J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 11(1) 53-73, 2003-2004

SEXUAL HARASSMENT AND THE LAW: COURT STANDARDS FOR ASSESSING HOSTILE ENVIRONMENT CLAIMS

LAWRENCE S. KLEIMAN

DARRIN KASS

YVETTE SAMSON

Bloomsburg University, Pennsylvania

ABSTRACT

This article reviews case law dealing with sexual harassment claims of hostile environment filed under the Civil Rights Act. The article is intended to provide employers with a better understanding of how the courts adjudicate these types of cases. The information reported in this article was gleaned by reviewing all 28 hostile environment cases decided at the circuit court level during the period of May 2002 to April 2003. The first section of the article identifies the types of evidence plaintiffs need to substantiate their claims of hostile environment sexual harassment. The article concludes with a discussion of the managerial implications suggested by the case law.

Title VII of the 1964 Civil Rights Act (CRA) prohibits sex discrimination at the workplace. The Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson* [1] made it quite clear that sexual harassment is a form of sex discrimination and is therefore unlawful [1]. Since this ruling, the number of reported cases of sexual harassment has steadily grown. In 1992, 10,532 charges of sexual harassment were filed with the U.S. Equal Employment Opportunity Commission (EEOC). By 2002, this number had risen to 14,396. The number of actual incidents of sexual harassment could be as high as 150,000 per year, given the fact that only about 10% of sexual harassment victims ever file a formal complaint [2, 3].

Because of the widespread nature of this phenomenon, employers cannot afford to bury their heads in the sand and simply ignore it. Failure to prevent sexual harassment not only causes emotional scars on its victims, but it also costs companies millions of dollars in lost productivity, absenteeism, employee turnover, and new employee training [4]. The Labor Department reports that these outcomes have cost U.S. organizations approximately $1 billion annually [5]. In addition, the EEOC reports that in 2002, companies spent over $50 million to settle harassment claims, and this figure does not include litigation costs, which often exceed $1 million when a case is lost in court.

There are two types of sexual harassment: quid pro quo and hostile environment harassment. In quid pro quo harassment, an employee is required to provide sexual favors in order to be hired, promoted, or allowed to sustain employment. The focus of this article is the second type of sexual harassment, hostile environment harassment, which occurs more frequently than quid pro quo [6]. A hostile environment is created when sexual behaviors have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

The aim of this article is to help employers better understand how the courts adjudicate hostile environment claims of sexual harassment filed under Title VII of the CRA. By better understanding the legalities of this issue, employers will be able to better respond (both proactively and reactively) to situations involving hostile environment claims.

The information reported in this article was gleaned by reviewing all 28 hostile environment cases decided at the circuit court level during the period of May 2002 to April 2003. Our analysis of these cases identified three primary elements that plaintiffs must prove to prevail in court:

1) The disputed behavior was gender-based.
2) The behavior was sufficiently severe or pervasive to create a hostile environment.
3) The employer is liable for the behavior.

These elements are addressed separately in each of the following three sections. The article concludes with a discussion of the managerial implications suggested by the case law.

WAS THE DISPUTED BEHAVIOR BASED ON GENDER?

The Civil Rights Act forbids employers from discriminating based on a person's sex. A court will rule that an employer's actions have been based on sex if it concludes that a member of one gender has been exposed to disadvantaged terms or conditions of employment to which members of the other gender have not been exposed. In a hostile environment case of sexual harassment, the court seeks to

determine whether the harassment would have occurred if had it not been for the plaintiff's gender.

The type of evidence needed to prove that harassment is gender-based depends on whether the disputed behavior was explicitly or implicitly sexual in nature and whether members of the same or different sex conducted it.

Explicit Nature of the Sexual Behavior

The courts have ruled that explicitly sexual conduct is, by its very nature, gender-based. Such behavior includes things like sexual propositions, innuendoes, pornographic materials, and sexually derogatory language [7]. Thus, when a charging party successfully demonstrates that the behavior in question is sexually explicit, its gender-based nature is automatically established; no further evidence is necessary. Most of the cases reviewed dealt with such behavior. For example, in *Suders v. Easton,* the plaintiff, a police communications operator, claimed that her supervisor and co-workers had sexually harassed her during her two-week training period [7]. In court, she recounted several instances of name-calling, explicit sexual gesturing (e.g., the men grabbing their private parts while yelling obscenities), offensive sexual conversations (e.g., discussions of people having sex with animals), and the posting of vulgar images. The court ruled that because this behavior was so sexually explicit, its gender-based nature "should be recognized as a matter of course" [7, at 7].

When the behavior in question is objectionable, but not sexually explicit, its gender-based nature must be demonstrated by proving that if it were not for the plaintiff's sex, the behavior would not have occurred. There were three cases in which at least some of the behaviors in question were not sexually explicit. We next describe these cases, indicating the types of behaviors that were judged to be nonexplicit and discussing how the courts decided whether these behaviors were gender-based.

In *Mast v. IMCO Recycling of Ohio,* the plaintiff complained about the following behaviors:

- Her male supervisor told her that she was too pretty to be working there.
- When angered, her supervisor grabbed her by the breasts, shook her, and yelled at her.
- Her supervisor told her there was something on her face and tried to remove it [8].

The court ruled that the only the first incident (i.e., she was "too pretty") was sexually explicit. The grabbing of her breasts was not considered explicitly sexual because, according to the plaintiff's testimony, her supervisor did not grab her breasts because she was a woman, but rather, because he was angry that she had asked for an unscheduled day off. Her testimony was corroborated by evidence that the supervisor had a history of inappropriately touching both male

and female employees when angry. The court concluded that he grabbed her chest because he was angry, but that anger did not stem from the fact that she was a woman. He would have similarly grabbed her had she been a man [8].

In the second case, *Ocheltree v. Scollon,* the plaintiff claimed that her supervisor and several male co-workers had engaged in the following behaviors in her presence:

- Talked openly about sex and about the sexual habits of other employees.
- Used foul, vulgar, and profane language.
- Told sexually-oriented jokes.
- Simulated oral sex and other sexual acts on a mannequin.
- Sang her a song with obscene lyrics.
- Passed around photographs of nude women [9].

The *Ocheltree* court concluded that only the vulgar song and the mannequin-related behavior were sexually explicit from a legal viewpoint. Regarding the other behaviors, the court noted that Title VII was not intended to prohibit such things as dirty jokes and sexually-based profanity spoken by a male supervisor to other male employees unless such behavior is gender-based. To determine whether these nonsexually explicit behaviors were gender-based, the court asked two questions:

1) Would the same conduct have occurred if the plaintiff had been male?
2) Were the profane words triggered by a gender bias [9]?

The court sided with the employer on both counts. Concerning the first question, the court noted that the conduct did not begin or change as of the date the employee was hired, but had been ongoing before she came to work there. It was thus not gender-based because the behavior was not motivated by her presence; it would have occurred whether or not she was there. The dissenting opinion argued that the conduct should be considered gender-based because it is more offensive to women than it is to men. The majority opinion rejected this argument, however, stating that the court must base its ruling on the motives behind the behavior and not on how members of each sex are affected by it [9].

Regarding the second question, the court concluded that the vulgarities were not triggered by a gender bias. While the discussions were generally degrading, humiliating, and insulting, they were not aimed solely at females. That is, the vulgar words spoken (e.g., "d**k head, mother f**") were sexually neutral and could be aimed at members of either sex [9].

The third case dealing with nonexplicit sexual behavior, *Walker v. National Revenue Corp.,* involved a gay employee's harassment complaint lodged against his female supervisor [10]. When first hired, the plaintiff's supervisor "came on" to him, rubbing his legs, thighs, neck, and hair, and positioning herself in a manner that revealed her underwear. Upon hearing that he was gay, and thus uninterested in her, she began physically and verbally abusing him. For example,

she threw paper at him, snapped his headset against his ear, threatened to send him home from work, and threatened to hit him with a plastic bat. She then began stalking him, following his transfer to another unit [10].

The court ruled that the original "come on" was sexually explicit and thus clearly gender-based. It ruled that the remaining behaviors were not sexually explicit, nor were they gender-based. The court concluded that the supervisor's "cruel behavior" was not influenced by the plaintiff s gender; she treated all employees that way [10].

> There is no question that Walker [the plaintiff] has presented evidence that Quinones was the type of supervisor for whom no employee wanted to work, that she acted in a juvenile and irrational manner on occasion, and that she was at best inconsiderate and at worst cruel in her treatment of those individuals under her supervision. However, Walker has not provided any evidence that Quinone's actions were motivated by gender; indeed he presented evidence that Quinones treated every employee badly, male and female alike [10, at 3].

Same-Sex Harassment

There were two cases dealing with the gender-based issue that involved charges of same-sex harassment. In *Lay Day v. Catalyst Tech,* the plaintiff, a heterosexual male, charged his male supervisor with the following infractions:

- He told the plaintiff that he was jealous because the plaintiff had a girlfriend.
- He approached the plaintiff from behind while he was bending down and fondled the plaintiff's anus.
- Following the previous two incidents, he spit tobacco on the plaintiff, stating, "this is what I think of you" [11].

In an effort to determine whether these behaviors are gender-based, the court relied on the Supreme Court's landmark decision for same-sex harassment cases, *Oncale v. Sundowner Offshore Servs., Inc.* [12]. The Supreme Court noted that one way of proving whether same-sex harassment is gender-based is to show that the alleged harasser is a homosexual who made explicit or implicit proposals of sexual activity [12].

The *Lay Day* court ruled that the behavior in question constituted an "explicit or implicit proposal of sexual activity" [11, at 3]. The more difficult issue for the court to decide was whether the defendant was a homosexual. Without evidence of any homosexual interest in the plaintiff, one could conclude that the behavior was not gender-based; the harasser may simply have been trying to humiliate the plaintiff for reasons unrelated to sexual interest, a motive that, while inappropriate, does not violate Title VII.

The court ruled for the plaintiff on this issue, concluding that it was very likely that the defendant was a homosexual and was thus motivated by his sexual interest in the plaintiff. It reached this conclusion based on the following evidence:

- The defendant's behavior (i.e., remarking that he was jealous of the plaintiff's girlfriend, poking of his anus, and spitting tobacco at him) was probably motivated by his anger over the plaintiff's rejection of his sexual advances.
- Testimony by two other male employees that the defendant made sexual overtures to them as well [11].

Rene v. MGM Grand Hotel also involved a charge of same-sex harassment [13]. The plaintiff, an openly gay male, was employed as a butler at a Las Vegas hotel. He complained that his male co-workers repeatedly grabbed his crotch and poked him in the anus. The defendant argued that the objectionable behavior was not gender-based, but rather was motivated by the defendants' disdain for the plaintiff's sexual orientation. The court disagreed, ruling that the physical attacks were gender-based because they were targeted at body parts (i.e., crotch and anus) that are clearly linked to his sexuality [13].

WAS THE DISPUTED BEHAVIOR SUFFICIENTLY SEVERE OR PERVASIVE TO CREATE A HOSTILE ENVIRONMENT?

Upon concluding that the disputed behavior is gender-based, the courts next tackle the issue of whether this behavior is sufficiently severe or pervasive to create a hostile work environment. In making this determination, the courts primarily rely on the Supreme Court's 1998 landmark decision in *Faragher v. City of Boca Raton,* which states that a hostile environment is one that is so offensive that it affects the terms and conditions of employment [14]. "A sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so" [14, at 787-788].

The next two sections examine the evidence needed to prove that the disputed conduct was sufficiently severe to create a hostile environment. The first section focuses on the issue of whether the environment was *subjectively* offensive; the second section on whether it was *objectively* offensive.

Was the Environment Subjectively Offensive?

As it is difficult to provide "hard" evidence regarding how one is subjectively affected by another person's behavior, the courts relied primarily on the plaintiffs' testimonies. For instance, in *Quantock v. Shared Marketing Services,* the plaintiff claimed that she was humiliated by the behavior and sought treatment by a psychologist [15]. In *Crowley v. L. L. Bean, Inc.,* the plaintiff stated that she was frightened to death and felt very shaky inside as a result of her co-worker's behavior [16. In *Lay Day v. Catalyst Tech, Inc.,* the plaintiff claimed that his supervisor's behavior caused severe depression that impaired his ability to work [11]. And in *Beach v. Yellow Freight System,* the plaintiff testified that he

felt degraded, demeaned, and humiliated by the graffiti that his co-workers had placed throughout the workplace that depicted him as a homosexual [17].

In one case, *Mast v. IMCO Recycling of Ohio,* the court ruled that the plaintiff had failed to prove that the disputed behavior was subjectively abusive [8]. As noted previously, the plaintiff had objected to her supervisor's comment that she was too pretty to work there. Testimony, however, revealed that the comment did not seem to upset her at the time; she simply "blew it off" [8, at 7].

Was the Environment Objectively Offensive?

As noted previously, the Supreme Court ruled in *Faragher v. City of Boca Raton* that a hostile environment is one that is so offensive that it affects the terms and conditions of employment [14]. The circuit courts have interpreted this ruling to mean that to be objectively offensive, the conduct in question must be extreme and not merely rude, unpleasant, or inappropriate. As noted in *Rogers v. City of Chicago:*

> A workplace is objectionably offensive when a reasonable person would find it hostile or abusive. This is a difficult thing to prove, and drawing the line is not always easy. Not every unpleasant workplace is a hostile environment. The occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers would be neither pervasive nor offensive enough to be actionable. The workplace that is actionable is one that is hellish [18, at 3].

Similarly, in *Mast v. IMCO Recycling of Ohio,* the court noted:

> A mere unfriendly work environment is insufficient to establish liability; rather the workplace must be permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [8, at 2].

To judge whether the conduct in question crosses the legal line, the courts view the totality of circumstances, including the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating, or merely an offensive utterance [8].

In the following sections, we first examine cases that failed to cross that line; that is, cases in which the behavior in question was neither sufficiently extreme nor pervasive enough to create an objectively offensive environment. We then examine cases that did cross the line.

Cases in Which the Environment Was Not Objectively Offensive

In several cases, the courts ruled that while the challenged behaviors may have been inappropriate, they did not cross the legal line. The key issue in some of these cases was the extent to which the behavior was sexually motivated or

sexually charged. For instance, in *Beiter v. Runyon,* the plaintiff accused her male supervisor of the following actions:

- He stopped her when she left for break, asked where she was going, yelled at her, told her to take her break and then "get her butt back here."
- He told her that he did not like her or her work habits.
- He constantly stared at her and paced behind her whistling, in order to let her know that he was watching her.
- He once ran his hand up and down her arm.
- He once rubbed his hand over her back in the area of her bra strap.
- He told her to limit her walking around because other supervisors were watching her.
- He was "overly friendly" with her, conversing about matters that were not related to work [19].

The court ruled that these behaviors did not create an objectively offensive environment because they were not sexually charged [19].

In *Alagna v. Smith,* the plaintiff was a female high school guidance counselor who charged that the following acts committed by a male science teacher created an objectively offensive environment:

- He called her at home more than 20 times to discuss his depression.
- He visited her office two or three times a week for similar discussions, often ending the conversations by moving close and touching her arm, looking her up and down and saying that she was very special and he loved her.
- He frequently stopped her in the hallway to tell her how much he loved her [20].

The court ruled that however inappropriate, the conduct was not sufficiently severe or pervasive to satisfy the legal threshold. The court reasoned that the teacher's behavior was not motivated by a sexual interest in the plaintiff. Rather, he was a person in search of a friendship who was seeking a reaffirmation of his self-worth.

When objectionable behavior is sexually charged or motivated, the employer could still prevail by convincing the court that such behavior either lacked severity or occurred infrequently. For instance, the plaintiff in *Duncan v. GMC* complained that her male supervisor harassed her in the following manner:

- He propositioned her one time (for which he later apologized).
- He asked her to prepare a document on his computer. The computer's screen saver was that of a naked woman.
- On four or five occasions, he unnecessarily touched her hand when she handed him the telephone.
- He had a planter in his office that was shaped like a man. The planter had a hole in front of the man's pants that allowed the cactus to protrude.

- He twice showed her a pacifier that was shaped like a penis.
- He asked the plaintiff to type a draft of the beliefs of the "He-Men Woman Hater's Club," which included a number of anti-female statements, such as "Women have coodies," and "Women are the cause of stress in men" [21, at 5].

The court noted that the defendant's behavior was sexually charged, as well as boorish, chauvinistic, and decidedly immature. However, the court did not find it sufficiently severe to create an objectively abusive environment, noting that a reasonable person would not conclude that the behavior altered the terms or conditions of the plaintiff's employment. While vulgar, these incidents were nothing more than "ordinary tribulations of the workplace" [21, at 4].

As noted earlier, the plaintiff in *Ocheltree v. Scollon* claimed that her supervisor and several male co-workers had engaged in inappropriate behaviors (i.e., a vulgar song and the simulation of sexual acts on a mannequin) that created an objectively offensive environment [9]. The court disagreed, noting that harassing behaviors were not sufficiently pervasive because they were infrequent, spread out over a span of one-and-a-half years.

Finally, in *Rogers v. City of Chicago,* the plaintiff attributed the following comments to her supervisor:

- I would like to be that little booklet you keep in your back pocket.
- Do you have a boyfriend? Do you need one?
- Your breasts look nice in that turtleneck.
- Put this in the bin so I can watch you walk over and put it in [18].

The court ruled that these comments did not create an objectively offensive environment, noting that the plaintiff "can prove little more than that she encountered a [small] number of offensive comments over a period of several months" [18 at 4].

Cases in Which the Environment Was Objectively Offensive

Plaintiffs' attempts at proving the environment was objectively offensive were much more successful when the behavior in question was sexually explicit, especially when the behavior was long-standing. Some examples follow:

In *Mack v. Otis Elevator,* the plaintiff filed the following charges against her male supervisor:

- On her first day at work, he told her that she was very attractive.
- He repeatedly told her that she had a fantastic ass, lucious lips, and beautiful eyes.
- He changed his uniform in front of her, stripping down to his underwear and "adjusting himself."

- He frequently boasted of his sexual exploits.
- One time he grabbed her by the waist, pulled her onto his lap, tried to kiss her, and touched her buttocks [22].

The court ruled in the plaintiff's favor, noting that these behaviors were clearly permeated with discriminatory intimidation, ridicule, and insult sufficiently severe and pervasive to alter the conditions of her employment [22].

The *Crowley v. L. L. Bean* court came to a similar conclusion when judging the following behaviors of the plaintiff's supervisor:

- He grabbed her foot and massaged it against her will.
- He followed her at work even when scheduled to work in a different warehouse.
- He physically blocked her path, forcing her to squeeze by him.
- He gave her gifts designed to let her know he was watching her.
- He followed her home from work.
- He broke into her house [16].

The defendant argued that these behaviors were trivial and isolated. The court disagreed, ruling that a reasonable person would find such a long-standing pattern of hostile and intimidating behavior to be severe or pervasive.

In *Quantock v. Shared Marketing Services,* the court made it clear that abusive conduct need not be both severe and pervasive to be actionable; one or the other will do [15]. In this case, the plaintiff was an account supervisor who charged the company president with the following actions:

- He propositioned her for sex three times during one meeting, asking first for oral sex, then to participate in a threesome, and then to have phone sex. She refused all three offers.
- He grabbed her breasts and forcibly kissed her [15].

Acknowledging that these actions were infrequent, the court nonetheless ruled that they were severe enough to create an objectionably abusive environment [15].

> Though infrequent, Lattanzio's alleged outright solicitation of numerous sex acts from Quantock is considerably more severe than the type of occasional vulgar banter, tinged with sexual innuendo that has previously been deemed to fall short of the hostile workplace standard. Given that Lattanzio made his repeated requests for sex directly to Quantock, and in light of Lattanzio's significant position of authority at the company and the close working quarters within which he and Quantock worked, a reasonable jury could find the sexual propositions sufficiently severe, as an objective matter, to alter the terms of Quantock's employment [15, at 3].

In one case, *Lay Day v. Catalyst Tech,* the work context was an important issue. As noted previously, this case involved a male worker who charged his male supervisor with a number of inappropriate behaviors that included the

fondling of his anus. The court pointed out that the severity of the defendant's behavior should be judged in the context of the firm's typical workplace behavior. In this case, the defendant's behavior was judged to be objectively abusive because such behavior was not normal in this work environment. That is, sexual joking was not common, and no one had testified to seeing any male employee touch another male employee in a sexual manner. The court noted that it would be different if male-on-male horseplay were common at the work site.

IS THE EMPLOYER LIABLE?

When plaintiffs are able to prove that a hostile environment has been created (i.e., the harassment was both gender-based and sufficiently severe or pervasive), the employer can still successfully defend itself by proving that it is not liable. The type of evidence needed depends on whether the person who created the hostile environment holds a supervisory position with the organization. In the following sections, we first address cases dealing with harassment by non-supervisors. We then focus on cases in which the hostile environments were created by the actions of supervisory personnel.

Harassment by Nonsupervisors

When nonsupervisors create a hostile environment, employers can escape liability by taking immediate and appropriate actions to correct the situation. There were four cases in which the courts scrutinized the employer's corrective actions to see if they were "appropriate."

In *Watson v. Blue Circle,* the female plaintiff claimed that male co-workers harassed her on two separate occasions [23]. On one occasion, a co-worker offered her money for sex and touched her buttocks. The other incident occurred when the plaintiff was assigned to work at a construction site. Upon her arrival, a male co-worker grabbed her by the hand and said that he wanted to "eat her." The plaintiff requested that she never again be assigned to that site [23].

The court ruled that the employer responded inappropriately in both instances. It failed to properly investigate the first complaint, concluded incorrectly that the co-worker's behavior was merely horseplay, took no punitive action. When the second incident was brought to management's attention, the investigator literally laughed out loud. No investigation was conducted, and the plaintiff was subsequently asked to return to that work site [23].

In *Crowley v. L. L. Bean,* the plaintiff presented evidence that a male co-worker stalked and harassed her, as noted earlier. The harassment continued for more than a year. The employer initially addressed the problem by issuing several warnings to the harasser, stating that his threatening, intimidating behavior would not be tolerated and that he must avoid any further contact with the plaintiff. When the harassment persisted, the company changed his work schedule so that he and

the plaintiff would work in different buildings and different shifts. The company finally suspended and eventually terminated him after the plaintiff obtained a court order against him [16].

The plaintiff argued that the company's corrective action was inadequate, given that he repeatedly ignored the warnings and often continued to work at her side, despite the edict that the two work different shifts at different locations. The employer countered with the argument that it is unfair to hold the company liable simply because its prior attempts to stop the harassment were not 100% effective. The court ruled for the plaintiff, stating that upon realizing that the warnings were ineffective, the company should not have waited 18 months to take stronger actions.

In *Alexander v. ALCATEL NA Cable Systems,* the female plaintiff claimed that a male co-worker had sexually assaulted her [24]. The employer argued that it was not liable for this alleged harassment because it took appropriate action upon hearing the plaintiff's complaint. It reported the incident to the police for investigation. The police were unable to find evidence to substantiate her claim. The company then told the alleged harasser that he would be fired if these charges were ever substantiated. Following this event, the firm held a sexual harassment training program for all employees [24].

The court ruled in favor of the plaintiff, however, noting that the employer's *post hoc* response to the complaint was appropriate, but it should have attempted to *prevent* the harassment in the first place. Prevention was important in this case because the employer knew that two other female employees had previously lodged assault complaints against the same individual. The company should have reasonably anticipated that he would harass the plaintiff. The court reasoned that the attack could have been prevented by the presence of a strong sexual harassment policy. However, the company's policy was weak, providing, in essence, that it would take necessary and appropriate steps to identify, discipline, and cooperate with local law enforcement authorities when issues of improper harassment were raised [24]. The court concluded the company had an obligation to take more rigorous action to check abuses that its own laxity had invited [24].

In *Minnich v. Cooper Farms,* the plaintiff charged a co-worker with the following actions:

- He made comments about wanting oral sex from her.
- He followed her around, blowing kisses.
- He ran his hands up and down her legs and rubbed his body and genitals against them.
- He jumped on top of her when she was bent over [25].

The employer argued that it had taken proper remedial action since it promptly investigated all complaints and gave the guilty party a warning that was effective in stopping the harassment for a time. When the harassment resurfaced, the

company first suspended and then transferred him to another location. When that remedy failed, the individual was terminated [25].

The court ruled that the employer's response was inadequate because it ignored the harasser's prior record. He had previously been given disciplinary warnings on three separate occasions for his abusive treatment of female employees. The court noted that the employer's actions were not strong enough, given this history; it should have realized that its response would be ineffective [25].

Harassment by Supervisors

In 1998 the Supreme Court ruled that employers are automatically liable for harassment caused by their supervisors when the disputed behavior involves some type of "tangible employment action." When the behavior in question is not a tangible employment action, employers are "vicariously" liable unless they can successfully make an "affirmative defense" [14, 26].

What Is a Supervisor?

According to the EEOC Guidelines, an individual is considered a supervisor if that person has the authority to either make tangible employment decisions affecting the employee or direct the employee's daily work activities [27]. This issue was addressed in two cases.

In *Mack v. Otis Elevator,* the court noted that a person is a supervisor if the authority given by the employer enables that individual to create a hostile environment [22]. The court ruled that the alleged harasser in this case was a supervisor because:

- He directed the particulars of the plaintiff's workdays, including her work assignments.
- This power gave him special dominance over the plaintiff arising out of their remoteness from others; there was no superior nearby to act as a check on his misbehavior [22].

In *Smith v. City of Oklahoma City,* the plaintiff was a police officer assigned to a K9 unit who claimed to have been sexually harassed by her sergeant [28]. The following evidence was presented concerning the status of the sergeant as a supervisor:

The sergeant had the following supervisory responsibilities:

1) He assigned her a dog.
2) He provided her with daily one-on-one training on dog handling.
3) He determined whether the plaintiff and her dog qualified after the completion of training [28].

The defendant argued that the sergeant was not a supervisor because he had no authority to make decisions regarding the plaintiff's leave, performance

evaluation, or discipline. Moreover, the collective bargaining agreement states that the position of sergeant is not a supervisory one [28].

Citing the Supreme Court's decision in *Faragher,* the court ruled that the alleged harasser should be considered a supervisor. It based its ruling on the fact that the sergeant's job duties closely resembled those of the supervisor in *Faragher,* where the supervisor was responsible for making daily lifeguard assignments, supervising fitness training, and controlling all aspects of day-to-day activities.

What is a Tangible Employment Action?

In two of the cases we reviewed, the court examined the issue of what constitutes a "tangible employment action." As noted earlier, this issue is important because the employer cannot establish an affirmative defense if the court concludes that its actions were tangible.

In *Suders v. Easton,* the plaintiff was continually harassed by a group of her supervisors over the course of her five-month tenure [7]. The plaintiff eventually resigned when her supervisors "set her up" by arresting her on a trumped-up theft charge. The employer felt that it could use an affirmative defense because there had been no tangible employment action; it did not fire her. The court disagreed, noting that while the plaintiff was not fired, her resignation should be viewed as a constructive discharge, which is a tangible employment action. The court noted that a constructive discharge occurs when an employer knowingly permits conditions of employment discrimination to become so intolerable that a reasonable person subject to those conditions would feel compelled to resign [7].

In *Min Jin v. Metro Life Insurance Co.,* the plaintiff's supervisor engaged in the following behaviors:

- He made crude sexual remarks.
- He touched her buttocks, legs, and breasts.
- He required her to attend a private evening meeting in his locked office, where he threatened her with a baseball bat, kissed, licked, bit, and fondled her, attempted to undress her, forced her to fondle him, pushed her against his exposed penis, and ejaculated on her.
- He repeatedly threatened to fire her if she did not accede to his sexual demands [29].

The employer claimed that there was no tangible employment action, and therefore it had the right to attempt an affirmative defense. The court disagreed, noting that coercing a victim to engage in sexual acts by threatening termination is a form of tangible employment action, as the court believed that she would have been fired had she not acceded to her supervisor's demands [29].

What Constitutes a Successful Affirmative Defense?

An employer can successfully make an "affirmative defense" by proving the following two points:

- It took reasonable care to prevent and correct sexual harassment.
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities that the employer provided.

In *Hardy v. University of Illinois at Chicago,* the plaintiff claimed that her supervisor sexually harassed her [30]. The employer argued that it took reasonable care to prevent harassment and adequately responded to the plaintiff's complaints. The court was satisfied with the firm's prevention efforts based on its strong sexual harassment policy that encourages employees to report instances of sexual harassment to the Access and Equity Office, which is authorized to investigate complaints, issue findings, and make remedial recommendations to the employer. The policy further provides the victims with an opportunity to seek counseling [30].

The court was also satisfied with the manner in which the firm responded to the complaint. It did a full investigation that substantiated some of the plaintiff's claims, but concluded that the harasser's conduct did not rise to a level that violated the sexual harassment policy. The supervisor was given a written warning for his inappropriate behavior and the behavior never re-occurred [30].

The remaining issue in this case was whether the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that the employer provided. The employer argued that she failed to follow its sexual harassment policy because she waited six weeks to file her initial complaint and took three months to file her report on the necessary form. The court ruled for the plaintiff on this issue, thus negating the employer's affirmative defense. The court noted that there was nothing unreasonable about waiting six weeks to file a complaint. Moreover, it was not unreasonable to take three months to complete her report; it often takes employees a lot of time to complete such forms because they want to ensure that all the relevant information is included [30].

In *Moisant v. Midwest, Inc.,* the plaintiff claimed that her supervisor created a hostile work environment by harassing her on three occasions [31]. The employer was able to establish the first prong of an affirmative defense by proving that it took prompt and appropriate actions in response to the complaints. In fact, the supervisor was terminated after the third incident was reported [31].

Regarding the second prong of the affirmative defense, the employer argued that the plaintiff did not report one of the three incidents of sexual harassment, and therefore the employer cannot be held vicariously liable for the supervisor's behavior. The court disagreed, noting that her failure to report one incident negated the employer's liability for that incident. However, it remained liable for the other two [31].

In *Hatley v. Hilton Hotels Corp.,* the plaintiffs alleged they were victims of sexual harassment from their supervisors [32]. They reported the harassment, but claimed that the employer conducted only a sham investigation that ultimately led to the two women resigning. The employer contended that it was not liable because it took immediate and appropriate action based on the complaints made by the defendants. However, both plaintiffs testified that after they made the formal complaints, the employer failed to separate them from the harassing supervisors, and the harassment continued until their departure. Additionally, four other cocktail waitresses testified that the employer had failed to respond to their own earlier complaints of harassment by the same supervisors [32].

The court found that the employer had failed to establish the first prong of an affirmative defense because the investigation into the harassment was inadequate and the firm did not take reasonable measures to correct or prevent the harassment [32].

Finally, in *Wyatt v. Hunt Plywood Co.,* the plaintiff reported sexual harassment by her supervisor to his superior [33]. Rather than helping to resolve the problem, the person receiving the complaint began sexually harassing her. The court concluded that the employer satisfied the first prong of the affirmative defense by maintaining a sexual harassment policy that clearly instructed employees on how to file a complaint. Moreover, the employer held regular meetings with supervisors to train them on how to prevent sexual harassment [33].

However, the employer lost the case because it could not satisfy the second prong of its defense. It argued that the plaintiff was at fault for not reporting the second harassment incident. The court rejected this argument, stating that the plaintiff followed the company's sexual harassment policy by reporting the initial incident to the proper person. Nothing in the policy required her to take additional steps [33].

MANAGEMENT IMPLICATIONS

We begin this section by posing several questions that will help employers estimate their chances of succeeding in court should a hostile environment claim be lodged. We conclude by suggesting ways in which employers can best prevent the occurrence of hostile environments.

Analyzing a Hostile Environment Complaint

Was the Behavior Sexually Explicit?

Behavior that is sexually explicit, such as sexual propositions, innuendos, and sexually charged language, is automatically considered to be gender-based [7]. When the behavior in question is objectionable, but not sexually explicit, plaintiffs

must prove that the behavior occurred because of their gender. Such behavior is considered gender-based when the following conditions exist:

- It was motivated by a sexual interest in the victim [10, 11].
- Members of only the victim's sex were exposed to the behavior [8, 9].
- The use of profanities was triggered by a gender bias [9].

We found several instances of clearly objectionable behavior (e.g., sexually oriented jokes, profanity, grabbing a plaintiff by the breasts) that were not considered gender-based because people of both genders were exposed to these types of behaviors.

Was the Behavior Both Subjectively and Objectively Offensive?

The courts rely on the plaintiff's testimony when considering the issue of a subjectively offensive environment. Critical to this determination is how the plaintiff felt at the time the behavior in question occurred. The environment is not considered subjectively offensive if the victim is unaffected by the behavior [8].

In determining whether the environment is objectively offensive, the courts consider the totality of circumstances. To be objectively offensive, the behavior must be more than merely inappropriate. It must create a "hellish" environment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment" [8]. It is more likely to be viewed as objectively offensive if it is sexually charged or motivated and is more than just the "ordinary tribulations" at the workplace [21, at 8]. Judges use a sliding scale in jointly assessing the severity and frequency of the behavior. The more severe the behavior, the less frequent it needs to be to be classified as objectively offensive [11, 15].

Did the Employer Take Appropriate Preventive and Corrective Actions?

Employers must take clear and appropriate steps to prevent and correct the alleged harassment. The following actions emerged as important factors in determining employer liability:

- Conduct an adequate investigation into the allegations [23, 32].
- Have a strong sexual harassment policy in place to prevent sexual harassment [24].
- If corrective actions (e.g., warnings, transfers) do not stop the harassment, additional, more rigorous actions should be taken quickly to stop the inappropriate conduct [16, 25].

- When the perpetrator has a history sexually harassing behavior, the employer must take additional steps to prevent the harassment [25].

Was the Alleged Harasser a Supervisor?

This question is important because the legal defense will differ depending on whether the person who created the hostile environment was in a supervisory position. To be classified as a supervisor, one does not need to have the authority to hire and fire a given employee. Rather, the courts have ruled that a position is considered supervisory if it gives someone the authority to direct an employee's day-to-day activities [28].

Did the Supervisor Engage in a Tangible Employment Action?

An employer has no defense when its supervisors harass subordinates by taking tangible employment actions. An action need not reach the level of a discharge to be considered tangible. An employee's resignation is considered a tangible employment action when the supervisor's actions create an intolerable work environment that would compel a reasonable person to resign [7]. It is also considered a tangible employment action when a supervisor coerces a victim to engage in sexual acts by threatening his/her termination [29].

Did the Victim Take Advantage of Any Preventive or Corrective Opportunities Provided by the Employer?

When a hostile environment is created by a supervisor, an employer cannot prevail in court unless it can show that the employee failed to follow its policies when reporting the harassment. Arguments that the victim was slow to file a report [30] or that the victim failed to report all incidents of harassment [33] are insufficient to make such a showing. Thus, the employer's chances of prevailing in court are very small when one of its supervisors has created a hostile environment.

Preventing Sexual Harassment

While the courts will tolerate a certain amount of sexually inappropriate behavior, employers should nevertheless do their best to prevent such behaviors. Once the door is opened to such behaviors, they can quickly get out of hand, leading to a successful lawsuit. Moreover, as noted in a number of decisions, the courts sometimes require the employer to take preventive measures to avoid liability, especially in instances where an employee has a past history of harassing conduct.

The best way to prevent sexually inappropriate behavior is to institute a zero-tolerance policy. Its potential effectiveness at reducing such behavior is

supported by the results of Gardner and Johnson, who reported that a zero-tolerance sexual harassment policy reduced the number of sexual harassment incidents in 78% of the organizations surveyed [34]. According to EEOC guidelines, the policy should clearly state that sexual harassment will not be tolerated, provide examples of behaviors that will be interpreted as sexual harassment, and delineate the consequences of being accused of violating that policy. The policy should be placed in employee handbooks and be redistributed periodically, and employees should sign a statement acknowledging that they have read and understood it [34].

Employers should also provide effective sexual harassment prevention training. Icenogle et al. found that most employees accurately recognize the behaviors associated with *quid pro quo* harassment, but not those associated with hostile work environment harassment [35]. The training should thus include "the subtleties of behaviors that may be interpreted as creating a hostile work environment" [35, p. 613].

Firms must also take steps to ensure that their reporting processes are effective. Wendt and Slonaker offered several suggestions [4]. First, remind the complainant of the procedures for reporting sexual harassment when s/he initiates a complaint. Second, have more than one person to whom a complaint can be made, especially in cases where the immediate supervisor is the one being accused. Lastly, reassure complainants there will be no retaliation for reporting sexual harassment, and instruct them to report any incidents of retaliation. Additionally, all sexual harassment claims should be taken seriously by management. An inadequate investigation opens the door to a successful harassment suit. Companies should thus hold the person responsible for the investigation personally liable for mishandling a complaint.

Organizational leadership is also an important factor in preventing harassment. Managers and supervisors should set a good example [34]. Organizations whose leaders strongly discouraged harassment reported fewer incidences than organizations whose leaders failed to take a strong antiharassment stand [36].

In conclusion, employers are strongly urged to implement a sexual harassment policy that contains clear guidelines and procedures for complaint filing. This action, coupled with effective sexual harassment training, can prevent the creation of a hostile environment, or at least minimize employee liability should such an environment exist.

ENDNOTES

1. *Meritor Savings Bank v. Vinson,* 40 FEP 1822, 477 US 57 (1986).
2. C. Dubois, R. Faley, G. Kustis, and D. Knapp, Perceptions of Organizational Responses to Formal Sexual Harassment Complaints, *Journal of Managerial Issues, 11*:2, p. 202, 1999.

3. R. Samborn, Many Americans Find Bias at Work, *The National Law Journal,* p. 16, June 1990.
4. A. Wendt and W. Slonaker, Sexual Harassment and Retaliation: A Double-Edge Sword, *S.A.M. Advanced Management Journal, 67*:4, pp. 49-58, 2002.
5. H. L. Moore, J. D. Cangelosi, Jr., and R. W. Gatlin-Watts, Seven Spoonfuls of Preventive Medicine for Sexual Harassment in Healthcare, *The Health Care Supervisor, 17*:2, pp. 1-9, 1998.
6. L. J. Munson, C. Hulin, and F. Drasgow, Longitudinal Analysis of Dispositional Influences and Sexual Harassment: Effects on Job and Psychological Outcomes, *Personnel Psychology, 53*, pp. 21-46, 2000.
7. *Suders v. Easton,* U.S. App 3rd Cir. LEXIS 7152, 2003.
8. *Mast v. IMCO Recycling of Ohio,* U.S.App 6th Cir. LEXIS 1940, 2003.
9. *Ocheltree v. Scollon,* U.S. App 4th Cir. LEXIS 21145, 2002.
10. *Walker v. Nat'l Revenue Corp,* U.S. App 6th Cir. LEXIS 15696, 2002.
11. *Lay Day v. Catalyst Tech, Inc.,* U.S. App 5th Circ. LEXIS 16476, 2002.
12. *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 140 L. Ed. 2nd 201 118 S. Ct. 998 (1998).
13. *Rene v. MGM Grand Hotel, Inc.,* U.S. App 9th Cir. LEXIS 20098, 2002.
14. *Faragher v. City of Boca Raton,* 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275, 1998.
15. *Quantock v. Shared Marketing Services,* U.S. App. LEXIS 25466, 2002.
16. *Crowley v. L. L. Bean, Inc.,* U.S. App 1st Cir. LEXIS 19268, 2002.
17. *Beach v. Yellow Freight System,* U.S. App 8th Cir. LEXIS 24295, 2002.
18. *Rogers v. City of Chicago,* U.S. App 7th Cir. LEXIS 3506, 2003.
19. *Beiter v. Runyon,* U.S. App 2nd Cir. LEXIS 23113, 2002.
20. *Alagna v. Smith,* U.S. App 4th Cir. LEXIS 6360, 2003.
21. *Duncan v. GMC,* U.S. App 8th Cir. LEXIS 17369, 2002.
22. *Mack v. Otis Elevator,* U.S. App 2nd Cir. LEXIS 6948, 2003.
23. *Watson v. Blue Circle,* U.S. App. LEXIS 5556, 2003.
24. *Alexander v. Alcatel NA Cable Systems,* U.S. App 4th Cir. LEXIS 21498, 2002.
25. *Minnich v. Cooper Farms, Inc.,* U.S. App 6th Cir. LEXIS 12876, 2002.
26. *Burlington Industries Inc. v. Ellerth,* 524 U.S. 764-65, 141 L. Ed. 2d 633, 118 S. Ct. 2257, 1998.
27. *EEOC Enforcement Guidelines on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual* (BNA) 405:7654, 1999.
28. *Smith v. City of Oklahoma City,* U.S. App 10th Cir. LEXIS 7073, 2003.
29. *Min Jin v. Metro Life Insurance Co.,* U.S. Appeals 2nd Cir. LEXIS 24078, 2002.
30. *Hardy v. University of Illinois at Chicago,* U.S. App 7th Cir. LEXIS 8679, 2003.
31. *Moisant v. Midwest, Inc.,* U.S. App 8th Cir. LEXIS 11085, 2002.
32. *Hatley v. Hilton Hotels Corp.,* U.S. App 5th Cir. LEXIS 20737, 2003.
33. *Wyatt v. Hunt Plywood* U.S. App. LEXIS 13276, 2002.
34. S. Gardner and P. Johnson, Sexual Harassment in Healthcare: Strategies for Employers, *Hospital Topics, 79*:4, pp. 5-12, 2001.
35. M. L. Icenogle, B. W. Eagle, S. Ahmad, and L. Hanks, Assessing Perceptions of Sexual Harassment Behaviors in a Manufacturing Environment, *Journal of Business and Psychology, 16*:4, pp. 601-616, 2002.

36. M. Bell, M. McLaughlin, and J. Sequeira, Discrimination, Harassment, and the Glass Ceiling: Women Executives as Change Agents, *Journal of Business Ethics, 37*:1,2, pp. 65-77, 2002.

Direct reprint requests to:

Lawrence S. Kleiman
Department of Management
Bloomsburg University
Bloomsburg, PA 17815
e-mail: lkleiman@bloomu.edu