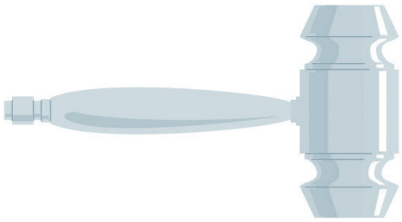
Legal Corner



By Michael I. Levin, Esq., PAESSP General Counsel

Hostile Work Environment

The word "harassment" and the phrase "hostile work environment" are overused and frequently used incorrectly. Some forms of harassment or hostile work environment are perfectly fine – such as when a supervisor takes action to supervise a subordinate employee who is performing poorly. The employee may consider the supervision as "harassment" and may believe that the anxiety he or she is facing is the result of a hostile work environment. However, there are forms of "harassment" and "hostile work environment" that are unlawful and that need to be stopped. This article will address the kinds of "harassment" and "hostile work environment" that are unlawful.

As you are well aware, it is unlawful for school districts to discriminate against their employees based upon the several enumerated protected classifications (i.e., race, gender, disability, age, etc.).[1] Employment discrimination can be undertaken by disparate discriminatory practices or by behavior amounting to harassment. Harassment can occur via tangible employment actions, such as demotions or dismissals or in the form of intangible actions such as unwelcome conduct that negatively affects a person's job. This second form of harassment is generally referred to as a hostile work environment. A hostile work environment can result from the unwelcome conduct of supervisors, co-workers, customers, vendors or anyone else with whom the victimized employee interacts on the job.

Because school administrators are both employees as well as supervisors, they are uniquely situated in terms of discrimination in the workplace. As supervisors, administrators are not only prohibited from committing such acts, but they are also expected to deter and remediate such acts. In addition, as employees, they also may be exposed to such discriminatory acts themselves.

Generally, in order to state a claim for illegal harassment under the several anti-discriminatory statutes, an employee must claim that he/she was subjected to harassment and that this harassment was motivated by his/her protected status.[2] An employer will be liable for the actions of the accused individual(s) if the conduct alleged was not welcome; the conduct was motivated by the fact that the employee is a member of a protected class; the conduct was so severe or pervasive that a reasonable person in that position would find their work environment to be hostile or abusive; and the employee believed his/her work environment to be hostile or abusive as a result of that conduct.

What is an Unlawful Hostile Work Environment?

As described by the courts, a hostile work environment can be found where there is extreme conduct amounting to a material change in the terms and conditions of an employee's employment.[3]

In *Bonenberger v. Plymouth Twp.*, 132 F. 3d 20, 25 (3d Cir. 1997), the Third Circuit Court of Appeals set forth the following requirements for proving a hostile work environment claim in a sex discrimination case brought under Title VII:

> **(1)** The employee suffered intentional discrimination because of [his or her] sex; **(2)** the discrimination was pervasive and regular; **(3)** the discrimination detrimentally affected the plaintiff; **(4)** the discrimination would detrimentally affect a reasonable person of the same sex in that position; and **(5)** the existence of respondeat superior liability.

In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the U.S. Supreme Court held that in order

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to fall within the purview of Title VII, the conduct in question must be severe and pervasive enough to create an "objectively hostile or abusive work environment – an environment that a reasonable person would find hostile – and an environment the victim employee subjectively perceives as abusive or hostile." In determining whether an environment is hostile or abusive, the court held that one must look at numerous factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance." *Id.* As noted by the court, a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive and one that the victim in fact did perceive to be so." *Id*. 510 U.S. at 21.

In *Weston v. Pennsylvania*, 251 F.3d 420 (3d Cir. 2001), the Third Circuit described the standards for a hostile work environment claim, as applied to sex discrimination as follows:

> Hostile work environment harassment occurs when unwelcome sexual conduct unreasonably interferes with a person's performance or creates an intimidating, hostile or offensive working environment… In order to be actionable, the harassment must be so severe or pervasive that it alters the conditions of the victim's employment and creates an abusive environment. *Id.,* 251 F.3d at 425-426, citing *Spain v. Gallegos*, 26 F.3d 439, 446-47 (3d Cir.1994).

The use of "severe or pervasive" indicates that some harassment may be severe enough even if not pervasive so as to violate the law, while other less objectionable conduct will only contaminate the workplace if it is pervasive. Therefore, the terms "severe or pervasive" provide for alternative possibilities for finding harassment. See *Jensen v. Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006). Thus, in determining whether a work environment is "hostile" the courts look at all of the circumstances, including but not limited to:

- The physical environment of the employee's work area.
- The degree and type of language and insult that filled the environment before and after the employee arrived.
- The reasonable expectations of the employee upon entering the environment.
- The frequency of the offensive conduct.
- The severity of the conduct.
- The effect of the working environment on the employee mental and emotional well-being.
- Whether the conduct was unwelcome, that is, conduct the employee regarded as unwanted or unpleasant.
- Whether the conduct was pervasive.
- Whether the conduct was directed toward the employee.
- Whether the conduct was physically threatening or humiliating.
- Whether the conduct was merely a tasteless remark.
- Whether the conduct unreasonably interfered with the employee's work performance.

In terms of sexual harassment cases, examples of conduct warranting a finding of a hostile work environment include verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body, sexual prowess or sexual deficiencies; sexually degrading or vulgar words to describe an individual; pinching, groping and fondling; suggestive, insulting or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986); *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 168 (3d Cir. 2013).

Employer Liability

Where an employee suffers an adverse *tangible* employment action (i.e., discharge, demotion or undesirable reassignment) as a result of a supervisor's discriminatory harassment, the employer is strictly liable for the supervisor's conduct. *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 765 (1998). *Faragher v. City of Boca Raton,* 524 U.S. 775, 790 (1998). An employee is a "supervisor" for purpose of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. *Vance v. Ball State Univ.,* 133 S. Ct. 2434, 2439 (2013).

In terms of adverse employment actions, the most common in terms of hostile work environment claims is that of

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"constructive discharge." In order to show that an employee was subjected to a constructive discharge, the employee must prove that working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004), the Supreme Court held that under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is treated as a formal discharge for remedial purposes. In such instances, the question is whether the working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Id*.

Employer liability for harassment by *non-supervisory* employees exists only where the employer "knew or should have known about the harassment, but failed to take prompt and adequate remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990); *Jensen v. Potter,* 435 F.3d 444, 453 (3d Cir. 2006). When the harassment is undertaken by **non-supervisory employees**, the employer will be liable if management level employees knew or should have known, of the abusive conduct (constructive notice). The courts have held that management level employees should have known of the abusive conduct if an employee provides the management level personnel with enough information to raise a probability of illegal harassment in the mind of a reasonable employer or if the harassment was so pervasive and open that a reasonable employer would have had to be aware of it. *Kunin v. Sears Roebuck and Co.,* 175 F 3.d 289, 294 (3d Cir.1999). As noted by the Third Circuit Court of Appeals in *Kunin,* in the absence of actual notice, an employer is not held to know everything that happens in the workplace, but employers cannot turn a blind eye to overt signs of harassment. *Id.*

In addition, employer liability for co-worker harassment exists only of the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action. See *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 105 (3d Cir. 2009). In *Huston*, the Third Circuit Court of Appeals stated:

> [A]n employee's knowledge of allegations of co-worker sexual harassment may typically be imputed to the employer in two circumstances: first, where the employee is sufficiently senior in the employer's governing hierarchy or otherwise in a position of administrative responsibility over employees under him, such as a departmental or plant manager, so that such knowledge is important to the employee's general managerial duties. In this case, the employee usually has the authority to act on behalf of the employer to stop the harassment, for example, by disciplining employees or by changing their employment status or work assignments...
>
> Second, an employee's knowledge of sexual harassment will be imputed to the employer where the employee is specifically employed to deal with sexual harassment. Typically such an employee will be part of the employer's human resources, personnel or employee relations group or department. Often an employer will designate a human resources manager as a point person for receiving complaints of harassment. In this circumstance, employee knowledge is imputed to the employer based on the specific mandate from the employer to respond to and report on sexual harassment.

Id, at 568 F.3d 107-08.

In instances of harassment when no adverse tangible employment action has occurred, an employer may raise an affirmative defense to liability or damages by proving that the employer exercised reasonable care to prevent and correct promptly any harassing behavior and/or that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth*, 524 U.S. at 765. Proof that the employer has established explicit policies against illegal harassment in the work place which have been fully communicated to its employees and provide reasonable means for employees to make such claims and that the employer took reasonable steps to correct the problems raised by the employee will establish that the employer exercised reasonable care to prevent and correct promptly any harassing behavior. Proof that the employee did not follow the reasonable complaint procedures provide by the employer will ordinarily be enough to prove that the employee unreasonably failed to take advantage of a corrective opportunity.[4]

Claims Under Sections 1981 and 1983 of the Civil Rights Act of 1866

The standards for a hostile work environment claim are identical under Title VII and Section 1981. *See, e.g., Verdin v. Weeks Marine Inc.*, 124 Fed. Appx. 92, 95 (3d Cir. 2005); *McKenna v. Pac Rail Serv.,* 32 F. 3d 820, 826 n. 3 (3d Cir. 1994). *Ocasio v. Lehigh Valley Family Health Center,* 92 Fed. Appx. 876, 879-80 (3d Circ. 2004). However, Section 1981 prohibits employers and *individuals*, including other

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employees, from racial discrimination against an employee. See *Cardenas v. Massey*, 269 F.3d 251, 268 (3d Cir. 2001). The Third Circuit has found individual liability under Section 1981 when the defendants intentionally cause an infringement of rights protected by Section 1981, regardless of whether the employer may also be held liable. Accordingly, individual employees can be liable for acts of racial harassment. Moreover, respondeat superior liability for discriminatory harassment by non-supervisory employees exists only where "the defendant" knew or should have known the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990); *Kunin v. Sears Roebuck and Co.,* 175 F.3d 289, 294 (3d Cir. 1999).

The Third Circuit Court of Appeals has made clear that sexual harassment can also give rise to a Section 1983 equal protection claim, but the elements of such a claim are not identical to those of a Title VII harassment claim (at least if the claim proceeds on a hostile environment theory). *See Andrews v. City of Philadelphia,* 895 F.2d 1469, 1478-79 (3d Cir. 1990); *Azzaro v. County of Allegheny,* 110 F.3d 968, 978 (3d Cir. 1997). To establish a Section 1983 claim against an alleged harasser, the plaintiff must show that the defendant acted under color of state law. The Court of Appeals has opined that this requires the defendant to have some measure of control or authority over the plaintiff. *See Bonenberger v. Plymouth Twp.,* 132 F. 3d 20, 24 (3d Cir. 1997). "A state employee may, under certain circumstances, wield considerable control over a subordinate whose work he regularly supervises, even if he does not hire, fire or issue regular evaluations of her work." *Id.,* 132 F.3d at 23.

However, the Court of Appeals has indicated that the elements of a hostile work environment claim under Section 1983 are not identical to those of a claim under Title VII. As noted above, a supervisor who subjects an employee to harassment on the basis of a protected characteristic is guilty of intentional discrimination if acting under color of state law. A co-worker who lacks any control or authority over the plaintiff does not act under color of state law and cannot commit an equal protection violation. However, the harasser's supervisor (or the employer) could be held liable under Section 1983 if the supervisor failed to properly address that harassment and did so with an intent to discriminate by failing to investigate or implicitly encouraging such abuse. *Andrews,* 895 F.2d at 1479. Therefore, an equal protection claim under Section 1983 arises if the harassment is **(1)** committed or caused by one with formal or de facto supervisory authority; or **(2)** improperly addressed by one with formal or de facto supervisory authority under circumstances that show that the supervisory individual had an intent to discriminate. Similarly, it would seem that an employer can be liable on the theory that it directly encouraged harassment of the plaintiff or on the theory that it did not do enough to prevent the harassment.

Conclusion and "Take-Aways"

School administrators are required to maintain a discrimination-free work environment. First and foremost, this means that administrators, like all other employees, are required to act in accordance with such laws. In addition, unlike other employees, it also means that school administrators must monitor and address the conduct of the employees they supervise. Recognizing acts of harassment creating hostile work environments and taking appropriate investigatory and remedial action are part of the duties of a school administrator. Therefore, all school administrators should be **(a)** cognizant of the anti-discrimination laws protecting employees; **(b)** aware of the types of conduct normally identified as harassment; and **(c)** familiar with the school district policies outlining the procedures to take in such circumstances.

In order to be proactive, school districts should make such issues a regular part of in-services and training. To this end, school administrators should also make efforts to remind lower level supervisors and employees of the district's policies and procedures related to such claims of harassment. Administrators should conduct prompt and thorough investigations of all complaints and should take appropriate action to ensure that no further incidents occur. In fact, whether a formal complaint is filed or circumstances simply present themselves, administrators must take prompt action to address and to eliminate conduct that could be considered harassment. Because the question of whether complained of conduct is harassment is often not clear, administrators should properly address incidents of unwelcome improper conduct well before they approach the level of "severity" or "pervasiveness" that would create a hostile environment as legal matter. Most importantly, if an administrator finds that harassment did occur (or even some inappropriate action falling short of harassment), the administrator should take (or recommend) the appropriate remedial action including but not limited to warnings, reprimands, suspension or discharge. In addition, administrators should not take for granted that the "perpetrator(s)" got the message and should monitor those situations to assure that

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such actions do not repeat themselves and if they do, that they are addressed promptly and more aggressively.

Finally, as administrators are employees, they are of course subject to possible harassment by others. Administrators who find themselves in such circumstances should avail themselves of the very same policies and procedures outlined in this article. In addition, should such harassment persist, it is incumbent upon administrators in such circumstances to follow the chain of command up to and including to the superintendent and if necessary to the school board.

End Notes

[1] For example, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.), prohibits employment discrimination based on race, color, religion, sex and national origin. The Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.) makes it illegal to discriminate against a qualified person with a disability. The Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. § 621 et seq.) prohibits discrimination based upon age (40 years or older).

[2] Note that not all workplace "harassment" is illegal. As noted by the Supreme Court, Title VII protects only against harassment based on discrimination against a protected class. It is not "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S.75, 80-81 (1998) An employer is not liable under Title VII for a workplace environment that is harsh for all employees; generalized harassment is not prohibited by Title VII. Id. As also noted by the Third Circuit Court of Appeals, "Many may suffer severe harassment at work, but if the reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no relief." *Jensen v. Potter*, 435 F.3d 444, 447 (3d Cir. 2006). Thus, the key question is whether the employee, as a member of protected class, was subjected to harsh employment conditions to which those outside the protected class were not.

[3] Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes and occasional teasing, does not constitute an abusive or hostile work environment. Also, isolated incidents, unless extremely serious, will not amount to a hostile work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998).

[4] The Supreme Court in *Suders* held that in terms of constructive discharge claims, an employer does not have recourse to this affirmative defense when a supervisor's official act precipitates the constructive discharge but absent such a "tangible employment action," however, the affirmative defense is available to the employer whose supervisors are charged with harassment. *Id.*

WOW! That's Why I Became a Principal

A Feature in The Pennsylvania Administrator Magazine

Pursuing a career in school administration may not be as appealing these days as it once seemed, if you believe all the negative images or controversy over issues related to our public schools. Many influences such as changing demographics, the economy and limited resources, accountability demands and the constant change of politically-driven initiatives impact not only public perception but the daily operations of our schools. Yet, despite constant changes and public scrutiny of our educational system, educators rise to the challenge of providing all children a quality program for learning and personal growth.

Effective principals take the criticisms and changes in stride as they focus on providing the best services possible for all students. Some days are harder than others to maintain the enthusiasm and stamina needed to be a school leader, but more often than not, something occurs that triggers the heart and mind, reminding us "why I became a principal."

We are seeking short, humorous or uplifting stories that relate to some telling aspect of a school administrator's work life for our feature, *"Wow! That's Why I Became a Principal."* Let's share our stories to encour-age, cheer and support each other...lest we forget why we followed this career path.

Articles should be no more than 350-400 words (less if you include a photo and a brief caption) and should be sent to Sheri Thompson at **sherit@paessp.org**.

If time is your obstacle, consider contacting Sheri to set up a phone interview to "tell your story." Then, we will format the article for you. **The deadline for submitting an article for the September 2015 issue is July 6, 2015.**

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