command

In some circumstances, an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power.[25] The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such authority, then the standard of liability for co-worker harassment applies.

IV. Harassment by Supervisor That Results in a Tangible Employment Action

A. Standard of Liability

An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases.[26] The Supreme Court recognized that this result is appropriate because an employer acts through its supervisors, and a supervisor's undertaking of a tangible employment action constitutes an act of the employer.[27]

B. Definition of "Tangible Employment Action"

A tangible employment action is "a significant change in employment status."[28] Unfulfilled threats are insufficient. Characteristics of a tangible employment action are:[29]

1. A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:
    - it requires an official act of the enterprise;
    - it usually is documented in official company records;
    - it may be subject to review by higher level supervisors; and
    - it often requires the formal approval of the enterprise and use of its internal processes.
2. A tangible employment action usually inflicts direct economic harm.
3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

Examples of tangible employment actions include:[30]

- hiring and firing;
- promotion and failure to promote;
- demotion;[31]
- undesirable reassignment;
- a decision causing a significant change in benefits;
- compensation decisions; and
- work assignment.

Any employment action qualifies as "tangible" if it results in a significant change in employment status. For example, significantly changing an individual's duties in his or her existing job constitutes a tangible employment action regardless of whether the individual retains the same salary and benefits.[32] Similarly, altering an individual's duties in a way that blocks his or her opportunity for promotion or salary increases also constitutes a tangible employment action.[33]

On the other hand, an employment action does not reach the threshold of "tangible" if it results in only an insignificant change in the complainant's employment status. For example, altering an individual's job title does not qualify as a tangible employment action if there is no change in salary, benefits, duties, or prestige, and the only effect is a bruised ego.[34] However, if there is a significant change in the status of the position because the new title is less prestigious and thereby effectively constitutes a demotion, a tangible employment action would be found.[35]

If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit.[36] Such harassment previously would have been characterized as "quid pro quo." It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands. The Commission rejects such an analysis. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis. The Supreme Court stated that there must be a significant *change* in employment status; it did not require that the change be adverse in order to qualify as tangible.[37]

If a challenged employment action is not "tangible," it may still be considered, along with other evidence, as part of a hostile environment claim that is subject to the affirmative defense. In *Ellerth*, the Court concluded that there was no tangible employment action because the supervisor never carried out his threats of job harm. Ellerth could still proceed with her claim of harassment, but the claim was properly "categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct." 118 S. Ct. at 2265.

C. Link Between Harassment and Tangible Employment Action

When harassment culminates in a tangible employment action, the employer cannot raise the affirmative defense. This sort of claim is analyzed like any other case in which a challenged employment action is alleged to be discriminatory. If the employer produces evidence of a non- discriminatory explanation for the tangible employment action, a determination must be made whether that explanation is a pretext designed to hide a discriminatory motive.

For example, if an employee alleged that she was demoted because she refused her supervisor's sexual

advances, a determination would have to be made whether the demotion was *because* of her response to the advances, and hence because of her sex. Similarly, if an employee alleges that he was discharged after being subjected to severe or pervasive harassment by his supervisor based on his national origin, a determination would have to be made whether the discharge was *because* of the employee's national origin.

A strong inference of discrimination will arise whenever a harassing supervisor undertakes or has significant input into a tangible employment action affecting the victim,[38] because it can be "assume[d] that the harasser . . . could not act as an objective, non-discriminatory decisionmaker with respect to the plaintiff."[39] However, if the employer produces evidence of a non-discriminatory reason for the action, the employee will have to prove that the asserted reason was a pretext designed to hide the true discriminatory motive.

If it is determined that the tangible action was based on a discriminatory reason linked to the preceding harassment, relief could be sought for the entire pattern of misconduct culminating in the tangible employment action, and no affirmative defense is available.[40] However, the harassment preceding the tangible employment action must be severe or pervasive in order to be actionable.[41] If the tangible employment action was based on a non-discriminatory motive, then the employer would have an opportunity to raise the affirmative defense to a claim based on the preceding harassment.[42]

V. Harassment by Supervisor That Does Not Result in a Tangible Employment Action

A. Standard of Liability

When harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability or damages, which it must prove by a preponderance of the evidence. The defense consists of two necessary elements:

(a) the employer exercised reasonable care to prevent and correct promptly any harassment; and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

B. Effect of Standard

If an employer can prove that it discharged its duty of reasonable care and that the employee could have avoided all of the harm but unreasonably failed to do so, the employer will avoid all liability for unlawful harassment.[43] For example, if an employee was subjected to a pattern of disability-based harassment that created an unlawful hostile environment, but the employee unreasonably failed to complain to management before she suffered emotional harm and the employer exercised reasonable care to prevent and promptly correct the harassment, then the employer will avoid all liability.

If an employer cannot prove that it discharged its duty of reasonable care *and* that the employee unreasonably failed to avoid the harm, the employer will be liable. For example, if unlawful harassment by a supervisor occurred and the employer failed to exercise reasonable care to prevent it, the employer will be liable even if the employee unreasonably failed to complain to management or even if the employer took prompt and appropriate corrective action when it gained notice.[44]

In most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability. An

effective complaint procedure "encourages employees to report harassing conduct before it becomes severe or pervasive,"[45] and if an employee promptly utilizes that procedure, the employer can usually stop the harassment before actionable harm occurs.[46]

In some circumstances, however, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee. For example, if an employee's supervisor directed frequent, egregious racial epithets at him that caused emotional harm virtually from the outset, and the employee promptly complained, corrective action by the employer could prevent further harm but might not correct the actionable harm that the employee already had suffered.[47] Alternatively, if an employee complained about harassment before it became severe or pervasive, remedial measures undertaken by the employer might fail to stop the harassment before it reaches an actionable level, even if those measures are reasonably calculated to halt it. In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care *and* that the employee unreasonably failed to avoid the harm. While a notice- based negligence standard would absolve the employer of liability, the standard set forth in *Ellerth* and *Faragher* does not. As the Court explained, vicarious liability sets a "more stringent standard" for the employer than the "minimum standard" of negligence theory.[48]

While this result may seem harsh to a law abiding employer, it is consistent with liability standards under the anti-discrimination statutes which generally make employers responsible for the discriminatory acts of their supervisors.[49] If, for example, a supervisor rejects a candidate for promotion because of national origin-based bias, the employer will be liable regardless of whether the employee complained to higher management and regardless of whether higher management had any knowledge about the supervisor's motivation.[50] Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly. The employer will be shielded from liability for harassment by a supervisor only if it proves that it exercised reasonable care in preventing and correcting the harassment *and* that the employee unreasonably failed to avoid all of the harm. If both parties exercise reasonable care, the defense will fail.

In some cases, an employer will be unable to avoid liability completely, but may be able to establish the affirmative defense as a means to limit damages.[51] The defense only limits damages where the employee reasonably could have avoided some but not all of the harm from the harassment. In the example above, in which the supervisor used frequent, egregious racial epithets, an unreasonable delay by the employee in complaining could limit damages but not eliminate liability entirely. This is because a reasonably prompt complaint would have reduced, but not eliminated, the actionable harm.[52]

C. First Prong of Affirmative Defense: Employer's Duty to Exercise Reasonable Care

The first prong of the affirmative defense requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. The steps described below are not mandatory requirements - - whether or not an employer can prove that it exercised reasonable care depends on the particular factual circumstances and, in some cases, the nature of the employer's workforce. Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms.[53]

There are no "safe harbors" for employers based on the written content of policies and procedures. Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively.[54] If, for example, the employer has an adequate policy and complaint procedure and properly responded to an employee's complaint of harassment, but management ignored previous complaints by other employees about the same harasser, then the employer has not exercised reasonable care in preventing

the harassment.[55] Similarly, if the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable care. Alternatively, lack of a formal policy and complaint procedure will not defeat the defense if the employer exercised sufficient care through other means.

1. Policy and Complaint Procedure

It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." *Ellerth*, 118 S. Ct. at 2270. While the Court noted that this "is not necessary in every instance as a matter of law,"[56] failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.[57] (See section V(C)(3), below, for discussion of preventive and corrective measures by small businesses.)

An employer should provide every employee with a copy of the policy and complaint procedure, and 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. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.

An anti-harassment policy and complaint procedure should contain, at a minimum, 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 investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

The above elements are explained in the following subsections.

a. Prohibition Against Harassment

An employer's policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (*i.e.*, opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by *anyone* in the workplace – supervisors, co- workers, or non-employees.[58] Management should convey the seriousness of the prohibition. One way to do that is for the mandate to "come from the top," *i.e.*, from upper management.

The policy should encourage employees to report harassment *before* it becomes severe or pervasive. While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. Therefore, to discharge its duty of preventive care, the employer must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law.

b. Protection Against Retaliation

An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti- harassment policy and complaint procedure will not be effective without such an assurance.[59]

Management 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.

c. Effective Complaint Process

An employer's harassment complaint procedure should be designed to encourage victims to come forward. To that end, it should clearly explain the process and ensure that there are no unreasonable obstacles to complaints. A complaint procedure should not be rigid, since that could defeat the goal of preventing and correcting harassment. When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing.

The complaint procedure should provide accessible points of contact for the initial complaint.[60] A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser.[61] Moreover, reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials.[62]

It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints of harassment. For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. Allowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by his or her supervisor may feel that officials within the chain of command will more readily believe the supervisor's version of events.

It also is important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies and to explain that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved.[63] While a prompt complaint process should make it feasible for an employee to delay deciding whether to file a charge until the complaint to the employer is resolved, he or she is not required to do so.[64]

d. Confidentiality

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis.[65]

A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to

employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.[66] One mechanism to help avoid such conflicts would be for the employer to set up an informational phone line which employees can use to discuss questions or concerns about harassment on an anonymous basis.[67]

e. Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances.[68] If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

i. Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?

- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

ii. Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

iii. Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make 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 should

be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

f. Assurance of Immediate and Appropriate Corrective Action

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.[69]

Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the employer could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate.

To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense.[70] If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate.[71]

Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise).[72] Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.[73]

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

Examples of Measures to Stop the Harassment and Ensure that it Does Not Recur:

- oral[74] 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 policy; and
- monitoring of harasser to ensure that harassment stops.

Examples of Measures to Correct the Effects of the Harassment:

- restoration of leave taken because of the harassment;
- expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- reinstatement;
- apology by the harasser;
- monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
- correction of any other harm caused by the harassment (*e.g.*, compensation for losses).

2. Other Preventive and Corrective Measures

An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an anti-harassment policy and complaint procedure. As the Supreme Court stated, "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." *Faragher*, 118 S. Ct. at 2291.

An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints[75] and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures.[76] For example, if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint.[77]

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.

An employer should keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program.[78] For example, an employer could include such compliance in formal evaluations.

Reasonable preventive measures include screening applicants for supervisory jobs to see if any have a record of engaging in harassment. If so, it may be necessary for the employer to reject a candidate on that basis or to take additional steps to prevent harassment by that individual.

Finally, it is advisable for an employer to keep records of all complaints of harassment. Without such records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern would be relevant to credibility assessments and disciplinary measures.[79]

3. Small Businesses

It may not be necessary for an employer of a small workforce to implement the type of formal complaint process described above. If it puts into place an effective, informal mechanism to prevent and correct harassment, a small employer could still satisfy the first prong of the affirmative defense to a claim of harassment.[80] As the Court recognized in *Faragher,* an employer of a small workforce might informally exercise sufficient care to prevent harassment.[81]

For example, such an employer's failure to disseminate a written policy against harassment on protected bases would not undermine the affirmative defense if it effectively communicated the prohibition and an effective complaint procedure to all employees at staff meetings. An owner of a small business who regularly meets with all of his or her employees might tell them at monthly staff meetings that he or she will not tolerate harassment and that anyone who experiences harassment should bring it "straight to the top."

If a complaint is made, the business, like any other employer, must conduct a prompt, thorough, and impartial investigation and undertake swift and appropriate corrective action where appropriate. The questions set forth in Section V(C)(1)(e)(i), above, can help guide the inquiry and the factors set forth in Section V(C)(1)(e)(ii) should be considered in evaluating the credibility of each of the parties.

D. Second Prong of Affirmative Defense: Employee's Duty to Exercise Reasonable Care

The second prong of the affirmative defense requires a showing by the employer that the aggrieved employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270.

This element of the defense arises from the general theory "that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Faragher*, 18 S. Ct. at 2292, *quoting Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982). Thus an employer who exercised reasonable care as described in subsection V(C), above, is not liable for unlawful harassment if the aggrieved employee could have avoided all of the actionable harm. If some but not all of the harm could have been avoided, then an award of damages will be mitigated accordingly.[82]

A complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages.

Proof that the employee unreasonably failed to use any complaint procedure provided by the employer will normally satisfy the employer's burden.[83] However, it is important to emphasize that an employee who failed to complain does not carry a burden of proving the reasonableness of that decision. Rather, the burden lies with the employer to prove that the employee's failure to complain was unreasonable.

1. Failure to Complain

A determination as to whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstances and information available to the employee *at that time*.[84] An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. Workplaces need not become battlegrounds where every minor, unwelcome remark based on race, sex, or another protected category triggers a complaint and investigation. An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resort to the complaint process.[85] The employee may directly say to the harasser that s/he wants the misconduct to stop, and then wait to see if that is effective in ending the

harassment before complaining to management. If the harassment persists, however, then further delay in complaining might be found unreasonable.

There might be other reasonable explanations for an employee's delay in complaining or entire failure to utilize the employer's complaint process. For example, the employee might have had reason to believe that:[86]

- using the complaint mechanism entailed a risk of retaliation;
- there were obstacles to complaints; and
- the complaint mechanism was not effective.

To establish the second prong of the affirmative defense, the employer must prove that the belief or perception underlying the employee's failure to complain was unreasonable.

a. Risk of Retaliation

An employer cannot establish that an employee unreasonably failed to use its complaint procedure if that employee reasonably feared retaliation. Surveys have shown that employees who are subjected to harassment frequently do not complain to management due to fear of retaliation.[87] To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment.

b. Obstacles to Complaints

An employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on unnecessary obstacles to complaints. For example, if the process entailed undue expense by the employee,[88] inaccessible points of contact for making complaints,[89] or unnecessarily intimidating or burdensome requirements, failure to invoke it on such a basis would be reasonable.

An employee's failure to participate in a mandatory mediation or other alternative dispute resolution process also does not does not constitute unreasonable failure to avoid harm. While an employee can be expected to cooperate in the employer's investigation by providing relevant information, an employee can never be required to waive rights, either substantive or procedural, as an element of his or her exercise of reasonable care.[90] Nor must an employee have to try to resolve the matter with the harasser as an element of exercising due care.

c. Perception That Complaint Process Was Ineffective

An employer cannot establish the second prong of the defense based on the employee's failure to complain if that failure was based on a reasonable belief that the process was ineffective. For example, an employee would have a reasonable basis to believe that the complaint process is ineffective if the procedure required the employee to complain initially to the harassing supervisor. Such a reasonable basis also would be found if he or she was aware of instances in which co- workers' complaints failed to stop harassment. One way to increase employees' confidence in the efficacy of the complaint process would be for the employer to release general information to employees about corrective and disciplinary measures undertaken to stop harassment.[91]

2. Other Efforts to Avoid Harm

Generally, an employer can prove the second prong of the affirmative defense if the employee unreasonably failed to utilize its complaint process. However, such proof will not establish the defense if the employee made other efforts to avoid harm.

For example, a prompt complaint by the employee to the EEOC or a state fair employment practices agency while the harassment is ongoing could qualify as such an effort. A union grievance could also qualify as an effort to avoid harm.[92] Similarly, a staffing firm worker who is harassed at the client's workplace might report the harassment either to the staffing firm or to the client, reasonably expecting that either would act to correct the problem.[93] Thus the worker's failure to complain to one of those entities would not bar him or her from subsequently bringing a claim against it.

With these and any other efforts to avoid harm, the timing of the complaint could affect liability or damages. If the employee could have avoided some of the harm by complaining earlier, then damages would be mitigated accordingly.

VI. Harassment by "Alter Ego" of Employer

A. Standard of Liability

An employer is liable for unlawful harassment whenever the harasser is of a sufficiently high rank to fall "within that class . . . who may be treated as the organization's proxy." *Faragher*, 118 S. Ct. at 2284.[94] In such circumstances, the official's unlawful harassment is imputed automatically to the employer.[95] Thus the employer cannot raise the affirmative defense, even if the harassment did not result in a tangible employment action.

B. Officials Who Qualify as "Alter Egos" or "Proxies"

The Court, in *Faragher*, cited the following examples of officials whose harassment could be imputed automatically to the employer:

- president[96]
- owner[97]
- partner[98]
- corporate officer

Faragher, 118 S. Ct. at 2284.

VII. Conclusion

The Supreme Court's rulings in *Ellerth* and *Faragher* create an incentive for employers to implement and enforce strong policies prohibiting harassment and effective complaint procedures. The rulings also create an incentive for employees to alert management about harassment before it becomes severe and pervasive. If employers and employees undertake these steps, unlawful harassment can often be prevented, thereby effectuating an important goal of the anti-discrimination statutes.

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[1] *See, e.g.,* 29 C.F.R. § 1604.11 n. 1 ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compliance Manual Section 615.11(a) (BNA 615:0025 ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees").

[2] *See* 1980 Guidelines at 29 C.F.R. § 1604.11(f) and Policy Guidance on Current Issues of Sexual Harassment, Section E, 8 FEP Manual 405:6699 (Mar. 19, 1990), *quoted in Faragher*, 118 S. Ct. at 2292.

[3] *Faragher*, 118 S. Ct. at 2292.

[4] *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998).

[5] *Faragher*, 118 S.Ct. at 2283. However, when isolated incidents that are not "extremely serious" come to the attention of management, appropriate corrective action should still be taken so that they do not escalate. *See* Section V(C)(1)(a), below.

[6] *Oncale*, 118 S. Ct. at 1003.

[7] Some previous Commission documents classified harassment as either "quid pro quo" or hostile environment. However, it is now more useful to distinguish between harassment that results in a tangible employment action and harassment that creates a hostile work environment, since that dichotomy determines whether the employer can raise the affirmative defense to vicarious liability. Guidance on the definition of "tangible employment action" appears in section IV(B), below.

[8] The guidance in this document applies to federal sector employers, as well as all other employers covered by the statutes enforced by the Commission.

[9] 29 C.F.R. § 1604.11(d).

[10] The Commission will rescind Subsection 1604.11(c) of the 1980 Guidelines on Sexual Harassment, 29 CFR § 1604.11(c). In addition, the following Commission guidance is no longer in effect: Subsection D of the 1990 Policy Statement on Current Issues in Sexual Harassment("Employer Liability for Harassment by Supervisors"), EEOC Compliance Manual (BNA) N:4050-58 (3/19/90); and EEOC Compliance Manual Section 615.3(c) (BNA) 6:15-0007 - 0008.

The remaining portions of the 1980 Guidelines, the 1990 Policy Statement, and Section 615 of the Compliance Manual remain in effect. Other Commission guidance on harassment also remains in effect, including the Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, EEOC Compliance Manual (BNA) N:4071 (3/8/94) and the Policy Guidance on Employer Liability for Sexual Favoritism, EEOC Compliance Manual (BNA) N:5051 (3/19/90).

[11] Harassment that is targeted at an individual because of his or her sex violates Title VII even if it does not involve sexual comments or conduct. Thus, for example, frequent, derogatory remarks about women could constitute unlawful harassment even if the remarks are not sexual in nature. *See* 1990 Policy Guidance on Current Issues of Sexual Harassment, subsection C(4) ("sex- based harassment - that is, harassment not involving sexual activity or language - may also give rise to Title VII liability . . . if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex").

[12] "Protected activity" means opposition to discrimination or participation in proceedings covered by the anti-discrimination statutes. Harassment based on protected activity can constitute unlawful retaliation. S*ee* EEOC Compliance Manual Section 8 ("Retaliation") (BNA) 614:001 (May 20, 1998).

[13] For cases applying *Ellerth* and *Faragher* to harassment on different bases, *see Hafford v. Seidner*, 167 F.3d 1074, 1080 (6th Cir. 1999) (religion and race); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) (age); *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 411 (6th Cir. 1999) (race) ; *Richmond-Hopes v. City of Cleveland*, No. 97-3595, 1998 WL 808222 at *9 (6th Cir. Nov. 16, 1998) (unpublished) (retaliation); *Wright- Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (*race*); *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925 at *5 (N.D. Ill. Jan. 7, 1999) (national origin). *See also Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998) (assuming without deciding that ADA hostile environment claims are modeled

after Title VII claims), *cert. denied*, 119 S. Ct. 1141 (1999).

[14] The majority's analysis in both *Faragher* and *Ellerth* drew upon the liability standards for harassment on other protected bases. It is therefore clear that the same standards apply. *See Faragher*, 118 S. Ct. at 2283 (in determining appropriate standard of liability for sexual harassment by supervisors, Court "drew upon cases recognizing liability for discriminatory harassment based on race and national origin"); *Ellerth*, 118 S. Ct. at 2268 (Court imported concept of "tangible employment action" in race, age and national origin discrimination cases for resolution of vicarious liability in sexual harassment cases). *See also* cases cited in n.13, above.

[15] *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

[16] Numerous statutes contain the word "supervisor," and some contain definitions of the term. *See, e.g.,* 12 U.S.C. § 1813(r) (definition of "State bank supervisor" in legislation regarding Federal Deposit Insurance Corporation); 29 U.S.C. § 152(11) (definition of "supervisor" in National Labor Relations Act); 42 U.S.C.. § 8262(2) (definition of "facility energy supervisor" in Federal Energy Initiative legislation). The definitions vary depending on the purpose and structure of each statute. The definition of the word "supervisor" under other statutes does not control, and is not affected by, the meaning of that term under the employment discrimination statutes.

[17] *See* 42 U.S.C. 2000e(a) (Title VII); 29 U.S.C. 630(b) (ADEA); and 42 U.S.C. §12111(5)(A) (ADA) (all defining "employer" as including any agent of the employer).

[18] *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Faragher,* 118 S. Ct. at 2290 n.3; *Ellerth*, 118 S. Ct. at 2266.

[19] *See Faragher*, 118 S. Ct. at 2288 (analysis of vicarious liability "calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement . . . but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment . . . ") and at 2290 n.3 (agency concepts must be adapted to the practical objectives of the anti-discrimination statutes).

[20] *Faragher*, 118 S. Ct. at 2290; *Ellerth*, 118 S. Ct. at 2269.

[21] *Ellerth*, 118 S. Ct. at 2269.

[22] *Ellerth*, 118 S. Ct. at 2269.

[23] *Faragher*, 118 S. Ct. at 2280. For a more detailed discussion of the harassers' job responsibilities, *see Faragher*, 864 F. Supp. 1552, 1563 (S.D. Fla. 1994).

[24] *See Grozdanich v. Leisure Hills Health Center*, 25 F. Supp.2d 953, 973 (D. Minn. 1998) ("it is evident that the Supreme Court views the term 'supervisor' as more expansive than as merely including those employees whose opinions are dispositive on hiring, firing, and promotion"; thus, "charge nurse" who had authority to control plaintiff's daily activities and recommend discipline qualified as "supervisor" and therefore rendered employer vicariously liable under Title VII for his harassment of plaintiff, subject to affirmative defense).

[25] *See Ellerth*, 118 S. Ct. at 2268 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *Llampallas v. Mini-Circuit Lab, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the

employee's action.").

[26] Of course, traditional principles of mitigation of damages apply in these cases, as well as all other employment discrimination cases. *See generally Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

[27] *Ellerth,* 118 S. Ct. at 2269; *Faragher*, 118 S. Ct. 2284-85. *See also Durham Life Insurance Co., v. Evans*, 166 F.3d 139, 152 (3rd Cir. 1999) ("A supervisor can only take a tangible adverse employment action because of the authority delegated by the employer . . .and thus the employer is properly charged with the consequences of that delegation.").

28 *Ellerth*, 118 S. Ct. at 2268.

[29] All listed criteria are set forth in *Ellerth*, 118 S. Ct. at 2269.

[30] All listed examples are set forth in *Ellerth* and/or *Faragher*. *See Ellerth*, 118 S. Ct. at 2268 and 2270; *Faragher*, 118 S. Ct. at 2284, 2291, and 2293.

[31] Other forms of formal discipline would qualify as well, such as suspension. Any disciplinary action undertaken as part of a program of progressive discipline is "tangible" because it brings the employee one step closer to discharge.

[32] The Commission disagrees with the Fourth Circuit's conclusion in *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172 (4th Cir. 1998), that the plaintiff was not subjected to a tangible employment action where the harassing supervisor "dramatically increased her workload," *Reinhold*, 947 F. Supp. 919, 923 (E.D Va. 1996), denied her the opportunity to attend a professional conference, required her to monitor and discipline a co-worker, and generally gave her undesirable assignments. The Fourth Circuit ruled that the plaintiff had not been subjected to a tangible employment action because she had not "experienced a change in her employment status akin to a demotion or a reassignment entailing significantly different job responsibilities." 151 F.3d at 175. It is the Commission's view that the Fourth Circuit misconstrued *Faragher* and *Ellerth.* While minor changes in work assignments would not rise to the level of tangible job harm, the actions of the supervisor in *Reinhold* were substantial enough to significantly alter the plaintiff's employment status.

[33] *See Durham*, 166 F.3d at 152-53 (assigning insurance salesperson heavy load of inactive policies, which had a severe negative impact on her earnings, and depriving her of her private office and secretary, were tangible employment actions); *Bryson v. Chicago State University*, 96 F.3d 912, 917 (7th Cir. 1996) ("Depriving someone of the building blocks for . . . a promotion . . . is just as serious as depriving her of the job itself.").

[34] *See Flaherty v. Gas Research Institute*, 31 F.3d 451, 457 (7th Cir. 1994) (change in reporting relationship requiring plaintiff to report to former subordinate, while maybe bruising plaintiff's ego, did not affect his salary, benefits, and level of responsibility and therefore could not be challenged in ADEA claim), *cited in Ellerth*, 118 S. Ct. at 2269.

[35] *See Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to the particular situation."), *quoted in Ellerth*, 118 S. Ct. at 2268-69.

[36] *See Nichols v. Frank*, 42 F.3d 503, 512-13 (9th Cir. 1994) (employer vicariously liable where its supervisor granted plaintiff's leave requests based on her submission to sexual conduct), *cited in Faragher*, 118 S. Ct. at 2285.

[37] *See Ellerth*, 118 S. Ct. at 2268 and *Faragher*, 118 S. Ct. at 2284 (listed examples of tangible employment actions that included both positive and negative job decisions: hiring *and* firing; promotion *and* failure to promote).

[38] The link could be established even if the harasser was not the ultimate decision maker. *See, e.g., Shager v Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (noting that committee rather than the supervisor fired plaintiff, but employer was still liable because committee functioned as supervisor's "cat's paw"), *cited in Ellerth*, 118 S. Ct. at 2269.

[39] *Llampallas*, 163 F.3d at 1247.

[40] *Ellerth,* 118 S. Ct. at 2270 ("[n]o affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action . . ."); *Faragher*, 118 S. Ct. at 2293 (same). *See also Durham*, 166 F.3d at 154 ("When harassment becomes adverse employment action, the employer loses the affirmative defense, even if it might have been available before."); *Lissau v. Southern Food Services, Inc.*, 159 F.3d 177, 184 (4th Cir. 1998) (the affirmative defense "is not available in a hostile work environment case when the supervisor takes a tangible employment action against the employee as part of the harassment") (Michael, J., concurring).

[41] *Ellerth*, 118 S. Ct. at 2265. Even if the preceding acts were not severe or pervasive, they still may be relevant evidence in determining whether the tangible employment action was discriminatory.

[42] *See Lissau v. Southern Food Service, Inc.*, 159 F.3d at 182 (if plaintiff could not prove that her discharge resulted from her refusal to submit to her supervisor's sexual harassment, then the defendant could advance the affirmative defense); *Newton v. Caldwell Laboratories*, 156 F.3d 880, 883 (8th Cir. 1998) (plaintiff failed to prove that her rejection of her supervisor's sexual advances was the reason that her request for a transfer was denied and that she was discharged; her claim was therefore categorized as one of hostile environment harassment); *Fierro v. Saks Fifth Avenue*, 13 F. Supp.2d 481, 491 (S.D.N.Y. 1998) (plaintiff claimed that his discharge resulted from national origin harassment but court found that he was discharged because of embezzlement; thus, employer could raise affirmative defense as to the harassment preceding the discharge).

[43] *See Faragher*, 118 S. Ct. at 2292 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care.").

[44] *See, e.g., EEOC v. SBS Transit, Inc.*, No. 97-4164, 1998 WL 903833 at *1 (6th Cir. Dec. 18, 1998) (unpublished) (lower court erred when it reasoned that employer liability for sexual harassment is negated if the employer responds adequately and effectively once it has notice of the supervisor's harassment; that standard conflicts with affirmative defense which requires proof that employer "took reasonable care to *prevent* and correct promptly any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer").

[45] *Ellerth*, 118 S. Ct. at 2270.

[46] *See Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 803 (5th Cir. 1999) ("when an employer satisfies the first element of the Supreme Court's affirmative defense, it will likely forestall its own vicarious liability for a supervisor's discriminatory conduct by nipping such behavior in the bud") (Wiener, J., concurring in *Indest*, 164 F.3d 258 (5th Cir. 1999)). The Commission agrees with Judge Wiener's concurrence in *Indest* that the court in that case dismissed the plaintiff's claims on an erroneous basis. The plaintiff alleged that her supervisor made five crude sexual comments or gestures to her during a week-long convention. She reported the incidents to appropriate management officials who investigated the matter and meted out appropriate discipline. No further incidents of harassment

occurred. The court noted that it was "difficult to conclude" that the conduct to which the plaintiff was briefly subjected created an unlawful hostile environment. Nevertheless, the court went on to consider liability. It stated that *Ellerth* and *Faragher* do not apply where the plaintiff quickly resorted to the employer's grievance procedure and the employer took prompt remedial action. In such a case, according to the court, the employer's quick response exempts it from liability. The Commission agrees with Judge Wiener that *Ellerth* and *Faragher* do control the analysis in such cases, and that an employee's prompt complaint to management forecloses the employer from proving the affirmative defense. However, as Judge Wiener pointed out, an employer's quick remedial action will often thwart the creation of an unlawful hostile environment, rendering any consideration of employer liability unnecessary.

[47] *See Greene v. Dalton*, 164 F.3d 671, 674 (D.C. Cir. 1999) (in order for defendant to avoid all liability for sexual harassment leading to rape of plaintiff "it must show not merely that [the plaintiff] inexcusably delayed reporting the alleged rape . . . but that, as a matter of law, a reasonable person in [her] place would have come forward early enough to prevent [the] harassment from becoming 'severe or pervasive'").

[48] *Ellerth*, 118 S. Ct. at 2267.

[49] Under this same principle, it is the Commission's position that an employer is liable for punitive damages if its supervisor commits unlawful harassment or other discriminatory conduct with malice or with reckless indifference to the employee's federally protected rights. (The Supreme Court will determine the standard for awarding punitive damages in *Kolstad v. American Dental Association*,119 S. Ct. 401 (1998) (granting certiorari).) The test for imposition of punitive damages is the mental state of the harasser, not of higher-level officials. This approach furthers the remedial and deterrent objectives of the anti-discrimination statutes, and is consistent with the vicarious liability standard set forth in *Faragher* and *Ellerth*.

[50] Even if higher management proves that evidence it discovered after-the-fact would have justified the supervisor's action, such evidence can only limit remedies, not eliminate liability. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-62 (1995).

[51] *See Faragher*, 118 S. Ct. at 2293, and *Ellerth*, 118 S. Ct. at 2270 (affirmative defense operates either to eliminate liability or limit damages).

[52] *See Faragher*, 118 S. Ct. at 2292 ("if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided").

[53] See Section V(C)(3) for a discussion of preventive and corrective care by small employers.

[54] *See Hurley v. Atlantic City Police Dept.*, No. 96-5634, 96-5633, 96-5661, 96-5738, 1999 WL 150301 (3d Cir. March 18, 1999) ("*Ellerth* and *Faragher* do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti- harassment policy of some sort"; defendant failed to prove affirmative defense where it issued written policies without enforcing them, painted over offensive graffiti every few months only to see it go up again in minutes, and failed to investigate sexual harassment as it investigated and punished other forms of misconduct.).

[55] *See Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 422 (11th Cir. 1999) (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action).

56 *Ellerth*, 118 S. Ct. at 2270.

[57] A union grievance and arbitration system does not fulfill this obligation. Decision making under such a system addresses the collective interests of bargaining unit members, while decision making under an internal harassment complaint process should focus on the individual complainant's rights under the employer's anti-harassment policy.

An arbitration, mediation, or other alternative dispute resolution process also does not fulfill the employer's duty of due care. The employer cannot discharge its responsibility to investigate complaints of harassment and undertake corrective measures by providing employees with a dispute resolution process. For further discussion of the impact of such procedures on the affirmative defense, see Section V(D)(1)(b), below.

Finally, a federal agency's formal, internal EEO complaint process does not, by itself, fulfill its obligation to exercise reasonable care. That process only addresses complaints of violations of the federal EEO laws, while the Court, in *Ellerth*, made clear that an employer should encourage employees "to report harassing conduct before it becomes severe or pervasive." *Ellerth*, 118 S. Ct. at 2270. Furthermore, the EEO process is designed to assess whether the agency is liable for unlawful discrimination and does not necessarily fulfill the agency's obligation to undertake immediate and appropriate corrective action.

[58] Although the affirmative defense does not apply in cases of harassment by co-workers or non-employees, an employer cannot claim lack of knowledge as a defense to such harassment if it did not make clear to employees that they can bring such misconduct to the attention of management and that such complaints will be addressed. *See Perry v. Ethan Allen*, 115 F.3d 143, 149 (2d Cir. 1997) ("When harassment is perpetrated by the plaintiff's coworkers, an employer will be liable if the plaintiff demonstrates that 'the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it'"), *cited in Faragher*, 118 S. Ct. at 2289. Furthermore, an employer is liable for harassment by a co-worker or non-employer if management knew or should have known of the misconduct, unless the employer can show that it took immediate and appropriate corrective action. 29 C.F.R. § 1604.11(d). Therefore, the employer should have a mechanism for investigating such allegations and undertaking corrective action, where appropriate.

[59] Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation. *See, e.g.,* Louise F. Fitzgerald & Suzanne Swan, "Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment," 51 *Journal of Social Issues* 117, 121-22 (1995) (citing studies). Surveys also have shown that a significant proportion of harassment victims are worse off after complaining. *Id*. at 123-24; *see also* Patricia A. Frazier, "Overview of Sexual Harassment From the Behavioral Science Perspective," paper presented at the American Bar Association National Institute on Sexual Harassment at B-17 (1998) (reviewing studies that show frequency of retaliation after victims confront their harasser or filed formal complaints).

[60] *See Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998) (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).

[61] *Faragher,* 118 S. Ct. at 2293 (in holding as matter of law that City did not exercise reasonable care to prevent the supervisors' harassment, Court took note of fact that City's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints"); *Meritor Savings Bank, FSB v. Vinson*, 471 U.S. 57, 72 (1986).

[62] *See* Wilson, 164 F.3d at 541 (complaint procedure deficient because it only required supervisors to report "formal" as opposed to "informal" complaints of harassment); *Varner v. National Super Markets Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert denied*, 519 U.S. 1110 (1997) (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).

[63] It is particularly important for federal agencies to explain the statute of limitations for filing formal EEO complaints, because the regulatory deadline is only 45 days and employees may otherwise assume they can wait whatever length of time it takes for management to complete its internal investigation.

[64] If an employer actively misleads an employee into missing the deadline for filing a charge by dragging out its investigation and assuring the employee that the harassment will be rectified, then the employer would be "equitably estopped" from challenging the delay. *See Currier v. Radio Free Europe/Radio Liberty, Inc.,* 159 F.3d 1363, 1368 (D.C. Cir. 1998) ("an employer's affirmatively misleading statements that a grievance will be resolved in the employee's favor can establish an equitable estoppel"); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992) (tolling is appropriate where plaintiff was led by defendant to believe that the discriminatory treatment would be rectified); *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 845 (3d Cir. 1992) (equitable tolling applies where employer's own acts or omission has lulled the plaintiff into foregoing prompt attempt to vindicate his rights).

[65] The sharing of records about a harassment complaint with prospective employers of the complainant could constitute unlawful retaliation. *See* Compliance Manual Section 8 ("Retaliation), subsection II D (2), (BNA) 614:0005 (5/20/98).

[66] One court has suggested that it may be permissible to honor such a request, but that when the harassment is severe, an employer cannot just stand by, even if requested to do so. *Torres v. Pisano***,** 116 F.3d 625 (2d Cir.), *cert. denied*, 118 S. Ct. 563(1997).

[67] Employers may hesitate to set up such a phone line due to concern that it may create a duty to investigate anonymous complaints, even if based on mere rumor. To avoid any confusion as to whether an anonymous complaint through such a phone line triggers an investigation, the employer should make clear that the person who takes the calls is not a management official and can only answer questions and provide information. An investigation will proceed only if a complaint is made through the internal complaint process or if management otherwise learns about alleged harassment.

[68] *See, e.g.*, *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996) (employer's response prompt where it began investigation on the day that complaint was made, conducted interviews within two days, and fired the harasser within ten days); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer's response to complaints inadequate despite eventual discharge of harasser where it did not seriously investigate or strongly reprimand supervisor until after plaintiff filed charge with state FEP agency), *cert. denied*, 513 U.S. 1082 (1995); *Saxton v. AT&T*, 10 F.3d 526, 535 (7th Cir 1993) (investigation prompt where it was begun one day after complaint and a detailed report was completed two weeks later); *Nash v. Electrospace Systems, Inc.* 9 F.3d 401, 404 (5th Cir. 1993) (prompt investigation completed within one week); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 319 (7th Cir. 1992) (adequate investigation completed within four days).

[69] Management may be reluctant to release information about specific disciplinary measures that it undertakes against the harasser, due to concerns about potential defamation claims by the harasser. However, many courts have recognized that limited disclosures of such information are privileged. For cases addressing defenses to defamation claims arising out of alleged harassment, *see Duffy v. Leading Edge Products*, 44 F.3d 308, 311 (5th Cir. 1995) (qualified privilege applied to statements accusing plaintiff of harassment**)**; *Garziano v. E.I. DuPont de Nemours & Co.,* 818 F.2d 380 (5th Cir. 1987) (qualified privilege protects employer's statements in bulletin to employees concerning dismissal of alleged harasser); *Stockley v. AT&T*, 687 F. Supp. 764 (F. Supp. 764 (E.D.N.Y. 1988) (statements made in course of investigation into sexual harassment charges protected by qualified privilege).

[70] *Mockler v Multnomah County*, 140 F.3d 808, 813 (9th Cir. 1998).

[71] In some cases, accused harassers who were subjected to discipline and subsequently exonerated have claimed that the disciplinary action was discriminatory. No discrimination will be found if the employer had a good faith belief that such action was warranted and there is no evidence that it undertook less punitive measures against similarly situated employees outside his or her protected class who were accused of harassment. In such circumstances, the Commission will not find pretext based solely on an after-the-fact conclusion that the disciplinary action was inappropriate. *See Waggoner v. City of Garland Tex.*, 987 F.2d 1160, 1165 (5th Cir. 1993) (where accused harasser claims that disciplinary action was discriminatory, "[t]he real issue is whether the employer reasonably believed the employee's allegation [of harassment] and acted on it in good faith, or to the contrary, the employer did not actually believe the co-employee's allegation but instead used it as a pretext for an otherwise discriminatory dismissal").

[72] *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer remedial action for sexual harassment by supervisor inadequate where it twice changed plaintiff's shift to get her away from supervisor rather than change his shift or work area), *cert. denied*, 513 U.S. 1082 (1995).

[73] *See Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) ("a remedial measure that makes the victim of sexual harassment worse off is ineffective *per se*").

[74] An oral warning or reprimand would be appropriate only if the misconduct was isolated and minor. If an employer relies on oral warnings or reprimands to correct harassment, it will have difficulty proving that it exercised reasonable care to prevent and correct such misconduct.

[75] *See Varner*, 94 F.3d at 1213 (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), *cert denied*, 117 S. Ct. 946 (1997); *accord Wilson v. Tulsa Junior College*, 164 F.3d at 541.

[76] *See Wilson,* 164 F.3d at 541 (complaint procedure deficient because it only required supervisors to report "formal" as opposed to "informal" complaints of harassment).

[77] *See, e.g., Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996) (where harassment of plaintiffs was so pervasive that higher management could be deemed to have constructive knowledge of it, employer was obligated to undertake corrective action even though plaintiffs did not register complaints); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp.2d 870, 882 (N.D. Ind. 1998) (employer has constructive knowledge of harassment by supervisors where it "was so broad in scope and so permeated the workplace that it must have come to the attention of someone authorized to do something about it").

[78] In *Faragher*, the City lost the opportunity to establish the affirmative defense in part because "its officials made no attempt to keep track of the conduct of supervisors." *Faragher*, 118 S. Ct. at 2293.

[79] See subsections V(C)(1)(e)(ii) and V(C)(2), above.

[80] If the owner of the business commits unlawful harassment, then the business will automatically be found liable under the alter ego standard and no affirmative defense can be raised. *See* Section VI, below.

[81] *Faragher*, 118 S. Ct. at 2293.

[82] *Faragher*, 118 S. Ct. at 2292 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could

have avoided.").

[83] *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293. *See also Scrivner v. Socorro Independent School District*, 169 F.3d 969, 971 (5th Cir., 1999) (employer established second prong of defense where harassment began during summer, plaintiff misled investigators inquiring into anonymous complaint by denying that harassment occurred, and plaintiff did not complain about the harassment until the following March).

[84] The employee is not required to have chosen "the course that events later show to have been the best." Restatement (Second) of Torts § 918, comment c.

[85] *See Corcoran v. Shoney's Colonial, Inc.*, 24 F. Supp.2d 601, 606 (W.D. Va. 1998) ("Though unwanted sexual remarks have no place in the work environment, it is far from uncommon for those subjected to such remarks to ignore them when they are first made.").

[86] *See Faragher*, 118 S. Ct. at 2292 (defense established if plaintiff unreasonably failed to avail herself of "a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense"). *See also* Restatement (Second) of Torts § 918, comment c (tort victim "is not barred from full recovery by the fact that it would have been reasonable for him to make expenditures or subject himself to pain or risk; it is only when he is unreasonable in refusing or failing to take action to prevent further loss that his damages are curtailed").

[87] *See* n.59, above.

[88] *See Faragher*, 118 S. Ct. at 2292 (employee should not recover for harm that could have been avoided by utilizing a proven, effective complaint process that was available "without undue risk or expense").

[89] *See Wilson*, 164 F.3d at 541 (complaint process deficient where official who could take complaint was inaccessible due to hours of duty and location in separate facility).

[90] *See* Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Compliance Manual (BNA) N:3101 (7/10/97).

[91] For a discussion of defamation claims and the application of a qualified privilege to an employer's statements about instances of harassment, *see* n.69, above.

[92] *See Watts v. Kroger Company*, 170 F.3d 505, 510 (5th Cir., 1999) (plaintiff made effort "to avoid harm otherwise" where she filed a union grievance and did not utilize the employer's harassment complaint process; both the employer and union procedures were corrective mechanisms designed to avoid harm).

[93] Both the staffing firm and the client may be legally responsible, under the anti- discrimination statutes, for undertaking corrective action. *See* Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Compliance Manual (BNA) N:3317 (12/3/97).

[94] *See also Ellerth*, 118 S. Ct. at 2267 (under agency principles an employer is indirectly liable "where the agent's high rank in the company makes him or her the employer's alter ego"); *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1376 (10th Cir. 1998) ("the Supreme Court in Burlington acknowledged an employer can be held vicariously liable under Title VII if the harassing employee's 'high rank in the company makes him or her the employer's alter ego'").

[95] *Faragher*, 118 S. Ct. at 2284.

[96] The Court noted that the standards for employer liability were not at issue in the case of *Harris v. Forklift Systems*, 510 U.S. 17 (1993), because the harasser was the president of the company. *Faragher,* 118 S. Ct. at 2284.

[97] An individual who has an ownership interest in an organization, receives compensation based on its profits, and participates in managing the organization would qualify as an "owner" or "partner." *Serapion v. Martinez*, 119 F.3d 982, 990 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998).

[98] *Id.*

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