

REVISED FLSA REGULATIONS COMPLIANCE

A. Exempt Classifications

The FLSA exempts certain employees from its requirements, meaning those employees do not need to be paid overtime compensation. The most common of these exemptions are the **“white collar worker” exemptions** for executive, administrative, and professional employees. These exemptions are based on the actual job duties of the employees in question, **NOT** on their job title or classification. In order to qualify as an exempt “white collar” employee, the employee must meet both the **“salary basis test”** and **“primary duties test.”**

○ Payment On A Salary Basis

In order to be considered eligible for one of the “white collar” exemptions to the FLSA’s overtime requirements, an employee must be paid on a **salary basis**. This means the employee must be paid a predetermined amount on a regular basis. The full salary must be paid whether or not the employee has worked the full workweek. Deductions may be taken when the employee has performed no work in a week.

1. Employment practices or policies which may destroy an employee’s salaried status:

- * *Salary deductions for partial-day absences.* Employers cannot make deductions from the salary of exempt employees for absences of **less than one day** without defeating the salary basis test.

Deductions from pay can be made when an employee is absent for one or more full days for **personal reasons**. *E.g.*, if an exempt employee is absent for two full days due to a move, the employee’s salaried status will not be affected if a deduction is made from the salary for the two full-day absences.

Deductions from pay may also be made for absences of one or more full days due to **sickness, disability or work-related injuries** if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for full-day absences may also be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted such leave.

- * *Salary deductions for absences caused by jury duty, appearance as a witness, or temporary military leave.*
- * *Suspensions without pay for temporary, budget-related business requirements.*

2. Deductions which will *not* destroy an exempt employee's salaried status:

- * *When the deduction constitutes a penalty imposed for an infraction of a safety rule of **major significance**. Such deductions may only be made for violations of vitally important safety rules relating to the prevention of serious danger to the employer's physical facility or to other employees.*
- * *When the deduction is for an **unpaid disciplinary suspension** of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees.*
- * *An employer is not required to pay the full salary in the **initial or terminal weeks of employment** and may pay a proportionate part of the salary from the time actually worked. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement.*

- * *When an exempt employee takes leave under the **Family and Medical Leave Act**, an employer may pay a proportionate part of the salary for time actually worked. E.g., - if an employee who normally works 40 hours a week uses four FMLA hours, the employer could deduct 10% of the employee's salary for that week.*

3. Window of correction

- An employer who makes improper deductions from an exempt employee's pay will destroy the exemption if the facts demonstrate that the employer did not intend to pay the employee on a salary basis or that the employer has an "actual practice" of making improper deductions. Factors to consider when determining if an "actual practice" exists include:

- the number of improper deduction;
- the time period during which the deductions were made;
- the number and geographic location of employees whose salary was improperly reduced, and of the managers making the deductions; and
- whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

- If an "actual practice" of improper deductions is shown, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers who were responsible for the actual improper deductions.

- An employer who reimburses an employee for an inadvertent or improper deduction, and promises to refrain from such improper deductions in the future, may be able to preserve the salaried status for that employee.

- Under the new regulations, if an employer who has a clearly communicated policy that prohibits improper pay deductions and that includes a complaint procedure, reimburses employees for the improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employee unless the employer willfully violates the policy by continuing to make improper deductions after receiving the complaint.

WARNING! A COMMON MISPERCEPTION ABOUT WAGE AND HOUR LAW IS THAT EMPLOYEES WHO ARE PAID ON A "SALARY" BASIS DO NOT NEED TO BE PAID OVERTIME. THIS IS INCORRECT! THE DETERMINATION OF WHETHER OR NOT AN EMPLOYEE IS EXEMPT DEPENDS ON THE NATURE OF HIS WORK AS WELL AS THE SALARY BASIS OF PAY.

B. Duties Test

EXECUTIVE EMPLOYEES

	Former “Short” Term	New Test	Notes
Salary Test	Salary minimum of \$250 per week	Salary minimum of \$455 per week	
Duties Test	<p>Primary duty is management related</p> <p>AND</p> <p>Customarily and regularly directs the work of two or more employees</p>	<p>Primary duty is management-related</p> <p>AND</p> <p>Customarily and regularly directs the work of two or more employees</p> <p>AND</p> <p>Has authority to hire or fire, or makes suggestions and recommendations as to the hiring, hiring, advancement, promotion or any other change of status of other employees that are given particular weight’</p> <p>(Employees earning at least \$100,000 annually must meet only one requirement)</p>	<p>New executive category – classifies as an exempt executive any employee who has a 20% equity interest in the enterprise in which he is employed and who is actively managing the enterprise.</p>

ADMINISTRATIVE EMPLOYEES

	Former “Short” Term	New Test	Notes
Salary Test	Salary or fees minimum of \$250 per week	Salary or fees minimum of \$455 per week	
Duties Test	<p>Primary duty is office or nonmanual work that directly relates to management policies or general business operations of employer or employer’s customers</p> <p>AND</p> <p>Includes work that requires exercise of discretion and independent judgment</p>	<p>Primary duty is office or nonmanual work that directly relates to management policies or general business operations of employer or employer’s customers</p> <p>AND</p> <p>Includes work that requires exercise of discretion and independent judgment</p>	<p>Generally exempt – insurance claim adjusters, financial services employees, team leaders assigned to major projects, administrative assistants to executives or business owners, human resources managers, and purchasing managers</p>

	Former “Short” Term	New Test	Notes
		(Employees earning at least \$100,000 annually must meet only one requirement)	with authority to bind employers to significant purchases.

PROFESSIONAL EMPLOYEES

	Former “Short” Term	New Test	Notes
Salary Test	Salary or fees minimum of \$250 per week	Salary or fees minimum of \$455 per week	
Duties Test	<p>Primary duty involves work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>AND</p> <p>Work requires exercise of discretion and independent judgment</p> <p>OR</p> <p>Primary duty involves work that requires invention, imagination or talent in a recognized field or artistic endeavor.</p>	<p>Primary duty requires knowledge of an advanced type defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction</p> <p>OR</p> <p>Primary duty involves work that requires invention, imagination or talent in a recognized field of artistic or creative endeavor.</p> <p>(Employees earning at least \$100,000 annually must meet only one requirement)</p>	<p>Acknowledgement that the exemption is available to certain employees who attained “advanced knowledge” through a combination of work experience and intellectual instruction.</p> <p>Generally exempt – medical technologists, RN’s (not LPNs), dental hygienists, physician assistants, CPA’s (not accounting clerks or bookkeepers).</p> <p>Generally not exempt - paralegals</p>

C. Pay For Time Not Worked

- Compensable time includes all time worked. Hours worked includes time that the employee is allowed or permitted to work, even if it is not at the employer's request. Work time includes all time spent by an employee performing tasks that are controlled, required, requested, permitted or suffered (whether authorized or not) and (2) primarily for the benefit of the employer.

- **Off-the-Clock-Time**

Voluntary, off-the-clock work by employees that benefits the employer is considered compensable time, so long as the employer knows, or has reason to know, that the time is spent working.

Employers have few alternatives when employees work off-the-clock. Basically, employers should develop a policy requiring that all overtime be approved in advance. If employees work unauthorized overtime, they should be disciplined to prevent further infractions of the overtime policy but should be paid for the time worked.

- **On-Call Time**

A determination of whether on-call time is compensable or not must be analyzed on a case-by-case basis. The case-by-case analysis focuses on whether the employee is required to remain on the employer's premises or so close to the premises that the employee cannot use the time for his or her own purposes. 29 C.F.R. § 785.17. Courts will also look at whether the time was primarily for the benefit of the employer or whether the employee's simply "waiting to be engaged." Other factors include the frequency of calls, the amount of time the employee has to respond, whether the use of a pager can help with the restrictions on the employee's use of his or her time and whether the employee actually engages in personal activities during the on-call time. *See, e.g., Armori Co. v. Wantock*, 323 U.S. 126, 134 (1944); *Rousseau v. Teledgie Movable Offshore*, 805 F.2d 1245 (5th Cir.), *cert. denied*, 484 U.S. 827 (1987).

- **Travel Time**

- a. ***Home to Work*** – Normal travel from home to work is not compensable time even if the worksite is different from the regular worksite.

- b. ***Emergency*** – Travel back to the regular worksite in emergency situations “after hours” is not compensable time. Only when employees must travel substantial distances should such travel be considered compensable.

- c. ***Travel to Other Cities***

- * When employees are asked to travel to another city as part of a special one-day assignment, the travel is considered compensable time.

- * Overnight travel away from home is worktime when it cuts across the workday. Also, traveling on non-workdays that occurs during the corresponding hours worked during normal workdays is also compensable. For example, an employee with a 8:00 a.m. to 5:00 p.m., Monday through Friday, work schedule would have to be paid for travel time between 8:00 a.m. to 5:00 p.m. on Saturdays or Sundays.

- **Vacation**

Under Arizona law, vacation pay is considered wages when the employee has a reasonable expectation of payment based on a policy, a past practice or verbal commitments. Therefore, employers should establish clear and concise policies that define when and how vacation will be paid or not paid upon separation of employment.

D. Payroll Issues

- **Overtime**

Overtime must be paid to all nonexempt employees for all hours actually worked in excess of 40 hours in a workweek.

- ♦ Workweek Defined

A workweek is any seven consecutive 24-hour periods. It may start at any hour and may be changed, provided that the purpose of the change is not to avoid overtime liability.

- ♦ Overtime Rate Defined

Overtime must be paid at one and one-half times the employee's "**regular rate**" of pay during the workweek in which the overtime hours are worked.

- ♦ Regular Rate Of Pay Defined

The "**regular rate**" is calculated on an hourly basis, regardless of whether the employee is paid an hourly rate or salary.

$$\text{"Regular Rate"} = \frac{\text{regular earnings}}{\text{hours worked in the workweek for which overtime is owed}}$$

WARNING! REGARDLESS OF THE MANNER OF CALCULATION, THE HOURLY RATE MUST ALWAYS BE AT LEAST MINIMUM WAGE.

The overtime rate calculation varies somewhat according to whether the employee is paid on an hourly rate or salary basis.

- ▶ If the employee is paid at an **hourly rate**, the overtime is one and one-half times the regular rate.
- ▶ If the employee is paid a **fixed salary for a predetermined number of hours**, the regular rate is the fixed salary divided by the hours actually worked, and the overtime rate is one and one-half times that regular rate for hours in excess of 40 in a workweek.
- ▶ If the employee is paid a **fixed salary for a fluctuating workweek**, the regular rate is the fixed salary divided by the actual hours worked, but the overtime rate is one-half that regular rate for the hours in excess of 40 in a workweek. (The employee has already received the regular rate for all hours worked, including the overtime hours, leaving only the one-half amount to be paid for the overtime hours.)

All wages earned by an employee **must be taken into consideration** when calculating an employee's "regular rate" of pay. This includes:

1. *Bonuses for attendance, production, or quality of work.*
2. *The reasonable fair value of meals and lodging furnished to the employee (unless excluded under a union contract).*
3. *On-call pay.*
4. *Shift differentials.*

The Department of Labor regulations do provide for the exclusion of many forms of payment. Examples of items **excluded** are:

1. *Gifts and payments which are not dependent upon hours worked, production or efficiency.*
2. *Payment for absences such as vacations, sick time, or jury duty.*
3. *Expense reimbursement.*
4. *Discretionary bonuses.*
5. *Payments made pursuant to a profit sharing, thrift, or savings plan.*
6. *Employer contributions to a retirement plan or insurance plan.*
7. *Premium pay for work in excess of weekly or daily standards is excludable and may be credited towards statutory overtime payments. Thus, hours paid at one and one-half times an employee's regular rate for hours worked over 8 hours in a day may be credited towards overtime for hours worked over 40 in a workweek. Similarly, premium pay for weekend and holiday work is excludable and can be used as a credit toward overtime liability. However, night shift premiums and premium pay for hazardous, arduous, or dirty work is included in the regular rate.*

8. “*Show-up*” or “*reporting*” pay. Amounts paid to compensate an employee for time lost by him in reporting to work, over and above what an employee would normally receive for actual *time* worked, is excluded. The same is true for “call-back” or “call-out” minimum payments that exceed actual hours worked.

- **Compensatory Time Off**

Government employers may give compensatory time off in lieu of overtime pay, but private sector employers may not. Private employers may use an informal method of compensatory time by adjusting the schedule within the same work week to ensure that the total hours worked do not exceed 40. However, overtime hours generally may not be averaged out over a longer period of time.

E. Military Leave Issues

- An employer cannot make deductions for absences of an exempt employee due to military leave. The employer may offset any amount received by an exempt employee for temporary military pay for a particular week against the salary due for that particular week. An employee does not need to be paid for any workweek during which he or she performs no work; for example, when he or she is on military leave for an entire workweek or more.

Carolann E. Bullock
Direct Line: 602-440-4828
Direct Fax: 602-257-6928
E-mail: cbullock@rcalaw.com

Sexual, Racial, and Other Harassment in the Workplace

A. Recent court cases and their implications such as *Burlington Northern v. White*

In *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (June 22, 2006), the Supreme Court redefined what constitutes an “adverse action” sufficient for an employee to successfully assert a Title VII retaliation claim.

The plaintiff, Sheila White, was the only female forklift operator in her department at Burlington. After White made a complaint of sexual harassment against her supervisor, Burlington suspended him. However, following the supervisor’s suspension, Burlington assigned White track laborer duties which were more physically demanding than her forklift operator duties. Burlington told White that she was getting transferred to perform laborer duties because other employees claimed that she had only been given the forklift job because of her gender.

Following her reassignment, White filed a sex discrimination and retaliation claim with the Equal Employment Opportunity Commission. About six months later she was suspended for alleged insubordination and her pay was withheld for 37 days. Upon further internal review, she was found not insubordinate and was reinstated with back pay. White then brought a lawsuit against Burlington and claimed that the reassignment to track laborer duties and the unpaid suspension constituted unlawful retaliation.

The United States Supreme Court agreed with White. A number of appellate courts had held that a claim for retaliation had to involve an “ultimate” employment decision such as a termination. However, the Supreme Court held that Title VII’s anti-retaliation provision extends beyond such “ultimate” employment actions. The Court concluded that while Burlington’s reinstatement of White and payment of her 37 days of back pay resulted in her being “made whole” economically, she still had a retaliation claim for reassignment to the track laborer duties and for the emotional distress she experienced as a result of her 37 day unpaid suspension.

Unfortunately, the Supreme Court did not set down any hard or fast rules for how harmful an adverse action must be to come within the scope of Title VII's anti-retaliation provisions. The Supreme Court did note that only "significant" versus "trivial" harm would be sufficient to establish a retaliation claim and noted that in determining whether an employment action was significant, the courts should apply an "objective standard," *i.e.* – would a reasonable employee have viewed the harm as significant?

The practical implication of *Burlington Northern* is that the scope of potential retaliation claims has dramatically expanded and employees can now bring retaliation claims for a much broader variety of employment actions.

B. What constitutes severe and pervasive conduct: is it harassment or just obnoxious behavior?

Title VII, is not a "general civility code." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1988). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Id.* (internal citation omitted).

- To establish a hostile work environment, a plaintiff must prove:
 - The conduct was unwelcome,
 - The conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment,
 - Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.
 - Given the totality of the circumstances, the conduct was both objectively and subjectively abusive.
 - Working environment was objectively abusive where, over a seven-month period, coworkers called the plaintiff and other Black employees racial slurs, threatened them with violence, and the employer allowed racial slurs, pictures, and threats to linger in the men's bathroom. *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906 (8th Cir. 2003).
 - Two Black employees were subjected to racially hostile environment where managers and coworkers repeatedly made racial remarks, and managers required them to do menial tasks outside their job description, yelled at them, and made their jobs more difficult by withholding necessary information, refusing to deal with them, and falsely accusing them of misconduct. *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074 (3d Cir. 1996).

- Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of creating a hostile working environment. “[T]he ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing” are not actionable. B. Lindemann & D. Kadue, *Sexual Harassment in Employment Law* 175 (1992), quoted in *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1988); see also *Dwyer v. Smith*, 867 F.2d 184, 187–89 (4th Cir. 1989) (holding that the plaintiff’s complaints that she was subjected to pornographic material in her mailbox, was accused of having sex with other workers, and was subject to sexually explicit conversations was not sufficiently severe or pervasive).
 - An isolated comment is generally not sufficient to create actionable harassment. *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004).
 - Mere utterance of an ethnic or racial epithet which engenders offensive feelings does not sufficiently alter the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).
 - Coworkers’ occasional annoying and merely offensive comments do not constitute harassment.
 - Working environment was not so objectively abusive as to alter the conditions of employment where over a two-and-a-half year period, harassment consisted of: two offensive and inappropriate incidents (one in which two co-workers ridiculed the plaintiff for mispronouncing a word, and another in which co-workers pulled their eyes back in an attempt to imitate the appearance of Asians), as well as other offhand remarks by coworkers and supervisors. *Manatt v. Bank of America*, 339 F.3d 792 (9th Cir. 2003).
 - No hostile work environment where employee was told that he had “a typical Hispanic macho attitude,” and that he should work in the fields because “Hispanics do good in the field,” and where he was yelled at in front of others. *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003).

C. Ethnic, religious, political violence in the workplace

- Establish a zero-tolerance policy toward workplace violence against or by employees.
 - This policy should be incorporated into an employee handbook.
 - Ensure that all employees know the policy and understand that all claims of workplace violence will be investigated and remedied promptly.

- Make sure the policy is actually implemented. *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001); *Winarto v. Toshiba America Electronic Components, Inc.*, 274 F.3d 1276 (9th Cir. 2001).
- Send a message that work is not a place where sharing one's prejudices will be tolerated.
- Make clear that your company's culture values diversity and does not tolerate discrimination.
- Make sure your employee manual has a clear anti-discrimination policy and procedures for reporting violations of that policy.
- Provide anti-discrimination and harassment training for all employees.
- Intervene promptly in the event of a problem.
 - Address conflict immediately and effectively.
- Facilitate a workplace environment that promotes healthy, positive means of airing and resolving problems.
- Enforce clear standards of conduct in the workplace.

D. Definition of a supervisor

The Supreme Court decided two sexual harassment cases which blurred the distinction between hostile environment harassment and quid pro quo harassment when the harassment is done by a management individual. Before the Supreme Court decided these two cases, (*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)) employers generally were automatically liable for harassment by managers if the employee gave in to the manager's demand for sexual favors or if the supervisor took the threatened adverse employment action against the employee, i.e., demotion or termination.

The Supreme Court's decisions confirmed that employers are automatically liable for harassment when the employee suffers adverse tangible consequences (for example, giving in to requests for sexual favors and having their employment affected). However, the Supreme Court also held that employers are not liable for sexual harassment by supervisors, which does not result in a tangible employment action like a termination, demotion, failure to receive a promotion, or undesirable job assignment.

An employer can only avoid liability for supervisory harassment, which does not result in a tangible employment action if it can show that:

1. It exercised reasonable care to prevent and eliminate sexual harassment; and
2. The employee unreasonably failed to take advantage of the employer's anti-harassment policy and complaint procedures.

- An individual qualifies as a supervisor if:
 - The individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
 - The individual has authority to direct the employee's daily work activities
- A “tangible employment action” means a significant change in employment status. Examples include hiring, firing, promotion, demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment.

E. What constitutes acceptable policies and training?

- Establish a clear, well thought out policy prohibiting discrimination and harassment.
 - The policy should make clear that the employer will not tolerate discrimination or harassment based on race, color, sex, religion, national origin, age, or disability, or harassment based on opposition to discrimination.
 - The policy should also state that the employer will not tolerate retaliation against anyone who complains of harassment or discrimination or who participates in an investigation into such complaints.
- Complaint Procedure
 - Employer should encourage employees to report discrimination and harassment before it becomes severe or pervasive.
 - The employer should designate more than one individual to take complaints, and should ensure that these individuals are in accessible locations.
 - Employer should instruct all of its supervisors to report complaints of harassment to appropriate officials, *e.g.*, human resources professional or an officer or director.
 - Employer should assure employees that it will protect the confidentiality of harassment complaints to the extent possible.
- Complaint Investigation
 - Employer should conduct a prompt, thorough, and impartial investigation.
 - The investigator should interview the employee who complained of harassment, the alleged harasser, and others who could reasonably be expected to have relevant information.
 - The employer should take steps to make sure the harassment does not continue.
- Harassment Correction

- Employer should take immediate measures to stop the harassment and ensure that it does not recur.
- Disciplinary measures should be proportional to the seriousness of the offense.
- Employer should correct the effects of the harassment.
- Retaliation
 - Policy should prohibit retaliation against an employee for making a good faith complaint of discrimination or harassment or participating in an investigation.
 - Employer should follow-up with an employee who makes a complaint to ensure that retaliation is not taking place.
- Training
 - Employees and supervisors should be regularly trained in the prevention of harassment and discrimination.
 - Effective, appropriate training may support an affirmative defense.

F. Vulnerability to charges from harassed and harassers

Liability to Acuser

- Employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. *Burlington Ind. Inc. v. Ellerth*, 524 U.S. 742 (1998).
- If supervisor's harassment creates a hostile work environment, the employer can avoid liability only if it can prove that:
 - It reasonably tried to prevent and promptly correct the harassing behavior; and
 - The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.
- The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control if it knew, or should have known about the harassment and failed to take prompt and appropriate action. *Bains LLC v. Arco Products Co., Div. of Atlantic Richfield, Co.*, 405 F.3d 764 (9th Cir. 2005).
- In case of a complaint, employer should:
 - Investigate promptly and thoroughly.
 - Follow established investigation procedures.
 - Interview both harasser and harassed and others who may provide information.
 - Maintain confidentiality to the extent possible.

Liability to Accused

- Employers also face potential liability to an alleged harasser, generally in the form of defamation, emotional distress, or wrongful discharge.
- A thorough investigation is the best defense against complaints of accused employees.
 - Talk to all relevant witnesses.
 - Ensure unbiased investigation.
 - Maintain confidentiality to the extent possible.
- Make sure employer has a reasonable basis to believe the harassment took place.
- Confidentiality is a key factor in avoiding liability.
- Employers should avoid jumping to conclusions.
- *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir. 2000).
 - Ruling against an employee investigated for sexual harassment who sued employer for negligent infliction of emotional distress.
 - Court noted that “such investigations foreseeably produce emotional distress—often in copious amounts—in the alleged harassers, whether guilty or innocent.”
 - “An employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer’s failure to investigate may allow a jury to impose liability on the employer.”
- *Bodett v. CoxCom, Inc.*, 366 F.3d 736
 - Employee brings charges including wrongful discharge and intentional infliction of emotional distress after employee was fired for violating company’s harassment policy by coercing and harassing openly gay subordinate.
 - Court held that employer’s proffered reason for terminating was legitimate and nondiscriminatory.

G. Strategies for avoiding litigation

- Prevention is the best tool to eliminate harassment and discrimination in the workplace.
- Employers should clearly communicate to employees that unwelcome harassing and discriminating conduct will not be tolerated.
- Employer should make clear to employees that it will protect the confidentiality of the harassment allegations to the extent possible.
- Preventive Action.
 - Clearly communicate policy against harassment and discrimination.
 - Establishing an effective complaint or grievance policy.

- Provide training to managers and employees.
- Keep records of harassment and discrimination complaints and check those records to reveal any patterns of inappropriate conduct by the same individuals.
- Remedial Action.
 - When a complaint is received, investigate promptly and thoroughly.
 - Take immediate and corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits and opportunities, and prevent the misconduct from recurring.
 - Take disciplinary action against the offending supervisor or employee.