H.329

Bor Yang, Executive Director

HRC Testimony

The Purpose & Goals of H.329

1. Clarifies the statute of limitations by adopting the standard 6-year statute of limitations.
2. Affirmatively states that the anti-discrimination laws are remedial in nature and shall be liberally construed and holds that discrimination cases are rarely appropriate for summary judgment.
3. Removes a significant barrier to people reporting harassment by adopting a standard that makes reprehensible behavior actionable.

The Statute of Limitations

Currently, plaintiffs have 3 and/or 6 years to file a lawsuit on the basis of discrimination (including harassment). The timeline for filing a lawsuit depends on the relief sought by the plaintiff. It's 3 years for personal injury such as emotional distress and 6 years if it is for other losses.

This is confusing for plaintiffs who are often unrepresented; and

It does not reflect the reality that Vermonters have limited opportunities and choices in housing, employment and schools. Plaintiffs will not file until they have achieved safety and security in these areas. It can take years before this has occurred.

Summary Judgment

Summary Judgment is when a court enters a decision in favor of one party because the law is so clear that a trial is not necessary.

Plaintiffs alleging discrimination lose at greater rates than any other civil plaintiff. Court precedence can be very strong against a plaintiff.

Summary Judgment is contrary to the remedial nature of the anti-discrimination laws of this state.

Severe or Pervasive

Harassment is a form of discrimination.

For a plaintiff to prevail on a claim of harassment, they must show that the harassing conduct rises to level of **“severe or pervasive.”**

The standard was first widely adopted after the 1986 Supreme Court decision: *Meritor Savings Bank v. Vinson*:

The Plaintiff, Mechelle Vinson, was an African-American woman who survived extreme sexual harassment at the hands of her supervisor over a four-year time period, including 40 to 50 instances of rape, accompanied by groping, demands for sexual favors, and instances in which the supervisor followed her into the bathroom and exposed himself.

Severe or Pervasive

In 1993, the U.S. Supreme Court further explained the standard in the landmark case of **Harris v. Forklift Sys., Inc.,**

The Plaintiff, Theresa Harris, sued after the president of the company insulted her gender and targeted her with unwanted sexual innuendo. The lower court dismissed her case, concluding that although the harassment was offensive, it was not so severe as to seriously psychologically affect Harris's well-being. Harris appealed all the way to the U.S. Supreme Court.

Justice O'Connor clarified that harassment may satisfy the severe or pervasive standard without seriously affecting the victim's psychological wellbeing. To be actionable, the harassing conduct must create an "objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."

Severe or Pervasive

- The standard is confusing and has resulted in inconsistent court decisions.
  - What behavior constitutes severe?
  - How much and how long must bad behavior occur to be pervasive?
- The standard is too high and has resulted in court decisions that permit unsafe and hostile workplaces, housing and school environments to continue, unchecked.

Severe or Pervasive in the 5th Circuit

- For a year, Sonja Barnett's supervisor leered at her, touched her in sexually inappropriate and unwelcome ways, and actively intimidated her after she complained of his actions by loitering outside the building where her office was located → Not severe or pervasive because it did not "destroy her ability to succeed in the workplace environment."
- The Court in Barnett's case relied on precedence set in Ladonna Hockman's case. Hockman alleged that over a year and a half, her co-worker made comments about her body, slapped her on the behind, grabbed or brushed her breasts and behind, tried to kiss her, asked her to come into the office early so they could be alone. → Not severe or pervasive.
- Also, Debra Jean Shepherd survived harassing behavior over a period of two years perpetrated by a coworker; behavior that included the co-worker attempting to look down the plaintiff's clothing; sexually suggestive comments including, "your elbows are the same color as your nipples" and "you have big thighs;" the harasser patting his lap and remarking, "here's your seat" while the plaintiff was looking for a seat in a meeting; and unwanted touching→ Not harassment because it did not impact the terms and conditions of her job.

Severe or Pervasive in the 11th Circuit

Gupta v. Florida Bd. of Regents, the plaintiff Srabana Gupta, a female associate professor, was harassed by the male department coordinator and chairman of the search committee for a tenured position Gupta was applying for, over a six or seven-month period. The harassment included comments such as: “I can look at you and I can tell you are innocent and don’t have much sexual experience;” calling Gupta frequently at night and asking her questions including, “Are you in bed yet?” and “Are you talking to your boyfriend?;” placing his hand on her inner thigh; touching her ring and bracelet; and lifting up the hem of her dress and asking, “What kind of material is this?” → The Court decided against Gupta saying that it would “lower the bar of Title VII to punish mere bothersome and uncomfortable conduct.”

The case was then used to uphold harassing behavior in Mitchell v. Pope. The plaintiff reported that for four years, her supervisor subjected her to sixteen separate incidents of harassment. The court of appeals affirmed a grant of summary judgment against the plaintiff. The court stated that the harassment she suffered was “not that frequent.”

Severe or Pervasive in the 4th Circuit

Montano v. INOVA Health Care Services: Over the course of one year, the plaintiff's co-workers referred to Hispanic patients as "Mexicans" and members of MS-13, complained that "these Latino people keep crossing the river," sought to deny Hispanic patients workers' compensation benefits, unreasonably questioned Hispanic patients about their immigration status, and insinuated that Hispanics come to America to receive government benefits. In addition, the plaintiff's supervisor came into work on his day off so he could stare at her breasts after she underwent cosmetic surgery, her co-workers told her that her breasts looked nice, a co-worker told her he heard she received a gift that her husband likes (referring to her breasts), and co-workers informed her others were spreading rumors about her breasts. → The Eastern District of Virginia court found the sex- and race-based harassing conduct was not "severe or pervasive." VA-Workplace-Harassment-Bill-FS-1.8.21.pdf (nwlc.org)

Virginia's Response…

SENATE BILL NO. 1360 in 2021 Session:

- A determination shall be made on the basis of the record as a whole, according to the totality of the circumstances. A single incident may constitute workplace harassment.
- Incidents that may be workplace harassment shall be considered in the aggregate.
- Identifies nine factors for consideration.
- Conduct may be workplace harassment regardless of whether (i) the complaining party is the individual being harassed; (ii) the complaining party acquiesced or otherwise submitted to, or participated in, the conduct; (iii) the conduct is also experienced by others outside of the protected class involved; (iv) the complaining party was able to continue carrying out duties and responsibilities of the party's job despite the conduct; (v) the conduct caused a tangible or psychological injury; or (vi) the conduct occurred outside of the workplace.

Severe or Pervasive in the 9th Circuit

The Ninth Circuit held in Brooks v. City of San Mateo, that a single incident where one employee groped another by touching her stomach and forcing his hand underneath her bra to grope her breast was not sexual harassment because it was an “isolated incident.”

Finding that even a single grope was too far, the California Legislature addressed it in 2018 during the #MeToo Movement.

California Clarifies Severe or Pervasive

- CA legislature overrules Brooks v. City of San Mateo stating that a single incident of harassing conduct is sufficient to create a triable issue.
- The CA Legislature affirms Justice Ruth Bader Ginsburg's concurring opinion in Harris v. Forklift Systems that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."
- The existence of a hostile work environment depends upon the totality of the circumstances.
- Harassment cases are rarely appropriate for disposition on summary judgment.

NYC Changes Severe or Pervasive

NYC passes The Restoration Act:

- Permitting a wide range of conduct to be found beneath the “severe or pervasive” bar would mean that discrimination is allowed to play some significant role in the workplace.
- The analysis must be guided by the need to make sure that discrimination plays no role.
- Finally, the “severe or pervasive” doctrine, by effectively treating as actionable only a small subset of workplace actions that demean women or members of other protected classes, is contradicted by the Restoration Act principle that the discrimination violations are per se “serious injuries.”

Severe or Pervasive in Vermont

Vermont Supreme Court held that harassment in school must be so severe, pervasive, **AND** objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. *Washington v. Pierce (2005).*

Allen v. University of Vermont, a student who was raped by another student reported it to staff. The student lost on the grounds that she had not reported it appropriately. The Court posited that 1)…isolated incidents of misconduct ordinarily are not "pervasive" in nature and thus will not support an action...; 2) that nothing in the instant complaint would necessarily lead the responding university staff to be cued to sexual harassment when reacting to an expressed complaint of an isolated and criminal rape.

The VT Legislature then clarified that the standard is "or" not "and."

H.329

The people of Vermont is asking the Legislature to replace the severe or pervasive standard because:

- The standard is unclear and inconsistently applied.
- The standard sets an unreasonably high burden for plaintiffs and plaintiffs lose before litigation has even started.
- Women of color and individuals with intersectional identities are particularly vulnerable to harassment and judges do not understand how to consider the totality of the circumstances in addressing race and gender claims.

The HRC's Proposed Amendments to H.329

Delete words "substantially" and "performance" from:

a. Lines 1-3 and 10-11 on page 5, under 21 V.S.A. § 495(d);
b. Line 20 on page 6, under 9 V.S.A. § 4501; and
c. Lines 15-16 on page 7, under 16 V.S.A. §11.

This more accurately reflects Justice Ruth Bader Ginsburg's position (and California's law) that "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."

The HRC's Proposed Amendments to H.329

Adopt language from Virginia's Bill. In determining whether conduct constitutes harassment as defined in this Chapter, the following shall apply:

- A determination shall be made on the basis of the record as a whole, according to the totality of the circumstances. A single incident may constitute harassment.
- Incidents that may be harassment shall be considered in the aggregate, with conduct of varying types, such as expressions of sex-based hostility, requests for sexual favors, and denial of employment opportunities due to sexual orientation, viewed in totality, rather than in isolation, and conduct based on multiple protected characteristics, such as sex and race, viewed in totality, rather than in isolation.
- Conduct may be workplace harassment regardless of whether (i) the complaining party is the individual being harassed; (ii) the complaining party acquiesced or otherwise submitted to, or participated in, the conduct; (iii) the conduct is also experienced by others outside of the protected class involved; (iv) the complaining party was able to continue carrying out duties and responsibilities of the party's job despite the conduct; (v) the conduct caused a tangible or psychological injury; or (vi) the conduct occurred outside of the workplace.

In Closing…

- Our current laws leave many women, people of color, people with disabilities, LGBTQ persons in the cold.
- There is very little deterrent to harassment.
- Employers, housing providers, schools rely on the law to dictate what they will investigate, what they will correct and where their resources will go for prevention. They rely on the severe or pervasive standard to govern their behavior.
- It is incumbent upon this body to check and balance the judicial branch when statutory interpretations run contrary to the intent, purpose and/or remedial nature of the law.
- The law must reflect the morals and values of a just, free and equal society.
- Pass H.329.

Sources

- Virginia Bill: Bill Tracking - 2021 session > Legislation (virginia.gov)
- National Women's Law Center's Virginia Fact Sheet: VA-Workplace-Harassment-Bill-FS-1.8.21.pdf (nwlc.org)
- National Women's Law Center's Summary of #MeToo Reforms: 2021 Progress Update: #MeToo Workplace Reforms in the States - National Women's Law Center (nwlc.org)
- Professor Jamillah William's Testimony: Letter re SB1360-HB2155 - Law Prof. Jamillah Williams.pdf
- A Call for Legislative Action: Workplace-Harassment-Legislative-Principles 12.18.pdf
- Legal Changes Needed to Strengthen #MeToo Movement by Sarah David Heydemann Sharyn Tejani, Richmond Public Interest Law Review: LEGAL CHANGES NEEDED TO STRENGTHEN THE #METOO MOVEMENT.pdf
- Legislative Intent for California's Law: 12923 Application of laws about harassment legislative intent.pdf
- New York City's Restoration Act: N.Y.C. LOC. L. NO. 85 (2005).

Cases

- Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).
- Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
- Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000)
- Barnett v. Boeing Co., 306 F. App'x 875 (5th Cir. 2009).
- Hockman v. Westward Commc’ns, L.L.C., 407 F.3d 317(5th Cir. 2004);
- Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871 (5th Cir. 1999).
- Mitchell v. Pope, 189 F. App'x 911 (11th Cir. 2006).
- Gupta v. Florida Bd. of Regents, 212 F.3d 571 (11th Cir. 2000)
- Washington v. Pierce, 2005 VT 125
- Allen v. University of Vermont 2009 VT 33