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Examining **Harassment Claims**

THIS ARTICLE ADDRESSES PROTECTED STATUS HARASSMENT issues, a subset of discrimination claims that arise where an employee alleges that he or she was subjected to unwelcome conduct in the workplace due to the employee's protected status (race, sex/gender, age, disability, national origin, etc.). It focuses on the elements of these claims and defenses to them. It also provides practical tips that employers can follow to address, defend, and avoid harassment claims.

Most harassment allegations assert that the employer created a hostile work environment that negatively impacted the terms and conditions of an employee's employment. But it is important for employers to remember that not all harassment is illegal. Most federal and state laws only prohibit harassment that is "severe or pervasive." One, or even a few, questionable incidents do not usually amount to unlawful harassment.

Not All Harassment Is Illegal

Many employees do not understand that not all harassment is illegal; it must be premised upon a particular protected category. Federal law, for example, prohibits harassment based on the following grounds:

- Race
- Color
- Religion
- Gender/sex
- Age
- Disability
- National origin
- Ethnicity
- Citizenship status
- Genetic information
- Military status
- Qualified medical leave
- Reporting discrimination

Many state jurisdictions have their own equal employment opportunity (EEO) laws that protect employees who fall into additional protected categories. For example, many states and the District of Columbia have enacted laws prohibiting

discrimination on the basis of sexual orientation. To cite another example, Michigan bans discrimination on the basis of height and weight.

Localities have also adopted categorical protections. For instance, New York City protects the unemployed from discrimination, while Broward County in Florida prohibits discrimination on the basis of political affiliation.

Because protected classifications vary from state to state and even city to city, when advising employers about potential harassment claims, you should be familiar with the laws of each state, county, and municipality where the employer is located.

Types of Harassment Claims

Generally, there are two types of unlawful harassment:

1. **Hostile work environment.** A hostile work environment exists when an employee's workplace is so permeated with discriminatory intimidation, ridicule, abuse, and/or insult that it alters the terms and conditions of the employee's employment and creates a hostile work environment.
2. ***Quid pro quo* harassment.** *Quid pro quo* harassment occurs where conditions of employment or job benefits are dependent upon an employee submitting to unwelcome conduct (usually sexual advances) or where an employer retaliates against an employee who rejected such unwelcome conduct.

Elements of a Harassment Claim

Generally, a valid claim for harassment must demonstrate the following:

- The employee is a member of a protected class.
- The employee was subjected to unwelcome verbal or physical conduct.
- The unwelcome conduct was due to the employee's membership in a protected class.
- The unwelcome conduct affected a term, condition, or privilege of employment.

Alfano v. Costello, 294 F.3d 365, 373–74 (2d Cir. 2002).

EEO Laws Are Not a Workplace Civility Code

Not all unwelcome conduct in the workplace that an employee might consider harassing affects a term, condition, or privilege of employment. The courts have been clear that federal and state anti-harassment laws are not intended to serve as a civility code for employers to implement in the workplace. As the U.S. Supreme Court has explained, Title VII of the Civil Rights Act of 1964 (Title VII) does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

"[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)" do not alter a "term, condition, or privilege" of employment. Id.

Hostile Work Environment

Many employees attempt to establish a claim of harassment by showing that the unwelcome conduct created a hostile work environment and, as a result, altered a term, condition, or privilege of the employee's employment. However, the courts have generally defined a hostile work environment as a workplace that is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of an employee's employment. Harris v. Forklift Systems, 510 U.S. 17, 21 (1993).

When determining whether conduct is sufficiently severe or pervasive to create a hostile work environment, courts view the alleged behavior both objectively and subjectively. That is, the unwelcome conduct must be both behavior that a reasonable

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person would find hostile and behavior that the employee actually finds to be hostile.

The Objective Test

It is not uncommon for employees to believe they were harassed, but more often than not, an objective review will come to a contrary determination. Whether alleged unwelcome conduct meets the objective test depends upon an analysis of the circumstances, which typically includes an analysis of the following:

- **The frequency of the conduct.** There is no magic number of instances of unwelcome conduct that will create a hostile work environment. When dealing with verbal harassment, courts typically require repeated instances of harassment that continue despite the employee's objection. Aulicino v. N.Y.C. Dep't of Homeless Servs., 580 F.3d 73 (2d Cir. 2009) ("racist comments, slurs, and jokes . . . must be more than a few isolated incidents of racial enmity").
- **The severity of the alleged conduct.** The more severe the conduct, the fewer number of instances necessary to create a hostile environment. For example, many courts have found that a single instance of physical assault (both sexual or nonsexual) can sufficiently alter the conditions of employment as to create a hostile work environment, but a single unwanted touching or utterance of a slur does not usually create a hostile work environment. See Richardson v. New York State Dep't of Corr. Serv., 180 F.3d 426, 437 (2d Cir. 1999) (observing that a single sexual assault may be sufficient to alter the terms and conditions of the victim's employment).
- **Whether the alleged conduct or comments are humiliating or physically threatening.** Comments due to an employee's protected category status that are humiliating and behavior that is physically threatening in nature (but does not rise to the level of a physical assault) can establish a hostile work environment. Examples such as conduct that invades an employee's personal space (such as backing the employee up against a wall or into a corner) or frequent comments in front of others that are not justified and that degrade or humiliate an employee may create a hostile work environment.
  - **Qualified privilege.** Note that if an employee makes a defamatory statement about another employee accused of harassing and humiliating conduct, the employer has a qualified privilege to convey this information within the company while investigating the harassment allegations, if it does so in good faith. See Vickers v. Abbott Labs., 308 Ill. App. 3d 393, 400-06, (1999) (employer had qualified privilege and did not abuse it when it made statements to current and former subordinates of a manager during investigation of alleged sexual harassing behavior by the manager). See also McCone v. New England Tel. & Tel. Co., 393 Mass. 231 (1984) (qualified privilege exists for intra-company statements made in good faith to department heads); Hollowell v. Career Decisions, Inc., 100 Mich. App. 561 (1980) (there is a qualified privilege for intra-company statements made in good faith to those with responsibility for the employer as a whole, such as members of the board of directors).
- **Whether the alleged conduct unreasonably interferes with the employee's work performance.** Behavior that unreasonably interferes with an employee's work performance typically involves conduct that makes it more difficult for the employee to perform his or her job. For example, unfounded comments that undermine an employee's authority with subordinates or clients or inexplicable exclusion from company-sponsored events may help an employee to establish a hostile work environment. Murray v. Visiting Nurse Service, 528 F. Supp. 2d 257, 278, (S.D.N.Y. 2007) (citing Alfano v. Costello, 294 F.3d 365 (2d Cir. 2002)).

No single factor determines whether a work environment is so hostile that it is unlawful; whether a hostile work environment exists depends on analysis of all relevant facts and circumstances. Harris v. Forklift Systems, 510 U.S. 17, 23 (1993).

The Subjective Test

The subjective test requires that the target of harassment believes that the environment is hostile. The employee's burden to establish this element of a harassment claim is relatively easier to meet than the objective test. However, an employer can defeat this element of a harassment claim by showing that the employee tolerated the behavior without asserting a protected category complaint, delayed in reporting it, or assented to or invited the conduct that he or she alleges was harassing. It is important to note that the subjective test does not necessarily require the employee to prove that (1) he or she felt physically threatened or (2) the harasser's intent was hostile.

Case Examples Where Harassment Did Not Create a Hostile Work Environment

The following are examples of judicial rulings finding that alleged conduct did not create a hostile work environment:

- **Isolated incidents did not rise to a hostile work environment.** In *George v. Leavitt,* the court concluded that statements by three coworkers over a six-month period that the employee should never have been hired, should "go back to Trinidad" or "go back where [she] came from," and told to "shut up" and allegations that the employee was not given

the type of work she deserved were isolated instances that did not rise to the level of severity necessary to find a hostile work environment. George v. Leavitt, 407 F.3d 405 (D.C. Cir. 2005). Instead, the court concluded that the allegations "constitute exactly the sort of 'isolated incidents' that the Supreme Court has held cannot form the basis for a Title VII violation." Id.

- **Supervisor's conduct was not severe or pervasive.** In *Hockman v. Westward,* the court concluded that a supervisor's conduct—which included comments to a female employee about another female employee's body, slapping the employee on the rear end with a newspaper, grabbing or brushing up against the employee's breasts and rear end, and attempting to kiss the employee—was not so severe or pervasive that it created a hostile or abusive work environment. Hockman v. Westward Communs., LLC, 407 F.3d 317 (5th Cir. 2004).
- **Single incident of intentional touching and a comment about employee's body not sufficient to rise to hostile work environment.** In *Quinn v. Green Tree Credit Corp.,* the court found that a supervisor's statement that a female employee had the "sleekest ass" in the office plus a single incident of "deliberately" touching the employee's breasts with some papers that the supervisor was holding in his hand were insufficient to create a hostile work environment. Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998).

Case Examples Where Conduct Created a Hostile Work Environment

The following are examples of decisions where the court ruled that alleged conduct, if it in fact occurred, could create a hostile work environment:

- **Use of racist nicknames, graffiti, and slogans, among other harassing actions, constituted a hostile work environment.** In *Cerros v. Steel Techs.*, supervisors and coworkers espoused the philosophy that "if it ain't white it ain't right" and referred to the plaintiff using racially derogatory nicknames, coworkers slashed the tires on the employee's car, racist graffiti was painted on the bathroom walls, and the plaintiff did not receive the same on the job training as similarly situated white employees. Cerros v. Steel Techs., Inc., 288 F.3d 1040 (7th Cir. 2002).
- **Sexist comments and conduct by supervisor and coworkers, among other harassing conduct, constituted a hostile work environment.** In *Williams v. GMC*, the alleged conduct included (1) comments by a supervisor (such as "You can rub up against me anytime," and "Back up; just back up" after plaintiff was bending over and supervisor walked up behind her); (2) conduct of coworkers (which included one coworker addressing the employee "Hey slut" or another saying "I'm sick and tired of these f[–]ing women," after throwing a box in the employee's direction); and (3) pranks by coworkers (such as locking the employee in her work area) were sufficient to create a hostile work environment. Williams v. GMC, 187 F.3d 553 (6th Cir. 1999).

Quid Pro Quo Harassment

Quid pro quo harassment occurs when an employer conditions employment or the receipt of job benefits on the employee submitting to unwelcome conduct (usually sexual advances) by a supervisor or where an employer retaliates against an employee who rejects a supervisor's advances. The elements of a *quid pro quo* claim of sexual harassment track those of a harassment claim, except that the employee must also show that either his or her submission to the unwelcome advances was an express or implied condition of employment or advancement or the receipt of job benefits. The employee may also demonstrate that his or her refusal to submit to a supervisor's advances detrimentally impacted the terms and/or conditions of his or her employment.

Paramour Exception

Not all types of sexual favoritism violate EEO laws. For example, Title VII generally does not prohibit preferential treatment of an employee engaged in a consensual romantic relationship with a supervisor or decision-maker. Where one party to a romantic relationship may favor the other party (i.e., the paramour) to the detriment of other employees, the result—while perhaps unfair—is not a violation of Title VII. The rationale for this conclusion is that the disadvantaged employees, usually including both men and women, were not treated less favorably because of their genders. Tenge v. Phillips Modern Ag Co, 446 F.3d 903, 910 (8th Cir. 2006).

Employer Liability

In addition to the factors outlined above, for an employer to be liable for harassment, an employee must also prove that he or she suffered a "tangible employment [adverse] action" and that the alleged harasser was his or her "supervisor." For an employee to demonstrate harassment by coworkers or non-employees, he or she must prove that the employer knew, or should have known, about the harassment and failed to address it. Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998).

Employer Liability for Harassment that Results in a Tangible Adverse Employment Action

An employer is strictly liable for harassment by supervisors of an employee in a protected category that results in a tangible adverse employment action such as a termination or demotion (vicarious liability). Claims of this nature are essentially disparate treatment claims asserting that an employee suffered

an unlawful adverse employment action due to his or her protected category status.

A tangible employment action is a significant change in employment status that usually results in direct economic harm to the employee. Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998).

Examples of tangible employment actions include:

- Hiring and firing
- Promotion or failure to promote
- Demotion or a change in job duties that diminishes an employee's opportunities for promotion or salary increases
- Suspension and other forms of discipline
- Assignment to a lesser position or reduction of job duties
- A decrease in benefits or compensation

Insignificant changes in any employee's employment status (such as a simple change in job title) generally do not amount to a tangible employment action.

Employer Liability for Harassment by Supervisors

Definition of Supervisor

The U.S. Supreme Court has clarified the definition of a "supervisor" for purposes of vicarious liability for hostile work environment claims, explaining that a supervisor is someone that the employer has authorized "to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013). The Supreme Court rejected EEOC guidance offering a more narrow definition of supervisor that included employees within the alleged victim's chain of command or that directed the purported victim's daily work activities.

In *Vance,* the Supreme Court did recognize, however, that employees may be supervisors in circumstances when they may not have the final say regarding significant changes in an employee's employment status, but do make recommendations that are given substantial weight by the ultimate decision-maker. Vance, 133 S. Ct. at 2452.

The Faragher-Ellerth Defense

Where harassment by a supervisor rises to the level of a hostile work environment but does not result in a tangible job action, an employer can assert an effective affirmative defense if it can show that it exercised reasonable care to prevent and promptly address the harassment, and the employee failed to take advantage of the preventative measures it offered. This defense, commonly is known as the *Faragher-Ellerth* defense, is based on two Supreme Court decisions: Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

To establish an *Faragher-Ellerth* affirmative defense, an employer must show both that:

- It exercised reasonable care to prevent and promptly address alleged harassment.
- The employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer.

The Employer's Duty to Exercise Reasonable Care

An employer establishes the first element of the *Faragher-Ellerth* defense by showing it took reasonable care to prevent and promptly correct the alleged harassment at issue. Generally, an employer will satisfy this standard when it has adopted and enforces comprehensive anti-harassment policies and complaint procedures that are communicated to all employees.

While courts give complaint procedures considerable weight when considering whether an employer exercises reasonable care, policies are not an absolute requirement. Cajamarca v. Regal Entm't Grp., 863 F. Supp. 2d 237, 249-50 (E.D.N.Y. 2012). For example, a small employer may be able to show that it exercised reasonable care even in the absence of a formal written policy. For larger employers though, it is most prudent to adopt a formal policy and complaint procedure.

The Employee's Duty to Take Advantage of Preventative or Corrective Opportunities

To defeat an employee's claim utilizing the *Faragher-Ellerth* defense, an employer must also show that the complaining employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. Employers typically satisfy this element by showing that the employee failed to timely file a complaint, failed to cooperate with the employer's efforts to investigate the employee's allegations, or that the employee unreasonably rejected the employer's proposed resolution of the employee's assertions.

Moreover, when an employee delays reporting alleged harassment and the employer can show that the delay exacerbated the effects of the harassment, the employer can diminish its exposure by avoiding damages that occurred during the period of delay.

An employee can excuse his or her delay by offering a reasonable explanation. However, whether an employee's explanation is reasonable is a fact-specific inquiry. The following rulings illustrate circumstances where the excuse offered by an employee for the delay in asserting a claim of harassment may be reasonable:

- **Legitimate concern that employer would not take the complaint seriously.** An employee's concern that his or her employer would not take his or her complaint of harassment seriously may excuse a delay in asserting his or her claim if the employee provides evidence that the employer ignored similar complaints in the past or if the employer's complaint procedure required the employee to register his or her concerns with the purported harassing supervisor. Leopold v. Baccarat, Inc., 239 F.3d 243, 246 (2d Cir. 2001).
- **Risk of retaliation.** An employee's failure to complain may be reasonable in circumstances where he or she had a credible fear of retaliation. An employee may not rely on his or her subjective belief, however, and must prove, for example, that the employer retaliated against employees who made similar complaints in the past. See, e.g., Reed v. MBNA Marketing Systems, 333 F.3d 27, 37 (1st Cir. 2003).
- **Obstacles to complaints.** An employee's failure to complain also may be excusable where the employer unnecessarily impeded his or her ability to complain by, for example, making the official recipient of the complaint unreasonably inaccessible or by adopting intimidating or burdensome reporting requirements. See, e.g., EEOC v. V & J Foods, Inc., 507 F.3d 575, 578 (7th Cir. 2007).

To protect themselves, it would be most prudent for employers to institute complaint procedures that allow employees to report harassment not only to their immediate supervisors, but also to human resources or other management representatives. The policy should also make clear that employees who report alleged harassment or participate in a related investigation will not be subjected to retaliation.

Employer Liability for Harassment by Coworkers and Third Parties

An employee can hold an employer vicariously liable for harassment by coworkers or third parties. However, to hold his or her employer liable for harassment by coworkers or others, an employee must demonstrate that the employer both:

- Knew or should have known about the harassment
- Failed to take prompt remedial action

Freeman v. Dal-Tile Corp., 750 F.3d 413, 423 (4th Cir. 2014).

How the employer addresses unlawful harassment depends on the nature of the alleged conduct. At the outset, the employer may want to consider removing the complaining employee from the harassing environment (by, for example, relocating the employee or the alleged harasser to another work station) and conducting an investigation to ascertain the full nature of the problem. Once the investigation is complete, the employer can assess whether further action (such as training, discipline, or further monitoring of the alleged harasser) is appropriate.

Assembling Harassment Defenses

The following section summarizes common defenses employers may wish to consider asserting in response to harassment claims.

Continuing Violation Doctrine

In some cases, employees allege harassment claims that extend over a period of months or years. The continuing violation doctrine allows employees to assert facts relating to claims of

harassment that happened before the applicable limitations period began if they are part and parcel of conduct that occurred after the limitations period began.

For example, if the statute of limitations on a hostile work environment claim began on February 10, 2016, and the claimant alleges that her manager inappropriately touched her on March 17, 2016, January 10, 2016, and December 1, 2015, the incidents on January 10, 2016 and December 1, 2015 would normally be time-barred because the statute of limitations began on February 10, 2016. However, under the continuing violation doctrine, a court may allow those time-barred facts into evidence to bolster a plaintiff's harassment claim because they represent continuous behavior similar to the March 17, 2016 allegation.

The continuing violation doctrine does not apply to discrimination claims that involve discrete actions such as a termination, demotion, or denial of a position. AMTRAK v. Morgan, 536 U.S. 101, 117 (2002).

Employers can defeat the continuing violation doctrine by showing a time gap between the time-barred harassment allegations and the incidents alleged in an actionable harassment claim. See, e.g., Weeks v. New York State Div. of Parole, 273 F.3d 76, 84 (2d Cir. 2001) (two-year time gap is usually too long to establish a continuing violation). An employer can also defeat a claimant's harassment continuing violation contention if the employee is unable to show that the employer's actions before and after the limitations period are part of the "same actionable hostile work environment practice." Morgan, 536 U.S. at 120. For example, if a claimant asserts infrequently occurring and unrelated actions that different managers perpetrated, it is unlikely that he or she will be able to establish a continuing violation. An employer's "intervening action," such as disciplining the alleged harasser, may also serve to interrupt a continuing hostile work environment and help defeat a plaintiff's assertion of a continuing violation theory. Morgan, 536 U.S. at 118.

The Faragher-Ellerth Defense (Harassment by Supervisors)

The *Faragher-Ellerth* defense is an affirmative defense that employers may use to defend harassment and hostile work environment claims against supervisors and provides an exception to the general rule that employers are vicariously liable for the harassing conduct of their supervisors. The *Faragher-Ellerth* defense is based on two U.S. Supreme Court decisions—Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). It permits an employer to avoid liability for harassment claims based upon the actions of supervisors if the employer can show that it exercised reasonable care to prevent and promptly correct any harassing behavior, the employee failed to take advantage of preventative or corrective opportunities provided by the employer, and the employer did not take a tangible job action against the employee.

Courts routinely decide cases in the employer's favor where the employee failed to take advantage of the employer's internal complaint process. Typically, if the employer did not fire the claimant (or take another tangible job action), had an EEO policy, and the claimant failed to report the harassment, then a *Faragher-Ellerth* defense will be available.

Standard of Liability for Harassment by Non-supervisors

The Supreme Court has held under federal law that an employee may only hold an employer responsible for non-supervisor harassment if the employee can show that the employer was "negligent in failing to prevent harassment from taking place." Vance v. Ball State Univ., 133 S. Ct. 2434, 2453 (2013). The Court stated that "the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." Id. at 2451. Courts must also assess "[e]vidence that an employer did not monitor the

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For an examination of the scope of the protection against discrimination found in 42 U.S.C. § 1981 and the damages available to successful plaintiffs, see

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For more detail on disparate treatment claims, see

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workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed." Id. at 2453.

Harassment Not "Severe or Pervasive" under Federal Law

Under federal EEO laws, for harassment to be actionable it must be "severe or pervasive." Harris v. Forklift Systems, 510 U.S. 17, 21 (1993). To determine whether harassment meets this standard, courts will look to the frequency and severity of the alleged conduct; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Murray v. Visiting Nurse Services, 528 F. Supp. 2d 257, 277–78 (S.D.N.Y. 2007) (citing Alfano v. Costello, 294 F.3d 365 (2d Cir. 2002)). Petty slights, minor annoyances, and a lack of manners do not give rise to an actionable harassment claim. It is not easy for plaintiffs to establish "severe or pervasive" conduct. Employers should assert its absence whenever appropriate.

Harassment Unrelated to a Protected Characteristic

While it may seem elementary, many employees simply do not understand that EEO laws only prohibit harassment that is based on a protected characteristic (e.g., age, race, gender) and do not prohibit all types of harassment. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). It is not uncommon for an employee to claim that a manager is harassing him or her because the manager does not like the employee. However, the Supreme Court has repeatedly stated that Title VII and other federal EEO laws are not meant to create a "general civility code" for the American workplace. In other words, EEO laws do not prohibit abusive language, personality conflicts, or snubbing by coworkers or supervisors unless the conduct is severe or pervasive and related to a protected characteristic. Employers should be prepared to raise this defense if the complainant attempts to characterize non-actionable harassment as actionable.

Inadequate Notice to Employer of Harassment

Courts will not hold employers liable for harassment if the employee's complaints do not put the employer on notice that the employee is being harassed due to a protected characteristic. Vague statements by an employee concerning coworkers' conduct are often not sufficient to put the employer on notice of prohibited harassment. See, e.g., Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 250 (2d Cir. 1995) (female employee's complaint to the employer that a male patient "stared at her" and "tried to get her attention from across a hallway" did not adequately notify the employer of harassment based on the female employee's gender); Schiraldi v. AMPCO Sys. Parking, 9 F. Supp. 2d 213, 221 (W.D.N.Y. 1998) (An employee alleged to her supervisor that a coworker "wouldn't leave her alone" and "called [her] names." A different employee said to same supervisor: "Please keep [the same coworker] away from me, he's bothering me." The court held that these comments did not indicate that the female employees' coworker's actions were based on the female employees' sex; thus, they did not adequately notify the employer that their harassment allegations related to a category protected by the law).

Not Objectively nor Subjectively Hostile

To assert an actionable claim of harassment the complaining employee must show an "objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive." Alfano v. Costello, 294 F.3d 365, 373–74 (2d Cir. 2002). To be an objectively hostile work environment, a reasonable person must find the accused's conduct created a hostile work environment based on a protected characteristic. To be a subjectively hostile work environment, the complaining employee must actually perceive the work environment to be hostile due to a protected characteristic. When available, employers should be quick to assert that a plaintiff cannot prove an objectively or subjectively hostile work environment.

No Interference with Work Performance

One of the factors that courts assess in determining whether conduct amounts to unlawful harassment is whether the alleged harassment "unreasonably interferes with [the] employee's work performance." Harris v. Forklift Systems, 510 U.S. 17, 23 (1993). Courts have dismissed harassment claims, at least in part, because the plaintiff could not demonstrate that the alleged harassing behavior affected his or her job performance. See Murray v. Visiting Nurse Servs., 528 F. Supp. 2d 257, 278 (S.D.N.Y. 2007) (citing Alfano v. Costello, 294 F.3d 365 (2d Cir. 2002)) (plaintiff's hostile work environment claim was not actionable because the plaintiff "testified that the alleged harassing comments did not affect his 'work performance,' and that, regardless of the comments, he 'got things done'"); Portee v. Deutsche Bank, 2006 U.S. Dist. LEXIS 9153, at *40 (S.D.N.Y. Mar. 7, 2006).

Avoiding Harassment Claims

Because harassment claims can be very costly to defend regardless of whether they have merit, employers should take the following measures to help avoid these types of claims:

- **Implement EEO policies.** Every employer should have broad and clearly defined equal employment opportunity policies in place that prohibit discrimination and harassment on all bases protected by federal, state, and local civil rights laws. These policies should clearly address conduct that could constitute harassment. It is good practice for employers to provide these policies to all new hires and require that all employees annually acknowledge receipt of them. Employers should review these EEO policies at least once a year to address any changes in applicable laws.
- **Training.** Employers should ensure that all employees—but especially supervisory employees and those involved in making hiring and firing decisions—receive training on their EEO policies. Doing so will serve to both prevent workplace harassment and prevent employees from successfully bringing harassment claims by satisfying a key element of the *Faragher–Ellerth* defense.
- **Implement EEO complaint procedures.** An employer's EEO policies should also include a procedure for employees and applicants to raise concerns about harassment to human resources or management, particularly when the employee believes his or her supervisor has unlawfully harassed him or her. A complaint procedure that is communicated to all employees will help the employer to promptly remediate potential harassment situations and insulate it from liability against claims related to harassment that the employee failed to report.
- **Review all terminations.** It is good practice for employers to require that managers and supervisors consult with human resources before disciplining or terminating employees to ensure that the impending action does not result in liability for the employer.
- **Document all disciplinary actions, including terminations.** While not determinative, it is wise practice for employers to document employee misconduct and job performance deficiencies. Employees alleging discrimination will attempt to utilize as evidence of discrimination inconsistencies between, for example, annual employment evaluations and the reasons articulated by an employer to explain an adverse job action. Obviously, adverse job actions, including terminations, are often fully justified based upon conduct occurring most recently. However, actions taken as a result of an employee's continuous misbehavior and/or performance deficiencies will be more easily defended if the employee's personnel record supports them.

Richard D. Glovsky, a partner in Locke Lord's Boston office who co-chairs the Firm's robust Labor and Employment Practice Group, handles employment litigation, including class actions, wage and hour issues, and discrimination and retaliation claims. Dick prosecutes cases for Fortune 500 companies and other businesses to protect their trade secrets and to prevent former employees from violating non-competition and non-solicitation obligations. He also is a valued counselor on employment related matters. Dick is a former Assistant United States Attorney and Chief of the Civil Division of the United States Attorney's Office for the District of Massachusetts.

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