LAW REVIEW, JANUARY 1995

PSYCHOLOGICAL INJURY NOT REQUIRED FOR SEXUAL HARASSMENT IN "ABUSIVE WORK ENVIRONMENT"

James C. Kozlowski, J.D., Ph.D.

As the "NRPA Law Review" column begins its 14th year of publication in *Parks & Recreation*, it seemed timely to revisit a topic which was examined in April 1983 in an article entitled *"Employer Liability for Sexual Harassment in the Workplace."* This article cited the case of *Henson v. City of Dundee*, 682 F2d 897 (1982), in which plaintiff alleged that the city's police chief "created a hostile and offensive working environment for women in the police station subjecting them to numerous harangues of demeaning sexual inquiries and vulgarities." The specific issue is this case was, therefore, whether the plaintiff had alleged sufficient facts to establish that "her resignation was tantamount to a constructive discharge based upon sex." As noted by the federal appeals court in *Henson*, "when an employee involuntarily resigns in order to escape intolerable and illegal employment requirements to which he or she is subjected became of race, color, religion, sex, or national origin, the employer has committed a constructive discharge in violation of Title VII."

> If discriminatory practices based upon sex would cause a reasonable person to quit her job, the employer will be held liable for effectively discharging the individual in violation of Title VII...
>
> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

According to the *Henson* court, federal regulations governing sexual harassment "included psychological well-being as well as tangible job benefits as terms or conditions or employment within the purview of Title VII."

> [U]nder certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job detriment ... [T]erms, conditions, or privileges of employment include the state of psychological well-being at the workplace . . . For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter

> the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well-being of employees is a question to be determined with regard to the totality of the circumstances.

As described herein, in the case of *Harris v. Forklift System, Inc*., the Supreme Court of the United States qualified this "hostile or abusive work environment" standard" in evaluating claims of sexual harassment. Specifically, the Court found that "[t]he effect on the employee's psychological well-being is, of course, relevant," but not conclusive "to determining whether the plaintiff actually found the environment abusive."

Workin' in a Coal Mine?

In the case of *Harris v. Forklift Systems, Inc*., 113 S.Ct. 1382, 122 L.Ed.2d 758 (1993), plaintiff Teresa Harris sued her former employer defendant Forklift Systems, Inc. for sexual harassment. Harris worked as a manager at Forklift Systems, Inc., an equipment rental company, from April 1985 until October 1987. Charles Hardy was Forklift's president. The facts of the case were as follows:

> [T]hroughout Harris' time at Forklift, Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman."
>
> Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate Harris' raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing.
>
> In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized. He also promised he would stop, and based on this assurance Harris stayed on the job. But in early September, Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy ... some [sex] Saturday night?" On October 1, Harris collected her paycheck and quit.

In her complaint, Harris claimed that Hardy's conduct had created an abusive work environment for her because of her gender in violation of Title VII of the Civil Rights Act of 1964 as amended (42 U. S. C. § 2000e et seq.) The federal district court reasoned as follows that Hardy's conduct "did not create an abusive environment":

> [S]ome of Hardy's comments offended Harris, and would offend the reasonable woman, but that they were not so severe as to be expected to seriously affect Harris' psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.
>
> Neither do I believe that Harris was subjectively so offended that she suffered injury. Although Hardy may at times have genuinely offended Harris, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to Harris.

The United States Court of Appeals for the Sixth Circuit affirmed. Harris appealed to the U.S. Supreme Court. The Supreme Court granted Harris's petition for review.

No Harm - No Foul?

Accordingly, the Supreme Court would "consider the definition of a discriminatorily 'abusive work environment' (also known as a "hostile work environment") under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e et seq." The specific issue before the Court was, therefore, whether the alleged sexual harassment "must seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury" to constitute an "abusive work environment" under federal civil rights laws. As cited by the Court, Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer 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. 42 U. S. C. § 2000e-2(a)(1)." Further, the Court noted as follows that "this language is not limited to economic or tangible 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, which includes requiring people to work in a discriminatorily hostile or abusive environment. When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.

As characterized by the Court, this "standard" for determining the existence of an abusive work environment "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."

> [M]ere utterance of an epithet which engenders offensive feelings in a employee, does not sufficiently affect the conditions of employment to implicate Title VII. 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.
>
> Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

On the other hand, the Court asserted as follows that "Title VII comes into play before the harassing conduct leads to a nervous breakdown":

> 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. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality...
>
> [E]nvironments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.

As a result, the Supreme Court concluded that "the District Court erred in relying on whether the conduct seriously affected plaintiff's psychological well-being or led her to suffer injury."

> Though the District Court did conclude that the work environment was not intimidating or abusive to Harris, it did so only after finding that the conduct was not "so severe as to be expected to seriously affect plaintiff's psychological well-being," and that Harris was not "subjectively so offended that she suffered injury"... The District Court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the court found this to be a "close case"...

> Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.

In so doing, the Supreme Court acknowledged that this "hostile environment" standard "is not, and by its nature cannot be, a mathematically precise test." Rather, the Supreme Court stated that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances" as follows:

> 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, of course, 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.

The Supreme Court, therefore, "reversed the judgment of the Court of Appeals and remand[ed] the case for further proceedings consistent with this opinion."

Interferes with Job Performance?

Both Justice Scalia and Justice Ginsberg concurred with the majority opinion of the Court written by Justice O'Connor. In his concurring opinion, Justice Scalia characterized the *Harris v. Forklift, Inc.* opinion as an elaboration of existing legal standards to determine the existence of sexual harassment in the workplace. According to Scalia, *Harris* reinforced the requirement that "the challenged conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive." On the other hand, Scalia lamented the advent of "more expansive vistas of litigation" will be generated by the "inherently vague statutory language" and the "abusiveness" test for determining an illegal environment in the workplace.

> "Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard-and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person's" notion of what the vague word means.

> Today's opinion does list a number of factors that contribute to abusiveness, but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.
>
> Be that as it may, I know of no alternative to the course the Court today has taken... One of the factors mentioned in the Court's nonexhaustive list-whether the conduct unreasonably interferes with an employee's work performance-would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute... I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts. For these reasons, I join the opinion of the Court.

Similarly, in her concurring opinion, Justice Ginsburg found that the determination of an illegal hostile or abusive work environment will depend, in large part, on "whether the conduct unreasonably interferes with an employee's work performance."

> As the Equal Employment Opportunity Commission emphasized, 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 make it more difficult to do the job.