



2026 ACC Annual Meeting Resource

THE THREE COURTROOMS

Managing hostile work environment claims in the courtroom,
the boardroom and the court of public opinion

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Defending a hostile work environment claim today requires more than determining whether the alleged conduct satisfies the governing legal standard. In-house counsel must also evaluate witness credibility, organizational process, business disruption, reputational exposure, media activity and the likely reactions of a judge and jury. These risks are interdependent: a communications statement can become impeachment evidence, an interim employment decision can become a retaliation narrative, and a preservation failure can transform an otherwise defensible claim into a credibility crisis.

The most effective approach is to treat the matter as unfolding in three courtrooms. The courtroom applies law to admissible proof. The boardroom decides which risks the organization can accept. The court of public opinion shapes employee, customer, investor and prospective-juror perceptions. A strategy that succeeds in only one of these forums is incomplete.



EXECUTIVE TAKEAWAY

A harassment claim should be managed as one integrated enterprise-risk matter. The first response, the leadership decision and the public narrative will eventually become part of the trial story.



1

The legal threshold is the floor, not the whole decision

Federal hostile work environment analysis generally asks whether unwelcome conduct based on a protected characteristic was severe or pervasive enough to create an objectively and subjectively hostile or abusive work environment. Petty slights, ordinary annoyances and isolated incidents generally do not qualify unless extremely serious. Context and the entire record matter.

Employer liability depends substantially on the actor and the consequences. Harassment by a sufficiently senior proxy may be imputed to the organization. Supervisor harassment that culminates in a tangible employment action can create vicarious liability. Where no tangible employment action occurs, the Faragher/Elzerth framework may provide an affirmative defense if the employer exercised reasonable care to prevent and promptly correct harassment and the employee unreasonably failed to use available preventive or corrective opportunities. Coworker and controlled third-party harassment generally turns on notice and the adequacy of corrective action.



PRACTICAL IMPLICATION A

A written policy is not a trial story. The organization must be prepared to show that reporting channels, training, investigations and corrective action worked in practice.

2

The first 72 hours become the later trial story

A high-profile complaint often arrives with incomplete facts and intense pressure to act. The company may need to separate the parties, protect safety, preserve evidence, notify leadership, manage access to confidential information and respond to opposing counsel at the same time. Speed matters, but unexplained haste can create as much risk as delay.

The key is to preserve process integrity while decisions are made in real time. Counsel should identify the response team, suspend relevant deletion practices, map custodians and data sources, define the investigation mandate and establish clean reporting and decision rights. Interim measures should protect the process without appearing to punish the complainant or protect a powerful accused executive.

1. Stabilize the people and the workplace. Address safety, contact, reporting lines and nonretaliatory interim measures.
2. Preserve the record. Secure volatile electronic evidence before interviews or internal discussion change the landscape.
3. Establish independent fact-finding. Define scope, authority, privilege considerations and the recipient of findings.
4. Coordinate leadership and communications. Use one fact base and one decision structure.
5. Document contemporaneous reasons. Jurors will later judge whether each action was reasonable based on what the company knew at the time.

3

The investigation may become a proxy for corporate honesty

Investigation quality may not appear as a standalone element on the verdict form, but jurors often use the process to decide whether the company acted honestly. When the underlying interaction is disputed, the investigation gives jurors a second and often more accessible story: who listened, what was collected, whether powerful people were treated differently and whether the final decision followed the evidence.

A defensible investigator should be able to explain the mandate, independence, interview sequence, evidence collected, credibility method, limitations and separation between factual findings and employment decisions. The organization should resist both extremes: presenting policy compliance as a complete defense and allowing the case to become an unfocused trial of every investigative imperfection.



KEY QUESTION

Can the investigator and HR witness explain what they did in plain language without sounding scripted, defensive or protective of rank?

4

The settle-or-try decision is an enterprise decision

A case may be legally defensible and still be a poor candidate for trial. Conversely, reputational anxiety alone should not force an unprincipled resolution. The decision should be structured around several aligned questions rather than a single probability-of-liability estimate.

Proof: Can the defense establish the necessary facts through admissible evidence and credible witnesses?

People: Will the claimant, accused, HR team, investigator and decision-makers be believed under cross-examination?

Process: Can the organization explain its prevention, response and interim decisions without appearing to protect rank?

Place: How do the governing law, judge, venue, jury pool and local public narrative affect risk?

Publicity: Can the organization absorb the effects on employees, customers, investors, leadership and future matters?

Proportionality: Do the likely verdict, fees, litigation cost and disruption support the chosen path?

Leadership should identify the business objective explicitly. Confidentiality, speed, precedent, vindication, workforce stability and governance may point in different directions. Documenting the objective helps explain why the organization may rationally pay a premium for resolution or, alternatively, prepare for trial when a demand is disconnected from the evidence.

5

Build a defense narrative jurors can accept morally and legally

A defense theme must do more than restate the burden of proof. It must give jurors a morally acceptable way to take harassment seriously while still requiring reliable evidence. An effective posture combines empathy without presumption, accountability without automatic liability, context without excuse-making and fair process rather than an implausible claim of perfection.



THEME TO TEST

Serious allegation. Fair process.
Reliable evidence.

The theme should be tested, not merely selected. The user-provided trial paper recommends distilling the case into three themes and a short, ten-sentence story. That discipline forces the team to identify what is genuinely necessary to prevail and prevents discovery, motions and witness preparation from drifting into disconnected detail.

Bad facts should be addressed before opposing counsel weaponizes them. Jurors may forgive a mistake that is acknowledged and explained; they are less likely to forgive evasion, exaggeration or an executive who appears indifferent to the effect of power. Every impeachment point should answer a simple question: why does this inconsistency matter to the core story?

6

Public communications must survive the courtroom

Public attention can form a narrative before pleadings are filed. Repetition may cause an accusation to be perceived as corroborated, while a categorical denial can become damaging if later evidence requires qualification. Legal and communications teams therefore need a coordinated response that protects confidentiality and privilege while remaining consistent with the eventual trial theme.

A process-focused holding statement is often safer than either silence by habit or premature factual certainty. It can acknowledge a serious report, an independent review, appropriate confidentiality and action based on reliable findings. The precise language will depend on the matter, applicable rules and stakeholder needs, but every public sentence should be reviewed as if it will be read aloud to a jury.



COMMUNICATION TEST

Is the statement accurate today, likely to remain accurate after discovery and consistent with what the company will ask jurors to believe?

7

Modern voir dire should uncover experience, certainty and influence

Political and cultural polarization does not produce one predictable juror profile. The more useful model is wider variance and stronger priors. Some prospective jurors may begin with institutional distrust; others may begin with false-claim or personal-responsibility concerns. Some will speak freely, while others will conceal views they believe are stigmatized. The team must evaluate not only which side a juror initially favors, but also who may dominate, bridge or reshape deliberations.

Voir dire should move from labels to lived experience. Counsel can provide context, normalize competing reactions, ask how many rather than whether anyone holds a view, validate an answer before probing and offer private follow-up for sensitive experiences. A meaningful mini-opening and a carefully designed questionnaire may reveal attitudes that abstract questions about fairness will not.

- When can a company investigation be trusted, and when can it not?
- What experiences shape your view of why someone may delay reporting harassment?
- Does executive status affect how you evaluate credibility?
- What have you heard about the case, how often and what conclusion did you reach?
- Could you take the allegation seriously while still requiring the plaintiff to prove every element?



8

Prepare for trial before the record hardens

Trial preparation should begin when the claim is first assessed, not when the pretrial order is due. The litigation team should create a proof chart linking each element and defense to the necessary fact, witness, exhibit, evidentiary risk and trial decision. The same chart can guide discovery, depositions, summary judgment, motions in limine, witness order, opening and closing.

Representative juror research is most useful when it can still change the case. Test the plaintiff's strongest version, the defense's worst facts and critical witness video before positions become fixed. Witness preparation should focus on truthful explanation and self-awareness rather than memorized language. The accused executive, HR witness and investigator often become the company in the jury's eyes.

Pretrial planning should also address other-acts evidence, social media, sexual-history evidence, recordings, lay opinion, experts, demonstratives and limiting instructions. Counsel should know the applicable evidence rules and court practices. Damages require a principled alternative map even when liability is contested; otherwise, the plaintiff's number may become the only framework available if the jury reaches that question.



9

Five moves for in-house counsel

- Assess the whole risk, not only the legal claim. Integrate proof, people, process, place, publicity and proportionality.
- Protect the process, not the powerful individual. Make interim decisions that remain explainable under hindsight.
- Test the worst facts before the record hardens. Use early witness assessment and representative-juror feedback.
- Build one credible story for every audience. Align leadership, communications, discovery and trial strategy.
- Prepare for trial from day one. Use the governing law and proof chart to drive every major decision.

Conclusion

Hostile work environment claims become most dangerous when the organization treats legal analysis, leadership judgment, communications and trial preparation as separate projects. The stronger model is one integrated response. Preserve evidence, protect a fair process, define the business objective, test the real witnesses and build a narrative that remains credible in the courtroom, the boardroom and the court of public opinion.



Important

This resource is for educational purposes and is not legal advice. Applicable federal, state and local law, court rules and organizational obligations vary. Consult counsel for the specific matter.

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