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Holland & Knight LLP
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Employment Issues Facing Theaters

Presented by
Lawyers for the Creative Arts
and
The League of Chicago Theaters

Panelists

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Employment Issues Facing Theaters

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Program Overview

The business of creating theatre and dance naturally places artists in environments that demand vulnerability and risk-taking that can be both emotional and physical. When complaints arise, the law -- and principles of best practices -- require management to address these situations promptly and fairly.

Our panel of experienced employment lawyers will discuss best practices you should follow in establishing appropriate policies before incidents occur. Should you have written policies? What specific concepts should they address?

Our panel will also provide practical advice for handling allegations of harassment when they occur. What immediate actions should you take? How do you accommodate the rights of privacy of the complainant, alleged harasser, and any witnesses. How do you respond to requests for information from those not involved? Audience interaction and questions are welcome and encouraged.

Program Agenda

I. Introduction (Jan Feldman)

II. General Legal Background (Steve Gillman)

III. Theatre Context and Current Landscape (Sarah Marmor)

IV. Best Practices and Practical Strategies (Jeannil Boji)

V. Hypotheticals (Jeannil Boji, Sarah Marmor, Steve Gillman)

VI. Conclusion (Jan Feldman)

Panelists

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Jan Feldman became Executive Director of Lawyers for the Creative Arts in 2014. He had been a member of LCA's Executive Committee where he led the organization's fundraising efforts for most of the last decade. Before he joined the LCA Board of Directors, Mr. Feldman held board president positions for several arts organizations in the areas of arts education, arts service and performing arts. They included the People's Music School, Arts Bridge and Mostly Music Chicago. He assisted those organizations in navigating challenging funding periods, significant program enhancements and transitions in their staff leadership.

Mr. Feldman is a 1981 graduate of Northwestern University Law School, and practiced civil litigation concentrating on high technology and trade secret disputes. He was a partner in several Chicago law firms including Phelan, Pope & John, Holleb & Coff, and most recently, Perkins Coie.

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Jeannil Boji, a partner in Perkins Coie's Labor and Employment group, counsels clients from startups to FORTUNE 100 companies in every aspect of employment law, including the latest developments in non-compete and trade secrets law, wage and hour law, leave and sick time law, fair employment, discrimination, and accommodation law, privacy issues and workplace investigations, and social media, confidentiality, and employment policies. Jeannil has a national practice and is well versed in federal employment law developments as well as the nuances of state employment laws throughout the country. Jeannil regularly drafts and negotiates executive employment and separation agreements, as well as non-competes and other restrictive covenants, and counsels employers on issues of workplace mobility when hiring or dealing with the departure of employees subject to employment agreements. Jeannil has successfully handled a wide variety of significant employment matters at the agency, state, and federal level, and in mediation/arbitration. Jeannil also regularly handles sensitive workplace investigations and internal compliance issues and provides employment law-related training.

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Steven L. Gillman is a partner in Holland & Knight and leader of the Chicago Labor and Employment Group. Mr. Gillman's practice emphasizes employment litigation, including claims of discrimination, wrongful discharge, breach of contract, misappropriation and use of trade secrets, defamation and other torts arising in the employment setting. He has extensive first-chair trial experience. He has appeared in cases in more than 25 states, and has tried cases in eight states. He has also handled a broad range of issues for unionized clients, including numerous labor arbitrations and unfair labor practice cases, and issues relating to union representation cases. He has amassed an extraordinary record of success in the cases he has tried. He has obtained numerous published summary judgments in cases filed in state and federal courts across the country.

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Sarah R. Marmor is a founding partner of Scharf Banks Marmor LLC, one of the largest women-owned law firms in the country. She concentrates her practice on employment law, complex business litigation, and life sciences/product liability. Ms. Marmor has tried complex cases throughout the United States.

Ms. Marmor heads her Firm's Employment Counseling and Litigation Practice. Her employment law experience comprises counseling in all aspects of this discipline, including discrimination claims, wage and hour issues, background checks, leave policies and law, diversity initiatives, and employment contracts and non-compete and related restrictive covenant matters. Ms. Marmor defends clients in state and federal investigations, and has tried employment contract, discrimination, and ERISA claims to successful verdicts in both state and federal courts. In recent years, she has developed significant expertise in social media law, as it applies to employers and more broadly, and she frequently lectures on this subject.


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STRONG
Equity
NEWS
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Actors' Equity Association

COMBATING HARASSMENT IN THE WORKPLACE

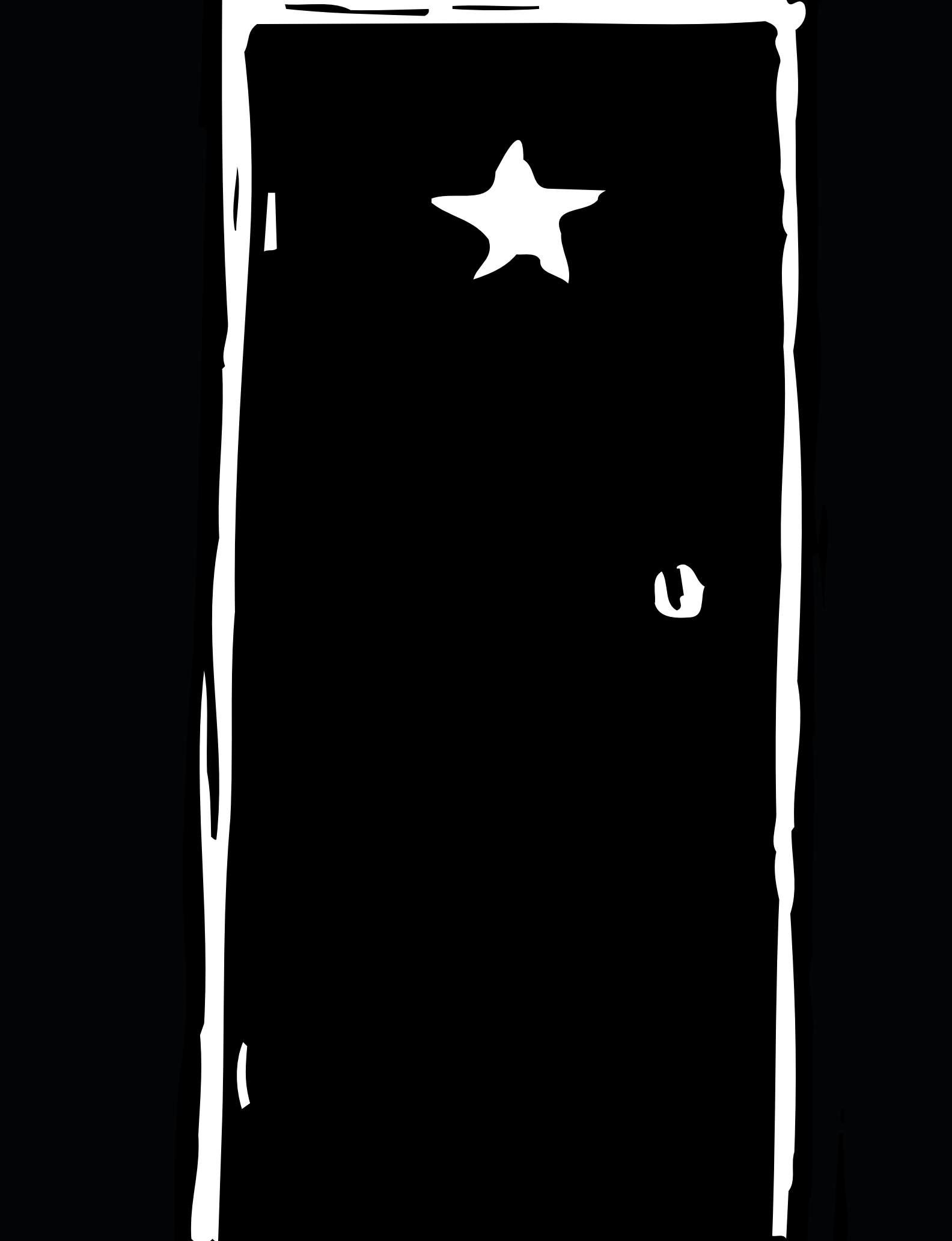
Immediately following the 11 o'clock number, the two star-crossed characters finally kiss for the first time. It's passionate and sincere — enough to elicit a visceral reaction from the audience. That romantic gesture is the highpoint of the show. All that's left is the finale and, in this case, the traditional happily-ever-after ending. Until tomorrow.

For one of the actors, that stage kiss is crushing. It represents months of harassment he or she has been receiving from that other performer. Inappropriate remarks, unwanted touching and crude language.

The theatre industry is a hard place to imagine workplace harassment – sexual or otherwise. A creative environment, theatre tends to sway left and right, straddling the line between conservative and provocative. But that by no means is an excuse for bad behavior. Equity members work in a fast-paced, open and creative atmosphere. As actors and stage managers, the hours are long and often spent in close, physical quarters, where significant relationships are quickly formed with colleagues.

Anyone working on a show might find themselves in an uncomfortable situation onstage, backstage or in a different setting altogether. The effects of harassment can be devastating to individuals and can lead to damaging effects for performances and careers.

(Continued on page 12)



"Equity is here to help our members when harassment occurs in the workplace," said Equity's Executive Director Mary McColl. "The moment it occurs — in whatever form it takes — can be paralyzing to the individual. But silence can make it worse. That's why I want to assure our members Equity is here for them."

It is illegal for any person to harass or discriminate on the basis of a "protected class," meaning a person's race or ethnicity, color, creed, national origin, alien or citizenship status, age, gender, disability, sexual orientation, gender identity and/or expression, marital status, familial status or other beliefs.

Harassment takes several guises: derogatory or demeaning comments, bullying, insulting or abusive actions, biased behavior and stereotyping, having prejudice, discrimination, humiliation, retaliatory behavior and denying opportunities.

There are two forms of sexual harassment. The first is referred to as "Hostile Work Environment," where due to the behavior of another, one is made to feel uncomfortable through jokes, visual images, language and gestures of a sexual nature. This "hostile work environment" can also stem from persistent, unwelcomed attention. The second form, "Quid Pro Quo," includes the suggestion of preferential treatment if someone agrees to sexual activities, or in the opposite instance, losing out on an opportunity for refusal to engage in these actions.

These actions aren't always concealed inside a dressing room or alone in a rehearsal studio. Offensive jokes, walking in on performers changing or even telling a risqué story aloud can be construed as harassment — and with good cause. The effects of harassment can be devastating. What someone views as a harmless joke or even any form of unwelcomed action could drastically hurt someone — personally and professionally. Not only is there potential for a bad reputation, but someone might be less productive at work or even lose out on a possible opportunity. Low morale, low self-esteem, professional and familial stress and the chance of financial costs and legal battles could all stem from unwelcomed attention. And according to the courts, the harassed party defines what is unwelcome, unwanted, offensive, intimidating or hostile.

It is the law and the right of any employee to expect employers to provide a workplace free of harassment. And that right — protecting members in the workplace — has always been a serious issue and concern for Actors' Equity Association. A union that doesn't take such matters lightly, Equity has historically stood up and spoken out against harassment in any form. The union, in every agreement, has steadfast rules against such behavior and actions toward any one of Equity's members. The union will assist any member who has been subjected to workplace harassment and will investigate claims under the union's collective bargaining agreements.

"Equity members have the right under federal, state and local law to work in an environment that's free from harassment and discrimination," said Thomas Carpenter, Eastern Regional Director/General Counsel. "And, Equity stands ready to protect its members whenever they face harassment of any kind in the workplace."

The first step: speak out.

> "The moment it occurs — in whatever form it takes — can be paralyzing to the individual. But silence can make it worse. That's why I want to assure our members Equity is here for them."
>
> - Mary McColl, Executive Director

The Actors Fund, a nonprofit human services organization assisting all members of the entertainment industry, highlights the "3 Rs." Respond: Firmly, but respectfully. Inform the offending person(s) that his/her behavior is unwelcomed and must stop. Record: If the behavior is repeated, note the incident (include date, place and any witnesses). Report: Don't be afraid to tell your deputy and your Equity representative.

Though it goes without saying, there are several ways to ensure a harassment and bullying-free workplace. Respecting co-workers and their diversity; be aware of language and communication style; keep emotions in check; avoid provocative jokes, pranks, teasing and confrontation; and avoid racial, ethnic and gender-based humor.

In addition to Equity, there are resources across the country that can help assist those affected by harassment in the workplace. Most importantly, however, you are your first and best advocate for safety.

"Find the courage to step up and step forward," said McColl, "for yourself and for those who follow you into that rehearsal hall and that theatre."

What is The Actors Fund?
The Actors Fund is a national human services organization that assists everyone working in performing arts and entertainment. With offices in New York, Chicago and Los Angeles, The Actors Fund provides a safety net and offers a variety of ongoing programs to meet the needs of professional artists.

How can The Actors Fund help me if I am being harassed?
These situations can be especially confusing and stressful. The Actors Fund offers Actors' Equity members a free, safe and confidential place to come for advice and support involving harassment and other workplace issues. You can speak privately with a licensed professional who will help you to better understand what happened and to explore your options.

Should I contact my union or company management before I call The Actors Fund?
If you experience something that makes you feel uncomfortable and that you believe constitutes harassment, you should report it to a union official such as your stage manager, Equity Deputy or your business representative. Your employer (company management) is responsible for addressing workplace issues, including harassment and discrimination, so you are always encouraged to bring it to their attention. But sometimes, you may not be clear if it is harassment or may not be comfortable talking to others in the workplace. You can contact The Actors Fund at any point – before, after or at the same time.

What if I am not located near an Actors Fund office?
The Actors Fund has a toll free number and they can talk with you over the phone or even by Skype. If they feel that you would benefit from seeing a counselor in your community, they will help you find the right one.

Will The Actors Fund refer me to an attorney if one is required?
They will help you determine if you need an attorney and discuss how to choose one, but they don't refer to individual legal practices. They can give you information on nonprofit legal service organizations.

RESOURCES FOR YOU

Equity always recommends that you first address any harassment issues directly with your employer and the union. There are also other resources available if you want to know more or speak with professionals.

The Actors Fund
The Actors Fund offers Actors' Equity members a free, safe and confidential place to come for advice and support concerning harassment and other workplace issues. You can speak privately with a licensed professional who will help you to better understand your experience and explore your options.
Call The Actors Fund nearest you:
New York: 800.221.7303 | Los Angeles: 888.825.0911| Chicago: 312.372.0989.

Other Resources:

Equal Employment Opportunity Commission: File a complaint and find your State office
1.800.669.4000 | eeoc.gov

Equal Rights Advocates:
Confidential counseling line
415.621.0672 | 800.839.4372
24-hour line: 415.621.0505

National Center for Victims of Crime:
Resource and advocacy organization for victims
1.800.FYI-CALL | 202.467.8700

New York Division of Human Rights:
File a complaint
dhr.ny.gov

The Feminist Majority Foundation:
A directory of sexual harassment state resources
feminist.org

Volunteer Lawyers for the Arts:
Offer mediation — which is a voluntary, confidential alternative dispute resolution to litigation — where a neutral third party assists parties in conflict to find a resolution to their differences or disagreements.
vlany.org/mediateart-faqs/

There are many community counseling organizations that can provide help in determining how to manage possible harassment situations. Check your local directory or speak with The Actors Fund for more assistance.

AEA reflects on 100 years of *Equity News* (See inside, p. 4 and a nod to the original masthead here)

EQUITY

The Official Organ of the Actors' Equity Association

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www.actorsequity.org

2015 Annual Election Gets Underway

All members wishing to run for Council must submit petitions

The 2015 Equity election is just around the corner, and now is your chance to step up and be a part of the action. Active members ensure that Actors' Equity continues to be a strong member-driven union. Consider running for a seat on Council to have a voice in representing your fellow actors and stage managers.

16 Council and Eight Officer Seats Open

Seats Available

There are a total of 16 Council seats open in this year's election. In the **Eastern Region** Principal category, there are eight seats for three-year terms. Also in the East, under the Chorus category, is one seat for a three-year term. There are two Eastern Stage Manager seats available this year, also with a term of three years. In the **Central Region**, there is one three-year Chorus seat and one three-year Stage Manager seat available. (There are no Principal seats available this year in the Central Region.) In the **Western Region**, there are three, three-year Principal seats available. (There are no Western Chorus or Stage Manager seats available this year.)

This year, in addition to the Council seats, the eight officer seats are also open. There are five national officers: president, first vice president (a member qualifying in the Principal category), second vice president (a member qualifying in the Chorus category), third vice president (a member qualifying in the Stage Manager category) and secretary/treasurer. There are also three regional officers, one regional vice president for each of Equity's geographic regions (Eastern, Central and Western). All officers serve for a term of three years.

Candidate Qualifications

General Criteria: In order to be eligible to run for and hold a seat on the Council, a member must have been a member in good standing for the two years prior to nomination and currently be in good standing at the time of the election. Candidates must be at least 18 years old, and not be in a conflict of interest, or be under fine or suspension. Candidates must reside in the region from which they are seeking election and must meet employment category qualifications for the position they seek.

Principal Councillor Criteria: In addition to meeting the general criteria, a candidate running in the Principal category must be a member in good standing, who has performed Principal work under no less than two Equity contracts or who has worked no less than one Equity contract performing principal work for no less than ten weeks.

Chorus Councillor Criteria: In addition to meeting the general criteria, a candidate running in the chorus category must be a member in good standing who has performed Chorus work within five years preceding the nomination or appointment to office (for the 2015 election, this date is June 1, 2010), provided the member has not worked as a principal performer for a total of 52 weeks within two years prior to such nomination or appointment to office (for the 2015 election, this date is June 1, 2013).

Stage Manager Councillor Criteria: In addition to meeting the general criteria, a candidate running in the Stage Manager category must be a member in good standing, who has worked as a stage manager five years preceding the nomination or appointment to office (for the 2015 election, this date is June 1, 2010): (1) under Equity contract for at least 30 weeks solely as a stage manager or assistant stage manager; or (2) under no less than five Equity contracts solely as a stage manager or assistant stage manager.

Becoming a Councillor

All nominations to hold a seat on the Council shall be made by petition on the Official Equity Nomination Petition Form, which can be picked up in person at any Equity office or is available for download at the Equity website (www.actorsequity.org), beginning Friday, February 6, 2015, at 12 p.m. Eastern Standard Time. If you wish to be nominated, you must obtain the signatures of 17 members in good standing from the region in which you reside. In addition to the petition, you must submit all administrative forms found in the packet, as well as a letter of intent, requesting such consideration, to the Equity office in your geographic region. Your letter of intent should state (1) you are a member in good standing resident in the applicable region; (2) you are eligible to run in accordance to the Constitution and By-Laws;

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Actors' Equity Association President Nick Wyman (right), along with Actors' Equity Foundation President Arne Gunderson (center), stand with the Foundation's 2014 Joe A. Callaway Award winners, Suzanne Bertish (left) and Paxton Whitehead and the St. Claire Bayfield Award winner, Amanda Quaid. To read the full stories, go to *actorsequity.org*.

Tax News: At VITA, It's all about IDs, Health Insurance Info…and Other Updates

By Sandra Karas, Director, VITA Program

Social Security cards will still be required.

If you use VITA services this season, you'll have to bring your Social Security card — or a photocopy of it — along with your paid-up union card and a current photo ID. SS cards must be provided for you and anyone else who is listed on your return, including your spouse and your dependents. This is the same procedure we've been following, so nothing's changed in that regard, and it remains the rule, even if you've had your taxes prepared at our center in the past. If you cannot locate your SS card or those of your spouse and/or dependents, you may obtain another from the Social Security Administration by visiting an office or going online to ssa.gov. VITA must comply with this procedure, so be prepared when you come in for your taxes or risk being turned away.

Health insurance forms will also be required.

This year, the Affordable Care Act provisions begin to appear on your tax returns in the form of a declaration of your health insurance coverage for the past year. If you enrolled for coverage on the exchange, sometimes referred to as the marketplace, you'll have to provide the preparer with Form 1095-A, which you'll be receiving in the mail at the same time you receive your W-2 forms and other tax statements. Taxpayers who are covered by an employer or other plans must declare their coverage on the tax returns as well, but won't be receiving the marketplace form in the mail.

Your forms are online.

As a reminder, you may access the IRS and VITA worksheets online at actorsequity.org if you want to save a trip to the office. Either way, completed IRS and VITA forms will be required to get your returns done.

What's new?

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Filing Status	10%	15%	25%	28%	33%	35%	39.6%
Single	$0	$9,076	$36,901	$89,351	$186,351	$405,101	$406,751
Married Joint	$0	$18,151	$73,801	$148,851	$226,851	$405,101	$457,601
Married Separate	$0	$9,076	$36,901	$74,426	$113,426	$202,551	$228,801
Head of Household	$0	$12,951	$49,401	$127,551	$206,601	$405,101	$432,201

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Area Liaison Hotline system

Call 877-AEA-1913

Equity has a national toll-free hotline system for members who live in area liaison and office cities. The number is 877-AEA-1913 (honoring the year of Equity's founding). Each area liaison city has its own extension, where members can access news and information in their region.

(1) Dial 877-AEA-1913

(2) Dial your city extension:

811 Atlanta
812 Austin/San Antonio
813 Boston
814 Buffalo/Rochester
815 Chicago
816 Cincinnati/Louisville
817 Cleveland
818 Dallas/Fort Worth
819 Denver
820 Detroit
821 Florida – Central
822 Florida – South
823 Houston
824 Kansas City
825 Las Vegas
826 Los Angeles
827 Milwaukee/Madison
828 Minneapolis/St Paul
829 Nashville
830 New Orleans
831 New York
832 Philadelphia
833 Phoenix/Tucson
834 Pittsburgh
835 San Diego
836 San Francisco
837 Seattle
838 St. Louis
839 Washington DC/Baltimore

ACTORS' EQUITY ASSOCIATION 1913

EQUITYNEWS

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2015 Election

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and (3) if elected, you will serve. Additionally, if you are a member who already holds Emeritus status on Council, you must indicate that you will be resigning that status in order to stand for election. You must submit your petition, signed by at least 17 members in good standing resident in the applicable region, along with the other administrative forms found in your Candidate Packet **by Friday, March 6, 2015 (by 2 p.m. Eastern Standard Time; 1 p.m. Central Standard Time; 11 a.m. Pacific Standard Time)**. If a document is mailed, emailed or faxed, there will be no presumption that it has been received by the union before the deadline. Therefore, the candidate who chooses to mail, email or fax his/her Nominating Petition is urged to do so with sufficient time for receipt by the established deadline and to check with the appropriate office to ensure that the Nominating Petition has been received. **Nominating Petitions received after the deadline will not be accepted and the untimely receipt of a Nominating Petition will invalidate the person's candidacy.**

	East	Central	West	Total
PRINCIPAL	8	0	3	11
CHORUS	1	1	0	2
STAGE MANAGER	2	1	0	3
TOTAL	11	2	3	16

For questions, email *elections@actorsequity.org.*

Tax News

(continued from page 1)

1. New tax rates are in effect for 2014.

2. Affordable Care Act (ACA): As noted above, this provision is in effect for the 2014 tax year. For most taxpayers, it is a "check the box" requirement. For those who purchased through the exchanges, qualified for subsidies, received any advance reduction in premiums or who were uninsured for any part of the year, you will have additional reporting to include on your tax returns. Some may be getting additional refunds, while some may face penalties for underinsurance. The IRS expects millions of additional telephone inquiries during the filing season and reminds taxpayers that the waiting time on these calls may be an hour or more.

3. Same-Sex Marriages, while recognized federally, might not be recognized in the state in which you live. As of press time, about 30 states accept same-sex joint filing and about 20 do not, but legislation and litigation will result in some changes in 2015, so check with your state's laws to determine how this may affect you.

4. Standard Mileage Rates for 2014. Business mileage is 56¢/mile; medical and moving mileage is 23.5¢/mile; Charitable mileage is 14¢/mile. In 2015, the rates for business mileage will be 57.5¢/mile, medical and moving will decrease to 23¢/mile. Charitable mileage remains at the statutory rate of 14¢/mile.

5. Social Security Tax wage base is at $117,000 and will rise to $118,500. The rate stays the same at 6.2 percent.

Extended Provisions for 2014:

A. Cancellation of mortgage debt that was secured by your main home (your principal residence) can be excluded from income, provided it was completed before the end of 2014.

B. Educators' above-the-line deduction of $250 (for K-12 teachers) is still in effect for those who qualify for this deduction for 2014.

C. Charitable donations from IRAs. Those taxpayers over 70 1/2 years old, who made direct contributions of their IRA to charities, may exclude those contributions from your taxable income again in 2014.

D. Energy Credits. Those popular tax credits for installing new windows, doors, furnaces, insulation materials and other energy-saving improvements to your home are still available through 2014.

E. Expensing your business and related equipment remains at the $500,000 maximum for the year. Be aware that you may only claim 100 percent of the cost if there is no personal use of the item. Otherwise, you apportion the business deduction for the amount you use the item for business.

F. State and Local Sales Tax Deduction remains available for 2014.

G. Tuition and Fees Deduction above-the-line is still allowed for 2014 up to a maximum of $4,000. Don't forget that tuition and other valuable education credits remain for taxpayers who attend college and pay out-of-pocket. See which method is better for you this year.

H. Interest on Mortgage Insurance Premiums continues as an itemized deduction in 2014.

If you have any questions about these or other tax matters, stop in your nearest VITA office. The New York office is located on the 14th Floor of the Equity Building, 165 West 46th Street. Hours are 10:30 a.m.-4 p.m., Monday, Wednesday, Thursday and Friday or call 212-921-2548.

Sandra Karas is Director of the VITA Program, Secretary-Treasurer of Equity and a NY Local Board member of SAG-AFTRA.

Equity Works

Birmingham, AL: City Equity Theatre and Actors Theatre of Alabama will merge and present a four-show season with the goal of bringing more professional theatre to the area.

Munster, IN - Theatre at the Center (TATC), operating on the CAT Agreement, will celebrate its 25th anniversary beginning January 2015.

New York, NY - Dream Catcher Theatre Company, founded by Equity Member Natalie Caruncho, will be producing its first SPT project, *Into The Woods*, in Caruncho's hometown of Miami, Florida, at the Carnival Studio Theater at the Adrienne Arsht Center.

Tracking What You're Owed

New York, NY - AEA secured one week of health pay for members on a cabaret contract who were called to an early rehearsal prior to start of scheduled rehearsals.

Touring

Equity negotiated a Special Agreement with Troika Entertainment for the tour of the new musical *Around the World in 80 Days*. This ground-breaking event will take place in a created venue in major markets across the country.

Resources Available for Actors Subjected to Sexual Harassment

Discrimination and sexual harassment are illegal, and no one should have to tolerate it. Yet, some Equity members working on contract might not be aware of the options that are available to them if they've been subject to sexual harassment or discrimination. Your union is here to protect you from violence, harassment and discrimination in the theatres where you work. If you believe that you have been subjected to working conditions that cross the line, here's what you should know.

Sexual harassment and discrimination are against the law, which means that if you have been subjected to unlawful behavior, it's possible to file an individual lawsuit against an employer for violations of the law. Moreover, in some of the more extreme circumstances, conduct may rise to the level of a criminal violation. Sexual assault, for example, is punishable as a criminal offense, whether or not it occurs in the workplace. For many reasons, however, people who've been victims of sexual harassment and discrimination may not wish to file charges or a lawsuit. If those individuals are union members, they have additional options.

All Equity collective bargaining agreements contain provisions that prohibit discrimination and sexual harassment. In cases where those provisions are violated, Equity can pursue remedies through the grievance and arbitration procedure of the contract. The grievance process is a private process and information is held in the strictest confidence. While arbitration provides a final and binding remedy, the private nature of the proceeding means that there are no public records that can be accessed by anyone. The investigation, as well as any decision or resolution is kept confidential and is completely private.

In addition, your union can help direct you toward other resources to assist members who have found themselves in difficult circumstances. Equity works closely with The Actors Fund to ensure that members have access to counselling and other services when they need them the most.

Remember that if you're ever in the situation of being the victim of violence, harassment or discrimination in a theatre while working on an Equity contract, your union is ready to stand by you. Any member who has questions or concerns should not hesitate to contact his or her business representative, in strict confidence. Equity will maintain confidentiality of all sensitive information, and the union never pursues a matter without explicit authorization from a member. Letting Equity know if something happens to you is important. You may not be alone, and by reaching out to us, we may be better able to protect other members who are in the same situation.

THE UNIVERSITY OF TOLEDO HUMAN RESOURCES AND TALENT DEVELOPMENT

LABOR AND EMPLOYEE RELATIONS

The labor & employee relations area focuses on contract administration; policy interpretation; liaison with union leadership at the local, state and national level; management training and development; collective bargaining and creative problem resolution. Various tools have been designed which can assist managers with consistent contract interpretation and employee coaching and development. Labor & employee relations functions as a strategic partner who can orchestrate appropriate stakeholder involvement in order to execute change initiatives within the organization.

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Just Cause - Seven Tests

SEVEN TESTS OF JUST CAUSE

The basic elements of just cause which different arbitrators have emphasized have been reduced to seven tests. These tests, in the form of questions, represent the most specifically articulated analysis of the just cause standard as an extremely practical approach. A "no" answer to one or more of the questions means that just cause either was not satisfied or at least was seriously weakened.

1) **NOTICE**: Did MCO give the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?
    a. Forewarning/foreknowledge: orally by Management, in writing through typed or printed sheets or books of work rules &of penalties for violation thereof.
    b. Certain offenses don't require written or oral warning due tot their seriousness that any employee in today's work environment may properly be expected to know already such conduct is offensive &n heavily punishable.
    c. MCO has the right to unilaterally promulgate reasonable rules & give reasonable orders and the same need not have been negotiated with the union.

2) **REASONABLE RULE OR ORDER**: Was MCO's rule or managerial order reasonable related to (a) the orderly, efficient, and safe operation of MCO's business, and (b) the performance that MCO might properly expect of the employee?
    - Even if an employee sees a policy as unreasonable they nonetheless must obey unless they feel that obeying would seriously or immediately jeopardize their personal safety/integrity.

3) **INVESTIGATION**: Did MCO, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of Management?
    a. The employee's "day in court": Employees have the right to know the offence with which they are being charged with reasonable precision so that they can explain their behavior.
    b. MCO's investigation should normally be made <u>before</u> a disciplinary decision is made.
    c. In certain circumstances under which Management must react immediately to the employee's behavior, the proper action is to suspend the employee pending investigation with the understanding that the final disciplinary decision will be made after the investigation. If the employee is found innocent, they should be restored to their job with full pay for the time lost.

4) **FAIR INVESTIGATION**: Was MCO's investigation conducted fairly and objectively?

>>>>OVER

5) **PROOF**: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
    a. "Proof" has three requirements: 1) the charge against the employee must be reasonably clear and specific; 2) there must be proof that supports the charge; and 3) the proof of the charge must be collected and demonstrated at the time of disciplinary action, not after the fact.
    b. MCO must prove just cause for its disciplinary action on the basis of the facts and evidence it knew of at the time the decision was made. After the fact additions cannot be expected to make up for the original lack of just cause.
    c. In discipline, the employer bears the burden of proof. It is MCO who must prove the employee "guilty", not the employee who must prove themselves "not guilty".
    d. In all cases, the evidence must be truly substantial and not flimsy. For example, the proof must not include any suspicions, assumptions, possibilities, unsupported opinions, and funny coincidences. Even the strongest showing of good faith cannot make up for the absences of solid proof. In cases of discharge and gross misconduct, beyond a reasonable doubt is a common standard.
    e. Actively seek out witnesses.

6) **EQUAL TREATMENT**: Has MCO applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
    a. A "no" answer may require negation or modification of the discipline imposed (policy vs. practice).
    b. To correct a past practice, tell the employees beforehand of your intent to enforce rules as written.

7) **PENALTY**: Was the degree of discipline administered by MCO in a particular case reasonably related to (a) the seriousness of the employees proven offense, and (b) the record of the employee in their service with MCO?
    a. A trivial proven offense does not merit harsh discipline unless the employee has been properly found guilty of the same or other offenses a number of times. *Reasonable judgment* is key.
    b. If employee "A's" record is significantly better than those of "B" and "C", MCO may properly give "A" a lighter punishment than it gives the others for the same offense.
    c. Reasonableness is always the key in decisions made by Management regarding discipline. The penalty of dismissal for a really serious first offense does not in itself warrant a finding of MCO's unreasonableness.

- Enterprise Wire, landmark arbitration case, 1966.

Chicago Theatre Standards

December 2017

This document is authored by representatives of Chicago theatre companies, artists, and administrators who volunteered their time, experience and expertise over the course of two years. It has been tested over the course of a year by 20 Chicago theatres and vetted by a variety of industry and legal professionals.

A list of contributing institutions and individuals can be found at notinourhouse.org.

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Declaration of Purpose

Arts environments require risk, courage, vulnerability, and investment of our physical, emotional and intellectual selves. Chicago theatre has a history of authenticity and risk on our stages. We are proud of that legacy, and seek to nurture spaces with strong safety nets that support that ethos without compromising a visceral and authentic experience for artists and audiences.

When creative environments are unsafe, both the artist and the art can become compromised. Spaces that prize "raw," "violent," and otherwise high-risk material can veer into unsafe territory if there are no procedures for prevention, communication, and when necessary, response. Too often, artists have been afraid to respond to abusive or unsafe practices, particularly where there is a power differential between the people involved. Artists have been afraid that speaking out will ruin a show or harm their reputations, and artists subjected to extreme abuse sometimes leave the craft, cutting their careers short. We believe that even in the absence of high-risk material, having pathways for response to unsafe conditions and harassment help to maintain the integrity of the work, its participants, and the organization.

This document seeks not to define artistry, prescribe how it is created value one kind of work over others, or stand as a legal document. It seeks rather to create awareness and systems that respect and protect the human in the art – to foster safe places to do dangerous things. It is the result of input from a large and experienced group of theatre producers and artists. It is meant to be flexible and to accommodate as many types and styles of theatre, organizations of diverse structures, budgets, and environments as possible.

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing anti-discrimination laws, but only some employees and some companies meet their definition of "workplace." Participants in small theatres are often not covered by these laws. Many theatre participants are therefore are not covered by the protections provided by the EEOC. Actors who work under an AEA contract enjoy limited protections and opportunities for registering complaints, but only if the participant is a member of the union, and only if the issue is covered in the AEA rulebook. Moreover, certain kinds of conduct can be harmful even though they are not technically unlawful. With this framework in mind, members of the Chicago theatre community joined forces to create a tool for self-governance. We seek to foster awareness of what artists should expect, and what companies can strive to provide in their spaces.

This document is the result of dozens of Chicago theatre participants meeting in round-table discussions for a year to produce a first draft, followed by over a year of pilot testing in 20 participating theatres. The result is the following **Chicago Theatre Standards**, which outlines simple and largely cost-free practices and tools to prevent and respond to the everyday challenges in arts environments.

The overriding tenets of this document are: **communication, safety, respect, and accountability.**

The **Chicago Theatre Standards (CTS)** is voluntary, cost-free, and not subject to enforcement by any outside body. In adopting this document, organizations state their intentions through procedures designed to help them live by those intentions. Participants who work with organizations that adopt the CTS endorse these intentions by reading the document and following its procedures and protocols. All involved are encouraged to call attention to situations when these intentions are not being met by using the reporting channels herein. This is a free document available online at notinourhouse.org.

History

On January 15, 2015, Chicago actor Lori Myers made a social media rallying cry "NOT IN OUR HOUSE" after hearing yet another account of sexual harassment by the same perpetrator at their long-standing theatre. Hundreds of responses revealed that the problem was well known, but no one felt safe enough to speak out. They feared reprisal both from their abuser and from the larger community. They feared they would not be believed. They feared they would not work again. People who knew felt they could not speak out because they didn't have first-hand experience. They feared they would harm the survivor. They feared they would be labeled as a gossip or divisive in the community. While a whisper network warned many, others knew nothing and some hoped they could "handle it." This theatre was highly regarded and offered opportunities to emerging artists, who often got noticed by the press and eager audiences. The brave survivors who spoke out changed the tide, and the Not in Our House Chicago Theatre Community was born.

By March of 2015, this document was underway. Coordinated by Chicago actor Laura T. Fisher, a small group of theatre artists and administrators crafted a draft over the course of a year. Twenty theatres agreed to pilot the document – they incorporated it into their theatre practices and met periodically to improve the document and discuss implementation strategies.

Mission Statement

The **Chicago Theatre Standards** is a voluntary tool for self-governance that seeks to nurture communication, safety, respect, and accountability of participants at all levels of theatrical production. Its mission is to create:

- ***Spaces free of harassment***, whether it be sexual, or based in race, gender, religion, ethnic origin, color, or ability;
- ***Nurturing environments*** that allow us to challenge ourselves, our audiences, and our communities; that support risk of mind and body; and that establish the freedom to create theatre that represents the full range of human experience;
- ***A common understanding*** of practices for theatre environments, including written, reproducible standards available at no cost; and by
- ***Peer support*** through mentorship and collaboration through online communication and community outreach.

Who is the Chicago Theatre Standards for?

Non-Union theatres: Non-union theatre companies were the inspiration for this document. They traditionally have the fewest regulations and support services. They are also where many theatre artists develop their craft and their professional ethic.

Union theatres: Those who work in Union theatres, particular those that do not meet the EEOC's standard of a "work place" are not protected by EEOC laws. The CTS is a tool for self-regulation that can allow small union theatres to assert professional expectations in their space

Large union theatres: While many large, institionalized theatres have HR departments and are covered by EEOC law, this document seeks to provide procedural preventions of unsafe conditions, industry-specific discussion of sexual harassment and other elements that are not covered in the current AEA rulebook

Theatre schools: Whether a college, a for-profit acting school, high school theatre club or other learning environment, these standards can help emerging artists learn what is expected of them, and what they can expect from potential environments they may engage in.

Parents: For parents who have children considering a career in the arts, these standards can support conversations about professional behavior, boundaries, and expectations. Too often when emerging artists find themselves in an, abusive or otherwise environment, they have said “I didn’t know who to talk to,” or “I just thought that’s the way things go.” One intention of this document is to educate prospective arts participants of what a safe environment can look like.

Disclaimer

This document is a nonbinding set of principles. It reflects the current state of a continually evolving interest to establish standards in theatre spaces, particularly theatres that do not have human resource departments or other institutionalized mechanisms to prevent and respond to unsafe environments and harassment. This document is not an agreement or contractual document. It is not intended, either by its explicit language or by implication, to create any obligation or to confer any right. It is not intended to change any person's legal, employment, or contractual status or relationships. Rather, it is intended as a vehicle by which organizations can demonstrate their desire to apply standards, preventions, and resolution procedures that are identifiable, reproducible, uniform, and shared among a wider theatre community. By indicating their endorsement of the CTS, organizations publicize the intention herein to existing and potential participants, rather than entering into a legally binding commitment. Notwithstanding the foregoing, nothing in the CTS should be construed to prevent a theatre company or producer from affirmatively incorporating the standards set forth here into their agreements or other legal documents and thereby to imbue some or all of these standards with legal force. This document is an on-going collaboration of a growing community of organizations interested in adopting it. It will continue to develop as more experience with the document develops.

How to Use This Document

The following sections seek to define terms created for this document, provide a timeline for how the document is used from season-selection through strike, share wisdom from companies that have piloted the document, and offer suggestions for how to get off on the right foot when introducing the document on the first day of rehearsal.

Definitions

Actor	A performer in a live theatrical production.
Casting Authority	An individual or individuals who determine which actors are cast in a production.
Participant	Someone who is engaged by a producer to participate in, administer, or support making theatre. This includes actors, designers, directors, production staff, box office staff, board members, volunteers, donors, and anyone involved in the work of the theatre.
Production	A theatrical undertaking that results in one or more public performances.
Producer	The person or organization (theatre company) responsible for mounting a production.
We/Our	This document is designed to be administrated by producers. Sections of the CTS are written from the perspective of the producer. For example, "We recognize our responsibility to…," can be read as, "We, ABC Theatre, recognize our responsibility to…."

Terms Created for this Document

The following terms and their meanings are used within each Standard of this document.

The Goal: Each standard will be introduced with a goal; wherein a "creative problem" can be "solved." Rather than creating a prescriptive action for every situation, a "goal" can be achieved in many different ways. The overarching goal is to create a participant-friendly space that values communication, safety, respect, and accountability.

The Standard: A general description of the collected suggestions of how to accomplish each goal. One might understand these as collected wisdom, and most are common practice in professional theatre spaces. These "suggested solutions" are geared for all budgets, size, performance venue, production style, etc.

Requires Disclosure: Disclosure assists prospective participants to make informed decisions when accepting auditions and offers, and know what to expect before they walk into the room for the first time. Disclosure also helps the producer assemble willing, able, and informed participants. In the event that elements of the CTS are not achievable (if a rehearsal is outside without access to drinking water, for example), conditions should be **disclosed** to all participants. Some standards have a "requires disclosure" section which serve to identify known elements that, if an organization cannot provide, should be disclosed. These items are not in the larger section as they might require money, or staff, and therefore do not meet the goal of the CTS to be usable for organizations of all budgets.

Explore it Further: In the interest of engaging producers at every budget level, this document seeks to suggest cost-free solutions. Suggestions that require money or other resources (sprung flooring, for example), appear in "Explore It Further" subsections.

Implementation Notes: During the Pilot Year, successful strategies for implementation were collected and are shared in these sections. It is understood that these sections may grow with more experience with CTS in spaces where it is used.

The Process

Adopting the CTS is a process that engages every level of a producing organization from season-selection through strike. This process requires a balance wherein the CTS is present without stifling creativity or causing participants to feel hesitant or distracted. One extreme would be filing the document away in a drawer and forgetting about it until a problem comes up. The other extreme would be a policed environment in which document became a tool for punishment or judgment. While each organization should strive to make the CTS work in their own space. A few things to keep in mind:

1. The CTS should be discussed at every level of the company, including company and board meetings. Everyone from the Board Chair to administrative staff to ensemble members to visiting participants should be encouraged to read the document, understand the company's commitment to its adoption, and any responsibilities each participant may have.
2. The CTS should be discussed as early as season selection meetings and pre-production meetings. Many problems can be avoided when safety issues are a regular part of pre-production discussions. For example, if a company cannot afford safe rigging, it should avoid plays that require aerial work. If a company cannot afford a fight choreographer, then a play with onstage violence might not be in the cards. The CTS is a tool for discussion to ensure that organizations choosing to adopt it work within their financial means and/or expertise.
3. Prospective stage managers should be informed that this document is being used with enough time for them to review the document and discuss the additional procedures and responsibilities.
4. The casting authority has an important role to play, and should be well versed in the document, particularly the audition section.
5. The CTS requires a thorough discussion on the first day of rehearsal. This is when participants with no exposure to the CTS will first encounter it. Taking the time (a suggested minimum of 30 minutes) to discuss the CTS in the first rehearsal will increase the chances of success with the CTS. Getting off on the right foot is essential to this process and the First Day Implementation Notes is designed to help.
6. CTS protocols throughout the rehearsal process, particularly for high-risk content.
7. Many elements of the CTS come into play during tech. Taking the time to visit safety, privacy, and other CTS elements helps to prevent problems before they happen.
8. The CTS offers suggestions for preventions and responses to issues throughout the run.
9. Theatres should be ready to address concerns. This document seeks to prevent some issues, but given that the document encourages those with concerns to come forward, it's recommended that theatres avail themselves of conflict resolution techniques. There are many good books on the subject, and The League of Chicago Theatres offers occasional classes on the topic.

First Day Implementation Notes

Creating a script for first rehearsals can make sure that all of the important points are covered. This script should be delivered by one or more representatives of the producing theatre (the Artistic Director, the Stage Manager (SM), the Director, an assigned company member, …) See the appendix section of this document for a First Rehearsal Script example, including an Oops/Ouch approach for handling issues when they arise.

Here are some of the most important things to communicate at the First Rehearsal:

1. Tell the company why you've chosen to adopt the Chicago Theatre Standards.

2. Distribute the Concern Resolution Path (CRP). The CRP documents communication pathways for resolving concerns before they get out of hand, to inform participants who to talk to if issues arise, to avoid repeated unsafe practices, and to mentor those who violate boundaries. The CRP and The Non-Equity Deputy are designed to provide confidential reporting channels that support and protect everyone, including the person/s that create concern. *Gossiping with those outside the reporting channels, or creating an atmosphere of "heroes and villains" can result in an inability to use the document to mentor and resolve issues peacefully. There are gray areas on stage. People can get hurt physically and/or emotionally without there being a "bad guy." In every possible situation, the CRP should be used to mentor participants, and nurture a positive and safe environment.*

3. Discuss the Non Equity Deputy (NED). The NED is a confidential liaison (reporting channel) between participants, the stage manager, and others on the Concern Resolution Path. The NED does *not* decide who's right and wrong, or even necessarily solve problems, but helps to ensure that communication paths are open. The NED is selected by the participants of each production by the end of the first week of rehearsal and is, whenever possible, not an ensemble member or employee of the producer. More specifics are available in the section of this document dedicated to The NED.

4. Point out areas of the CTS that are particularly pertinent to the production. If there are high-risk elements in the production (sexual content, fights, nudity) suggest that the participants read those sections of the document in the interest of letting them know that safety protocols have been a part of the planning process for the production.

5. Producers are not asked to distribute hard-copies of the entire document, but please tell the company that they can read the document in its entirety online at www.notinourhouse.org.

Concern Resolution Path (CRP)

The Goal

The goal of the CRP is to provide a documented communication pathway to address issues in a production or within an organization. The CRP seeks to inform participants what to do and who to address with serious issues, and dispel the fear of reprisal for reporting issues of safety, harassment, or other serious concerns.

The Standard

This Concern Resolution Path should be printed and distributed to all participants and discussed on the first day of rehearsal. It should be clearly communicated that the producer seeks to resolve concerns early, before participants or the production are put at risk and before the concern escalates.

What is a concern resolution path?

The CRP provides names and contact information for members of the organization and production who have agreed to be responsive to reported issues and work to resolve them. It consists of:

- A written, clear, and transparently shared list of procedures for addressing a concern;
- A written, clear, and transparently shared list of persons with whom the concern should be addressed;
- A commitment to give reported concerns priority and a reasonable timeline for resolution.

Structure

- Level One—We recognize that many concerns can be resolved through conversation with the parties involved. Whenever possible participants should be encouraged to discuss challenges and concerns

with one another. Sharing and hearing concerns with openness and respect can prevent situations from escalating further.

- Level Two—The following participants should be granted a certain level of authority and trust to determine whether a concern can be resolved at this level or if it needs to be sent to the next level. All concerns should be reported to Level Three, even if no action is required.
    - Non-Equity Deputy
    - Stage Manager
    - Production Manager
    - Director
- Level Three—These participants should be considered the final level of the path, capable of resolving issues that have not been resolved prior to reaching this stage. They are strongly advised to consult with each other and review legal or other implications of any decision.
    - Artistic Director
    - Managing and/or Executive Director
    - Board Members

Communication

- The CRP should be verbally explained and provided in writing at the first rehearsal (digitally and/or in print). It should include the name, title, and contact information for every individual on the CRP.
- A copy of the CRP should be posted or otherwise available in the rehearsal and performance spaces.
- Participants should be encouraged to report their concerns in writing for recordkeeping purposes.

Recordkeeping

- The producer should maintain personnel files, which should include reported concerns. Such files are to be kept confidential and accessible only to the individual(s) responsible for maintaining the files.

Legal Remedies

- In the event of civil or criminal misconduct or liability, the CTS is not a replacement for legal advice or action, nor does it stand in stead of any local, state or federal law.
- A violation of civil rights can be reported to the Illinois Attorney General: http://www.illinoisattorneygeneral.gov/rights/civilrights.html.

Implementation Notes

- Producers should complete a CRP with the names and contact information of all individuals who will serve on the path for each production. Theatres may adapt the CRP to reflect their staffing structure.
- The CRP is a tool to help create communication pathways to prevent and resolve issues, not create divisions. To that end, nothing in the CTS encourages firing or marginalizing participants for mistakes, a momentary loss of temper, an argument (whether artistic or personal), a single unintentional injury, etc. The CRP is designed to provide pathways to respond to events, behavior, and conditions that create reasonably understood *unsafe* conditions, not *uncomfortable* situations. The function and goal of the CRP should be discussed at the first rehearsal.
- Some of the individuals on the CRP will change with each production, and it should be updated for each production.
- All individuals listed on the CRP should understand their role in resolving concerns, the process for recording concerns, and the process for reporting those concerns to others on the path.
- Creating and using a Concern Resolution Path can assist with recordkeeping.
- The individuals listed on the CRP should be provided with resources and/or training in conflict resolution.

The Role of the Stage Manager Regarding the CTS

The Goal

The Stage Manager (SM) is traditionally the primary communication conduit between participants and producers as well as between actors and directors; and so plays a crucial role in executing the CTS. The goal of this standard is to respect that the additional responsibilities of the SM in theatres that use the CTS compliment the expertise and authority of the SM as a leader and advocate throughout the production.

The Standard

The Stage Manager's responsibilities with regards to the CTS are:

- Read and be familiar with the CTS.
- Know and follow the theatre's published CRP.
- Ensure that consent is discussed before scenes of sexual content and nudity and document applicable specifics.
- Document all choreography, including sexual content. The Stage Manager be present for all rehearsals when choreography is rehearsed.
- Allow for the selection of the Non-Equity Deputy (NED) during the first week of rehearsal and include the NED in the safety walk on the first day of tech before actors take the stage.
- Work with and communicate with the NED, particularly regarding any raised concern.

Requires Disclosure

- SMs should be told if an organization has adopted the CTS before they commit to a production.
- SMs should have access to the script, or known scope of a production, before they agree to participate.

Non-Equity Deputy (NED)

The Goal

The goal of the Non-Equity Deputy (NED) is to create a confidential and peer-level liaison and reporting channel between participants and the producer. Communicating concerns can be challenging. Participants often have long-standing relationships, aspirations for future collaboration, or a fear of being labeled "difficult." Any of these might dissuade a participant from voicing a concern. The NED can help to alleviate this tension.

The Standard

The NED was inspired by the Actors' Equity's "Equity Deputy," but the NED does not report to any outside regulatory body, since the CTS is a tool for self-regulation. The NED navigates the CTS for participants over the course of a single production, can serve as a reporting channel for an individual participant or an acting company when confidentiality is required or requested, and may also serve (alongside the stage manager) as a first contact when a concern cannot be resolved by an individual.

Role and Responsibilities of the Non-Equity Deputy (NED)

- Become familiar with the CTS, CRP, and any related policies and procedures provided by the producer.
- Help familiarize others with the CTS, CRP.
- Provide contact information and availability for consultation outside of rehearsal/performance space/hours.
- Serve as a liaison between the cast, crew, stage manager, and producer for issues brought to attention by participants.

- Protect anonymity whenever possible.
- Report concerns, both their own and those reported by fellow participants, using the CRP, and communicate the resolution of such concerns to fellow participants as appropriate.
- Respond to concerns as quickly as possible (within 24 hours whenever possible).
- Shadow the SM on the safety walk-through (see the Basic Health and Safety standard).
- Commit with integrity and empathy to prioritize the safety and wellbeing of participants and discourage efforts (intentional or otherwise) to use the CTS to divide or create an atmosphere of "heroes and villains."
- Engage the CRP if the SM is unable, unwilling, or is the individual of concern.
- Understand that their role is not to solve problems or act in a judiciary role, but serve as a confidential reporting channel and liaison.
- Understand that their role is one of service, and not a position of power or status.

Outside of the NED's Scope

- The NED should not override traditional roles of the SM, director, or any other member of the organization.
- The NED should never create divisions or marginalize participants.

Implementation Notes (how to select a NED)

- Each producer should establish a process for selecting an NED. For example, this might include a nominating process with secret ballot at the first rehearsal or shortly thereafter.
- If a getting-acquainted period is necessary (where participants don't know one another), a NED may be chosen by the end of the first week.
- For theatres with acting ensembles, the NED should not be a member of that ensemble, whenever possible.

The Standards

Auditions

The Goal

To help prospective participants make informed decisions about proposed productions' requirements and expectations. We seek to communicate what we expect of our participants and what those participants may expect of us. For the purpose of this section, auditions may constitute interviews, readings, presentations of prepared pieces, improvisation, singing, movement, or similar activities involved in a casting process.

The Standard

Audition Notices and Invitations

We intend to include the following information in audition notices and invitations:

- Role(s) for which the actor is called, and role(s) that already have been cast;
- Any role that depicts a character with a specifically stated disability;
- The nature of the activity to be performed at the audition (i.e., sides from the play, choreography, improvisation, monologue, etc.);
- Any potential stage combat, feats of physical daring, nudity, partial nudity, sexual content, or other reasonably-understood high-risk activities;
- An assertion that prospective participants can decline auditions without fear of losing future audition invitations;
- Disclosure if the audition will be recorded;
- The names of the director, casting authority, and producer.

Auditions

- We intend to provide a safe space for the audition including:
    - A smoke-free environment.
    - A reasonably clean space with sufficient lighting and safe temperature.
    - A safe surface for dance or fight calls, if applicable.
- We will not ask prospective participants to attend more than three (3) audition calls for a single production.
- Audition calls should be no longer than three (3) hours, and should not run later than 11pm.
- Required materials (scripts and sides) should be provided at the audition.
- We will not ask prospective participants to perform violence or sexual contact as part of the audition without disclosing this expectation in the audition notice or invitation.
- Any physical contact required for an audition should be disclosed and choreographed. Actors should not be asked to improvise violent or sexual contact.
- We will not ask prospective participants to disrobe at an audition. (See the Sexual Content and Nudity standard.)
- The casting authority should confirm with the prospective participant that they have reviewed the supplied materials and are aware of the requirements as outlined in the audition notice or invitation.
- Auditions should not be recorded unless specified in the notice or invitation. If recordings are made, there will be written assurance that the recording will be used privately among casting authorities and destroyed/deleted after the completion of casting.

- We will endeavor to make reasonable accommodations to facilitate access, such as allowing interpreters when necessary, holding auditions in accessible facilities, and providing audition materials in advance to artists with disabilities.
- Disclosures should be clearly posted at all auditions and callbacks (See the Sample Audition Disclosure Form).
- We will not charge prospective participants a fee to audition.
- Prospective participants may decline audition invitations or casting offers without fear of losing future opportunities, and will not be asked to explain their reason.

Requires Disclosure

- If scenes of violence, sexual content, or other choreography will be a part of the audition.
- Whether or not understudies will be engaged for the production.
- Who is in the audition room.
- If an audition will be recorded.
- If known, when callbacks are scheduled.

Explore It Further

- Provide the full script with audition invitation.
- Provide the names of the production's design team, including choreographers.
- If the producer has an inclusivity policy, it should be provided with audition notices or invitations.
- Once casting is complete, producers should notify those who were called-back, but not cast.

Implementation Notes

- Try creating a template email posting for audition notices and invitations. This will help ensure you don't forget anything important.
- An Audition Disclosure Form visible at all auditions can streamline communication and disclosure.
- Engage Casting Director in any meetings/conversations to share necessary information with enough time to prepare audition disclosures with accurate information.

Agreements

The Goal

To create an understanding between Participants and Producers of what is expected throughout the production process at the beginning of the process.

The Standard

We will provide each participant with a document outlining our mutual expectations for each production. These agreements do not imply that participants are employees, but seek to provide information about the terms of the participant's role in the production.

Requires Disclosure

Agreements should include, at a minimum, the following disclosures:

- **Compensation**—the amount and payment schedule of any stipend, honorarium, or other compensation to participant.
- **Responsibilities**—a general outline of the responsibilities of the participant.
- **Schedule**—the basic schedule information (start date, whether the rehearsals will be the day or evening, proposed hours-per-week, dates/hours of tech) and the possibility of extensions.

Explore It Further

- Having agreements reviewed by a labor attorney can help make sure that the agreements are as clear and comprehensive as possible.

Implementation Notes

- A sample agreement is included in the appendix of this document. More are available at www.notinourhouse.org
- Producers may customize agreements, or use those they already have, provided they include the information described here and accurately convey the expectations and responsibilities of the participants.

Understudies

The Goal

Being an understudy is a tough job, and the job can be made more difficult if the understudy is not kept in the loop throughout the production process. This standard seeks to provide ways to prepare, include, and inform understudies so they are ready to save the day.

The Standard

Engaging understudies is strongly encouraged. The following guidelines can help ensure that they are effective and productive members of the production, and given an opportunity to succeed.

- Understudies should have a written agreement detailing expectations and compensation.
- Understudies should be introduced to the NED and should have the CRP explained to them.

Requires Disclosure

- If understudies will be engaged for the production (disclosed at auditions).
- Any special skills required (dialect, combat, singing, sexual content and nudity, etc.).
- What support the understudies will receive (work with dialect coach, choreographer/s, for example).
- Which role(s) the understudy is expected to cover.
- General rehearsal schedule including (in a general sense) when understudies are welcome into rehearsals.
- Whether a put-in rehearsal will be scheduled, if advance notice allows.
- Whether costumes will be provided, or if the understudy wears the costumes of the actor being covered, or if the understudy is expected to supply their own costume.
- If an actor leaves a production, whether the understudy will replace that actor or the role will be recast.
- The complimentary ticket policy.
- The amount of any stipend, honorarium, or other compensation that will be provided.

Explore it Further

- Have understudies shadow the actors they are covering during a performance.
- Allow understudies to observe any rehearsals when special skills (dialects, choreography, etc.) are being taught.

Implementation Notes

- Having understudies at the performance venue 30 minutes before each performance will ensure that they are always there when needed. Alternatively, being within a 30-minute travel radius on performance days gives understudies more flexibility while still helping to protect the production.
- Provide a date by which understudies are expected to be off-book and performance ready. Have a policy for what happens if the understudy has to go on before that date. Will they go on with a book or will the performance be cancelled?
- In the event a character has audio and or/video in production, (If a character leaves a voice mail, for example), backup recordings featuring the understudies should be made in case they go on.
- If an archival video recording of the production is made, giving understudies access to this recording can help them prepare for performance.

Basic Health and Safety

The Goal

Performance-day problems are often preventable with careful planning, and we endeavor to create spaces and processes for auditions, rehearsals, and performance that are as physically safe as possible.

The Standard

We intend to make health and safety a regular topic at production meetings, and to maintain awareness and procedures that contribute to a safe environment at all times. We seek to prevent injuries, identify and remedy situations that might be considered unsafe or unhealthy, and respond to injuries and medical events, and seek medical attention when required.

We will strive to promote basic health and safety practices by providing the following:

- Toilets and sinks, with soap and towels or a hand dryer;
- Access to drinking water or disclosure of lack of availability;
- A reasonable working temperature (avoiding inclement weather or unsafe temperatures outdoors);
- Lighting suitable for the work being carried out;
- Reasonably clean and well-maintained rehearsal space;
- Floors and traffic routes that are free from undue obstructions and tripping hazards;
- Functional, non-expired fire extinguishers;
- A suitably stocked first-aid kit;
- An insurance policy that covers on-site injuries;
- A plan for costume maintenance and laundry.

At the first rehearsal and first tech day with actors, a safety walk with the SM and NED should include:

- Fire exit locations;
- Locations of first-aid kits;
- Emergency procedures (including contact information for local police stations and the nearest ER);
- Tripping or safety hazards in rehearsal settings and constructed stage settings;
- Locations of restrooms;
- Scenic units, stage floor surfaces, and special effects;
- Areas of potential hazard that have or may require glow tape, including the opportunity for performers to point out where they need additional glow tape.

If unsafe conditions are discovered, they should be immediately reported to the stage manager, who should keep a record of concerns and their resolution. The SM should also maintain:

- Accident, incident, and first-aid reports;
- A checklist of first rehearsal and first tech rehearsal walk-throughs.

Requires Disclosure

- If any aspect of this Standard cannot be achieved because of the nature of the rehearsal or performance space, it should be disclosed to all prospective and active participants. For example, if a rehearsal or performance space is outdoors, participants should be notified in advance so that they can wear appropriate shoes and clothing for the weather and the surface (grass, asphalt, etc.). Another example: if the theatre cannot supply, maintain, or launder costumes, that should be disclosed at the time of audition.

Explore It Further

- Rehearsal and performance spaces should comply with the City of Chicago building and fire codes.
- Staff within the organization should be trained in first aid and CPR.
- Fire extinguishers should be regularly inspected by a professional.
- If individuals are leading participants in physical warm-ups, yoga, or other physical activities, they should have certification or professional training to do so.

Audience and Front of House

The Goal

Audience members are active participants in live performance. In recognizing this, we seek to create an environment in which audiences and artists can collaborate and share a space in a way that is both safe for all involved and conducive to the theatrical experience designed by the production's creative team.

The Standard

Productions are mounted in a wide range of venues, environments, and types of interaction with audiences. This standard defines them as follows:

> A **traditional audience environment** is understood to be a performance that takes place in a theatre where the audience space and the performance space are defined and primarily separate from one another. In a traditional audience environment, actors are not typically expected to directly interact with the audience.
>
> A **nontraditional audience environment** includes, but is not limited to, site-specific theatre, performances with direct audience interaction, promenade theatre, and performances where the actors move throughout and/or interact with the audience.

Preproduction

The type of audience environment should be disclosed to the participants at the time of audition, or as soon as known.

Preview Performances

Nontraditional audience environments may require that special attention be paid to the preview process in order to create the desired audience interaction. Preview performances for productions with audience engagement are strongly recommended.

Performances
To the extent feasible, without disturbing the artistic integrity of the production, the nature of any audience interaction or other nontraditional audience environment should be communicated to audience members before the performance begins. This allows the audience to be willing participants in the production and can help to prevent unexpected audience behavior during the performance. It will also allow audience members to make informed an informed choice based on their needs and comfort level.

For all public performances, including previews, the producer should designate an individual to oversee the box office and front of house operations. This individual should be expected to:

- Attend at least one run-through or technical rehearsal prior to the first audience.
- Inform the stage manager of any audience conditions that may impact the performance.
- Conduct a pre-performance meeting with any and all ushers and front of house staff prior to every show to cover:
  - Building safety requirements and emergency plans;
  - Audience configuration;
  - Expectations of audience engagement;
  - A prevention and response plan for frequent unacceptable audience behaviors (drunkenness, inappropriate interactions with actors).

Dressing Rooms

The Goal

Performers need time and space to prepare for their performance. The space provided for this preparation should be safe, respectful, and wherever possible, private.

The Standard

Even in the tiniest of spaces, privacy and concentration are important when preparing for performance. We will endeavor to create a dressing room environment where all inhabitants recognize these values and participate in fostering a safe place for artists to prepare.

- Children under the age of 18 should be given private dressing room accommodations whenever possible.
- Reasonable accommodations should be made to respect individual modesty, and designated space should be provided for participants to change clothes and prepare for their performance. This space will be referred to as a dressing room, even if it's not an entire room.
- Non-actors (with the exception of the SM and wardrobe staff) should not be allowed in the dressing room during the time between 30 minutes before the performance begins and 30 minutes after the performance ends. In the event that is not possible, communication between the dressing room inhabitants and those who need to pass through is encouraged to establish the least intrusive way to share the space.
- Where costumes are used, a clothing rack and hangers should be provided.
- Recording by any means, and posting any recordings or photos online, should not be permitted in the dressing room without the prior consent of all individuals present.
- Reasonable accommodations should be made to respect the preferences of all participants sharing a dressing room, particularly with regard to the discussion of reviews or who might be in the audience.
- Inhabitants of dressing rooms should respect the property and personhood of fellow inhabitants by limiting their use of perfumes, smelly or messy food, and behavior such as talking on cellphones, playing music (without consulting dressing room mates), or other similar activities.

- Any concerns related to the dressing rooms should be resolved (a) between its inhabitants, (b) with the consultation of the NED, or (c) according to the concern resolution path.

Explore It Further

- Dressing room space should accommodate a reasonable amount of participants' personal belongings.
- While it is always advisable to leave valuables at home, provisions should be made for a reasonable quantity of "valuables" to be collected before and returned immediately after each performance.
- Where separate dressing and restrooms are available for men and women, actors should be allowed to occupy the dressing room in accordance with their gender identification.

Choreography: Nudity, Violence, Movement, and Physical Theatre

The Goal

Some forms of theatre and styles of movement carry with them a greater risk of harm than others, and the goal of this section is to outline considerations specific to these forms of higher-risk theatre, including onstage violence, sexual choreography and nudity, and physical theatre. These forms share many of the same considerations, while some considerations are form-specific. The shared considerations also apply to other forms of physical theatre, including dance and other forms of choreography, and this section may serve as a guide for these forms as well.

The Standard

In audition notices, auditions, offer discussions, agreements, understudy preparation, rehearsals, tech, and performances, we intend to create a safe and respectful atmosphere for all participants. We believe that communication, safety, respect, accountability, artistic freedom, collaborative integrity, and personal discipline are the cornerstones of this atmosphere.

Facilities

The following should be provided in all rehearsal and performance spaces in which high-risk physical theatre takes place:

- First-aid kit, including cold packs
- Accident report forms
- Water
- Telephone for emergencies
- Adequate on- and off-stage lighting
- Temperature control
- Ventilation
- Space for warm-ups
- Floors and surfaces that are clean, well maintained, and appropriate for the activity
- Padded and/or glow-taped corners and hazards
- Proof of liability insurance

Equipment, Weapons, and Specialized Costumes

All specialized equipment and costumes should be:

- Suitable for the required choreography;
- Installed by a qualified rigger, if applicable;
- Inspected/maintained by a trained technician before each use;
- Inspected by any actors who use the equipment before each use.
- Handled only by those required to do so.

Preproduction and Auditions

- A designer or choreographer should be engaged for any production that includes weapons, hand-to-hand combat, sexual violence, specialized movement techniques, or any similar high-risk activity.
    - This designer/choreographer may or may not be the production's director or an actor in the production, so long as the role is clearly communicated to all participants.
    - This designer/choreographer should be engaged as early in the production process as possible and be included in production and design meetings whenever feasible.
- At the time of audition, prospective participants should be notified about:
    - The nature of any specialized movement or physical theatre (i.e. weapons, physical combat, sexual violence, tumbling, aerial acrobatics, dance, yoga, etc.) acknowledging that concepts may change;
    - The name and professional experience of the designer/choreographer if possible.
- At the time of audition, prospective participants should be asked to provide accurate descriptions of their physical abilities and limitations/injuries as they relate to the possible choreography.

Rehearsal

- The designer/choreographer should be introduced to the cast at the first rehearsal, or as soon thereafter as possible.
- A schedule for rehearsing all choreography should be established and followed.
- Adequate time should be allocated for stretching and warming up before all choreography rehearsals.
- Adequate time should be given to teach, rehearse, and adjust all choreography or movement techniques.
- Adequate time should be allocated at the end of rehearsal for cooling down, asking questions, and voicing concerns.
- Before work starts the actors, director, choreographer, and stage manager should agree to the requirements of the planned activity (kiss, slap, dance, etc.). Participants are then responsible for staying within those agreed-upon boundaries.
- A choreography captain (typically a cast member with experience in the form of physical theatre being taught) should be chosen to ensure that the choreography is rehearsed and doesn't change unintentionally. The captain should be empowered to notify the stage manager or designer/choreographer of any issues with the choreography.
- Choreography should be recorded (in writing or on video, if appropriate) so that performers and captains have a reference for maintaining the choreography.
- Time should be set aside at the beginning of rehearsal to run through choreography. These calls are particularly important before running the show. Calls should be conducted in a distraction-free, appropriately lit space.
- Actors should communicate any injury, discomfort, or fatigue experienced before, during, and after rehearsals.
- A 10-minute break should be provided after every 80 minutes of physical work.
- The director/choreographer and actors should agree on a vocabulary of safety (i.e., the word "bail" could be used to abandon a movement mid-execution).
- Regular rehearsal reports should be sent to the designer/choreographer and should include notes to the designer/choreographer if any adjustments need to be made to the choreography, or if any problems develop.

- A comfortable working temperature should be maintained in the rehearsal space. The nature of the choreography should be considered when establishing this temperature (warmer in the case of nudity, cooler in the case of highly physical activity, for example).

Performance

- Choreography calls should occur before every show, and should take place in a focused environment free of interruptions or distractions.
- Performance reports should include the designers/choreographers, noting any issues that arise and any actor injuries (whether related to the choreography or not).
- Performers should have a communication plan with the stage manager to report (on the day it occurs) any inappropriate or potentially unsafe changes in the performance of choreography and/or use of equipment or weapons.
- A comfortable working temperature should be maintained in the space. The nature of the choreography should be considered when establishing this temperature (warmer in the case of nudity, cooler in the case of highly physical activity, for example).
- The stage manager should check in before and after performances with each actor involved in the choreography, confirming that the choreography is maintained and consent/boundaries have not been overlooked.
- If any choreography is altered during performance, actors should notify the stage manager and/or NED as soon as possible.

Specific Considerations: Violence

The Goal

Onstage violence can be a shove, a slap, the use of weapons, elaborate fight sequences, sexual violence and more. We believe that performers should not routinely incur pain, bruises, or other injury while enacting violence. Our intention is to prepare for and mitigate the risks of onstage violence to create a safe space in which to take artistic risks.

Implementation Notes

- It can be helpful to assign a fight captain who is not involved in the fight choreography, so that the fight captain has the opportunity to observe the choreography from the outside (off-stage during performances, if possible).
- The stage manager should have a good line of sight to any fight choreography so that they can monitor and discuss any changes during the run of the show.

Specific Considerations: Sexual Content and Nudity

The Goal

Sexual Content and Nudity (SC/N) require careful consideration as early as the season selection process. Artists in scenes with SC/N take great personal risk, and our goal is to allow them to take that risk in an environment that is as safe, supportive, and comfortable as possible. SC/N should only be included in a production when it can be done responsibly and according to the following recommendations. We seek to replicate the conditions, detail and documentation and accountability traditionally employed for fight choreography for scenes with sexual choreography.

Preproduction and Auditions

- SC/N should not be required or requested at any audition.

- Actors performing nude must be at least 18 years old, and should provide proof of age at the audition.
- Actors who will be asked to perform SC/N as part of the production should confirm consent to performing SC/N at the time of audition.

Rehearsal

- Prior to rehearsing scenes with SC/N, the actors, director, choreographer, and stage manager should discuss the content and create consent for the rehearsal. Participants should build consent and discuss boundaries before rehearsing scenes with SC/N. A safe word (such as "hold") should be established for SC/N rehearsals.
- Initial SC/N rehearsals should be closed, such that only participants involved in the scene are present. SC/N rehearsals should be opened after agreement by the stage manager, director, and actors involved. The stage manager should be present at all rehearsals where SC/N is rehearsed.
- Stage managers should document the terms of consent and details of sexual choreography.
- Actors performing nude scenes should be allowed to have and wear robes or other coverings when not rehearsing.
- Actors should have the option to decline SC/N elements added after audition disclosure.
- Nude actors should not be photographed or recorded on video at any time during rehearsal, tech, or performance.

Tech

- Nudity during technical rehearsals should be limited to those times when it is absolutely necessary. Flesh-colored clothing or a robe may be worn when nudity is not required.
- Technical rehearsals should be closed to visitors during scenes with SC/N.
- The stage manager should be vigilant in identifying and resolving potential physical hazards for nude actors, such as splinters and rough edges.

Performance

- Only participants whose presence is required should be present in the wings or in any backstage space with a view of the stage. Gawkers should be dispatched.

Consent

We believe that building consent among participants is an important part of creating an atmosphere of trust and communication. We intend to recognize the following practices when building consent among participants:

- A consent-building conversation should specify the range of contact that is acceptable (e.g., anything but bikini area is within the range, or kissing is always closed mouth, etc.).
- The boundaries may change over the rehearsal process, either narrowing or broadening, but any change to the boundaries should be discussed and agreed upon before the rehearsal.
- There should be an opportunity to discuss potential boundary violations at the end of each rehearsal and performance.
- The agreed-upon structure of intimate contact should be maintained once a show is in production.
- Actors should inform the stage manager and their scene partner(s) if they are sick (sore throat, cold sore, etc.), and alternate choreography should be defined for sick days.

Requires Disclosure

- SC/N should be disclosed in notices and invitations and at auditions.
- Precast actors or hired designers should be made aware of SC/N prior to accepting their roles.
- Designers should receive disclosure of SC/N and known design requirements.

Explore It Further

- When sexual choreography is required, prospective participants can be auditioned using nonsexual choreography to determine physical control.
- Discussions around sensitive requirements and how they will be handled should begin during preproduction meetings.
- Intimacy designers should be engaged for the production and included in pre-production meetings.
- The producer should standardize communication and protocols with directors requiring SC/N.
- If a full script is made available to prospective participants, language similar to the following should be included: “Please read the script closely and confirm that you are comfortable working with this material. Feel welcome to bring questions about content to the audition process. Your level of comfort with the content of this script will not impact your casting consideration for future productions.”
- Robes should be provided and regularly laundered for all actors who will appear nude.
- Actors, directors, and choreographers should have equal status in devising SC/N scenes.
- A time limit for rehearsing SC/N should be established and communicated.
- Backstage areas and dressing rooms should provide reasonable accommodations for modesty/privacy.

Specific Considerations: High-Risk Physical Theatre

The Goal

High-risk physical theatre uses performance techniques that carry with them a greater chance of injury than traditional theatre practices. This includes but is not limited to acrobatics, tumbling, performing on silks or other equipment, and performing in motorized set pieces. This type of work should not be undertaken without the extra attention, equipment, and precaution needed to do so safely.

Sexual Harassment

The Goal

We seek to understand sexual harassment as it pertains to the theatre, provide procedures to prevent it, and outline recourse when it occurs. We recognize the potential for harassment in rehearsal, during performance, and outside the theatre among participants, staff, board, and audience members. We acknowledge theatre environments can court confusion about the difference between chemistry, artistic freedom, and harassment; we believe participants can be bold and live “in the moment” of theatrical material while maintaining choreography, fellow participants’ safety, and agreed-upon boundaries.

The Standard

Clear boundaries should be established and agreed upon among all participants involved, both in rehearsals and performance, particularly in scenes depicting violence, sex, intimate contact, abuse, or gestures of intimacy.

For reference, according to the U.S. Equal Employment Opportunity Commission (EEOC), sexual harassment is described as follows:

> It is unlawful to harass a person (an applicant or employee) because of that person’s sex [sic]. Harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex [sic]. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex [sic].

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

The EEOC covers "employees" only, not contractors and volunteers. For that reason, this standard seeks to provide a definition for sexual harassment in the theatrical workplace for participants not covered by EEOC laws and other regulations, and to provide an understanding of and sensitivity to the nuances of a theatrical workplace.

Harassment in a broader sense includes, but is not limited to:

- Inappropriate or insulting remarks, gestures, jokes, or innuendoes or taunting about a person's gender, gender identity, sexual identity, racial or ethnic background, color, place of birth, citizenship, ancestry, creed, or ability;
- Persistent unwanted questions or comments about a participant's private life outside the boundaries of consent established in rehearsal;
- Posting or displaying materials, articles, graffiti, and so on, which may cause humiliation, offense, or embarrassment on prohibited grounds that are outside the parameters of the production. A production about pornography, violence, or racism may involve such images in the rehearsal space or in a dramaturgy packet, but such images are not appropriate for open display in dressing rooms, bathrooms, or other similar spaces.

Sexual Harassment in a theatrical workplace:

- In a theatrical context, harassment can be additionally defined as one or a series of comments or conduct of a gender-related or sexual nature outside the boundaries of consent or production content, which is known or ought reasonably be known to be unwelcome/unwanted, offensive, intimidating, hostile, or inappropriate. It is worth noting that the higher the emotional/sexual risk a production asks of its artists, the greater the diligence of each member of production and artistic staffs is needed to foster an environment of emotional safety.
- Sexual harassment includes but is not limited to:
    - Unwelcome remarks, jokes, innuendoes, or taunts about a person's body, attire, gender, or sexual orientation outside the boundaries of consent or production content;
    - Negative stereotyping of race, gender, gender identity, religion, color, national origin, ancestry, marital status, sexual orientation, ability, or other status protected by law outside the boundaries of consent or production content;
    - Any unwanted or inappropriate physical contact such as touching, kissing, massaging, patting, hugging, or pinching outside the boundaries of consent or production content;

- Unwelcome inquiries or comments about a person's sex life or sexual preference outside the boundaries of consent or production content;
- Leering, whistling, or other suggestive or insulting sounds outside the boundaries of consent or production content;
- Inappropriate comments about clothing, physical characteristics, or activities outside the boundaries of consent or production content;
- Posting or displaying materials, articles, or graffiti that is sexually oriented outside the boundaries of consent or production content;
- Requests or demands for sexual favors, especially those that include, or imply, promises of rewards for complying (e.g., job advancement opportunities) and/or threats of punishment for refusal (e.g., denial of job advancement or opportunities) outside the boundaries of consent or production content;
- Attempting to engage in sexual behaviors offstage that are choreographed for the stage;
- Suggesting an actor who appears naked onstage or in rehearsal is not allowed physical boundaries and/or privacy backstage or in the dressing room and/or not respecting those boundaries;
- Intentional failure to observe the dressing room standards laid out in this document;
- Inviting an actor to rehearse sexual content outside of scheduled rehearsals;
- Repeated invitation/suggestion to take relationships of a sexual nature beyond the stage;
- Using the text of a production that is sexual, violent, threatening, or offensive in offstage discourse;
- Improvising sexual content without expressed consent.

- **Participants have the right to be free from:**
  - Sexual solicitation or advance made by a person in a position to confer, grant, or deny a benefit or advancement outside production content;
  - Reprisal or threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made by a person in a position to grant, confer, or deny a benefit or advancement outside production content.

Any of the behaviors outlined here have the potential to create a negative environment for individuals or groups. It should be noted that a person does not have to be a direct target to be adversely affected by a negative environment. It is understood that creative atmospheres are not always “emotionally sanitary”—they can safely be bawdy, profane, vulgar, and challenging. We assert that having (a) a practice of building consent and (b) an environment that allows for response to clear boundary violations can broaden our opportunity to be challenging and fearless in our work.

Concerns about harassment, safety, or a negative environment should be reported using the concern resolution path (starting with level one wherever possible), and all concerns should be treated with the utmost respect for the safety and well being of all participants.

Diversity, Inclusion and Representation

The Goal

Theatre engages the full spectrum of humanity. Telling the stories of complex human experience often includes representations of violence, racism, homophobia, abuse, and other challenging content. We seek an ethical atmosphere when engaging in this content, working with diverse groups of participants, and particularly when producing culturally sensitive work. The Chicago Theatre Standards does not dictate

content, casting, design, or other production elements but seeks to create respectful, safe and equitable environments.

The Standard

We make the following commitments to all participants who work with us:

- When invited to audition, prospective participants have the right to make inquiries about how their cultural personhood will be used within the production, particularly when the work will be devised (when there is no script at the time of audition). Inquiries will receive a thoughtful response and will remain confidential.
- Sometimes a potential participant discovers in the course of auditioning that they are uncomfortable with production elements as they relates to their personhood. Potential participants have the right to decline casting offers without fear of reprisal such as losing future opportunities. It is not the participant's responsibility to explain why they chose to decline an offer.
- Whenever possible, diversity and inclusion should be considered both in casting and in assembling production and design teams. In particular, culturally specific work should seek production personnel who can speak to that cultural experience.
- During the rehearsal process, participants should voice concern if they feel uncomfortable with the use of their cultural personhood, which may include:
    - Costume pieces that can reasonably be understood as culturally demeaning, which were not disclosed at audition/casting, and could not have been expected by a reading of the script or otherwise available materials;
    - Staging (culturally based violence or abuse, for example), which was not disclosed at the time of audition/casting;
    - Accents or dialects to underscore a cultural representation not disclosed at the time of auditions/casting;
    - Make-up that can reasonably be described as "black face," "brown face," or similar portrayal, which was not disclosed at the time of audition/casting.
- When staging scenes of cultural violence, or other culturally charged narratives and language, we will follow the same practice of consent building outlined in the Sexual Content and Nudity standard. Disclosure of this type of performance will be made at the audition, and the emotional risk associated will be recognized throughout the process.
- We seek to address concerns with generosity and humility through the channels of the Concern Resolution Path as outlined in this document.

Explore it Further

- Producers should seek opportunities to intern, mentor, include, and professionally engage participants of color at all levels of their organization.

Appendix of Forms and Supplemental Support

Sample Concern Resolution Path

Creating a safe and comfortable environment for all members of our team is important to this company. We take concerns seriously and seek to address issues in a sensitive and timely manner.

The following individuals are available to help you resolve any concerns or issues that may arise. We encourage concerns of level 2 and above to be made in writing when possible.

Level One
If you feel comfortable doing so, we encourage you to first directly address your concern with the individual(s) involved. This helps to foster an honest and open community and is often the fastest path to a resolution.

Level Two
If you are not comfortable directly addressing the individual(s) involved, or if no resolution can be agreed upon, your next points of contact can be any of the following:

NAME: _____
TITLE: Stage Manager
EMAIL: _____
PHONE #: _____

NAME: _____
TITLE: Director
EMAIL: _____
PHONE #: _____

NAME: _____
TITLE: Non-Equity Deputy
EMAIL: _____
PHONE #: _____

NAME: _____
TITLE: (Equity Business Rep. or other/s)
EMAIL: _____
PHONE #: _____

Level Three
If an issue is not been resolved through Levels One and Two, or if you are an individual named in Level Two who needs assistance to resolve the issue, your next points of contact can be any of the following people. The contacts at this level may consult with each other and review any legal or other implications of any decision.

NAME: _____
TITLE: Artistic Director
EMAIL: _____
PHONE #: _____

NAME: _____
TITLE: Managing or Executive Director
EMAIL: _____
PHONE #: _____

NAME: _____
TITLE: Board Member
EMAIL: _____
PHONE #: _____

NAME: _____
TITLE: (Other Individual)
EMAIL: _____
PHONE #: _____

A complaint may include allegations of civil or criminal misconduct or liability, and may require legal advice or action.
A violation of civil rights should be reported to the Illinois Attorney General:
http://www.illinoisattorneygeneral.gov/rights/civilrights.html.
In case of physical emergency or criminal activity, call 911.

Sample Audition Disclosure Form

- This theatre has adopted The **Chicago Theatre Standards**, which seeks to foster an environment of communication, safety, respect, accountability, and the health, safety, and well-being of institutions and its participants. We hope the following disclosures help you make an informed choice should you be offered a role in this production.
- All theatres that abide by The Chicago Theatre Standards make the following audition commitments to you:
    - You will not be asked to audition more than 3 times for this production without compensation
    - You will not be kept at any audition more than 3 hours, or past 11pm.
    - You will not be asked to disrobe or perform any intimate contact or violence as a part of your audition.

PRODUCTION SCHEDULE
First day of rehearsal: _____
Range of rehearsal hours: _____
Tech begins: _____
First preview: _____
Opening: _____
Closing: _____
Days/times of planned performances: _____
Performance venue: _____

DISCLOSURES (check all that apply):
☐ There is a possibility that the production will be extended through _____.
☐ Costumes will be supplied by the producer.
☐ Actors will be expected to help build and strike the set.
☐ There will be understudies for this production.
☐ There will be pay for this production in the amount of _____.
☐ This production contains sexual content.
☐ This production contains nudity.
☐ This production contains violence.
    ☐ If yes, a fight choreographer will be on staff for this production.
☐This production contains culturally sensitive content.
☐ This production is accessible to actors who use a mobility device.
☐ This production will have a nontraditional audience seating arrangement.
☐ There are _____ previews planned for this production.

Further Disclosures: _____

_____

_____

The Chicago Theatre Standards welcomes feedback at help@notinourhouse.org at NotInOurHouse.org. Please fill out an anonymous e-comment card at NotInOurHouse.org and let us know any questions or suggestions you have regarding this disclosure form, or any experience you have relative to the CTS. We respect your anonymity. Thank you!

Sample Written Agreement

This sample agreement is written for a performer. Additions and omissions should be made to adapt the agreement for directors, designers, and other participants.

The following agreement is made between _____ ("Theatre") and _____ ("Actor") on this _____ (date). The Theatre hereby engages the Actor in its production of _____ ("Production") in the role of _____.

1. **Production Dates.** The Production Dates are as follows:
Rehearsals:
Tech:
Previews:
Opening Date:
Performances:
Tentative Closing Date:

2. **Compensation**. Actor shall receive a total fee of $_____, according to the following schedule: _____. This agreement shall not constitute the Actor as an employee of the Theatre, and it is understood that the Actor shall perform his/her duties as an independent contractor.

3. **Rehearsal and Performance Schedule.** Subject to Section 4 of this Agreement, the Actor agrees to report to and attend punctually all rehearsals, tech, calls, and performances as stipulated by the Theatre, the director, or the stage manager. The Actor agrees to be available for all performances. Any factors that may impact the Actor's availability must be immediately communicated to the stage manager. The failure by the Actor to attend such rehearsals, tech, or performances or the late arrival by the Actor to such rehearsals, tech, or performances may result in termination of the Actor and removal from the Production at the discretion of the Theatre, without notice or compensation.

4. **Conflicts and More Remunerative Employment.**

a. Any potential conflicts with the performance schedule shall be disclosed to the Theatre prior to the execution of this contract. All absences due to conflicts must receive prior approval by the director and stage manager. Approvals for an Actor's absence due to conflicts will not be granted for tech, previews, or opening night or any performance during the first weekend ("Opening Weekend").
b. In the event the Actor has been offered short-term, higher paying employment in the entertainment industry during the Production, the Theatre will generally grant permission to the Actor to take a short-term leave of absence to pursue such employment. *Such employment must be within the jurisdiction of one of the entertainment unions.*? In order to receive approval for such more remunerative employment, the Actor must notify the director and the stage manager no later than at the time of the audition for employment that would qualify under this section. Approval is at the discretion of the Theatre, and will not be granted for tech, previews, or Opening Weekend.

5. **Responsibilities**. The Actor agrees to meet all guidelines generally accepted for professional behavior, including, but not limited to, punctuality with regard to all rehearsal and performance calls and adherence to the director and producing body's intents. The Actor agrees to perform such roles and duties as are listed on the face of this contract as well as other duties that may be assigned at a later date. The Actor further agrees to abide by all rules, regulations, and policies as set forth by the Theatre, such policies to be discussed and

distributed at the first rehearsal, and deemed to be incorporated into this agreement. The Actor's failure to comply with the responsibilities herein stated may result in termination of the Actor and removal from the Production at the discretion of the Theatre, without notice or compensation.

6. **Property.** The Theatre and its representatives are not responsible for the Actor's personal property during meetings, rehearsals, tech, or the run of the production. The Actor hereby waives all claims for recovery from the Theatre for any such loss or damage (whether or not such loss or damage is caused by negligence of the Theatre).

7. **Complimentary Tickets.** [Insert complimentary ticket policy]

8. **Severability**. The provisions of this contract shall be separable, and the invalidity of any provision shall not affect the validity of the remaining provisions.

9. **Entire Agreement.** The parties agree that this instrument represents the entire agreement between them and that the terms of this agreement may not be altered unless such alteration is accomplished in writing and is signed by both parties.

Agreed and Accepted as of the date first written above, by:

Name: For the Theatre	Name: Contractor

Sample First Rehearsal Language

The following is adapted from the First Rehearsal Script created by Lifeline Theatre In Chicago; one of the contributors to the Chicago Theatre Standards. The following is an extension of the "First Day Implementation Notes" described earlier in this document. Pilot theatres have found these support documents particularly helpful. The following is not prescriptive or definitive, but is offered as a sample to be used or adapted. This script does not include the election of the NED, although that is often done at the first rehearsal.

Staff Member: _____Theatre has adopted The Chicago Theatre Standards, available at notinourhouse.org.

The aim of the CTS is to adopt procedures to prevent and respond to unsafe and/or abusive events, environments or individuals. If there is a fight scene in the show, there will also be a qualified choreographer. If there's a sex scene in the show, parameters will be agreed upon and safeguards will be put in place to maintain them.

An important component of the CTS is the Concern Resolution Path. This is a three-tiered list of people who you can contact if you feel uncomfortable or have any concerns throughout this production process. You have received a printed copy of the Concern Resolution Path with contact information for everyone on the path. This document will also be posted in the rehearsal and dressing rooms for your reference. I'd like to ask everyone on the path to introduce themselves.

The Chicago Theatre Standards contains a number of pledges that we, the producing theater, make to you. Among these is a welcoming environment free of harassment and discrimination.

Since a positive environment is a team effort, we'd like to take this opportunity to read the definitions of harassment aloud to make sure we have a shared understanding. ***NAME (show director)*** if you could begin, and then everyone else just jump in for a section when you like, no particular order, changing speakers with color changes.

Company members read aloud: Harassment includes, but is not limited to:

1. Inappropriate or insulting remarks, gestures, jokes, innuendoes or taunting about a person's racial or ethnic background, color, place of birth, citizenship, ancestry, creed, or disability,
2. Unwanted questions or comments about an Artist's private life,
3. Posting or display of materials, articles, or graffiti, etc. which may cause humiliation, offence or embarrassment on prohibited grounds.
4. Sexual Harassment:
    a. One or a series of comments or conduct of a gender-related or sexual nature that is known or ought reasonably be known to be unwelcome/unwanted, offensive, intimidating, hostile or inappropriate. Artists have the right to be free from:
        i. Sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement,
        ii. Reprisal or threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made by a person in a position to grant, confer, or deny a benefit or

advancement.

b. Sexual harassment includes but is not limited to:

   i. Unwelcome remarks, jokes, innuendoes or taunting about a person's body, attire, gender, or sexual orientation,

   ii. Unwanted touching or any unwanted or inappropriate physical contact such as touching, kissing, patting, hugging or pinching,

   iii. Unwelcome enquiries or comments about a person's sex life or sexual preference,

   iv. Leering, whistling, or other suggestive or insulting sounds,

   v. Inappropriate comments about clothing, physical characteristics or activities,

   vi. Posting or display of materials, articles, or graffiti, etc. which is sexually oriented,

   vii. Requests or demands for sexual favors which include, or strongly imply, promises of rewards for complying (e.g., job advancement opportunities, and/or threats of punishment for refusal (e.g., denial of job advancement or opportunities).

All or part of the above grounds may create a negative environment for individuals or groups. This may have the effect of "poisoning" the work environment. It should be noted that a person does not have to be a direct target to be adversely affected by a negative environment. It includes conduct or comment that creates and maintains an offensive, hostile, or intimidating climate.

***Staff Member*:** Thank you. Negative comments or actions often occur accidentally – but even when that is the case -- if we don't address them in the moment it can start a slide into a less professional room. (please see following page for Oops and Ouch approach)

Oops and Ouch: One way to handle negative comments or actions in real time

We'd like to recommend a system of "Ouch" and "Oops." For instance:

Speaker A is trying too hard to be funny and makes a thoughtless remark. Speaker B says "Ouch!" This cues Speaker A to realize that the funny remark was potentially hurtful. Speaker A says "Oops" to indicate recognition and regret. Then there's a Pause.

It's up to the Ouch-caller whether this moment requires some conversation. So maybe there's a conversation – or maybe the Ouch caller says "Cool, let's move on." But the decision to move on must come from the Ouch-caller.

Please note that anyone in the room can call "Ouch." It does not have to come from the person who is the focus of the potentially hurtful remark.

Any questions or discussion?

- Most common *question* is: "Sometimes I don't know there was an "ouch" until I'm trying to sleep that night. Can I bring it back later?"
- I say "Yes. If you've felt an ouch and didn't say anything, please do bring it to whoever you're comfortable with on the leadership team. We want to know and we will figure out how to address it.
- ** most common *comment* is "If anyone is thinking this feels like overkill, let me tell you what happened to me last week at blahblah (insert bad story here). If something like this had been set up in advance, I bet it wouldn't have happened."

Thank you. May I ask that we pledge to each other that we will work together to promote an environment where it feels safe to speak up -- and that we will welcome any reminder to maintain a positive and respectful room. If you so pledge, please say "I do."

Thank you. If an experience ever feels larger than an Ouch-Oops moment, please know that concerns about harassment, safety, or a negative environment may be reported through several channels.

1. For cast members:

    a. The stage manager.

    b. The non-equity deputy (NED) (After the first week of rehearsal, the cast elects a member who agrees to be a conduit to bring cast questions or concerns to the stage manager or to the organization).

    c. If you do not feel comfortable reporting to either your stage manager or the NED, please report to either _____(Artistic Director) or _____(Managing Director)

2. For production team:

    a. _____(Production Manager)

    b. _____(Artistic director) or _____(Managing director)

Additional Resources for Conflict Resolution

Books

Nonviolent Communication by Marshall B. Rosenberg

Workshops

Effective Management Strategies for Theatre Leaders, produced regularly by the League of Chicago Theatres

The Lilly Awards Foundation

The Lilly Awards were started in the Spring of 2010 as an outlet to honor the work of women in the American theater. The founders of The Lilly Awards, or "The Lillys," as we affectionately refer to them are: Julia Jordan, Marsha Norman and Theresa Rebeck. The awards are named for Lillian Hellman, a pioneering American playwright who famously said "You need to write like the devil and act like one when necessary."

In partnership with the Dramatists Guild (http://www.dramatistsguild.com/), we have gathered our resources and conducted a national survey simply called The Count (http://www.thelillyawards.org/initiatives/the-count/) that accurately showcases which theaters are producing the work of women, and which are not. With our annual fundraiser (http://www.thelillyawards.org/broadway-cabaret/) and prestigious awards ceremony (http://www.thelillyawards.org/thelillyawards/2015-lilly-awards/), The Lilly Awards Foundation is dedicated to carrying on Lillian Hellman's spirit and are proud to continue to honor the work of women in the American theater.

BOARD OF DIRECTORS (HTTP://WWW.THELILLYAWARDS.ORG/ABOUT-THE-LILLY-AWARDS/BOARD-OF-DIRECTORS/)

ANNUAL LILLY AWARDS (HTTP://WWW.THELILLYAWARDS.ORG/ANNUAL-AWARDS-CEREMONY/)

BROADWAY CABARET (HTTP://WWW.THELILLYAWARDS.ORG/BROADWAY-CABARET/)

THE COUNT (HTTP://WWW.THELILLYAWARDS.ORG/INITIATIVES/THE-COUNT/)

"You need to write like the devil and act like one when necessary." ~ Lillian Hellman

Lillian "Lilly" Florence Hellman (June 20, 1905 – June 30, 1984) was an American dramatist and screenwriter known for her success as a playwright on Broadway, as well as her left-wing sympathies and political activism.

Born in New Orleans, Louisiana, into a Jewish family, she was famously blacklisted by the House Committee on Un-American Activities (HUAC) at the height of the anti-communist campaigns of 1947–52. Although she continued to work on Broadway in the 1950s, her blacklisting by the American film industry caused a precipitous decline in her income during which time she had to work outside her chosen profession. Hellman was praised by many for refusing to answer questions by HUAC.

Lillian Hellman's papers are held by the Harry Ransom Center at the University of Texas (http://norman.hrc.utexas.edu/fasearch/findingAid.cfm?eadid=00398p1) at Austin. Her archive includes an extensive collection of manuscript drafts, contracts, correspondence, scrapbooks, speeches, teaching notes, awards, legal documents, appointment books, and honorary degrees. 32 of Lillian Hellman's 50 years as a writer were devoted primarily to writing for the theatre.

Source (https://en.wikipedia.org/wiki/Lillian_Hellman)

The Lilly Awards Foundation Mission Statement

The Lilly Awards Foundation is dedicated to developing and celebrating women artists by promoting gender parity at all levels of theatrical production.

Currently only 22% of the plays and musicals produced in America are written by women. We are eager to change the way decisions are made about production, by spreading the facts, like for example, that plays by women are as profitable as plays by men.

In the Spring, we produce The Lilly Awards (http://www.thelillyawards.org/annual-awards-ceremony/), a boisterous awards ceremony honoring a selection of women writers, composers, directors and designers. In the winter, we conduct a Spotlight Series highlighting the work of emerging women artists, and we produce our celebratory Broadway Cabaret (http://www.thelillyawards.org/broadway-cabaret/) gala fundraiser. We run a Family Friendly Summer Colony (http://www.thelillyawards.org/initiatives/family-friendly-writers-colonies/) initiative, which allows women to take their children along to the prestigious summer writing programs which are so vital to getting their work into the pipeline for major production. We initiated and are continuing to carry out The Count (http://www.thelillyawards.org/initiatives/the-count/), a national study that answers the question "Who is Being Produced in the American Theatre?" The Count (http://www.thelillyawards.org/initiatives/the-count/) has been a game-changer in the conversation about parity, and we are very proud of that ongoing effort, in a partnership with the Dramatists Guild (http://www.dramatistsguild.com/).

The Lilly Awards Foundation, Inc. is a grantee of The New York Women's Foundation (http://www.nywf.org/).

As a voice for women and a force for change, The New York Women's Foundation are a cross-cultural alliance of women catalyzing partnerships and leveraging human and financial capital to achieve sustained economic security and justice for women and girls. With fierce determination, they mobilize hearts, minds and resources to create an equitable and just future for women, families and communities in New York City.

FOLLOW US

(https://www.facebook.com/TheLillyAwards) (https://twitter.com/thelillyawards)
(https://www.youtube.com/channel/UCosexr3CRt_pWGWc4dUPTqg) ([contact-form-7 id=)

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awards/)

OFFICIAL 501(C)(3) NONPROFIT

The Lilly Awards Foundation is a 501(c)(3) nonprofit organization whose mission is to celebrate the work of women in the theater and promote gender parity at all levels of theatrical production.

MAKE A DONATION

Donate now and help support our work. Donations are tax-deductible to the extent permitted by law.

MAKE DONATION

LILLY'S IN THE NEWS

(Http://Www.Thelillyawards.Org/2017/06/09/Gender-Counts-Analysis-Gender-Irish-Theatre-2006-15-Via-Wakingthefeminists/)
Gender Counts: An Analysis Of Gender In Irish Theatre 2006-15 (Via #WakingTheFeminists) (Http://Www.Thelillyawards.Org/2017/06/09/Gender-Counts-Analysis-Gender-Irish-Theatre-2006-15-Via-Wakingthefeminists/)

In 2016, thanks to support from The Arts Council / An Chomhairle Ealaíon, #WakingTheFeminists...

(Http://Www.Thelillyawards.Org/2017/05/23/Photo-Coverage-Broadway-Celebrates-Women-Theatre-8th-Annual-Lilly-Awards-Via-Broadwayworld-Com/)

STATEMENT ON HARASSMENT

Official Statement On Harassment

In December of 2014, Attorney Norman Siegel and a small group of theater professionals met to discuss harassment and abuse in the theatrical community. They drew up a preliminary Statement of Principle in order to raise awareness and identify ways in which the handling of such cases could be improved. On January 12, 2015, a larger group of supporters and representatives from the AEA, Dramatists Guild and the SDC met at New Dramatists to discuss it. The following Statement is the result of that discussion, incorporating the criticisms and ideas generated by the group. Over five hundred theater professionals and advocates have signed on to support the statement. We hope the Coalition of Broadway Unions and Guilds will give the following ideas and concerns their due consideration. The statement is published below.

Statement Of Principle

No one should be forced to choose between her personal safety and dignity, and her job. But too often in the theater community this is exactly the choice that women must make. Sexual discrimination and harassment and gender-based violence often occur in the intimate and physical context of a theater production.

Victims of such conduct face a stark choice between continuing to work in close collaboration with their abuser and quitting the show. Few can afford to give up a job and lose not only income, but also the opportunity for career advancement. There is a sense in the community that it is not necessarily in a victim's best interest to report abuse because of fear that the response will be insufficient and open her up to retribution.

In addition, many instances of abuse happen outside of the physical boundaries of a theater. No theater, union or guild currently takes responsibility for handling such cases. However, the two people involved will most likely have to work together the next day or in another production**,** and the victims are left to deal with the aftermath by themselves. In the face of these realities, victims often choose silence and the abuse is allowed to continue. It is time for the theater community to break its own silence on harassment and abuse and formally address the problem.

The reality is that those who behave abusively are generally in positions of power. Artistic directors hold the power to employ, playwrights have hiring approval; removing a director mid-rehearsal puts an entire production in doubt; losing a celebrity from the cast hurts ticket sales. All of these roles continue to be held predominantly by men and their victims are predominantly women. An unresolved conflict with a person in power can easily become an ongoing barrier to career opportunities throughout a woman's career. Harassment and abuse are contributing factors that slow the advancement of women in theater.

We are aware of men being intentionally injured during performances, as well as gay and straight men being harassed and abused in much the same way as women have been. Victims can be anyone, stagehands as well as actresses, designers as well as writers. A more robust and victim-centered response to the problem will move the culture forward and benefit all.

On January 12th at New Dramatists, a meeting was held of members of the theater community, including representatives from the Dramatists Guild of America, the Actor's Equity Association and the Stage Directors and Choreographers Society. Three proposals for change and enhancement of their existing procedures were generated and discussed:

1. We recommend that a clear statement be read at each professional production's first company meeting outlining the procedure to file a complaint. The procedures and related contact numbers should be prominently posted on theater and union/guild websites.
2. We recommend that each union or guild designate a specific person to receive complaints. This person should be thoroughly educated and knowledgeable about the procedures and be prepared to guide victims to them and to appropriate support services.
3. We recommend that, when appropriate, a mediation process overseen by a neutral professional be added to what the unions and guilds currently offer to parties in dispute over a claim of abuse or harassment.

Move For Mediation

Mediation has an overwhelming success rate. Over the past twenty years it has become a broadly endorsed method for handling harassment claims in the courts and in private practice. All federal district courts are required by law to devise and implement programs to promote and encourage alternative dispute resolution. The New York Supreme Court has both mandatory and voluntary mediation programs, depending on the nature of the dispute. A study of the U.S. Equal Employment Opportunity Commission's (EEOC) mediation program found that 91% of claimants and 96% of respondents who used mediation to solve their dispute would use it again. It is commonly held that when disputing parties voluntarily participate in mediation they are more likely to abide by the terms of their agreement and there is less likely to be retribution, one of the most common reasons victims do not come forward with complaints. Moreover, mediation provides a complainant the opportunity to speak for herself and empowers her to participate in shaping a remedy. It also allows the accused to clarify his side of the story and avoid public charges. In addition, mediation is the most likely method to reach an amicable resolution in a relatively short time, which limits costs and disruption to the production, theater, union or guild.

We strongly recommend and support making these simple changes to recognize and address the needs of the victims of abuse. By instituting these measures, the unions and guilds will be taking steps towards ensuring the safety and dignity of their members.

The theater community has long whispered, laughed and written about harassment in its ranks, telling tales of the casting couch and out of control stars. It is past time we stopped ignoring or even encouraging abusive behavior and publicly recognize the existence of sexual discrimination, harassment, and gender-based violence within our community. It is time to confront and overcome this abuse.

The Lilly Awards Foundation
New Georges
New York Theater Workshop
Alliance of Resident Theatres/New York (A.R.T./New York)
The League of Professional Theater Women
50/50 in 2020
International Center for Women Playwrights
Los Angeles Female Playwrights Initiative
Voice of the City
Two Birds Casting
Theatre Wit
Oracle Productions
The Hypocrites
Knife & Fork Chicago
Bailiwick Chicago
Pride Film & Plays
Kate Erbe, Actor
Joanna Gleason, Actor
Jane Alexander, Actor & former Director of the NEA
Marsha Norman, Playwright
Jessica Chastain, Actor
Jess Weixler, Actress
Neil Labute, Playwright &Director
Terry Kinney, Actor & Director & Steppenwolf Theater Company founder
Jose Rivera, Playwright & Screenwriter
Tracey Scott Wilson, Playwright & Screenwriter
Thandie Newton, Actor
Todd London, Director U of WA Drama, former director New Dramatists
Gloria Steinem, Journalist & Activist
Norman Siegel, Lawyer
Karen Hartman, Playwright
Lynn Nottage, Playwright,
Jo Bonney, Director
Tony Goldwyn, Actor & Director
Amy Morton, Actor
Martha Plimpton, Actor
Amanda Green, Lyricist
David Cromer, Actor & Director
Jonathan Marc Sherman, Playwright
Stephen Adly Gurgis, Actor & Playwright
Richard LaGravenese, Playwright, Screenwriter & Director
Vivienne Benesch, Actor & Director
Mairin Lee, Actor
Sheri Wilner, Playwright
Nina Hellman, Actor
Katie Finneran, Actor
Shannon Burkett, Actor & Playwright
Jeannie Dorsey, Playwright & Screenwriter
Kristen Anderson Lopez, Actress, Lyricist
Bobby Lopez, Composer & Lyricist
Georgia Stitt, Composer & Lyricist
Jason Robert Brown, Composer & Lyricist
Lear deBessonet, Director
Sasha Eden, actress, Artistic Director Women's Expressive Theater
Casey Childs, director, Executive Producer of Primary Stages

Andrew Leynse, Artistic Director of Primary Stages
Elliot Fox, Managing Director of Primary Stages
Adam Greenfield, Associate Artistic Director of Playwrights Horizons
Maddie Corman, Actress
Randy Graff, Actress
Kelli Garner, Actor
Adam Bock, Playwright
Julia Jordan, Playwright & Lyricist
Brooke Berman, Playwright
Susan Bernfield, Artistic Director of New Georges
Deb Laufer, Playwright
David Friedlander, Entertainment Lawyer
Linda Chapman, Associate Artistic Director
Jim Nicola, Artistic Director
Jack Doulin, casting director, NYTW
Jeremy Blocker, Managing director of NYTW
Stephen Belber, Playwright
Anne Washburn, Playwright
Tanya Barfield, Playwright
Lucy Thurber, Playwright
Betsy Aidem, Actor
Marin Ireland, Actor
Maddie Corman, Actor
Carmen Zilles, Actor
Evan Cabnet, Director
Daniel Talbott, Playwright, Director, Actor, Artistic Director of Rising Pheonix Rep
Cusi Cram, Playwright
Eisa Davis, Actor,Playwright & Composer
Lucas Papaelias, Actor & Composer
Mike Lew, Playwright
Adam Gwon, Composer & Lyricist
Francine Volpe, Playwright
Dana Eskelson, Actor
Polly Lee, Actor
Michele Pawk, Actor
Sevrin Mason, Actor
Andrea Ciannavei, Playwright
Charlayne Woodard, Actress & Playwright
Bekkah Brunstetter, Playwright
Dallas Roberts, Actor
Melissa Kievman, Director
Winter Miller, Playwright & Journalist
Erica Gould, Director & Fight Director
Adam Rapp, Playwright & Director
Adriana Perez, Actor and Educator
Didi O'Connell, Actor
Courtney Baron, Playwright
Leigh Silverman, Director
Mary Testa, Actor
Maggie Keenan-Bolger, Actor, Singer & Playwright
Daniel Goldstein, Director
Caissie Levy, Actor
Laura Maria Censabella, Playwright
Rachel Bonds, Playwright
Susan Louise O'Connor, Actor
Rachel Hauck, Set Designer
Tatiana Suarez-Pico, Playwright
Barbara Cassidy, Playwright
Hilary Bettis, Playwright
Dipika Guha, Playwright
Andrea Lepcio, Playwright
Cori Thomas, Playwright & Actor
Joan Lipkin, Playwright & Director
Mandy Siegfried, Actor
Young Jean Lee, Playwright & Director
Alice Gordon, Playwright
Cathy Gropper, Playwright
Alexis Clements, Playwright
Mallery Avidon, Playwright
Lori Myers, Actor
Peggy Miller, Actor
Elaine Grogran Luttrell
Cecilia Copeland, Playwright

Amy Driesler, Actor
Beth Blatt, Lyricist
Carrie Brewer, Fight Choreographer
Karina Richardson, Playwright

Emma Goldman-Sherman, Playwright
Jeffrey Frace, Actor
Tom Dacey Carr, Actor
Jenny Lyn Bader, Playwright
Peggy Stafford, Playwright
Siobahn O'Neill, Producer
Christen Gee, Actor
H. Lin, Playwright
Yvette Heyliger, Playwright
Gael Schaefer, Actor & Fight Choreographer
Fengar Gael, Playwright
Micheline Auger, Playwright
Susan Rose, Producer
Jennie Redling, Playwright
David Johnston, Playwright
Laura Eason, Playwright
Tim Huang, Composer & Lyricist
Sturgis Warner, Director
Molly Rice, Playwright
Julia Pearlstein, Actress
Stephanie Zadravec, Playwright
Sibyl Kempson, Playwright
Wendy MacLeod, Playwright
Kait Kerrigan, Playwright & Lyricist
Deborah Stein, Playwright
Romy Nordlinger, Actor
Suzanne Bradbeer, Playwright
Judith Binus, Stage Manager
Lisa Rothe, Director
Maxine Kern, Dramaturg
Mary Ellen Ashley, Actor
Michael Cuomo, Actor
Sarah Hammond, Playwright & Lyricist
Lisa Joyce, Actor
Ilana Ransom Toeplitz, Director & Choreographer
Nicole Pandolfo, Playwright
Zach Shaffer, Actor
Tari Stratton, Director of Education & Outreach for the Dramatists Guild
Helen Sneed, Playwright
Lauren Feldman, Playwright
Joanna Carpenter, Actress
Tammy Ryan, Playwright
James Carpinello, Actor
Mahayana Landowne, Director
Jenny Maguire, Actor
Jill Dolan, Professor of Theater, Gender Studies & English Lit at Princeton Univ.
Alexandra Neil, Actress
Charise Castro Smith, Playwright & Actor
Diane DiVita, Stage Manager
Kathryn Meisle, Actor
Marguerite Stimpson, Actor
Marjorie Duffield, Playwright
Maria Gobetti, Artistic Director of the Victory Theater Center
Valerie Weak, Actor & Educator
Laura Shamas, Playwright
Jennie Webb, Playwright
Robin Byrd, Playwright
Caterina Bartha, Producer, Director of Finance at the Dramatists Guild
Neil Huff, Actor
Bryce Pinkham, Actor
Somer R. Benson, Actor
Kim Chelf Haymes, Actor
Molly Brennan, Actor
Laura T. Fisher, Actor
Aaron Christensen, Actor
B.J. Jones, Artistic Director Northlight Theatre
Kirsten Fitzgerald, Actor, Artistic Director, A Red Orchid Theatre

Jennifer Markowitz
Caitlin Parrish, Playwright
Michael Patrick Thorton, Co-Founder & Artistic director, The Gift Theatre
Robin Witt, Director
Elizabeth Ellis, Actor & playwright
Caroline Neff, Actor
Jason Butler Harner, Actor
Janelle Snow, Actor & Educator
Michael Denini, Actor
Bilal Dardai, Playwright, Artistic Director of The Neo-Futurists
Hillary Clemens, Actor, The Gift Theatre Company ensemble member
Lindsey Pearlman, Actor
Will Kinnear, Actor
Maria Margaglione, Actor
Michelle Courvais, Actor
Paul N. Moulton, Playwright
Isaac Gomez, Literary Manager, Victory Gardens Theater
Thomas J. Cox, Actor & Educator
Kristin Idaszak, Playwright
Justine Serino, Actor
Erica Weiss, Director
Jason A. Fleece, Director
Mickle Maher, Playwright, Co-Founder of Theater Oobleck
Andrew Hinderaker, Playwright, Ensemble Member, The Gift Theatre Company
Meg Thalken, Actor
Dani Bryant, Playwright
Elaine Romero, Playwright
Guy Van Swearingen, Actor
Whitney Morse, Actor
Natasha Lowe, Actor
Cynthia Castiglione, Actor
Carin Silkaitis, Artistic Director & Actor, Professor at North Central College
Theo Allyn, Actor
Roderick Peeples, Actor
Rita Vreeland, Stage Manager
Corrbette Pasko, Actor, Playwright
Marika Mashburn, Actor, Casting Director
Dutes Miller, Performance & Visual Artist
Stan Shellabarger, Performance & Visual Artist
Monty Cole, Artistic Programs Manager & Casting Director, Victory Gardens Theater
Tiffany Scott, Actor
Brian Russell, Director
Jared Fernley, Actor
Warner Crocker, Director, Playwright
Kelly Lynn Hogan, Actor
Erica Sartini-Combs, Casting Professional
Jodi Kingsley, Actor, Ensemble Member – Irish Theatre of Chicago
Rachael Patterson, Owner, Acting Studio Chicago
John Tovar, Fight Director
Curtis Jackson, Actor
John Morrison, Director
Alison C. Vesely, Artistic Director, First Folio Theatre
David Rice, Executive Director, First Folio Theatre
Maggie Cain, Actor
Christy Arington, Actor & Educator
Sandra Marquez, Actor
Anne Fogarty, Actor
Dana Black, Actor
Donna McGough, Actor
Victor Bayona, Partner R&D Choreography
Samuel Taylor, Actor
Gail Rastorfer , Actor
Stephanie Chavara, Actor
Richard Gilbert, Violence Designer, Co-founder R&D Choreography
Darci Nalepa, Actor
Patrick McGroarty-King, Actor
Jonathan Mastro, Composer and Writer
Mary Jo Bolduc, Actor
Rebecca Spence, Actor, Rivendell Theatre Ensemble member
Jacey Powers, Actor
Jeff Still, Actor
Keith Nobbs, Actor

ILLINOIS DEPARTMENT OF Human Rights
WWW.ILLINOIS.GOV/DHR

Public Contracts

Model Employer Sexual Harassment Policy

NOTE: This Model Employer Sexual Harassment Policy has been adapted from a Policy Statement and Model Policy issued by the Illinois Governor's Office by Executive Order Number 16 on November 5, 1999.

REQUIREMENT:

Illinois law requires all parties to a public contract and all eligible bidders to have a written sexual harassment policy covering their employees and applicants for employment. This requirement applies regardless of the number of persons employed or the dollar value of any public contract. According to Section 2-105(A) (4) of the Illinois Human Rights Act, each sexual harassment policy must contain the following elements:

1. A statement that sexual harassment is illegal.
2. The definition of sexual harassment under the Illinois Human Rights Act.
3. A description of the acts that constitutes sexual harassment, with examples.
4. The employer's internal complaint procedure, including penalties.
5. The legal recourse, investigative, and complaint process available through the Illinois Department of Human Rights (IDHR) and the Illinois Human Rights Commission (IHRC).
6. Information as to how a person can contact IDHR and IHRC.
7. Information regarding the protection against retaliation under Section 6-101 of the Illinois Human Rights Act.

A copy of the employer's policy must be submitted to the Department or to a contracting agency upon request.

A model employer **Sexual Harassment Policy Statement** is available for employers.

IMPORTANT DISCLAIMER: The Sexual Harassment Policy Statement is only an example of a policy which covers each requirement of Section 2-105(A)(4) of the Illinois Human Rights Act (775 ILCs 5/2-105(A)(4)). It is not meant to be taken and used without consultation with a licensed attorney. Employment policies should always be tailored to each employer's circumstances and needs. Additionally, laws may vary by jurisdiction, so modification of this Sexual Harassment Policy Statement may be needed depending on where the employer is located. Any sample policy such as this Sexual Harassment Policy Statement should be reviewed by a licensed attorney to ensure that the policy fits the employer's situation and complies with the laws of the employer's jurisdiction. Since this policy is provided for general information purposes only, the Illinois Department of Human Rights cannot be responsible for any legal consequences which may arise if the Sexual Harassment Policy Statement is adopted in any particular circumstances.

Type Company Name Here

SEXUAL HARASSMENT POLICY STATEMENT

The company is committed to providing a workplace that is free from all forms of discrimination, including sexual harassment. Any employee's behavior that fits the definition of sexual harassment is a form of misconduct which may result in disciplinary action up to and including dismissal. Sexual harassment could also subject this company and, in some cases, an individual to substantial civil penalties.

The company's policy on sexual harassment is part of its overall affirmative action efforts pursuant to federal and state laws prohibiting discrimination based on age, race, color, religion, national origin, citizenship status, unfavorable discharge from the military, marital status, disability and gender. Specifically, sexual harassment is prohibited by Title VII of the Civil Rights Act of 1964 and the Illinois Human Rights Act.

Each employee of this company must refrain from sexual harassment in the workplace. No employee - male or female - should be subjected to unsolicited or unwelcome sexual overtures or conduct in the workplace. Furthermore, it is the responsibility of all supervisors and managers to make sure that the work environment is free from sexual harassment. All forms of discrimination and conduct which can be considered harassing, coercive or disruptive, or which create a hostile or offensive environment must be eliminated. Instances of sexual harassment must be investigated in a prompt and effective manner.

All employees of this company, particularly those in a supervisory or management capacity, are expected to become familiar with the contents of this policy and to abide by the requirements it establishes.

Type Company Name Here

SEXUAL HARASSMENT POLICY

DEFINITION OF SEXUAL HARASSMENT

According to the Illinois Human Rights Act, sexual harassment is defined as:

Any unwelcome sexual advances, requests for sexual favors or any conduct of a sexual nature when:

1. Submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The courts have determined that sexual harassment is a form of discrimination under Title VII of the U.S. Civil Rights Act of 1964, as amended in 1991.

One example of sexual harassment is a case where a qualified individual is denied employment opportunities and benefits after rejecting the supervisor's sexual advances or request(s) for sexual favors or the individual is terminated. Another example is when an individual is subjected to unwelcome sexual conduct by co-workers because of his or her gender which makes it difficult for the employee to perform his or her job.

Other conduct, which may constitute sexual harassment, includes:

- **Verbal:** Sexual innuendos, suggestive comments, insults, humor, and jokes about sex, anatomy or gender-specific traits, sexual propositions, threats, repeated requests for dates, or statements about other employees, even outside of their presence, of a sexual nature.

- **Non-Verbal:** Suggestive or insulting sounds (whistling), leering, obscene gestures, sexually suggestive bodily gestures, "catcalls", "smacking" or "kissing" noises.

- **Visual:** Posters, signs, pin-ups or slogans of a sexual nature, viewing pornographic material or websites.

- **Physical:** Touching, unwelcome hugging or kissing, pinching, brushing the body, any coerced sexual act, or actual assault.

- **Textual/Electronic:** "Sexting" (electronically sending messages with sexual content, including pictures and video), the use of sexually explicit language, harassment, cyber stalking and threats via all forms of electronic communication (e-mail, text/picture/video messages, intranet/on-line postings, blogs, instant messages and social network websites like Facebook and Twitter).

While the most commonly recognized forms of sexual harassment involve the types of conduct described above, non-sexual conduct can also constitute a violation of the applicable laws

when that conduct is directed at the victim because of his or her gender (for example, a female employee who reports to work every day and finds her tools stolen, her work station filled with trash and her equipment disabled by her male co-workers because they resent having to work with a woman).

The most severe and overt forms of sexual harassment are easier to determine. On the other end of the spectrum, some sexual harassment is more subtle and depends, to some extent, on individual perception and interpretation. The courts will assess sexual harassment by a standard of what would offend a "reasonable person."

For this reason, every manager, supervisor and employee must remember that seemingly "harmless" and subtle actions may lead to sexual harassment complaints. The use of terms such as "honey", "darling" and "sweetheart" is objectionable to many women who believe that these terms undermine their authority and their ability to deal with men on an equal and professional level. And while use of these terms by an individual with authority over a female employee will rarely constitute an adverse employment action, it may lead to the creation of a hostile work environment.

Another example is the use of a compliment that could potentially be interpreted as sexual in nature. Below are three statements that might be made about the appearance of a woman in the workplace:

"That's an attractive dress you have on."
"That's an attractive dress. It really looks good on you."
"That's an attractive dress. You really fill it out well."

The first statement appears to be simply a compliment. The last is the most likely to be perceived as sexual harassment, depending on individual perceptions and values. To avoid the possibility of offending an employee, it is best to follow a course of conduct above reproach or to err on the side of caution.

Sexual harassment is unacceptable misconduct, which affects both genders. Sexual harassment will often involve a man's conduct directed at a woman. However, it can also involve a woman harassing a man or harassment between members of the same gender.

RESPONSIBILITY OF INDIVIDUAL EMPLOYEES

Each individual employee has the responsibility to refrain from sexual harassment in the workplace.

An individual employee who sexually harasses a fellow worker is, of course, liable for his or her individual conduct.

The harassing employee will be subject to disciplinary action up to and including discharge in accordance with company policy or any applicable collective bargaining agreement, as appropriate.

RESPONSIBILITY OF SUPERVISORY PERSONNEL

Each supervisor is responsible for maintaining the workplace free of sexual harassment. This is accomplished by promoting a professional environment and by dealing with sexual harassment as with all other forms of employee misconduct. It must be remembered that

supervisors are the first line of defense against sexual harassment. By setting the right example, a supervisor may discourage his or her employees from acting inappropriately. In addition, supervisors will often be the first to spot objectionable conduct or the first to receive a complaint about conduct which he or she did not observe.

The courts and the Illinois Human Rights Commission have found that organizations as well as supervisors can be held liable for damages related to sexual harassment by a manager, supervisor, employee, or third party (an individual who is not an employee but does business with an organization, such as a contractor, customer, sales, representative, or repair person).

Liability is either based on an organization's responsibility to maintain a certain level of order and discipline among employees, or on the supervisor, acting as an agent of the organization. It should be noted that recent United States Supreme Court cases involving sexual harassment claims against supervisors have made the employer's liability for supervisors' actions even stricter. Therefore, supervisors must understand that their adherence to this policy is vitally important; both with regard to their responsibility to maintain a work environment free of harassment and, even more importantly, with regard to their own individual conduct. The law continues to require employers to remain vigilant and effectively remedy sexually harassing conduct perpetrated by individual(s) on their coworkers. Supervisors must act quickly and responsibly not only to minimize their own liability but also that of the company.

Specifically, a supervisor must address an observed incident of sexual harassment or a complaint, with equal seriousness, report it, take prompt action to investigate it, implement appropriate disciplinary action, take all necessary steps to eliminate the harassment and observe strict confidentiality. This also applies to cases where an employee tells the supervisor about behavior considered sexual harassment but does not want to make a formal complaint.

Also, supervisors must ensure that no retaliation will result against an employee making a sexual harassment complaint.

Furthermore, managers/supervisors should remind employees, on a regular basis, that their incoming and outgoing electronic messages on employer owned/issued equipment are subject to monitoring and that employees have no expectation of privacy on employer owned/issued electronic equipment. Inform employees that if they are subjected to inappropriate electronic communications while at work or on employer-owned equipment, or even on their personal cell phones and computers, that they should contact their supervisor or Human Resources immediately. Advise managers, supervisors, and employees not to “friend” each other on social networks and to limit their electronic messages to relevant business matters. Investigate complaints on a case-by case basis and remind employees of the company’s code of conduct and ethics rules if applicable.

PROCEDURES FOR FILING A COMPLAINT

An employee who either observes or believes herself/himself to be the object of sexual harassment should deal with the incident(s) as directly and firmly as possible by clearly communicating her/his position to the offending employee, her/his supervisor and company contact:

It is not necessary for sexual harassment to be directed at the person making a complaint.

The following steps may also be taken: document or record each incident (what was said or done, the date, the time, and the place). Documentation can be strengthened by written records such as letters, notes, memos, and telephone messages.

All charges, including anonymous complaints, will be accepted and investigated regardless of how the matter comes to the attention of the company. However, because of the serious implications of sexual harassment charges and the difficulties associated with their investigation and the questions of credibility involved, the claimant's willing cooperation is a vital component of an effective inquiry and an appropriate outcome.

No one making a complaint will be retaliated against even if a complaint made in good faith is not substantiated. In addition, any witness will be protected from retaliation.

Proper responses to conduct which is believed to be sexual harassment may include the following:

Electronic/Direct Communication. If there is sexual harassing behavior in the workplace, the harassed employee should directly and clearly express her/his objection that the conduct is unwelcome and request that the offending behavior stop. The initial message may be verbal. If subsequent messages are needed, they should be put in writing in a note or a memo.

Contact with Supervisory Personnel. At the same time direct communication is undertaken, or in the event the employee feels threatened or intimidated by the situation, the problem must be promptly reported to the immediate supervisor or

If the harasser is the immediate supervisor; the problem should be reported to the next level of supervision or

Formal Written Complaint. An employee may also report incidents of sexual harassment directly to

will counsel the reporting employee and be available to assist with filing a formal complaint. The company will fully investigate the complaint and advise the complainant and the alleged harasser of the results of the investigation.

Resolution Outside Company. The purpose of this policy is to establish prompt, thorough and effective procedures for responding to every complaint and incident so that problems can be identified and remedied internally. However, an employee has the right to contact the Illinois Department of Human Rights (IDHR) or the Equal Employment Opportunity Commission (EEOC) about filing a formal complaint. An IDHR

complaint must be filed within 180 days of the alleged incident(s) unless it is a continuing offense. A complaint with the EEOC must be filed within 300 days. In addition, an appeal process is available through the Illinois Human Rights Commission, (IHRC) after IDHR has completed its investigation of the complaint. Where the employing entity has an effective sexual harassment policy in place and the complaining employee fails to take advantage of that policy and allow the employer an opportunity to address the problem, such an employee may, in certain cases, lose the right to further pursue the claim against the employer.

ADMINISTRATIVE CONTACTS

- Illinois Department of Human Rights (IDHR)
  Chicago: 312-814-6200 or 800-662-3942
  Chicago TTY: 866-740-3953
  Springfield: 217-785-5100
  Springfield TTY: 866-740-3953
  Marion: 618-993-7463
  Marion TTY: 866-740-3953

- Illinois Human Rights Commission (IHRC)
  Chicago: 312-814-6269
  Chicago TTY: 312-814-4760
  Springfield: 217-785-4350
  Springfield TTY: 217-557-1500

- United States Equal Employment Opportunity Commission (EEOC)
  Chicago: 800-669-4000
  Chicago TTY: 800-869-8001

An employee, who is suddenly transferred to a lower paying job or passed over for promotion after filing a complaint with IDHR or EEOC, may file a retaliation charge, also due within 180 days (IDHR) or 300 days (EEOC) of the alleged retaliation.

An employee who has been physically harassed or threatened while on the job may also have grounds for criminal charges, such as assault or battery.

FALSE AND FRIVOLOUS COMPLAINTS

False and frivolous charges refer to cases where the accuser is using a sexual harassment complaint to accomplish some end other than stopping sexual harassment. It does not refer to charges made in good faith which cannot be proven. Given the seriousness of the consequences for the accused, a false and frivolous charge is a severe offense that can itself result in disciplinary action.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Honorable Rubén Castillo, Chief Judge Thomas G. Bruton, Clerk of Court

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TITLE VII AND SECTION 1981:

A Guide for Appointed Attorneys
in the Northern District of Illinois

Chicago Lawyers' Committee
for Civil Rights Under Law
June 2012

Foreword

The Chicago Lawyers' Committee for Civil Rights Under Law has prepared this manual for use by attorneys appointed by judges in the Northern District of Illinois to represent indigent clients in employment discrimination cases. The manual contains a summary of Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991, including Supreme Court, Seventh Circuit, and Northern District cases decided through April 2012. This manual is intended to be a starting point for research and should not be used as a substitute for original research tailored to the facts of a specific case.

The Chicago Lawyers' Committee has agreed to assist appointed counsel by producing this manual and by conferring with appointed counsel in evaluating settlement offers, drafting pleadings, determining case strategy, and providing other assistance that appointed counsel may need. For assistance, appointed counsel may contact Cunyon Gordon at the Chicago Lawyers' Committee for Civil Rights Under Law, 100 N. LaSalle, Suite 600, Chicago, IL 60602, (312) 630-9744, cgordon@clccrul.org.

TABLE OF CONTENTS

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Introduction: Title VII, 42 U.S.C. §§ 2000e, prohibits discrimination in hiring, pay, promotion, termination, compensation, and other terms and conditions of employment because of race, color, sex (including pregnancy), national origin, or religion. "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to dsicriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." *Ricci v. DeStefano*, 557 U.S. 557 (2009). To be actionable, the employment decision must have been sufficiently adverse. *Minor v. Centocor, Inc*. 457 F.3d 632, 634 (7th Cir. 2006) (assignment of more work is sufficiently adverse). *Cf. Ellis v. CCA of Tennessee LLC,* 650 F.3d 640 (7th Cir. 2011) (a shift change policy that does not create an objective hardship is not sufficiently adverse); *Fane v. Locke Reynolds, LLP*, 480 F.3d 534 (7th Cir. 2007) (heavier work load not adverse); *Maclin v. SBC Ameritech*, 520 F.3d 781, 787 (7th Cir. 2008) (denial of discretionary bonus and change in title not adverse).

B. Covered Employers: Title VII applies to federal, state, and local governments and to private employers, labor unions, and employment agencies. Congress validly waived states' immunity under the Eleventh Amendment in enacting Title VII. *Nanda v. Board. of Trustees*, 303 F.3d 817 (7th Cir. 2002). A covered employer must be a "person" (including a corporation, partnership, or any other legal entity) that has 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). *Arbaugh v. Y&H Corp.,* 546 U.S. 500 (2006) (question whether employer has 15 workers is not jurisdictional); *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006) (highly placed managers may be treated as employees for counting purposes).

1. Exempt Employers: The following types of employers are exempted from Title VII's coverage: bona fide membership clubs, Indian tribes, and religious organizations (a partial exemption). 42 U.S.C. § 2000e(b)(1)-(2).

2. Economic Realities Test: The Seventh Circuit follows the "economic realities" test for determining who the actual employer is. *Heinemeier v. Chemetco, Inc.*, 246 F.3d 1078, 1082 (7th Cir. 2001) (noting that a major factor that defendant was an employer of plaintiff was that it set the plaintiff's salary). The economic realities test requires the court to consider the following five factors: "(1) the extent of the employer's control and supervision over the worker, (2) the kind of occupation and nature of skill required, (3) which party has responsibility for the costs of operation, such as the provision of equipment and supplies and the maintenance of the workplace, (4) the source of payment and benefits, and (5) the duration of the job." *Daniel v. Sargent & Lundy, LLC*, No.

09-cv-7206 (N.D.Ill. Mar. 14, 2012) (citing *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002)) (*Available at*: 2012 WL 874419). It is important to note that the most important factor among those five is the first factor. *Id*.

C. Protected Classes: Title VII prohibits discrimination on account of:

1. Race or Color: This category includes blacks, whites, persons of Latino or Asian origin or descent, and indigenous Americans (Native Alaskans, Native Hawaiians, Native Americans). Race can never be a bona fide occupational qualification (BFOQ). *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908, 913 (7th Cir. 2010) (explaining "a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race"); *See also Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990) (explaining in dicta that a merchant cannot refuse to hire African-American workers because they believe their customers prefer white workers); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982) (holding a state agency could not reguse to hire a white applicant because some community members stated that they preferred that the position go to an African-American).

2. National Origin: The Supreme Court has interpreted national origin as referring to "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (1981 reaches discrimination against a person because she is genetically a part of an ethnically and physiognomically distinctive group). The EEOC defines "national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or characteristics of a national origin group." 29 C.F.R. § 1606.1; *See also Salas v. Wisconsin Dept. of Corrections*, 493 F. 913 (7th Cir. 2007) (noting that labeling an employee "Hispanic" and taking an adverse employment action because the employee was "Hispanic" would constitute national origin discrimination despite the fact that a particular country is not referenced); *But See Lapine v. Edward Marshall Boehm, Inc.*, No. 89-cv-8420 (N.D.Ill. Mar. 28, 1990) (Available at: 1990 WL 43572) (dismissing the employee's claim because labeling an employee as "Jewish" did not indicate national origin because "Jews, like Catholics and Protestants, hail from a variety of different countries.").

a. Bona Fide Occupational Qualification: Discrimination based on national origin violates Title VII unless national origin is a bona

fide occupational qualification for the job in question. The employer must show that the discriminatory practice is "reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). *Henry v. Milwaukee County*, 539 F.3d 573 (7th Cir. 2008). The courts and the EEOC interpret the BFOQ exception very narrowly. *See* 29 C.F.R. § 1604.2(a).

b. Political Boundaries Unnecessary: "A Title VII plaintiff need not show origin in a 'nation' with recognized political or geographic boundaries." *Hamdan v. JK Guardian Sec. Services*, No. 94-cv-565 (N.D.Ill. Oct. 6, 1994) (*Available at*: 1994 WL 548229) (holding Title VII's national origins protections extend to Palestinians); *See also Janko v. Illinois State Toll Highway Auth.*, 704 F.Supp. 1531, 1532 (holding that Title VII's prohibitions extend to an employee labeled as a "Gypsy" by his employer because the term is generally used "to refer to various ethnic groups not originally from (a) land who are different from the rest because of ties to earlier nomadic minority tribal peoples.")

3. Sex: This provision prohibits discrimination based on gender, and applies to both men and women. Employer rules or policies that apply only to one gender violate Title VII. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (rule prohibiting children applied only to women). Employment decisions based on gender stereotypes also violate Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004). Employers may not provide different benefits to women than to men. *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978). Title VII also prohibits sexual harassment, as described more fully below.

a. Pregnancy: In 1978, Congress amended Title VII to make it clear that the statute prohibits discrimination because of pregnancy. 42 U.S.C. § 2000e-(k). Employers may not consider an employee's pregnancy in making employment decisions. *Id.*; See also 29 C.F.R. § 1604.10(a). Employers must treat pregnancy-related disabilities and medical conditions like other disabilities that similarly affect an employee's ability to work. 29 C.F.R. § 1604.10(b) (See the Northern Distric's ADA Manual for further discussion on pregnancy-related conditions). In *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), the Supreme Court implied that classifications based on fertility or infertility alone were not barred by the Pregnancy Discrimination Act, which prohibits only gender-specific classifications. However, "even where (in)fertility is at issue, the

employer conduct complained of must actually be gender neutral to pass muster." *Hall v. Nalco Co.* 534 F.3d 644 (7th Cir. 2008) (plaintiff's termination violated Title VII because employees terminated for taking time off to undergo in vitro fertilization would always be women, and thus the classification was gender-specific and not gender-neutral).

b. **Bona Fide Occupational Qualification:** Discrimination based on sex violates Title VII unless sex is a bona fide occupational qualification (BFOQ) for the job in question. *See, e.g., Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (explaining that gender may be a BFOQ for accommodating a healthcare facilities' patients' privacy interests); *But See Henry v. Milwaukee County*, 539F.3d 573 (7th Cir. 2008) (juvenile detention center did not justify sex based assignments). It is important to note that the Seventh Circuit considers the "BFOQ defense (as) a narrow exception to the general prohibition on sex-based discrimination." *Keller v. Indiana Family & Soc. Servs. Admin.*, 388 F.App'x 551, 553 (7th Cir. 2010) (citing *Henry* at 579-580); *See also Dothard v. Rawlinson*, 433 U.S. 321 (1977). Conclusory statements regarding whether a particular sex is more suited for a particular position are insufficient to survive at the summary judgment level. *Id*. "Discrimination based on sex is valid only when the *essence of the business of the operation* would be undermined." *Dothard* at 333 (Emphasis added). The E.E.O.C. will consider sex as a BFOQ "where it is necessary for the purpose of authenticity or genuineness…e.g., an actor or actress." 29 C.F.R. § 1604.2(a)(2). Employers bear the burden of establishing the following: (1) that a particular qualification is a BFOQ and (2) that they were unable to "rearrange job responsibilities or otherwise eliminate the clash between the business necessities and the employment opportunities of" the affected gender. *Henry* at 580 (citing *Torres v. Wis. Dept. of Health & Social Servs.*, 838 F.2d 944, 953 n.6 (7th Cir. 1988)).

c. **Sexual Orientation v. Sex Stereotyping:** Title VII does not prohibit discrimination against someone because of his/her sexual orientation. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000). However, it does prohibit discrimination based on "sex stereotyping," that is, the failure to conform to established sexual stereotypes. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003).

(i) **Illinois Practice Note:** It is important to note that the Illinois Human Rights Act prohibits sexual orientation

discrimination in the employment context. 775 ILCS 5/1-102(A). Therefore, consider filing a complaint with the Illinois Department of Human Rights (IDHR).

4. **Religion:** The term "religion" includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e-(j). The EEOC Guidelines state that protected religious practices "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. Sincerity of religious belief is an issue for the trier of fact. *E.E.O.C. v. Ilona of Hungary, Inc.,* 97 F.3d 204 (7th Cir. 1997).

a. Required Notice: An employee must give fair notice that a religious practice might interfere with his employment. *Xodus v. Wackenhut Corp.*, 619 F.3d 683 (7th Cir. 2010) (employee's statement that it was against his "belief" to cut his hair did not put employer on notice of employee's Rastafarian faith).

b. **Employer's Duty to Accommodate:** Title VII imposes a duty to "reasonably accommodate to an employee's religious observance or practice" unless doing so would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e-(j); *See also* 29. C.F.R. 1605.2(b)(1)-(3); *See e.g. Matthews v. Wal-Mart Stores, Inc.*, 417 F.Appx. 552, 554 (7th Cir. 2011). Under this standard, Title VII does not require that "public service" officers be allowed to opt out of job assignments viewed as religiously offensive (such as guarding gaming establishments or abortion clinics). *Endres v. United States*, 349 F.3d 922 (7th Cir. 2003). However, employers may be required to accommodate religious headwear (except for public employers, as to whom Eleventh Amendment immunity trumps Title VII). *Holmes v. Marion County Office of Family and Children,* 349 F.3d 914 (7th Cir. 2003). It is important to note that an employer's "mere assumption that many more people with the same religious practices as the person being accommodated may also need the accommodation is not evidence of undue hardship." 29 C.F.R. § 1605.2(c)(1).

c. **Religious Organizations Exempt:** Title VII exempts from coverage a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a).

d. **Ministerial Positions:** The protection against religious discrimination does not cover jobs where the job function is "ministerial" in nature. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d. 698 (7th Cir. 2003).

e. **Bona Fide Occupational Qualification:** Religious discrimination is not unlawful under Title VII where religion is a BFOQ for the job in question. 42 U.S.C. § 2000e-2(e)(1).

D. Theories of Discrimination

1. **Disparate Treatment:** Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class. The central issue is whether the employer's action was motivated by discriminatory intent, which may be proved by either direct or circumstantial evidence.

a. **Direct Method:** Under the direct method, a plaintiff attempts to establish that membership in the protected class was a motivating factor in the adverse job action either through use of direct evidence or circumstantial evidence. *Winsley v. Cook County*, 563 F.3d 598, 604 (7th Cir. 2009); *See also Cosey v. Easter Seals Soc. Metro. Chicago, Inc.*, No.10-cv-2520 (N.D.Ill. Mar. 16, 2012) (*Available at*: 2012 WL 917846).

(i). **Direct Evidence:** Plaintiff may offer direct evidence, such as that the defendant admitted that it was motivated by discriminatory intent or that it acted pursuant to a policy that is discriminatory on its face.

(ii) **Circumstantial Evidence:** A plaintiff may also proceed under the direct method by offering circumstantial evidence. *See e.g. Burnell v. Gates Rubber Co.*, 647 F.3d 704, 708 (7th Cir. 2011); *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009); *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008). "Circumstantial evidence may include suspicious timing, ambiguous statements, behavior or comments direct at others in the protected class, and evidence that similarly situated employees outside the protected class received systematically better treatment." *Burnell v. Gates Rubber Co.*, 647 F.3d 704, 708 (7th Cir. 2011); *See also Marshall v. Am. Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998); *Troupe v. May Dep't. Stores*, 20 F.3d 734, 736 (7th Cir. 1994). When a plaintiff seeks to introduce words, either written or

spoken, as circumstantial evidence of discrimination, the Supreme Court has emphasized that looking to the context surrounding the words' usage is essential to determining whether certain words are discriminatory. *Ash v. Tyson Foods Inc*. 126 U.S. 1195 (2006) (use of the word "boy" may be discriminatory, depending on context). Positive comments about an employee's race do not demonstrate discrimination. *Brewer v. Bd. of Tr. of the Univ. of Ill.*, 479 F.3d 908, 916 (7th Cir. 2007).

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(iii). **Stray Remarks:** Courts generally give little strength to stray remarks, such as those made by persons other than the decisionmaker(s) that was/were responsible for the adverse employment action, those not pertaining directly to the plaintiff, or those which were made long before the disputed employment decision. *See e.g.*, *Dickerson v. Bd. of Trustees of Cmty. Coll. Dist. No. 522*, 657 F.3d 595, (7th Cir. 2011). *Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569 (7th Cir. 2003) (stray remarks five months before and one month after adverse employment decision too far removed in time); *Darchak v. City of Chicago Bd. of Educ.,* 580 F.3d 622 (7th Cir. 2009) (remark made three months before adverse action is probative). But recency alone may not be the decisive factor. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008). The power of "stray remarks" was given some new life after the Supreme Court ruled in *Reeves v. Sanderson Plumbing, Inc.,* 530 U.S. 133 (2000), that the court of appeals erred by discounting evidence of the decision maker's age-related comments ("you must have come over on the Mayflower") merely because not made "in the direct context of termination." *But see Davis v. Time Warner Cable of Southeastern Wisc., LP*, 651 F.3d 664 (7th Cir. 2011) (finding stray remarks insufficient evidence because the plaintiff presented no evidence that the remarks related to the reason for termination); *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 631 (explaining isolated remarks are not enough to meet the plaintiff's burden unless those remarks are coupled with an adverse employment action). Stray remarks that are neither proximate nor related to the employment decision itself are insufficient to defeat summary judgment on their own. *Dickerson v. Bd. of Trustees of Cmty. Coll. Dist. No. 522*, 657 F.3d 595 (7th Cir. 2011); *See also Nichols v. S. Ill. University-Edwardsville*, 510 F.3d 722 (7th Cir. 2007);

Jennings v. Waukegan Pub. Sch. Dist. No. 60, No. 10-cv-3130 (N.D. Ill. Sept. 22, 2011) (*Available at*: 2011 WL 4449676).

(iv). **Cat's Paw Theory:** "In employment discrimination law, the 'cat's paw' metaphor refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor (or other decision-maker) who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action." *Cook v. I.P.C. Int'l Corp.*, ---F.3d--- (7th Cir. 2012); See also *Staub v. Proctor Hospital*, --- U.S. --- (2011), 131 S.Ct. 1186, 1193 (2011); *Schandelmeier-Bartels v. Chicago Park District*, 634 F.3d 372 (7th Cir. 2011); *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008) (derogatory remarks relevant if made by someone who provided input into challenged decision); *Sun v. Bd. of Tr. of the Univ. of Ill.*, 473 F.3d 799, 813 (7th Cir. 2007) (statements by someone other than the decision maker may be probative if that individual had significant influence over the decision maker); *West v. Ortho-McNeil Pharm. Corp.,* 405 F.3d 578 (7th Cir. 2005); *Waite v. Bd. of Trs.,* 408 F.3d 334 (7th Cir. 2005); *Cerutti v. BASF Corp.* 349 F.3d 1055 (7th Cir. 2003). In certain instances, the employer may attempt to evade liability because a committee was responsible for the adverse employment action in question. Under the Cat's Paw Doctrine, a bigoted supervisor's stray remark can be imputed to the committee if the plaintiff can show that the committee was simply a rubber stamp. *Mateu-Anderegg, v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002).

A. **Practice Note:** The Seventh Circuit's application of the Cat's Paw Doctrine has admittedly been quite inconsitent since it first recognized the doctrine in *Shager v. Upjohn*, 913 F.2d 398 (7th Cir. 1990). *See Brewer v. Bd. of Tr. of the Univ. Ill.*, 479 F.3d 908 (7th Cir. 2007) ("Our approach to Title VII cases involving an employee's influence over a decision maker has not always been quite clear."). In *Shager*, the Seventh Circuit characterized the subordinate's influence as needing to be "decisive" evaluating the "causal link" between the

subordinate's bias and Shager's discharge. *See Shager* at 405.

1. **The Lenient Approach:** In some cases following *Shager*, the Seventh Circuit applied a much more lenient standard, which merely asked whether the biased employee's animus "may have effected the adverse employment action." *Dey v. Colt Constr. and Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994); *See also Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004); *Hoffman v. MCA, Inc.*, 144 F.3d 1117 (7th Cir. 1998); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394 (7th Cir. 1997).

2. **The Stringent Approach:** In more recent cases, the Seventh Circuit has promoted the use of a far more stringent standard requiring the biased employee to exercise a "singular influence" over the official decisionmaker. *See Brewer* at 917-918; *See also Little v. Ill. Dept. of Revenue*, 369 F.3d 1007 (7th Cir. 2004) (explaining the biased employee must possess so much influence over the decision that he or she is the "functional…decision-maker.").

B. ***Staub*'s Effect on the Application of the Cat's Paw Doctrine:** In 2011, the Supreme Court overruled the more stringent approach called for by cases such as *Brewer* in a case arising under USERRA. *See Staub v. Proctor Hosp.*, ---U.S.---, 131 S.Ct. 1186 (2011). Applying the basic agency principles under tort law, Justice Scalia explained that an employer may be liable for employment discrimination if a non-decision-maker "performs an act motivated by (discriminatory) animus that is *intended*…to cause an adverse employment action, and…that act is a *proximate cause* of the ultimate employment action." *Id*. at 1194 (Emphasis added); *See also Harris v. Warrick County Sheriff's Dept.*, 666 F.3d 444 (7th Cir. 2012). Northern District and Seventh Circuit opinions following the *Staub* decision seem suggest that the Seventh Circuit and

Northern District are now likely to apply a more stringent standard than the approach taken in *Dey* but less stringent standard that in *Brewer*. *See e.g. Cook v. I.P.C. Int'l Corp.*, ---F.3d--- (7th Cir. 2012) (Title VII sex discrimination); *Dickerson v, Bd. of Trustees of Cmty. Coll. Dist. No. 522*, 657 F.3d 595, 602 (7th Cir. 2011) (ADA); *Davis v. Metroplex, Inc.*, No. 10-cv-3216 (N.D.Ill. 2012) (Title VII race discrimination claim); *Lee v. Waukegan Hosp. Corp.*, No. 10-cv-2956 (N.D.Ill. Dec. 5, 2011) (FMLA). It appears that courts now require the biased employee's "action to be *a causal factor* of the ultimate employment action." *Staub* at 1193 (Emphasis added); *See also Cook v. IPC Int'l Corp.*, ---F.3d--- (7th Cir. 2012) (Available at 2012 WL 739303); *But see Wojtanek v. District No. 8, Int'l Ass'n of Machinists & Aerospace Workers AFL-CIO*, 435 F.App'x 545, 549 (7th Cir. 2011) (explaining the Supreme Court's holding in *Staub* cannot be extended to the ADEA because under the ADEA, biased employee's action must be "the determinative factor—not just a motivating factor—in the (employer's) decision to take adverse action.").

(v) **Pretext & Similarly Situated Employees are Unnecessary Under Direct Method:** Under the direct method a plaintiff need not show pretext, *Darchak v. City of Chicago Bd. of Educ.,* 580 F.3d 622 (7th Cir. 2009), or have evidence that similarly situated employees were treated better. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008).

b. ***McDonnell Douglas*** **Burden-Shifting Method:** In most cases, the plaintiff lacks direct evidence of discrimination and must prove discriminatory intent by inference. The Supreme Court has created a structure for analyzing these cases, commonly known as the *McDonnell Douglas* burden-shifting formula, which it first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later refined in *Tex. Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The analysis is as follows: (1) the plaintiff must establish a prima facie case of discrimination; (2) the employer must then articulate, through admissible evidence, a legitimate, nondiscriminatory reason for its actions; and (3) in order to prevail,

the plaintiff must prove that the employer's stated reason is a pretext to hide discrimination. *McDonnell Douglas*, 411 U. S. at 802-04; *Burdine*, 450 U.S. at 252-56; *See also, Keri v. Bd. of Trustees of Purdue Univ.*, 458 F.3d 620, 643 (7th Cir. 2006). It is not necessary that the alleged discriminator's race (or other protected status) be different from that of the victim. *Oncale v. Sundowner Offshore Services.,* 523 U.S. 75 (1998); *See also Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524 (7th Cir. 2003).

(i) **Prima facie case:** "Under the indirect method, the plaintiff carries 'the initial burden under the statute of establishing a *prima facie* case of…discrimination." *Coleman v. Donahoe*, 667 F.3d 835, 845 (7th Cir. 2012). "The burden of establishing a *prima facie* case of disparate treatment is not onerous," and by establishing the prima facie case, the plaintiff creates an inference that the employer acted with discriminatory intent. *Burdine* 450 at 253-254. The elements of the *prima facie* case vary depending on the type of discrimination.

A. **Discriminatory Hiring Prima Facie Case:** In a discriminatory hiring case, they are: (i) the plaintiff is a member of a protected class; (ii) the plaintiff applied and was qualified for the job; (iii) the application was rejected; and (iv) the position remained open after the rejection. *Hicks*, 509 U.S. at 505-507.

B. **Wrongful Termination Prima Facie Case:** In a termination case, the second element is whether the plaintiff was performing up to the employer's "legitimate expectations" and the fourth element is whether similarly situated employees (not in plaintiff's protected group) were treated better. *Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir. 2001). A plaintiff in a termination case need not show, for *prima facie* case purposes, a similarly situated comparator, but rather must show only that the employer sought someone else to do plaintiff's work after the termination. *Pantoja v. American NTN Bearing*, 495 F.3d 840, 846 (7th Cir. 2007).

C. **Discriminatory Supervisor in Question:** The legitimate expectations formulation may not be

appropriate if those who evaluated the plaintiff's performance are accused of discrimination, *Pantoja v. American NTN Bearing*, 495 F.3d 840, 846 — (7th Cir. 2007); *Thanongsinh v. Board of Education, District U-46*, 462 F. 3d 762, 772 (7th Cir. 2006) (employer cannot argue that an employee is unqualified if qualifications are measured in a discriminatory manner); *Peele v. Country Mutual Ins. Co.*, 288 F.3d 319 (7th Cir. 2002); *Oest v. Ill. Dep't. of Corr.,* 240 F.3d 605 (7th Cir. 2001), if the plaintiff claims she was singled out (i.e., for discipline) based on a prohibited factor, *Curry v. Menard, Inc.*, 270 F.3d 473 (7th Cir. 2001); *Grayson v. O'Neill*, 308 F.3d 808 (7th Cir. 2002), or if the employer's "expectations" are shown to be pretextual, *Goodwin v. Board of Trustees, Univ. of Ill.,* 442 F.3d 611 (7th Cir. 2006); *Brummett v. Lee Enters. Inc.*, 284 F.3d 742 (7th Cir. 2002).

D. **"Similarly Situated" Employees:** "The similarly situated inquiry is flexible, common sense, and factual. It asks 'essentially are there enough common features between the individuals to allow a meaningful comparison?'" *Coleman v. Donahoe*, 667 F.3d 835, 841 (7th Cir. 2012) (citing *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007)); *See also Good v. University of Chicago Medical Ctr.*, ---F.3d--- (7th Cir. 2012) (*Available at*: 2012 WL 763091). However, the degree of similarity that the court will require will vary from case-to-case. For example, in some instances, the Seventh Circuit has required very close similarity of the plaintiff and her comparable employees, for both *prima facie* case and pretext purposes. *See e.g., Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731 (7th Cir. 2006) (plaintiff must identify employees who are "directly comparable in all material respects"); *Ineichen v. Ameritech,* 410 F.3d 956 (7th Cir. 2005); *Steinhauer v. DeGolier*, 359 F.3d 481 (7th Cir. 2004) (plaintiff not similar to comparable worker where plaintiff was probationary employee). However, in other instances, the Seventh Circuit has required much less similarity. *See e.g., Good v. University of Chicago Medical Ctr.*, ---F.3d--- (7th Cir. 2012)

(*Available at*: 2012 WL 763091); *Weber v. Universities Research Ass'n, Inc.*, 621 F.3d 589 (7th Cir. 2010); *Chaney v. Plainfield Healthcare Center,* 612 F.3d 908 (7th Cir. 2010) (comparative need not be clone and need not have been accused of identical misconduct); *Fischer v. Avanade, Inc.*, 519 F.3d 393, 402 (7th Cir. 2008) (where an employer claims that another employee was not similarly situated simply because of his experience in the temporary position of the same job title, and where the plaintiff alleges that the initial appointment was itself made on a discriminatory basis, the employees' qualifications *before* the temporary appointment are relevant to whether they were similarly situated); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (plaintiff and comparator need not have the same job title); *Humphries v. CBOCS West, Inc.,* 474 F.3d 387, 404-05 (7th Cir. 2007) (similarly situated test is flexible and meant to determine whether there are enough common factors to allow for a meaningful comparison); *Crawford v. Indiana Harbor Belt RR Co.,* 461 F. 3d 844, 845 (7th Cir. 2006) (rejecting tendency to require close and closer degrees of similarity)*; Ezell v. Potter*, 400 F.3d 1041, 1050 (7th Cir. 2005) (employee similarly situated to his supervisor)*; Freeman v. Madison Metro. Sch'l Dist.*, 231 F.3d 374, 383 (7th Cir. 2000) (employee can be similarly situated to employees in different job position).

1. **Size of the Company and Comparator Pool:** The degree of similarity required between the plaintiff and comparable employees may vary with the size of the company and the potential comparator pool. *Humphries v. CBOCS West, Inc.,* 474 F.3d 387, 405 (7th Cir. 2007).

2. **Termination:** In the discriminatory termination context, the Seventh Circuit has held that "to be similarly situated, [an employee] must have been treated more favorably by the same decision maker that fired the [plaintiff]." *Ellis v. UPS, Inc*., 523

F.3d 823, 826 (7th Cir. 2008). An employee is not similarly situated if governed by a different supervisor. *Montgomery v. American Airlines, Inc.*, 626 F.3d 382 (7th Cir. 2010).

E. **Statistics:** Statistics can be used to establish a *prima facie* case of disparate treatment. *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001). Furthermore, the conventional 5% level of significance (or two standard deviation level) typically used to establish aberrant decision-making is not a legal requirement. *Id*. Generally, the statistics should focus on employees from the same division where plaintiff worked, and include only similarly qualified employees with a common supervisor during a similar time period. *Balderston v. Fairbanks Morse Engine Div.*, 328 F.3d 309 (7th Cir. 2003); *See also Hemsworth v. Quotesmith.com*, 476 F.3d 487, 492 (7th Cir. 2007) (rejecting plaintiff's proposed statistical evidence where it lacked "the necessary context for meaningful comparison"); *Ibarra v. Martin*, 143 F.3d 286 (7th Cir. 1998); *Lenin v. Madigan*, No. 07-cv-4765 (N.D.Ill. July 12, 2011) (Available at: 2011 WL 2708341). Moreover, any use of "statistical evidence, which fails to properly take into account nondiscriminatory explanations (will) not permit an inference of discrimination." *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616-617 (7th Cir. 2000).

F. **Legitimate Expectations:** If an employer insists that it took the adverse employment action in question because the plaintiff failed to meet its legitimate expectations, the plaintiff can "stave off summary judgment and proceed to the pretext inquiry" by "*produc(ing) evidence sufficient* to raise an inference that an employer applied its legitimate expectations in a disparate manner." *Montgomery v. American Airlines, Inc.*, 626 F.3d 382, 394 (7th Cir. 2010) (citing *Elkhatib v. Dunkin Donuts, Inc.*, 497 F.3d 827, 831 (7th Cir. 2007) (Emphasis added)). If the plaintiff provides such evidence, "the second and fourth prongs (of the *prima facie* case) merge."

Id. It is important to note that the plaintiff must put forth "actual evidence" and not mere conclusory allegations in order to proceed in this manner. *Id*.; *See also Brummett v. Lee Enters., Inc.*, 284 F.3d 742, 744 (7th Cir. 2002) (explaining the plaintiff may not "put the pretext cart before the prima facie horse" by making providing mere conclusory statements alleging discrimination); *Grayson v. O'Neill*, 308 F.3d 808, 818 (7th Cir. 2002) ("The prima facie case must be established and not merely incanted.").

(ii) **Employer's burden of production:** In order to rebut the inference of discrimination, the employer must articulate, through admissible evidence, a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *See also Stockwell v. City of Harvey*, 597 F.3d 895, 901 (7th Cir. 2010). The employer's burden is one of production, not persuasion; the ultimate burden of persuasion always remains with the plaintiff. *Hicks*, 509 U.S. at 511 (1993); *See also Hossack v. Floor Covering Associates of Joliet, Inc.*, 492 F.3d 853, 860 (7th Cir. 2007). But, the employer must provide a nondiscriminatory reason which is sufficiently specific such that plaintiff can attempt to show pretext. *EEOC v. Target,* 460 F. 3d 946 (7th Cir. 2006).

(iii) **Plaintiff's proof of pretext:** Proof that the defendant's asserted reason is untrue permits, but may not require, a finding of discrimination. *Reeves v. Sanderson Plumbing Prods, Inc.,* 530 U.S. 133 (2000); *Hicks*, 509 U.S. at 511 (1993); Anderson *v. Baxter Healthcare Corp*., 13 F.3d 1120, 1123 (7th Cir. 1994). If the employer's stated reason is not the true reason, the case cannot be decided on summary judgment. *Forrester v. Rauland-Borg Corp*, 453 F.3d 416 (7th Cir. 2006).

A. **Proving Pretext:** To prove pretext, plaintiff must present evidence that impeaches the employer's stated reason for its employment decision, which generally involves demonstrating that the employer did not sincerely believe its proffered reason. *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 635 (7th Cir. 2011) ("The question is not whether the employer's stated reason was inaccurate or

unfair, but whether the employer honestly believed the reason it has offered to explain the (adverse employment action)."); *See also Naik v. Boehringer Ingleheim Pharm., Inc.*, 627 F.3d 596, 601 (7th Cir. 2010) ("It's not the court's concern that an employer may be wrong about its employee's performance, or may be too hard on it employee. Rather the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie."); *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 397 (7th Cir. 2010); *Brown v. Ill. Dep't of Natural Res.*, 499 F.3d 675, 683 (7th Cir. 2007) ("To show pretext, a plaintiff must show that (1) the employer's nondiscriminatory reason was dishonest and (2) the employer's true reason was based on discriminatory intent.") *Humphries v. CBOCS West, Inc.*, 474 F. 3d 387, 407 (7th Cir. 2007) ("[e]rroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons."); *Sublett v. Wiley & Sons*, 463 F. 3d 731 (7th Cir. 2006) (employer's justification must be a lie rather than simply mistaken). However, the argument may be made, based *Reeves v. Sanderson Plumbing Prods, Inc*., 530 U.S. 133 (2000) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993), that a jury need not find that the employer lied in order to find pretext. Instead, merely demonstrating that the employer's belief was incorrect may suggest that the employer's stated explanation is insincere. Bell v. E.P.A., 232 F.3d 546 (7th Cir. 2000).

B. **Multiple Reasons For Adverse Action:** Where the defendant asserts several reasons for its decision, it may not be enough for the plaintiff to refute only one of the reasons. *Fischer v. Avanade, Inc.*, 519 F.3d 393, 403-04 (7th Cir. 2008); *See also Evertt v. Cook County*, 655 F.3d 723, 730 (7th Cir. 2011); *Walker v. Bd. of Regents*, 410 F.3d 387 (7th Cir. 2005). *But see Monroe v. Children's Home Ass'n of Ill.*, 128 F.3d 591, 593 (7th Cir. 1997) (a plaintiff who proves a prohibited factor motivated the adverse action need not rebut all asserted reasons). However, there may be circumstances where "multiple grounds offered by

the defendant . . . are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment." *Fischer*, 519 F.3d at 404 (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 69-70 (7th Cir. 1995)). Furthermore, pretext can be shown where the employer gives one reason at termination but then offers another later (and that one lacks documentation). *Chaney v. Plainfield Healthcare Center,* 612 F.3d 908 (7th Cir. 2010); *Fischer v. Avanade, Inc.*, 519 F.3d 393, 407 (7th Cir. 2008); *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002). *See also Pantoja v. American NTN Bearing,* 495 F.3d 840, 851 (7th Cir. 2007) (employer's shifting rationales are evidence of pretext)*; Rudin v. Lincoln Land Cmty. Coll.,* 420 F.3d 712 (7th Cir. 2005); *Zaccagnini v. Charles Levy Circulating Co.,* 338 F.3d 672 (7th Cir. 2003).

C. **Circumstantial Evidence of Pretext:** Any evidence that impeaches the employer's explanation may help show pretext. *Reeves v. Sanderson Plumbing Prods, Inc.,* 530 U.S. 133 (2000). For example, plaintiff may offer evidence that the employer's belief was incorrect (e.g., it did not hire the most qualified candidate) as proof that the employer's reason for action was insincere. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000). A plaintiff's superior qualifications can also show pretext, but the burden on the plaintiff is high. *Fischer v. Avanade, Inc.,* 519 F.3d 393, 404 (7th Cir. 2008) (holding that plaintiff must establish that "no reasonable person" could have disputed that plaintiff was better qualified for the position). *See also Ash v. Tyson Foods Inc.*, 126 U.S.1195 (2006); *Sublett v. Wiley & Sons*, 463 F. 3d 731 (7th Cir. 2006) (to show pretext, plaintiff's qualifications must be so superior that plaintiff is incontrovertibly better qualified for the position than the employee who received it).

D. **Specific Examples of Pretext:** Other circumstances that can suggest pretext include: a failure to timely mention a reason for termination; *Culver v. Gorman & Co.*, 416 F.3d 540 (7th Cir. 2005); deviations

from the employer's stated or usual procedure; *See e.g., Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010); *See also Davis v. Wis. Dep't of Corrections*, 445 F.3d 971 (7th Cir. 2006); *Rudin v. Lincoln Land Cmty Coll.*, 420 F.3d 712 (7th Cir. 2005); the employer's grounds for its adverse action are poorly defined, the grounds are inconsistently applied, the employee has denied the existence of the grounds, and no manager owns responsibility for the employment decision. *See e.g., Gordon v. United Airlines*, *Inc.*, 246 F.3d 878 (7th Cir. 2001). In addition, the sincerity of the employer's belief is undercut by the unreasonableness of the belief; employers need not be taken at their word. *Id.*

E. **Same Hirer/Firer:** The fact that the same person hired and fired the plaintiff does not preclude discrimination but is part of the evidentiary mix. *Chaney v. Plainfield Healthcare Center,* 612 F.3d 908 (7th Cir. 2010).

F. **Comparative evidence:** Plaintiff may prove pretext by offering evidence that similarly situated employees who are not in the plaintiff's protected group were treated more favorably. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) (employer's general practice with respect to minority employees may be relevant to pretext); *Lawson v. CSX Transp., Inc*. 245 F.3d 916 (7th Cir. 2001). As discussed earlier, opinions differ as to who is similarly situated. *Radue v. Kimberly Clark Corp*., 219 F.3d 612 (7th Cir. 2000) (plaintiff and similarly situated employee must be subject to same decision maker). *But see Ezell v. Potter*, 400 F.3d 1041, 1050 (7th Cir. 2005) (plaintiff similarly situated to his supervisor)*; Freeman v. M Madison Metro. Sch.'l Dist.*, 231 F.3d 374, 383 (7th Cir. 2000) (plaintiff can be similarly situated to e employees in different job positions). But see *Patterson v. Indiana Newspapers, Inc*. 589 F.3d 357 (7th Cir. 2009)(plaintiff not similarly situated to his supervisor).

G. Using Statistics to Demonstrate Pretext: Pattern evidence is admissible in individual disparate treatment cases, but its usefulness depends on its relevance to the challenged decision. *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008). Statistics may suggest pretext where the statistics encompass all employment decisions made by the employer in the relevant market. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000). However, statistics alone may not prove pretext. *Baylie v. Fed. Reserve Bank of Chi.*, 476 F. 3d 522, 524 (7th Cir. 2007); *Rummery v. Ill. Bell Tel. Co.*, 250 F.3d.553 (7th Cir. 2001). Evidence that an employer hires many workers within the protected class, while relevant, is not dispositive of nondiscrimination. *Reeves v. Sanderson Plumbing Prods, Inc.,* 530 U.S. 133 (2000).

(iv) Sufficiency of Evidence: In *Reeves v. Sanderson Plumbing Prods, Inc*., 530 U.S. 133 (2000), the Supreme Court unanimously held that a plaintiff's *prima facie* case, combined with evidence sufficient to rebut the employer's nondiscriminatory explanation, often meets plaintiff's burden of persuasion. Proof of pretext generally permits (but does not require) a fact finder to infer discrimination because proof that an employer falsely stated its reasons is probative of discrimination. However, in some cases, proof of pretext may not suffice to sustain a finding of discrimination. (For example, defendant gives a false explanation to conceal something other than discrimination). *See e.g. Benuzzi v. Bd. of Educ. of the City of Chicago*, 647 F.3d 652 (7th Cir. 2011) (stating that an employee must show not only that the employer's stated reasons for suspending her were dishonest, but also that the true reason was based on prohibited discriminatory animus). In determining the sufficiency of evidence, a court must credit the employee's evidence, and consider only the evidence from the movant that is uncontradicted, unimpeached, and provided by disinterested witnesses. *Reeves,* 120 S. Ct. at 2110; *Davis v. Wis. Dep't of Corrections,* 445 F.3d 971(7th Cir. 2006); *Tart v. Ill. Power Co.*, 366 F.3d 461 (7th Cir 2004). Courts should be particularly careful not to supplant their view of the evidence for that of the jury in employment discrimination cases, which often involve only circumstantial evidence. *Id.*

A. **Surviving Summary Judgment:** At summary judgment plaintiff need only raise a material issue of fact as to the believability of the employer's justification. *E.E.O.C. v. Target Corp.*, 460 F.3d 946, 960 (7th Cir. 2006); *See also Malozienc v. Pacific Rail Servs.*, 606 F.Supp.2d 837 (N.D.Ill. 2009). Plaintiff need not also provide evidence of discriminatory motive. *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005). "The plaintiff's oral testimony if admissible will normally suffice to establish a genuine issue of material fact," *Randolph v. Indiana Regional Council of Carpenters,* 453 F.3d 413 (7th Cir. 2006). On summary judgment, where the movant's version of the facts is based solely on self-serving assertions, self serving assertions to the contrary from the nonmovant may create a material issue of fact. *Szymansky v. Rite Way Lawn Maint. Co.*, *Inc.,* 231 F.3d 360 (7th Cir. 2000).

(v) **Instructing the jury:** If the case goes to a jury, the elaborate *McDonnell Douglas* formula should not be part of the jury instructions. *Achor v. Riverside Golf Club*, 117 F.3d 339, 340 (7th Cir. 1997). The ultimate question for the jury is whether the defendant took the action at issue because of the plaintiff's membership in a protected class. *Id*. at 341.

c. **Mixed Motives:** The plaintiff in a disparate treatment case need only prove that membership in a protected class was *a motivating factor* in the employment decision, not that it was the sole or even the "but for" factor. *See e.g., Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012); *Makowski v. SmithAmudsen LLC*, 662 F.3d 818 (7th Cir. 2011); *Lewis v. City of Chicago Police Dep't*, 590 F.3d 427 (7th Cir. 2009); *Boyd v. Ill. State Police*, 384 F.3d 888 (7th Cir. 2004) (jury instruction that race had to be "catalyst" for challenged decision was error).

(i) Desert Palace: If the employer proves that it had another reason for its action and that it would have made the same decision without the discriminatory factor, the employer may avoid liability for monetary damages, reinstatement or promotion. 42 U.S.C. § 2000e-5(g)(2); *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003); *Cook v. IPC Int'l Corp.*, 673

F.3d 625 (7th Cir. 2012); *Hossack v. Floor Covering Assoc. of Joliet, Inc.*, 492 F.3d 853 (7th Cir. 2007). The court may still grant declaratory relief, injunctive relief, and attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (overruling in part *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Cook v. IPC Int'l Corp.*, 673 F.3d 625 (7th Cir. 2012).

(ii) **Retaliation Claims:** The Seventh Circuit has held that in a mixed motives retaliation case, the plaintiff is not entitled to declaratory relief, injunctive relief, or attorneys' fees because retaliation is not listed in the mixed motives provision of the 1991 Civil Rights Act. *Speedy v. Rexnord Corp.*, 243 F.3d 397 (7th Cir. 2001); McNutt *v. Bd. of Trs. of the Univ. of Ill.*, 141 F.3d 706 (7th Cir. 1998). Following *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009) it is not clear that a plaintiff can bring a *Price Waterhouse* mixed motive claim at all under Title VII's retaliation provisions, but the Seventh Circuit has yet to expressly declare such claims are prohibited.

d. **After-Acquired Evidence:** If an employer takes an adverse employment action for a discriminatory reason and later discovers a legitimate reason, which it can prove, would have led it to take the same action, the employer is still liable for the discrimination, but the relief that the employee can recover may be limited. *McKennon v. Nashville Banner Publ's Co.*, 513 U.S. 352, 363 (1995) (holding the employer must establish that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge"); *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002) (after-acquired evidence of misrepresentation on resume or job application does not bar claim); *Rodriguez, ex rel. Fogel v. City of Chicago*, No. 08-cv-4710 (N.D.Ill. 2011) (*Available at*: 2011 WL 1103864); *Berg v. BCS Fin. Corp.*, 372 F.Supp. 108, 1096 (N.D.Ill. 2005) (explaining that Illinois state courts have not explicitly written off the acter-acquired doctrine but have suggested that it is not available in claims arising under state law); *Sheehan v. Donlen Corp.*, 979 F.Supp. 760, 766 (denying employer's motion for summary judgment based on the after-acquired evidence doctrine *Petrovich v. LPI Serv. Corp.*, 949 F.Supp. 626, 628 (N.D.Ill. 1996). In general, the employee is not entitled to reinstatement or front pay, and back pay is limited to the time between the occurrence of the discriminatory act and the date the misconduct

justifying the job action is discovered. *McKennon*, 513 U.S. at 361-62.

e. Pattern or Practice of Discrimination: In class actions or other cases alleging a widespread practice of intentional discrimination, plaintiffs may establish a *prima facie* case using statistical evidence. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). The statistical evidence needs to control for potentially neutral explanations for the employment disparities. *Radue v. Kimberly Clark Corp.*, 219 F.3d 612 (7th Cir. 2000). Plaintiffs often combine statistical evidence with anecdotal or other evidence of discriminatory treatment. *See, e.g., Adams v. Ameritech Servs., Inc.,* 231 F.3d 414 (7th Cir. 2000) (statistics eliminate innocent variables and anecdotal evidence supports discriminatory animus); *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 874-75 (7th Cir. 1994). The employer can rebut the *prima facie* case by introducing alternative statistics or by demonstrating that plaintiff's proof is either inaccurate or insignificant. *Teamsters*, 431 U.S. at 339-41. The plaintiff then bears the burden of proving that the employer's information is biased, inaccurate, or otherwise unworthy of credence. *Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985).

2. Disparate Impact: Even where an employer is not motivated by discriminatory intent, Title VII prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class. *Puffer v. Allstate Ins. Co.*, ---F.3d--- (7th Cir. 2012) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 325 n. 15) (explaining "disparate impact claims require no proof of discriminatory motive and 'involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity'…"); *Farrell v. Butler Univ.*, 421 F.3d 609, 616 (7th Cir. 2005); *See also O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 986 (7th Cir. 2001); *Reidt v. County of Trempealeau*, 975 F.2d 1336, 1340 (7th Cir. 1992) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 329).

a. Supreme Court Cases: The Supreme Court first described the disparate impact theory in 1971, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-2 (1971): Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate

as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

(i) ***Wards Cove*:** In 1989, the Supreme Court reduced the defendant's burden of proving business necessity to a burden of producing evidence of business justification. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989).

(ii) **The Civil Rights Act of 1991:** The Civil Rights Act of 1991 overturned that portion of the *Wards Cove* decision. 42 U.S.C. § 2000e-2(k).

b. **Examples:** Examples of practices that may be subject to a disparate impact challenge include written tests, height and weight requirements, educational requirements, and subjective procedures, such as interviews.

c. **Allocation of proof:**

(i) **Prima facie case:** The plaintiff must prove, generally through statistical comparisons, that the challenged practice or selection device has a substantial adverse impact on a protected group. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). The defendant can criticize plaintiff's statistical analysis or offer different statistics.

(ii) **Business necessity:** If the plaintiff establishes disparate impact, the employer must prove that the challenged practice is "job-related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(iii) **Alternative practice with lesser impact:** Even if the employer proves business necessity, the plaintiff may still prevail by showing that the employer has refused to adopt an alternative employment practice which would satisfy the employer's legitimate interests without having a disparate impact on a protected class. 42 U.S.C. § 2000e-2(k)(1)(A)(ii). *See generally Allen v. Chicago*, 351 F.3d 306 (7th Cir. 2003); *Bryant v. City of Chicago*, 200 F.3d 1092 (7th Cir. 2000) (upholding the content of police lieutenant's exam but holding the city violated Title VII by refusing to use a less discriminatory method for promotion); *Woodard v. Rest Haven Christian Servs.*, No.

07-cv-0665 (N.D.Ill. 2009) (*Available at*: 2009 WL 703270).

d. Selection Criterion

(i) Scored tests: There are several methods of measuring adverse impact.

A. The EEOC Four-Fifths Rule: One method is the EEOC's Uniform Guidelines on Employee Selection Criteria, which finds an adverse impact if members of a protected class are selected at a rate *less than four fifths* (80 percent) of that of another group. *See e.g. Allen v. City of Chicago*, 351 F.3d 306, 310 n. 4 (7th Cir. 2003); *Kozlowski v. Fry*, 238 F.Supp.2d (N.D.Ill. 2002). For example, if 50 percent of white applicants receive a passing score on a test, but only 30 percent of African-Americans pass, the relevant ratio would be 30/50, or 60 percent, which would violate the 80 percent rule. 29 C.F.R. §§ 1607.4 (D) and 1607.16 (R)(2003). The 80 percent rule is a rule of thumb for administrative convenience, and has been criticized by courts. In certain circumstances, the EEOC will determine that smaller differences than the above-mentioned Four-Fifths rule will constitute an adverse impact. In those circumstances, the smaller difference is deemed to be "significant both in and practical terms or where a user's actions have discouraged applicants disproportionately based on" the potential applicants' status as a member of a protected class. 29 C.F.R. § 1607.4(D).

B. **Standard Deviation Analysis:** The courts more often find an adverse impact if the difference between the number of members of the protected class selected and the number that would be anticipated in a random selection system is *more than two or three standard deviations*. *See e.g. Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 424 (7th Cir. 2000) ("Two standard deviations is normally enough to show that is extremely unlikely that [a] disparity is due to chance."); *See also Cullen v. Indiana University Bd. of Trustees,* 338 F.3d 693, 702 n. 6 (7th Cir. 2003). "However, the Seventh Circuit rejects a bright-line rule that would find statistical evidence of less than two standard deviations inadmissible." *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 465 (N.D.Ill. 2009) aff'd, No. 11-1273 (7th Cir. Mar. 27, 2012) (*Available at*: 2012 WL 1003548); *See also Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir. 2001).

C. **The Defendant's Rebuttal—"Business Necessity":** The defendant may then rebut the *prima facie* case by demonstrating that the scored test is job related and consistent with business necessity by showing that the test is "validated," although a formal validation study is not necessarily required. 29 CFR § 1607.5(B)(2003); *See also Lewis v. City of Chicago,* ---U.S.---, 130 S.Ct. 2191 (2010); *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 998 (1988); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The Seventh Circuit has held, in the context of using a particular cut-off score for hiring decision, that such scoring satisfies business necessity if the score is based on a "logical 'break-point' in the distribution of scores." *Bew v. Chicago*, 252 F.3d 891 (7th Cir. 2001). 2005 U.S. Dist. WL 693618 (N.D. Ill. Mar. 22, 2005) (a discriminatory cut score on an entrance exam must be shown to measure minimum qualifications for successful job performance).

(ii) **Nonscored objective criteria:** The Uniform Guidelines are applicable to other measures of employee qualifications, such as education, experience, and licensing.

In cases involving clerical or some blue-collar work, the courts have generally found unlawful educational requirements that have a disparate impact. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (invalidating high school diploma requirement for certain blue collar positions, where 34 percent of white males in state had completed high school while only 12 percent of African American males had done so, and defendant did not demonstrate link between high school diploma and job performance).

(iii) **Subjective criteria:** Subjective decision making criteria are subject to challenge under a disparate impact theory. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *See also McReynolds v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, No. 05-cv-6583 (N.D.Ill. Feb. 14, 2011) (Available at: 2011 WL 658155); *Watkins v. City of Chicago*, 73 F.Supp.2d 944, 948 (N.D.Ill. 1999).

e. **Race Conscious Steps to Avoid Disparate Impact**: In *Ricci v. DeStefano*, 557 U.S. 557 129 S.Ct. 2658 (2009), the Supreme Court held that an employer can take race conscious steps to mitigate the disparate impact of an employment test or procedure only where there is a strong basis in evidence that inaction would lead to disparate impact liability.

3. **Harassment:** Although racial, religious, ethnic and sexual harassment are forms of disparate treatment, a different legal analysis is used for harassment claims.

a. **Types of Harassment:** Traditionally, there were two types of sexual harassment, quid pro quo and hostile environment. These labels are not dispositive of liability, *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), although the terms continue to be used. For employer liability, the focus is on who the harasser is, what the harasser did, and how the victim responded. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. Inc., v. Ellerth*, 524 U.S. 742 (1998).

(i) **Quid pro quo:** "Quid pro quo harassment occurs in situations where submission to sexual demands is made a condition of tangible employment benefits." *Bryson v. Chicago State Univ.*, 96 F.3d 912, 915 (7th Cir. 1996) (finding that committee assignments and in-house titles can constitute tangible employment benefits for the purposes of

a quid pro quo harassment claim); *See e.g. Jackson v. County of Racine*, 474 F.3d 493, 501 (7th Cir. 2007) (holding a promise for a promotion in exchange for sexual favors only constitutes quid pro quo harassment if a promotion actually was available and the plaintiff was qualified for the promotion.); *Traylor v. Brown*, 295 F.3d 783, 789 (7th Cir. 2002) (upholding lower court's dismissal of plaintiff's claim because merely denying the plaintiff the ability to perform certain clerical duties did not deny her access to any tangible employment benfits); *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997); *Mattern v. Panduit Corp.*, No. 11-cv-984 (N.D.Ill. Oct. 11, 2011) (*Available at*: 2011 WL 4889091); *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, No. 09-cv-1824 (N.D.Ill. Oct. 5, 2011) (*Available at*: 2011 WL 4738520); *Walko v. Acad. of Bus. & Career Dev., LLC*, 493 F.Supp.2d 1042, 1046 (N.D.Ill. 2006); *Hawthorne v. St. Joseph's Carondelet Child Ctr.*, 982 F.Supp. 586 (N.D.Ill. 1997). The E.E.O.C. describes quid pro quo sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . .." 29 C.F.R. § 1604.11(a)(1)-(2).

A. **Prima Facie Case:** "In *Bryson v. Chicago State University,* 96 F.3d 912, 915–916 (7th Cir.1996), the Seventh Circuit referred to a five-part test, in which a plaintiff must show: '(1) that she or he is a member of a protected group, (2) the sexual advances were unwelcome, (3) the harassment was sexually motivated, (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment, and (5) *respondeat superior* has been established.' The fourth element asks 'what tangible aspect of employment was affected,' and the fifth element 'recognizes that there is a need to link the employer to the actions of the harasser.'" *Mattern v. Panduit Corp.*, No. 11-cv-984 (N.D.Ill. Oct. 11, 2011) (Available at: 2011 WL 4889091).

(ii) **Hostile environment:** "A sexually hostile work environment is a form of sex discrimination under Title VII." *E.E.O.C. v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 432 (7th Cir. 2012). In order to be actionable, "a plaintiff must prove conduct that is so severe and pervasive as 'to alter the conditions of [her] employment and create an abusive working environment.'" *Id*. (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). The E.E.O.C. describes such a working environment as existing when "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3).

A. **Prima Facie Case:** For a *prima facie* case, the plaintiff must demonstrate that (1) she was subjected to unwelcome sexual harassment; (2) the harassment was based on sex; (3) the harassment unreasonably interfered with the plaintiff's work performance and environment and (4) there is a basis for employer liability (more on this element below). *Robinson v. Sappington*, 351 F.3d 317, 328-329 (7th Cir. 2003); *See also Erickson v. Wisc. Dep't of Corrections*, 469 F.3d 600, 604 (7th Cir. 2006); *Patton v. Keystone RV Co.*, 455 F.3d 812, 815-816 (7th Cir. 2006) (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-431 (7th Cir. 1995) (holding mere offensive conduct does not give rise to liability, for "Title VII is not a civility code" and the "occasional vulgar banter tinged with sexual innuendo, of coarse and boorish workers" does not establish a hostile work environment). "The third prong of the prima facie case requires both a subjective and objective inquiry, compelling the court to ask whether a reasonable person would find the environment hostile…. It is not a bright line…between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other." *Id*. at 329; *See e.g., E.E.O.C. v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 432 (7th Cir. 2012) (quoting *Gentry v. Export Packaging Co.*, 238 F.3d 842, 850 (7th Cir.

2001) (explaining the work environment should be evaluated "from both a subjective and objective viewpoint, 'one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'"); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 975-976 (7th Cir. 2004); *Barth v. Village of Mokena*, No. 03-cv-6677 (N.D.Ill. Mar. 31, 2006) (*Available at*: 2006 WL 862673). This analysis is fact-intensive and depends on the totality of the circumstances. *Bilal v. Rotec Indus., Inc.*, 326 F.App'x 949, 957 (7th Cir. 2009); *See also Lapka v. Chertoff*, 517 F.3d 974, 982 (7th Cir. 2008) (explaining courts should evaluate a plaintiff's claim of hostile work environment in light of the "particular facts and circumstances" of the case); *Robinson* at 329 (explaining the court "must consider *all of the circumstances*, including the frequency of the discriminatory conduct; its severity; whether is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.") (Emphasis added).

B. **Degree of Severity of Offensive Conduct**: Courts generally require that the offensive behavior be fairly extreme, yet need not be so severe that it makes the work environment intolerable. *See e.g. Jackson v. County of Racine*, 474 F. 3d 493, 500 (7th Cir. 2007) (work environment need not be "hellish" to constitute illegal harassment); *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 942 (7th Cir. 2007) ("Title VII comes into play before the harassing conduct leads to a nervous breakdown."). Factors that the courts consider include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993); *See e.g. E.E.O.C. v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 432-433 (7th Cir. 2012) (plaintiff was subjected to harassment during every shift that a particular assistant manager was on duty).

C. **Second Hand Harassment:** Second hand harassment (harassment that plaintiff herself did not hear) will have a lesser impact on plaintiff. *Whittaker v. Northern Ill. Univ.*, 424 F.3d 640 (7th Cir. 2005); *Smith v. Northeastern Ill. Univ.*, 388 F.3d 559 (7th Cir. 2004); *See also Yuknis v. First Student*, 481 F.3d 552, 555-556 ("Offense based purely on hearsay or rumor really is 'second hand;' it is less credible, and, for that reason and also because it is less confrontational, it is less wounding than offense based on hearing or seeing…."); *Mannie v. Potter*, 394 F.3d 977, 983 (7th Cir. 2005) (holding that comments made about the plaintiff out of her presence were less damaging); *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134 (7th Cir. 1997); *Miller v. Dep't of Corrections*, No. 08-cv-50248 (Mar. 24, 2011) (Available at: 2011 WL 1120270);*Taylor v. ABT Electronics, Inc.*, No. 05-cv-576 (N.D.Ill. Jan. 15, 2010) (*Available at*: 2010 WL 234997). Whether a comment is second-hand harassment or simply a vague comment directed at the plaintiff can be difficult to determine so the comment should be analyzed by examining the context in which it was said. *Yuknis* at 554. Incidents of harassment directed at co-workers have some relevance in determining whether a hostile work environment exists; however, they are more o an indirect connection, so they are given less weight. *Yancick v. Hanna Steel Corp*., 653 F.3d 532 (7th Cir. 2011).

D. **Additional guidelines:** Harassment need not be both pervasive *and* severe. *Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007); *See also Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) ("Even one act of harassment will suffice if it is egregious."). Direct contact with intimate body parts is the most severe type of sexual harassment. *Patton v. Keystone RV Co.*, 455 F.3d 812 (7th Cir. 2006) (four touchings might suffice)*; Worth v. Tyer II,* 276 F.3d 249 (7th Cir. 2001) (two touchings of breast actionable). Comments need not be of a sexual nature as long as they create different terms and conditions of employment.

Berry v. CTA, 618 F.3d 688 (7th Cir. 2010) (comments may be sexist rather than sexual, but those comments must still be analyzed objectively and subjectively); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007). Thus, a thinly-veiled murder threat can be sufficient. *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). The harassment must be both objectively and subjectively offensive; however, for the subjective inquiry, it is sufficient that the plaintiff declare that she felt harassed. *Worth,* 276 F.3d 249. A victim's own use of racist or sexist remarks does not necessarily mean that the victim welcomes these types of remarks. *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 940 (7th Cir. 2007); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004). Sexual harassment can exist when a man treats a woman in a way he would not treat a man. *Frazier v. Delco Elecs. Co.*, 263 F.3d 663 (7th Cir. 2001).

E. **Application of guidelines:** It is often difficult to predict whether a given set of facts will be sufficiently severe to be considered a hostile environment. *See, e.g. Worth v. Tyer II,* 276 F.3d 249 (7th Cir. 2001) (two touchings of breasts is actionable); *Gentry v. Exp. Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (touching, plus solicitation, plus crude pictures shown by supervisor is actionable); *Hostetler v. Quality Dining, Inc.* 218 F.3d 798 (7th Cir. 2000) (two attempted kisses, an attempted bra removal and a lewd comment may create hostile environment); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004) (repeated use of word "nigger" creates racial hostility"); *Patt v. Family Health Sys., Inc.*, 280 F.3d 749 (7th Cir. 2002) (eight offensive comments with only two made to plaintiff not pervasive or hostile); *Quantock v. Shared Mktg. Servs. Inc.*, 312 F.3d 899 (7th Cir. 2002) (boss propositioning employee sexually and explicitly at one meeting actionable); *Hilt-Dyson v. Chicago*, 282 F.3d 456 (7th Cir. 2002) (occasional back rubbing and inspecting clothes not objectively unreasonable); *Wolf v. Northwest Ind. Symphony Soc'y,* 250 F.3d 1136 (7th Cir. 2001) (collecting

cases); *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011) (making mean faces at another falls short of hostile environment).

F. **Proof of Harm:** The plaintiff is not required to prove psychological harm or tangible effects on job performance. *Harris v. Forklift Sys.*, 510 U.S. 17 (1993). "Objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). The sexual harassment need not occur in front of other witnesses to be actionable. *Cooke v. Stefani Mgt. Servs., Inc.*, 250 F.3d 564 (7th Cir. 2001).

(iii) Employer liability

A. **The *Meritor* Decision:** In *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70-73 (1986), the Supreme Court held that an employer is not automatically liable for harassment by a supervisor in a hostile environment case, and that courts should look to traditional agency principles to determine liability. Essentially, there are two standards for employer liability: vicarious liability, where the harasser is a supervisor; and negligence, where the harasser is a coworker.

B. **Harassment by a co-worker:** When the harasser is a co-worker, the employer is liable only if it was negligent, that is, only if it knew or should have known of the harassment and failed to take reasonable corrective action. *Bernier v. Morningstar, Inc.*, 495 F.3d 369 (7th Cir. 2007) (citing *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005)) (plaintiff has burden to show that employer knew of harassment and that the employer did not act reasonably to equalize the working conditions once it had knowledge); *See also Sutherland v. Wal-Mart Stores*, 632 F.3d 990 (7th Cir. 2011) (holding an employer may be liable for a hostile work environment created by employees when the employer does not promptly and adequately respond to employee harassment);

Montgomery v. Am. Airlines, Inc., 626 F.3d 382 (7th Cir. 2010); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004) (no employer liability where victim made only vague complaints to managers); *Miller v. Ill. Dep't of Corrections*, Case No. 08-cv-50248 (N.D.Ill. Mar. 24, 2011) (*Available at*: 2011 WL 1120270); *But see Cerros v. Steel Technologies, Inc.* 398 F.3d 944 (7th Cir. 2005) (plaintiff need not follow letter of employer's harassment policy if employer had notice of harassment); *Loughman v. Malnati Org.*, 395 F.3d 404 (7th Cir. 2005) (if coworker harassment is sufficiently severe, it may not be enough for the employer to simply warn the harassers).

1. **Notice:** "With respect to the extent of the notice given to an employer, a plaintiff cannot withstand summary judgment without presenting evidence that she gave the employer enough information to make a reasonable employer think there was some probably that she was being sexually harassed." *Parkins v. Civil Contractors of Ill., Inc.*, 163 F.3d 1027, 1035 (7th Cir. 1998). The plaintiff must present this evidence to someone who has some sort of duty to channel the complaints to those who are empowered to act upon such a complaint. *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997). If a direct supervisor is identified in a company's employment policy as someone who can receive and relay employee complaints, the plaintiff's notification to that person is considered notice to the corporation itself. *Id*. at 675; *See also Parkins* at 1035; *Miller v. Ill. Dep't of Corrections*, Case No. 08-cv-50248 (N.D. Ill. Mar. 24, 2011) (*Available at*: 2011 WL 1120270)

2. **Reasonable Response**: Once an employer knows of conduct causing a hostile work environment "an employer satisfies its legal duty in coworker harassment cases if it takes reasonable steps to discover and rectify acts

of harassment by its employees. *Bernier* at 373. The assessment of an employer's actions begins by evaluating the steps the employer actually took. *Sutherland* at 994. The steps an employer "failed to take only relevant if the steps it actually took were not reasonably likely to end the harassment." *Id*. It is important to note that what is "reasonable" wholly depends on the gravity of the harassment. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995).

3. Steady Stream of Harassment: The existence of a steady stream of harassment may be evidence that the employer's harassment policy is not effective. *Id. See also Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 943 (7th Cir. 2007) (failure to discipline harasser despite multiple complaints suggests that employer did not exercise reasonable care).

C. **Harassment by a supervisor:** An employer is liable for actionable harassment by a supervisor with immediate (or higher) authority over the harassed employee. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The employer can be liable for harassment by a supervisor that creates a hostile work environment or for harassment that results in an adverse job action. If the harassment creates a hostile work environment, the employer may have an affirmative defense to liability. If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is liable and has no affirmative defense. *Huff v. Sheahan*, 493 F.3d 893 (7th Cir. 2007); *see infra* "Affirmative Defense."

1. **The Harasser:** The harasser must be the one who imposes the adverse job action or there must be evidence of a conspiracy between the decision maker and the

harasser. *Murray v. Chi.Transit Auth.*, 252 F.3d 880 (7th Cir. 2001).

2. **Who is a Supervisor:** Harassment by high-level supervisors is imputed to the employer as a matter of vicarious liability. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001). The plaintiff must show that the harasser was her supervisor. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473 (7th Cir. 2004). A supervisor has the authority to hire, fire, demote, promote, transfer, *or* discipline an employee. *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382 (7th Cir. 2010) (stating "supervisor is a term of art that denotes more than an individual with a higher rank, a superior title, or some oversight duties."); *Valentine v. City of Chicago*, 452 F.3d 670 (7th Cir. 2006); *Huff v. Sheahan*, 493 F.3d 893 (7th Cir. 2007) (individuals who are authorized to take tangible employment actions against the plaintiff are supervisors); *But see Rhodes v. IDOT*, 359 F.3d 498 (7th Cir. 2004); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002)*; Gawley v. Ind. Univ.,* 276 F.3d 301 (7th Cir. 2001). Supervisors without this authority are treated the same as co-workers for purposes of determining employer liability (negligence standard). *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001). But, an employer must exercise greater care where the harasser is a low level supervisor than where the harasser is a coworker; how much greater is usually a jury question. *Doe v. Oberweis*, 456 F.3d 704 (7th Cir. 2006). One factor in determining whether a manager has sufficient supervisory authority is whether he is the only manager on site for long periods. *Doe*, 456 F.3d 704.

3. **Tangible Employment Action:** If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is liable and has no affirmative defense (described below).

D. **Harassment by independent contractor:** An employer may be liable for harassment by a third party, *Lapka v. Chertoff*, 517 F.3d 974, 984 n. 2 (7th Cir. 2008), for example, by an employee of an independent contractor. *Dunn v. Wash. County Hosp.*, 429 F.3d 689 (7th Cir. 2005). Moreover, where an employer loans an employee's services to another employer, Title VII protects the employee against retaliation by either entity. *Flowers v. Columbia Coll. Chi.*, 397 F.3d 532 (7th Cir. 2005).

E. **The Faragher/Ellerth Affirmative Defense:** When the harasser is the employee's supervisor and no tangible employment action is taken, the employer may raise an affirmative defense. The defense has two elements: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

1. **Reasonable Care**: While proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. For example, an employer must promulgate a policy, which the plaintiff can understand. *EEOC v. V&J Foods, Inc*., 507 F.3d 575 (7th Cir. 2007).

2. **Will the response prevent future harassment:** The employer's response to reported harassment must be reasonably

calculated to prevent future harassment. *Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007); See e.g., Tutman v. WBBM-TV, Inc./CBS, Inc., 209 F.3d 1044 (holding an employer has taken adequate remedial measures where it conducts a prompt investigation into the harassment complaint, reprimands the harasser, produces a letter of apology, and separates the victim from the harasser); *See also Roby v. CWI*, 579 F.3d 779 (7th Cir. 2009) (employer's response sufficient where employer promptly investigated and reprimanded harasser); *Porter v. Erie Foods Intern., Inc.,* 576 F.3d 629 (7th Cir. 2009) (employer's investigation was sufficient); *But see Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001) (employer response that stops harassment not necessarily adequate); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798 (7th Cir. 2000) (holding an employer who transfers a harassment victim into a materially worse position has not provided an effective remedy and may be liable for damages arising from the undesirable transfer (even if the harassment has stopped due to the transfer)).

3. **Anti-Harassment Policies:** The mere creation of an anti-harassment policy does not establish this affirmative defense; the employer must implement the policy and respond to complaints brought under it. *E.E.O.C. v. Mgmt Hospitality of Racine, Inc., et al.*, 666 F.3d 422 (2012) (holding "a rational jury could have found that the (employer's) policy and complaint mechanis, were not reasonably effective in practice," because the managerial employees did not carry out their duties, frequently ignored complaints of harassment, delayed investigations for months, and were at times possibly engaging in harassing behavior); *See also Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001). The defense is

not available when the employer fails to name a person to whom an employee may complain. *Gentry v. Exp. Packaging Co.*, 238 F.3d 842 (7th Cir. 2001), or where the employer's harassment policy designates the harasser as the only person to whom the harassment victim can complain. *Faragher,* 524 U.S at 790. Moreover, if the employer shrugs off complaints of harassment and does not provide ready access to its anti-harassment policy, it has not acted in good faith. *See e.g., Berry v. CTA*, 618 F.3d 688 (7th Cir. 2010) (where supervisor to whom plaintiff complained told plaintiff that she would lose her job if she complained and made other disparaging remarks, summary judgment reversed as to whether employer was negligent in responding to harassment complaint); *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001).

F. The Plaintiff's Complaint (or lack thereof): While proof that an employee failed to fulfill his or her corresponding obligation of reasonable care by not making use of an employer-provided complaint procedure, demonstrating the employee's fail to use the procedure will normally satisfy the employer's duty under the second element of the employer's affirmative defense. *Faragher*, 524 U.S. 775 (1998); *See also Burlington Indus.*, 524 U.S. 742 (1998). If the plaintiff waited a significant period of time to complain about harassing behavior, that may also satisfy the employer's duty under the second element of the affirmative defense. *See e.g., Roby v. CWI, Inc.*, 579 F.3d 779 (five months too long); *Jackson v. County of Racine*, 474 F.3d493 (7th Cir. 2007) (four months too long); *But see Johnson v. West*, 218 F.3d 725 (7th Cir. 2000) (allowing a case to proceed even though plaintiff waited an entire year to report harassing behavior). An employee's refusal to provide details during an investigation may also doom his or her claim. *Porter v. Erie Foods Intern, Inc.*, 576 F.3d 629 (7th Cir. 2009).

An employee need not use the phrase "sexual harassment" when making her complaint. *Gentry v. Exp. Packaging Co.*, 238 F.3d 842 (7th Cir. 2001); *See e.g. Valentine v. City of Chicago*, 452 F.3d 670 (holding an employee who complains that a supervisor "put his hands on me" sufficiently put the employer on notice."). A plaintiff's complaint to a coworker, if relayed to management, may also suffice to put the employer on notice. *Bombaci v. Journal Cmty. Pub. Group, Inc.*, 482 F.3d 979 (7th Cir. 2007).

G. **Constructive discharge:** Severe harassment, which would compel an employee to resign, renders the affirmative defense unavailable because such constructive discharge is a tangible employment action. *Pa. State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342 (2004); *Patton v. Keystone RV Co.*,2006 WL 2129723 (7th Cir. 2006). The employer may assert the *Faragher* affirmative defense unless the plaintiff reasonably resigned in response to an adverse action changing her employment status such as a demotion, extreme cut in pay or humiliating change of position. Where the harasser has been fired, there is no evidence that the harassment would continue, undercutting constructive discharge. *McPherson v. City of Waukegan*, 379 F.3d 430 (7th Cir. 2004).

H. **Discovery:** Plaintiffs who seek damages for emotional distress will likely be required to turn over psychiatric records. *See e.g., Doe v. Oberweis*, 456 F.3d 704, 718 (7th Cir. 2006); *See also Flowers v. Owens*, 274 F.R.D. 218 (N.D.Ill. 2011); *Noe v. R.R. Donnelley & Sons*, Case No. 10-cv-2018 (N.D.Ill. Apr. 12, 2011) (Available at: 2011 WL 1376968). However, the Seventh Circuit has yet to declare whether *all* plaintiffs who seek damages for emotional distress must turn over such records or only those plaintiffs whose emotional distress claims are "severe." *See Flowers* at 224-229.

(iv). **Same Sex Harassment:** An employer may be liable for harassment by a supervisor or co-worker who is the same gender as the plaintiff, provided that the harassment was motivated by the

plaintiff's gender. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998) (holding sex discrimination consisting of same-sex sexual harassment is actionable under Title VII); *See e.g. Warner v. USF Holland, Inc.*, Case No. 08-cv-6823 (N.D.Ill. Jan. 25, 2012) (*Available at*: 2012 WL 245190). A husband and wife employed in the same workplace may both experience gender-based harassment, at the hands of different managers. *Venezia v. Gottlieb Mem'l Hosp.*, 421 F.3d 468 (7th Cir. 2005). Harassment based on sexual orientation alone is not actionable. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr, Inc.* 224 F.3d 701 (7th Cir. 2000).

(v). Racial or Ethnic Harassment: Workers who are subjected to racial or ethnic jokes, insults, graffiti, etc. may be able to establish a violation of Title VII. *See Cerros v. Steel Technologies*, 288 F.3d 1040 (7th Cir. 2002) (anti-Hispanic harassment actionable; an unambiguous racist statement such as "spic"is at the severe end of the spectrum)*; Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668 (7th Cir. 1993). While racial harassment need not be explicitly racial, the harassment must be sufficiently tied to race to be actionable. *Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854 (7th Cir. 2005). In general, the legal standards for racial harassment are the same as for sexual harassment, as detailed above.

(vi). "Equal Opportunity" Harassment: When an employer harasses everyone equally, Title VII is not violated.. *See e.g. Yancick v. Hanna Steel Corp.,* 653 F.3d 532 (7th Cir. 2011); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000); *Wyninger v. New Venture Gear, Inc.* 361 F.3d 965 (7th Cir. 2004) (both men and women experienced vulgar language). But where one group experienced more severe harassment because of membership in a protected class, Title VII has been violated. *Kampmier v. Emeritus Corp.*, 472 F. 3d 930, 940 (7th Cir. 2007).

4. Retaliation

a. Standing for Retaliation Claims: Any person aggrieved by an unlawful retaliatory action may bring a retaliation claim under Title VII. *Thompson v. North American Stainless*, 131 S.Ct. 863 (2011) (holding an employer's alleged act of firing an employee in retaliation against an employee's fiancée, if proven, constituted unlawful retaliation). The Supreme Court defined "person aggrieved" as anyone in the protected "zone of interest" of the

Title VII provision whose violations form the basis for the legal complaint. *Id.* at 870. This includes more than just the person who participated or opposed an unlawful employment practice or action. *Id.* In *Thompson*, the Supreme Court held the plaintiff had standing to bring a retaliation action when he was fired after his fiancée filed a discrimination complaint. *Id.*

b. Retaliation for "Participation": Title VII prohibits discrimination against an employee or job applicant "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997) (the term "employees," as used in anti-retaliation provision of Title VII, includes former employees). For the employee's expression or conduct to be protected, it must make reference to a protected class or type of discrimination. *Tomanovich v. City of Indianapolis*, 457 F.3d 656 (7th Cir. 2006). If an employee only refers to lost benefits is not protected conduct under Title VII. *Miller v. Am. Family Mut. Ins. Co.,* 203 F.3d 997 (7th Cir. 2000). Informal complaints made to an employer are protected. *Davis v. Time Warner Cable of Southeastern Wisconsin, L.P.*, 651 F.3d 664 (7th Cir. 2011). Where an employer loans an employee's services to another employer, Title VII protects the employee against retaliation by either entity. *Flowers v. Columbia Coll. Chi.*, 397 F.3d 532 (7th Cir. 2005).

c. Retaliation for "Opposition": Title VII also prohibits discrimination against an employee or applicant "because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The opposition clause protects an employee who complains of discrimination, whether he makes an affirmative complaint or simply responds to his employer's questions. *Crawford v. Metropolitan Gov't of Nashville*, 129 S.Ct. 846 (2009). The employee is protected if she had a reasonable and good faith belief that the practice opposed constituted a violation of Title VII, even if it turned out not to violate Title VII. *Fine v Ryan Int'l Airlines*, 305 F.3d 746 (7th Cir. 2002); *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1043 (7th Cir. 1980). But, if the worker engages in protected activity that is unreasonable with a bad faith purpose, there is no protection. *Nelson v. Realty Consulting Services, Inc.*, 431 Fed.Appx. 502 (7th Cir. 2011); *Mattson v. Caterpillar, Inc*. 359 F.3d 885 (7th Cir. 2004); *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984) (court should balance disruption of plaintiff's work absence to attend protests against the protest's advancement of Title VII

policies). A complaint to one's employer concerning a third party harasser (i.e. clients or customers) may also trigger retaliation protection. *Pickett v. Sheridan Heath Care Ctr.*, 619 F.3d 434 (7th Cir. 2010).

d. **The Importance of Timing:** The amount of time that passes between the protected activity and the adverse employment action can be probative of the retaliatory motive. See e.g., *Burnell v. Gates Rubber Co.*, 647 F.3d 704 (7th Cir. 2011) (plaintiff being fired after a meeting in which he was accused of "playing the race card" establishes a question of material fact regarding causation sufficient enough to survive summary judgment); *Magyar v. St. Joseph Regional Medical Center*, 544 F.3d 766 (7th Cir. 2008) (on employer's Rule 56 motion, suspicious timing clock starts at most plaintiff-favorable time); *Lewis v. City of Chicago*, 496 F.3d 645, 655 (7th Cir. 2007); *Lang v. Ill.s Dep't. of Children & Family Servs.,* 361 F.3d 416 (7th Cir. 2004) (after years of positive evaluations, baseless complaints made after plaintiff's protected complaint); *Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720 (7th Cir. 2003) (holding a three-month time span between the protected activity and the alleged retaliation is not too long to support an inference of retaliation.); *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000). However, suspicious timing alone, without additional evidence and even as short as one week between protected activity and discharge, can be insufficient. *Culver v. Gorman & Co.,* 416 F.3d 540 (7th Cir. 2005); *Pugh v. City of Attica*, 259 F.3d 619 (7th Cir. 2001); *see also Hall v. Forest River, Inc.* (7th Cir. 2008) (holding that "the mere fact that one event preceded another does not prove causation," especially when the alleged retaliation is a failure to promote). A supervisor's hostility following a discrimination complaint can support an inference of causation. *Pickett v. Sheridan Heath Care Ctr.*, 619 F.3d 434 (7th Cir. 2010) (citing supervisor comments such as "nothing is going to change" and "why don't you go elsewhere"). For a helpful circumstantial evidence retaliation analysis, albeit in a First Amendment case, see *Valentino v. Village of South Chicago Heights,* 575 F.3d 664 (7th Cir. 2009).

e. **Application of *McDonnell-Douglas*:** Plaintiffs may use the *McDonnell-Douglas* burden-shifting formula in retaliation cases. To show a prima facie case, a plaintiff must show that she engaged in protected activity under Title VII; that she suffered an adverse action; and that there is a causal link between the two under either the direct or indirect method of proof. *O'Neal v. City of Chicago*, 588 F.3d 406 (7th Cir. 2009); *See also Tomanovich v. City of*

Indianapolis, 457 F.3d 656, 662-663 (7th Cir. 2006); *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 642-644 (7th Cir. 2002). How clear the causal connection must be in order to establish the prima facie case is still unclear. Some judges require a direct causal connection between the two while others have only required the plaintiff to establish that he or she was performing his or her job satisfactorily when he or she experienced the adverse action following his or her protected activity. *See e.g. Burnell v. Gates Rubber Co.*, 647 F.3d 704 (7th Cir. 2011); *Culver v. Gorman & Co.*, 416 F.3d 740 (7th Cir. 2005); But see, *Johnson v. Cambridge Indus.*, 325 F.3d 892 (7th Cir. 2003) (holding that a causal link is unnecessary to establish a prima facie case) *and Sublett v. Wiley & Sons*, 463 F. 3d 731, 740 (7th Cir. 2006) (same). Circumstantial evidence can suffice. *See e.g.*, *Sylvester v. SOS Children's Villages Illinois, Inc*. 453 F.3d 900 (7th Cir. 2006).

f. **Employment-Related Nature of Retaliation:** The retaliation need not be employment related, but it must involve "real harm." *Johnson v. Cambridge Indus.*, 325 F.3d 892, 902 (7th Cir. 2003); *See also Metzger v. Ill. State Police*, 519 F.3d 677 (7th Cir. 2008); *Szymanski v. County of Cook*, 468 F.3d 1027 (7th Cir. 2006); *Harris v. Firstar Bank Milwaukee, N.A.*, 97 Fed.Appx. 662, 665 (7th Cir. 2004). For example, the denial of a consulting contract, while not strictly employment related, may be actionable. *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632 (7th Cir. 2004).

g. **Retaliatory Hostile Work Environment:** An employer who creates or tolerates a hostile work environment (e.g., intimidating threats) against a worker because he filed a charge of discrimination may be liable for retaliation. *Heuer v. Weil-McLain*, 203 F.3d 1021 (7th Cir. 2000).

h. **Post-employment retaliation:** Retaliation claims are actionable even if the defendant no longer employs the plaintiff at the time of filing an EEOC charge and at the time of the alleged retaliation. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *See also Abdullahi v. Prada USA Corp.,* 520 F.3d 710, 712 (7th Cir. 2008) (spreading derogatory rumors about the plaintiff after she filed an EEOC charge was actionable, even though the plaintiff was no longer employed by defendant).

5. **Adverse Action:** An employment action is materially adverse if it would deter a reasonable worker from complaining of discrimination. *Burlington Northern v. White,* 126 S.Ct. 2405 *(*2006); *Washington v. Ill. Dep't. of Revenue*, 420 F.3d 658 (7th Cir. 2005). It follows that the range

of conduct prohibited under the retaliation provisions of Title VII is *broader* than the range of conduct prohibited under the discrimination provisions. *Lewis v. City of Chicago* 496 F.3d 645, 654-55 (7th Cir. 2007).

a. **Examples of Actionable Adverse Actions:** Besides discharge, demotion, lack of promotion, harassment and retaliation, other "adverse" conditions of employment can be actionable, such as loss of a more distinguished title, loss of benefits, or diminished job responsibilities. *Lewis v. City of Chicago*, 496 F.3d 645, 653 (7th Cir. 2007) (distinguishing between adverse action for retaliation and for other types of disparate treatment); *Tart v. Ill. Power Co.*, 366 F.3d 461 (7th Cir 2004) (reviewing cases). Adverse action may also include firing a family member in response to an employee filing a complaint. *Thompson v. North American Stainless*, 131 S.Ct. 863 (2011) (firing the employee's fiancé constitutes retaliation by the employer). Additional examples of adverse action include: *Timmons v. Gen. Motors Corp.*, 469 F.3d 1122 (7th Cir. 2006) (material diminution of responsibilities even in the absence of a diminution of compensation); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (denial of a raise and underpayment for work); *Patt v. Family Health Sys. Inc.*, 280 F.3d 749 (7th Cir. 2002) (change in responsibilities that prevents career advancement); *Russell v. Bd. of Trs.,* 243 F.3d 336 (7th Cir. 2001) (5-day suspension plus misconduct charge in personnel file); *Stutler v. Ill. Dep't. of Corr.*, 263 F.3d 698 (7th Cir. 2001) (retaliatory harassment); *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000) (denial of raise and denial of temporary promotion); *Place v. Abbott Labs.*, 215 F.3d 803 (7th Cir. 2000) (medical exam upon return from leave); *Malacara v. Madison*, 224 F.3d 727 (7th Cir. 2000) (failure to train an employee); *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000) (career ending performance review).

b. **Constructive discharge:** In order to succeed on a claim for constructive discharge, a plaintiff must show that the harassment made her working conditions so severe that a reasonable person would have resigned. *Pa. State Police v. Suders*, 124 S.Ct. 2342 (2004). Claims for constructive discharge are quite difficult to prove because courts typically require extremely intolerable conditions before crediting an employee with a constructive discharge. *Griffin v. Potter*, 356 F.3d 824 (7th Cir. 2004) (change in work location not materially adverse and does not justify constructive discharge); *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662 (7th Cir. 2001). *Cf. Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) (jury could find that a reasonable person had no

choice but to resign after repeated complaints of sexual harassment were ignored); *Patton v. Keystone RV Co.,* 455 F.3d 812 (7th Cir. 2006) (sexual harassment sufficient to constitute constructive discharge).

II. THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. § 1981

A. Statutory Language: Section 1981 states that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ."

B. Scope

1. Section 1981 prohibits *only* "racial" discrimination; although, it defines "race" quite broadly, to mean identifiable classes of persons based on their ancestry or ethnic characteristics. For example, Section 1981 has been applied to discrimination against groups such as blacks, whites, Latinos, Jews, Iraqis, and Arabs. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). *See Pourghoraishi v. Flying J,* 449 F.3d 751 (7th Cir. 2006) (collecting cases); *see also Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 712 (7th Cir. 2008)..

2. Section 1981 applies to all employers even if they do not have 15 employees.

3. The term "make and enforce contracts" in § 1981 "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (added by the Civil Rights Act of 1991 to overrule *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which held that § 1981 applied only to hiring and promotions that create a new and distinct relation between the employer and employee). A plaintiff can make a claim under Section 1981 *only* if she has rights under the existing contract that she wishes to enforce. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

4. Section 1981 authorizes retaliation claims. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007) upheld by *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (U.S. 2008).

C. Differences from Title VII: Section 1981 discrimination claims are analyzed in the same manner as claims brought pursuant to Title VII of the Civil Rights Act. *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 389 (7th Cir. 2010). However, there are some differences, which are listed below.

1. Section 1981 applies to *all employers* regardless of size, unlike Title VII's restriction to employers with 15 or more employees. Individual supervisors may be named under Section 1981 (though not under Title VII), if they personally harassed or discriminated against the plaintiff. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 753 (7th Cir. 1985).

2. Section 1981 claims are filed directly in federal court, not with the EEOC or any other agency.

3. Section 1981 does not prohibit practices that have a disparate impact; it *only* applies to intentional discrimination. *General Bldg Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

4. A successful plaintiff may receive *unlimited compensatory and punitive damages*; there are no caps on damages as there are under Title VII.

5. The statute of limitations for most employment based § 1981 claims is four years. The Supreme Court in *Jones v. R.R. Donnelley*, 541 U.S. 369 (2004) held that a four year statute of limitations applied to any claims that were made possible by a post-1990 enactment.

6. It is important to note that following *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009), it is doubtful that a plaintiff can bring a *Price Waterhouse* mixed motive claim under section 1981.

D. State Law Tort Claims: If a plaintiff can make out a tort law claim independent of any duties derived from the Illinois Human Rights Act, the tort is not preempted by the Illinois Human Rights Act and can be added to a federal court complaint. *Naeem v. McKesson*, 444 F.3d 593 (7th Cir. 2006); *Maksimovic v. Tsogalis*, 177 Ill.2d. 511 (Ill. 1997).

III. EEOC PROCEEDINGS

A. Scope of These Materials: This manual is intended for use by attorneys appointed to represent plaintiffs in employment discrimination cases in the Northern District of Illinois. At the time of such appointment, proceedings before the EEOC have terminated. Therefore, an extensive discussion of EEOC proceedings is beyond the scope of this manual.

B. Summary of Proceedings

1. **Title VII Prerequisite:** Title VII claims may not be brought in federal court until after they have been filed in writing with the EEOC and the EEOC has issued a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1); See also Hill v. Potter, 352 F.3d 1142, 1145-46 (7th Cir. 2003); *Vela v. Sauk Vill.,* 218 F.3d 661 (7th Cir. 2000). A dismissal for failure to exhaust the EEOC administrative process will not be on the merits (unless the plaintiff failed to cooperate with the EEOC). *Hill v. Potter*, 352 F.3d 1142 (7th Cir. 2003).

2. **Time Requirements for Charges:** In general a charge must be filed with the EEOC within 180 days from when the discrimination occurs, except in states like Illinois, where the Illinois Department of Human Rights also has the power to investigate claims of discrimination. In Illinois, a charging party has 300 days from the date of the alleged discrimination to file a charge with the EEOC if the IDHR also has jurisdiction over the claim. *Filipovic v. K &R Express Sys., Inc.*, 176 F.3d 390, 395 (7th Cir. 1999); *Marlowe v. Bottarelli*, 938 F.2d 807, 813 (7th Cir. 1991); *Sofferin v. Am. Airlines, Inc*., 923 F.2d 552, 553 (7th Cir. 1991).

   a. **Equitable Tolling:** This filing requirement is not a jurisdictional prerequisite, and is subject to laches, estoppel, and equitable tolling, *Zipes v. Trans World Airline, Inc.*, 455 U.S. 385, 393 (1982), and relation back principles, *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 122 S.Ct. 1145 (2002). Equitable tolling may delay the statute of limitations until such time as the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) her injury. *Allen v. CTA,* 317 F.3d 696 (7th Cir. 2003) (tolling allowed where plaintiff did not know that failure to promote was race based); *Clark v. City of Braidwood*, 318 F.3d 764 (7th Cir. 2003). *Cf. Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854 (7th Cir. 2005) (tolling asks whether a *reasonable plaintiff* would have been aware of possibility of discrimination).

   b. **Equitable Estoppel:** For "equitable estoppel" to apply (as opposed to equitable tolling), a plaintiff must show that the employer prevented the plaintiff from filing suit (e.g., concealed the claim or promised not to plead the statute of limitations). *Beckel v. Wal-Mart Assocs., Inc.,* 301 F.3d 621 (7th Cir. 2002).

   c. **The 300-Day Statute of Limitation Period for Discrete Acts:** The period starts to run when the discriminatory act occurs, not when the last discriminatory effects are felt. *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980). Discrete discriminatory acts (such as termination, failure to promote, refusal to hire) are not actionable if time barred, even if they are related to other still timely

discriminatory acts. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854 (7th Cir. 2005). For example, when an employer adopts a facially neutral policy with discriminatory intent, the statute begins to run *when the policy was adopted*. *Castel v. Exec. Bd. of Local 703*, 272 F.3d 463 (7th Cir. 2001). Each allegedly discrete, discriminatory act starts a new clock for filing a charge so as to each discrete act of alleged discrimination, the plaintiff has 300 days to file a charge with the E.E.O.C. from each discrete act. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *See also Roney v. Ill. Dep't. of Transp.*, 474 F.3d 455, 460; *Plantan v. Harry S. Truman College*, Case No. 10-cv-108 (N.D.Ill. Oct. 28, 2011) (*Available at*: 2011 WL 5122691). Additionally, an employer's current refusal to reverse a previous discriminatory act does not revive an expired limitations period; rather, it begins a new limitation period for the discriminatory refusal. *Sharp v. United Airlines, Inc.*, 236 F.3d 373 (7th Cir. 2001). It is important to note that even if discrete acts are not actionable because they are untimely, they may be relevant to actionable, timely events and therefore admissible. *West v. Ortho-McNeil Pharm. Corp.,* 405 F.3d 578 (7th Cir. 2005); *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696 (7th Cir. 2001).

d. **Disparate Impact:** A plaintiff who does not file a timely charge challenging the *adoption* of a practice may assert a disparate impact claim in a timely charge challenging the employer's *application* of that practice. *Lewis v. City of Chicago*, 130 S.Ct. 2191 (2010).

e. **Continuing Violations:** Plaintiff may try to allege a continuing violation, linking a series of discriminatory acts with at least one occurring within the charge-filing period. Courts struggled for many years to define a principled basis for the continuing violations theory. The Supreme Court provided some guidance for individual disparate treatment cases in the *Morgan* case.

(i) **Equal Pay:** In *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) the Supreme Court limited the application of continuing violation theory in equal pay cases. Congress acted to overturn this decision in the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2. In the Act, Congress clarified "that a discriminatory compensation decision or other practice that is unlawful under [Title VII] occurs *each time* compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes."

f. **E.E.O.C. Charge Intake Questionnaire**: The simple act of filling out an E.E.O.C. charge intake may suffice as an EEOC charge. *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).

g. **Harassment Context:** Because hostile work environment claims require repeated conduct, continuing violation theory applies to these claims. In other words, so long as one act of harassment occurs within the statutory time period, all prior acts that are part of the same harassment pattern are actionable. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

3. **Investigation:** The EEOC's investigation may include a request for information regarding the respondent's position, witness interviews, and a request for documents. The EEOC has the power to issue subpoenas in connection with an investigation. 42 U.S.C. § 2000e-9. Plaintiff's counsel may request a copy of the EEOC's investigative file under FOIA and under Section 83 of the EEOC's Compliance Manual.

4. **Determination:** At the conclusion of the investigation, the EEOC issues a letter of determination as to whether "there is reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). If there is a reasonable cause finding, the EEOC must attempt to conciliate the claim. 28 C.F.R. § 42.609(a)(2003).

5. **Dismissal and Issuance of Right-to-Sue Letter:** The EEOC will issue a right-to-sue letter even if it finds there is no reasonable cause to believe that the charge is true. The EEOC may dismiss a charge and issue a right-to-sue letter in any of the following situations:

a. The EEOC determines it does not have jurisdiction over the charge, 29 C.F.R. § 1601.18(a)(2003);

b. The EEOC closes the file where the charging party does not cooperate or cannot be located, 29 C.F.R. § 1601.18(b), (c)(2003);

c. The charging party requests a right-to-sue letter before the EEOC completes its investigation (if less than 180 days after filing of charge, EEOC must determine that the investigation cannot be completed within 180 days);

d. The EEOC determines there is no reasonable cause, 29 C.F.R. 1601.19(a)(2003); or

e. The EEOC has found reasonable cause, conciliation has failed, and the EEOC (or the Department of Justice for governmental respondents) has decided not to litigate.

6. State and Local Government Employees: While the EEOC investigates charges involving state and local governments, it is the Justice Department, not the EEOC, that has the authority to litigate these cases. 42 U.S.C. § 2000e-5(f)(1). If the Justice Department declines to litigate the case, the EEOC issues a right to sue to the charging party.

7. Federal Employees: Federal employees do not file original charges directly with the EEOC; they first go through an internal process. The regulations describing this process and related appeals are at 29 C.F.R. §§ 1614.105 and 1614.408. Federal agencies that fail to raise defenses to employment charges during the administrative exhaustion process have waived those defenses in subsequent lawsuits. *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001).

IV. THE COMPLAINT

A. Proper Defendants for a Title VII Action: As a general rule, a party not named in an EEOC charge cannot be sued under Title VII.

1. Employers: Title VII applies to employers. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar years, and any agent of such a person." 42 U.S.C. § 2000e(b).

2. Labor Organizations and Employment Agencies: These entities are also covered by Title VII. 42 U.S.C. 2000e-2. *See Maalik v. International Union of Elevator Constructors,* 437 F.3d 650 (7th Cir. 2006) (union liable for refusing to take steps to encourage its members to train plaintiff, an African American woman); *Randolph v. Indiana Regional Council of Carpenters,* 453 F.3d 413 (7th Cir. 2006) (union could be liable for refusing to put plaintiff on work list because of her gender or age).

3. Supervisors: A supervisor, in his or her individual capacity, does not fall within Title VII's definition of an employer. *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995).

4. Sufficiency of Complaint: The Seventh Circuit has long held that a Title VII complaint need not track the *McDonnell-Douglas* formula; like all civil complaints, it need only be a short and plain statement. *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007). But, the Supreme Court

arguably recently raised the pleading standard in two non-employment cases. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court held that a complaint must state a claim that is *plausible* on its face. *See also Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007). After *Bell Atlantic*, the Seventh Circuit held that a Title VII complaint must "describe the claim in sufficient detail to give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests,'" and that "its allegations must plausibly suggest that the defendant has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007) (citations omitted). "Acknowledging that *a complaint must contain something more than a general recitation of the elements of the claim*," however, the court in *Concentra* "nevertheless reaffirmed the minimal pleading standard for simple claims of race or sex discrimination." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008) (Emphasis added); *See also Swanson v. Citibank*, *N.A.* 614 F.3d 400 (7th Cir. 2010) (setting forth what individual disparate treatment plaintiff must plead).

B. **Scope of the Title VII Suit:** A plaintiff may pursue a judicial claim not explicitly included in an EEOC charge *only if* the claim falls within the scope of the EEOC charge. *Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 602 (7th Cir. 2009): *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 550 (7th Cir. 2002). In determining whether the current allegations fall within the scope of the earlier charges, the court looks at whether the allegations are like or reasonably related to those contained in the EEOC charge. *See e.g. Irby v. Bd. of Educ. of City of Chicago*, Case No. 10-cv-3832 (N.D.Ill. April 20, 2011) (quoting *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994)) (*Available at*: 2011 WL 1526732) (Explaining "Claims are deemed reasonably related if there is a factual relationship between them. 'This means that the E.E.O.C. charge and the complaint must, at a minimum describe the same conduct and implicate the same individuals.'") If they are, the court then asks whether the current claim reasonably could have developed from the EEOC's investigation of the charges before it. *Geldon v. South Milwaukee Sch. Dist.,* 414 F.3d 817 (7th Cir. 2005); *McGoffney v. Vigo County Div. of Family & Children Servs.*, 389 F.3d 750 (7th Cir. 2004) (charge held to cover only one denial of promotion, despite references to other promotions). Adverse employment actions, which occur *after* the plaintiff's final E.E.O.C. charge, are generally not deemed reasonably related to the E.E.O.C. *See e.g., Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 602 (7th Cir. 2009).

C. **Timeliness in a Title VII Suit:** A judicial complaint must be instituted within ninety days of the "receipt" of the right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1). A Title VII complaint can be filed before a right-to-sue is issued, but the complaint is subject to dismissal until issuance of the right-to-sue. *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535 (7th Cir. 2002).

1. The ninety day limit begins to run on the date the notice was delivered to the most recent address plaintiff provided the EEOC. *St. Louis v. Alverno Coll.*, 744 F.2d 1314, 1316 (7th Cir. 1984). It is important to note that the term "delivered" refers to the point at which the plaintiff *or his or her agent* actually receives the right-to-sue letter. *DeTata v. Rollprint Packaging Products, Inc.*, 632 F.3d 962, 967-968 (7th Cir. 2011); *Prince v. Stewart*, 580 F.3d 571, 574 (7th Cir. 2009); *Threadgill v. Moore, U.S.A., Inc.*, 269 F.3d 848, 849-50 (7th Cir. 2001). If the plaintiff's attorney or even her former attorney receives the right-to-sue letter, this receipt may suffice to start the clock. *Reschny v. Elk Grove Plating Co.*, 414 F.3d 821 (7th Cir. 2005).

2. Solely oral notice that the EEOC has issued a right-to-sue letter is insufficient to commence running of the 90-day limitations period. *DeTata v. Rollprint Packaging Products Inc.*, 632 F.3d 962 (7th Cir. 2011).

2. Compliance with the 90-day time limit is not a jurisdictional prerequisite. It is a condition precedent to filing suit and is subject to equitable modification.

D. Timeliness in a § 1981 Suit: As discussed above, most § 1981 claims are now subject to a four-year statute of limititaions. Filing a complaint with the EEOC does *not* toll the running of the statute of limitations on a § 1981 claim.

E. Right to a Jury Trial: When legal and equitable claims are presented, both parties have a right to a jury trial on the legal claims. The right remains intact and cannot be dismissed as "incidental" to the equitable relief sought. *Curtis v. Loether*, 415 U.S. 189, 196 (1974). If the plaintiff seeks compensatory and punitive damages, any party may demand a jury trial. 42 U.S.C. § 1981a(c).

F. Evidence: The Illinois Personnel Records Review Act, 820 ILCS 40/1 et seq. requires employers to give employees access to documents used to determine qualifications for employment or discharge, and sets forth sanctions for noncompliance. In *Park v. City of Chicago*, 297 F.3d 606 (7th Cir. 2002), the Seventh Circuit considered the implication of an employer's noncompliance with this Act in a Title VII case. The Court held as follows: (1) an employer's failure to produce documents to an employee in response to a request under the Act does not render those documents inadmissible under the Federal Rules of Evidence; (2) there is no cause of action in federal court for violation of the Act where the only relief sought is the inadmissibility of the evidence; and (3) failure to keep records in accordance with the similar EEOC record-keeping requirements (absent bad faith) does not require an adverse inference instruction to the jury.

G. Rule 68 Offers of Judgment: A plaintiff who rejects an offer of judgment that turns out to be more than the amount the plaintiff recovers after trial may not be

able to recover her attorneys' fees incurred after the date of the offer. *Payne v. Milwaukee County*, 288 F.3d 1021 (7th Cir. 2002).

V. Remedies

A. Equitable Remedies for Disparate Treatment: If the court finds that the defendant has intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may enjoin the defendant from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, including, but not limited to, reinstatement or hiring of employees, with or without back pay, or any other equitable relief the court deems appropriate. 42 U.S.C. § 2000e-5(g)(1). Reinstatement may not be denied merely because the employer is hostile to the employee as a result of the lawsuit. *Bruso v. United Airlines, Inc.* 239 F.3d 848 (7th Cir. 2001).

1. Back pay in an individual Title VII case may be awarded as far back as two years prior to the filing of a charge with the EEOC. 42 U.S.C. § 2000e-5(g)(1).

2. A back pay award will be reduced by the amount of interim earnings or the amount earnable with reasonable diligence. 42 U.S.C. § 2000e-5(g)(1). It is defendant's burden to prove lack of reasonable diligence. *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989).

3. Back pay and/or reinstatement/order to hire will only be granted if the court determines that, but for the discrimination, the plaintiff would have gotten the promotion/job or would not have been suspended or discharged. 42 U.S.C. § 2000e-5(g)(2)(A).

4. In a mixed motive case, if the employer shows that it would have taken the adverse employment action even absent discrimination, the court may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment, but may grant declaratory relief, injunctive relief (as long as it is not in conflict with the prohibited remedies) and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(I).

5. A district court can order demotion of somebody whose promotion was the product of discrimination. *Adams v. City of Chicago*, 135 F.3d 1150 (7th Cir. 1998). Other injunctive relief includes expungement of an adverse personnel record, and an injunction against future retaliation where plaintiff will continue working for the same (discriminatory) supervisors. *Bruso v. United Airlines, Inc.,* 239 F.3d 848 (7th Cir. 2001).

B. Compensatory and Punitive Damages: Compensatory and punitive damages are available in disparate treatment cases, but not in disparate impact cases. 42

U.S.C. § 1981a. Punitive damages are not available against state, local, or federal governmental employers. 42 U.S.C. § 1981a(b)(1).

1. Compensatory damages may be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 42 U.S.C. 1981a(b). Medical evidence is not necessary to show emotional distress. *Farfaras v. Citizens Bank*, 433 F.3d 558 (7th Cir. 2006). But the award will be reduced if monstrously excessive, not rationally supported by the evidence, or out of line with awards in similar cases. *Marion County Coroner's Office v. EEOC*, 612 F.3d 924 (7th Cir. 2010)(reducing emotional distress award of 200k to 20k).

2. Punitive damages may be awarded when the defendant is found to have engaged in discriminatory practices with malice or with reckless indifference. 42 U.S.C. § 1981a(b)(1). *See, e.g., Gile v. United Airlines, Inc.* 213 F.3d 365 (7th Cir. 2000); *Slane v. Mariah Boats, Inc.,* 164 F.3d 1065 (7th Cir. 1999). The question of whether an employer has acted with malice or reckless indifference ultimately focuses on the actor's state of mind, not the actor's conduct. An employer's conduct need not be independently "egregious" to satisfy §1981(a)'s requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an employee can show the "malice" or "reckless indifference" needed to qualify for such an award. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118 (1999).

   The "malice" or "reckless indifference" necessary to impose punitive damages pertains to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. An employer is not vicariously liable for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII. *See id.*

   The Seventh Circuit has stated the test for punitive damages as: (1) the employer knows of the anti-discrimination laws (or lies to cover up discrimination); (2) the discriminators acted with managerial authority; and (3) the employer failed to adequately implement its own anti-discrimination policies (i.e., no good faith). *Bruso v. United Airlines, Inc.* 239 F.3d 848 (7th Cir. 2001); *Cooke v. Stefani Mgmt. Servs., Inc.*, 250 F.3d 564 (7th Cir. 2001). In the context of sexual harassment, there is no good faith if the employer shrugs off complaints of harassment, does not put its anti-harassment policy in writing and does not provide ready access to the policy. *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001); *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001) (punitive damages

allowed when company knows that touchings are illegal and sees it happening). In the context of retaliation, punitives have been awarded when the employer creates two documents explaining why it discharged plaintiff, one truthfully disclosing a retaliatory motive and the other giving a pretextual motive. *Fine v. Ryan Int'l Airlines*, 305 F.3d 746 (7th Cir. 2002). Punitive damages may be awarded even when back pay and compensatory damages are not. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998). There need not be a one-to-one ratio between compensatory and punitive damages. *Pickett v. Sheridan Health Care Center* (7th Cir. 2010). *See also Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007) (holding the ratio between punitive damages and compensatory damages may be high when the compensatory damages are relatively low).

3. Compensatory and punitive damages are added together and the sum is subject to caps in Title VII cases. The sum amount of compensatory and punitive damages awarded for each complaining party shall not exceed, (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000. 42 U.S.C. § 1981a(b)(3). Backpay and front pay do not count toward these caps. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000).

C. Front Pay and Lost Future Earnings: Both front pay and lost future earnings are Title VII remedies. Front pay is an equitable remedy and is a substitute for reinstatement when reinstatement is not possible. An award of lost future earnings compensates the victim for intangible non-pecuniary loss (an injury to professional standing or an injury to character and reputation).An award of lost future earnings is a common-law tort remedy and a plaintiff must show that his injuries have caused a diminution in his ability to earn a living. The two awards compensate the plaintiff for different injuries and are not duplicative. *Williams v. Pharmacia*, 137 F.3d 944 (7th Cir. 1998). In calculating front pay, the plaintiff must show the amount of the proposed award, the anticipated length of putative employment and then must apply an appropriate discount rate. *Bruso v. United Airlines, Inc.,* 239 F.3d 848 (7th Cir. 2001). Front pay is not subject to the caps on Title VII compensatory damages. *Pollard v. E.I. Dupont de Nemours & Co.*, 532 U.S. 843 (2001).

D. Attorney's Fees: In Title VII cases, the court, in its discretion, may allow a prevailing party a reasonable attorney's fee and reasonable expert witness fees. 42 U.S.C. § 2000e-5(k). In § 1981 cases, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee and may include expert fees as part of the attorney's fee. 42 U.S.C. § 1988(b-c).

1. Although the language of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, in a Title VII case, attorney's fees are only awarded to prevailing defendants upon a finding that the plaintiff's action was "frivolous, unreasonable or groundless" or that the plaintiff continued to litigate after it clearly became so. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

2. Although the language of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, in a § 1981 case, the prevailing defendant is only entitled to attorney's fees if the court finds that the plaintiff's action was "vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429, n.2 (1983).

3. "A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Cady v. City of Chicago*, 43 F.3d 326, 328 (7th Cir. 1994).

VI. Arbitration

A. The Gilmer Decision: In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that an Age Discrimination in Employment Act claim could be subject to compulsory arbitration. The Supreme Court did not decide in *Gilmer* whether this rule applied generally to all employment relationships. However, the Court held that the employee retains the right to file a charge with the EEOC and obtain a federal government investigation of the charge. *Id.* at 28.

B. The Circuit City Decision: In *Circuit City Stores, Inc. v. Adams,* 121 S.Ct. 1302 (2001), the Supreme Court resolved the question unanswered in *Gilmer* and held that employment agreements containing an agreement to arbitrate an employment discrimination claim are subject to compulsory arbitration. The Seventh Circuit had previously held that Title VII claims are also subject to compulsory arbitration. *See, e.g., Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Kresock v. Bankers Trust Col*, 21 F.3d 176 (7th Cir. 1994). However, in *EEOC v. Waffle House,* 534 U.S. 279 (2002), the Supreme Court held that the EEOC may pursue a claim on behalf of a Charging Party notwithstanding the Charging Party's agreement to arbitrate her individual case with her employer.

C. **Collective Bargaining Agreements:** In *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 846(2009) the Supreme Court held that a collective bargaining agreement that clearly and unmistakably requires members to arbitrate statutory discrimination claims is enforceable. The Seventh Circuit had previously held that collective bargaining agreements cannot compel arbitration of statutory rights. *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997).

D. **Fact-Specific Defenses to Arbitration:** A plaintiff can assert contract defenses to an arbitration agreement. *See Tinder v. Pinkerton Sec.*, 305 F.3d 728 (7th Cir. 2002)(continued employment after the employer published notice of implementation of a mandatory arbitration policy was sufficient consideration to enforce the policy ,even where the employee denied receiving notice). *But see Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997) (arbitration agreement was unenforceable because the employer did not give the employee any consideration for her agreement to arbitrate). In *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001), an arbitration agreement was held invalid because the promisor (the provider of arbitration services) made no definite promise to the employee. In *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002), the arbitration agreement was unenforceable because it forced the employee to forfeit a substantive right – attorneys' fees.

E. **Class Actions**: Arbitrators cannot decide class claims unless the arbitration policy expressly provides for arbitration of these claims. *Stolt-Nielsen v. Animal Feeds Int'l Corp.*, 130 S.Ct. 1758 (2010)