1. Dall v. St. Catherine of Siena Med. Ctr., 2013 U.S. Dist. LEXIS 115090 (E.D.N.Y. Aug. 14, 2013)

Facts: Plaintiff Robert Dall worked as a technician in the radiology department for Defendant, a not-for-profit hospital. Working with him in the radiology department was a nurse named Beatrice Birmingham, who routinely engaged in sexually explicit comments and behavior on the job, including discussing sex toys, bringing in photos of her ex-husband's genitalia, and describing sex acts she enjoyed. At a holiday party in December 2009, Birmingham announced that she was not wearing underwear, and Dall took a photo of her under her dress. Dall claimed the photo was of Birmingham's knee and lower thigh and was not explicit or inappropriate. Witnesses claimed Dall and Birmingham were dancing together and kissing during the party. Dall later showed the photograph to other coworkers at work. Soon after, Dall and Birmingham had a falling out regarding patient care, and he confronted her and also complained to her supervisor about her work ethic. Immediately following this confrontation, one month after the holiday party, Birmingham filed a complaint of sexual harassment against Dall for taking the photograph and circulating it at work.

Defendant's human resources representative, Danielle Robbins, conducted an investigation of Birmingham's complaint. She interviewed three individuals identified by Birmingham as having witnessed Plaintiff's inappropriate conduct, and she said that each employee confirmed Birmingham's allegations. Robbins then met with Plaintiff to discuss Birmingham's complaint. He allegedly admitted that he had taken a photo under Birmingham's dress and had shown the photograph to co-workers.

Two days after Birmingham filed her sexual harassment complaint against Plaintiff, Plaintiff filed a sexual harassment complaint against Birmingham, citing Birmingham's sexually inappropriate behavior in the workplace. Plaintiff asserted that he had not previously filed a complaint because he was afraid of retaliation and did not want to cause any problems, but by filing a complaint against him, Birmingham "made it fair to go out and complain." Three coworkers submitted statements confirming that Birmingham routinely acted in a sexually inappropriate manner in the workplace.

While investigating Plaintiff's complaint, Robbins allegedly told his union advisor that the Medical Center had a "zero tolerance policy" with respect to sexual harassment, and she was therefore seeking to terminate Plaintiff's employment. The union advisor told Plaintiff that he would be terminated if he did not resign. Robbins maintains that she did not request Plaintiff's resignation or advise Plaintiff that he would be terminated if he did not resign.

Plaintiff then met with Robbins to discuss the results of the investigation. The same day, Plaintiff resigned. He testified that he resigned after the meeting in a letter which stated he was leaving due to the hostile work environment caused by Birmingham. Robbins testified that, following her investigation, a determination was made to suspend Birmingham, and she believed Birmingham was suspended.

Holding: The court denied Defendant's motion for summary judgment, noting that a factfinder could determine that the Plaintiff was forced to choose between resignation and termination, despite conflicting testimony presented by Defendant that it had not decided to terminate his employment and did not request his resignation. In reviewing the evidence in the light most favorable to Plaintiff, the Court found that a reasonable jury could conclude that Plaintiff was subjected to disparate disciplinary treatment by Defendant on the basis of his gender, since he presented evidence that both he and Birmingham violated Defendant's Sexual Harassment Policy, filed sexual harassment complaints, and that Plaintiff was constructively discharged following the investigation, whereas Birmingham was not. However, the court granted Defendant's motion for summary judgment on the retaliation claim, noting that the termination decision had been made in response to Plaintiff's misconduct, as a result of the internal investigation, and not in response to his own harassment complaint.

Take-Away: **Treat everyone fairly, male and female**.

Redacted by CCIC due to request from named individual (31 May 2018)

2. [redacted]

[redacted]

[redacted]

<u>Take-Away</u>: **Don't terminate an employee directly after she registers a complaint**.

3. Clegg v. Falcon Plastics Inc., 174 Fed. Appx. 18, 2006 U.S. App. LEXIS 8576 (3d. Cir. 2006)

Facts: Clegg worked for Falcon Plastics. She reported to Levers, and for a period of time the two had a friendly relationship. They engaged in email exchanges and in one, she said to him: "talk d y to me." He responded. She initially responded to one of his emails that his email had "knocked my socks off." However, she eventually stopped responding and stopped all association via the internet with Levers. For several months, Levers continued harassing Clegg. Clegg then complained to the Company President, Nugent, that Levers was sexually harassing her by sending emails, giving her a back rub, and other incidents, including leaving a rose on her desk. Clegg told Nugent that "she did not want to be Levers' girlfriend and that things were getting way out of control." Nugent told her that Levers had no authority to fire her and told her to report any further harassment immediately. Nugent then called Levers in his office with The Human Resources Manager, informed him of Clegg's allegations, and advised him that sexual harassment would not be tolerated. After the meeting, the sexual advances stopped. However, Clegg thereafter complained that Levers "harassed her in other ways"; he took away work duties she had performed in the past; he stopped giving her information about new customers; he stopped communicating with her; and he excluded her from lunches.

Clegg thereafter met with the Human Resources Manager and Nugent, at her request, at least fifteen times. Levers finally was given a formal, written reprimand and was told that any negative treatment of Clegg would be deemed retaliation on his part and would not be tolerated. He was told that if any such retaliation or negative treatment toward Clegg occurred, he would be subjected to immediate termination from employment. Clegg took a medical leave of absence and Falcon then offered her a lateral transfer. Clegg did not respond to the letter offering her a transfer and never returned to work.

Clegg brought a Title VII hostile work environment and retaliation claim and related state law claims against Falcon Plastics, Nugent and Levers. The United States District Court for the Western District of Pennsylvania granted summary judgment to all defendants.

Holding: The Third Circuit Court reversed the District Court's judgment that Falcon prevailed as a matter of law on its affirmative defense that it had acted reasonably on the sexual harassment claim. **The Court held that given the facts, a jury could reasonably believe that Falcon had not acted with sufficient diligence to avoid further harassment after Clegg's initial complaint. There was evidence that Falcon only acted at Clegg's repeated insistence.** Also, according to Clegg, Nugent eventually appeared "annoyed" with the situation and would walk the other way when he saw Clegg coming. At one point after a complaint, Nugent "cussed" at Clegg and said that they should both be fired. In light of these facts, the Third Circuit held that a jury could determine Falcon did not act with sufficient diligence to avoid harassment.

Take-Away: Keep the President out of the Investigation!

4. Huston v. Procter & Gamble Paper Products Corp., 568 F.3d 100 (3d. Cir. 2009)

Facts: Huston brought a Title VII action against her former employer alleging sexual harassment and retaliation. The United States District Court for the Middle District of Pennsylvania granted summary judgment in favor of her employer. Huston appealed.

Huston complained to a senior-level manager and to a Human Resources Manager about incidents of sexual harassment involving co-workers; P&G launched an investigation on the same day that Huston complained; several employee witnesses were interviewed. At the conclusion of the investigation, P&G sanctioned everyone in Huston's work group, including Huston, within the framework of its five-step disciplinary program. Huston was disciplined because P&G determined that the entire work group used vulgar language at work, a practice P&G sought to eliminate. Although Huston had already been on Step 4, she was not advanced to Step 5; her personnel file was annotated, however, to note that she was requested to be mindful of her "language" at work.

Several months later, Huston's employment was terminated after two subsequent infractions involving admittedly falsifying machine data logs. Huston filed a complaint for sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-2(a)(1), 2000e-3(a) and under the Pennsylvania Human Relations Act (PHRA), 43 Pa. Cons. Stat. § 955. The District Court granted summary judgment against Huston, holding that P&G took prompt and adequate remedial measures as soon as it had notice of the harassment claim.

Holding: The Third Circuit affirmed the District Court's holding that the record did not present a genuine issue of material fact as to whether P&G responded promptly and adequately to Huston's complaint. In so ruling, the Court relied on the following facts: P&G (1) launched an investigation on the very day that Huston filed her complaint; (2) previously moved Huston to a different team to accommodate her physical limitations so she never had to work with her alleged harassers again; (3) as part of the investigation, interviewed various individuals who Huston mentioned in her complaint; (4) disciplined every employee it found to have violated company policies; and (5) no further sexual harassment occurred after Huston reported her concerns to P&G managers. Although Huston objected to the leniency of the sanctions P&G imposed on her co-workers, she did not dispute the fact that no further sexual harassment occurred after she reported her concerns to P&G management. Thus, the Third Circuit affirmed the District Court's judgment as to Huston's hostile work environment claims under Title VII and the PHRA, as the record did not present a genuine issue of material fact as to whether P&G promptly and adequately responded to Huston's complaint.

Take-Away: **This is how you do it!**

5. Mastro v. Potomac Electric Power Company, 447 F.3d 843 (D.C. Cir. 2006)

Facts: Brian Mastro, a Caucasian, was a System Engineer with Defendant ("PEPC") when an employee he supervised, Donald Harsley, an African-American, was arrested and jailed. Harsley asked Mastro for his accrued vacation time to be utilized while he was incarcerated. Whether Harsley told Mastro that he was in jail at the time became an issue in dispute between Mastro and Harsley. PEPC planned to fire Harsley for lying to his supervisor about his whereabouts when he made his vacation time request, but reconsidered after he described his version of events and claimed that Mastro had always known his whereabouts when he granted the vacation time. Moreover, another employee, an African-American who was second in command to Mastro and kept timesheets for Mastro's team, told management that Mastro did in fact know the true facts at the time. The company conducted an internal investigation headed by an African-American Senior Employee Relations Investigator, to determine who, if anyone was untruthful. He concluded that Mastro, not Harsley, was lying and, consequently, Mastro was terminated. Mastro initiated suit under Title VII against PEPC for reverse discrimination.

Holding: The Court held that Mastro offered "ample evidence by which a reasonable jury could conclude that PEPC's stated reasons for terminating him were pretextual and that discrimination motivated its decision," as the evidence suggested that the investigation, "which was central to and culminated in Mastro's termination, was not just flawed but inexplicitly unfair." First, Mastro was not interviewed, although other individuals were. Mastro was only given an opportunity to offer his version of events at a later date, when management already had received the results of the investigation, putting Mastro on the defensive and depriving him of the same opportunity given to Harsley, who was interviewed before the findings were presented to management. **The court noted the fact that the investigator spoke to everyone "except the individual at the center of the controversy, and the only Caucasian, might well strike a jury as odd."**

The Court also opined that the investigation lacked the "careful, systematic assessments of credibility one would expect in an inquiry on which an employee's reputation and livelihood depended." For example, the investigator relied heavily on Mastro's second-in command's statements, even though he had much to gain by having his boss disciplined and/or terminated. Moreover, there was evidence of a strained working relationship between the two; Mastro testified that the witness had displayed major insubordination toward him on several occasions. The investigator also ignored major contradictions in the testimony of the witnesses, which could lead a jury to determine that the investigation was not full or complete, and never attempted to determine the credibility of any of the individuals he interviewed (e.g., he never explored whether the individuals interviewed were on a friendly basis with Harsley, or if they had talked to one another about the incident before speaking with him). The investigator, in fact, remarked that such considerations were not an "integral part of his investigation." Finally, his "decisionmaking process lacked the appreciable reflection one would expect for resolving such a serious matter," as he stated that he relied upon his instincts in determining whether the individuals were telling the truth, not objective indicia. **The Court noted that the failure to consider credibility when performing the investigation (looking merely at the number of witnesses without making critical assessments necessary to a thorough investigation) rendered the investigation flawed.** PEPC argued that the mere fact that it conducted an investigation and fired Mastro as a result was an effective affirmative defense to Mastro's claims. The Court disagreed, holding that Mastro presented sufficient evidence to attack the employer's proffered explanation for its actions, and that the investigation was not a reasonably objective assessment of the circumstances, but instead, could be considered an inquiry "colored by racial discrimination." Thus, the Court reversed summary judgment in favor of Defendant, and allowed the discrimination issue to be decided by a jury.

Take-Away: **This is not the way to do it!**

6. Forrest v. Brinker International Payroll Company, LP d/b/a Chili's Grill & Bar, 511 F.3d 225 (1st Cir. 2007)

Facts: **This is a workplace romance case gone bad**. Allison Forrest was a server and bartender at Chili's Bar and Restaurant, when she began to date her co-worker, Mike Vashaw, who was a line cook. They dated on and off and had a volatile relationship. Eventually Forrest ended the relationship and began dating another man. As a result, Vashaw allegedly used gender specific expletives at work and refused to help Forrest in the kitchen. Forrest complained to the General Manager, but she also expressed that she did not want Vashaw to be fired. The GM investigated the complaint and issued Vashaw a verbal warning to stop and behave professionally, or further action would take place. Shortly thereafter, Vashaw allegedly continued to verbally abuse Forrest using gender-specific profanity, and Forrest complained to the Kitchen Manager about Vashaw's conduct. That manager issued Vashaw a written warning, directing him to stop negative confrontations, telling him to correct the problem immediately, and advising him that he would be terminated if he behaved inappropriately again. Forrest was informed that Vashaw had been warned, and she was invited to advise the restaurant if any inappropriate behavior continued. A couple of weeks later, Forrest again complained that Vashaw called her a whore and otherwise acted inappropriately toward her. The company investigated, found at least one of the allegations to be credible, and terminated Vashaw's employment.

Holding: As this was a case involving co-worker liability, Forrest had to show that the employer "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate action." The Court noted that Forrest complained about Vashaw's behavior to managers on at least three (3) occasions, investigations took place, and action was taken. The Court noted that the "prompt and appropriate" standard often requires the "sort of case-specific, fact-intensive analysis best left to a jury." Nevertheless, the Court concluded that the employer acted reasonably in addressing Forrest's complaints with progressive discipline and ultimately firing Vashaw when he did not behave. The Court noted that the allegations were lodged "between ex-lovers known to have a volatile relationship," and also found significant the fact that Forrest told her employer that she did not want Vashaw fired when she initially complained about him.

Take-Away: **Be even-handed and fair.**

7. Chaloult v. Interstate Brands Corporation, 540 F.3d 64 (1st Cir. 2008)

Facts: Bonnie Chaloult worked at IBC's production plant and was a Bread Supervisor. Her immediate supervisor was Kevin Francoeur, the Assistant Production Manager. **Chaloult complained that Francoeur repeatedly sexually harassed her during the course of her employment, yet she failed to complain at any time prior to her resignation. When she resigned, she submitted a letter stating that Francoeur questioned her personal affairs with another supervisor and, specifically, accused her of having a sexual relationship with that supervisor**. She stated in her letter that she was no longer comfortable working for Francoeur. When the company received the letter, the department manager, Paul Santos, met with her that day to discuss the situation. Santos in turn consulted with Human Resources. After Santos interviewed Chaloult, he also interviewed Francoeur and co-worker Jim Anderson, allegedly a witness. **Written statements were obtained, and Santos reached factual conclusions including making credibility determinations**. Santos found that Francoeur made an inappropriate and unwarranted comment, and he issued a warning to him. Chaloult claims that her co-worker, Jim Anderson, was also a first-level supervisor who was aware of the alleged sexual harassment and failed to act on the company's behalf. Anderson was aware of some of the alleged inappropriate behavior, but testified that he did not believe that Chaloult was offended or that the sexual harassment policy was implicated. Chaloult never used the term "sexual harassment" in her conversations with Anderson in describing Francoeur's behavior.

Holding: **The First Circuit affirmed the lower court's granting of summary judgment in the employer's favor.** The Court rejected Chaloult's argument that Anderson's awareness of the alleged inappropriate behavior was sufficient to impute liability to the company. It is undisputed that Chaloult failed to report the alleged sexual harassment. The Court noted that Chaloult and Anderson both reported to Francoeur, the alleged harasser. The Court distinguished this case from others where people in management levels above or at the same level as the alleged harasser observed or were told of the harassment. The Court also rejected Chaloult's argument that the company's voluntary adoption of a policy requiring all supervisors to report sexual harassment increases the scope of the company's legal liability as a matter of law. The Court noted that one circuit, the Sixth Circuit, has held differently. The Court noted that no claim was lodged that the company routinely ignored harassment complaints or that there were prior complaints against others. Chaloult also does not claim that the company acted unreasonably once she did file a complaint with her letter of resignation. Once the company received the resignation letter, it promptly interviewed the alleged victim, alleged harasser, and the witness, made conclusions, and punished Francoeur for his inappropriate language. The employer thus "was fully in compliance" with the second aspect of the Faragher-Ellerth prong. The Court noted that "this is a case where the company was deprived of the opportunity to take remedial action because — with the exception of the one incident Chaloult reported, which Santos promptly investigated and acted on — Chaloult did not make allegations of sexual harassment until she filed suit…."

Take-Away: **You still need to investigate even if the complaint is lodged after the complaining party is a former employee**.

8. Aponte–Rivera v. DHL Solutions (USA), Inc., 650 F.3d 803 (1st Cir. 2011)

Facts: Julissa Aponte-Rivera alleged hostile work environment and gender discrimination against DHL. Aponte-Rivera began working for DHL in 2000. By 2003, she supervised employees, oversaw shipments and documentation, and interacted with DHL's clients. Enrique Frias became her supervisor in 2004. Later that year, Aponte-Rivera filed a written complaint with DHL's human resources department, **stating that Fria created an "uncomfortable" work environment by giving her an overwhelming workload and making comments with sexual connotations**. A DHL human resources manager interviewed Aponte-Rivera and Frias. HR then told Frias, "don't get personal" and "focus [on] the operation and in work." Shortly thereafter, Aponte-Rivera took a one-month leave of absence.

In November 2004, Rafael Camacho became Aponte-Rivera 's direct supervisor. Aponte-Rivera worked with Camacho for approximately one month before leaving work for eleven months on a second leave of absence. Aponte-Rivera testified that Camacho made derogatory references to women in supervisory positions, saying, for example, that women were good for household chores and referring to women as "dummies." In November 2005, Aponte-Rivera returned to DHL and, again, was assigned to report to Camacho. Frias and Camacho confronted Aponte-Rivera , asking her why she returned instead of resigning. They said that the person running the operation "had to have balls." There was evidence of numerous situations in which the two men treated male employees respectfully but treated female employees and Aponte-Rivera , in particular, differently.

Camacho gave Aponte-Rivera two warnings about performance and, in March 2006, Aponte-Rivera again complained to human resources about gender discrimination. A DHL human resources employee met with her later that month. Shortly thereafter, Aponte-Rivera expressed in a March 30th email that she noticed a positive change. A month later, Aponte-Rivera took another leave of absence, and ultimately resigned from DHL on June 17. In her resignation letter, she stated that her resignation was involuntary but necessary due to the gender discrimination she suffered at work that left her "in an emotional deterioration."

Holding: A jury returned a $350,000 verdict in favor of Aponte-Rivera , which was upheld by the district court. The case was remitted on the emotional distress damages award, and the First Circuit affirmed. The appeals court held that a reasonable jury could have found that Aponte-Rivera was subjected to discriminatory intimidation, ridicule and insult sufficiently pervasive to alter her working conditions and create a hostile work environment. On appeal DHL argued that the jury unreasonably rejected its *Faragher* defense because, even taking Aponte-Rivera 's version of the facts as true, the company acted promptly and appropriately each time that Aponte-Rivera complained, and Aponte-Rivera 's March 30 email shows that Aponte-Rivera 's situation improved. **The Court noted that it was DHL's burden to show its actions both corrected and prevented further harassment, and that "[d]etermining what constitutes a 'prompt and appropriate' employer response to allegations of sexual harassment often requires the sort of case-specific, fact-intensive analysis best left to a jury.***"* Thus, DHL's entitlement to the *Faragher* defense is not "so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice." **Here, Aponte-Rivera complained in writing on two separate occasions and testified that she ultimately had to quit her job in order to avoid the hostile situation.** In addition, Aponte-Rivera testified that the harassment at work only temporarily improved after her meeting with HR in March 2006. The Court concluded that a reasonable jury could find that Aponte-Rivera availed herself of DHL's corrective opportunities without experiencing a lasting improvement in her work situation.

Take-Away: **Don't hire Neanderthal men! And, if you do, don't make them managers**.

9. Rand v. Town of Exeter., 976 F. Supp. 2d 65 (D.N.H. 2013)

Facts: Brenda Rand, a solid waste transfer operator in the Town of Exeter's Highway Department, sued her former employer, former co-worker George McAllister, and four of her former supervisors. She alleges that McAllister sexually assaulted her while they were both working at the Town's waste transfer station. She also claims that the Town and her supervisors failed to properly respond to and investigate her sexual harassment complaint and retaliated against her when she complained of the harassment. She brought claims under Title VII, New Hampshire's Law Against Discrimination, and common law.

On November 12, 2009, McAllister opened the transfer station, and Rand arrived shortly thereafter. In a friendly gesture, Rand either patted McAllister on the shoulder or gave him a hug and kiss on the cheek. Immediately after that, Rand alleges that McAllister grabbed her waist, pulled her body close to his and fondled her breast. She attempted to pull away, and claims that McAllister grabbed her hand and pressed it against his clothed, erect penis while laughing and making various lewd remarks. He then allegedly dragged her across the parking lot, but a resident arrived and nothing more happened. Rand claims that her right hand sustained gouges, abrasions and bruises from the assault. No one witnessed the incident.

Rand documented the incident that day in the log book, and she also told her husband about it the next day. Five days after the incident, Rand confided in a co-worker, Walter Dow, and, later that day, told three supervisors. She provided the Town with her log book.

An investigation ensued, led by the Town's Human Resources Director, Donna Cisewski, and pursuant to the Town's sexual harassment policy. McAllister was directed to stay away from the transfer station during the pendency of the investigation. Cisewski interviewed Rand (on November 17 and 20), McAllister (on November 18), and Dow (on November 18 and 20). She took handwritten notes during the interviews, and had the interviewees read and sign the notes to indicate they accurately reflected the substance of the interview. Cisewski had prepared a list of questions in advance to guide her. The interviewees also had an opportunity to recount the relevant events in narrative form. Rand submitted a written statement describing what occurred. Photographs were taken of the injuries to her hand.

In his interview, McAllister denied any sexually-inappropriate behavior. He stated that he stumbled in the parking lot due to his poor eyesight and reached out to Rand to break his fall. He claims that his hand brushed against Rand's breast when he stumbled and after she had hugged him.

When Dow was interviewed, he recounted what Rand had reported to him, but he expressed doubt that she was truthful about the alleged sexual misconduct. He had never known McAllister to act that way. Indeed, McAllister's personnel file shows no history of such misconduct.

Cisewski prepared a written investigative report on November 25, 2009, and she met with Rand on December 8th to apprise her of the findings. Cisewski concluded that the complaint lacked merit, and McAllister would not be disciplined. The investigator explained that there was a lack of credible evidence corroborating Rand's version of the events, as well as inconsistencies in her story. Rand became angry and left the meeting; she was thereafter placed on paid administrative leave and told that she may need to attend anger management counseling before being allowed to return to work.

In the interim, on November 24, 2009, a Town resident sent an email to the Town indicating that Rand had been rude to her during a visit to the transfer station on November 22nd. Rand was reprimanded for that behavior as well as violating a no smoking policy. Rand denied acting inappropriately. She claims this was retaliatory, as she heard that co-workers were told to "watch out for" her, and she noticed co-workers were less friendly to her. Rand eventually was terminated after the Town claimed that she violated several provisions of the Personnel Plan.

Holding: The Court granted the Town's motion for summary judgment with respect to all claims except Rand's retaliation claims against the Town, her assault and intentional infliction of emotional distress claims against McAllister, and her wrongful termination claim.

The Court held that the Town took prompt remedial action once it was on notice of the allegations, thereby defeating the sexual harassment claim against a non-supervisor. The following facts led to this conclusion: McAllister was prohibited from going to Rand's worksite. Within three days, Cisewski had completed interviews of three witnesses. She took notes, which were acknowledged, and she had utilized an interview guide tailored to each interviewee. She prepared a report within five days of the last interview and, two weeks later, informed Rand of the results. The investigation was done in accordance with Town policy.

Quoting Swenson v. Potter, 271 F.3d 1184, 1197-98 (9th Cir. 2001), the Court stated, "[W]here the proof of harassment is weak and disputed . . . the employer need not take formal disciplinary action simply to prove that it is serious about stopping sexual harassment in the workplace. Where, as here, the employer takes prompt steps to stop the harassment, liability cannot be premised on perceived inadequacies in the investigation." The Court stated that the Town need not adopt the complaining party's version of what occurred when a dispute of fact exists. Rather, "[W]hat matters is whether the employer was negligent in allowing the harassment to occur and whether it took reasonable steps to respond to the claim that harassment had occurred."

The retaliation claim was allowed to proceed, as the Court noted the "sufficient temporal proximity" between Rand's complaints and the reprimands that she began receiving, co-workers avoiding her at work, her lengthy administrative leave and eventual termination.

The case went to trial and, on February 14, 2014, the jury returned a verdict in Rand's favor for retaliation, wrongful discharge, battery and intentional infliction of emotional distress. She was awarded a total of $76,500. She sought recovery of $144,720 in attorney's fees and $6,749.50 in costs.

Take-Aways:

1. **Make your best credibility a prompt judgments following and thorough investigation. Great job here.**

2. **Even so, be vigilant about a potential retaliation claim.**

10. Kelley v. Commonwealth of Massachusetts Department of Conservation and Recreation, 32 Mass. L. Rep. 182 (Mar. 21, 2014)

Facts: Plaintiff Jeannie Kelley's claim of retaliation against her former employer, the Commonwealth of Massachusetts, Department of Conservation and Recreation resulted in a verdict in her favor on December of 2012. The jury awarded her the following in damages: $139,000 in back pay, $500,000 in emotional distress damages, and $250,000 in punitive damages. The defendant Commonwealth filed a motion for Judgment Notwithstanding the Verdict and for remittitur of damages or, in the alternative, a new trial.

Kelley worked as a clerk in the Sign Shop, and she did well in that position. Her workplace was located close to her home, and she began her workday at 6:30 a.m. Kelley's educational background and skillset were well suited to this position.

In January 2006, Kelley and others were uncomfortable when a co-worker and supervisor engaged in an overt romantic relationship in the Sign Shop. Blatant favoritism resulted. On January 19, Kelley complained to her indirect supervisor, James Griffin, that the relationship made her feel uncomfortable and interfered with her ability to do her job. Griffin then discussed Kelley's complaint with other managers and, during the discussion, he raised a 3-year-old issue about Kelley and her use of overtime, an issue long since resolved. Griffin reported the complaint to Johanna Zabriskie, the Human Resources Director, who initiated a sexual harassment investigation.

The investigation was described as follows. On January 28, members of the Sexual Harassment Team arrived unannounced at Kelley's workplace to interview her. Kelley was upset that they appeared on the job site and did not arrange for a private interview with her in an appropriate setting. She participated in the interview, which took place in a motor vehicle outside the shop.

While the investigation was ongoing, the supervisor involved in the relationship was ordered to stay away from the Sign Shop. He did not stay away; Kelley spotted him several times on the premises. The co-worker involved in the romantic relationship was given an email summary of Kelley's complaint and was told to keep it confidential. Despite the instruction, copies of the email spread throughout the shop. This caused Kelley to go out on sick leave effective February 16.

On March 16, Zabriskie concluded that the supervisor and co-worker engaged in conduct that was "inappropriate and detrimental to the workplace" and that it may have had the effect of "creating a workplace that is detrimental and offensive to other employees." Kelley was not satisfied with the results, complaining that various aspects of her complaint were not addressed. She was also offended that she was accused of "being in cahoots" with her supervisor who had also filed a complaint about the relationship.

When Kelley returned to work, her working conditions changed. She was now limited to a 30-minute lunch going forward despite the fact that she had taken an hour-long lunch for many years, forgoing her breaks. Her starting time was changed from 6:30 a.m. to 7:00 a.m. She was the only employee with a change in start time. Also, within days, she was ordered to take a refresher course in payroll despite the fact that she no longer performed payroll functions at the shop.

Kelley's indirect supervisor Griffin, just days later, emailed Zabriskie and complained **that Kelley "has arbitrarily decided that she works in a hostile work environment. Despite recent events there is no basis in fact for her claim. As a result, I am requesting that she be transferred out of the sign shop immediately**." **Two days later, Zabriskie requested a meeting with Kelley, and she advised Kelley that she was going to be transferred out of the Sign Shop purportedly to make her feel more comfortable**. Kelley had never been consulted about a potential transfer and had never been asked if she would prefer it. The transfer was lateral, but it was at a different location with a longer commute, had a different schedule, and had different job responsibilities. She claimed that the "lateral" transfer amounted to a material adverse action. The jury agreed when it found that she had been the victim of retaliation.

Holding: The Court denied the motions and allowed the monetary awards to stand. The Court ruled that the jury had an opportunity to assess the demeanor and credibility of the Commonwealth's employees "who had a hand in (1) the investigation of Ms. Kelley's initial complaint and the action taken in response to it; (2) the treatment of Ms. Kelley's March 19, 2006 complaint; and (3) the decision to transfer her." The Court concluded that the jury was warranted in awarding the damages it did, after considering the Commonwealth's explanations for their various actions and determining their motivations. The Court gave a lengthy narrative about the emotional distress that testimony at trial revealed about Kelley. The Court noted that the testimony by Kelley's husband and sister were "particularly coherent and compelling" about how the experience that led to and culminated in her transfer affected her. The Court noted, "There was no miscarriage of justice in the jury's award for the Plaintiff's emotional distress."

Take-Aways:

1. **Don't investigate like the Security Department.**
2. **Don't let the Manager decide the remedy.**
3. **Don't punish the complaining party.**

11. Miles v. Wyndham Vacation Ownership, et. al., (2014 WL 287617)(D.P.R. Jan. 24, 2014)

Facts: London Miles brought suit against her former employer, Wyndham Vacation Ownership and her former supervisor, Shawyn Maley, for sexual discrimination, sexual harassment, and retaliation. Miles was a Sales Representative at the Rio Grande office, and Shawyn Maley became her Sales Manager. He allegedly made numerous comments about perfect breasts and sexual relations he had with his girlfriend, and he showed her photographs of his girlfriend. He allegedly stared at her breasts. Another worker, Michelle Pérez, was offended as well by Maley's conduct, and complained about it.

An investigation ensued, and Maley was suspended pending the investigation. Miles and Pérez met with the Director and Assistant Director of Human Resources. Miles detailed many instances of misconduct and submitted a written statement as well. In addition, the Human Resources Director interviewed Maley and three other witnesses. Maley denied the allegations, and another witness denied having knowledge of Maley acting inappropriately. Other employees corroborated that the harassment occurred.

After investigating for three days, Wyndham concluded that the allegations against Maley could not be substantiated. In response, Maley was counseled on the proper work environment and company policies, and he was advised of the Company's zero tolerance on retaliation.

Three days after Miles gave her statement to Human Resources, she was removed from a list of discovery tours, which she complained about to Human Resources. Nothing was done.

Holding: The Court denied the Defendant's motion for summary judgment. The Court examined the sexual harassment and retaliation claims and allowed both to proceed. The Court examined Miles' allegation that she was removed from the list to lead lucrative discovery tours, which the Court characterized as retaliation for her complaint of sexual harassment rather than as a direct result of the harassment itself. For this reason, the Court noted that Wyndham could avail itself of the *Faragher-Ellerth* affirmative defenses. The Court noted that Wyndham provides employees with a manual that contains a harassment policy and a grievance procedure. Wyndham also trains its managers on employment matters.

The investigation was then examined. While the Court noted that the Company interviewed employees, collected written statements, and suspended the alleged harasser pending determination of the outcome, the Court also noted the following unfavorable facts: Not everyone who reported harassment was interviewed. When five employees reported harassment, but the alleged harasser and one other employee denied it, the Company concluded that the claims were unsubstantiated. The alleged harasser was merely counseled on proper work environment and company policies following the investigation. Thereafter, Wyndham transferred the alleged harasser to supervise a different office. In light of these facts, the Court ruled, "[a] jury could find that Wyndham's actions to prevent and correct harassment were not reasonable."

On the retaliation issue, the Court found that Miles had engaged in protected activity, suffered a materially adverse employment action, and a reasonable inference of causation could and adverse action created a reasonable inference of causation, the three days at issue here made the inference "even stronger."

Take-Aways:

1. **Some cases are just tough, particularly when the Sales Manager is involved.**

2. **A strong investigation may still leave you in a quandary about the appropriate level of discipline**.

12. Lightbody v. Wal-Mart Stores East, L.P. (2014 WL 5313873)(D. Mass. Oct. 17, 2014)

Facts: Diana Lightbody alleged violation of state law, Mass. Gen. Laws c. 151B for a sexually hostile work environment and inadequate investigation. The Court denied Wal-Mart's motion for summary judgment.

Diana Lightbody worked as a Zone Merchandise Supervisor at Wal-Mart's Walpole, Massachusetts store. Robin Wilson was assigned to be Assistant Manager. On December 17, 2009, Lightbody filed a written complaint to Wal-Mart citing specific instances of Wilson's alleged inappropriate behavior toward her. That alleged misconduct consisted of his comments that she was "hot," that she "excited him," and that he planned to sit on his couch naked all weekend. Further, she alleged that he pinched her stomach twice and tried unsuccessfully to pinch her buttocks. She further alleged that he stared at her, asked if she needed lip gloss, and licked his lips.

Wal-Mart initiated an investigation on December 18, 2009, the day after receiving Lightbody's complaints. Jennifer Castillo, Wal-Mart's Market Human Resources Manager, was the investigator. Over the next eight days, she interviewed Lightbody, Wilson, and two employees. Wilson denied many of Lightbody's accusations. In the investigation findings, Wal-Mart only corroborated Wilson's statement about his intention to spend the weekend sitting naked on his couch.

Lightbody alleges that Wal-Mart's investigation was deficient because the investigator failed to interview all the potential witnesses that she identified and that two witnesses identified as well. She asserts that Wal-Mart could have obtained corroboration of Wilson's misconduct had a more thorough investigation taken place.

On January 7, 2010, Wal-Mart disciplined Wilson by warning him that subsequent harassment policy violations would result in immediate termination, and it required him to undergo additional training regarding sexual harassment.

Prior to June 3, 2010, Wal-Mart employee Alyssha Dellis spoke with an Assistant Manager to say that she witnessed Wilson pinch and grab Lightbody's stomach at least twice, which corroborated Lightbody's complaints.

On June 3, 2010, Lightbody informed Wal-Mart that Wilson had recently stared at her breasts, which resulted in the Company suspending Wilson pending an investigation. In connection with that investigation, Castillo interviewed Lightbody and three witnesses, who corroborated the allegation. Another employee told Castillo that Wilson had made inappropriate comments to the employee and grabbed her waist at least once. Following this investigation, Wilson was terminated on June 23.

Holding: **The Court denied Wal-Mart's summary judgment motion on the sexually hostile work environment claim**, stating that it could not conclude from the record that no reasonable jury could find the alleged conduct was sufficiently severe or pervasive to create a hostile work environment. The inadequate investigation claim, likewise, was allowed to proceed. The Court cited the First Circuit's negligence test for determining employer liability for co-worker harassment. That is, once Wal-Mart had notice of the alleged harassment, it was obligated to take immediate and appropriate remedial action. "An inadequate response to a sexual harassment complaint could itself foster a hostile environment and so give rise to liability therefor."

Lightbody's contention that Wal-Mart's investigation was deficient focused on two issues. First, the investigator failed to investigate statements regarding Wilson's alleged harassment of other employees provided by two employees Castillo interviewed following Lightbody's December 2009 complaint. One of those employees stated that at least six other female employees claimed inappropriate behavior by Wilson, but they were never questioned. Lightbody asserts that interviews of any of those six employees might have uncovered additional misconduct or led Wal-Mart to discredit Wilson's denials of harassing Lightbody. **Second, Lightbody contends that Wal-Mart should have reopened its investigation in January 2010 when Dellis corroborated Lightbody's allegation about Wilson grabbing and pinching Lightbody's stomach.**

The Court ruled that a reasonable jury could conclude that Wal-Mart's investigation was deficient and that it failed to take appropriate remedial action. A jury could find that Wal-Mart should have pursued the leads provided by the witnesses that Castillo interviewed as part of her initial investigation. Further, a jury could conclude that a thorough investigation and formulation of an appropriate disciplinary action required Wal-Mart to follow leads that bore on Wilson's credibility. The Court noted that the adequacy of Castillo's investigation of Lightbody's allegations would "have a bearing on the defendant's liability at trial."

Take-Away: **A thorough investigation requires tenacity and a desire to get it right. Following all leads is important.**

13. Kimberly Thirkield v. Neary & Hunter OB/GYN, LLC et. al., (2015 WL 44590)(D. Mass. Jan. 2, 2015)

Facts: Kimberly Thirkield brought sexual harassment and retaliation claims under state and federal law, as well as aiding and abetting claims against her former employer, Neary & Hunter OB/GYN, a small, family-run obstetrics and gynecology practice, and other defendants. Thirkield claims that Faye Hunter, the receptionist, sexually harassed Thirkield by groping and making sexualized comments toward her. Thirkield claims that Hunter engaged in similar conduct toward other employees. Thirkield informed her supervisor of Hunter's conduct and provided a handwritten list of a number of incidents, including breast grabbing and sexual comments.

Among the claims in her suit, Thirkield argued that the practice failed to promptly and appropriately respond to her sexual harassment complaints. The facts reveal that, on February 29, 2012, Thirkield approached the Office Manager to report the only incident of Hunter's inappropriate touching. The Office Manager immediately alerted the Practice Manager, and the two of them met with Thirkield a second time to discuss the alleged harassment further. They apologized to Thirkield and advised her that Hunter's conduct was inappropriate in an office setting. They assured her they would speak with Hunter about the inappropriate touching, despite Thirkield asking that the complaint be kept confidential. Two days later, the managers met with Hunter and explained that touching other employees in the office was inappropriate and needed to stop. Hunter never touched Thirkield again.

A month later, Thirkield argues that she witnessed Hunter touch another employee, and she implied that the practice's response (a verbal reprimand) was insufficient to stop the harassing conduct. She argued that the response was, therefore, inappropriate.

Holding: The Court held that an employer's "disciplinary decision must be evaluated in real time; it cannot be evaluated in hindsight." The Court further noted that verbal reprimands may be an appropriate intervention following an initial harassment complaint. The Court granted the Defendants' motion for summary judgment because the employer's response was appropriate. The managers met with Thirkield to discuss her complaint and, shortly thereafter, met privately with the alleged harasser and advised her that touching other employees was inappropriate and must stop. Thirkield was never touched again. The Court rejected Thirkield's claim that the practice should have taken additional disciplinary and investigative steps, such as issuing a formal reprimand and interviewing other employees about Hunter's alleged behavior. The Court stated that the fact that alternative options were available to the practice fails to establish that the actions the practice did take were not appropriate. **An employer is to be afforded flexibility in selecting appropriate sanctions for employee misconduct**.

Take-Away: **Use your best judgment on the appropriate remedy and hope for the best.**

14. Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009)

Facts: Carl Thomas Sassaman was an Elections Administrator for the Dutchess County Board of Elections, working under David Gamache, the Republican Commissioner of the Board. Gamache was unhappy with Sassaman's work and demoted him to Elections Specialist. In his place, he named Michelle Brant to assume the Elections Administrator position. Sassaman suspected that Gamache and Brant had a romantic relationship which played a role in the job trade. Later, Sassaman allegedly called Brant and asked her out for a drink, which she declined. **He alleged that Brant revealed intimate aspects of her personal life to him and tried to ascertain whether he would be interested in a one-time sexual encounter. She alleges that he was the one who propositioned her for sex. Brant then complained to Gamache about Sassaman "harassing and stalking her**." Sassaman was suspended from work with pay, and the complaint was referred to the sheriff's office for a criminal investigation. No internal investigation took place. Brant and Sassaman were interviewed, and the sheriff's office determined that insufficient evidence existed to support any criminal charges. Gamache and Sassaman then met twice, and Gamache informed Sassaman that he would be terminated unless he resigned. **Gamache allegedly said that Brant "knows a lot of attorneys; I'm afraid she'll sue me. And besides you probably did what she said you did because you're male and nobody would believe you anyway."** In response, Sassaman resigned. He subsequently alleged that his employer pressured him to resign because of a sex stereotype regarding the propensities of men to sexually harass their female coworkers. He also alleges that his employer failed to investigate properly the sexual harassment charge that was lodged against him.

Holding: The Court agreed that the remark made by Gamache could reasonably be construed as an "invidious sex stereotype." The Court notes that Gamache appeared to have credited Brant's allegations of sexual harassment by pointing to the propensity of men, as a group, to sexually harass women. The Court noted that, in the course of investigating sexual harassment claims, employers cannot presume male employees to be "guilty until proven innocent" based on invidious sex stereotypes. The court found the remark was not "stray," but that it tended "to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class." The fact that the investigation was a minimal effort to verify Brant's accusation could be used as evidence of discrimination. The Court found that Gamache conducted no investigation into Brant's allegations nor did he ask anyone else to act as investigator. The Court went on to say that "Title VII suits often require a court or jury to consider whether an employer's response to an allegation of discrimination *itself* constitutes evidence of discrimination or liability for discrimination. When employees complain of Title VII violations, for example, employers 'can be held liable . . . if [they do] not fulfill [their] duty to take reasonable steps to remedy the [violation].'" The Court further stated, "[t]he failure of an employer to conduct an adequate investigation or to undertake an appropriate response can constitute evidence in support of a Title VII plaintiff's allegations." Further, employers may not rely on an alleged fear of a lawsuit as a reason to shortcut its investigation and justify an employment decision adverse to the putative harasser. "Indeed, just as the lack of investigation of a reported claim of harassment may factor into the determination of an employer's liability for discrimination against the complainant, so too may it indicate discrimination by an employer whose adverse determination against the putative harasser otherwise bears indicia of prohibited discrimination." In this case, the Court found that a reasonable jury could infer from the inadequacy of the investigation that the defendant relied solely on a sex stereotype and not the outcome of a reasonable investigation undertaken in response to the fear of a lawsuit as the basis for the decision to pressure Sassaman to resign. Where a plaintiff could point to evidence closely tied to the adverse employment action that could reasonably be interpreted as indicating that discrimination drove the decision, an arguably insufficient investigation may support an inference of discriminatory intent.

Take-Aways:

1. **Men have rights, too**.

2. **Assumptions are no substitute for investigating the claim and determining the facts**.

15. <u>Galdamez v. Potter</u>, 415 F.3d 1015 (9th Cir. 2005)

<u>Facts:</u> Arlene Galdamez was born in Honduras and speaks English with a discernible accent. She began working for the Postal Service in 1983. In late 1993, she took over as postmaster in Willamina, Oregon. Galdamez immediately began to make a number of changes designed to bring the Willamina office into line with Postal Service regulations. For example, she insisted on timely payment of post office box fees, prohibited non-employees from entering non-public areas, and insisted on returning incorrectly addressed mail even when carriers knew how to deliver it. These changes were met by hostility and opposition from both customers and other postal workers. Customers complained to Jim Bogroff, her immediate supervisor, as well as William Jackson, the District Manager for Oregon. Local media also devoted considerable coverage to the controversy. Galdamez, however, perceived a good deal of this hostility as stemming from her race, national origin, and accented English. Throughout her time in Willamina, she endured offensive verbal comments from customers and community members, references in local newspapers to her accent and foreign birth, direct and indirect threats to her safety, and vandalism to her car. **According to Galdamez, her reports of harassment and requests for assistance were rebuffed by Bogroff and other Postal Service managers**.

Community opposition to Galdamez resulted in a petition to remove her from office. The Postal Service initiated a disciplinary investigation of Galdamez based on complaints that she was "rude" and that her insistence on regulatory compliance undermined good customer service. The Postal Service did not investigate Galdamez's complaint that community criticism was motivated by her foreign birth and accent rather than her performance as postmaster. The Postal Service placed her on administrative leave. Galdamez sued the Postmaster General alleging race, color and national origin discrimination.

Holding: The Ninth Circuit Court of Appeals affirmed the defense verdict on the discrimination claims. However, the Appeals Court determined that the trial court had erroneously refused to instruct the jury on the Postal Service's duty to investigate and remedy actionable harassment by customers and community leaders, stating: "**An employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it**."

The Ninth Circuit's analysis is instructive:

> Galdamez testified that she informed her superiors almost immediately after taking office in 1994 of customer harassment based on her accent and national origin. When Galdamez first complained of the harassment, Bogroff told her Willamina was a "redneck town" and that she was "tough" enough to deal with the treatment. Jackson testified that postmasters were expected to "grin and bear" racist remarks and harassment, at least up to the point where law enforcement involvement became necessary. These same supervisors also testified that they did not know whether they had any specific obligation to look into racial harassment, or special procedures for confronting it, as they did in the context of sexual harassment. This evidence suggests that the Postal Service's response to Galdamez's difficulties was limited at best. . . . .
>
> On the other hand, there was some evidence that Galdamez's superiors did respond, specifically by offering Galdamez a position in a town with a larger Hispanic community and by arranging for a diversity specialist to inquire into the situation. They did so, however, only in conjunction with imposing formal discipline against Galdamez. Weighing all the evidence, a reasonable jury could have found that the harassment was actionable, that management-level Postal Service employees knew or should have known about it while it was happening, and that they nonetheless failed to take steps reasonably calculated to end and deter it, at least to the extent such steps were within their power.

415 F.3d 1015, 1024-25 (9th Cir. 2005).

Take-Away: **The Company can be liable for failing to act against third-party harassment.**

16. EEOC v. New Breed Logistics, 783 F.3d 1057 (6th Cir. 2015)

Facts: New Breed Logistics is supply chain logistics company. Facility at issue was staffed with 80% temporary employees. EEOC brought Title VII sexual harassment and retaliation action against the company. Jury found that Calhoun, a supervisor, sexually harassed female employees and retaliated against them when they complained. Also found that Calhoun retaliated against male employee who opposed Calhoun's harassment of female employees.

Calhoun made inappropriate comments to female workers and told them that he could do whatever he wanted because he would fire whoever complained about him. Calhoun would also allow female employees to be late, but started to discipline them for tardiness after they rejected his advances.

At one point, Calhoun became aware of an employee's plan to place an anonymous call to company's hotline about him. After anonymous complaint (which said it was anonymous because person feared retaliation), Calhoun transferred the complaining employee and another employee who had also rejected his advances to a new department and told their new boss to keep an eye on them because they started fights and weren't hard workers. New boss later fired them after meeting with Calhoun.

When HR received the anonymous complaint, it met with Calhoun for 30 minutes and asked him five questions. Calhoun denied any wrongdoing. HR did not interview any other employees.

Jury found New Breed Logistics liable for supervisor's actions and awarded over $1.5M in damages. New Breed Logistics asked court to overturn ruling, claiming there wasn't enough evidence.

Holding: Court found that there was evidence to support the jury's verdict and that the company could be liable for Calhoun's conduct.

Court let punitive damage award stand, holding that company did not engage in good faith efforts to comply with Title VII because: (1) only permanent employees got copy of the handbook with sexual harassment policy, even though temporary employees made up 80% of the workforce; (2) although HR received an anonymous complaint, the only thing it did was ask the alleged perpetrator if it was true, and did not interview anyone else in the department; (3) when HR did eventually interview people, it did not interview the witness identified in the anonymous call; and (4) employees who complained were all terminated during HR's investigation.

Take-Away: **Actually investigate!**