

TABLE OF CONTENTS

PREFACE	i
CHAPTER ONE: OVERVIEW	1
CHAPTER TWO: TANGIBLE EMPLOYMENT ACTIONS	5
I. TANGIBLE EMPLOYMENT ACTION DEFINITION.....	5
A. CHARACTERISTICS OF TANGIBLE EMPLOYMENT ACTIONS.....	6
B. COMMITTED BY SUPERVISOR.....	6
1. 1999 <i>Enforcement Guidance on Vicarious Liability</i>	7
2. Circuit Court Split.....	7
3. <i>Vance v. Ball State University</i>	7
4. Acting Supervisors	9
5. Apparent Authority	9
6. Team Leaders.....	9
7. Cat’s Paw and Tangible Employment Actions.....	9
C. SPECIFIC EMPLOYMENT ACTIONS.....	10
1. Threatened Tangible Employment Action	10
2. Reassignment.....	11
3. Change in Assignment/Duties	11
4. Leave-Related Actions.....	13
5. Failure to Hire/Promote.....	13
6. Denial of Career Advancement.....	14
7. Performance Appraisals.....	14
8. Negative Employment Reference	17
9. Denial of Overtime	18
10. Deprivations Impacting Job Performance.....	18
11. Denial of Bonus or Step Increase.....	18
12. Letter of Counseling, Reprimand.....	18
13. Constructive Discharge.....	19
14. Rescinded Actions	20
15. Denial of Reasonable Accommodation	21
16. Schedule Changes	21
17. Reductions in Force	21
18. Denial of Training.....	21
19. Telework Requests.....	22
20. Collective Actions/Administrative Matters.....	22
D. BENEFICIAL TANGIBLE EMPLOYMENT ACTIONS.....	22
II. ACCEPTANCE/REJECTION OF SEXUAL ADVANCES.....	23
A. IMPLIED CONDITION	23
III. CAUSATION	24
A. CIRCUMSTANTIAL EVIDENCE	24
1. Failure to Rebut Employer’s Reason for Action	24
2. Different Decision-Maker	25
3. Temporal Proximity	26
B. DIRECT EVIDENCE.....	27
1. Analysis in Direct Evidence Cases.....	27
2. Defining Direct Evidence.....	28
C. MIXED MOTIVES	28
IV. THIRD-PARTY CLAIMS.....	29
V. OTHER TYPES OF HARASSMENT	29
A. RELIGIOUS COERCION AND TANGIBLE EMPLOYMENT ACTIONS.....	30
B. REPRISAL	31

CHAPTER THREE: HOSTILE WORK ENVIRONMENT—OVERVIEW	35
I. HISTORY OF HOSTILE WORK ENVIRONMENT THEORY	35
A. <i>MERITOR SAVINGS BANK V. VINSON</i>	35
B. <i>HARRIS V. FORKLIFT SYSTEMS</i>	37
II. BASIC ELEMENTS OF HOSTILE WORK ENVIRONMENT CLAIM	38
A. ELEMENT ONE—MEMBERSHIP IN A PROTECTED CLASS	38
B. ELEMENT TWO—UNWELCOME REQUIREMENT	38
C. ELEMENT THREE—BASED ON A STATUTORILY PROTECTED CLASS	39
D. ELEMENT FOUR—SEVERE AND PERVASIVE REQUIREMENT	39
E. ELEMENT FIVE—LIABILITY	39
F. AGENCY’S DEFENSES	39
G. AGENCY’S AFFIRMATIVE DEFENSE	40
CHAPTER FOUR: TIMELINESS	41
I. THE 45-DAY TIME LIMIT	41
II. THE PROBLEM OF “CONTINUING VIOLATIONS”	41
A. THE <i>ANISMAN</i> ANTIDOTE	42
III. <i>MORGAN</i> AND “UNLAWFUL EMPLOYMENT PRACTICES”	44
A. <i>MORGAN</i> ON DISCRETE ACTS	44
B. <i>MORGAN</i> ON HOSTILE ENVIRONMENT CLAIMS	46
IV. THE LAW SINCE <i>MORGAN</i> FOR HOSTILE ENVIRONMENT CLAIMS: TIMELY COUNSELOR CONTACT	49
A. COUNSELING DENIED	50
B. INDEPENDENT OR DISCRETE ACTS AND HARASSMENT	50
1. Independent Acts of Harassment—Relatedness Requirement	50
2. Independent Acts of Harassment—Relief for Complainants	52
3. Claims With Discrete Acts—Relatedness Requirement	52
4. Discrete Acts—Relief for Complainants	55
C. TIMELINESS AND EQUITABLE DOCTRINES	56
1. Minor Complainants	56
2. Incapacitated Complainants	56
3. Waiting for the Agency to Act	56
D. RETALIATION CLAIMS	57
CHAPTER FIVE: UNWELCOME CONDUCT	59
I. UNWELCOME REQUIREMENT: OVERVIEW	59
II. TIMING OF REPORTING HARASSING CONDUCT	60
A. DELAYS IN REPORTING	60
B. CONTEMPORANEOUS REPORTS	61
III. PARTICIPATION IN OR SUBMISSION TO CONDUCT	61
A. SUBMISSION TO SEXUAL ADVANCES	62
B. PARTICIPATION IN CONDUCT	62
1. “Solicit or Incite”	62
2. Context	62
3. Totality of the Circumstances Analysis	64
4. Activities Outside Work	65
C. CONSENSUAL RELATIONSHIPS	65
IV. REACTION OF THE COMPLAINANT	67
V. HARASSMENT BASED ON RELIGION AND WELCOMENESS DETERMINATIONS	68
CHAPTER SIX: BASIS OF CONDUCT	71
I. ESTABLISHING THE EVIDENTIARY LINK, THE ABRIDGED VERSION	72
II. PROTECTED STATUS—SEX	72
A. SEXUAL CONDUCT	73
1. Physical Sexual Conduct	74
2. Other Sexual Conduct	74
3. Sexually Charged Comments	75
B. GENDER-BASED CONDUCT	76
1. Conduct Inherently Tied to Protected Status	77
2. Facially Neutral Conduct Directed at Protected Employees	78
3. “Sex-Plus” Harassment	80

4.	Attire and Dress Codes	81
5.	Gender Stereotyping	83
C.	MARITAL STATUS AND CAREGIVER RESPONSIBILITIES.....	85
D.	GENDER IDENTIFICATION /TRANSGENDER STATUS AND SEXUAL ORIENTATION.....	85
1.	Gender Identification/Transgender Status	86
a.	Transgender Status and Bathroom Usage	90
2.	Sexual Orientation	92
3.	The Courts on Gender Identification, Transgender Status, and Sexual Orientation	97
a.	<i>Bostock v. Clayton</i>	98
b.	Pre- <i>Bostock</i> Court Decisions.....	100
4.	Religious Objections	101
E.	SEX OF PERPETRATOR AND VICTIM	101
1.	Same-Sex Harassment.....	101
2.	The “Equal Opportunity” Harasser.....	103
a.	The Evolution of “Equal Opportunity Harasser” Law in the Courts	103
b.	<i>Brown v. Henderson</i>	104
c.	The Commission’s Position on “Equal Opportunity Harassers”	106
F.	CONDUCT DIRECTED TOWARD OTHERS	108
1.	Paramour Favoritism	108
a.	Single Incident—Consensual	109
b.	Single Incident—Coerced.....	109
c.	Widespread Favoritism.....	110
III.	ALL OTHER PROTECTED STATUSES, GENERALLY	111
A.	BASED ON RACE/COLOR.....	111
1.	Evidence of Race-Based Discrimination.....	113
2.	Based on Race—Racial Commentary and Slurs.....	114
3.	Based on Race—Conduct and Symbols of Racism	116
4.	Based on Race—Same Race Harassment.....	117
B.	BASED ON NATIONAL ORIGIN	118
C.	BASED ON RELIGION	119
D.	BASED ON DISABILITY	123
E.	BASED ON AGE.....	126
F.	BASED ON REPRISAL.....	127
G.	ASSOCIATIONAL DISCRIMINATION	128
IV.	INTERSECTION OF TWO OR MORE ALLEGED BASES OF DISCRIMINATION	131
V.	BALANCING CONFLICTING PROTECTED BASES	133
CHAPTER SEVEN: SEVERE OR PERVASIVE CONDUCT		135
I.	THE BASICS	135
A.	SEVERE OR PERVASIVE	135
B.	OBJECTIVE AND SUBJECTIVE ELEMENTS	135
C.	STATING A CLAIM FOR RELIEF	136
D.	TOTALITY OF THE CIRCUMSTANCES	136
E.	SLIDING SCALE.....	137
F.	RETALIATION HARASSMENT/REPRISAL	137
G.	RELIGION-BASED HARASSMENT	139
II.	THE SEVERE OR PERVASIVE REQUIREMENT.....	139
A.	ONE-TIME AND ISOLATED INCIDENTS	139
1.	Sexual Harassment	139
2.	Sex-Based Harassment	140
3.	Racial/Color Harassment	142
a.	Slurs.....	142
b.	Racist Symbols	144
4.	National Origin Harassment.....	145
5.	Religious Harassment	145
6.	Disability Harassment.....	147
7.	Age Harassment	147
8.	Retaliatory Harassment.....	147
B.	REPEATED INCIDENTS/FREQUENCY OF THE CONDUCT	148
1.	Sexual and Sex-Based Harassment	148

2.	Racial Harassment.....	149
3.	National Origin Harassment.....	151
4.	Religious and Disability Harassment.....	151
C.	DURATION OF THE CONDUCT	152
1.	Sexual and Sex-Based Harassment	152
2.	Racial Harassment.....	153
3.	Religious Harassment	153
D.	PASSAGE OF TIME BETWEEN INCIDENTS	154
1.	Sexual and Sex-Based Harassment	154
2.	Race and National Origin Harassment	155
3.	Religious Harassment	156
E.	CONDUCT DIRECTED AT OTHERS	156
1.	Sexual and Sex-Based Harassment	156
2.	Race and National Origin-Based Harassment	157
3.	Age Harassment	158
4.	Religion-Based Harassment.....	159
F.	CONDUCT OUTSIDE OF THE COMPLAINANT'S PRESENCE	159
1.	Sexual and Sex-Based Harassment	159
2.	Race and National Origin Harassment.....	160
3.	Disability Harassment.....	162
4.	Religious Harassment	162
G.	PHYSICAL CONTACT OR CONDUCT	162
1.	Sexual Contact	162
2.	Non-Sexual and Incidental Physical Touching	164
3.	Physical Conduct vs. Actual Contact	164
H.	VERBAL CONDUCT	165
I.	ROUTINE SUPERVISION	166
J.	CHANGES TO DUTIES/ASSIGNMENTS/INCREASED WORK SCRUTINY	167
K.	CHANGES IN THE WORK ENVIRONMENT	169
1.	Exposure to Harm	169
2.	Exposure to Known Harasser	169
L.	PERPETRATOR AND RECIPIENT OF CONDUCT.....	170
1.	Harassing Conduct by Supervisor.....	170
2.	Vulnerability of Employee	170
3.	Third Party Harassment.....	171
M.	CONDUCT INVOLVING DISCRETE ACTS.....	171
N.	OFFENSIVE PICTURES OR SYMBOLS	173
1.	Sexual Harassment	173
2.	Religious Harassment	173
3.	Racial Harassment.....	173
O.	INFERIORITY/INTELLIGENCE/CULTURAL REFERENCES	174
P.	LINGUISTIC CHARACTERISTICS/LANGUAGE PROFICIENCY	174
Q.	OFF-PREMISES CONDUCT	176
R.	HARASSMENT VIA SOCIAL MEDIA	177
1.	Claims of Harassment via Social Media.....	177
2.	Link to Workplace/Agency Involvement	178
3.	Religion-Based Harassment and Proselytizing	180
III.	AGENCY'S RESPONSE TO HARASSMENT COMPLAINT	181
CHAPTER EIGHT: THE OBJECTIVE AND SUBJECTIVE ELEMENTS		183
I.	REASONABLE PERSON	183
A.	REASONABLE WOMAN	184
B.	CHARACTERISTICS OTHER THAN GENDER.....	187
II.	SUBJECTIVE STANDARD	189
A.	SERIOUS PSYCHOLOGICAL HARM IS NOT NECESSARY.....	189
1.	Must Affect Terms or Conditions of Employment	190
B.	THE EMPLOYEE'S CONDUCT	191

CHAPTER NINE: LIABILITY FOR HARASSMENT	193
I. OVERVIEW OF LIABILITY FOR HARASSMENT	193
II. THE LIABILITY PROBLEM	193
A. <i>RESPONDEAT SUPERIOR</i> /VICARIOUS LIABILITY	194
B. 29 CFR § 1604.11	194
C. <i>MERITOR SAVINGS BANK V. VINSON</i>	195
III. RESOLVING THE LIABILITY PROBLEM.....	196
A. THE RULES OF AGENCY	196
B. THE RULES OF LIABILITY	196
1. The “Alter Ego” Theory.....	196
IV. HARASSMENT BY SUPERVISORS	197
A. <i>BURLINGTON INDUSTRIES V. ELLERTH</i>	198
B. <i>FARAGHER V. CITY OF BOCA RATON</i>	202
C. <i>VANCE V. BALL STATE UNIVERSITY</i> /DEFINITION OF “SUPERVISOR”	209
D. APPARENT AUTHORITY	214
E. TANGIBLE EMPLOYMENT ACTIONS	214
F. HOSTILE ENVIRONMENT CLAIMS	214
1. Anti-Harassment Policy Requirement.....	215
2. Duty of Reasonable Care	215
3. Failure to Avoid Harm.....	216
V. HARASSMENT BY COWORKERS AND THIRD PARTIES.....	218
A. KNOWLEDGE OF EMPLOYER	218
1. Actual Knowledge.....	218
2. Constructive Knowledge.....	219
3. Harasser Unknown.....	220
4. Reporting Misconduct	221
B. THIRD PARTY HARASSMENT	221
1. Employee Organizations	222
VI. PROMPT AND EFFECTIVE CORRECTIVE ACTION AND REMEDIAL MEASURES	222
A. DUTY TO PROMPTLY INVESTIGATE	223
1. “Promptly”	223
2. “Investigate”	225
B. DUTY TO TAKE INTERIM ACTIONS.....	227
C. PROMPT AND EFFECTIVE CORRECTIVE ACTION	228
1. Effectiveness of Action	228
2. Severity/Pervasiveness of Conduct	230
3. Duty of Further Inquiry	232
4. Treatment of Victim	233
D. REMEDIAL MEASURES	233
VII. SPECIFIC CORRECTIVE ACTIONS TAKEN BY AGENCY.....	234
A. SEPARATING THE VICTIM AND HARASSER	234
B. REMOVING/MODIFYING WORK.....	235
C. REASSIGNING THE COMPLAINANT.....	235
D. RETURNING THE ALLEGED HARASSER TO THE WORKPLACE.....	235
E. AGENCY ADVERSE ACTIONS AGAINST ALLEGED HARASSERS	237
VIII. REMEDIES AND DAMAGES AVAILABLE TO THE COMMISSION.....	237
A. EQUITABLE REMEDIES.....	237
1. Tangible Employment Actions	237
2. Hostile Environment Cases	238
B. COMPENSATORY DAMAGES.....	238
C. CORRECTIVE AND PREVENTIVE RELIEF	238
1. Disciplinary Actions.....	239
CHAPTER TEN: AVOIDING LIABILITY	241
I. ANTI-HARASSMENT POLICIES, PROCEDURES AND PROGRAMS	241
A. POLICY REQUIREMENTS	241
1. Confidentiality Issues.....	243
B. POSTING AND DISTRIBUTION.....	243

C.	REPORTING HARASSMENT	244
D.	ENFORCEMENT	244
II.	RESPONDING TO HARASSMENT COMPLAINTS.....	244
A.	PROMPT INVESTIGATIONS	244
B.	REMEDIAL ACTIONS	245
C.	ACTIONS PENDING INVESTIGATIONS.....	247
III.	TRAINING	247
	TABLE OF CASES.....	249