The Legal Standard for Hostile Work Environment Discrimination

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Federal Law

42 U.S.C. § 2000e-2(a)

(a) It shall be an unlawful employment practice for an employer--

(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Federal Law

42 U.S.C. § 2000e-3(a)

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

State Law

<u>21 V.S.A. § 495(a)(1)</u>

* * *

(a) It shall be unlawful employment practice . . .:

(1) For any employer . . . to discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, crime victim status, or age or against a qualified individual with a disability;

* * *

State Law

21 V.S.A. § 495(a)(8)

(8) Retaliation prohibited. An employer . . . shall not discharge or in any other manner discriminate against any employee because the employee:

(A) has opposed any act or practice that is prohibited under this chapter;

(B) has lodged a complaint or has testified, assisted, or participated in any manner with the Attorney General, a State's Attorney, the Department of Labor, or the Human Rights Commission in an investigation of prohibited acts or practices;

(C) is known by the employer to be about to lodge a complaint, testify, assist, or participate in any manner in an investigation of prohibited acts or practices;

* * *

(E) is believed by the employer to have acted as described in subdivisions (A) through (D) of this subdivision.

State Law

21 V.S.A. § 495d(13)

(13) “Sexual harassment” is a form of sex discrimination and means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

* * *

(C) the conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.

Case Law: Recognition of Harassment as a Form of Discrimination

"The phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (*citations and quotations omitted*).

Applies to all protected classes, not just sex.

Case Law: Reasoning Behind Protections Against Harassment

"A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

Case Law: What Constitutes a Hostile Work Environment

"For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

". . . the adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, '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 'ma[k]e it more difficult to do the job.'" Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, *concurring*) (*citations omitted*).

Case Law: Severity and Pervasiveness of Harassment

“. . . 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.’ A recurring point in these opinions is that ‘simple teasing,’ offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’” Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (*citations omitted*).

“The incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.” Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997).

Case Law: Severity and Pervasiveness of Harassment

"Usually, a single isolated instance of harassment will not suffice to establish a hostile work environment unless it was 'extraordinarily severe.' Thus, the plaintiff must demonstrate 'either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her working environment.'" Howley v. Town of Stratford, 217 F.3d 141, 153 (2d Cir. 2000) (*citations omitted*).

> "Although [defendant] 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 [plaintiff] was the only female and many of the men were her subordinates. And his verbal assault included charges that [plaintiff] had gained her [position] only by performing [a sexual act]." Id., 217 F.3d at154.

"We emphasize that '[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as [the N-word] by a supervisor in the presence of his subordinates.' The use of racially offensive language is particularly likely to create a hostile work environment when, as here, it is presented in a 'physically threatening' manner." Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 24 (2d Cir. 2014) (*citations omitted*).

Case Law: Reasonable Person Standard

“. . . the perspective from which the evidence must be assessed is that of a ‘reasonable person in the plaintiff’s position, considering all the circumstances [including] the social context in which particular behavior occurs and is experienced by its target.” Petrosino v. Bell Atl., 385 F.3d 210, 221 (2d Cir. 2004).

“The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment. ‘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.’ Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) *(citations omitted)*.

Case Law: Totality of the Circumstances

"The mere fact that men and women are both exposed to the same offensive circumstances on the job site . . . does not mean that, as a matter of law, their work conditions are necessarily equally harsh. The objective hostility of a work environment depends on the totality of the circumstances." Petrosino v. Bell Atl., 385 F.3d 210, 221 (2d Cir. 2004).

"…whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include 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 an employee's work performance. The effect on the employee's psychological well-being is . . . relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

"Facially neutral incidents may be included . . . among the 'totality of the circumstances' that courts consider in any hostile work environment claim, so long as a reasonable fact-finder could conclude that they were, in fact, based on [the protected characteristic]." Alfano v. Costello, 294 F.3d 365, 378 (2d Cir. 2002)

Case Law: Employee's Acquiescence

"The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the 'voluntariness' of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).

Case Law: Ambient Harassment

"Because the analysis of severity and pervasiveness looks to the totality of the circumstances, 'the crucial inquiry focuses on *the nature of the workplace environment as a whole,*' and 'a plaintiff who herself experiences discriminatory harassment *need not be the target of other instances of hostility in order for those incidents to support her claim.*'" Kaytor v. Elec. Boat Corp., 609 F.3d 537, 547 (2d Cir. 2010) (*italics in original*).

"The Supreme Court has cautioned us to consider the totality of circumstances in cases such as this. The mere fact that Schwapp was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim. Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment." Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997) (*citations omitted*).

S.103: Impact on Severe or Pervasive Standard

Excerpt from Sec. 1 (amending 21 V.S.A. § 495):

(k) Notwithstanding any State or federal judicial precedent to the contrary:

(1) harassment and discrimination need not be severe or pervasive to constitute a violation of this section; and

(2) behavior that a reasonable employee with the same protected characteristic would consider to be a petty slight or trivial inconvenience shall not constitute unlawful harassment or discrimination pursuant to this section.

S.103: New Harassment Definition

Excerpt from Sec. 2 (amending 21 V.S.A. § 495d):

(16) "Harass" means to engage in unwelcome conduct based on an employee's race, color, religion, national origin, sex, sexual orientation, gender identity, ancestry, place of birth, age, crime victim status, or physical or mental condition that interferes with the employee's work or creates a work environment that is intimidating, hostile, or offensive. In determining whether conduct constitutes harassment:

(A) The determination shall be made on the basis of the record as a whole, according to the totality of the circumstances, and a single incident may constitute unlawful harassment.

(B) Incidents that may be harassment shall be considered in the aggregate with varying types of conduct and conduct based on multiple characteristics viewed in totality rather than in isolation.

S.103: New Harassment Definition

Excerpt from Sec. 2 (amending 21 V.S.A. § 495d):

(C) Conduct may constitute harassment, regardless of whether:

(i) the complaining employee is the individual being harassed;

(ii) the complaining employee acquiesced or otherwise submitted to or participated in the conduct;

(iii) the conduct is also experienced by others outside the protected class involved in the conduct;

(iv) the complaining employee was able to continue carrying out the employee's job duties and responsibilities despite the conduct;

(v) the conduct resulted in a physical or psychological injury; or

(vi) the conduct occurred outside the workplace.

Any Questions?