

Hostile Work Environment Harassment: It's Whatever a Jury Says it is

September 27, 2018 – Cross-Border Counselor

by Aaron Goldstein

When one thinks of the law, one often thinks of hard and fast rules. Employers cannot fire employees for a discriminatory or a retaliatory reason. Employees must be paid at least minimum wage. And so on. The law governing hostile work environment claims in the United States, however, is not so easily defined and applied.

At first glance, the elements of a hostile work environment sexual harassment claim seem definite enough. In order to prove a claim for hostile work environment sexual harassment, a plaintiff has to prove that he or she has been subject to behavior that is:

1. Sexual in nature or directed at an individual solely because of his or her gender;
2. Uninvited or unwelcome;
3. Offensive to a reasonable person; and
4. Severe or pervasive enough to adversely affect a person's work environment.

The first two elements are clear enough conceptually. Was the conduct sexual or about the plaintiff's gender and was the plaintiff a willing participant in the conduct? Like anything in the law, there are tough cases. For example, what about someone who participates in the conduct at first, but stops participating later?

The last two elements, however, are based entirely on the subjective feelings of the jurors in any given case. What exactly *is* offensive to a reasonable person? Who is this reasonable person and what is she or he like? When exactly would any particular conduct affect that person's ability to do her or his job?

When a judge instructs a jury in a hostile work environment case, she or he will tell the jury that, in order to find for the plaintiff, you must find that the conduct complained of is offensive to a reasonable person. When assessing this issue, the vast majority of jurors will ask themselves, "do I find the conduct offensive?" The reason for this is simple—most people consider themselves reasonable. If I find conduct highly offensive, then it is offensive to a reasonable person because I myself am reasonable.

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The difficulty with this standard is that it makes hostile work environment claims a moving target. What is offensive in a small rural town may not be offensive in a big city. What is offensive in a very socially liberal area may not be offensive in a conservative area, or vice versa.

What is more, standards for what is or isn't offensive change over time and across generations. A recent survey by The Economist/YouGov found that almost 25% of millennial men in the United States believe that asking someone out for a drink is sexual harassment. This statistic is, to say the least, surprising to many in older generations.

What does this mean for companies looking to employ workers in the United States? First, it means you cannot be too careful. Even if you think that certain behavior is just harmless flirtation or joking around, you need to ask yourself, how confident are you that 12 strangers in the city where your employees live would agree with you?

Sexual harassment verdicts frequently reach into the six and seven figures range when attorney fees and emotional distress damages are added to an employee's lost wages. Are you willing to bet that kind of money on your ability to tell whether a sexually charged joke at work crossed the line?

Furthermore, as a practical matter, it is not enough to have a case that will win a trial. Between document discovery, depositions, motion practice, trial preparation, and the actual trial, "winning" a sexual harassment case at trial will cost a company hundreds of thousands of dollars. To really win, your case has to be so good that a court will dismiss it as a matter of law. Recently such victories have become harder to come by. In early 2017, the Ninth Circuit Court of Appeals, which hears cases from Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, overturned a trial court's order dismissing a harassment case where the plaintiff claimed she was hugged too much by her boss, but never complained of the hugging to her boss or human resources. Courts are increasingly unwilling to say what is or isn't offensive to a reasonable person as a matter of law.

As an employer, it is important to set policies that keep employees from coming close to what they consider to be "the line" and to address employees' concerns regarding possible harassment quickly and thoroughly. You might think the behavior was harmless, but how much are you willing to bet that 12 strangers will agree with you? Well-crafted policies written in consultation with your employment lawyer can make it clear to your employees that your company has zero tolerance for inappropriate behavior. Wherever your employees think the line is, they shouldn't even come close.