Sexual Harassment in the Workplace: The Do's, Don'ts, and Defenses of Handling Sexual Harassment Claims

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I. Introduction

Sexual harassment in the workplace continues to plague school districts and poses some of the most highly-charged and sensitive issues school districts and their attorneys may face. These cases are often high profile and can include district personnel "taking sides." The drama associated with "who did what to whom" divides loyalties and often results in negative publicity.

It has been nearly thirty years since the Supreme Court's 1986 seminal decision in *Meritor Savings Bank v. Vinson*, in which the Court determined that Title VII's prohibition against sex discrimination in employment encompassed sexual harassment based on a hostile work environment theory.[2] Since that decision, case law has continued to evolve, with courts addressing multiple legal theories related to sexual harassment claims as well as claims of retaliation. Importantly, courts have differentiated liability standards and defenses with respect to peer worker sexual harassment claims and supervisor harassment claims. Recent cases and administrative actions with regard to sexual orientation and gender identity have further muddied the waters. More recently, courts have struggled with the definitions of sex and gender, standards of liability, defenses, and remedies. Often the case law defining these concepts varies significantly by jurisdiction. Further, some school employees have asserted sexual harassment and related retaliation claims pursuant to Title IX, or cloaked as a First Amendment claim, in an effort to avoid Title VII's administrative exhaustion requirements. In addition, plaintiffs often abandon federal court and elect to file claims solely under state law to avoid damage caps, to assert claims against individual defendants, and to seek the application of more favorable standards of liability.

This article provides an overview of the legal theories impacting sexual harassment claims in the workplace, as well as practical guidance for responding to such claims, with a focus on issues that are unique to the school district environment. This article also discusses the recent trends in sex-based discrimination and harassment law, including the expansion of rights of pregnant employees and the rise in sexual orientation and gender identity claims.

II. Title VII

The primary federal law prohibiting sexual harassment and sex-based discrimination in the workplace is found at 42 U.S.C. § 2000e, *et seq*., and is most commonly referred to as "Title VII." Title VII, on its face, prohibits employers from discriminating against individuals with respect to their "compensation, terms, conditions, or privileges of employment" based on their

[1] The presenters wish to recognize the significant contributions of Mollie Mohan, an attorney at TUETH KEENEY COOPER MOHAN AND JACKSTADT, P.C., who provided tremendous amounts of research and drafting for this article.
[2] *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

race, color, religion, sex, or national origin.[3] The law applies to any employer that has more than fifteen (15) employees.[4] The Supreme Court, in 1986, explicitly recognized that discrimination on the basis of sex includes sexual harassment.[5] The Court held that the phrase "terms, conditions, or privileges" of employment "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."[6]

A. Administrative Exhaustion

Prior to filing a lawsuit under Title VII, an employee must file a Charge of Discrimination with either the Equal Employment Opportunity Commission ("EEOC") and/or (if it exists) the state and/or local "Fair Employment Practices Agency" ("FEPA").[7] Specifically, an employee must file a Charge of Discrimination within 180 calendar days of the date of each discrete discriminatory act, or 300 days, if there is a state and/or local agency (FEPA) that also enforces employment discrimination claims.[8] For hostile work environment claims (constituting a series of separate acts that culminate in workplace harassment) the employee "need only file a charge within 180 or 300 days of any act that is part of the hostile work environment."[9] If the FEPA has a work-sharing agreement with the EEOC, once an employee files a Charge of Discrimination with the EEOC, it is dually filed with the FEPA, and vice versa.[10] Practitioners should be aware of whether there is a FEPA in the specific jurisdiction where the alleged discrimination occurred, as this could potentially impact whether a Charge was timely filed.

[3] 42 U.S.C. § 2000e-2(a)(1).
[4] *Id*. at § 2000e(b).
[5] *Meritor Sav. Bank*, 477 U.S. at 64.
[6] *Id*. at 65. Interestingly, some argue that the word "sex" was added to Title VII by Howard W. Smith, a representative from Virginia, as a way to defeat the legislation in its entirety. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989) (noting that the word "sex" was included "in an attempt to defeat the bill"), *abrogated as to the "mixed-motive" theory of liability by the 1991 amendments to Title VII, as recognized in University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013); *see also* Clay Risen, *The Accidental Feminist*, SLATE (Feb. 7, 2014, 12:54 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/the_50th_anniversary_of_title_vii_of_the_civil_rights_act_and_the_southern.single.html (describing how Rep. Smith added the term "sex" after his previous "tricks" to block passage of Title VII had failed).
[7] § 2000e-5.
[8] § 2000e-5(e).
[9] *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) (holding that, "[p]rovided that an act contributing to the claim occurs within the filing period, the entire period of the hostile environment may be considered by a court for the purposes of determining liability"); *see also Time Limits for Filing a Charge*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/timeliness.cfm (last visited August 31, 2015). For other circuits' interpretations of *Morgan*, *see, e.g*., *Lockridge v. University of Maine*, 597 F.3d 464, 474 (1st Cir. 2010) (requiring, for a continuing violation, that an "anchoring act" occur within the limitations period, where an "anchoring act" is a discriminatory act that "substantially relate[s] to the earlier incidents of abuse"); *Papelino v. Albany College of Pharmacy*, 633 F.3d 81, 91 (2d Cir. 2011) (holding that, "under the continuing violation doctrine, a plaintiff may bring claims for discriminatory acts that would have been barred by the statute of limitations as long as an act contributing to that hostile work environment took place within the statutory time period") (internal quotations omitted); *Mandel v. M&Q Packaging Corp*., 706 F.3d 157, 165–66 (3d Cir. 2013) (holding that an employee can establish a continuing violation by showing "that all acts which constitute the claim are part of the same unlawful employment practice and that at least one act falls within the applicable limitations period").
[10] *See Fair Employment Agencies (FEPAs) and Dual Filing*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/fepa.cfm (last visited September 13, 2015).

Once an employee files a Charge, the EEOC or FEPA must conduct an investigation and, within 120 days, either initiate "informal methods of conference, conciliation, and persuasion," or make a determination there is not "reasonable cause to believe that the charge is true."[11] The EEOC and/or FEPA can initiate litigation or administrative action against an employer directly if they find the charge has merit, but more often, they issue what is known as a "Notice of Right to Sue" letter to the employee, informing him/her of the right to initiate litigation.[12] Once a Right to Sue letter has been issued, the employee has ninety (90) days within which to file a lawsuit.[13] If an employee does not comply with the administrative exhaustion requirements outlined above, the claim will be time-barred.[14] Practitioners should note, however, that state or local non-discrimination statutes or ordinances may have different exhaustion requirements.[15]

B. Categories of Sexual Harassment Cases

Sexual harassment cases typically fall into one of two categories—*quid pro quo* or hostile work environment. *Quid pro quo* (a Latin phrase meaning "this for that") harassment refers to instances where an employer requires submission to sexual conduct as a condition of the individual's employment.[16] A hostile work environment is harassing conduct of a sexual nature that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[17] Although the Supreme Court noted that the terms "*quid pro quo*" and "hostile work environment" have "limited utility" with regard to determining liability, the Court conceded that the terms are helpful "in making a rough demarcation between cases."[18]

1. Quid pro quo

Quid pro quo harassment consists of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[19] To establish a claim of *quid pro quo* harassment, a plaintiff must establish that the employer took an adverse employment action against the employee as a result of the employee's failure to comply with the unwelcome sexual conduct.[20] A tangible employment action, for Title VII purposes, is any change in the terms and

[11] 42 U.S.C. § 2000e-5(b).
[12] *National R.R.*, 536 U.S. at 106.
[13] 42 U.S.C. § 2000e-5(f).
[14] *Morgan*, 536 U.S. at 109.
[15] *See Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. 2013) (holding that employer's failure to assert the timeliness of the charge until the summary judgment phase of litigation constituted a waiver of the defense, as the timeliness argument was not raised at the "earliest opportunity," because the employer could have asserted that defense at the agency level).
[16] 29 C.F.R. § 1604.11(a).
[17] *Id*.
[18] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).
[19] 29 C.F.R. § 1604.11(a); *see also Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995).
[20] *See Anderson v. Family Dollar Stores of Ark., Inc.*, 579 F.3d 858, 863 (8th Cir. 2009); *see also Giddens v. Community Edus. Ctrs., Inc.*, 540 F. App'x 381, 387 (5th Cir. 2013) (requiring a determination that "the tangible

conditions of employment.[21] Some courts also require that the employer knew (or should have known) about the harassment and failed to take action.[22]

2. Hostile work environment

A plaintiff may also bring a sexual harassment claim as a hostile work environment claim. As discussed in more detail below, liability depends, in large part, on whether the alleged harasser was the plaintiff's supervisor, as opposed to a co-worker, third party, etc. The concept of a hostile work environment sexual harassment claim was first discussed by the Supreme Court in *Meritor Savings Bank v. Vinson*, where the Court adopted the Equal Employment Opportunity Commission's guidelines defining "hostile work environment" harassment as conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[23]

In *Meritor*, the plaintiff, Michelle Vinson, worked at Meritor Savings Bank for four years, starting as a teller and working her way up to branch manager.[24] Her supervisor, Sidney Taylor, was a vice president of the bank and manager at one of the branches.[25] At trial, Ms. Vinson testified that shortly after being hired, Mr. Taylor invited Ms. Vinson to dinner and suggested, at dinner, that they go to a motel to "have sexual relations."[26] Ms. Vinson initially refused, but eventually gave in because she feared she would lose her job.[27] Over the next four years, she alleged that "Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours."[28] Ms. Vinson estimated she had intercourse with him forty to fifty times during the time she worked at the bank.[29] She also alleged that Mr. Taylor "fondled her in front of other employees, followed her into the women's

employment action suffered by the employee resulted from her acceptance or rejection of her supervisor's alleged sexual harassment"); *Souther v. Posen Constr., Inc*., 523 F. App'x 352, 354–55 (6th Cir. 2013) (defining *quid pro quo* harassment as being "anchored in an employer's sexual discriminatory behavior which compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments").

[21] *Anderson*, 579 F.3d at 863.

[22] *See, e.g., Okoli v. City of Baltimore*, 648 F.3d 216, 222 (4th Cir. 2011) (stating the five elements of a *quid pro quo* harassment claim as follows: "(1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment must be an express or implied condition to the receipt of a job benefit or cause of a tangible job detriment to create liability. Further, as in typical disparate treatment cases, the employee must prove that she was deprived of a job benefit she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision; and (5) the employer, as defined by Title VII, knew or should have known of the harassment and took no remedial action."). The Fourth Circuit finds the "knew or should have known" element to be satisfied when "the harassment was alleged to have been perpetrated by a supervisor." *Id*.

[23] 477 U.S. 57, 58–59 (1986) (quoting 29 C.F.R. § 1604.11(a)(3)).

[24] *Id*. at 59.

[25] *Id*. at 60.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[30]

The district court rejected the plaintiff's claim of sex discrimination, finding that the sexual relationship was "voluntary" and that it had "nothing to do with her continued employment at the bank or her advancement or promotions at that institution."[31] The district court also determined that the bank could not be liable, because even though the bank had a policy prohibiting discrimination, Ms. Vinson never made a complaint that Mr. Taylor was harassing her.[32] The court of appeals reversed, and the Supreme Court affirmed this ruling, but on different grounds.[33]

The Supreme Court held that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex."[34] The Court further stated that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[35] To establish a hostile work environment claim under Title VII, a plaintiff must prove the conduct was sufficiently severe or pervasive such as to alter the conditions of the victim's employment and create an abusive working environment.[36] The plaintiff must also establish that the sexual advances were unwanted and that she or he indicated that they were unwelcome.[37]

In 1993, the Supreme Court revisited the legal framework of sexual harassment claims in *Harris v. Forklift Systems, Inc.*[38] The Supreme Court sought to resolve a circuit split regarding whether "conduct, to be actionable as abusive work environment harassment . . . must seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury."[39] In an unanimous opinion, the Court rejected a requirement that "harassing conduct lead[] to a nervous breakdown," and instead articulated a "totality of the circumstances" test.[40] The Court also noted the objective and subjective elements of considering whether conduct rises to the level of a Title VII violation.[41] Specifically, a court should review the "totality of the circumstances" when considering whether a reasonable person would consider the environment hostile or abusive.[42] In addition, the victim must subjectively perceive the environment to be abusive.[43] In instituting this objective and subjective test, the Supreme Court noted that establishing psychological injury is not necessary.[44] The Court included factors to consider when determining whether the environment is severely and pervasively hostile, including: "the

[30] *Id*.
[31] *Id*. at 61 (internal quotations omitted).
[32] *Id*. at 62.
[33] *Id*. at 63.
[34] *Id*. at 64.
[35] *Id*. at 65.
[36] *Id*. at 67.
[37] *Id*.
[38] 510 U.S. 17 (1993).
[39] *Id*. at 20 (internal quotations omitted).
[40] *Id*. at 21–23.
[41] *Id*. at 21.
[42] *Id*.
[43] *Id*.
[44] *Id*. at 22.

frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere utterance; and whether it unreasonably interferes with an employee's work performance."[45]

In 1998, the Supreme Court further addressed the fundamental aspects of Title VII sexual harassment claims in *Oncale v. Sundowner Offshore Services, Inc*., holding that same-sex sexual harassment was actionable.[46] The Court cautioned, however, that harassment between men and women, even when "the words used have sexual content or connotation," is not *per se* discrimination under Title VII.[47] Rather, the "critical issue" is whether the discrimination took place because of sex—whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[48]

Courts have struggled with applying the "severe and pervasive" standard to fact patterns, resulting in an often wide disparity of results. For instance, in *Leopold v. Baccart, Inc*., the Second Circuit upheld a jury verdict for the plaintiff when she was subjected to five offensive comments over two years.[49] In *Smith v. Norwest Fin. Acceptance, Inc*., the Tenth Circuit found that a hostile work environment had been established when a plaintiff had been subjected to six comments over two years.[50] These cases seem relatively mild when compared with the Seventh Circuit's affirmance of summary judgment for the employer when the employee's supervisor asked her on dates, called her a "dumb blond," tried to kiss her numerous times, put his arm on her shoulders numerous times, and put "I love you" signs in her work area.[51] Or when compared with the judgment for the employer in *Elley v. Catholic Charities Archdiocese*, where the employee's supervisor gave her "hugs with sensual back rubs" every other week, made comments every week about her clothes, buttocks, weight and hairstyles, including a comment that she looked "sexy," all occurring over an eleven-month period.[52] Justice Scalia's concurrence in *Harris*, predicted this outcome.[53] He stated that, despite the Court's addition of the "objectively reasonable" element to the test for sexual harassment cases, the vagueness of such a standard would lead to inconsistencies in the application by "virtually unguided juries."[54]

These inconsistent outcomes are dangerous for employers, as they make predicting liability in a particular case nearly impossible. School districts should implement far-reaching sexual harassment policies and ensure that proper training and enforcement is being undertaken. Further, should claims or lawsuits arise, school attorneys would be wise to take a conservative approach when defending such claims, as liability essentially turns on a particular jury's opinion of what constitutes "severe and pervasive."

[45] *Id*. at 23.
[46] *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 79 (1998).
[47] *Id*. at 80.
[48] *Id*.
[49] 174 F.3d 261 (2d Cir. 1999).
[50] 129 F.3d 1408 (10th Cir. 1997).
[51] *Weiss v. Coca-Cola Bottling Co*., 990 F.2d 333 (7th Cir. 1993).
[52] 833 F. Supp. 2d 595 (E.D. La. 2011).
[53] 510 U.S. at 24 (Scalia, J., concurring).
[54] *Id*.

C. Other Important Issues in Sexual Harassment Cases

1. Supervisor and Non-Supervisor Harassment Standards of Liability

In 1998, the Supreme Court decided two landmark sexual harassment cases—*Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, in which the Court recognized different standards of liability depending on whether or not the alleged harasser was a supervisor. The Court also outlined a specific affirmative defense, which is available only in cases of supervisor harassment that did not result in a tangible employment action.[55]

The Court held that where an employee is harassed by a non-supervisor (such as a co-worker), and the workplace is sufficiently and severely hostile, the employer is liable only if the employer was "negligent in controlling work conditions."[56] If the harasser, however, was the employee's supervisor "with immediate (or successively higher) authority over the employee," the employer was subject to vicarious liability.[57]

In supervisor harassment cases where there was no detrimental tangible employment action, an employer may raise an affirmative defense to avoid liability when: (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) the employee "unreasonably failed to take advantages of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[58]

In *Ellerth*, the plaintiff, who worked as a salesperson for Burlington Industries, claimed she had been subjected to "constant" sexual harassment by her supervisor.[59] Her boss reported to a "mid-level" manager, Ted Slowik, who had authority to make hiring and promotion decisions, subject to the approval of his supervisors.[60] During Ms. Ellerth's approximately one year of employment at Burlington, Mr. Slowick made repeated offensive comments and gestures to her.[61] He also told Ellerth, after she did not respond to a comment about her breasts, that she should "loosen up" and told her he could "make [her] life very hard or very easy at Burlington."[62] When she became eligible for a promotion, he expressed reservations in her interview that she was not "loose enough," and then proceeded to rub her knee (during the interview).[63] When Slowik called Ellerth to inform her she received the promotion, he told her "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs."[64] He commented on another phone call that he did not have time to talk to her, "unless [she] wanted to tell [him] what [she was] wearing."[65] On another occasion, Slowik

[55] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
[56] *Vance v. Ball State Univ*., 133 S. Ct. 2434 (2013).
[57] *Ellerth*, 524 U.S. at 765.
[58] *Id.*; *Faragher*, 524 U.S. at 807.
[59] 524 U.S. at 747.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 748.
[63] *Id*.
[64] *Id*.
[65] *Id*.

asked Ellerth if she was wearing shorter skirts yet because, according to him, "it would make [her] job a heck of a lot easier."[66] Ellerth quit shortly after this last comment.[67]

Although Burlington had a sexual harassment policy, Ellerth never complained to anyone in authority about the harassment.[68] The Seventh Circuit Court of Appeals reversed the district court's grant of summary judgment to Burlington, finding that plaintiff was entitled to submit to the jury the question of whether the employer should be vicariously liable for the supervisor's behavior.[69] The Seventh Circuit could not agree on the standard for applying liability to the employer.[70] The Supreme Court granted *certiorari* to "assist in defining the relevant standards of employer liability."[71]

The Supreme Court began its opinion by expressing disfavor for categorizing sexual harassment claims as either "*quid pro quo*" or "hostile work environment."[72] The Court stated that Title VII is violated "by either explicit or constructive alterations in the terms or conditions of employment and . . . the latter must be severe or pervasive."[73] The Court went on to clarify that, "[w]hen a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands," she establishes an adverse employment action.[74] Similarly, if a plaintiff proves she was subjected to a hostile work environment and could show "severe or pervasive conduct," she would also establish an adverse action.[75]

On the issue of vicarious liability, the Court reaffirmed the principle set forth in *Meritor* that an employer is liable when a supervisor takes a tangible employment action against a subordinate, regardless of whether the employer "knew, or should have known, or approved of the supervisor's actions."[76] The Court stated that, in instances where a tangible employment action had not been taken, the employer is entitled to a defense (now called the *Ellerth*/*Faragher* defense).[77] To assert this defense, the employer must prove that (a) it exercised "reasonable care to prevent and correct promptly any sexually harassing behavior" and (b) the employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[78] The Court went on to explain that proof that the employer promulgated a harassment policy is not necessary, but is helpful to establish the first prong of the defense.[79] Further, the employee's failure to comply with the employer's complaint

[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*. at 750.
[70] *Id*.
[71] *Id*. at 751.
[72] *Id*. at 752.
[73] *Id*.
[74] *Id*. at 753.
[75] *Id*. at 754.
[76] *Id*. at 760–61 (The Court defined "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").
[77] *Id*. at 765.
[78] *Id*. (noting that the burden of proof for the employer was a preponderance of the evidence standard).
[79] *Id*.

procedure is not the only way to establish the second prong of the defense, but it will normally be sufficient to do so.[80]

In *Faragher v. City of Boca Raton*, decided the same day as *Ellerth*, the Court reiterated this defense.[81] Beth Ann Faragher was a lifeguard for the City of Boca Raton, working for the Marine Safety Section of the Parks and Recreation Department.[82] She had one main supervisor, Bill Terry, who was responsible for hiring, firing, and discipline, and two other supervisors, David Silverman and Robert Gordon, who were responsible for scheduling and training.[83] Over the course of Faragher's employment with the city, both Terry and Silverman harassed her and the other female lifeguards.[84] Specifically, Terry would touch the female lifeguards and make sexual simulations and crude references toward them.[85] Silverman would also make lewd gestures and vulgar comments.[86] He also expressed interest in having sex with several of the female lifeguards.[87]

The city had a sexual harassment policy that was disseminated to some employees, but it was never shared with the Marine Safety Section and accordingly, Terry, Silverman, Gordon, and the lifeguards were unaware of the policy.[88] Ms. Faragher had informal conversations with Gordon about her other two supervisors, but Gordon did not report them because he "did not feel it was his place to do so."[89] Two months before Faragher resigned, another female lifeguard complained to the city's personnel director about Terry and Silverman.[90] The city conducted an investigation and reprimanded and sanctioned both supervisors.[91] Faragher ultimately resigned and filed suit under Title VII.[92]

The district court held the city liable for the harassment and awarded Faragher one dollar in nominal damages.[93] The Eleventh Circuit reversed, finding that there was no evidence the city had knowledge of the harassment and therefore, the city could not be held liable under agency principles.[94]

The Supreme Court reversed the Eleventh Circuit, reiterating the two-prong affirmative defense laid out in *Ellerth*.[95] Applying this defense to Ms. Faragher's case, the Court found that the city could not establish the affirmative defense because it did not take "reasonable care to

[80] *Id*.
[81] 524 U.S. 775 (1998).
[82] *Id*. at 780.
[83] *Id*. at 781.
[84] *Id*. at 782.
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*. at 783.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*. at 783–84.
[95] *Id*. at 807–808.

prevent and correct promptly any sexually harassing behavior."[96] Specifically, the city failed to disseminate its harassment policy to an entire department of employees and further, the policy itself did not include any mechanism by which employees could bypass their supervisors when registering complaints.[97] The Court then took the unusual step of reinstating the district court's holding, as a matter of law.[98]

In reviewing cases of workplace sexual harassment, it is important to determine whether the alleged harasser was a supervisor. If the harasser is not a supervisor, then the employer will be liable only if the employer was negligent in its response to such conduct.[99] Note that the EEOC regulations provide that an employer is liable for co-worker harassment in the following circumstances: "(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[100] Although harassment by non-supervisors is analyzed under a negligence standard, courts often use factors similar to the *Ellerth*/*Faragher* prongs when analyzing the employer's negligence.[101]

If the harassing employee is a supervisor, courts examine whether a detrimental tangible employment action occurred.[102] In 2013, in *Vance v. Ball State University,* the Supreme Court, clarified that a supervisor is one who is "empowered . . . to take tangible employment actions against the victim."[103] The Supreme Court also reaffirmed that the following actions constituted tangible employment actions: (a) hiring; (b) firing; (c) failure to promote; (c) reassignment with significantly different responsibilities; or (d) a decision causing a significant change in benefits.[104]

In the supervisor context, courts will hold employers strictly liable if the supervisor took a tangible employment action against the employee.[105] However, in the absence of a tangible employment action, the employer may still be liable, unless it establishes the two prongs of the *Ellerth/Faragher* affirmative defense: that it took reasonable steps to prevent/correct the

[96] *Id*. at 808.
[97] *Id*.
[98] *Id*. at 810.
[99] *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013).
[100] 29 U.S.C. § 1604.11.
[101] *See, e.g.*, *Sutherland v. Wal-Mart Stores, Inc*., 632 F.3d 990 (7th Cir. 2011). In *Sutherland*, the Court analyzed the promptness and appropriateness of the employer's response to a complaint when determining whether the employer was negligent. *Id*. at 994. The Court noted that the employer has an obligation to respond promptly to an employee's complaint about another employee's harassment. *Id*. It noted, however, that, "[w]hile promptness is a virtue, an employer must also provide an appropriate response to an employee's complaints of harassment." *Id*. at 994–95. An appropriate response is when an employer responds "in a manner reasonably likely to end the harassment." *Id*. at 995. The Court stated that, in some circumstances, "creating physical separation and minimizing time worked together are steps reasonably likely to end harassment." *Id*.
[102] 133 S. Ct. at 2442.
[103] *Id*. at 2443.
[104] *Id*. (outlining examples of tangible employment actions).
[105] *Id*.

harassment and that the employee failed to avail herself of the opportunities provided or otherwise failed to mitigate her harm.[106]

2. Retaliation Claims

In an increasing number of cases, plaintiffs are asserting retaliation claims after complaining of a hostile work environment; these cases are particularly problematic.[107] This situation occurs when an employee has been or believes she has been harassed, complains of this harassment, and is then subject to an adverse employment action. Under Title VII, it is unlawful for an employer to "discriminate against any of his employees because the employee has opposed any practice made an unlawful employment practice by Title VII [typically referred to as the 'opposition clause'], or because the employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII [typically called the 'participation clause']."[108] As discussed later, the causation standard in retaliation claims under Title VII (unlike Title VII discrimination claims) is but-for causation (meaning that liability cannot be established unless, but for the impermissible consideration, the employment decision would not have been made).[109]

Under the opposition clause (which is where the majority of sexual harassment retaliation claims arise), if an employee has a reasonable, good faith basis to believe the employer's conduct is unlawful—even if that belief is later found to be mistaken—the employee has engaged in protected opposition activity for purposes of Title VII's retaliation protections.[110] In this context, the Supreme Court has emphasized the "reasonableness aspect" of this inquiry (assuming, without deciding, that the opposition clause requires only a good faith belief), holding that a reasonable person must have believed that the employer's conduct "violated Title VII's standards."[111]

In *Clark County School District v. Breeden*, the Supreme Court reviewed a claim involving an employee complaint about an isolated comment made by her supervisor and another male employee during a meeting.[112] Specifically, the plaintiff, her supervisor, and another co-

[106] *Ellerth*, 542 U.S. at 765.
[107] *See Retaliation-Based Charges FY 1997- FY 2014*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm (last visited September 1, 2015) (noting that the number of retaliation-based charges more than doubled in the period from 1997 to 2014, with 18,198 charges filed in 1997 and 37,955 charges filed in 2014); *see also* Catherine Ho, *Rise in Retaliation Claims Reflect Changing Laws, Attitudes About Workplace Bias*, THE WASHINGTON POST, Nov. 2, 2014, http://www.washingtonpost.com/business/capitalbusiness/rise-in-retaliation-claims-reflect-changing-laws-attitudes-about-workplace-bias/2014/10/31/978628d6-5ee9-11e4-91f7-5d89b5e8c251_story.html (quoting one EEOC attorney as stating that, "I see often where there's sexual harassment that in the past might have been tolerated, now is leading to internal complaints of discrimination, and that then sets the stage for retaliation of some sort.").
[108] *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001) (quoting 42 U.S.C. § 2000e-3(a) (internal quotations omitted)).
[109] *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013).
[110] *See Wolf v. J.I. Case Co*., 617 F. Supp. 858, 868 (E.D. Wis. 1985) (noting that, every federal appellate court, including the 1st, 5th, 7th, 8th, 9th, 10th, and D.C. Circuits, that has considered Title VII's opposition clause has interpreted the clause to require only a reasonable, good faith belief).
[111] *Breeden*, 532 U.S. at 271.
[112] *Id*. at 269.

worker were reviewing applications for potential hires.[113] One of the items included in the application was a psychological evaluation of the applicant.[114] One evaluation contained the following comment, reportedly made by the applicant: "I hear making love to you is like making love to the Grand Canyon."[115] In the meeting to review the applications, the supervisor indicated to the plaintiff and the co-worker that he did not know what that meant.[116] The co-worker then said, "Well, I'll tell you later" and both men "chuckled."[117] Plaintiff reported the comment and alleged in her lawsuit she was subject to retaliation for making the report.[118]

In striking down the plaintiff's retaliation claim, the Court held that, regardless of whether the reasonable, good faith belief requirement was a correct interpretation of Title VII, the plaintiff could not have reasonably believed the employer's conduct was unlawful.[119] The Court stated that sexual harassment must be severe and pervasive and that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."[120] The Court noted that, not only could "[n]o reasonable person . . . have believed that the single incident recounted above violated Title VII's standards," but that the plaintiff, herself, had admitted she was not offended by the comment.[121]

It is also helpful to remember that in sexual harassment retaliation cases, like other discrimination cases, if a plaintiff establishes a prima facie case, the employer is entitled to rebut the case by demonstrating a legitimate, non-discriminatory reason for the employer's action.[122] If the employer accomplishes this task, the plaintiff must show the action was pretextual, *i.e.*, that the "presumptively valid reasons for [the employment action] were in fact a cover up for a . . . discriminatory decision."[123] If the plaintiff fails to establish pretext, his/her Title VII retaliation claim will also fail.[124]

School attorneys should advise clients to be cautious whenever they are contemplating adverse action against an employee who has complained of discrimination, regardless of the basis of the complaint. Depending on the facts and timing, courts are often reluctant to dismiss these claims prior to trial, as the reason behind the school district's decision is often the crux of the case.

[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*. at 270.
[120] *Id*. at 271 (internal quotations omitted).
[121] *Id*.
[122] This burden-shifting framework was first announced in 1973, in the landmark Supreme Court case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Although the case dealt with retaliation based on race, the Supreme Court applied the rule to all Title VII cases. *Id*. at 801.
[123] *Id*. at 804; *see also Hnin v. TOA (USA), LLC*, 751 F.3d 499, 506 (7th Cir. 2014) (holding, in a national origin claim, that, "[t]he focus of the pretext inquiry is whether the proffered reason is a lie").
[124] *McDonnell Douglas*, 411 U.S. at 807.

D. Practical Considerations for School Law Practitioners

As was made clear in the *Faragher* decision, school law practitioners should make sure their districts have widely-disseminated policies prohibiting discrimination and harassment, coupled with training regarding such policies. Policies should contain at least two different persons to whom an employee may make a report of harassment or discrimination, and delineate the process a district will follow after receiving such a report. Districts will also want to ensure that individuals who receive reports and individuals who investigate such reports are trained in those duties. Plaintiffs may attack the sufficiency or legitimacy of investigations where the investigator does not conduct interviews, or fails to follow up on information provided by either party as part of the investigation. Thus, investigators should be trained to make credibility determinations, to make proactive determinations about the relevance of the information offered by the parties (and whether such information requires additional investigation), and to properly document the investigation.

Investigators and adjudicators of such policies should understand that their task is simply to determine whether the alleged conduct occurred, and if so, whether such conduct violated district *policy*, as opposed to making a determination of whether there was a violation of law. If there is a determination that a violation of policy did occur, counsel should advise districts to document carefully all remedial efforts utilized to address the harassing behavior, as those efforts may have direct bearing on liability in later litigation.

Counsel for districts may also consider whether some investigations should be conducted by attorneys for the district (either inside or outside counsel), and whether the district will want to assert privilege with regard to those investigations. Counsel should also consider whether the use of an outside investigator (attorney or otherwise) is appropriate when the allegations are against high-ranking members of the district's administration or against board members, as jurors may question the ability of district personnel to remain objective under those circumstances.

Once a district receives notice that a current or former employee has filed a Charge of Discrimination against a district, counsel should pay particular attention to timing issues—noting, and raising as a defense, situations where the Charge is filed more than 180 (or 300, depending on the jurisdiction) days after the alleged harassing behavior. Counsel should pay similar attention to timing issues in litigation (which would also include whether the action was filed within 90 days of the issuance of a Right to Sue letter), as these issues may provide a complete defense to claims at either the Motion to Dismiss or Summary Judgment stage of litigation. Once the employer receives notice of a claim, practitioners should review the litigation hold requirements applicable to their case, as this may differ depending on the jurisdiction. As a practical matter, regardless of the jurisdiction, it is a best practice to issue a litigation hold so that important information is preserved and the client is not subject to an adverse jury instruction or other sanction.

In defending against claims of sexual harassment, counsel also should pay particular attention to the following factual issues—whether the alleged harasser is a supervisor (as that term is defined by courts); whether the conduct rises to a level that is actionable (which may vary

depending on jurisdiction); whether the conduct was reported to the district, and if so, the district's response to the report; and whether there was any fall-out from the complaint, investigation, or response that could give rise to an inference of discrimination. These are the categories of "facts" that will likely shape counsel's response to a claim of sexual harassment.

School law practitioners should also be aware of other potential landmines more unique to the school law practice—for example, ensuring that respondents in sexual harassment investigations are provided adequate due process. School districts may also face (what are properly) Title VII sexual harassment and related retaliation claims cloaked as claims brought under other laws, such as Title IX or the First Amendment. Such Title IX claims are discussed in more detail below. First Amendment retaliation claims arising out of an employer's purported adverse action taken against an employee because of that employee raising concerns of sexual harassment are analyzed under the Supreme Court's *Connick*/*Pickering* test, which was clarified by *Garcetti* in 2006. The Supreme Court set forth a balancing test in *Connick*/*Pickering*, stating that a court must "seek a balance between the interests of the employee as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[125] In *Garcetti v. Ceballos*, the Supreme Court clarified that speech made pursuant to an employee's official responsibilities is not protected speech under the First Amendment.[126]

III. Title IX

While most practitioners are familiar with Title IX in the student context, it has been extended to an employee/employer context in limited circumstances.[127] The text of Title IX is broad: "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[128]

In 1982, the Supreme Court upheld the Department of Health, Education, and Welfare's regulations extending Title IX protection to employees.[129] Specifically, the Supreme Court stated that, "a female employee who works in a federally funded education program is subjected to discrimination under that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues."[130] Prior to that decision, the Supreme Court had already recognized a private right of action under Title IX in some circumstances, but those cases typically involved students.[131]

[125] *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Educ*., 391 U.S. 563, 568 (1968)).
[126] 547 U.S. 410, 424 (2006) (The Supreme Court emphasized that whether the employee's speech was protected was a threshold question).
[127] The Department of Education states that the key areas in which recipients have Title IX obligations are: "recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment." *Title IX and Sex Discrimination*, OFFICE FOR CIVIL RIGHTS, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (revised April 2015).
[128] 20 U.S.C. § 1681 (a).
[129] *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); *see also* 34 C.F.R. § 106.51–61 (regulations regarding discrimination on the basis of sex in employment in education programs or activities).
[130] *Bell*, 456 U.S. at 521(internal quotations omitted).
[131] *See Cannon v. University of Chicago*, 441 U.S. 677 (1979).

Within the last ten years, the Supreme Court has recognized that Title IX encompasses an employee's private right of action to allege retaliation resulting after asserting Title IX complaints on behalf of students. In *Jackson v. Birmingham Board of Educ.*, the plaintiff, Roderick Jackson, was a physical education teacher and girls' basketball coach at a Birmingham, Alabama high school.[132] Mr. Jackson noticed that the girls' basketball team was not receiving "equal funding and equal access to athletic equipment and facilities."[133] Mr. Jackson complained to the administration regarding the inadequate funding and resources and alleged that, rather than the district remedying the issue, he received negative evaluations and was eventually removed as the basketball coach.[134]

The lower courts denied Jackson's claim, finding that Title IX did not include a private cause of action for retaliation.[135] The Supreme Court reversed, holding that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action."[136]

While the Supreme Court expressly recognized that employees may assert retaliation claims under Title IX, the Court has never addressed the interplay between Title IX and Title VII as it relates to claims by employees. For example, may an employee bring a workplace sexual harassment claim under Title IX? Also, may an employee bring a Title IX retaliation claim for conduct that would be covered by Title VII? Courts that have addressed these questions have largely disallowed such claims as they impermissibly allow the employee to bypass the exhaustion scheme of Title VII.[137] These courts hold that (a) "Title VII's comprehensive scheme should not be bypassed" and (b) "Title VII was meant to preempt subsequent remedies."[138] To hold otherwise would result in employees of educational institutions receiving greater protections than all other employees, which would give them favored status, a result that Congress likely did not intend.[139]

[132] 544 U.S. 167, 171 (2005).
[133] *Id*.
[134] *Id*. at 171–72.
[135] *Id*. at 172.
[136] *Id*. at 173.
[137] *See, e.g.*, *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995) (holding that Title VII preempts Title IX claims for an employee against her employer); *Waid v. Merril Area Pub. Sch*., 91 F.3d 857, 861–62 (7th Cir. 1996), *abrogated as to the Section 1983 preemption by*, *Fitzgerald v. Barnstable Sch. Comm*., 555 U.S. 246 (2009); *Schultz v. Board of Trs. of Univ. of W. Fla*., 2007 U.S. Dist. LEXIS 36815, at *9 (N.D. Fla. May 21, 2007) (finding that Title VII preempts the "more general remedy under Title IX"); *Hankinson v. Thomas Cnty. Sch. Dist*., 2005 U.S. Dist. LEXIS 25576, at *6 (M.D. Ga. Oct. 28, 2005) (holding that Title VII preempts damage suits brought by employees against employers for discrimination under Title IX); *Tompkins v. Barker*, 2011 U.S. Dist. LEXIS 90788, at *19 (M.D. Ala. July 13, 2011) (same); *Ludlow v. Northwestern Univ*., 2015 U.S. Dist. LEXIS 114984, at *10–15 (N.D. Ill. Aug. 28, 2015) (same); *Cooper v. Gustavus Adolphus College*, 957 F. Supp. 191, 193 (D. Minn. 1997) (same); *Torres v. School Dist. of Manatee Cnty*., 2014 U.S. Dist. LEXIS 117254, at *12 (M.D. Fla. Aug. 22, 2014) (noting a circuit split as to whether Title VII preempts Title IX with regard to purely employee/employer discrimination claims). Note, however, that the cases cited in the *Torres* which allowed both Title VII and Title IX claims do not contain analysis of the preemption issue. At least one of the cases (*Ivan v. Kent State Univ*., No. 94-4090, 1996 U.S. App. LEXIS 22269, at *7 n.10 (6th Cir. July 26, 1996)) involved a graduate student with teaching responsibilities (and who thus, could, arguably, assert claims under both Title VII and Title IX theories under *Jackson*).
[138] *Burrell v. City of Univ. of N.Y*., 995 F. Supp. 398, 410 (S.D.N.Y. 1998).
[139] *Vega v. State Univ. of N.Y. Bd. of Trs.*, 2000 U.S. Dist. LEXIS 4749, at *9 (S.D.N.Y. Apr. 13, 2000).

Practitioners should be mindful to assert this preemption defense when responding to claims by employees alleging sexual harassment (or retaliation based only on the employee's complaints about the work environment) pursuant to Title IX. Note that some individuals may legitimately be able to assert Title VII and Title IX claims (students who have an employment relationship to the educational institution, and vice versa).[140] In those cases, courts often apply Title VII discrimination standards in examining the Title IX claim.[141]

IV. Recent Developments in Sex-based Discrimination and Harassment Law

A. Pregnancy discrimination

On March 25, 2015, in *Young v. United Parcel Service*, the Supreme Court decided a case involving pregnancy discrimination under Title VII.[142] The case involved Peggy Young, a part-time UPS driver who was required, by UPS policy, to be able to lift up to seventy pounds (up to 150 pounds with assistance).[143] After Ms. Young became pregnant, her doctor forbade her from lifting more than twenty pounds during the first twenty weeks of her pregnancy and more than ten pounds in her last weeks of pregnancy.[144] UPS denied Ms. Young's request for an accommodation to work with the restrictions and, as a result, Ms. Young was forced to stay home without pay, which eventually resulted in her loss of medical coverage.[145] Ms. Young filed suit under Title VII, claiming UPS discriminated against her on the basis of pregnancy by failing to accommodate her workplace restrictions, whereas they had accommodated similar workplace restrictions for non-pregnant employees.[146]

The Supreme Court began its analysis with the language of Title VII prohibiting discrimination "against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex."[147] The Court noted that the statute specifically includes "pregnancy, childbirth, or related medical conditions" as part of "sex."[148] The Court narrowed its analysis to a disparate treatment claim, citing the clause stating that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[149] To prove her case, Young had to show either (a) that a workplace policy, practice, or decision relied on a protected characteristic or (b) that the employer discriminated under the "burden-shifting framework set forth in *McDonnell Douglas*."[150] The *McDonnell Douglas* framework requires a plaintiff to establish (a) membership in a protected

[140] *See Ivan*, 1996 U.S. App. LEXIS 22269 (allowing both a Title VII and Title IX claim for a graduate student who also had teaching responsibilities).
[141] *See Preston v. Virginia*, 31 F.3d 203, 206 (4th Cir. 1994) (noting that, most courts apply Title VII principles to Title IX actions).
[142] *Young v. UPS*, 135 S. Ct. 1338 (2015).
[143] *Id*. at 1344.
[144] *Id*.
[145] *Id*.
[146] *Id*.
[147] *Id*. (quoting 42 U.S.C. § 2000e-2(a)(1)).
[148] *Id*. at 1345 (quoting § 2000e(k)).
[149] *Id*.
[150] *Id*.

class; (b) qualification for the job; (c) an adverse employment action; and (d) members outside of the protected class were not subjected to the adverse employment action.[151]

Ms. Young pointed to the fact that UPS's occupational health manager told her she could not return to work until she could satisfy the lift requirements and that she did not qualify for a temporary alternative assignment.[152] She also relied on statements made by UPS's Capital Division Manager that she was "too much of a liability" while pregnant and that she "could not come back until she was no longer pregnant."[153] UPS's collective-bargaining agreement stated that alternative work assignments were to be given to employees who were unable to perform the job because of an on-the-job injury.[154] The agreement also stated that UPS would attempt to provide reasonable accommodations for employees with permanent disabilities.[155] Drivers who lost their certifications or licenses were entitled to "inside" jobs according to the agreement.[156]

Ms. Young argued that similarly-situated employees (employees with disabilities, on-the-job injuries, or employees who lost certification and/or licenses) were given accommodations that she, as a pregnant person, was denied.[157] Ms. Young also identified several employees who had similar injuries that were not covered by the collective-bargaining agreement, and yet, the employees were accommodated.[158] Specifically, Ms. Young pointed to employees who were unable to perform the work, but who had not suffered on-the-job injuries.[159] Ms. Young also submitted deposition testimony from a shop steward who had worked for UPS for approximately a decade, claiming that the only accommodation/light duty requests that became issues "were with women who were pregnant."[160]

The district court granted UPS's motion for summary judgment and the Fourth Circuit Court of Appeals affirmed this ruling.[161] Both courts held that Ms. Young's identified comparators were too different to qualify as similarly-situated, as Ms. Young was not disabled, nor did she have a legal obstacle impeding her from performing her job.[162] The Fourth Circuit pointed out that UPS's policy was "at least facially a neutral and legitimate business practice and not evidence of UPS's discriminatory animus toward pregnant workers."[163]

The Supreme Court zeroed in on the phrase from Title VII defining similarly-situated employees, for purposes of pregnancy, as employees "similar in their ability or inability to work."[164] Young argued that, because there was evidence that "pregnant and non-pregnant

[151] *Id*.
[152] *Id*. at 1346.
[153] *Id*. (internal quotations omitted).
[154] *Id*.
[155] *Id*.
[156] *Id*.
[157] *Id*. at 1347.
[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] *Id*.
[162] *Id*.
[163] *Id*. (quoting 707 F.3d 437, 446 (4th Cir. 2013)) (internal quotations omitted).
[164] *Id*. at 1348.

workers were not treated the same," she should win.[165] UPS argued, essentially, that Young was required to pick a sub-set of employees to compare herself to—*i.e.* employees with off-the-job injuries.[166] The thrust of UPS's argument was that pregnancy discrimination is identical to gender discrimination.[167]

The Court rejected both of these arguments. As to Young's position, the Court found this created a "most-favored-nation" status for pregnant employees wherein, if an employer provided one or two employees a certain accommodation, it must provide "similar accommodations to *all* pregnant workers," regardless of their workplace limitations.[168] As to UPS's position, the Court noted that Congress rejected the view that pregnancy discrimination was equivalent to gender discrimination when it passed the Pregnancy Discrimination Act.[169] The Court noted that Congress explicitly rejected a prior Supreme Court ruling that allowed employers to treat pregnancy less favorably than "diseases or disabilities resulting in a similar inability to work."[170]

The Court instead, found that a pregnant employee could make out a prima facie case of disparate treatment discrimination under the *McDonnell Douglas* framework by showing that "it is more likely than not" the employer's actions were based on a discriminatory motive.[171] Under *McDonnell Douglas*, the Court noted, a plaintiff need not establish that "those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."[172] Under the text of the statute, the plaintiff is, thus, required to establish only that similarly-situated employees were similar "in their ability and inability to work."[173] Applied to the facts of the case at bar, the Court held that Young could prevail if she established that UPS "accommodates most non-pregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations."[174]

The dissent, authored by an acerbic Justice Scalia (and joined by Kennedy and Thomas), noted that the analysis was "as dubious in principle as it is senseless in practice."[175] The dissent argued that the Court effectively conflated the standard for disparate treatment and disparate impact claims, despite the fact that the claims are different.[176] In so doing, the dissent argued, a lower court will be required to "concentrate on effects and justifications to the exclusion of other considerations."[177] Time will tell whether the dissent's prediction regarding conflation of disparate treatment and disparate impact claims will come true.

As the Court notes, the relevance of this case may be limited by the 2008 amendments to the Americans with Disabilities Act. Even so, employers should be careful in examining how

[165] *Id*. at 1349.
[166] *Id*.
[167] *Id*. at 1352.
[168] *Id*. at 1349–50.
[169] *Id*. at 1353.
[170] *Id*. (rejecting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)).
[171] *Id*. at 1353–54.
[172] *Id*. at 1354.
[173] *Id*.
[174] *Id*.
[175] *Id*. at 1361 (Scalia, J., dissenting).
[176] *Id*. at 1365.
[177] *Id*.

they have treated accommodation requests by employees who face similar work restrictions to pregnant employees. To the extent a district has provided work place accommodations to others (whether such accommodations are based on a medical need or not), districts should consider carefully whether similar accommodations should be provided to pregnant employees.

B. Sexual orientation and gender identity

On June 26, 2015, in *Obergefell v. Hodges,* a 5-4 decision, the Supreme Court ruled that the Fourteenth Amendment requires states to allow marriage between same-sex couples and to recognize same-sex marriages performed in other states, effectively legalizing same-sex marriage.[178] There was some discussion prior to the *Obergefell* decision that the Supreme Court might decide the case on Equal Protection grounds, designating sexual orientation as a separate protected class.[179] Although the Court prohibited bans on same-sex marriage under a fundamental right analysis,[180] the decision is a significant step toward expanding the rights of persons with a same-sex sexual orientation.

The *Obergefell* decision represents the culmination of the cultural shift to expand protections for LGBT persons. Although courts have not recognized sex orientation discrimination *per se* as cognizable under the express language of Title VII, numerous courts have imposed liability for sex orientation discrimination under a gender stereotyping theory. This theory was first developed by the Supreme Court in 1989 in *Price Waterhouse v. Hopkins*.[181]

The *Price Waterhouse* case involved a female, Ann Hopkins, who brought a gender discrimination claim based on the company's alleged failure to promote her to partner.[182] Ms. Hopkins was not promoted to partner at her firm based on her inability to behave in a so-called "feminine" manner.[183] Specifically, Ms. Hopkins was described by one partner as "macho," another partner advised her to take a "course at charm school," and a third partner told her that, to improve her chances to become partner, she should "walk more femininely, wear make-up,

[178] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[179] *See, e.g.*, Amy Davidson, *The Here and Now of Same-Sex Marriage*, NEW YORKER, April 28, 2015, http://www.newyorker.com/news/amy-davidson/obergefell-v-hodges-supreme-court-same-sex-marriage (proposing that the Court might hold in *Obergefell* that gays and lesbians are a protected class warranting heightened scrutiny).
[180] The majority grounded its analysis in the Due Process clause of the Fourteenth Amendment, holding that the fundamental right to marry must be extended to same-sex couples. *Obergefell*, 135 S. Ct. at 2602. However, the Court mentioned, in passing, that the "right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Id*. The discussion of the Equal Protection clause is brief and the Court did not articulate the level of scrutiny required to analyze a same-sex equal protection claim. *Id*. at 2602–05. In Chief Justice Roberts' dissent, he noted that the majority did not "seriously engage with this claim." *Id*. at 2623 (Roberts, CJ, dissenting). Roberts concluded that the Equal Protection clause was not violated under the rational basis test because the state articulated a "legitimate state interest in preserving the traditional institution of marriage." *Id*. (internal quotations omitted). It will be interesting to see if the majority's opinion will be used to bring Equal Protection challenges for employment discrimination claims based on sexual orientation, and if lower courts will apply Roberts' preference for rational basis or if they will apply a heightened level of scrutiny.
[181] 490 U.S. 228 (1989), *abrogated as to the "mixed-motive" theory of liability by the 1991 amendments to Title VII, as recognized in University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).
[182] *Id*. at 231.
[183] *Id*. at 235.

have her hair styled, and wear jewelry."[184] In years prior, when evaluating other female candidates for partner, one partner actually stated that "he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers."[185]

The Supreme Court began with the familiar adage that, "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[186] From there, the Court easily found that sex stereotyping was a cognizable form of gender discrimination.[187] With respect to Ms. Hopkins, the Court found she had put forth evidence of gender discrimination in that she had established Price Waterhouse acted based on sex stereotyping.[188]

In the wake of *Price Waterhouse*, and with the rise of individuals bringing claims based on sexual orientation discrimination, courts have expanded the gender stereotyping reasoning to cases where a homosexual individual is discriminated against because he/she did not display the typical behaviors of his/her gender. For example, in 2009, the Third Circuit allowed a claim to proceed to the jury for an employee who was discriminated against for crossing his legs, walking in an effeminate manner, and pushing the encoder buttons with "pizzazz."[189] The Third Circuit was careful to note that the claim was proceeding under a gender discrimination theory and not on the basis of sexual orientation.[190] Numerous other courts have expanded *Price Waterhouse* to allow what appear to be sexual orientation discrimination claims to proceed on a gender stereotyping theory.[191]

With regard to federal employees, President Clinton amended Executive Order 11478 in 1998, which prohibited discrimination in employment based on race, color, religion, sex, national origin, handicap, or age, to include sexual orientation as a protected class.[192] This eliminated the federal government's ability to avoid liability for claims brought on the basis of sexual orientation discrimination.

[184] *Id*.
[185] *Id*. at 236.
[186] *Id*. at 251 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).
[187] *Id*. at 250 (holding that, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender").
[188] *Id*. at 258.
[189] *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009); *see also Nichols v Azteca Rest. Enter., Inc*., 256 F.3d 864, 874–75 (9th Cir. 2001) (upholding sex discrimination claim where coworkers harassed male employee for "walking and carrying his tray like a woman").
[190] *Prowel*, 579 F.3d at 287.
[191] *See, e.g.*, *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 456 (5th Cir. 2013) (finding sex stereotype claims legally cognizable under Title VII and upholding plaintiff's claim of discrimination when he was harassed for using Wet Wipes at work); *Lewis v. Heartland Inns of America, LLC*, 591 F.3d 1033, 1036 (8th Cir. 2010) (upholding discrimination claim based on manager's termination of employee because she was "masculine" and had "an Ellen DeGeneres kind of look"); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (finding transsexual male plaintiff who was ridiculed for his feminine appearance and mannerisms had sufficiently stated a Title VII sex discrimination claim); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), *overruled on other grounds*, 523 U.S. 1001 (1998) (finding liability under Title VII for employee who was harassed because "his voice is soft, his physique is slight, his hair long").
[192] Exec. Order 13087 (May 28, 1998).

The EEOC has taken a more aggressive stand with regard to Title VII protection on the basis of sexual orientation. While initially using the gender stereotyping theory to assert liability in claims of sexual orientation discrimination, more recently, the EEOC has taken the position that Title VII, on its face, provides employment protection to individuals based on their sexual orientation.

In 2011, the EEOC decided two cases imposing liability under Title VII sex discrimination for employees who were being discriminated against because of their sexual orientation. In the first case, *Veretto v. Donahoe*, the complainant, Jason Veretto, worked for the Post Office as a "rural carrier."[193] Mr. Veretto posted a wedding announcement in the local newspaper announcing his marriage to his male life partner.[194] Upon seeing this announcement, one of Mr. Veretto's coworkers began to harass him.[195] Specifically, this coworker was "extremely upset" and "yelling" to another coworker about Mr. Veretto's wedding.[196] When Mr. Veretto got into a disagreement with the coworker's wife (who also worked at the Post Office), the coworker charged into Mr. Veretto's work space, bumped his chest into the wall, and screamed, "I will beat you, you f---ing queer."[197]

The EEOC began its analysis by recognizing that "Title VII's prohibition of discrimination does not include sexual preference or orientation as a preference."[198] However, the agency held that a complainant could recover based on the gender stereotyping theory set forth in *Price Waterhouse*.[199] As to Mr. Veretto's complaint, despite the absence of any allegation that he was discriminated against for failing to conform to gender norms, the EEOC found that the coworker's creation of a hostile work environment was "motivated by the sexual stereotype that marrying a woman is an essential part of being a man."[200] The EEOC found the complaint sufficient under a gender stereotyping theory because the coworker's actions were "motivated by his attitudes about stereotypical gender roles in marriage."[201]

Later that same year, in December of 2011, the EEOC upheld another complaint based on sex stereotyping. This complaint again involved the Post Office and a lesbian complainant, Cecile Castello.[202] Ms. Castello claimed that she was subjected to a hostile work environment when her manager stated, "Cece gets more pussy than the men in the building."[203] The EEOC allowed Ms. Castello's claim under the sex stereotyping theory.[204] Specifically, the EEOC found that the manager's comment was "motivated by the sexual stereotype that having relationships

[193] EEOC Decision No. 0120110873 (July 1, 2011).
[194] *Id*.
[195] *Id*.
[196] *Id*.
[197] *Id*.
[198] *Id*.
[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Castello v. Donahoe*, EEOC Decision No. 0520110649 (Dec. 20, 2011).
[203] *Id*.
[204] *Id*.

with men is an essential part of being a woman."[205] Again, the complaint did not allege that Ms. Castello was treated differently because her behavior did not conform to a gender norm.[206]

In July, 2015, the EEOC issued another sexual orientation Title VII decision.[207] The complainant in this case (unnamed) filed an EEOC complaint against the Federal Aviation Administration ("FAA") based on sex discrimination.[208] The complainant was an openly gay male and claimed that when he talked about his relationship with his partner, his supervisor would make comments like "We don't need to hear about that gay stuff" or that he was "a distraction in the radar room."[209] Purportedly based on his orientation, complainant was not selected for a promotion.[210] The EEOC started its analysis by stating that "the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has relied on sex-based considerations or taken gender into account when taking the challenged employment action."[211] In deciding that the complainant could prevail on his claim, the EEOC took the extraordinary step of concluding that "sexual orientation is inherently a sex-based consideration and an allegation based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."[212] Specifically, in holding that sexual orientation discrimination is *per se* sex discrimination, the EEOC stated:

> Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite sex. It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations . . . . Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.[213]

The EEOC likened this analysis to race discrimination claims brought under Title VII for an employee's association with a person of another race, "such as an interracial marriage or friendship."[214] Finding that, because Title VII prohibits discrimination because a person is

[205] *Id*.
[206] *Id*.
[207] *Complainant v. Anthony Foxx*, EEOC Decision No. 010133080 (July 16, 2015).
[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] *Id*. (internal quotations omitted).
[212] *Id*. (internal quotations omitted).
[213] *Id*. (internal citations omitted).
[214] *Id*. (citing *Floyd v. Amite Cnty. Sch. Dist*., 581 F.3d 244, 259 (5th Cir. 2009)).

married to a person of another race, it likewise prohibits discrimination because a person is married to (or in a relationship with) a person of the same sex.[215]

These decisions illustrate the EEOC's continued prioritization of sexual orientation and gender identity claims.[216] It will be interesting to see the development of sexual orientation discrimination under Title VII (and perhaps Title IX) in wake of the Supreme Court's *Obergefell* decision and the EEOC's progressive stance taken in July, 2015.

With regard to transgender rights, President Obama expanded Executive Order 11478 (applicable to civilian employees of the Federal Government) further on July 21, 2014, to include gender identity as a protected class.[217] Later in 2014, the Attorney General announced that the Department of Justice ("DOJ") would, going forward, take the position that gender identity claims are encompassed by Title VII.[218] This DOJ position has two major implications. First, the federal government will no longer defend Title VII transgender claims on the ground that gender identity is not covered by Title VII.[219] Second, the Civil Rights Division of the DOJ may now file claims against state and local public employers on behalf of transgender individuals.[220]

In April, 2012, the EEOC allowed a complaint to proceed under Title VII for transgender discrimination.[221] In this claim, Mia Macy, a transgender woman, worked as a police detective in Phoenix, Arizona (prior to her transition).[222] Ms. Macy applied for a position at the Bureau of Alcohol, Tobacco, and Firearms as a lab director.[223] She spoke with the director of the lab (while still presenting as a male), who assured her that she would get the position, assuming there were no problems with her background check.[224] After informing the lab of her gender transition, Ms. Macy was told the position was no longer available, due to federal budget reductions.[225] She later learned the lab had given the position to someone else.[226]

The EEOC initially bifurcated her claim—keeping the gender and sex stereotyping aspects of her complaint within the EEOC and referring her gender identity claim to the Department of Justice.[227] On appeal, the EEOC overturned the initial ruling, based on President

[215] *Id*. The EEOC also concluded that the complaint could succeed under a gender stereotyping framework.
[216] *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited August 24, 2015).
[217] Exec. Order 13672 (July 21, 2014).
[218] *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, OFFICE OF THE ATTORNEY GENERAL, (Dec. 15, 2014), http://www.justice.gov/file/188671/download.
[219] DEPARTMENT OF JUSTICE, *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims*, (Dec. 18, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination.
[220] *Id*.
[221] *Macy v. Holder*, EEOC Decision No. 0120120821 (Apr. 20, 2012).
[222] *Id*.
[223] *Id*.
[224] *Id*.
[225] *Id*.
[226] *Id*.
[227] The Department of Justice's process, by the EEOC's admission, "allows for fewer remedies and does not include a right to request a hearing." *Id*.

Obama's Executive Order 13672.[228] The EEOC explicitly stated that "claims of discrimination based on transgender status . . . are cognizable under Title VII's sex discrimination prohibition."[229] As to Ms. Macy, the EEOC held that her complaint contains claims that "are simply different ways of stating the same claim of discrimination based on sex, a claim cognizable under Title VII." Thus, the EEOC's ruling was based on the finding that transgender or gender identity discrimination qualified as discrimination based on sex.

The EEOC's adjudications, the courts' expansion of gender stereotyping protections, and the recent executive orders all signal a shift toward greater protections for individuals asserting sexual orientation and gender identity claims. The Supreme Court's same-sex marriage ruling further solidifies this shift. It is likely that, in the wake of this opinion, plaintiffs will seek Supreme Court review of sexual orientation and gender identity claims under Title VII (and possibly Title IX) to obtain a holding that sexual orientation and/or gender identity are protected. It will also be interesting to see if Congress reacts to the shifting tide of public opinion on sexual orientation and/or gender identity by amending the text of Title VII or Title IX to include expressly those categories as protected classes.

Further, although the Supreme Court declined to articulate a level of scrutiny under the Equal Protection clause in *Obergefell*, it is likely plaintiffs will seek recognition of sexual orientation and/or gender identity as a protected class that requires heightened scrutiny. Under the Equal Protection Clause, a plaintiff can bring a claim via 42 U.S.C. § 1983 for deprivation of the constitutional right to be treated equally to similarly situated persons.[230] To prevail, a plaintiff must establish that: (a) he/she has been treated differently from others with whom he/she is similarly-situated and (b) the treatment was the result of intentional discrimination.[231] If these elements are met, the court then determines whether "the disparity in treatment can be justified under the requisite level of scrutiny."[232] Thus far, sexual orientation is analyzed under rational basis review, which is the most forgiving standard for employers.[233]

Plaintiffs have advanced claims under 42 U.S.C. § 1983 for constitutional deprivations based on sexual orientation with mixed results, likely because only a rational basis level of scrutiny is applied.[234] If plaintiffs can succeed in classifying sexual orientation as a protected

[228] *Id*.
[229] *Id*.
[230] *Dawkins v. Richmond Cnty. Sch*., 2012 U.S. Dist. LEXIS 62518 (M.D.N.C. May 4, 2012).
[231] *Id*. at *12–13.
[232] *Id*. at *13 (quoting *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001)).
[233] The Supreme Court has applied only a rational basis analysis to Equal Protection challenges to laws infringing upon a person based on his/her sexual orientation. *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (invalidating a statute forbidding deviate sexual conduct, overturning *Bowers v. Hardwick*, and noting that, in *Romer v. Evans*, the Court adopted a rational basis test for "persons who were homosexuals, lesbians, or bisexual either by orientation, conduct, practices, or relationships"). As noted above, the dissent in *Obergefell* applied a rational basis test to the Equal Protection clause analysis, while also pointing out that the majority failed to articulate a standard. *Obergefell*, 135 S. Ct. at 2623 (Roberts, CJ, dissenting).
[234] *Compare Dawkins*, 2012 U.S. Dist. LEXIS 62518 (finding that the complaint sufficiently pled § 1983 sexual orientation violation, but failed to establish that employer had policy or custom authorizing discrimination based on sexual orientation, but allowing plaintiff to amend complaint to so plead); *Hutchinson v. Cuyahoga Cnty. Bd. of Cnty. Comm'rs*, 2011 U.S. Dist. LEXIS 46633, at *18–20 (Apr. 25, 2011) (holding that a plaintiff could survive a motion to dismiss on her § 1983 claim because her allegations were sufficient to establish a plausible claim of sexual

class warranting a more stringent form of scrutiny, § 1983 could supplant Title VII as the preferred method to adjudicate sexual orientation employment discrimination cases (assuming Congress does not amend Title VII or Title IX).

V. Conclusion

Sexual harassment claims continue to confound school districts and their attorneys almost thirty years after the Supreme Court first considered how to analyze such claims. Determining whether specific conduct rises to the level of actionable harassment still varies to some degree by jurisdiction, and practitioners should carefully consider the case law in their circuit when advising clients about the likelihood of liability. School practitioners should also be cognizant that claimants may cloak claims in other vehicles—such as Title IX and the First Amendment—and should be prepared to raise the appropriate defenses.

It may be that school attorneys best serve their clients by ensuring that districts have comprehensive policies and procedures for addressing sexual harassment claims, and then by guiding districts through the nuances of responding when complaints are asserted at the employer level.

In addition, practitioners should be aware of the evolving and growing body of law related to other Title VII sex-based issues, such as pregnancy discrimination, as well as sexual orientation and gender identity harassment and discrimination. Practitioners should consider the varying positions of courts and administrative agencies when advising their clients about these evolving issues.

orientation discrimination under a rational basis review); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (C.D. Utah 1998) (granting plaintiff's motion for summary judgment for § 1983 sexual orientation discrimination claim, finding that the decision to not allow teacher to continue coaching was based on her sexual orientation and was not supported by a "rational job-related basis"); *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ*., 20 F. Supp. 2d 1160, 1174 (S.D. Ohio 1998) (upholding judgment for employee who was non-renewed based on his sexual orientation as the employer "did not present any evidence at trial to support a legitimate rationale for discriminating against homosexual teachers"), *with Schroeder v. Hamilton Sch. Dist*., 282 F.3d 946 (7th Cir. 2002) (rejecting § 1983 sexual orientation claim, under rational basis analysis, because plaintiff failed to demonstrate that district's failure to adopt specific anti-discrimination policy geared toward sexual orientation was "based on any animus toward [Plaintiff] or homosexuals in general"); *Ambris v. City of Cleveland*, 2012 U.S. Dist. LEXIS 164905, at *16–20 (N.D. Ohio Nov. 19, 2012) (rejecting § 1983 sexual orientation discrimination claim, even under the rational basis test, as the plaintiff must meet the Title VII elements, and dismissing the Southern District's opinion in *Glover* as "entirely irrational").