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Unlawful Workplace Harassment: It's Not Just About Sex Anymore

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Our Presenters

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Unlawful Workplace Harassment: It's Not Just About Sex Anymore

By

Linda Walton and Ann Cooper

I. INTRODUCTION

Simply put, in the area of workplace harassment claims—it's not just about sex anymore. Last year the Washington Supreme Court confirmed that the Washington Law Against Discrimination provides employees with a cause of action for disability-based hostile work environment harassment. In addition, in recent years the federal courts have upheld hostile work environment harassment claims against employers based on same sex sexual harassment and on the basis of sexual orientation, religion, race and national origin. And, even as state and federal courts have expanded the bases on which employees may bring harassment claims, the Washington Supreme Court has made clear that individual supervisors and managers may be found liable for unlawful harassment.

This briefing focuses upon the ever-expanding ways in which employers and management employees may find themselves liable for unlawful workplace harassment.

II. IT'S STILL ABOUT SEX: SEXUAL HARASSMENT— THE BASICS AND BEYOND

A. The Basics

Sexual harassment claims continue to make up a significant percentage of the number of employment-related lawsuits filed against employers each year. Even as the courts recognize claims of harassment based on race, national origin, religion and disability, they rely on legal precedent established in sexual harassment cases. As such, employers should be mindful of the basic elements of the two types of sexual harassment claims actionable under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Washington Law Against Discrimination ("WLAD").

1. Quid Pro Quo Sexual Harassment

The key elements of a quid pro quo claim are as follows:

- Definition: Tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and adverse job

consequences result from the employee's refusal to submit to the conduct.

- A claim of quid pro quo harassment may evolve from a single incident.

- A plaintiff may prevail even where the defendant has not explicitly invited plaintiff to engage in a sexual relationship.

- "Voluntariness" is no defense to a claim of quid pro quo harassment. The issue is whether the sexual advances were **unwelcome to** the person who was the object of the harassment.

While quid pro quo cases appear in reported case law far more rarely than hostile environment harassment cases, it is worth noting that they have not disappeared entirely from the landscape. Henningsen v. WorldCom, Inc., 102 Wn. App. 828 (2000), involved a WLAD quid pro quo sex harassment claim. In 1990, WorldCom hired the plaintiff, Christa Henningsen, as a sales office administrator. Rob Green, a district sales manager, supervised Henningsen. As Henningsen's supervisor, Green evaluated her performance and had authority to promote Henningsen to a sales representative position and to discipline and discharge her. In late 1991 and early 1992, Henningsen repeatedly requested that she be considered for a sales representative position. In May 1992, when Henningsen reiterated her interest in a sales position, Green informed Henningsen that he was sexually attracted to her. Later that day, Green kissed Henningsen. A couple of weeks later, Green invited Henningsen into his office where Henningsen, "[f]eeling panicky and powerless, . . . submitted to sexual relations with Green."

After this sexual encounter, Henningsen told Green that she did not want a sexual relationship with him and asked him to treat her in a professional manner. Green agreed. Shortly thereafter, Green agreed to interview Henningsen for a sales position. During the interview, Green proposed that they have sex. When Henningsen expressed disapproval, Green claimed to have been "only kidding."

In September 1992, Green offered Henningsen a sales position and she "was an immediate success." Green continued to make sexual advances and comments to Henningsen, and occasionally kissed her. Green told Henningsen that she "owed" him for the sales position and "intermittently directed angry outbursts at [her]." In March 1993, "scared and feeling

powerless, Henningsen again had sexual relations with Green, in a co-worker's office."

In April 1993, Green was promoted. Although he no longer directly supervised Henningsen, Green continued his regular supervisory contact with her and retained authority to discipline and discharge her. Green continued to tell Henningsen that she "owed" him and to make sexual advances. In October 1993, he appeared at Henningsen's apartment and told her he wanted to have sex. Henningsen declined and Green persisted. "In a confused daze, Henningsen had sexual relations with Green for a final time." Henningsen never reported Green's conduct to WorldCom's human resources department, which was the designated place to report employment discrimination. However, she reported Green's sexual conduct to the regional account relations manager, and his verbal abuse to the Seattle branch manager. Neither manager reported Henningsen's allegations to human resources.

In 1994, Green was again promoted, this time to the Northwest regional sales director position. While Green had less frequent contact with Henningsen, he continued to make sexual advances. In late 1994, Henningsen's sales fell below her quota. In November 1994, Green was discharged when his position was eliminated in a corporate restructuring. In January 1995, still not meeting her sales goals, Henningsen commenced a disability leave. She was discharged in July 1995 after exhausting her disability leave.

The case was tried without a jury. Henningsen was awarded $415,000 in damages and $186,000 in attorneys' fees. On appeal, WorldCom contended that Henningsen's quid pro quo claim was barred by the three-year statute of limitations applicable to WLAD claims. That is, it argued that Henningsen's promotion to sales representative was the last tangible employment action related to Green's quid pro quo harassment. Because the promotion occurred more than three years before Henningsen filed her lawsuit, WorldCom argued that the quid pro quo claim was time-barred. The Court of Appeals disagreed, noting that Green continued to remind Henningsen during the statute of limitations period that she "owed" him for her promotion, conveying the "explicit message . . . that she had more to pay for the job benefit he had bestowed upon her and the implicit message was that the tender for repayment was sexual in nature." Because Henningsen submitted to sexual relations with Green within the three-year limitations period (in October 1993), the court held that Henningsen's quid pro quo claim was timely and affirmed the trial court's judgment on the claim.

2. Hostile or Offensive Work Environment Sexual Harassment

The key elements of a hostile work environment claim are as follows:

- Definition: Harassment which is sufficiently severe or pervasive so as to alter the conditions of the employee's employment, creating an abusive working environment.

- The harassment is "because of sex."

- To be actionable, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive so. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

- Unlike quid pro quo sexual harassment, which may evolve from a single incident, hostile environment sexual harassment generally must be characterized by multiple and varied combinations and frequencies of offensive exposures.

- In a hostile environment claim, the plaintiff generally must prove more than a few isolated incidents and cannot rely solely on "casual comments or trivial events and sporadic conversation."

(a) Because of Sex

The United States Supreme Court has enumerated three circumstances in which courts may infer that the alleged harasser's conduct toward someone of the harasser's sex was because of sex: (1) harassment motivated by sexual desire, including when proposals to engage in sexual activity are made by the harasser and there is credible evidence that the harasser is homosexual; (2) when the victim is treated in a sex-specific manner that suggests hostility toward people of the victim's sex; or (3) when men and women are treated differently by the harasser. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-81 (1998).

(b) Sufficiently Severe or Pervasive Conduct

In Haubry v. Snow, 106 Wn. App. 666 (2001), the plaintiff sued her former employer for, among other things, alleged sex harassment in violation of the Washington Law Against Discrimination. Haubry was a receptionist in a doctor's office. She claimed that over the course of a year, the doctor looked at her almost every day in an

offensive, leering way that included staring at her breasts, touched her several times—including touching her shoulders, squeezing her waist, rubbing her knees, legs, buttocks, and crotch area, commented on her clothing in what Haubry found to be a sexual manner, and pressed his body against hers. The doctor also recommended that Haubry try a particular bakery's cinnamon rolls "if she wanted a great orgy."

Haubry interpreted the doctor's comments and conduct as sexual advances and began placing a file cart beside her at work to create a barrier between her and the doctor. She avoided being alone with him. According to Haubry, during her employment, she "had difficulty concentrating" and sleeping, "had nightmares about being locked in a small room, unable to get out," and became afraid of people standing behind her and unexpectedly approaching her. Ultimately, Haubry resigned because she was so uncomfortable with her work environment.

The trial court dismissed Haubry's sex harassment claim, finding that she failed to raise a genuine issue of material fact as to the elements of sex harassment. However, the Washington Court of Appeals reversed the grant of summary judgment and remanded the case for trial. The appellate court found that Haubry's allegations created a genuine issue of material fact for trial as to whether the doctor's purported conduct was based on Haubry's sex, and whether the alleged harassment was sufficiently severe and pervasive to alter the conditions of Haubry's employment and create an abusive working environment.

(c) Generally More Than Isolated Incidents

In Kortan v. California Youth Authority, 217 F.3d 1104, 1110-11 (9th Cir. 2000), the Ninth Circuit Court of Appeals found that a supervisor's offensive comments, such as using the terms "regina," "madonna," and "castrating bitch" to describe former employees (not the plaintiff), and generally referring to women as "bitches" and "histrionics" were not sufficiently frequent, severe, or abusive to interfere unreasonably with the plaintiff's employment. The court found that while there was no question that the supervisor's remarks during a particular outburst were offensive to the plaintiff, "[the comments] were mainly made in a flurry on [one particular occasion]." According to the plaintiff, "once or twice before" the supervisor had referred to a former female manager as a "castrating

bitch" or "madonna" or "regina," but the plaintiff did not regard this as harassing and she thought that the supervisor behaved like a "perfect gentleman" prior to the day of his outburst. The court found that as unpleasant as the supervisor's outburst was, the comments were about other people, and that he never directed a sexual insult at the plaintiff.

In Washington v. Boeing Co., 105 Wn. App. 1 (2000), Bettena Washington, an African-American female employee brought several claims against her former employer, including claims for sex and race harassment under the Washington Law Against Discrimination. The trial court dismissed Washington's claims in their entirety because she failed to raise a genuine issue of material fact on all claims.

On appeal, in support of her sex harassment claims, Washington argued that she was offended by isolated incidents in which she was addressed as "dear" and "sweet pea," that male employees commented about Washington's objection to a calendar she found offensive, and that a male co-worker refused to assist Washington's work on the flight line. The Washington Court of Appeals affirmed the dismissal of her sex harassment claim, holding that these alleged events—even if true—could not have unreasonably interfered with Washington's work performance.

As illustrated in the case of Clark County School District v. Breeden, 532 U.S. 268, 121 S. Ct. 1508 (2001), isolated incidents are generally insufficient to establish a cause of action for sexual harassment. In a decision reversing the Ninth Circuit Court of Appeals, the U.S. Supreme Court in Breeden held that the single isolated incident about which the plaintiff-employee complained (her supervisor's laughter at a presumably sexual comment from one of the plaintiff's co-workers) was not sufficient to give rise to a reasonable belief of a violation of Title VII. Holding that the conduct of the plaintiff's co-workers at most constituted an isolated incident that could not be deemed sufficiently severe or pervasive as to alter the terms and conditions of the plaintiff's employment, the court held that any alleged punishment suffered by the plaintiff for complaining about her supervisor's action could not constitute actionable retaliation, since the incident itself did not violate Title VII and the complaints thus did not constitute such activity protected by the statutes.

In Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2002), the Ninth Circuit Court of Appeals confirmed that a single but severe incident can create a hostile environment. The court reinstated the claim of a plaintiff who alleged that her employer failed to adequately respond to her complaint that she had been raped by a client of the employer. The plaintiff claimed that when she reported the rape to three levels of managers—including the company president—she was told in various ways to "keep it quiet," "try to put it behind her" and "I don't want to hear about it." Taking the facts in the light most favorable to the plaintiff, the Ninth Circuit reversed the trial court's order of summary judgment holding that "[r]ape is unquestionably among the most severe forms of sexual harassment . . . [and] the employer's reaction to a single serious episode may form the basis for a hostile work environment claim." Id. at 967-968.

B. Same Sex Sexual Harassment

In the landmark case of Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), the U.S. Supreme Court held that same-sex sexual harassment is actionable under Title VII. In late October 1991, Oncale was working for respondent Sundowner Offshore Services on a Chevron U.S.A., Inc., oil platform in the Gulf of Mexico. He was employed as a roustabout on an eight-man crew. According to Oncale, three of his co-workers forcibly subjected him to sex-related, humiliating actions in the presence of the rest of the crew. He also alleged that he was physically assaulted in a sexual manner, and that one of the harassers threatened him with rape.

Oncale alleged that complaints to supervisory personnel not only produced no remedial action, but that the company's Safety Compliance Clerk told Oncale that two of the harassers "picked [on] him all the time too" and called him a name suggesting homosexuality. Oncale eventually quit, asking that his pink slip reflect that he "voluntarily left due to sexual harassment and verbal abuse." When asked at his deposition why he left Sundowner, Oncale stated, "I felt that if I didn't leave my job, that I would be raped or forced to have sex."

The Fifth Circuit Court of Appeals dismissed Oncale's lawsuit on the grounds that a male could not bring a Title VII claim of sexual harassment based on harassment from other males. The U.S. Supreme Court reversed the Fifth Circuit, holding that nothing in Title VII necessarily bars a claim of discrimination "because of . . . sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.

C. Harassment Because of Sexual Orientation/Sexual Stereotyping

In Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2000), the Ninth Circuit Court of Appeals reversed the trial court's judgment in favor of the employer, holding that where the employee claimed that he had been verbally harassed by male co-workers and a supervisor because he was effeminate and did not meet their view of a male stereotype, the conduct complained of constituted actionable harassment under both Title VII and the WLAD. The plaintiff claimed he was sexually harassed because he was "effeminate" and failed to conform to the male stereotype. The plaintiff produced evidence that his male co-workers regularly used female pronouns when referring to him, describing him as "she" and "her." Sometimes these same co-workers alluded to plaintiff's sexuality and called him "faggot." They also referred to the plaintiff as a "female whore." The court found that because these terms clearly indicated that the harassers discriminated against the plaintiff because he "act[ed] too feminine," the abuse was closely linked to gender and satisfied the "because of sex" requirement of Title VII.

In the case of Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) cert. denied, the Ninth Circuit Court of Appeals reversed the trial court's order of summary judgment dismissing the Title VII claim of an openly gay man, using a rationale other than the "sexual stereotyping" analysis. In Rene v. MGM Grand Hotel, Inc., the plaintiff provided extensive evidence that, over the course of a two-year period, his supervisor and several of his fellow butlers subjected him to a hostile work environment on almost a daily basis. The harassers' conduct included whistling and blowing kisses at Rene, calling him "sweetheart" and "muñeca" (Spanish for "doll"), telling crude jokes and giving sexually oriented "joke" gifts, and forcing Rene to look at pictures of naked men having sex. "On 'more times than [Rene said he] could possibly count,' the harassment involved offensive physical conduct of a sexual nature. Rene gave deposition testimony that he was caressed and hugged and that his co-workers would touch [his] body like they would to a woman.' On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing. When asked what he believed was the motivation behind this harassing behavior, Rene responded that the behavior occurred because he is gay."

Rene filed a charge of discrimination with the Nevada Equal Rights Commission alleging that he "was discriminated against because of my sex, male" and indicating "I believe that my sex, male, was a factor in the adverse treatment I received." Rene later filed a complaint in federal district court, alleging that he had been unlawfully sexually harassed in violation of Title VII and attaching a copy of his Nevada Equal Rights Commission charge. MGM Grand moved for summary judgment on the grounds that "claims of discrimination based on sexual

orientation are not cognizable under Title VII." The district court agreed that Rene had failed to state a cognizable Title VII claim. In granting summary judgment in favor of MGM Grand, the district court concluded that "Title VII's prohibition of 'sex' discrimination applies only [to] discrimination on the basis of gender and is not extended to include discrimination based on sexual preference."

In an unusual split majority en banc opinion, the Ninth Circuit reversed the decision of the trial court. Five of the judges found the case to be "a fairly straightforward sexual harassment claim." They noted that:

> In granting MGM Grand's motion for summary judgment, the district court did not deny that the sexual assaults alleged by Rene were so objectively offensive that they created a hostile working environment. Rather, it appears to have held that Rene's otherwise viable cause of action was defeated because he believed he was targeted because he is gay. This is not the law. We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim.

The opinion of five members of the court went on to hold:

> Title VII prohibits offensive "physical conduct of a sexual nature" when that conduct is sufficiently severe or pervasive. [citation omitted]. It prohibits such conduct without regard to whether the perpetrator and the victim are of the same or different genders. [citation omitted] And it prohibits such conduct without regard to the sexual orientation—real or perceived—of the victim.

Three other members of the court reached the same result (reversing the trial court order of summary judgment), but found that the conduct suffered by Rene was indistinguishable from the conduct alleged in the Nichols case, and that the case was, thus, actionable gender stereotyping. Taken together, the two opinions represented the majority decision of the en banc panel.

III. BUT IT'S NOT JUST ABOUT SEX

A. Racial Harassment

In Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001), cert. denied, 535 U.S. 1018 (2002), the Ninth Circuit Court of Appeals upheld a judgment in favor of the

plaintiff in his cause of action for racial discrimination in the amount of $5,612 in back pay, $30,000 in emotional distress and $1,000,000 in punitive damages.

The plaintiff, who was the only African-American employee in a workplace of approximately 140 employees, put on evidence that a supervisor (not his supervisor) regularly told racially offensive jokes in the presence of the plaintiff and others. Among the "jokes:" "What do you call a transparent man in a ditch? A nigger with the shit kicked out of him;" "Why don't black people like aspirin? Because they're white, and they work;" "Did you ever see a black man on 'The Jetsons'? Isn't it beautiful what the future looks like?" and referring to "Pontiac" as an acronym for "Poor old nigger thinks it's a Cadillac." The plaintiff testified that the supervisor began telling such jokes soon after he arrived at the company and continued "whenever he felt like it, all the time," and that the plaintiff's supervisor witnessed the racial jokes and laughed along. The plaintiff also presented evidence that his co-workers also told racially offensive jokes in his presence, ranging from numerous references to Swinton as a "Zulu Warrior" to a comment in the food line, "They don't sell watermelons on that truck, you know, how about a 40-ouncer?" Testimony by co-workers underscored the ubiquity of the racist atmosphere in the workplace. One co-worker testified that there were jokes about a wide variety of ethnic groups, including whites, Asians, Polish people, gays, Jews, and Hispanics.

Citing to evidence that the plaintiff had been subjected to highly offensive language over a long period of time, coupled with the evidence of the employer's "abject failure" to combat the harassment, the court held that the record contained evidence of highly reprehensible conduct justifying its significant punitive damages award.

Racial harassment hostile environment claims are, of course, subject to the same limitations as sexual harassment hostile environment claims. In Washington v. Boeing Co., 105 Wn. App. at 13, Division One of Washington Court of Appeals affirmed dismissal of the plaintiff's racial harassment claim, which was premised on her allegation that another employee referred to her hair as "brillo head." The court held that, although the alleged remark was "highly offensive," it was "an isolated incident" that was "not sufficiently pervasive to alter the conditions of her employment." Washington's race harassment claim also failed because after she reported the alleged comment, the employer responded with "adequate corrective action" by counseling the employee alleged to have made the comment and other employees who worked with Washington regarding proper ways to address employees. Thus, the court held that the alleged remark could not be imputed to the employer.

B. National Origin Harassment

In Pavon v. Swift Transportation Co., 192 F.3d 902 (9th Cir. 1999), the Ninth Circuit Court of Appeals affirmed a jury verdict awarding the plaintiff $1,218 in back pay, $250,000 in non-economic damages and $300,000 in punitive damages. The plaintiff, who was a U.S. citizen of Hispanic origin born in Honduras, presented evidence at trial that within months after his hire date, while he was working at his post, a co-worker subjected him to racial slurs and harassment by calling him "beaner," "fucking Mexican," "wet back," "spic," "illiterate" and "stupid." The plaintiff also presented evidence that the co-worker taunted him with comments like "go home," and "go back to Columbia," and threatened to turn him in to immigration. The plaintiff complained several times to his shop foreman and supervisor about his co-worker's remarks. The foreman in turn reported the plaintiff's complaints to his supervisor. The harassment continued on a near-daily basis. The plaintiff then complained directly to the foreman's supervisor, who issued the plaintiff a disciplinary warning. After meeting with the plaintiff and the co-worker, the supervisor decided to transfer the plaintiff to a separate workstation, the Fuel Shop. The transfer was not accompanied by a loss of pay or benefits, but the plaintiff saw it as a demotion and disciplinary action, because the Fuel Shop was a station to which new and inexperienced employees were normally assigned.

After the plaintiff's transfer, the co-worker continued to search him out and to taunt him with racial slurs. The plaintiff again complained to his supervisor. His supervisor in turn prepared disciplinary notices relating to the plaintiff. The plaintiff sued the company after he was terminated.

C. Religious Harassment

A case from outside the Ninth Circuit illustrates the application of workplace harassment principles in the context of a claim of religious discrimination. In Shanoff v. Illinois Department of Human Services, 258 F.3d 696 (7th Cir. 2001), the Seventh Circuit Court of Appeals reversed the trial court's judgment in favor of the employer. The court held that the plaintiff presented sufficient facts to enable a reasonable jury to conclude that his supervisor's harassment created an objectively hostile work environment, where, according to the plaintiff, over the course of several months the supervisor told him that she was "going to be able to keep [his] white Jewish ass down," that "she knew how to handle white Jewish males," that "once and for all that [he] needed to leave [his position] and get out of her hair," and when the plaintiff responded that her conduct was harming his health and career, she replied by laughing and dismissing him from her office. The court held that the plaintiff produced sufficient evidence from which a jury could find that the supervisor used her supervisory position to bully, intimidate

and insult the plaintiff because of his race and religion, which is the type of "extreme" harassment that is the hallmark of a hostile environment claim.

D. Disability-Based Harassment

Upholding the trial court's judgment in favor of the plaintiff-employee, the Washington Supreme Court in Robel v. Roundup Corp., 148 Wn.2d 35 (2002), recons. denied, (Mar. 24, 2002), held that the Washington Law Against Discrimination supports a disability-based hostile work environment claim. The plaintiff was able to prove to the satisfaction of the trial court that the defendant employer "through the acts of its *managers*, participated, authorized, knew and/or should have known of the verbal and non-verbal harassment of [the plaintiff] in the work setting." The plaintiff alleged that she was subjected to a hostile environment when her co-workers and supervisor mocked and ridiculed her because of a back injury.

IV. RETALIATION CLAIMS ARE ALIVE AND WELL

Retaliating against someone who has complained of sexual harassment is against the law *even if the underlying complaint has no basis*. If after complaining of sexual harassment, an employee is fired for another reason or if the employee is treated in such a way that he or she feels left with no choice but to resign, the employer may be found liable for retaliation.

The decision in Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611 (2002), illustrates how an employer may be liable for retaliation even when the underlying harassment claim fails. In Renz the plaintiff sued her former employer for alleged sex harassment and retaliatory discharge in violation of Title VII and the Washington Law Against Discrimination. The trial court dismissed her claims at summary judgment. She appealed only the dismissal of her retaliatory discharge claim.

Renz was a licensed optician. She commenced employment with Spokane Eye Clinic on March 24, 1997. Renz's employment was conditioned on satisfactory completion of a 90-day probationary period. Renz alleged that during the 90-day period, her supervisor, clinic manager Kenneth Sweatt, told her "she was doing well and would be a full-time employee on her 90-day anniversary." According to Renz, in June, Sweatt made a comment to Renz about "eating his banana." On June 24, 1997, Renz's three-month anniversary, Sweatt assured her that "everything was great" and the clinic would be "keeping [her]."

Renz claimed that shortly thereafter, she was fixing her hair and commented to Sweatt that she was "'getting pretty' because she had a dinner date with her boyfriend," and that Sweatt told Renz "to 'be sure to use protection.'" Sweatt overheard her tell another clinic employee about the comment. On July 7, 1997, Sweatt informed Renz that

the clinic was reinstating her probationary period for 30 days. A few days later, he criticized a report Renz had prepared. Renz further claimed that Sweatt saw her kneeling down and said, in front of customers, "'on your knees again? Didn't you spend most of your weekend that way?'" Renz reported Sweatt's alleged comment to the clinic's human resources manager. The Clinic instructed Sweatt to have no further contact with Renz. Within a day of Renz's complaint to human resources, Sweatt sent Renz on weeklong assignments at other clinic locations for evaluation by two other managers. Both submitted negative evaluations of Renz's performance. Based on these evaluations, as well as Sweatt's evaluation of Renz, the clinic discharged Renz for alleged performance deficiencies in several areas and, therefore, failure to successfully complete the second probationary period.

The Washington Court of Appeals held that Renz established a prima facie case of retaliatory discharge for several reasons: (1) after Renz's complaint, "[h]er supervisor was no longer available to her in any manner" because she was transferred to work at other clinics, (2) Renz's discharge was based, in part, on Sweatt's evaluation of her work, (3) the extension of Renz's probationary period occurred after Sweatt overhead Renz complaining about him, (4) Renz's discharge occurred a short time after she complained to human resources about Sweatt, and (5) Renz's performance evaluation and treatment changed after Sweatt overheard her complaint and after her complaint to human resources.

Because Renz established a prima facie case of retaliatory discharge, the burden of production shifted to the Clinic to establish a legitimate, nonretaliatory reason for Renz's discharge. The Clinic met this burden in asserting that it discharged Renz for performance deficiencies. Accordingly, the burden shifted back to Renz to show that the Clinic's asserted reasons for her discharge were a pretext for retaliation. Renz's evidence of pretext included that she successfully completed the initial 90-day probationary period and received favorable comments from Sweatt about her performance prior to her complaints, the short time between Sweatt overhearing Renz's complaint and his documentation of her shortcomings, the fact that Renz's extended probationary period was not instituted until after Sweatt overheard her complaining about him, and testimony from a co-worker that an ophthalmologist instructed the co-worker not to discuss "Renz's situation" and that she could be fired for doing so. The Court of Appeals held that Renz presented sufficient evidence of pretext, reversed the grant of summary judgment in favor of the Clinic, and remanded the claim for trial.

V. WHAT'S AT STAKE?

A. The Basics: Employer Liability

Under the Equal Employment Opportunity Commission Guidelines, employers are responsible for maintaining a harassment-free workplace. Consequently, employers are expected to:

- Take appropriate measures to prevent harassment.
- Investigate all complaints of sexual harassment.
- Take appropriate corrective action to eliminate sexual harassment when it exists.

B. Employer Liability for the Conduct of Supervisors

Employers are strictly liable to employees who suffer harm as a result of quid pro quo harassment if the harasser had actual or apparent authority to alter the employee's work conditions.

The U.S. Supreme Court has held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

When no tangible employment action is taken, an employer may, however, raise an affirmative defense to liability or damages. That defense requires the employer to provide that: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid the harm otherwise.

Under the WLAD, a plaintiff claiming sexual harassment must demonstrate that the alleged harassing conduct should be imputed to the employer. Glasgow v. Georgia-Pacific Corp, 103 Wn.2d 401, 406, 407 (1985). In Glasgow v. Georgia-Pacific Corp., the Washington Supreme Court held that where an owner, manager, partner, or corporate officer personally participates in the harassment, this element of the harassment claim is met by proof of the harasser's management status. Id. at 407.

In Washington v. Boeing, 105 Wn. App. at 12, Division One of the Washington Court of Appeals held that flight line managers' alleged participation in the

negative gender-related comments could not be imputed to the employer for two reasons: (1) the managers did not occupy sufficiently senior positions to be considered the employer's "alter ego" and (2) the only evidence Washington presented regarding managers' participation in the alleged harassment was one purported instance in which a manager referred to Washington as "dear;" however, the manager apologized immediately when Washington told him she did not want to be called "dear" and he never again called her "dear." In holding that the alleged comments could not be imputed to the employer, the court also noted that the employer counseled its employees regarding use of inappropriate terms to address co-workers and provided all flight line employees with EEO and antiharassment training.

In the very recent U.S. Supreme Court case, Pennsylvania State Police v. Suders, 124 S. Ct. 2342 (2004), the Court addressed employer liability in what it characterized as "one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual harassment, or 'hostile work environment,' attributable to a supervisor." The Court noted that:

> harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.

Accordingly, the court held that an employer may assert the Ellerth/Faragher affirmative defense to such a claim unless the plaintiff quit in reasonable response to an adverse action officially changing her employment status or situation, e.g., a humiliating demotion, extreme cut in pay or transfer to a position in which she would face unbearable working conditions.

C. Employer Liability for the Conduct of Co-Workers

In Star v. West, 237 F.3d 1036 (9th Cir. 2001), the Ninth Circuit Court of Appeals affirmed the decision of the trial court, holding that where the defendant employer informed the plaintiff's co-worker that the plaintiff had complained of two incidents of unwelcome physical conduct, and ordered the co-worker to stay away from the plaintiff and moved him to a different shift, the defendant's actions constituted an adequate disciplinary response, and the defendant was not liable under Title VII.

D. Employer Liability for the Conduct of Nonemployees

In Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2002), the Ninth Circuit reversed the trial court's order of summary judgment in favor of the employer, holding that where the employee presented the evidence that her client had raped her, she had offered sufficient evidence to preclude summary judgment on her hostile environment claim under Title VII and the Washington Law Against discrimination, because the rape was sufficiently severe to make a reasonable woman feel that her work environment had been altered, and the employer's subsequent actions (telling her that she would need to take a cut in base pay and firing her when she found the pay cut unacceptable) reinforced rather than remediated the harassment.

E. Personal Liability

Under Washington law a manager or supervisor may be found personally liable for unlawful harassment. In Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349 (2001), in the context of an action that included a claim of sexual harassment, the Washington Supreme Court held that a supervisor acting in the interest of an employer that employs eight or more people can be held individually liable for discriminatory acts against an employee. In addition, depending on the nature of the claim of unlawful harassment, the victim of the harassment may sue the individual supervisor or manager for assault, battery or intentional infliction of emotional distress.