Gray Zone: Words, Actions in Sexual Harassment Rulings

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Dec. 2, 2013

U.S. Supreme Court Justice Potter Stewart famously used the phrase "I know it when I see it" in 1964 to describe his threshold test for obscenity in *Jacobellis v. Ohio*. When it comes to sexual harassment claims, the same is not true. While all may agree that certain behaviors are offensive and unacceptable, attempting to categorize those behaviors as harassment remains difficult.

Sometimes, words alone will constitute actionable harassment, or actions will not be sufficient. The highly fact-specific nature of the inquiry means general counsel must exercise caution.

The broad outlines of sexual harassment law were established years ago. In *Faragher v. Boca Raton* (1998), the U.S. Supreme Court held that sexual harassment must be sufficiently "severe or pervasive" to alter the conditions of the victim's employment and create an abusive working environment.

But what do courts mean by "severe or pervasive"? The short answer is "serious or frequent," although this belies the complexity and unpredictability of the fact-specific determination. The U.S. Court of Appeals for the Fifth Circuit's acknowledgement that the determination is not an exact science is an understatement; the nature of conduct that qualifies as severe or pervasive harassment is uncertain at best.

A recurrent issue is whether offensive language alone is sufficient to sustain a "hostile environment" claim, or whether some degree of physical touching is required. Most courts take the "sticks and stones" approach.

The Supreme Court stated in *Meritor Savings Bank v. Vinson* (1986) that simply using an epithet that engenders offensive feelings in an employee doesn't sufficiently affect employment conditions to constitute sexual harassment.

The Fifth Circuit has held that harassment must be "more than rude or offensive comments." But it also has held that physical touching is not a requirement for sexual harassment. All the cases discussed below were decided on summary judgment, with courts determining either: 1. Even if the alleged conduct occurred, it was not sufficiently severe or pervasive to withstand a motion for summary judgment, or 2. There was a fact issue as to whether the alleged conduct, if it occurred, was sufficiently severe or pervasive, thus defeating summary judgment.

Donaldson v. CDB Inc. (2009) exemplifies the Fifth Circuit's view that alleged behavior need not involve physical touching to be actionable. In *Donaldson*, the alleged offender made comments to or about women other than the plaintiff. He implied he had been in bed with one, he asking another whether it was her time of the month, he made hand gestures simulating oral sex, and he talked about his sexual performance to his whole staff. He would yell "code red" when an attractive woman entered the store.

He made statements to the plaintiff, Gwendolyn Donaldson, about her boyfriend and their sexual relationship, disparaged her physical appearance, and suggested that Donaldson have sex with the manager of the service station across the street so that he could get a free oil change.

When Donaldson complained about the comments, he replied that he knew the law and told her "you can say what you want to say but you can't touch."

The Fifth Circuit determined that he didn't know the law as well as he thought, finding that the offensive statements were sufficiently pervasive to constitute sexual harassment—even though they were similar in severity to the comments allegedly involved in *Hockman* and *Shepherd*, discussed below. In doing so, the court referenced its 1996 opinion in *Farpella-Crosby v. Horizon Health Care*, in which the alleged offender commented on the claimant's sexual life two to three times a week but did not touch the claimant.

The U.S. District Court for the Eastern District of Texas reached a similar result this year in *Stewart v. L.A. Fitness International*. The offender allegedly told April Stewart that she would be successful at sales "[b]ecause you're beautiful and you have big boobs." He also once responded to her comment that his shoes were cute by saying, "I can't help it I am so f----ing hot all the girls want to f--- me. If you wanted to f--- me I would f---ing let you." He once told her, "I want to f---ing punch you in the f---ing face." He also used "the B and C words" in reference to customers, although not in describing Stewart.

The court, while acknowledging that harassment must be more than rude or offensive comments, teasing or isolated incidents, held that the statements were sufficient to represent severe or pervasive conduct. What's missing from the *Stewart* opinion is any indication of how frequently he made the statements. But the message from Stewart remains clear: It's foolish for employers to assume that verbal conduct alone won't support a claim.

Don't Assume

Similarly, it is equally flawed to assume that physical touching always suffices to establish severe or pervasive harassment. The Fifth Circuit's decisions in *Hockman v. Westward Communications* (2004) and *Shepherd v. Comptroller of Texas* (1999) are illustrative, since both involved at least some incidents of touching.

In *Hockman*, the alleged conduct consisted of telling the plaintiff that a co-worker had a nice behind/body; grabbing/brushing against the plaintiff's breasts and behind several times; slapping the plaintiff's behind with a newspaper; holding the plaintiff's face and cheeks while attempting to kiss her; and asking the plaintiff to come in early so that he could be alone with her.

In *Shepherd*, the alleged offender said "your elbows are the same color as your nipples," and "you have big thighs" while he simulated looking under the plaintiff's dress. He also tried to look down her clothing; touched her arm on several occasions; and on two occasions, after the plaintiff came in late to an office meeting, patted his lap and remarked "here's your seat."

In both cases the Fifth Circuit found the conduct insufficient to meet the "severe or pervasive" threshold, though it is uncertain whether *Shepherd* and *Hockman* retain their precedential value after the Fifth Circuit issued its decision on Nov. 21 in *Royal v. CCC&R Tres Arboles*, which noted that those decisions referenced an incorrect standard ("severe and pervasive").

Recently, a similar fact pattern in a Southern District of Texas case also failed to cross that threshold. In *St. Clair-Sears v. Lifechek Staff Services* (2013), the alleged offender once sat on the employee, rubbed her back, repeatedly asked her out, wrote her notes asking how she felt about him, rubbed up against her and placed his hands on her behind, and once stood so close she could feel his erection.

Relying largely on *Hockman* and *Shepherd*, the district court found that, while some of the conduct was "offensive," it did not rise to the level of severity or pervasiveness necessary to survive summary judgment.

The Fifth Circuit's precedents and the recent cases following them should give pause to general counsel trying to gauge their companies' liability under the severe/pervasive test. Statements that do not seem objectively extreme might be sufficient to establish severe or pervasive harassment, while incidents of inappropriate touching might fall well short of that standard.

What's the takeaway for general counsel from this cautionary tale? Combine good hiring practices with diligent employee training, so employees don't think they know the law better than they really do.

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