Severe or Pervasive: Just How Bad Does Sexual Harassment Have to Be in Order to Be Actionable?

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The Law of Workplace Sexual Harassment: Basics and Background

The Standard: Severe or Pervasive

Elements:

1. He or she belongs to a protected group;

2. He or she was subject to unwelcome sexual harassment;

3. The harassment was based on sex;

4. The harassment affected was so severe or pervasive it affected a “term, condition, or privilege” of employment; and

5. The employer knew or should have known of the harassment in question and failed to take proper remedial action.
The History of “Severe or Pervasive”

- **Ellerth and Faragher**
  
  United States Supreme Court ruled that employers can be “vicariously liable” for harassment by supervisors.

  Affirmative Defense: The employer exercised “reasonable care” to prevent and correct the harassment, and the employee unreasonably failed to use its complaint procedure.

- **Subordinate Harassment:** *Stewart v. Rise*

- **Duncan and Eich**
  
  Is the harassment so “severe or pervasive” as to alter a term, condition, or privilege of the employee’s employment?
Severe or Pervasive: One Standard with Two Parts (And Many Interpretations)

**Severity Cases**

- Sexual Assault
- Physical Assault
- Physical Assault or Threats in Conjunction with a Sexual Harassment Claim
- Physical Confinement and Limited Options for Avoidance
- Offensive Touching
- Verbal Harassment
Pervasiveness Cases

- 10 incidents over a 3 year period not enough
- 3 incidents (pornography, inappropriate verbal and physical contact) not enough
- 2-3 sexually inappropriate comments every week for 14 months not enough
- 5 weeks of “ungentlemanly” conduct not enough
- 3 incidents (kissing, confinement and assault) not enough
What is an “Incident”?

- Striking a co-worker’s buttocks on two occasions?

- Striking a co-worker’s buttocks on two occasions + verbal harassment for seven months?

- Two sexually inappropriate text messages and one pornographic e-mail?
The Time Elapsed Between Incidents and the Plaintiff’s Reaction May Affect the Analysis

- Failure to complain or protest the alleged harassment when it was occurring

- Ongoing Pattern?
Severity and Pervasiveness May be Weighed Against

- **7th Circuit**: The plaintiff must show that the workplace is “hellish” to prove hostile work environment.

- **11th Circuit**: The plaintiff *can* bring a claim for hostile work environment based on “sex specific” language even when the language is not directed at the plaintiff.
Severe or Pervasive is a Very High Standard

- Miller v. Bd. of Regents
- Kenneh v. Homeward Bound
Claims Against Government Bodies

- Indiana
- Oregon
- Iowa

Perhaps The Law Needs to Change

- New York Law Changes – Elimination of Severe or Pervasive
- Minnesota’s Attempt to Change the Law
CONCLUSION

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