

## Avoiding Hostile Work Environment Claims in Today's Workplace

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The importance of workplace policies targeted at preventing and addressing workplace discrimination and harassment cannot be overstated. As we have reported in our seminars, the Equal Employment Opportunity Commission (EEOC) has recently emphasized the importance of employer training and effective policies in its proposed Enforcement Guidance on Unlawful Harassment. Preventing systemic harassment has also been reaffirmed as a priority in the EEOC's Strategic Enforcement Plan for 2017-2021. "Prevention is the best cure" is the guiding principal. To this end, employers are urged to establish effective and accessible workplace policies, as well as effective harassment training in the workplace.

Uncertainty about what is meant by the term "harassment" remains an issue in the workplace. Courts recognize a discrimination claim founded upon a hostile work environment when the harassment so infects a workplace that it alters the terms or conditions of the plaintiff's employment. In order to establish a legally viable claim for a hostile work environment, also referred to as harassment, a plaintiff must show the following elements:

1. The employee suffered intentional discrimination because of his/her protected characteristic (e.g., race, sex, disability, etc.);
2. The discrimination was severe or pervasive;
3. The discrimination detrimentally affected the plaintiff;
4. The discrimination would detrimentally affect a reasonable person in like circumstances; and
5. The existence of *respondeat superior* liability; that is, the employer is responsible.

There has been a split about the correct legal standard to be applied in evaluating the second prong of the legal test for harassment, specifically, the "severe or pervasive" standard. Within the Third Circuit, some district courts have held that the discrimination must be "pervasive and regular" to establish a claim, and other courts have held that the correct standard is "severe and pervasive."

The Third Circuit Court of Appeals addressed the legal standard used to determine whether a discrimination plaintiff has set forth a claim of hostile work environment in a recently filed opinion. In the case of *Castleberry v. STI Group*, 2017 U.S. App. LEXIS 12611 (3d Cir. July 14, 2017), the Court held that the correct legal standard for determining whether a plaintiff has set forth a claim for a hostile work environment is that the discrimination must be "severe or pervasive." In the *Castleberry* case, the plaintiffs, African-Americans, alleged that their supervisor used a racial slur in front of them and their co-workers. The supervisor's use of the highly offensive word was alleged to have been accompanied by a threat of termination. Both plaintiffs were terminated a couple of weeks after they complained about the incident. The employer filed a motion to dismiss the case under F.R.C.P. 12(b)(6), arguing that the plaintiffs had failed to set forth a plausible claim for a hostile work environment. The District Court agreed, holding that a single use of a racial slur was not sufficient to state a claim, because they failed to plead discrimination that was "pervasive and regular."

The Third Circuit reversed. In its opinion, the Court ruled that even a single incident of discrimination could be adequate to set forth a plausible claim of harassment, provided that the incident is adequately "severe." The Court relied on the Supreme Court's holding that "isolated incidents (*unless extremely serious*) will not amount to harassment" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). To meet this standard, "the incident [must] 'be extreme to amount to a change in the terms and conditions of employment' for it to serve as the basis of a harassment claim." *Castleberry*, 2017 U.S. App. LEXIS 12611 at \* 7.

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The Court of Appeals emphasized the procedural posture of the case in its opinion. The District Court dismissed the case on a FRCP 12(b)(6) motion to dismiss, thus disposing of the case before any discovery had occurred. The Court of Appeals noted that the claims should not have been dismissed at this early stage of the litigation, before the plaintiffs had the opportunity to take discovery regarding their claims.

For employers, the *Castleberry* case provides an important reminder of the necessity of having an effective harassment policy in place, as well as training at all levels of management on anti-harassment. In evaluating employee complaints, human resources managers should be aware that even a single act of discrimination could be sufficient to establish a plausible claim of harassment, if it is sufficiently severe. On this basis, it is imperative to take appropriate action in investigating all claims of discrimination with an accurate understanding of the legal standard that could be applied in court. Prompt and appropriate remedial action by the employer must then be taken as warranted.

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