Published on *The National Law Review* https://natlawreview.com

Should the Legal Standard for Harassment/Hostile Work Environment Claims be Redefined?

Article By:

Zuckerman Law Whistleblower Practice Group

With the possibility of more employees returning to the office in 2021, momentum is building at the state and local levels to rethink what an employee must show to prove they have been harassed at work. Harassment cases, which encompass hostile work environment claims, make up about 10% of all charges filed with the EEOC, and in FY2019 (the most current data available) these cases numbered over 26,000 and resulted in nearly $140 million in awards/settlements reached by the EEOC. Sexual harassment claims are the most common type of this complaint, but harassment and hostile work environment cases can also be based on race, religion, disability, and other protected characteristics.

Current federal law on harassment: the "severe or pervasive" standard

The operative framework for hostile work environment claims in federal court is known as the "severe or pervasive" standard. Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

The Supreme Court has interpreted the phrase "terms, conditions, or privileges of employment" to evince a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment, "which includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17 (1993).

Subsequent Supreme Court cases dictate that whether a work environment is hostile or abusive must be reviewed by "looking at all the circumstances" of the environment, which includes:

- the frequency of the discriminatory conduct;
- the severity of the conduct;
- whether it is physically threatening or humiliating, or a mere offensive utterance; and
- whether it unreasonably interferes with an employee's work performance

See Harris, 510 U.S. at 23. Other factors are also in play, including whether the harasser is a supervisor versus a co-worker.

Concerns about the “severe or pervasive” standard

A steadily rising chorus of criticism about the “severe or pervasive” standard for hostile work environment claims is advancing. Critics of this standard view it as out of touch with current societal norms and creating an unnecessary roadblock for victims of harassment to have their claims decided by a jury. For example, in Montgomery County, Maryland, the Council highlighted an appellate court decision from the U.S. Court of Appeals for the Seventh Circuit, *Swyear v. Fare Foods Corp*., 911 F.3d 874 (7th Cir. 2018), as an example. It summarized the alleged facts as follows:

“during an overnight business trip, a sales representative followed his female colleague into her hotel room, got into her bed, said he wanted a ‘cuddle buddy,’ and asked her to go skinny dipping. The female colleague reported the harassment to her employer.”

The Montgomery County Council noted that in *Swyear*, “the employer did not reprimand the sales representative and, instead, fired the female employee a month after she complained of the abuse.” Despite this, the federal appellate court ruled that the employee’s case should be dismissed before she had the opportunity for a jury trial because “the sales representative’s actions towards his colleague ‘were not severe as compared with acts this Court has found sufficient to create a hostile or abusive work environment.’”

One aspect of how the “severe or pervasive” standard is applied in courts is that judges must rely on prior cases (precedent) when they determine if the case before them meets the standard. Some of this precedent is from 25 or 30 years ago and involves conduct that, at the time, may have been considered mere “incivility” but would today be deemed far more severe behavior.

Differing interpretations in federal courts

In federal courts, the “severe or pervasive” standard has been applied inconsistently in different parts of the country. In one example, the Supreme Court recently declined to hear a harassment case out of the U.S. Court of Appeals for the Eighth Circuit, *Paskert v. Kemna-ASA Auto Plaza, Inc*. In *Paskert*, the allegations by the female employee included a supervisor’s unwelcome physical touching, a supervisor’s statements that he could “have” the employee (in a sexual manner), and that the supervisor said he wished he had never hired a woman and wanted to make the employee cry. The appellate court found that these facts could not constitute a hostile work environment and dismissed the employee’s claims prior to trial. The court acknowledged that while the alleged behavior was “certainly reprehensible and improper,” it is “not nearly as severe or pervasive as the behavior found” to establish a hostile work environment in prior cases.

In a different hostile work environment case out of the U.S. Court of Appeals for the Second Circuit, the court found that the employee presented sufficient evidence for a jury trial where a supervisor allegedly called him, “you fucking n***er.”*Daniel v. T&M Protection Resources, LLC*, No. 15-560-cv, 2017 WL 1476598 (2d Cir. April 25, 2017). The lower court had decided that a single use of a slur could never be considered a hostile work environment. But the appellate court rejected this proposition and noted that “perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as ‘n***er’ by a supervisor in the presence of his subordinates.”

By contrast, the U.S Court of Appeals for the Eighth Circuit decided that, although an employee was subjected to “morally repulsive” comments — like being called a “terrorist,” “camel jockey” and “sand n***er” and told “go back home, go to your country” — he had not suffered a hostile work

environment and thus his case must be dismissed. *Abdel-Ghani v. Target Corp.*, 686 F. App'x. 377 (8th Cir. May 5, 2017).

Needless to say, the varying interpretations of the "severe or pervasive" standard can sometimes feel like a judicial Rorshach test.

State and local jurisdictions redefine harassment laws with a standard that is more protective of employees

Back in Montgomery County, Maryland, the Council **recently updated its law prohibiting employment discrimination to make clear that harassment is not governed by the federal "severe or pervasive" standard. Instead, unlawful harassment occurs when it rises above the level of being "more than a petty slight, trivial inconvenience, or minor annoyance."** Bill 14-20.

The Council explained that it and other jurisdictions have been "motivated to consider more protective standards after cases in which alleged abusive workplace conduct went unchecked by the courts and was not permitted to go to a jury." Additional state and local jurisdictions, including California and New York, have similarly cast aside the "severe or pervasive" standard for harassment claims. And more states, Colorado and Minnesota among them, are considering revamping their harassment standards. Given that these changes are relatively recent, it will be fascinating to see how this more protective standard for harassment claims plays out in court

National Law Review, Volume XI, Number 12