Effectively Addressing Workplace Bullying In The Wake Of The 2016 Presidential Election

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Introduction

The tone set in the most recent Presidential election is having an impact far beyond the election itself. Unfortunately, some have considered the rhetoric and conduct of one Presidential candidate in particular as granting permission to engage in bullying behavior based on race, sex, religion, national origin, disability status, and/or other protected classes. Although civil rights statutes governing the workplace do not prohibit all bullying behavior, those laws do bar such conduct when based on a protected class.

Hostile environment claims under employment and civil rights statutes remain the primary mechanism for combatting bullying by supervisors and coworkers alike. In this context, plaintiff counsel must be clear about what the law requires and aggressively oppose the effort to narrow or otherwise distort the scope of legal protections going forward.

I. Prevailing Legal Theories in Hostile Environment Cases

There are two basic theories under which liability can be established in hostile environment cases: (1) the doctrine of vicarious liability, which considers whether a plaintiff employee unreasonably failed to avoid harm because an affirmative defense is available to employers in that context and (2) the doctrine of negligence liability, which focuses on the employer's – not a plaintiff employee's – conduct because no affirmative defense is available.

A. Vicarious Theory Of Liability

By making the employer liable for conduct of its supervisors, the concept of vicarious liability – in theory – makes it less challenging for plaintiffs to hold employers accountable for harassment.[1] Under this analytical approach, an employer can avoid liability if it successfully invokes an affirmative defense established by the United States Supreme Court.[2] Importantly, an employer has the burden of proof on all 3 fact-intensive elements of the affirmative defense to vicarious liability:

(1) The employer took adequate preventive action;

(2) The employer took adequate corrective action; and

(3) The employee unreasonably failed to avoid harm.[3]

B. Negligence Theory Of Liability

The employer has no affirmative defense to a plaintiff's claim of harassment under a negligence theory of liability because, under this alternative approach, the question is whether the employer knew or should have known – from the employee's initial report or otherwise – about the harassment and did not take immediate and adequate corrective action.[4]

The United States Supreme Court has long recognized that "the absence of actual notice of the harassment . . . [does not] result automatically in employer immunity."[5] In other words, either actual or constructive knowledge confers notice of the harassment as well as the duty to take immediate and adequate corrective action.[6]

Consequently, the Eighth Circuit has consistently held that an employee need not report a second time under the employer's harassment policy or use a second complaint mechanism to put an employer on notice of harassment.[7] The Eighth Circuit has so recognized even when the employee to whom the plaintiff complained about the harassment was the person who was harassing the plaintiff.[8]

Harassment claims prosecuted under a negligence theory of liability may offer more promise for at least 3 reasons. First, as mentioned above, no affirmative defenses to liability exists under this analytic approach. Second, whether an employer was negligent in handling the harassment at issue generally should be a fact question to be decided at trial.[9] Third, other-acts evidence – which, as discussed below in Part II, has been given greater importance in employment and civil rights cases – can be especially helpful to prove an employer's failure to act timely and sufficiently after receiving notice of harassment.

II. Important Evidentiary Considerations

A hostile work environment exists when a plaintiff shows either that the unwelcome harassment based on a protected class was severe or that it was pervasive and, thus, altered a term or condition of employment.[10]

A. Evidence Of Explicit Conduct Or Animus Based On A Protected Class Is Not Necessary For A Harassment Claim To Succeed

The United States Supreme Court has held that actionable harassment based on sex, for example, goes beyond behavior of a sexual nature: "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[11]

Likewise, the Eighth Circuit has consistently rejected the notion that harassment must be explicit and involve class-based animus:

> A worker "need not be propositioned, touched offensively, or harassed by sexual innuendo" in order to have been sexually harassed, however. Intimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. Furthermore, physical aggression, violence, or verbal abuse may amount to sexual harassment.[12]

Otherwise stated, sex-based harassment is still illegal even when it is not sexual in nature or motivated by sexual desire. The Minnesota Supreme Court and State courts across the nation have ruled similarly.[13]

B. Other-Acts Evidence – Including Conduct By Different Supervisors In Different Facilities – Is "Highly Probative" Of Harassment Claims Even When A Plaintiff Is Unaware Of The Other-Acts Evidence

In a landmark harassment case, the Eighth Circuit held as follows regarding other-acts evidence of which the plaintiffs were unaware until the discovery phase of litigation:

> Irrespective of whether a plaintiff was aware of the other incidents, the evidence is highly probative of the type of workplace environment she was subjected to and whether a reasonable employer should have discovered the sexual harassment.[14]

The Eighth Circuit's ruling in that case, Sandoval, et al. v. Am. Bldg. Maint. Indus., Inc., et al.,[15] reflects a progressive extension of prior precedent and relevant regulations.[16]

Recent Eighth Circuit and Minnesota Court of Appeals decisions continue to follow this more liberal approach to other-acts evidence. In Williams v. Herron, for example, the Eighth Circuit affirmed the

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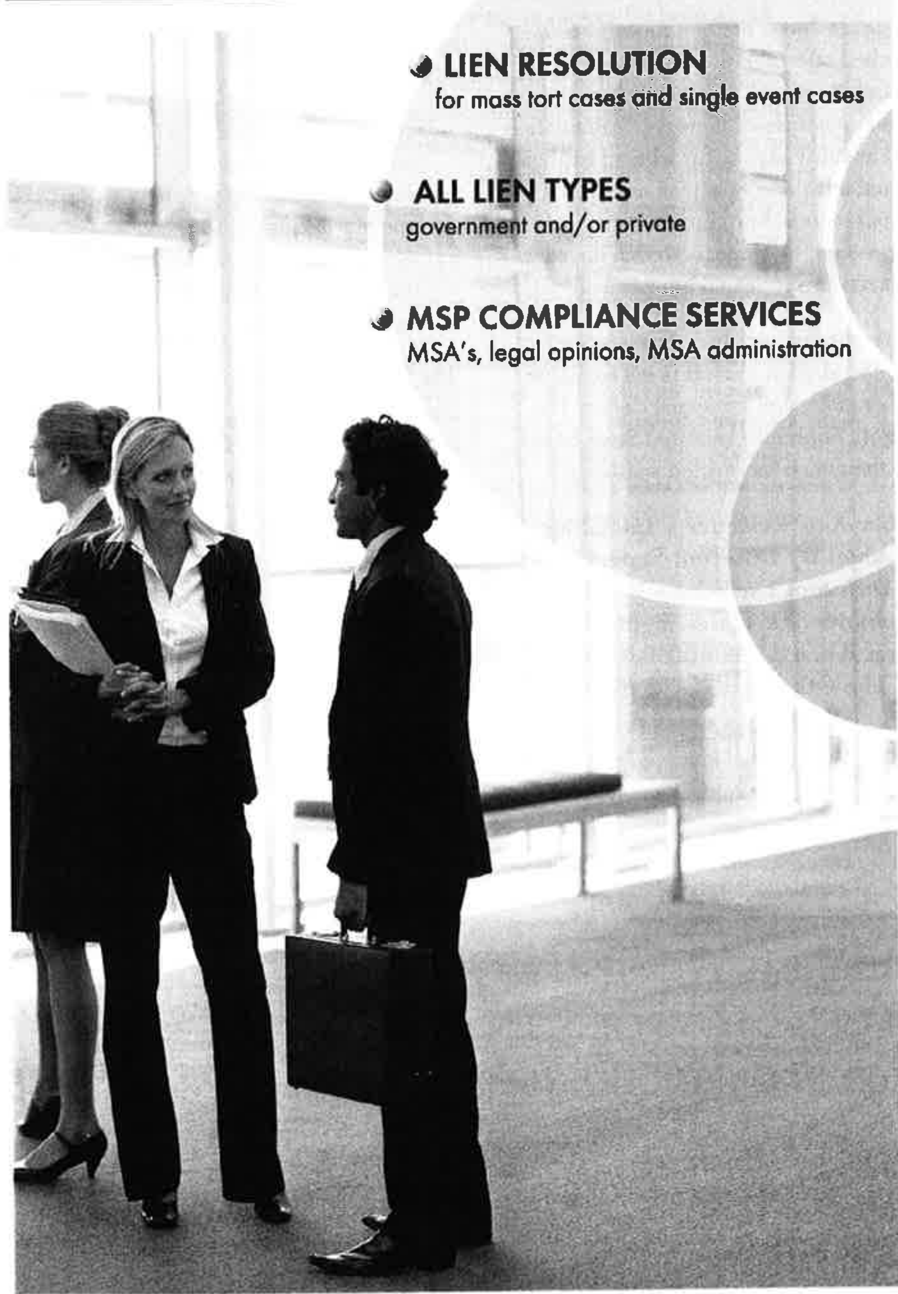

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judgment for the plaintiff.[17] In rendering its decision, the Eighth Circuit reasoned that "***this court has long held harassment directed towards other*** [employees] is relevant and ***must*** ***be considered***."[18]

III. Additional Strategic Issues for Pursuit of Hostile Environment Claims in 2017 and Beyond

Despite the recent positive developments, it will likely continue to be challenging for plaintiffs in harassment cases – especially with the tone set during the recent Presidential election and since.[19] Accordingly, and depending on the outcome of pre-suit discovery, plaintiff counsel should also consider whether pursuit of retaliatory harassment claims makes sense.[20]

Retaliatory harassment claims could provide fertile ground because the United States Supreme Court has expanded and aggressively enforced anti-retaliation protections in recent years.[21] In that regard, it warrants reiterating that "Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority.'"[22]

Due to the increasingly fissured workplace – which is afflicted by employer manipulation of employer and employee identity to evade legal obligations – another important point of law must be emphasized. In particular, "employer" and, thus, "employee" are defined broadly under employment and civil rights law. Nearly every other Circuit as well as the United States Equal Employment Opportunity Commission has long adopted this view, which the Eighth Circuit recently articulated emphatically:

> "Title VII of the Civil Rights Act of 1964 is to be accorded a liberal construction in order to carry out the purposes of Congress. . . ." In particular, "[s]uch liberal construction is also to be given to the definition of 'employer.'"[23]

Conclusion

Constant vigilance by employees and their counsel will be vital to remedy the illegal bullying by supervisors and coworkers that appears to be escalating and intensifying now. Although typically difficult cases to prosecute, hostile environment cases will more likely result in favorable outcomes for plaintiffs to the extent that plaintiff counsel draw on the points of law and strategy summarized above.

[1]See generally Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998).

[2]Id.

[3]Faragher, 524 U.S. at 807-09; Phillips v. Taco Bell Corp., 156 F.3d 884, 888-89 (8th Cir. 1998); see also EEOC Policy Guidance on Vicarious Liability, No. 915.002 (June 18, 1999), § V(C), 1999 WL 33305874 at *8 ("Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively.").

[4]See, e.g., Ellerth, 524 U.S. at 758-59, 764-65 (distinguishing between negligence liability, where the affirmative defense is unavailable, and vicarious liability, where the affirmative defense is available); see also Karl v. Burlington Northern R. Co., 880 F.2d 68, 76 (8th Cir. 1989) (citations omitted) ("It is well established . . . that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.").

[5]Faragher, 524 U.S. at 791 (1998) (citation omitted); see also Engel v. Rapid City School District, 506 F.3d 1118, 1123 (8th Cir. 2007) (citations omitted) (reaffirming that an employer is liable for harassment when it "knows or should have known of the conduct, unless it can show that it took immediate action and appropriate corrective action.").

[6]See, e.g., Diaz v. Swift-Eckrich, Inc., 318 F.3d 796, 800-01 (8th Cir. 2003) (reversing summary judgment for the employer because the person to whom the plaintiff complained about harassment "apparently had the authority to discipline employees."); Sims v. Health Midwest Physician Services Corp., 196 F.3d 915, 919-20 (8th Cir. 1999) (citation omitted) (reversing summary judgment for the employer, reasoning that when "the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable.").

[7]Weger v. City of Ladue, 500 F.3d 710, 721 (8th Cir. 2007) (citation omitted) ("When an employer has a clear and published policy that outlines the procedures an employee must follow to report suspected harassment and the complaining employee follows those procedures, actual notice is established."); see also Howard v. Winter, 446 F.3d 559, 569 (4th Cir. 2006) (reversing summary judgment for the employer because the plaintiff's conversation with a human resources staffer might have put the employer on notice); Loughman v. Malnati Organization Inc., 395 F.3d 404, 408 (7th Cir. 2005) (reversing summary judgment for the employer by rejecting the argument that the plaintiff "should have reported the incidents to more senior managers when they happened."); Swinton v. Potomac Corp., 270 F.3d 794, 805 (9th Cir. 2001), cert. denied 535 U.S. 1018 (2002) (citations omitted) (affirming judgment for the plaintiff because the person to whom the plaintiff complained had "an official or strong de facto duty to act as a conduit to management for complaints about work conditions."); Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3rd Cir. 1999), cert. denied 528 U.S. 1074 (2000) (holding that the plaintiff need not make a second report or use a second complaint mechanism "because her immediate supervisor, who was responsible for preventing and redressing harassment pursuant to the [the employer's] own policy, was on notice of the harassment."); Distasio v. Perkin Elmer Corp., 157 F.3d 55, 64-65 (2nd Cir. 1998) ("We reject this attempt to shift the company's failure to respond onto the plaintiff's shoulders. When a plaintiff reports harassing misconduct in accordance with company policy, she is under no duty to report it a second time before the company is charged with knowledge of it."); Williamson v. City of Houston, 148 F.3d 462, 467 (5th Cir. 1998) (citation omitted) (affirming the jury verdict for the plaintiff because "[a]n employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law.").

[8]Ogden v. Wax Works, Inc., 214 F.3d 999, 1007 (8th Cir. 2000) (ruling that the plaintiff reported harassment "when she told her supervisor [ ] to stop his offensive conduct."); Hall v. Gus Const. Co., Inc., 842 F.2d 1010, 1012, 1018 (8th Cir. 1988) (reasoning that the employer had notice because, in part, the plaintiffs complained to the supervisor who was sexually harassing them); see also Hurley, 174 F.3d at 104, 118 (holding that complaints to the harassing supervisor put the employer on notice of the sex harassment); Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1301 (8th Cir. 1997), cert. denied 524 U.S. 953 (1998) (affirming judgment against the employer because first-line supervisors had actual knowledge of the sex harassment).

[9]See, e.g., Phillips, 156 F.3d at 889 (reversing summary judgment for the employer because whether the employer took timely and sufficient action is "best left to the finder of fact."); see also Thieman v. Johnson, 257 F.2d 129, 132 (8th Cir. 1958) (emphasis added) ("Negligence is generally a question of fact to be determined by the jury.").

[10]Faragher, 524 U.S. at 786-87 (reaffirming that the severe-or-pervasive standard governs); Ellerth, 524 U.S. at 752 (same); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998) (same); Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993) (same); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (same); Wright v. Rolette County, 417 F.3d 879, 885 (8th Cir. 2005) (same); Baker v. John Morrell & Co., 382 F.3d 816, 828 (8th Cir. 2004) (same).

[11]Oncale, 523 U.S. at 80 (emphasis added) (reversing summary judgment for the employer); see also EEOC v. National Educ. Ass'n, 422 F.3d 840, 845 (9th Cir. 2005) (reversing summary judgment for the employer because "[t]he district court erred in holding that the 'because of . . . sex' element of the action requires that the behavior be either 'of a sexual nature' or motivated by 'sexual animus.'").

[12]Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1379 (8th Cir. 1996) (citations omitted) (reversing summary judgment for the employer); see also Fuller v. Fiber Glass Systems, LP, 618 F.3d 858, 864 (8th Cir. 2010) (citations omitted) (upholding the jury verdict for the plaintiff because she experienced racial harassment "even if the conduct was not inherently racial."); Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999) (citations omitted) (reversing summary judgment for the employer because "[h]arassment alleged to be because of sex need not be explicitly sexual in nature."); Hall, 842 F.2d at 1014 (citation omitted) (affirming judgment for the plaintiffs because "[w]e have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of an employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones.").

[13]See, e.g., LaMont v. Indep. School Dist. No. 728, 814 N.W2d 14, 19 (Minn. 2012) (ruling that harassment need not be sexual in order for a plaintiff to have a valid sex harassment claims); Payne v. Children's Home Society of Washington, Inc., 892 P.2d 1102, 1105 (Wash. App. Div. 3, 1995) (citation omitted) ("When gender-based harassment is not of a sexual nature, but is a term or condition of employment, it too unfairly handicaps the employee against whom it is directed and creates a barrier to sexual equality in the workplace. A court-imposed requirement that the conduct be explicitly sexual to be actionable would be contrary to the purpose of [the statute]."); see also generally City of San Antonio v. Cancel, 261 S.W.3d 778 (Tex. Ct. App. 2008); Speedway SuperAmerica, LLC, v. Dupont, 933 So.2d 75 (Fla. App. 5 Dist. 2006); DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13 (R.I. 2005); Nava v. City of Santa Fe, 103 P.3d 571 (N.M. 2004); Hampl v. Food Ingredients Specialists, Inc., 729 N.E.2d 726 (Ohio 2000); Willis v. Wal-Mart Stores, Inc., 504 S.E.2d 648 (W. Va. 1998); McIntyre v. Manhattan Ford, Lincoln, Mercury, Inc., 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997); Alphonse v. Omni Hotels Management Corp., 643 So.2d 836 (La. App. 4 Cir. 1994); Accardi v. Superior Court, 21 Cal.Rptr.2d 292 (Cal. App. 2 Dist. 1993); Lehman v. Toys R Us, Inc., 626 A.2d 445 (N.J. 1993); Huch v. McCain Foods, 479 N.W.2d 167 (S.D. 1991).

[14]Sandoval, et al. v. Am. Bldg. Maint. Indus., Inc., et al., 578 F.3d 787, 802, 803, rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009) (reaffirming that other-acts evidence is "highly relevant to prove the sexual harassment was severe. . . .").

[15]578 F.3d 787, rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009).

[16]Williams v. Conagra Poultry Co., 378 F.3d 790, 794 (8th Cir. 2004) (affirming judgment for the plaintiff based, in part, on coworkers' testimony about their harassment complaints of which the plaintiff was

unaware because "the testimony made more credible [the plaintiff's] testimony about the environment that he was exposed to."); Howard v. Burns, 149 F.3d 835, 838 (8th Cir. 1998) (citation omitted) (upholding judgment for the plaintiff and reiterating, "[w]e have considered harassment of employees other than the plaintiff to be relevant to show pervasiveness of the hostile environment."); see also Sprint/United Management Co. v. Mendelsohn, 552 U.S. 379, 388 (2008) ("The question whether evidence of discrimination by other supervisors is relevant . . . is fact based and depends on many factors. . . ."); Clark County School Dist. v. Breeden, 532 U.S. 268, 270 (2001) (quoting Supreme Court cases) ("Workplace conduct is not measured in isolation; instead, 'whether an environment is sufficiently hostile or abusive' must be judged 'by "looking at all the circumstances". . . .'"); Hurley, 174 F.3d at 111 (affirming judgment for the plaintiff because the harassment of third-parties – of which the plaintiff was unaware – was probative of the plaintiff's claims); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (emphasis in original) ("[O] ne of the critical inquiries in a hostile environment claim must be the ***environment***. Evidence of a general work atmosphere therefore – as well as evidence of specific hostility directed toward the plaintiff – is an important factor in evaluating the claim."); 29 C.F.R. § 1604.11(b) (promulgating that the fact-finder shall "look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.").

[17]687 F.3d. 971, 978 (8th Cir. 2012).

[18]Williams, 687 F.3d. at 976 (citing Sandoval, et al. v. Am. Bldg. Maint. Indus., Inc., et al., 578 F.3d 787, 802 rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009)) (emphasis added); see also Watson v. CEVA Logistics U.S., Inc., 619 F.3d 936, 943 (8th Cir. 2010) (reversing summary judgment for the employer, in part, because "slurs and other incidents evidencing racial animus were directed at co-workers in the same protected group.").

[19]See, e.g., EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 687 (8th Cir. 2012) (affirming that highly offensive sexual propositioning, repeated boasting of past sexual exploits, and vulgar sexual remarks by the plaintiffs' respective "Lead Driver" while performing overnight/ cross-country trucking duties with the plaintiffs did not establish a hostile environment); LaMont, 814 N.W. 2d. at 22-24 (ruling that multiple offensive remarks to the plaintiff, the prohibition of the plaintiff and other female employees from speaking in the workplace, the segregation of the plaintiff and other female employees in the workplace, and the requirement that only the plaintiff and other female employees obtain permission before taking a break in the workplace was insufficient to create a hostile environment).

[20]See generally Jensen v. Potter, 435 F.3d 444 (3rd Cir. 2006) (recognizing that the employee who raised a complaint of harassment or discrimination is a "protected employee" who can bring a retaliatory harassment claim against her employer under Title VII for subsequent offensive and negative treatment by her supervisors or coworkers); see also Minn. Stat. § 363A.15.

[21]See, e.g., Thompson v. North Amer. Stainless, LP, 131 S.Ct. 863, 868 (2011) (holding, in a unanimous opinion announced by Justice Scalia, that adverse action against a third party can support a retaliation claim by the plaintiff); Crawford v. Metropolitan Government of Nashville, 129 S. Ct. 846, 849 (2009) (ruling that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential Title VII violation); Gomez-Perez v. Potter, 553 U.S. 474, 478-79 (2008) (essentially reading an anti-retaliation provision, in an opinion authored by Justice Alito, into the Age Discrimination in Employment Act); Burlington North and Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006) ("We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.").

[22]N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980) (citation omitted).

[23]Sandoval, 578 F.3d at 792-93; (quoting Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1977)); see also Torres-Negron v. Merck & Co., Inc., 488 F.3d 34, 42 (1st Cir. 2007); Kang v. U. Lim America, Inc., 296 F.3d 810, 815 (9th Cir. 2002); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999); Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761, 763-64 (5th Cir. 1997); Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1241 (2nd Cir. 1995); Johnson v. Flowers Industries, Inc., 814 F.2d 978, 981-82, n.1 (4th Cir. 1987); Armbruster v. Quinn, 711 F.2d 1332, 1338 (6th Cir. 1983), abrogated on other grounds 546 U.S. 500 (2006); see also 42 U.S.C. § 2000e-1(c)(1), (3) (codifying reliance on the Baker factors for determining whether a domestic company will be liable for Title VII violations by a foreign company).

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