

Hugging Can Create a Hostile Work Environment, Ninth Circuit Rules—Are Your Employees Aware?

by Aaron Goldstein

“He’s just the hugging type”—we have all heard one time or another in the workplace. But is there a limit to platonic hugging in the workplace? The Ninth Circuit recently ruled there is.

In order to support a hostile work environment claim, a plaintiff has to show that he or she was subject to harassment that was either severe or pervasive. Put another way, the conduct at issue must either be really bad, or there has to be a lot of it. Even behavior that sounds relatively innocuous can create a hostile work environment if it is unwanted and happens frequently enough. This point was driven home by the Ninth Circuit last Thursday when it ruled that even hugging can create a hostile work environment if it is “unwelcome and pervasive.”

In *Zetwick v. County of Yolo*, the plaintiff, a female corrections officer, alleged that her superior, a male sheriff, created a hostile work environment by “greeting her with unwelcome hugs on more than one hundred occasions.” The trial court dismissed the case on the employer’s motion for summary judgment, but the Ninth Circuit reversed.

According to the Ninth Circuit, the trial court applied the wrong legal standard to the plaintiff’s claims in two respects. First, the trial court incorrectly cited prior case law to suggest that hugs and kisses on the cheek can never support a hostile workplace claim. Second, the trial court stated that the hugs in question could not create a hostile work environment because they were not severe *and* pervasive. The Ninth Circuit emphasized that the underlying conduct need only be severe *or* pervasive to support a hostile work environment claim.

The Ninth Circuit also rejected what it characterized as the trial court’s attempt to apply “a mathematically precise test” to the individual defendant’s conduct. The trial court stated that “simple math indicates that Plaintiff experienced this conduct an average of around seven or eight times per year for a couple [of] seconds on each occurrence” and not “on a daily basis.” The Ninth Circuit held that “simply looking at the number of hugs

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over the period of time did not adequately address whether [the plaintiff] had generated genuine issues of material fact that the environment she faced was sexually hostile.”

Most of us would agree that a 100 hugs is too many, but is it actionable harassment?

There is an important lesson lying underneath the text of the Ninth Circuit’s decision. The type and severity of conduct that can constitute a hostile work environment is ever changing based upon developing social norms. Thirty years ago it might have been socially acceptable to call a subordinate employee “honey,” but today it most definitely is not. The trial court put the individual defendant’s conduct within the category of indisputably socially acceptable conduct. What the Ninth Circuit announced, without explicitly holding, is that it is no longer indisputably socially acceptable for a male to subject a female subordinate to frequent unwanted hugs.

This case is an important lesson for employers. Behavior that some of your employees think is harmless might now be socially unacceptable based on developing social norms.

In fact, on January 10, 2017, the EEOC released for public input proposed guidance recommending that employers provide their employees with civility training. <https://www.regulations.gov/document?D=EEOC-2016-0009-0001>. This proposed guidance references the findings of an EEOC Select Task Force, which concluded that “workplace civility training” and “bystander intervention training” show “significant promise for preventing harassment in the workplace.” https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf. Here, the EEOC makes explicit what the Ninth Circuit implies. Hostile work environment cases turn on “expectations of civility and respect in the workplace.” And those expectations are always changing.

Employers should keep their employees up to date on these changing expectations with regular training to make sure everyone is on the same page.