
Third-Party Harassment and Discrimination: Employer Liability for Acts of Customers, Clients, and Vendors

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Third-Party
Harassment
and
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Employer
Liability for Acts
of Customers,
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Employer Liability for Non-Employee Harassment and Discrimination - Outline

1. Theory of employer liability for non-employee harassment
2. Different contexts for non-employee harassment
 - A. Customers
 - B. Clients
 - C. Healthcare facilities
 - D. Prisons
 - E. Schools/Universities
 - F. Vendors/sub-contractors

Outline (Con't)

3. Sources of law

- A. EEOC
- B. Federal courts
- C. State anti-discrimination laws

4. Elements of Employer Liability

- A. Severe or pervasive harassment
- B. Employer's knowledge of harassment
 - 1. Actual Knowledge
 - 2. Constructive knowledge
 - 3. Constructive knowledge of customer harassment

Outline (Con't)

5. Failure to remediate as ratification
6. Non-Liability - successful remediation
7. Liability – failure to remediate

Theory of Employer Liability for Harassment Committed By Non- Employees

- “An employer who condones or tolerates the creation of [a workplace permeated with discriminatory intimidation, ridicule, and insult] should be held liable regardless of whether the environment was created by a co-employee or a nonemployee, since the employer ultimately controls the conditions of the work environment. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073-74 (10th Cir. 1998).
- “...it makes no difference whether the person whose acts are complained of is an employee, independent contractor, or for that matter a customer. Ability to ‘control’ the actor plays no role. Employees are not puppets on string; employers have an arsenal of incentives and sanctions (including discharge) that can be applied to affect conduct. It is the use (or failure to use) these options that makes an employer responsible— and in this respect independent contractors are no different from employees.” *Dunn v. Washington Cnty.*, 429 F.3d 689, 691 (7th Cir. 2005).

Different Contexts for Non- Employees Harassment: Customers

- *Creacy v. BCBG Max Azria Group*, 14 Civ. 10008 (ER), 2017 WL 1216580 (S.D.N.Y. Mar. 3, 2017) (customer stomped on foot of African-American sales manager, yelling such things as, “You people don’t do right ... Hurry up ... Your job is to serve me ... You can’t be manager, your kind ... You call security. They are not going to nothing for you people.”)
- *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618, 624-25 (7th Cir. 2010) (for over a year male customer hounded female employee at store, asking her intimate questions and asking her out, filming her, twice touching her in a sexual manner, and his behavior persisted even after plaintiff obtained a “no contact” order issued by the state court).
- *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998) (customer sexually assaulted waitress).
- *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005) (remanding for new trial where plaintiff brought Title VII claims that customers and members of the community created a hostile environment based on race and national origin, and Postal Service failed to take steps to end or deter the harassment although it had the power to do so).
- *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003) (reversing summary judgment against female truck driver who was sexually harassed by both co-workers and customers).

Contexts: Clients

- *Little v. Windermere Relocation, Inc.*, 301 F3d 958 (9th Cir. 2002) (Corporate Services Manager raped by prospective client after she passed out at a business dinner with him).
- *LaRose v. Kings County*, 8 Wash. App.2d 90, 437 P.3d 701, 714 (Ct. App., Div. 2, 2019) (public defender received incessant sexually motivated, harassing calls from client, who eventually made repeated unwanted visits to her house, causing her to suffer depressive disorder and PTSD).

Contexts: Healthcare Facilities

- *Gardner v. CLC of Pascagoula, LLC*, 915 F.3d 320, 322 (5th Cir. 2019) (holding genuine issues of material fact existed as to nurse's sexual harassment claim against her employer, an operator of residential living program, where a patient suffering from dementia, brain injury and personality disorder repeatedly grabbed and made repeated sexual comments and requests to her).
- *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1110 (8th Cir. 1997) (reversing summary judgment for operator of residential home for individuals with developmental disabilities sued by three support staff members who were subjected to physical aggression and sexual assaults by resident).

Contexts: Prisons

- *Roy v. Correct Care Solutions, LLC*, 914 F.3d 52, 65-67 (1st Cir. 2019) (reversing summary judgment for medical staffing agency, which placed female nurse at a state prison, where she was sexually harassed by correctional officers, and finding that notwithstanding the difficulty in controlling working environment, the employer had a duty to take reasonable steps to stop or abate harassment).
- *Beckford v. Dep't of Corrections*, 605 F.3d 951 (6th Cir. 2010) (affirming verdict for 13 female non-security employees who claimed that the prison failed to remedy the sexually offensive conduct of male inmates).

Context: Schools/ Universities

- *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (affirming summary judgment dismissing sexual harassment claims of female graduate student who, while working as football team's manager, was subjected to sexually hostile work environment, holding that the harassment could not be imputed to the university employer); *cf. Berger-Rothberg v. City of New York*, 803 F.Supp.2d 155 (E.D.N.Y. 2011) (denying summary judgment where students in special education class were threatening and physically aggressive, allegedly because of the teacher's race, religion and gender).

Context: Vendors and Sub- Contractors

- *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 423-24 (4th Cir. 2014) (reversing summary judgment, holding that genuine issues of material fact existed as to whether that the employer knew or should have known about an independent sales representative's racial and sexual harassment of its customer sales agent, but failed to take remedial action for three years).
- *Modern Continental/Obayashi v. Mass. Com'n Against Discrimination*, 445 Mass. 96, 105, 833 N.E.2d 1130 (2005) (dismissing complaint of female apprentice carpenter sexually harassed by subcontractors' employees on grounds that the employer made reasonable efforts to remedy the harassment).

Sources of Law - EEOC

- 29 CFR § 1604.11(e):

“An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.”

Sources of Law – Federal Courts

- Federal circuit courts have uniformly held that an employer may be held liable for the harassment or discrimination of its employee by a non-employee when (1) the employer knows or should have known of the conduct and (2) fails to take immediate and appropriate corrective action. *See Roy*, 914 F.3d at 68, n. 19 (collecting cases); *Freeman*, 750 F.3d at 422, n.4 (collecting cases).
- This is a negligence standard; strict liability does not apply.

State Laws

- **Massachusetts:** See *Modern Continental/Obayashi v. Mass. Com'n Against Discrimination*, 445 Mass., 96, 105, 833 N.E.2d 1130 (2005) (G.L. c 151B § 4(16A)).
- **New York:** See *Swiderski v. Urban Outfitters, Inc.*, 14-CV-6307 (JPO), 2017 WL 6502221 (S.D.N.Y. Dec. 18, 2017) (more demanding standard for employer liability under New York State Human Rights Law, requiring a showing that the employer encouraged, approved, or condoned the discriminatory conduct; “[a]n employer’s calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation.” (internal quotation and citation omitted)).
- **Minnesota:** See *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1110 (8th Cir. 1997) (Minnesota Human Rights Act, § Minn. Stat. 363.01, subd. 41(3)).
- **Washington:** See *LaRose v. Kings County*, 8 Wash. App.2d 90, 437 P.3d 701, 714 (Ct. App., Div. 2 2019) (Wash. Rev. Code Ann. § 49.60.180(3)).
- **West Virginia:** See Human Rights Cmn, CSR 77-4-3.3

Elements of Employer Liability for Non- Employee Harassment under Title VII

The harassment: It must be “severe or pervasive” based upon the employee’s sex, race, or other protected category;

Imputation of liability to the employer: The employer 1) knew or should have known about the offensive work environment and 2) failed to prevent or take immediate corrective action to remedy the situation. *See Lockard v. Pizza Hut, Inc.*, 162 F.3d at 1073-74 (adopting EEOC standard); *see also, e.g., Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 423-24 (4th Cir. 2014) (holding that employer liability for non-employee harassment depends on employer’s knowledge and whether the employer’s response was “reasonably calculated to end the harassment”) (internal quotation marks omitted).

Severe or Pervasive Harassment

- *Gardner v. CLC of Pascagoula, LLC*, 915 F.3d 320, 322 (5th Cir. 2019) (the fact that the harasser was a patient at a residential living program suffering from dementia did not bar plaintiff's sexual harassment claim, although the claim "must be judged to determine whether a reasonable person would find the work environment hostile or abusive taking due account of the unique circumstances involved in caring for mentally diseased elderly patients") (inner quotation marks and citation omitted).

Employer's Knowledge of the Harassment

- “[a] plaintiff may prove that the employer had **actual knowledge** based on her reports of harassment to management-level employees or **constructive knowledge** based on the pervasiveness of the sexual hostility within the working environment.” *See Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001).

Constructive Notice of Harassment

- In *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238 (10th Cir. 2001), a psychologist at a state mental hospital was sexually assaulted by a patient. While the psychologist did not make a complaint about the patient prior to the attack, the court found that the hospital was under constructive notice based upon the pervasive atmosphere of sexual hostility throughout the institution.
- *Watson*, 324 F.3d at 1260-61 (holding that issues of fact existed as to whether the employer was on constructive notice of the harassment where a reasonable jury could conclude that the employer did not adequately investigate or respond to sexual harassment complaints).
- *Freeman*, 750 F.3d at 424 (“an employer cannot avoid Title VII liability by adopting a ‘see no evil, hear no evil strategy’”) (internal citation omitted).

Constructive Notice of Harassment by Customer

- *Swiderski*, 2017 WL 65002221 at *9 (“generally, an employer is not liable for failing to prevent an act of harassment by a first-time customer”).

Failure to Remediate as Ratification of Harassment

An employer's failure to remediate may represent a condonation or ratification of the harassment:

"An employer who passively tolerates the creation of a hostile working environment implicitly ratifies the perpetrator's misconduct and thereby encourages the perpetrator to persist in such misconduct, whatever the employer's precise legal relationship to the perpetrator. Moreover, acquiescence on the part of the employer effectively communicates to the victim of the harassment that her employer does not care about the hostile environment in which she must work, a message that can only operate to exacerbate the adverse effects of that hostile environment. In this context, an employer who is not part of the solution inevitably becomes part of the problem." *Modern Continental/Obayashi*, 445 Mass. at 105; see also *Little*, 301 F.3d at 968-69 (finding issues of fact as to whether the employer ratified a non-employee's rape of plaintiff by failing to take immediate and effective corrective action).

Non-Liability: Employer's Successful Remediation

- *Summa*, 708 F.3d at 124-25 (finding that university met its obligation when it spoke to the offending players within a few days of plaintiff student-manager's complaints, disciplined one of the harassers, and had the entire athletic department take sexual harassment training before the start of the next football season).
- *Modern*, 445 Mass. at 118 (“The obligation to make reasonable efforts cannot be transformed into an obligation to make maximum efforts. That [the employer] was not completely successful in eradicating all remaining vestiges of sexual harassment (i.e. occasional graffiti) and that one can envision additional steps that might have been taken (still with no guarantee of success) does not suffice to impose liability on [the employer].)”

Liability: Employer's Failure to Remediate

- *Little*, 301 F.3d 968-69 (finding that employer's response to rape of employee by a client was "equivocal at best," where, among other things, she was not effectively removed from the account after reporting the incident, and was demoted and terminated after complaining to the president).
- *Lockard*, 162 F.3d at 1075 (where manager had notice of customers' harassment of waitress, by ordering her to continue waiting on them he placed her in an abusive situation, although he could have directed a male waiter to serve the men, done so himself, or asked the customers to leave the restaurant).
- *Creacy*, 2017 WL 1216580 at *11 (finding factual dispute existed as to whether employer had taken adequate remedial action, in part because the employer neither undertook any investigation into the incidents of customer harassment, nor trained its employees in proper harassment procedures and corrective actions, nor sought a trespass warning against the harassing customer).



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Consequences of Harassment

- Low employee morale
- Absenteeism
- High turnover
- Stigma/Reputation
- Legal costs
- Monetary damages
- Bad publicity (examples: Fox News, Uber)
- Job loss/discipline

What is “The Workplace”?

- At the office
- Off property where business is conducted
- Online
- Phone/Text/Facebook/Instagram, etc.

Harassment & Discrimination Is Prohibited Under...

- Federal Law
- State Law
- Company Policy



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Rights and Responsibilities

1. You have a **RIGHT** to work in an environment free from harassment and discrimination.
2. You have a **RESPONSIBILITY** to **REFRAIN** from harassment and discrimination and to **REPORT** if it happens to you or you witness it happening to someone else.



What Does the Law Require?

- It is against the law to discriminate against employees based on membership in a “protected classification.” These classifications can include:

- Race/Color
- Religion
- Sex/Pregnancy
- National Origin
- Ancestry



What Does the Law Require?

- Protected Classifications cont.
 - Disability
 - Age
 - Sexual Orientation or Preference
 - Veteran Status
 - Genetic Information
 - Gender Identity or Expression
 - Marital Status
 - Domestic Partnership and/or Civil Union Status
 - Medical Condition

What Does the Law Require?

- It is against the law to retaliate against or intimidate an employee for:
 - Pursuing rights
 - Complaining about discrimination, unfair treatment or harassment
 - Participating in an investigation or proceeding

Liability under Title IX

- Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)
 - Fifth-grader alleged repeated harassment by a school mate
 - Complained multiple times to teacher
 - Teacher spoke with other student but no attempt to separate them
 - 3 months after first complaint finally allowed to move seats
 - Supreme Court held that School Board could be liable for inaction

Liability to Managers and the Company

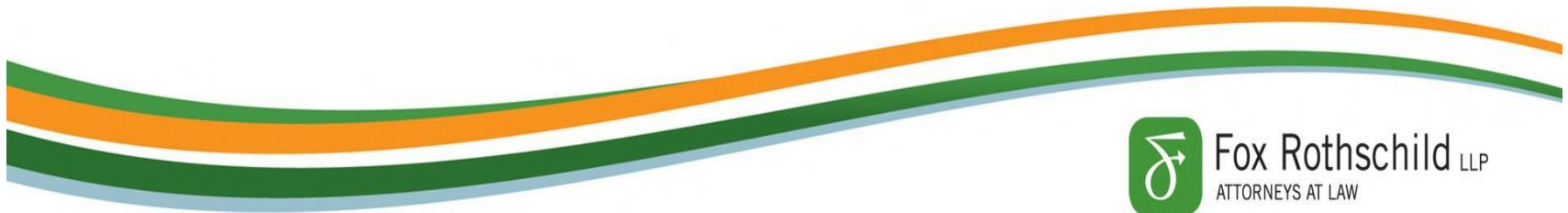
- Tangible employment action: An employer is strictly liable for a supervisor's harassment of a supervisee which results in tangible employment action.
- Individuals can be sued

Potential Liability

- Employer's Defense Under Federal Law (Title VII):
 - (1) there was no tangible job detriment;
 - (2) the employer had a policy prohibiting harassment which was in place and well-known; and
 - (3) the victim did not complain about the harassment.
- Employer's Defense Under California Law (the FEHA):
 - Strict liability for harassment by a supervisor.
 - But California employers have a defense for damages (not liability) called "avoidable consequences."
- Farragher/Ellerth defense not recognized by NYC and starting October 11, 2019, not recognized by NY state.

Potential Liability

- Elements of Avoidable Consequences Defense
 - Employer took reasonable steps to prevent and correct workplace harassment;
 - Employee unreasonably failed to use the preventative and corrective measures that the employer provided; and
 - Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.



Damages

- back pay
- front pay
- compensatory
- punitive damages
- Attorneys' fees



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Reducing Liability

- **Hostile work environment**: An employer can assert an affirmative defense to a claim of hostile work environment harassment if it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm.

What is Harassment?

1. Definition

- a. Unwelcome
- b. Unsolicited
- c. Conduct
 - 1) Of sexual nature; or
 - 2) Because of one's sex (including pregnancy), gender identity, race, color, religion, national origin, age, veterans status, status as the victim of domestic violence or sexual assault, disability, marital status, sexual orientation, domestic or civil union partnership status, genetic information or other protected classification

What is Sexual Harassment?

- It is a form of sex discrimination
- Includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity, and the status of being transgender

Hostile Work Environment



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What is a Hostile Work Environment?

- Hostile Environment Harassment
 - Conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.



Hostile Work Environment (cont.)

- The conduct must be severe or pervasive enough given the totality of the circumstances so that it alters the conditions of the victim's employment and creates an abusive environment.

Hostile Work Environment (cont.)

- The reasonable victim under like circumstances would perceive, and the victim actually did perceive, that an abusive working environment has been created.

REMEMBER: Behavior acceptable in some settings can be abusive in a work context

Who Can Commit Harassment?

- Managers and Supervisors
- Co-Workers
- Vendors or consultants or customers
- Men or women
- People with whom you have a business interaction, regardless of level of authority, race, color, sex (including pregnancy), religion, national origin, etc.

Different State/Local Standards

- New York just amended its Labor Law to match the New York City definition of harassment
 - Effective October 11, 2019
 - No longer required to prove that harassment was severe or pervasive
 - New standard: Unlawful harassment is anything that “subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories.”

Third Party Harassment

- Non-employees (such as vendors or customers) can also harass employees, and an employer can be liable if:
 - The employer knew of or should have known of the harassment;
 - Had the power to control the conduct of the non-employee; and
 - Failed to take prompt corrective action.

EEOC Regulations on Third-Party Harassment

- An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

– 29 CFR 1604.11(e)

Who does the Company Policy Against Discrimination Protect?

- All employees
- In some states, paid or unpaid interns, and contractors who work in the workplace

Examples of Harassment

- Physical assaults or attempts
- Unwanted sexual advances
- Visual displays of inappropriate pictures of any kind, and gestures
- Vulgar, suggestive, offensive or racist comments or jokes
- Sending inappropriate e-mails or accessing pornographic web sites
- Behavior that makes others feel uncomfortable

Examples of Harassment (cont.)

- Gender stereotyping
 - Harassing a person because that person does not conform to gender stereotypes
 - Harassing a person because they are performing a job normally performed by members of the opposite sex
 - Refusing to address a person by their preferred pronoun or prohibiting them from using bathroom of choice

Case Examples

- Multiple cases have resulted in significant liability to employers
 - 2013 EEOC \$30,000 Settlement with Southwest Virginia Community Health System to resolve claims receptionist was harassed by male patient
 - Also required to conduct training to all employees and post a notice about the settlement, give harassment policy to employees and report all future claims of sexual harassment to EEOC
 - 2018 – EEOC filed suit against Amada Senior Care in Colorado Springs
 - Home health care aides alleged that they had been groped by a client and raised multiple complaints
 - Also alleged retaliation for complaining in that their assignments were changes and hours were cut

Case Examples

- Gardner v. CLC of Pascagoula, 894 F.3d 654 (5th Cir. 2018)
 - Nurse alleged that assisted living facility allowed resident to harass
 - Special consideration because courts recognize that diminished capacity of patient may implicate whether harassment should be perceived as affecting terms and conditions of employment
 - Patient in question had Alzheimer’s and dementia and was sexually inappropriate
 - Would grope nurses. Documented on his chart
 - Facility transferred patient to a new wing but declined to have him psychiatrically evaluated after he assaulted his roommate.
 - Employee who complained told to put her “big girl panties on and go back to work”
 - Incident where patient repeatedly groped her and punched her breast led to termination
 - Fifth Circuit said this was not behavior that was to be expected in a nursing home

Harassment Claims are Not Going Anywhere

- EEOC 2018 Fiscal Year Employment and Litigation Data
 - <https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm>
- Retaliation is still most common claim
- 7609 sexual harassment charges
 - 13.6% increase from 2017
 - \$56.6 million recovered for victims of sexual harassment
- 199 lawsuits filed by the EEOC
- 302 active cases as of end of year
- Successful outcome in 95.7% of all district court resolutions

Complaint Procedure

- Employees should have more than one avenue to complain
- Do not have to report to harasser
- Investigation will be as confidential as possible



Training Managers What to Do if They Receive a Complaint of Harassment?

- When speaking with the person who is complaining:
 - Try to get as much detail as possible
 - Be neutral. Do not tell the employee you believe or don't believe the complaint.
 - Let the employee know that an investigation will be started asap
 - Assess whether immediate steps, such as suspension of the alleged wrongdoer need to be taken
- Immediately contact HR before doing anything else.
- HR must be contacted even if the employee does not want to file a formal complaint.



Investigating Complaints

- Once issue is raised, HR investigates.
- Immediate, thorough, and objective investigation.
- Discrete, but not confidential.
- Assess situation, fair to all sides.
- If you are required to participate, be honest.
- You may be required to preserve documents, emails, text messages and phone records
- You are protected from retaliation.

Investigating Complaints

- If there is a policy violation, then the problem is fixed; remedial action taken.
- Harasser will be disciplined.
 - But that discipline will not be widely publicized.
- Steps taken to prevent further harassment.
- Results of investigation will be communicated to complainant, harasser, and others as appropriate.

How to Investigate When Accused is Not Your Employee

- Cannot just rely on third-party's employer to conduct an investigation
- If third-party is a customer or client and refuses to cooperate in investigation, then must take steps to terminate relationship
- If harassment done by contractor, think about including a duty to cooperate in investigations as part of independent contractor agreement or agreement with temporary employment agency
 - Right to remove contractor for violation of harassment policies

How Do you Wrap Up a Complaint for Harassment?

- If a manager:
 - Follow up with HR for status and/or direction.
 - Be aware for signs of retaliation
- HR should advise both the complainant and the accused of the outcome
 - Follow up on any recommended/mandatory discipline

Prevention Tips

- Train managers and employees on harassment prevention
- Empower managers to address claims of third-party harassment
- Train contractors on harassment policies
- Don't rely on annual trainings
 - Reinforce policies throughout the year at informal meetings

QUESTIONS?

- Any questions?
- Any concerns?
- What three things will you take away from today's session?

Thank You!

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