The Federal Employee Advocate

EEOC Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

Issued by the EEOC March 8, 1994

The Federal Employee Advocate is publishing here the EEOC's Guidance No. N-915-002 issued March 8, 1994 on issues of sexual harassment in the U.S. Supreme Court's decision in Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). The law firm of Josh F. Bowers, P.C. has extensive experience representing Federal employees in sexual harassment cases.

Disclaimer

EEOC Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the Supreme Court considered whether a plaintiff was required to prove psychological injury in order to prevail on a cause of action alleging hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. A unanimous Court held that if a workplace is permeated with behavior that is severe or pervasive enough to create a discriminatorily hostile or abusive working environment, Title VII is violated regardless of whether the plaintiff suffered psychological harm. The Court's decision reaffirms *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 40 EPD ¶ 36,159 (1986), and is consistent with existing Commission policy on hostile environment harassment. Consequently, the Commission will continue to conduct investigations in hostile environment harassment cases in the same manner as it has previously.

Background

In *Harris*, the plaintiff, Teresa Harris, brought a Title VII action against her former employer, Forklift Systems, Inc. ("Forklift"), an equipment rental company, alleging that Forklift

had created a sexually hostile work environment. Harris had worked for Forklift as a manager from April 1985 to October 1987.

The case was heard by a Magistrate who found that during the period of Harris' employment, Forklift's President, Charles Hardy, subjected Harris to numerous offensive remarks and unwanted sexual

innuendos. Specifically, the court found that Hardy had, on a number of occasions, asked plaintiff and other female employees to retrieve coins from his front pants pocket, asked plaintiff and other female employees to retrieve objects that he had thrown on the ground in front of them and commented, using sexual innuendo, about plaintiff's and other female employees' attire. On other occasions, he remarked to plaintiff in the presence of other employees, "You're a woman, what do you know," "You're a dumb ass woman," and "We need a man as the rental manager." In addition, he once remarked in the presence of other employees, as well as a client, that he and Harris should "go to the Holiday Inn to negotiate [Harris'] raise." *Harris*, slip op. at 1.

In August 1987, Harris complained to Hardy that she found his behavior offensive. Although Hardy apologized and promised to desist, in September 1987 he suggested in the presence of other employees that plaintiff had promised sexual favors to a customer in order to secure an account. Shortly thereafter, Harris tendered her resignation and filed a Title VII action against Forklift alleging hostile environment sexual harassment.

The district court dismissed the case, concluding that Harris had failed to support her claim of sexual harassment. The court found, however, that "Hardy is a vulgar man [who] demeans the female employees at his work place." *Harris v. Forklift Sys., Inc.*, 60 EPD ¶ 42,070 (M.D. Tenn. 1991). Moreover, the court stated that "[a] reasonable woman manager under like circumstances would have been offended by Hardy." *Id.* Nevertheless, the court concluded that this was not enough to support a claim of sexual harassment. Applying the standard set forth in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620, 41 EPD ¶ 36,643 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), the court asserted that "the test for whether or not sexual harassment rises to the level of a hostile work environment is whether the harassment is 'conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances.'" *Harris*, 60 EPD ¶ 42,070 (quoting *Rabidue*, 805 F.2d at 620). The district court concluded that Hardy's comments were not "so severe as to be expected to seriously affect [Harris'] psychological well-being," *id.*, and dismissed the complaint. In the court's view, "[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." *Id.* In a brief *per curiam* opinion, the Sixth Circuit affirmed the judgment for Forklift upon the Magistrate's reasoning. *See Harris v. Forklift Sys., Inc.*, 60 EPD ¶ 42,071 (6th Cir. 1992)(per curiam).

The Supreme Court granted *certiorari*, 507 U.S. (1993), to resolve a conflict among the circuits regarding whether a plaintiff must show psychological injury in order to prevail on a hostile environment sexual harassment claim.

The Opinion

At the outset, Justice O'Connor, writing for a unanimous Court, reaffirmed the standard set forth in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 40 EPD ¶ 36,159 (1986), that sexual harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment. The Court noted that an "objectively hostile or abusive work environment" is created when "a reasonable person would find [it] hostile or abusive," and the victim subjectively perceives it as such. *Harris*, slip op. at 4.

Rejecting the Sixth Circuit's psychological injury requirement, the Court noted that even though discriminatory incidents may not seriously affect an employee's psychological well-being,[1] a discriminatorily abusive work environment may, among other things, affect an employee's job performance or advancement. The Court concluded that even if harassing conduct produces no "tangible effects," a plaintiff may assert a Title VII cause of action if 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." *Id.* According to the Court, "[w]hen 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." *Id.* (quoting *Meritor*, 477 U.S. at 65, 67)(citations omitted).

In an attempt to clarify *Meritor*, the Court noted that *Meritor*'s reference to environments that completely destroy the emotional and psychological stability of members of minority groups was intended to illustrate egregious cases and was not intended to "mark the boundary of what is actionable." *Id.* at 5. The Court stated: "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." *Id.* (citation omitted).

Noting that the test for hostile environment is not "mathematically precise," the Court concluded that in assessing a hostile environment claim, the totality of the circumstances must be examined, including "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." *Id.* While psychological injury may be relevant, it is not required. *See id.* at 5-6.

Accordingly, the Court remanded the case for consideration of whether a hostile environment had been created. The Court concluded that the district court's concern with whether Harris suffered psychological injury "may well have influenced its ultimate conclusion, especially given that the court found this to be a 'close case.'" *Id.* at 6.

Justice Scalia and Justice Ginsburg issued separate concurring opinions. In his concurrence, Justice Scalia suggested that although the Court refined the *Meritor* standard, little certitude has been added. His concurrence noted that even though the Court adopted an objective standard for determining whether a hostile environment has been created and listed factors to be evaluated, it did not suggest how much of each factor is required, nor did it isolate a single factor as determinative. However, Justice Scalia asserted that he knew of "no alternative to the course the Court today has taken . . . I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts." *Harris* (Scalia, J., concurring), slip op. at 2.

In her concurring opinion, Justice Ginsburg framed the critical issue in hostile environment cases as "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris* (Ginsburg, J., concurring), slip op. at 1. Citing the Commission's Brief, Justice Ginsburg suggested that the major inquiry in hostile environment cases should be "whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance." *Id*. According to Justice Ginsburg, all the plaintiff need establish is that the harassing conduct "[made] it more difficult to do the job." *Id.* at 1-2.

Analysis

The Court's decision in *Harris* reaffirmed *Meritor* and clarified, rather than altered, the elements necessary for proving hostile environment sexual harassment. The decision is fully consistent with the Commission's "Guidelines on Discrimination Because of Sex," 29 C.F.R. § 1604.11 and its Policy Guidance, "Current Issues of Sexual Harassment," EEOC Policy Guidance No. N- 915-050, CCH ¶ 3114 (March 19, 1990). Accordingly, *Harris* requires no change in Commission policy or in the way the Commission investigates charges.

The Court in *Harris* adopted the "totality of the circumstances" approach which the Commission had previously set forth in its "Guidelines on Discrimination Because of Sex" and in its Policy Guidance "Current Issues of Sexual Harassment." Thus, in evaluating welcomeness and whether conduct was sufficiently severe or pervasive to constitute a violation, investigators should continue to "look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. § 1604.11(b).

The Court also noted that the factors that indicate a hostile or abusive environment may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.[2] The factors cited by the Court parallel those enumerated in the Commission's Policy Guidance "Current Issues of Sexual Harassment." *See* "Current Issues of Sexual Harassment," at 14. Moreover, both the Court and the Commission have stressed that an employee is not required to show any single factor in order to succeed on a hostile environment cause of action. *See Harris*, slip op. at 5-6; "Current Issues of Sexual Harassment," at 17. Based on the foregoing, investigators should continue to evaluate charges by considering the factors listed in *Harris* as well as any additional factors that may be relevant in the particular case.

The Court's rejection of the psychological injury requirement is also consistent with the Commission's policy. The Commission explicitly rejects the notion that in order to prove a violation, the plaintiff must prove not only that a reasonable person would find the conduct sufficiently offensive to create a hostile work environment, but also that his/her psychological well-being was affected. While investigators may consider psychological injury as a factor in assessing whether a hostile environment has been created, they should keep in mind that neither this nor any other single factor is required to state a cause of action for hostile environment harassment.[3] *See generally* "Current Issues of Sexual Harassment," at 15, n.20.

The Court in *Harris* used the "reasonable person" standard for assessing hostile environment claims. Previously, in its Policy Guidance on "Current Issues of Sexual Harassment," the Commission had adopted a "reasonable person" standard: "[i]n determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.'" "Current Issues of Sexual Harassment," at 14.

In defining the hypothetical "reasonable person," the Commission has emphasized that "[t]he reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior." *Id.* at 15. In *Harris*, the Court did not elaborate on the definition of "reasonable person." The Court's decision is consistent with the Commission's view that a reasonable person is one with the perspective of the victim.[4] Thus, investigators should continue to consider whether a reasonable person in the victim's circumstances would have found the alleged behavior to be hostile or abusive.

Example -- CP works in a thirty person advertising firm as a copywriter. CP is one of three female employees at the firm. After she had worked at the firm for about eight months, she was promoted to senior copywriter.

Following her promotion, two of her supervisors stopped by her office to inform her of her new responsibilities. During this visit, the supervisors insinuated that CP was promoted because the firm needed to show potential clients "some good bodies" and "some nice legs" in higher positions. They also asked CP if she had slept with the head of personnel in order to obtain her promotion.

Thereafter, these supervisors as well as some of CP's co-workers continued to taunt CP in front other co-workers and sometimes before clients, suggesting that CP had been promoted because of her looks and because she was willing to succumb to the advances of clients and supervisors. CP complained to management and subsequently filed a charge with the Commission.

An investigator reviewing this charge should consider the behavior from the standpoint of the reasonable person in CP's position. A reasonable person in CP's position might take umbrage at the comments about "good bodies," "nice legs," or "sleeping one's way to a promotion" and thus might consider her co- workers' and supervisors' behavior to be hostile and offensive.

In *Harris* the Court stated that to violate Title VII, the challenged conduct must not only be sufficiently severe or pervasive objectively to offend a reasonable person, but also must be subjectively perceived as abusive by the charging party. *See Harris*, slip op. at 4. The Court noted that "[s]o long as the environment would reasonably be perceived, *and is perceived*, as hostile or abusive," Title VII would be violated. *Id.* at 5 (emphasis added). There is nothing novel in the notion that a charging party must subjectively perceive a hostile environment in order to assert a violation of Title VII. It is well-settled that a charging party's claim will fail if the allegedly offensive conduct is found to be "welcome." [5]

Under the Commission's current policy, an investigator must consider whether the alleged harassment was "unwelcome . . . verbal or physical conduct of a sexual nature . . . ." 29 C.F.R. § 1604.11(a); *see Meritor*, 477 U.S. at 2406 (requiring unwelcomeness analysis). Adopting the Eleventh Circuit's definition of unwelcome conduct, the Commission has stated that "conduct must be unwelcome 'in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.'" "Current Issues of Sexual Harassment," at 7 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 903, 29 EPD ¶ 32,993 (11th Cir. 1982)). This policy requires investigators to examine whether the victim's conduct is consistent with an assertion that the alleged harassing behavior was both uninvited and offensive to the charging party. The second prong of the unwelcomeness inquiry, whether the employee considered the conduct offensive, is, in effect, synonymous with "subjectively perceiv[ing] the environment to be abusive." *Harris*, slip op. at 4.

In order to establish a subjective perception of abuse, the charging party must testify that s/he found the alleged conduct to be hostile or abusive at the time it occurred.[6] Unless the respondent produces evidence to the contrary, the subjective prong of the analysis will be satisfied.

Example -- CP, a woman, has worked for A Corporation for three years. When she first began working for A Corporation, she joined in when her co-workers and supervisors

would have sexual discussions. She herself would make sexual comments and lewd references.

After she had worked for A Corporation for about a year, her supervisors allowed her co-workers to post sexually explicit pictures on their office walls and in the hallways. Even though CP had not been offended by her co- workers' bawdy remarks, she believed that the posting of pornographic pictures demeaned women. She complained to her supervisor who refused to ask the employees to remove the pictures. Shortly thereafter, more pictures were posted. After again receiving no response to her complaint, CP filed a charge.

Based on these facts, an investigator should find that the conduct was unwelcome, *i.e.*, that CP subjectively considered the pornographic pictures to be abusive. Her willingness to engage in sexual banter is not material to assessing her perception of the pictures.

Note that an investigator may consider the prevalence of sexual banter in analyzing whether a hostile environment was created for other employees.

Finally, the *Harris* decision reinforces the Commission's position that conduct that constitutes harassment on any of the bases covered by Title VII is equally unlawful as a discriminatory term, condition or privilege of employment. *See Harris*, slip op. at 4; *see also id.* at 2 (Ginsburg, J., concurring)(noting that harassment based on race, national origin, religion and gender is equally unlawful). The Commission believes that *Harris* also applies to cases involving hostile environment harassment on the basis of age or disability. Accordingly, investigators should consider *Harris* applicable regardless of the antidiscrimination statute on which the charge is premised.[7]

Charge Processing

Investigators should continue to take the following steps when processing charges involving hostile environment harassment:

> Consider the totality of the circumstances -- Examine, among other things, the nature of the conduct (*i.e.*, whether it was verbal or physical), the context in which the alleged incident(s) occurred, the frequency of the conduct, its severity and pervasiveness, whether it was physically threatening or humiliating, whether it was unwelcome, and whether it unreasonably interfered with an employee's work performance.
>
> Consider whether a reasonable person in the same or similar circumstances would find the challenged conduct sufficiently severe or pervasive to create an intimidating, hostile or abusive work environment. *See* "Current Issues of Sexual Harassment," at 14-15.
>
> Consider whether the charging party perceived the environment to be hostile or abusive, *i.e.*, whether the conduct was unwelcome. In making this analysis, the investigator should consider the charging party's behavior. *See* "Current Issues of Sexual Harassment," at 10.

For more detailed guidance, *see* Policy Guidance on "Current Issues of Sexual Harassment."

March 8, 1994 Approved:_____
Date Tony E. Gallegos

Chairman

---

[1] Prior to oral argument, the respondent conceded that psychological injury was not required in order to support a hostile environment cause of action under Title VII.

[2] In order to show that "[the alleged conduct] unreasonably interferes with . . . work performance," the employee need not show diminished performance but only that the alleged offensive conduct made it more difficult for him/her to do his/her job. *See Harris* (Ginsburg, J., concurring), slip op. at 1-2; *see also Harris*, slip op. at 4 ("even without regard to these tangible effects [such as detracting from employees' job performance], the very fact that the discriminatory conduct was so severe or pervasive that it created an environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of work place equality").

[3] Psychological injury may also be relevant for purposes of computing damages.

[4] For a more detailed discussion of this issue, *see* "Current Issues of Sexual Harassment," at 14. As explained there, although the reasonable person standard must take account of the victim's perspective, "Title VII does not serve 'as the vehicle for vindicating the petty slights suffered by the hypersensitive.'" *Id.* (quoting *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784, 35 EPD ¶ 34,766 (E.D. Wisc. 1984)).

[5] Note that even if a particular charging party has not been subjectively offended by the conduct in question, if a reasonable person would find the conduct offensive, the Commission itself may pursue relief for any other persons identified in the course of the investigation who subjectively found the environment to be hostile. *See General Telephone Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318, 22 EPD ¶ 30,861 (1980).

[6] It is the Commission's position that "[w]hen there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she [or he] made a contemporaneous complaint or protest." "Current Issues of Sexual Harassment," at 7. However, while making a complaint or issuing a protest may be helpful to charging party's case, "it is not a necessary element of the claim." *Id.* at 8.

[7] If one is subjected to taunts on the basis of race, national origin, etc., there is ordinarily no question that the comments are perceived as abusive and are therefore unwelcome. Nevertheless, before and after *Harris*, if the record shows that the comments are not unwelcome or perceived as hostile or offensive, the charging party will not prevail.

This page was last modified by the EEOC on June 21, 1999.