A hostile sexual harassment: a legal update

Henry Findley
Troy University

Lee Vardaman
Troy University

Ping He
Troy University

ABSTRACT

Hostile sexual environment continues to be an important issue in the workplace. Few studies have examined the courts' interpretation of the sexual harassment guidelines based on the rules set forth by the Supreme Court in 1998. This article reviews over 200 cases and provides guiding principles and recommendations for practitioners.

Keywords: Sexual harassment, hostile work environment

INTRODUCTION

Sexual harassment has been recognized as a violation of the Civil Rights Act under Title VII since the late 1970's [Twomey, 2007]. In 1980 the Equal Employment Opportunity Commission [EEOC] propagated guidelines regulating sexual harassment in the workplace [29CFR1604.11]. Since then, charges have steadily risen until they peaked in 2001 at 15,475 [EEOC]. Complaints slowly declined until 2008, when they suddenly displayed a 10.8% increase [EEOC]. Since that time, charges have shown a modest decline. Currently, sexual harassment charges comprise 11.4% of all claims filed with the agency.

There has been comparatively little recent research on court interpretation of the sexual harassment guidelines [Shoenfelt, Maue & Nelson, 2002; Miller, 2001]. Given that sexual harassment litigation represents a significant amount of the EEOC caseload, is rising again, is very costly to organizations, and is such a controversial and complex issue, it would be helpful to review the recent case law interpreting the EEOC regulations on the subject. In particular, the review should focus on the area where there is the most confusion and litigation--sexual hostile environment.

To that end, a LEXIS-NEXIS key word search was conducted that yielded over 500 cases at the appeals court level [chosen because the legal principles are more settled and accepted than at the district level] since the Supreme Court set forth its hostile environment guidelines in Faragher v. City of Boca Raton [Faragher v. City of Boca Raton, 1998]. Over 225 usable cases were identified and examined for guiding principles as to the circumstances that constitute an illegal sexual hostile environment. Cases cited are representative or highlight special issues/circumstances that assist in determining the hostile environment threshold. Female on male and same-sex harassment cases were not included because some research has suggested there are differences among the sexes as to their perceptions/reactions to sexual harassment [Shoenfelt, Maue & Nelson, 2002]. Recommendations for administrators and legislators are provided.

HOSTILE SEXUAL ENVIRONMENT

Sexual harassment is defined under the EEOC guidelines as:

> "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature…when [1] submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [2] submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or [3] such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" [29CFR1604.11].

The Supreme Court upheld the EEOC guidelines in Meritor Savings v. Vinson and distinguished between quid pro quo and hostile environment claims [Meritor Savings v. Vinson, 1986]. It is the third definition that deals with hostile environment cases and is the subject of this article.

In Faragher v. City of Boca Raton, the Supreme Court clearly enunciated the factors to be considered in determining hostile environment claims filed under Title VII [Faragher v. City of Boca Raton, 1998]. First, it must "be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive" [Faragher v. City of Boca Raton, at 286].

Second, all circumstances must be examined, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" [Faragher v. City of Boca Raton, at 286].

The Supreme Court pointed out that "Title VII does not prohibit genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and the opposite sex. Simple teasing, offhand comments, and isolated incidents [unless extremely serious] will not amount to discriminatory changes in the terms and conditions of employment" [Faragher v. City of Boca Raton, at 286]. In fact, the Supreme Court previously made clear in Meritor Savings v. Vinson that no one is guaranteed a pristine work environment [Meritor Savings v. Vinson, 1986]. The Faragher Court underscored this point when it said that the guidelines when properly applied would filter out "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing [Faragher v. City of Boca Raton, at 286]. It should go without saying that nonsexual behavior is not covered by the guidelines. However, these cases do occur.

NONSEXUAL CONDUCT

Even though nonsexual behavior may be boorish and unprofessional, it is unprotected activity. For example, in Dianne Tatt v. Atlanta Gas, about once a week, an office assistant would present her supervisor with paperwork to sign, he would pretend to unzip his pants and urinate all over the paperwork. Nearly everyday, while others were present, he would yell across the office at her saying why don't you take off early and go on down to the American Legion and pull on some long necks [Dianne Tatt v. Atlanta Gas, 2005]. The Eleventh Circuit found no proof these actions were sexual in nature and the court noted even if they were, they were not severe or pervasive enough to create a hostile work environment [Dianne Tatt v. Atlanta Gas, 2005].

More recently, a former high school teacher was subject to a number of incidents by her supervisor over a seven year period that included him occasionally commenting on her physical appearance, once making a nonsexual sarcastic/derogatory remark, throwing a piece of paper at her once during a faculty meeting, and at least once a month conversing with her about matters unrelated to work [Cristofaro v. Lake Shore Central, 2012]. In affirming summary judgment, the Second Circuit of Appeals stated in an unpublished opinion that "with the exception of the comments about Crisofaro's physical appearance…the conduct principally cited by Cirstofaro was not based on sex." While the facially neutral incidents may be considered in the totality of the circumstances…in any hostile work environment claim, there must be a circumstantial or other basis for inferring that incidents sex-neutral on their face were in fact discriminatory work [Cristofaro v. Lake Shore Central, at 3].

SEXUALLY-RELATED CONDUCT

A hostile sexual environment can generally be classified into three main categories: physical, verbal, or visual. Cases usually, however, involve a combination of these types of conduct. We will examine each in turn. While it is not the focus of this article, it should be noted that in all of the cases reviewed the offending conduct had been made known to be clearly unwelcome.

PHYSICAL CONTACT

Physical touching of another person is generally the most serious form of conduct according to the Supreme Court. For example, in Lapka v. Chertoff, a female adjudication officer with the Bureau of Customs and Immigration Services was assaulted by a fellow employee on a business trip [Lapka v. Chertoff, 2008]. While the agency tried to argue that a single isolated event of assault was not pervasive, the Seventh Circuit disagreed. It noted that sexual assault alone can be sufficient to create an objectively hostile work environment because such an act by its very nature is considered severe [Lapka v. Chertoff, 2008]. It further explained that the continued presence of the perpetrator exacerbates and reinforces the fear and anxiety suffered by the victim [Lapka v. Chertoff, 2008].

The nature of the job does not necessarily ameliorate the conduct of the perpetrator[s] [Randolph v. Ohio Depart. of Youth Services, 2006]. A female prison guard was subjected to multiple physical attacks, in addition to verbal harassment and threats. The court found that these actions, even though in a prison setting, were severe and breached prevailing social norms and would be traumatic and humiliating to anyone in that situation [Randolph v. Ohio Depart. of Youth Services, 2006].

In a case involving customers physically harassing a waitress, the victim was able to prove a hostile environment existed with only one incident of physical touching [Lockard v. Pizza Hut, 1998]. A male customer at a Pizza Hut pulled the waitress's hair, along with other verbal comments. Following this incident, she asked to be reassigned to another customer, but the manager refused. Upon returning to the customer, he pulled her to him by her hair, grabbed her breast, and then placed his mouth on her breast. Pizza Hut argued that this was just one isolated incident and as such did not qualify as a hostile environment. However, the Tenth Circuit Court of Appeals found the offending conduct was both physically threatening and humiliating; therefore, it was sufficiently severe and pervasive to be declared illegal [Lockard v. Pizza Hut, 1998].

Nevertheless, less extreme forms of physical conduct do not always result in a hostile environment. In an often cited case, Gupta v. Florida Board of Regents, a male supervisor at a college touched a female subordinate's ring and bracelet, the hem of her dress [moving it a few inches], and her knee [briefly] over a 6 to 7 month period [Gupta v. Florida Board of Regents, 2000]. Additionally, he repeatedly called her at her home [though of personal nature, the calls were not sexual, intimidating or threatening], complimented her on her looks, and invited her to lunch several times. Once when she walked into his office, he was putting on his dress shirt and tucking it in his pants, which were partially opened. The Eleventh Circuit Court of Appeals denied the claim because much of this conduct occurs in normal workplace interactions. The dress shirt incident was found to be nonsexual. The touching of the hem and knee, though more serious, were ruled to be isolated, infrequent momentary events, and his actions were neither physically threatening nor humiliating [Gupta v. Florida Board of Regents, 2000].

In another Eleventh Circuit case, a sales associate filed a hostile environment claim after she had been touched twice on the buttocks by two different co-workers and asked by another if she had seen or worn panties with a "built in butt" [Dar Dar v. Associated Outdoor Club, Inc. at 85]. Another worker once told her that he had seen a "whale of a d--k" in the restroom [Dar Dar v. Associated Outdoor Club, Inc. at 85]. Given that the incidents occurred over a 22-month period, the appeals court found the conduct fell in the realm of simple teasing, offhand remarks, and isolated incidents [not extremely serious][Dar Dar v. Associated Outdoor Club, Inc., 2007].

The Seventh Circuit has gone so far as to say that some physical contact that is relatively minor and infrequent may be considered insufficiently abusive to be described as severe or pervasive [Hosteletler v. Quality Dining, Inc., 2000]. This includes a hand on the shoulder, a brief hug, a peck on the cheek, an attempted kiss on the lips, a hand on the thigh, or pinch on the buttocks as long as these incidents occur infrequently [Hosteletler v. Quality Dining, Inc., 2000]. For example, there was no hostile environment in Adusumilli v. City of Chicago when in four separated incidents a co-worker briefly touched a female employee's arm, fingers, and buttocks over a 10-month period [Adusumilli v. City of Chicago, 1998]. The same result occurred in Quinn v. Green Tree, where a male supervisor deliberately touched a subordinate's breasts with some papers he was holding and on another occasion told her she had been voted the sleekest ass in the office [Quinn v. Green Tree, 1998].

In Bussell v. Motorola, a temporary employee was subjected to a co-worker rubbing up against her back as he passed her in cramped quarters some 10 to15 times over a two-month period [Bussell v. Motorola, 2005]. He also made various sexually-related comments; on one occasion, he lifted her shirt up and pulled her pants down slightly to view her tattoo. While the behavior was crass, inappropriate, and unprofessional, the appeals court did not find the conduct to be sufficiently severe, pervasive, or repetitive enough to create a hostile work environment [Bussell v. Motorola, 2005].

Even a supervisor pulling back a lady's shirt to see the type of bra she was wearing has been ruled to be insufficient due to the isolated/infrequent nature of the action [McPherson v. City of Waukegan, 2004]. However, in the same case, the work environment became hostile when the supervisor later put his hands inside her blouse and felt her breasts and then a few days later did it again along with running his hand down inside her pants and touching her private areas. At this point, even though it was only two actions, they were very serious and both were physically threatening and humiliating [McPherson v. City of Waukegan, 2004].

Nevertheless, more frequent but "less serious" physical acts can create a sexually hostile work environment. For example, in Harvil v. Westward Communications, over a seven month period, a male co-worker, not only grabbed and kissed a new female employee on the cheek, but repeatedly made comments about her sex life, popped rubber bands at her breasts, fondled her breasts, patted her on the buttocks [at least once a week], and came and rubbed his body parts against her [from behind]. Although not as serious as the actions in McPherson v. City of Waukegan [2004], these acts occurred frequently enough to create a hostile work environment [Harvil v. Westward Communications, 2005].

In Schiano v. Quality Payroll, the Second Circuit reversed a summary judgment for the employer stating that the jury could find the harasser's actions repetitive enough as to change the conditions of the victim's work environment to one that was hostile [Schiano v. Quality Payroll, 2006]. In this case, a corporate financial assistant was subjected to a co-worker putting his hand on her thigh at a company party; he then pulled her skirt up a few inches and took a picture of his hand on her thigh. When leaving the party he suggested that he join her in her hotel room. Over the next 3 to 4 months, he came from behind her on 5 to 6 occasions and placed his hands on her back or neck and leaned into her while she worked. During this time, he made various verbal comments to her: He told her that she was sleeping with the wrong employee, remarked she was really hot, and asked what type of underwear she wore. Even after complaining about his behavior several times, he would pass by her cubical and leer at her [Schiano v. Quality Payroll, 2006].

VERBAL CONDUCT

The vast majority of hostile environment charges involve verbal comments of a sexual nature. In general, verbal comments are considered less serious by the courts than physical contact. As a result, verbal comments must be more frequent in order to reach the hostile environment threshold.

In some situations, the sexually-related comments are relatively benign even though they can be annoying. Anatasia v. CitiGroup [2011] is one such case. The realty manager had been romantically attracted to one of his subordinates for many years but had not done or said anything to suggest such an attraction. One day at lunch, he told her of his feeling toward her. The feelings were not mutual and she became distraught. Other than gently grabbing her arm once, he had never touched her. After the incident, he awkwardly apologized on several occasions. Even though she filed a hostile environment claim, the courts could not find where his actions were severe or pervasive and dismissed the case [Anatasia v. CitiGroup, 2011].

In Reeves v. Robinson Worldwide, a transportation sales representative was subjected to nearly three years of co-workers using sex specific language in her presence and playing sexually offensive radio programs every morning [Reeves v. Robinson Worldwide, 2008]. Comments included referring to women as "c--ts" or "whores" as well as vulgar references to sexual acts such as "f--- your sister," conversations concerning ejaculation, men's erotic dreams, female sexual anatomy, and sources and indications of female sexual arousal [Reeves v. Robinson Worldwide at 1145]. She was also once exposed to a pornographic image on a co-worker's computer.

None of the conduct was physically threatening, but the language and radio programs could be found to be a humiliating work environment, particularly because she was the only female in the work group. Taken together, the comments could be considered severe in that the words or phrases used fell within the spectrum of language that is particularly offensive to most women [Reeves v. Robinson Worldwide, 2008]. Clearly, the conduct was pervasive throughout the work environment. The court pointed out that her performance also could have been adversely affected because she testified that all of the conduct made it difficult for her to concentrate and caused her to often leave her workstation and stand in the hallway [Reeves v. Robinson Worldwide, 2008]. Also, she claimed that she started to shake when she was exposed to the pornographic image. The court noted that while no single episode crossed the Title VII threshold, it was the repeated exposure over three years to the verbal comments and the pervasive nature of all the actions that created the hostile environment. As a result, the Eleventh Circuit Court of Appeals reversed a summary judgment for the company and remanded the case.

However, many charges involving sexually-related comments that are less repetitive and over a relatively short period of time do not lead to a hostile environment. For example, isolated sexual advances such as indicating one wants to have relations with the opposite sex while grabbing one's private parts does not create a hostile work environment [Pomales v. Celulares Telefonica, 2006], nor does five phone calls at night over several weeks asking for dates [Nurse "BE" v. Columbia Palms, 2007].

In Lockett v. Choice Hotels, a co-worker made sexually-related comments to a female reservations clerk when she visited the company café during her breaks [Lockett v. Choice Hotels, 2009]. Over a four month period, he talked about sexual positions and indicated that "he would lick her p---y," that "he would go down on her good," that "her boyfriend ain't f---ing her right," and that she needed "to get with a real guy" [Lockett v. Choice Hotels, at 867]. She

stopped going to the café for three weeks, but when she returned he indicated that he wanted to hug her; she refused, however. On another occasion, he touched her bottom quickly, but it did not affect her performance. The Eleventh Circuit Court of Appeals concluded that based on the totality of the circumstances the offending behavior did not meet the threshold of a hostile work environment because it was infrequent, insufficiently severe or pervasive [Lockett v. Choice Hotels, 2009].

In another case that failed to meet the conditions of a hostile work environment, a supervisor of a female deputy sheriff, over a three month period, made comments [about once or twice a week] to her about wearing tighter clothes, that she looked hot, and that he wished his wife wore hot clothes; once he also made a comment to her husband over her cell phone that he was "eating her" [Webb-Edwards v. Orange County Sheriff's, at 1019]. In Patt v. Family Health Systems, eight gender-based comments over several years, which included hearing "the only valuable thing to a woman is that she has breasts and a vagina," were not pervasive enough to support a hostile environment claim [Patt v. Family Health Systems, 2002].

Similarly, in Rhonda L. Moser v. Indiana Department of Corrections, a co-worker talked down to a secretary and other females, made a reference to her "tits," told several new male employees to "watch out because she likes good-looking men," asked her "if she had gotten a new set of legs," used profanity in her presence, "told a joke about a boy's anatomy," commented on physical appearance of female job applicants, and "made an innuendo about his penis size when a dimension was mentioned by a female co-worker"[Rhonda L. Moser v. Indiana Department of Corrections at 904]. He also made sexually related comments to others outside her presence, but the courts generally do not allow these comments into evidence [that is, offensive statements must occur in the victim's presence]. The Seventh Circuit concluded that "sporadic use of abusive language, gender-related jokes, and occasional teasing are fairly commonplace in some employment settings and do not amount to actionable harassment" [Rhonda L. Moser v. Indiana Department of Corrections at 905]. In a recent Wal-Mart case, the Seventh Circuit went so far as to state that using vulgar language [such as calling an employee "a f---ing bitch" or cursing], yelling at the victim, and making isolated comments about older women in the workplace over a five month period was not actionable, although crass [Anne B. Raciot v. Wal-Mart, 2005].

Nevertheless, given enough repetition and seriousness of the comments a hostile environment will occur. In Parker v. General Extrusions, a "loose" atmosphere pervaded the night shift of a fabrication department where there was a tremendous amount of horseplay in the work area replete with shop/locker room talk that included the use of profanity as well as crude and vulgar terms [Parker v. General Extrusions, 2007]. Male employees routinely made sexual comments about and to female employees. The victim, over about a three year period, was referred to as a "f---ing whore" and endured vulgar comments about her possible sexual activities, implying that she was promiscuous [Parker v. General Extrusions at 600]. When she reported the problems to her supervisor, he told her that she should consider it a compliment. She was repeatedly referred to as "whore," "bitch," "slut," and "crybaby," sometimes in front of the foreman [Parker v. General Extrusions at 600]. Although she complained a number of times, little or nothing was done and the comments continued. Eventually, all of the inappropriate conduct caused her to take two separate medical leaves of absence. The Sixth Circuit found that the harassment was sufficiently continuous and serious enough and that given her performance was adversely affected by the leaves of absence were sufficient grounds to create a hostile work environment [Parker v. General Extrusions, 2007].

In Boumehdi v. Plastag Holdings, the supervisor of a female production worker, over a period of 10 months made at least 18 sex-based comments to her [Boumehdi v. Plastag Holdings, 2007]. These included on at least five or more occasions telling her that women do not belong in the production area and that women think they know everything [Boumehdi v. Plastag Holdings, 2007]. He once commented when she was bending over that she should remain in that position as it was perfect. He also told her that women should work in flower shops and that she should wear a low cut blouse and shorter shorts. When she was pregnant, he asked her if she had gotten a breast enlargement over the weekend; upon finding out that she had miscarried, he asked her what business she had getting pregnant at her age [Boumehdi v. Plastag Holdings, 2007]. On another occasion, he told her that her gender did not exempt her from taking out the trash, and he also told her to clean the production room, noting that he did not ask men to do the cleaning because that's what women were supposed to do [Boumehdi v. Plastag Holdings, 2007]. Additionally, he once told her that he had to leave work to get a lap dance down the street [Boumehdi v. Plastag Holdings, 2007]. The Seventh Circuit concluded that the sexist comments were pervasive and frequent enough to reverse a summary judgment for the company [Boumehdi v. Plastag Holdings, 2007].

However, it doesn't have to take nearly a year or more to obtain a hostile environment ruling. In Fairbrother v. Pamela Morrison, a female forensic treatment specialist at a maximum-security facility for the criminally insane was called the "b" word almost daily for several months; she was also called a whore approximately 10 to15 times [Fairbrother v. Pamela Morrison, 2005]. Also, "she was asked why she wasn't wearing a French maid outfit" [Fairbrother v. Pamela Morrison at 52]. Over about a six-month period, male employees routinely talked about their sexual activities and asked her about hers, pornography was left in bathrooms and the staff office where meetings were held. Co-workers would yell to one another with comments about their private parts. At any given time, there were at least two or three sexually offensive jokes posted on the staff office bulletin boards [Fairbrother v. Pamela Morrison, 2005]. The Second Circuit found "these circumstances are egregious enough to permit a reasonable juror to conclude that the conditions of Fairbrother's employment were altered because of the hostile work environment she faced undermined her ability to perform her job" [Fairbrother v. Pamela Morrison at 53].

VISUAL CONDUCT

Conduct of a visual nature can lead to a legitimate hostile environment claim as well. Visual conduct includes gestures, staring, displaying pornography, revealing or directing attention to body parts, and text messages. In Valentine v. City of Chicago, a co-worker in the City's Department of Transportation rubbed his crotch in front of the victim nearly every day for about six months [Valentine v. City of Chicago, 2006]. He repeatedly asked her for dates [30 to 40 times] and made repeated comments about her "tits" and "ass"; he also asked her on at least 20 occasions to leave her fiancé [Valentine v. City of Chicago at 681]. On at least 6 occasions, he rubbed her arm or shoulder. He also humiliated her in front of her co-workers with an unwelcome sexual prank that involved him mimicking masturbating. Even though she continually made him aware that his behavior was unwelcome, it continued, causing her to experience anxiety, inability to concentrate, and depression. The Seventh Circuit reversed a summary judgment for the employer and allowed the case to go to trial because of the frequency, severity, and the pervasiveness of the conduct.

In Ocheltree v. Scollon Productions [2003], a new female shoe production worker began to be increasingly subjected to male sexual antics that went on for about a year. Almost daily, the male employees would make sexually explicit comments, talk about intimate sexual activities with their wives or girlfriends, and use sexually-related gestures, involving a female-form mannequin [Ocheltree v. Scollon Productions, 2003]. These actions included fondling the mannequin and demonstrating various sexual techniques on it. The harassment was so offensive at times that it would drive the victim from the workroom. The courts found the actions to be pervasive, repetitive, and humiliating enough as to create a hostile work environment [Ocheltree v. Scollon Productions, 2003].

The context, however, can mitigate the severity of the conduct. In Duguie v. City of Burlington, janitorial staff would be cleaning men's bathrooms in a police department, and the male police officers would come in and undress or urinate while the janitorial staff cleaned [Duguie v. City of Burlington, 2006]. However, there were only a few such isolated incidents and they were not considered sufficiently severe or pervasive to create a hostile work environment.

Although usually innocuous, staring can rise to the level of actionable hostile environment as it did in Billings v. Town of Grafton. A secretary to the town administrator began to notice after a few months that her supervisor was looking at her chest during conversations with her. He would make eye contact, then his eyes would shift to her breasts and he would stare at them for approximately five seconds or longer. She started avoiding being alone with him and would hold a piece of paper in front of her chest while walking through the office. He once stared at her so many times in the first half hour of the day that she went home to change the sweater she was wearing [Billings v. Town of Grafton, 2008]. Even after complaining, the conduct did not stop. This lasted for some two and a half years. In reversing a summary judgment for the city, the First Circuit stated that the conduct was not isolated and could be found by a jury to be satisfactorily severe and pervasive [Billings v. Town of Grafton, 2008].

Exposure to pornographic pictures in just a handful of incidents can lead to a hostile environment verdict. In Criswell v. Intellirisk, the Eleventh Circuit Court of Appeals ruled that exposure to explicit pornographic pictures on three separate occasions were so extreme and severe that a hostile environment ruling was appropriate [Criswell v.Intellirisk, 2008]. In Bright v. Hill's Pet Nutrition, male production workers would try to make women view pornographic material on the men's computers while they were training them [Bright v. Hill's Pet Nutrition, 2007]. When the women refused to view the pictures, the men would not conduct any further training. In addition, the workplace was replete with unwelcome sexual overtures by males, and they would make streams of misogynistic invective remarks [Bright v. Hill's Pet Nutrition, 2007]. This lasted for over two years and was ruled to constitute a hostile environment.

However, in Lucero v. Nettle Creek School, on one occasion a student held up a picture of a student's naked buttocks, and on another occasion 20 Playboys were placed in the same teacher's classroom by some of her students [Lucero v. Nettle Creek School, 2009]. While the courts found these incidents to be deplorable behavior that no teacher should be subjected to, the incidents were nevertheless "isolated and were neither sufficiently severe nor pervasive as to rise to the level of actionable harassing conduct" [Lucero v. Nettle Creek School at 730]. Likewise, in Coolidge v. Consolidated City of Indianapolis and Marion County, a female crime lab worker discovered two pornographic videotapes left by a man who had retired. Given that the exposure was brief, the nature of her job was such that she was used to seeing nudity as part of her job,

and due to the accidental nature of the discovery, the courts found no violation [Lucero v. Nettle Creek School, 2007].

INTERNET RELATED

More recently, a customer service representative with U.S. Airways filed a charge after a co-worker took a picture of her leaning over a table at work, revealing her underwear [Yancy vs. US Airways, 2012]. The co-worker then posted the picture on his Facebook page. While this case was filed on other grounds, posting such a picture on a Facebook page would likely sufficiently humiliating to constitute a hostile work environment. In another case, explicit sexual text messages played a key role in the in the Fifth Circuit of Appeals upholding a jury verdict for the plaintiff in Cherry v. Shaw Coastal [2012].

MIXED CASES

Many cases have a mixture of physical, verbal, and visual components which make it harder to evaluate. For example, in EEOC v. Great Steaks [2012] a waitress was subjected to repeated sexually-related conduct by her supervisor for a month until she was terminated. These actions included touching her lower back and buttocks on several occasions, making repeated comments about her breasts while looking down her shirt, and once asking her if she wanted to have sex with him [*EEOC v. Great Steaks,* 2012] Given that she was newly hired and subject to repeated physical, visual, and sexual explicit comments any reasonable person would have felt humiliated and threatened. In this case, the Fourth Circuit of Appeals upheld the jury verdict.

CONCLUSION

Determination of a hostile environment is not a simple process because each case must be considered in its own context with varying circumstances requiring interpretation of the conduct involved, which is inherently complex; therefore, it is difficult to present precise directions as to determining an exact hostile environment legal threshold. However, some general guidelines can be provided. Usually, it takes a significant amount of frequent unwelcome sexually-related behavior over a considerable period of time to cross the hostile environment demarcation point unless it is clearly humiliating and involves touching of private parts and/or is threatening. Often, less severe forms of physical touching that are nonthreatening when isolated and occur over a number of months are not usually deemed illegal. In general, based on the appeals court decisions reviewed, sexually-related comments by themselves must generally be more frequent and often take 6 to 10 months or more to become hostile [though not always]. Visually related behavior that is severe only takes a few instances to create a hostile workplace, but less severe incidents may take many occurrences and months to create a hostile environment. Teasing, joking, or vulgar language is not commonly protected activity.

There were no systematic discernable differences among the various circuit courts. However, this may be due to the comparative lack of usable cases for a number of the circuits.

Administrators are under no legal obligation to withhold corrective action until the hostile environment limit is reached. Nor are they required to tolerate teasing, vulgar, crass, or unprofessional [sexually-related or not] behavior in the workplace. In fact, sexually-related

behavior and any unprofessional or vulgar behavior could affect workplace productivity and morale long before legal stipulations are breached. Even though workers are not guaranteed a pristine environment, organizations are well within their legal rights to formulate policies and procedures that go so far as to have virtually zero tolerance for such conduct.

This would be particularly important for high profile managerial and media positions as well as government, education, religion, and child care institutions which are often held to higher social standards due to the nature of their work. It would also be important in other work environments as well, such as hazardous occupations where "horse play" of any type can result in serious injury. In fact, legislators at both the Federal and State level should at the very least consider tightening the sexual harassment rules governing these types of occupations and work environments.

In any event, it makes much more sense for organizations to propagate policies that are intolerant of such behavior. These policies may be in addition to or incorporated into the organization's current sexual harassment policy. This accomplishes two important purposes. First, it will minimize legal exposure to sexual harassment litigation. Second, and perhaps more important, it creates a work environment free from unprofessional and sexually-related conduct, however benign, which can only detract from workplace productivity and ultimately affect worker motivation, morale, well-being, and performance.

REFERENCES

Adusumilli v. City of Chicago, 164 F.3d 353 [7th Cir.1998].
Amelia Anastasia v. Citigroup, 455 Fed. Appx. 236 (3rd 2011).
Ann M. Hostetler v. Quality Dining, Inc., 218 f.3d 798 [7th Cir. 2000].
Anne B. Raciot v. Wal-Mart Stores, Inc., 414 F.3d 675 [7th Cir. 2005].
Cherry v. Shaw Coastal, 668 F.3d [5th Cir. 2012].
Code of Federal Regulations, [2006] 29CFR1604.11.
Corrine Cristofaro v. Lake Shore Central School District, LEXIS 6550 [2nd Cir. 2012]
Donna Randolph v. Ohio Department of Youth Services, 2006, No. 04-3468 [6th Cir. 2006].
Donna Valentine v. City of Chicago, 452 F.3d 670 [7th Cir. 2006].
EEOC, [2009] http://archive.eeoc.gov/stats/harass.html.
EEOC v. Great Steaks, 667 F.3d 510 (4th Cir. 2012).
Elaine Webb-Edwards v. Orange County Sheriff's Office, 525 F.3d 1013 [11th Cir. 2008].
Elizabeth A. Bright v. Hill's Pet Nutrition, Inc. 510 F.3d 766 [7th Cir. 2007].
Fairbrother v. Pamela Morrison, 412 F.3d 39 [2nd Cir. 2005].
Faragher v. City of Boca Raton, 524 U.S. 775 [1998].
Geraldine Dar Dar v. Associated Outdoor Club, Inc., 248 fed. Appx. 82 [11th Cir. 2007].
Harvil v. Westward Communications, 433 F.3d 428 [5th Cir. 2005].
Ingrid Reeves v. C.H. Robinson Worldwide, Inc., 525 F.3d 1139 [11th Cir. 2008].
Julie Boumehdi v. Plastag Holdings, LLC., 489 F.3d 781 [7th Cir. 2007].
Kelly S. Coolidge v. Consolidated City of Indianapolis, 505 F.3d 731 [7th Cir. 2007].
Latrece Lockett v. Choice Hotels International, Inc. 315 Fed. Appx. 862 [11th Cir. 2009].
Leah A. Lapka v. Michael Chertoff, 517 F.3d 974 [7th Cir. 2008].
Lisa L. Ocheltree v. Scollon Productions, 335 F.3d 325, [4th Cir. 2003].
Magalena Pomales v. Celulares Telefonica, 447 F.3d 79 [1st Cir. 2006].
Mary Dianne Tatt v. Atlanta Gas Light Company, 138 Fed. Appx. 145 [11Cir. 2005].

Meghan Bussel v. Motorola, Inc. 141 Fed. Appx. 819 [11th Cir., 2005].
Meritor Savings Bank v. Vinson, 477 U.S. 57, 1986.
Michele Yancy vs. US Airways, LEXIS 6729 [5TH Cir. 2012].
McPherson v. City of Waukegan, 379 F.3d 430 [7th Cir. 2004].
Miller, G.L. [2001]. What the General Practitioner Needs to Know to Recognize Sexual Harassment Claims. *The Alabama Lawyer*, 62, July, 246.
Nancy M. Billings v. Town of Grafton, 515 F.3d 39 [1st Cir. 2008].
Nancy Parker v. General Extrusions, 491 F.3d 596 [6th Cir. 2007].
Nicole Schiano v. Quality Payroll Systems, Inc., 445 F.3d 597 [2nd Cir. 2006].
Nurse "BE" v. Columbia Palms West Hospital, 490 F.3d 1302 [11th Cir. 2007].
Patricia Duguie v. City of Burlington, 161 Fed. Appx. [2nd Cir. 2006].
Patt v. Family Health Systems, Inc. 280 F.3d 749 [7th Cir. 2002].
Quinn v. Green Tree Credit Corp., 159 f.3d 759 [2th Cir. 1998].
Rena Lockard v. Pizza Hut, Inc., 162 F.3d 1062 [10th Circuit, 1998].
Rhonda L. Moser v. Indiana Department of Corrections, 406 F.3d 895 [7th Cir. 2005].
Sharon A. Lucero v. Nettle Creek School Corporation, 566 F.3d 720 [7th Cir. 2009].
Shoenfelt L., Maue A., & Nelson J. [2002]. Reasonable Person versus Reasonable Woman, *American University Journal of Gender Social Policy & Law*, 10, 633.
Srabana Gupta v. Florida Board of Regents, 212 F.3d 571 [11th Cir. 2000].
Twomey, D. P [2007] *Labor & Employment Law Text and Cases* Thompson/West; Australia.
Vicki Criswell v. Intellirisk Management Corporation, 286 Fed. Appx. 660 [11th Cir. 2008].