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Hostile Work Environment—With a Capital 'H'

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Probably every employment lawyer has received a call from a potential client, a friend or a family member about what that person says is a "hostile work environment." The caller then describes a workplace where, for example, a manager constantly yells at people. While such an environment may be stressful or unpleasant, it is not necessarily "Hostile" under the law. This is perhaps the single biggest misconception about the laws prohibiting workplace harassment.

A hostile work environment (HWE) involves conduct *directed at a person or group of person's protected trait* or traits, e.g., race, color, religion, gender, disability, sexual orientation. Sexual harassment is harassing conduct directed at the person because of that person's gender. While the standards differ under federal (and state) and city law, the complained-of conduct must still be based on a protected trait to fall under the umbrella of HWE. And while a stressful, as opposed to a "Hostile," work environment may not be illegal, when conducting training I always encourage employees to bring such matters to human resources if it bothers them.

History of HWE

The Supreme Court first recognized a cause of action for harassment in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Id. at 65. Thus, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." Id. at 66.

The court identified *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971),

cert. denied, 406 U.S. 957 (1972), as the first case to recognize a claim for "discriminatory work environment."

> [E]mployees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and … the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

Id. at 238.

Closer to home, in *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 126 (S.D.N.Y. 1977), the court held that Title VII's "language indicates a Congressional intent to

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define discrimination in the broadest possible terms and to include the entire scope of the working environment … .” And in *Snell v. Suffolk County*, 782 F.2d 1094, 1102 (2d Cir. 1986), the Second Circuit joined the view of other Circuits that “a working environment overrun by racial antagonism constitutes a Title VII violation.”

Because of a Protected Trait

“Of course, it is axiomatic that mistreatment at work, whether through subjection to a hostile environment or through other means, is actionable under Title VII only when it occurs because of an employee’s … *protected characteristic,* such as race or national origin.” *Rivera v. Rochester Genesee Reg’l Transp. Auth.*, 743 F.3d 11, 20 (2d Cir. 2014) (citations and quotations omitted).

More to the point, “[i]t is not enough that a plaintiff has an overbearing or obnoxious boss. She must show that she has been treated less well at least in part *because of* her gender.” *Mihalik v. Credit Agricole Cheunreux N. Am.*, 715 F.3d 102, 110 (2d Cir. 2013) (citations and quotations omitted).

> Everyone can be characterized by sex, race, ethnicity, or (real or perceived) disability; and many bosses are harsh, unjust, and rude. It is therefore important in hostile work environment cases to exclude from consideration personnel decisions that lack a linkage or correlation to the claimed ground of discrimination.
> * * *
> Alfano makes much of Brown’s admission at trial that he disliked Alfano personally, but there is no indication that he disliked her because she was a woman … .

Alfano v. Costello, 294 F.3d 365, 377-78 (2d Cir. 2002).

In *Gordon v. City of New York*, 612 Fed. Appx. 629 (2d Cir. 2015), the two plaintiffs were “violently assaulted” by a co-worker, Rodriguez; one of them reported it to the police. Both plaintiffs missed work due to injuries suffered in the assault. Shortly after their return to work, Rodriguez killed himself, following which plaintiffs were “ridiculed, ostracized, and blamed for [the] suicide by their co-workers.” Id. at 630. The court rejected their claims of HWE:

> The gravamen of the complaint is that Gordon and Murawski were “made to feel responsible for Rodriguez’s suicide” and taunted by co-workers “because Gordon reported Rodriguez’s violent attack to police.” The complaint contains no plausible allegation that the behavior of plaintiffs’ co-workers was *additionally* motivated by racial and gender animus.
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> Id. at 632.

The “because of” requirement also applies under New York City law.

Plaintiff in *Russo v. New York Presbyterian Hosp.*, 972 F. Supp. 2d 429 (E.D.N.Y. 2013), complained of an incident where a surgeon yelled at the entire operating room staff because of what happened with a patient. The court found that the outburst “arose out of Adkins’ anger about the events that transpired with the patient … [and] involved foul language and abusive behavior … [but] it did not involve discrimination on the basis of sex.” Id. at 449 (citations and quotations omitted).

> Adkins may have said offensive and inappropriate comments, acted inappropriately on occasion, and may have been a difficult person to work with, but there is no evidence he created an environment that was particularly difficult for women, subjected Plaintiff to unwanted sexual attention, or otherwise treated Plaintiff “less well” because she was a woman.
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> Id. at 453.

Thus, one of the core elements of a HWE is that the conduct is directed at the employee *because of* the employee’s protected trait.

Federal and State Law: Severe or Pervasive

When the workplace is 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, Title VII is violated.

> This standard … takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. … [M]ere utterance of an epithet which engenders offensive feelings in a[n] employee does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.
>
> But Title VII comes into play before the harassing conduct leads to a nervous breakdown.

Harris v. Forklift Systems, 510 U.S. 17, 21-22 (1993) (citations and quotations omitted).

In evaluating HWE claims, "courts should examine the totality of the circumstances, 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 the victim's job performance." *Rivera*, 743 F.3d at 20 (citations and quotations omitted).

"There is neither a threshold magic number of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim." *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426, 439 (2d Cir. 1999) (citations and quotations omitted). Indeed, "a single episode of harassment can establish a hostile work environment if the incident is sufficiently severe." *Redd v. New York Div. of Parole*, 678 F.3d 166, 176 (2d Cir. 2012) (citations and quotations omitted). There, the female plaintiff alleged that a female supervisor touched her breasts three times. The court reversed summary judgment against plaintiff because "[d]irect contact with an intimate body part constitutes one of the most severe forms of sexual harassment." Id. at 180.

A hostile work environment (HWE) involves conduct directed at a person or group of person's protected trait or traits, e.g., race, color, religion, gender, disability, sexual orientation.

Plaintiff in *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000), was a lieutenant in the defendant's fire department and its only female firefighter. Her claim stemmed from events that happened on a single occasion—at a meeting of the firefighter's benevolent association—with a co-worker who was on the opposite side of a contentious issue. During and after the meeting the co-worker made a series of obscene, sexist comments in front of numerous firefighters. See id. at 148.

The court reversed summary judgment in favor of the employer.

> Holdsworth's conduct could reasonably be viewed as having intolerably altered Howley's work environment, for Holdsworth did not simply make a few offensive comments; nor did he air his views in private; nor were his comments merely obscene without an apparent connection to Howley's ability to perform her job. Although Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a large group in which Howley was the only female and many of the men were her subordinates. And his verbal assault included charges that Howley had gained her office of lieutenant only by performing fellatio.

Id. at 154.

In *Dillon v. Ned Mgmt.*, 85 F. Supp. 3d 639 (E.D.N.Y. 2015), within two months a co-worker twice referenced sexual conduct with plaintiff in exchange for cash and once grabbed her buttocks. The court

denied summary judgment to the defendant, noting "a single incident of contact with an intimate body part is sufficient to establish a hostile work environment claim." Id. at 656.

Title VII, however, is not a general civility code, so mere "trivial harms" do not create a HWE. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). See *Mira v. Kingston*, 715 Fed. Appx. 28, *30 (2d Cir. 2017) (supervisor implying that plaintiff was "involved with illegal drug activity in Mexico" insufficient); *Douglass v. Rochester City School Dist.*, 522 Fed. Appx. 5, *7-8 (2d Cir. 2013) (addressing plaintiff "discourteously", denying her requests for equipment, exclusion from meetings, and once telling her to "get her butt out there" insufficient).

New York City Law

Rather than the severe or pervasive standard, City law merely requires a showing that the employee was "treated less well" because of a protected trait. *Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dept. 2009).

> [The] 'severe or pervasive' test reduces the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status. In contrast, a rule by which liability is normally determined simply by the existence of differential treatment (i.e., unwanted gender-based conduct) maximizes the law's deterrent effect."
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> Id. at 76.

Under City law, severity and pervasiveness only go to the issue of damages. Id. Even a "single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace" may be actionable. Id. at 80, n.30.

Like federal and state law, however, the City law is not a civility code. Id. at 79. But under City law the burden is on the employer by way of an affirmative defense to show that the conduct "consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences." Id. at 80. Accordingly, the *Williams* court found that one incident, "where sex-based remarks were made in her presence, although not directed at her" was insufficient.

Plaintiff in *Russo* complained that the surgeon referred to a chest tube numerous times as "mister softee" and requested a pair of 36 chest tubes as a "pair of 36s" while making a hand gesture as if grabbing a woman's breasts, once momentarily trapped plaintiff between his legs as she moved past him and brushed up against her while passing by on another occasion. The court granted summary judgment to defendants. 972 F. Supp. 2d at 451-52; see also *Husser v. N.Y.C. Dept. of Educ.*, 137 F. Supp. 3d 253, 277 (E.D.N.Y. 2015) (12 "inappropriate and boorish" comments and events over a three-year period insufficient; the comment "blow me" was made sarcastically, not sexually).

Conclusion

Necessary elements of a Hostile Work Environment claim include that the complained-of conduct is directed at the person because of the person's protected trait and that such conduct is severe or pervasive (under federal and state law) or results in the person being "treated less well" because of the protected trait (under city law).