## 10.7 Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence

The plaintiff seeks damages from the defendant for a hostile work environment caused by [sexual] [racial] [*other Title VII protected characteristic*] harassment. The plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiff was subjected to a [sexually] [racially] [*other Title VII protected characteristic*] hostile work environment by a [non-immediate supervisor] [co-worker]; and

2. the defendant or a member of the defendant’s management knew or should have known of the harassment and failed to take prompt, effective remedial action reasonably calculated to end the harassment.

A person is a member of management if the person has substantial authority and discretion to make decisions concerning the terms of the harasser’s employment or the plaintiff’s employment, such as authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the plaintiff’s employment. A person who lacks such authority is nevertheless part of management if he or she has an official or strong duty in fact to communicate to management complaints about work conditions. You should consider all the circumstances in this case in determining whether a person has such a duty.

The defendant’s remedial action must be reasonable and adequate. Whether the defendant’s remedial action is reasonable and adequate depends on the remedy’s effectiveness in stopping the individual harasser from continuing to engage in such conduct and in discouraging other potential harassers from engaging in similar unlawful conduct. An effective remedy should be proportionate to the seriousness of the offense.

If you find that the plaintiff has proved both of the elements on which the plaintiff has the burden of proof, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.

**Comment**

*See* Introductory Comment to this chapter. *See also Swinton v. Potomac Corp.*, 270 F.3d 794, 803-05 (9th Cir. 2001). Use this instruction when the claim against the employer is based on negligence and involves harassment by another co-worker or a supervisor who is not the plaintiff’s direct (immediate or successively higher) supervisor.

Use this instruction in conjunction with Instruction 10.5 (Civil Rights—Title VII—Hostile Work Environment—Harassment Because of Protected Characteristics—Elements).

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

Under a negligence theory, an employer is liable if the employer (or its “management”) knew or should have known of the harassing conduct and failed to take reasonably prompt corrective action to end the harassment.  *Swinton*, 270 F.3d at 803-04. There are two categories of employees who constitute “management” for purposes of a negligence claim. *Id.* at 804. The first category is a member of management who possesses substantial authority and discretion to make decisions over the plaintiff’s or the harasser’s employment, such as “authority to counsel, investigate, suspend or fire the accused harasser, or to change the conditions of the harassee’s employment.” *Id.*  The second category of employees who qualify as management consists of any supervisor who lacks this authority but nonetheless “has an official or strong de facto duty to act as a conduit to management for complaints about work conditions.” *Id.* at 805 (citations omitted)*.*

It should be noted, however, that neither *Swinton* nor any of the cases relied on by *Swinton* provides a definition of a supervisor or other employee with “an official or strong de facto duty to act as a conduit to management for complaints about work conditions.” *See Swinton*, 270 F.3d at 804-05. To aid jury understanding, the Committee has modified the *Swinton* language of “de facto duty to act as a conduit to management . . ..” to “duty in fact to communicate to management . . ..”

The two elements of this instruction are based on *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999), and *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998). The text of the instruction addressing remedial action is based on *Mockler*, 140 F.3d at 813 (citing *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991)).

The burden is on the plaintiff to “show that the employer knew or should have known of the harassment and took no effectual action to correct the situation.” *Mockler*, 140 F.3d at 812 (citations omitted). “This showing can . . . be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment.” *Id.*

In determining whether an employer’s response to the harassment is sufficient to absolve it from liability, “the fact that [the] harassment stops is only a test for measuring the efficacy of a remedy, not a way of excusing the obligation to remedy.”  *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995), *as amended* (Apr. 24, 1995). “Once an employer knows or should know of harassment, a remedial obligation kicks in.” *Id.*  Therefore, “if 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach.”  *Id.* at 1528-29; *see also Reynaga v. Roseburg Forest Prods*., 847 F.3d 678, 690 (9th Cir. 2017) (“[P]rompt action is not enough. The remedial measures must also be effective.”); *Christian v. Umpqua Bank*, 984

F.3d 801, 811 (9th Cir. 2020) (“Inaction is not a remedy ‘reasonably calculated to end the

harassment[.]’”).

For purposes of proving that the defendant “knew or reasonably should have known of the harassment,” it is appropriate to impute this knowledge to a defendant employer if a management-level employee of the employer defendant knew or reasonably should have known that harassment was occurring.  *Swinton*, 270 F.3d at 804.

In *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024), the Ninth Circuit summarized the law governing a claim of subjecting a person to a sexually hostile work environment and explained that there are three factors: (1) whether the plaintiff was subjected to verbal or physical conduct of a sexual nature; (2) whether the conduct was unwelcome; and (3) whether the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Id*. at 1178-79. The court also noted that “[i]n analyzing the objective hostility of a working environment, we must look to the totality of the circumstances surrounding the plaintiff’s claim,” *id*. at 1179, and “conduct that took place outside of the physical work environment is part of the totality of the circumstances we evaluate when considering a hostile work environment claim.” *Id*. at 1180.

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