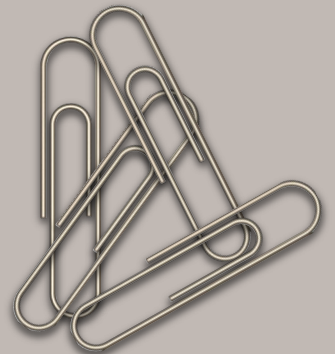
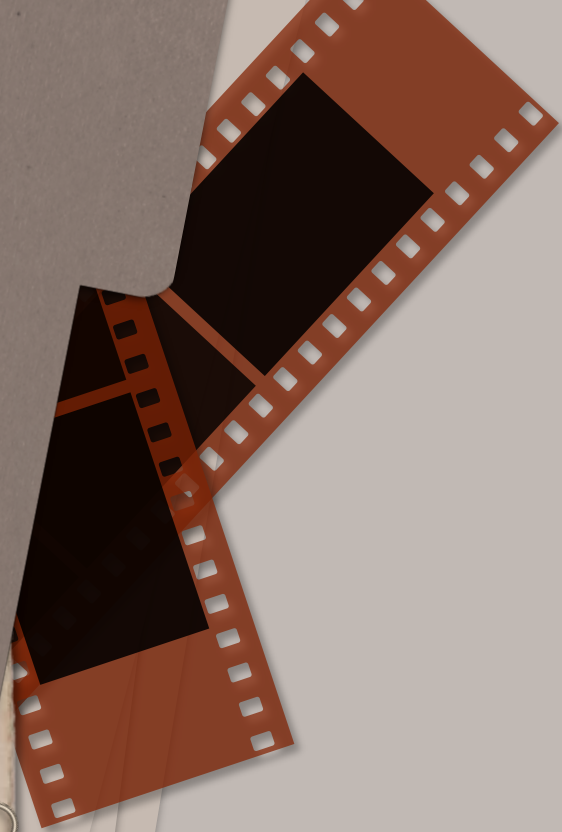


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Cara Leahy White

TOASE
TAYLOR · OLSON · ADKINS · SRALLA · ELAM
ATTORNEYS & COUNSELORS



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After receiving a written reprimand for excessive absences, Ryan Howard, Public Works Billing Clerk, vents to a friend, Michael Scott, Director of Sanitation, that the reason he does not come to work as regularly as he should is because his Department Head, a beloved and long-term City employee with a stellar reputation, Kelly Kapoor, has repeatedly made sexual advances toward him. Ryan further alleges that his direct supervisor, Meredith Palmer, is aware of the alleged sexual harassment, but has failed to report the issue because Kelly ignores Meredith's alleged on-duty drug use. Ryan begged Michael not to report the issue up the chain of command or to Toby Flenderson in Human Resources, explaining that he was just venting and does not want any action taken.



Name: Ryan Howard

Position: Public Works Billing Clerk

Department Head: Kelly Kapoor

Direct Supervisor: Meredith Palmer

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Name: Michael Scott

Position: Director of Sanitation

Department Head:
Robert California

Direct Supervisor: Jan Levinson



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After sitting on it for a few weeks, Michael makes a report to Human Resources anyway, explaining that he too has heard the rumors of alleged drug use within the department, and feels the rumors should be investigated. In his report to Human Resources, Michael down plays the alleged harassment, explaining that Ryan must have read the situation the wrong way because there is no way Kelly would ever engage in such conduct in the workplace.



Name: Meredith Palmer

Position: Public Works Billing
Supervisor

Department Head: Kelly Kapoor

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Nature of the
Allegation:

Reported drug use
while on-duty



Name: Kelly Kapoor

Position: Director of Public Works

Supervises: Meredith Palmer and Ryan Howard

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Nature of the Allegation:

Sexual harassment

11 Steps of the Investigative Process



Step 1:
Respond to
Allegations

Step 2:
Determine type
of Investigations

Step 3:
Make a Plan

Step 4:
Gather
Evidence

Step 5:
Plan Order of
Interviews

Step 6:
Plan
Questions

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11 Steps of the Investigative Process



**Step 7:
Conduct
Interviews**

**Step 8:
Gather
Additional
Evidence**

**Step 9:
Create a Written
Report**

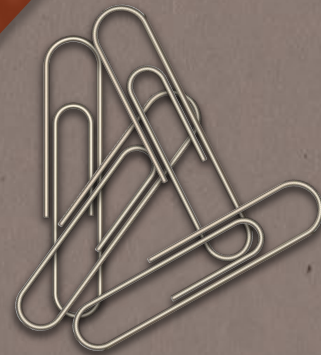
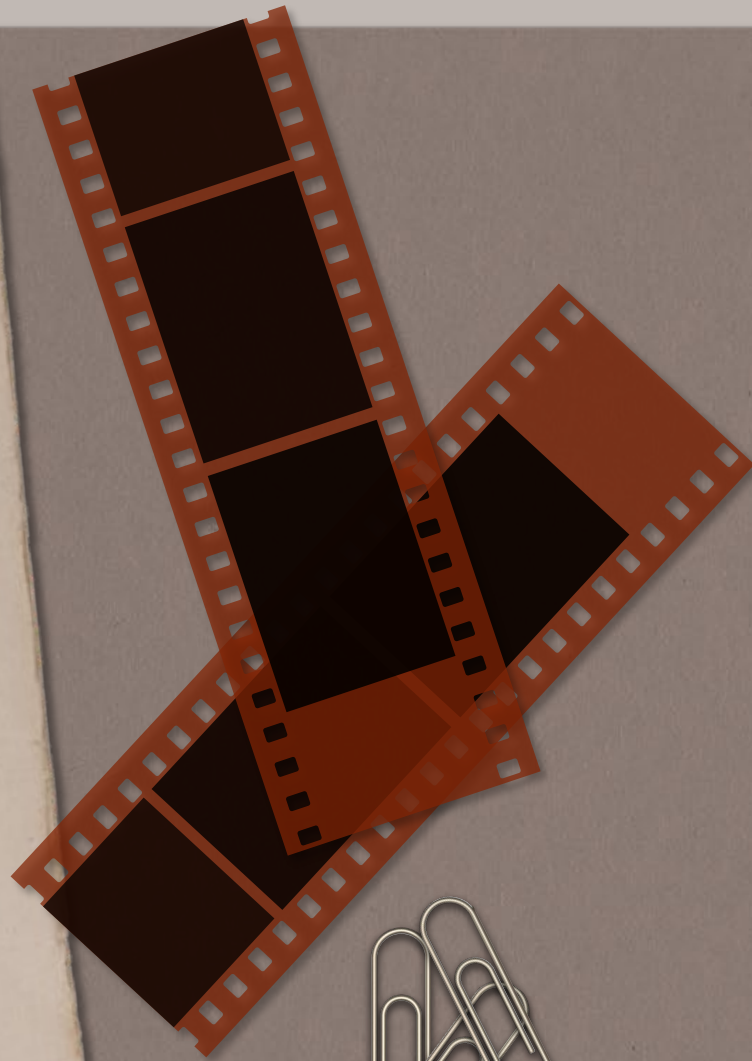
**Step 10:
Results of
Investigation**

**Step 11:
Investigation
Follow-Up**

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Step 1: Respond to Allegations

- Take all complaints seriously.
 - Do not make assumptions of legitimacy of complaint.
 - Be wary of request to NOT investigate.
- Investigate rumors?
- Be prompt.
 - Conduct investigations promptly – do not unnecessarily drag them out or delay in beginning investigation.
 - Lessens issues with memory/evidence disappearing.
 - Avoids continuing misconduct.
 - Lessens legal liability.



Step 2: Determine Type of Investigation Needed

- Formal vs. Informal
 - If choosing formal, document the steps taken and the resolution.
- Follow Policy
 - If you have a policy dictating how certain allegations will be investigated, follow the policy.

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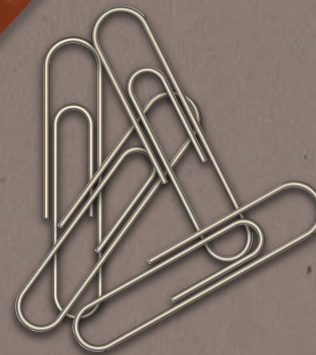
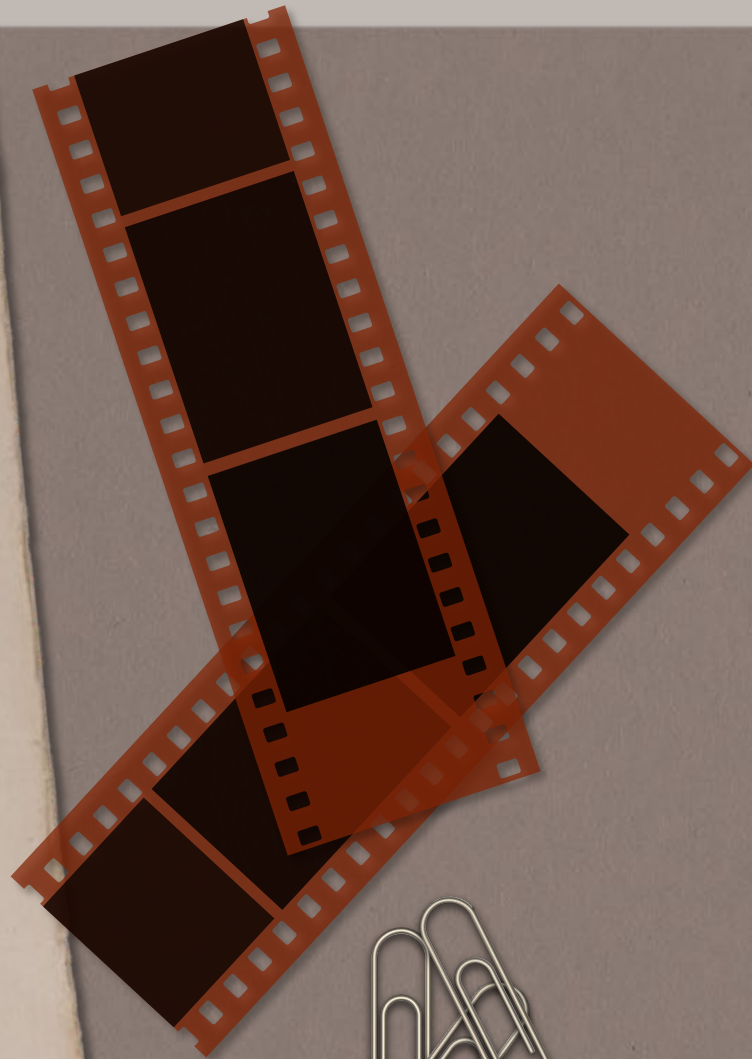
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Toby, the HR Director is new to the City of Scranton. He speaks with another long term employee, Angela Kinsey, about the rumored drug use. Angela confirms that Meredith often appears impaired while at work and that rumors regarding drug use within the department have persisted for years.

Toby, aware that City policy requires the investigation of all harassment allegations speaks with City management about the need to investigate both issues. The Assistant City Manager argues that the Police Department should conduct the investigation. However, the Police Chief has been friends with Meredith for years, and it is well known that the Chief, Meredith, and their families vacation together regularly.

Step 3: Make a Plan

- Who will investigate?
 - Trained, experienced investigator
 - Can investigator be objective?
 - Does investigator have a conflict of interest?
 - Consider confidentiality.
 - Follow policy
- What are you investigating?
- Issue Written Complaint?
- Place subject on Administrative Leave with pay?
- Issue Confidentiality Order?
- Issue Garrity Warning?



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Because (i) City Policy requires that HR conduct harassment investigations and (ii) the appearance of a conflict of interest, the decision is made to have Toby investigate. Kelly is advised of the allegations via a signed complaint. After reading the complaint, Kelly denies the harassment allegations and claims she has no knowledge of Meredith's alleged drug use. Kelly is placed on administrative leave with pay pending the outcome of an investigation.

Meredith is similarly notified of the investigation. Meredith admits to use of medical marijuana, but alleges that she has a valid prescription from her physician that was provided to the previous Human Resources Director. She further alleges that Kelly is aware that Meredith takes prescribed medical marijuana.

Step 4: Gather Evidence

- Gather audio/video footage.
- Gather any written evidence.
 - Consider emails and other electronic communications.
- Consider security/confidentiality.

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DOD PRESCRIPTION	
PAT. full name, address, & phone number (if under 13, give age) <i>John R. Doe, MARS, USAF</i>	
U.S.S. <i>Never forgotten</i> (DD 178)	
MEDICAL FACILITY U.S.S. <i>Never forgotten</i> (DD 178)	DATE <i>23 Jun 99</i>
B (Superscription)	
Prescription) <i>Tn. Belladonna</i>	Qty or mL <i>15 ml</i>
Subscription) <i>Amphigol good</i>	<i>120 ml</i>
Sign) <i>Sup: 5ml tid ac.</i>	
MOB. <i>None</i>	EXP DATE: <i>01/02</i>
LOT NO. <i>P22N706</i>	REL'D BY: <i>EMT</i>
R. NUMBER: <i>10072</i>	<i>John R. Doe</i> <i>LODR, MD, USAF</i> SIGNATURE, RANK, AND GRADE
EDITION OF 1 JAN 80 MAY BE USED FOR S/N: 0102-LF-012-8201	

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Step 5: Plan Order of Interviews

1. Interview complainant.
2. Interview all available witnesses.
 - Including former employees where available/appropriate.
 - Including citizens where available/appropriate.
3. Subject of investigation.
4. Conduct any necessary follow-up interviews.



Michael Scott - Complainant



Ryan Howard - Victim

Meredith Palmer - Subject



Kelly Kapoor - Subject

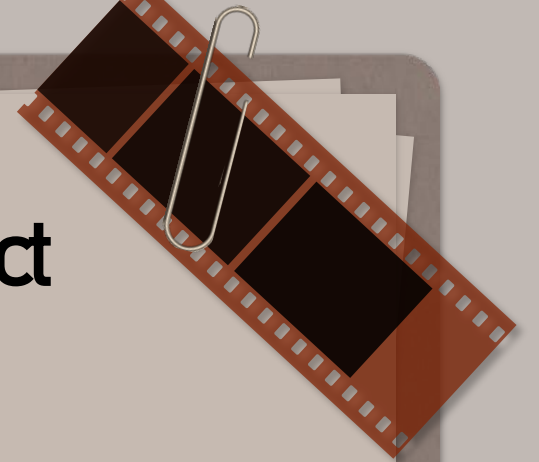


Step 6: Plan Questions

- Think about policy violations at issue.
- Ask open-ended questions.
- Prepare outline, but be prepared to go where questions lead.

Step 7: Conduct Interviews

- Remain neutral and have an open mind.
- Be respectful and straightforward.
- Avoid being overly aggressive.
- Avoid distractions.
- Conduct a complete and thorough investigation.
- Take notes.
- Consider recording.



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Multiple employees report that Meredith is regularly impaired at work and state that it is impossible that Kelly is unaware of the issue. One employee reports that Meredith was seen consuming what appeared to be THC gummies at work earlier that day and appears to be currently impaired. Toby makes a point of observing Meredith at work, and believes that she is, in fact, impaired.

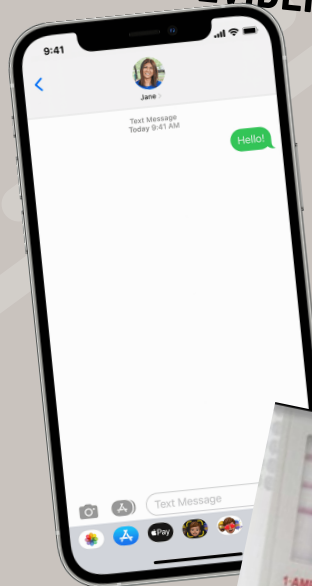
Most of the employees interviewed denied ever witnessing or being subjected to harassment by Kelly. Several employees were angry at Ryan for making such absurd allegations against Kelly. However, several employees were aware that Kelly regularly hugs her staff, both male and female. All of the employees reported that this is welcomed conduct and not a sexual gesture in any way. However, it is noted that Ryan is the only male employee in the Department. In his interview, Ryan reported that he asked Kelly via email to stop hugging him, but she persists.

Step 8: Gather Additional Evidence

- Gather additional evidence needed after conducting interviews:
 - Text messages.
 - Emails.
 - Diary entries.
 - Teams/Slack/Employee Chats.
 - Additional interviews.
 - Drug testing.

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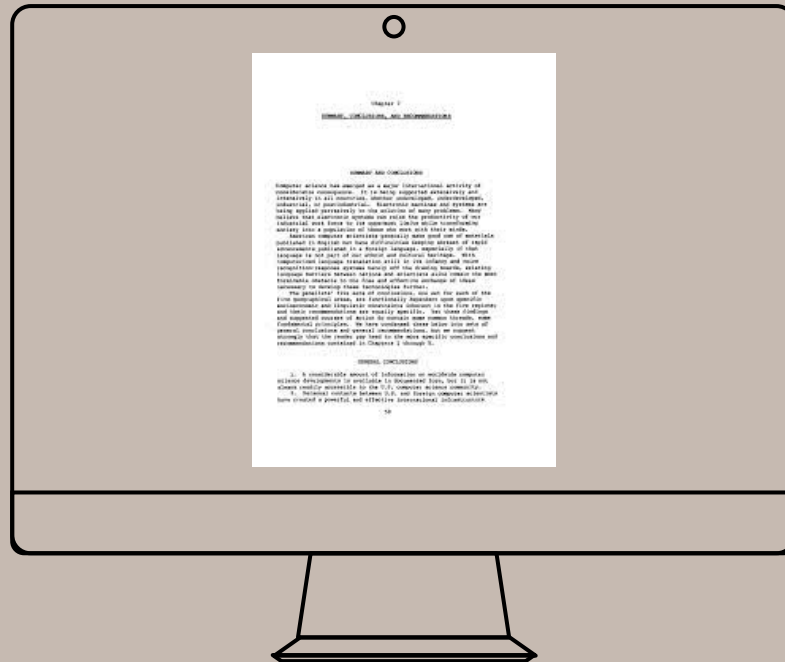
Based on the reports of on-duty use and his own observations, Toby sends Meredith for a reasonable suspicion drug test, the results of which reflect that Meredith has more THC in her system than that prescribed by her physician.

Toby further requests IT to review emails from Ryan to Kelly in an effort to locate the email referenced by Ryan.

Step 9: Create Written Report

- Report should be thorough.
- Maintain neutrality.
- Evaluate evidence.
- Credibility assessment.
- Reach a conclusion.

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Toby concludes that Meredith is in violation of the City's drug free workplace policy. Based on his own observations and the reports of multiple witnesses, he further concludes that Kelly knew or should have known of Meredith's on-duty impairment and ignored the issue.

Toby further concludes that, while Meredith did not intend to harass Ryan, she has repeatedly hugged him at work in a manner which made Ryan very uncomfortable, and she refused to stop when requested to do so. When asked why, Kelly responded that she didn't mean anything by the hugs, that she told Ryan that the hugs were innocent, and he needed to get used to her way of interacting with her staff.

Step 10: Results of Investigation

- Disciplinary action where appropriate.
- Involve law enforcement where appropriate.
- Evaluate need for additional training.
- Evaluate need for policy revisions.

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Step 11: Investigation Follow-Up

- Issues ongoing?
- Retaliation occurring?
- Moral of Department?

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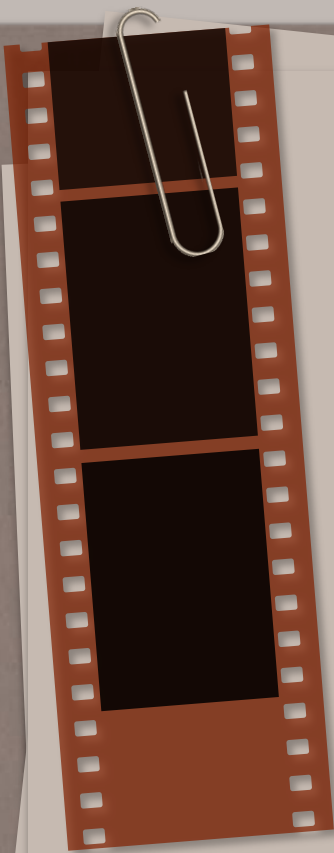
As a result of the investigation, Meredith is terminated for violating the City's Drug Free Work Place Policy and Kelly is fired for violating the City's sexual harassment policy.



Toby follows-up with the Department and with Ryan over the next several months to ensure that problems within the department are not persisting. While Ryan reported some retaliation immediately following Kelly's termination, the Department has since learned that Kelly was, in fact, a toxic supervisor and the Department runs more smoothly in her absence.



Farragher-Elerth Defense

Under the Farragher-Elerth affirmative defense, an employer will not be vicariously liable for harassment if it can show that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.



<p>Employee Harassed By Supervisor</p> 	<p>Employer has no anti-discrimination policy</p> <p>Strict liability for Employer.</p>	<p>Employer does have anti-discrimination policy (or other method for reporting complaints)</p> <p>Employer is afforded an affirmative defense. Employer has the burden of establishing that Employee failed to take advantage of preventative opportunities.</p>
<p>Employee Harassed By Co-Worker</p> 	<p>Employer has no anti-discrimination policy</p> <p>Employer's liability is based on negligence standard. Employer is liable if it knew or should have known of harassment.</p>	<p>Employer does have anti-discrimination policy (or other method for reporting complaints)</p> <p>Employer's liability is based on negligence standard. Employer is liable if it knew or should have known of harassment. However, Employee must follow policy to provide sufficient notice to hold employer liable.</p>



Wallace v. Performance Contractors, Inc.

57 F.4th. 209

Fifth Circuit, 2023

Plaintiff sued alleging sex discrimination, harassment and retaliation. The evidence showed that, while the Defendant had a policy prohibiting sexual harassment, multiple attempts to contact Human Resources regarding the alleged harassment were unanswered. Plaintiff reported the alleged harassment to another supervisor who likewise attempted to report the matter to HR without response. The Court further noted that several employees witnessed the alleged harassment and failed to report it despite a requirement in the policy requiring reports by anyone who witnesses harassment. Thus, the Court concluded that the employer's policy was ineffective because employees did not know about or understand the nature of sexual harassment, and claims were not investigated. As such, the District Court's grant of summary judgment was reversed.



Miller v. New York

2022 U.S. App. LEXIS 10354

Second Circuit, 2022

Plaintiff, an African American male and former investigator for the New York State Police, argued that his Caucasian supervisor created a racially hostile working environment by using racially derogatory language. In response to New York's Faragher-Elterth defense, Plaintiff argued that New York did not take any action to promptly correct the harassing behavior because the internal investigation that followed his complaint resulted only in the supervisor's censure for using a photo without permission in a social media post. However, New York was able to show it conducted a thorough investigation with evidence that it reviewed records and inquired into each of the alleged incidents through witness interviews. It also produced a detailed written report on the findings. The Court held that, as a result, the summary judgement granted to the State based on the Faragher-Elterth defense was appropriate.

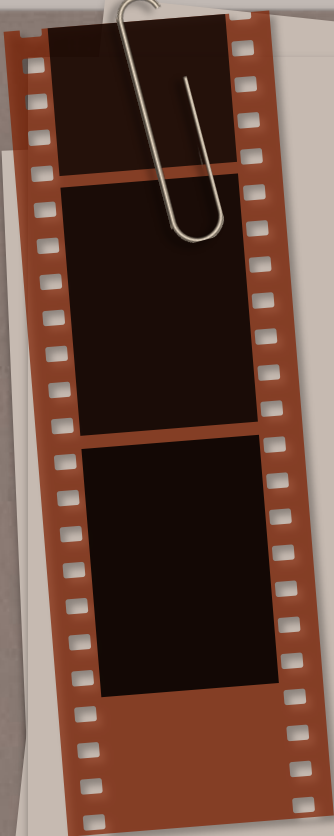


Wyatt v. Nissan North America, Inc.

999 F.3d 400

Sixth Circuit, 2021

Plaintiff alleged that she was subjected to a sexually hostile working environment, discriminated against because of her disabilities, and retaliated against. The Court found that, after the Plaintiff reported the alleged harassment to a supervisor, it took the supervisor nine days to report the matter to HR, despite a policy requiring an immediate report. HR did not reach out to the Plaintiff or the reporting supervisor for another twelve days (during which time the Thanksgiving Holiday occurred), with no investigation or steps taken toward investigation during that time period, and no remedial action to prevent the alleged continuing harassment. After speaking with Plaintiff, HR did not meet with the alleged harasser for another 6 days, at which time the harasser admitted to some of the conduct, and was removed from the workplace. The Court ruled that because Nissan waited twenty days to investigate and twenty-eight days to separate the Plaintiff from the alleged harasser, summary judgment in favor of Nissan was not appropriate.



Hale v. Mayor of Baltimore City
2022 U.S. Dist LEXIS 22324
District of Maryland, 2022

Plaintiff sued the Mayor and City Council for claims arising from alleged sexual harassment against Plaintiff. Plaintiff waited more than seven months to complain, alleging that she did not believe the City would act reasonably after receiving her complaint and she hoped the alleged harasser would apologize and improve his conduct. The Court held that an employee's "subjective belief in the futility of reporting a harasser's behavior is not a reasonable basis for failing to take advantage of any preventive or corrective opportunities provided by the employer." The Plaintiff's delay in reporting the alleged harassment, coupled with her rejection of the City's repeated requests for an interview in conjunction with its investigation was sufficient to grant summary judgment to the City.



Meng Huang v. Ohio State University

2022 U.S. Dist. LEXIS 202010

Southern District of Ohio, 2022

Plaintiff alleged sexual harassment. Plaintiff argued that Ohio State was not entitled to the Faragher-Ellerth affirmative defense, in part, because Ohio State did not issue its investigative report until more than three months after Plaintiff's complaint. However, the record reflected that Ohio State issued a 37-page report responding to Plaintiff's 43 pages of allegations. The University interviewed 39 witnesses and reviewed extensive documents. Accordingly, the Court found that the University took reasonable care to promptly investigate Plaintiff's allegations.



Turner v. PNC Financial Services Group

2022 U.S. Dist. LEXIS 13600

Western District Pennsylvania, 2022

Plaintiff alleged that she was subjected to a sexually hostile working environment arising out of her supervisor's reaction to her need to take regular breaks to express breast milk. The Bank argued it was entitled to the Faragher-Ellerth affirmative defense. The Bank was able to establish, and Plaintiff concurred, that it addressed the issues about which Plaintiff complained. Accordingly, the Court agreed that summary judgment was appropriate based on the defense.

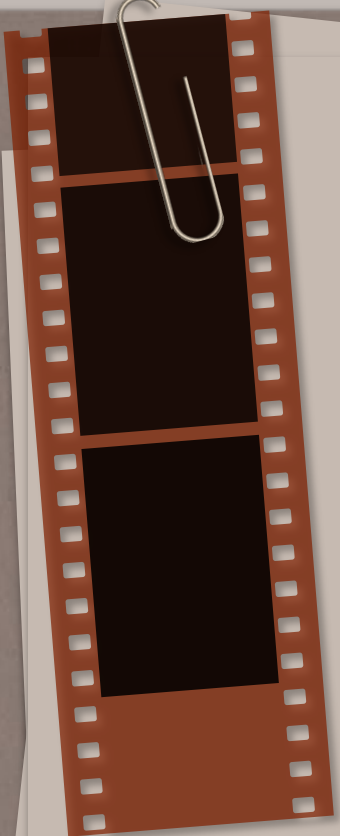


Perez v. Cook Cty. Sheriff's Office

2022 U.S. Dist. LEXIS 55285

Northern District of Illinois, 2022

Plaintiff sued alleging sexual harassment and FMLA retaliation. While several of Plaintiff's FMLA retaliation complaints were apparently ignored, the Court found that Plaintiff's sexual harassment complaints were promptly investigated. Upon receipt of the sexual harassment complaint, numerous individuals were investigated, documents and emails were reviewed, the investigation was thoroughly documented, and a lengthy formal report issued. HR also advised Plaintiff that she would not have to report to or communicate with the alleged harasser during the investigation, offering the opportunity to switch shifts. The Court held that these facts demonstrated that the Sheriff's office reasonably and appropriately investigated Plaintiff's harassment allegations.



Questions?

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