

The Successful Summary Judgment and Preventing a Hostile Work Environment

By Jennifer Weidinger

While creating a maximal productive environment is the key to preventing future harassment claims, defense counseling frequently begins only after someone files a claim, so your representation often will involve damage control.

Exploring the Severe or Pervasive Requirement in Harassment Claims

An employment attorney has many pleadings, motions, and modes of discovery in his or her tool kit when faced with a harassment claim. One of the most important and fundamental of these is the motion for a summary

judgment. A successful motion can put the brakes on a case that cannot go forward as a matter of law. This undoubtedly will save an employer not only time and money but also the reputational hazards associated with a discrimination or a harassment claim. What is the key to a successful motion for a summary judgment? The key is to educate yourself in the prevailing law, precedents, and trends associated with harassment claims and the nuances within each jurisdiction so that you can write a compelling motion. You can then begin actively counseling clients in policy making and investigative procedures to create the structure for a positive work environment with the ultimate goal, of course, of preventing future harassment claims.

Educate Yourself in the Prevailing Law

One of the most fundamental tasks an employment attorney can do is to educate yourself in the law. This education encompasses case law in your practice jurisdiction and other jurisdictions.

The U.S. Equal Employment Opportunity Commission (EEOC) defines harassment as a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), and the Americans with Disabilities Act of 1990 (ADA). Harassment is unwelcome conduct that is based on race, color, religion, sex, including pregnancy, national origin, age (40 or older), disability, or genetic information. Harassment becomes unlawful when (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is *severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive*. Antidiscrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge; testifying or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals in violation of these laws.



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Employer Liability for Harassment

To state a claim for hostile environment harassment, a plaintiff must establish that (1) he or she was subjected to unwelcome advances, conduct, or comments; (2) the harassment was based on sex; and (3) the harassment was so severe or pervasive that it altered the conditions of the plaintiff's employment and created an abusive working environment. See *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 67 (1986). To warrant legal action, an 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 to be so. See *Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App. 4th 1047, 1059 (2011). Someone cannot recover for occasional, isolated, sporadic, or trivial conduct. See *Lyle v. Warner Brothers Television Prods.*, 38 Cal. 4th 264, 284 (2006); *Haberman v. Cengage Learning, Inc.*, 180 Cal. App. 4th 365 (2009). The law doesn't consider "ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" actionable harassment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

An employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, or loss of wages. If a supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that (1) it reasonably tried to prevent and promptly to correct the harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

An employer will be liable for harassment by non-supervising employees or non-employees over whom it has control, such as independent contractors or customers on the premises, if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action. When investigating allegations of harassment, the EEOC reviews the entire record, including the nature of the conduct and the context in which the alleged incidents occurred. A determination of whether harassment is sufficiently severe or pervasive to be illegal is made on a case-by-case basis.

Federal Precedent

Analyzing federal cases demonstrates that you have the ability to overcome a harassment claim through a successful motion for a summary judgment. In *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 738 (8th Cir. 2000), the court found that "a few inappropriate comments and an unwanted slow dance at a company party do not amount to particularly severe conduct that was threatening or humiliating." In *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998), the court held that a statement that the plaintiff had the "sleekest ass" in the office coupled with a single incident of intentional touching of the plaintiff's "breasts with papers that he held in his hand" was insufficient to establish a hostile work environment. And in *Candelore v. Clark Co. Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992), the court held that "isolated instances of 'sexual horseplay'... over a period of years were not sufficiently egregious to render work environment hostile."

Even a single instance of a severe action by a supervisor will not meet a plaintiff's burden unless it is a true sexual assault. In the now infamous case *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998), the court found that plaintiff had not met her burden of proving a hostile work environment. The plaintiff stated that the governor requested that she come up to a hotel suite, and while there he put his hand on her leg and eventually exposed himself to the plaintiff. She stated that she was extremely upset and confused and, not knowing what to do, attempted to distract the governor by chatting about his wife. The plaintiff left the room, the door of which was not locked, the governor "detained" her momentarily, "looked sternly" at her, and said, "You are smart. Let's keep this between ourselves." The court held that "[w]hile the alleged incident in the hotel, if true, was certainly boorish and offensive, the Court has already found that the Governor's alleged conduct does not constitute sexual assault.... This is thus not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state a claim of hostile work environment sexual harassment." Cf. *Crisonino v. New York City Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997) (denying a motion to dismiss a hostile work

environment claim based on a single incident of a supervisor calling the plaintiff a "dumb bitch" and shoving the plaintiff "so hard that she fell backward and hit the floor, sustaining injuries from which she has yet to fully recover").

The cases reveal that plaintiffs typically have the most difficulty overcoming summary judgment motions when they base

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claims on pervasive sexual harassment. In contrast, a plaintiff who claims quid-pro-quo harassment simply has to declare under penalty of perjury that, for example, a supervisor made unwelcome demands for sexual favors as a condition of employment or continuing employment, as a condition of avoiding some type of adverse employment action, or both. Plaintiffs sometimes have difficulty overcoming summary judgment motions based on a claim of "severe" harassment based on a single event. As noted above, the plaintiff must declare that the incident involved physical violence or a threat of it based on sex. Successful allegations are usually supported by declarations that there was either unwanted sexual contact or unwanted groping of a sexual part.

Stray Remarks Not a Defense

Notably, outlining a successful motion for summary judgment involves a slippery slope. An employment attorney's goal is to use the facts to show clearly that a plaintiff cannot meet his or her burden as a matter of law without making the entire motion about the facts. An attorney should, therefore, present arguments concerning stray remarks warily. Although a plain-



tiff's reliance on stray remarks is insufficient to establish discrimination, at least one court, albeit a state court, has held that consideration of stray remarks constitutes "fact finding." Consequently, the defendant's argument concerning stray remarks thwarted its motion for a summary judgment. *Reid v. Google*, 50 Cal. 4th 512, 516 (2010).

The lesson learned here is to know the decisions in your jurisdiction and possible shifts in the way that the courts there interpret the law.

The California FEHA

California lawyers frequently cite federal decisions when crafting a motion for a summary judgment. As one court explained, "Because the antidiscrimination objectives and relevant wording of [Title VII, the ADEA, and the ADA] are similar to those of the [California Fair Employment and Housing Act (FEHA)], California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA." *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 66 (Cal. Ct. App. 1996). FEHA prohibits harassment or discrimination based on age, race, color, sex, ancestry, national origin, pregnancy, marital status, sexual orientation, sexual identity, religion, medical condition, mental disability, and physical disability. The California Fair Employment and Housing Commission, which enforces California state law on the subject, further defines potentially harassing behavior to include (1) *verbal harassment* such as epithets, derogatory comments or slurs, repeated romantic overtures, sexual comments and jokes, and prying into one's personal affairs; (2) *physical harassment* such as unwanted touching, rubbing against someone, assault, and physical interference with movement or work; and (3) *visual*

harassment such as sexually explicit derogatory cartoons or e-mail messages, drawings or posters, lewd gestures, or leering.

Focus on the Elements

A successful motion for a summary judgment will focus on the elements of the hostile work environment. For example, in *Haberman v. Cengage Learning, Inc.*, the plaintiff could not sustain a cause of action against her former employer for sexual harassment because the acts of alleged harassment did not rise to the level of establishing a hostile work environment. See *Haberman v. Cengage Learning, Inc.*, 180 Cal. App. 4th 365, 369, 386 (2009). The plaintiff alleged 13 instances of harassment against her first supervisor and six incidents of harassment against her second supervisor. Those acts did not create a hostile work environment as a matter of law. *Id.* at 376. Similarly, in *Mokler v. County of Orange*, the court found that it fell short of establishing a pattern of continuous, pervasive harassment when a supervisor (1) asked about the plaintiff's marital status and called her an "aging nun"; (2) took the plaintiff by the arm, pulled her to his body, and made a sexual comment about her legs; and (3) told the plaintiff that she looked nice and put his arm around her. 157 Cal. App. 4th 121, 144-145 (2007).

The same year in *Hughes v. Pair*, 46 Cal. 4th 1035 (2009), the court found that the defendant, the trustee for the plaintiff's son's multimillion dollar trust, did not sexually harass the plaintiff in the context of their business relationship. Among other comments, the defendant reportedly told plaintiff, "Here's my home telephone number and call me when you're ready to give me what I want," and "I'll get you on your knees eventually." Assigning to the words "pervasive or severe" the same meaning as in the employment context, the court held that the defendant's conduct was not sexual harassment under California Civ. Code §51.9.

A plaintiff may allege harassment based on not only a sex-based classification. A plaintiff can base a harassment allegation on any one of the protected classes. In *Holmes v. Petrovich*, summary adjudication was granted properly on a hostile work environment claim based on the plaintiff's pregnancy. 191 Cal. App. 4th 1047, 1059 (2011). The plaintiff in *Holmes* began

working for the defendant in June 2004. In July 2004, she told the defendant that she was pregnant and that her due date was in December. *Id.* at 1052. The next month, she advised her employer that she needed to begin her maternity leave in November. Her supervisor responded that he was "in shock," also stating, "I need some honesty. How pregnant were you when you interviewed with me and what happened to six weeks?" *Id.* at 1053, 1055. The trial court properly found that the "brief, isolated, work-related exchanges between her and [the defendant], and others in the office, could not be objectively found to have been severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment based upon her pregnancy." *Id.* at 1057.

The Rise of Derivative Claims in California

Employment attorneys have observed an increased number of claims that include a cause of action for intentional infliction of emotional distress and other derivative, statute-based claims tacked on to a harassment claim. It is an unlawful employment practice for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Cal. Gov. Code §12940(k). An employer that violates antidiscrimination laws implicates unfair business practices. See *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 173 (2000); *Herr v. Nestle U.S.A., Inc.*, 109 Cal. App. 4th 779, 789 (2003). It is well settled, however, that a plaintiff must have been subjected to harassment or discrimination before a court may determine if the employer took appropriate steps to prevent any inappropriate conduct. See *Trujillo v. North County Transit District*, 63 Cal. App. 4th 280 (1998).

To establish a prima facie case of intentional infliction of emotional distress, a plaintiff must demonstrate the following elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the defendant's outrageous conduct actually and proximately caused the emotional dis-

gress. See *Hughes v. Pair*, 46 Cal. 4th 1035, 1050–1051 (2009). A defendant’s conduct is “outrageous” when it is so “extreme as to exceed all bounds of that usually tolerated in a civilized community.” 46 Cal. 4th at 1050–1051. As the Restatement of Torts explains, liability “does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.... There is no occasion for the law to intervene where some one’s feelings are hurt.” See *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 155 (Cal. 1987) (quoting Restatement (Second) of Torts §46 cmt. d (2010)). In *Hughes*, in upholding the summary judgment, the court concluded that the defendant’s inappropriate comments fell far short of “outrageous” conduct. 46 Cal. 4th at 1051. That conduct consisted of comments in a telephone conversation calling the plaintiff “sweetie” and “honey” and saying that he thought of her “in a special way” and asking the plaintiff to call him “when you’re ready to give me what I want,” as well as a statement that the defendant made during a social event: “I’ll get you on your knees eventually. I’m going to f*** you one way or another.” *Id.* at 1040. As explained above, if a plaintiff’s discrimination and harassment claims fail, the derivative claims must also fail.

Seventh Circuit Law and the Severe and Pervasive Requirement

Is the standard for a plaintiff to prevail in a sexual harassment claim stricter than if he or she brought a racial harassment claim? Many attorneys practicing in the Seventh Circuit would say yes.

Take for example, the case of *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993), in which the plaintiff’s supervisor repeatedly asked the plaintiff about her personal life, called her a dumb blonde, placed a hand on her shoulder at least six times, asked her out, placed “I love you” signs in her work area, and tried to kiss her once in a bar and twice at work. The Seventh Circuit held that this conduct was insufficient to establish a hostile work environment because though pervasive, the conduct was not severe. But wait a minute, isn’t the standard severe or pervasive? Contrast this case with the racial harassment case of *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040 (7th Cir. 2002).

In *Cerros*, the Latino plaintiff argued that his white supervisor called him a “wet-back” and told him to “go back to Mexico.” The court found the trial court erred in granting the summary judgment because these “unambiguous racial epithets” were severe enough to meet the standard. The court opined that “[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguous racial epithet.”

The lesson learned here is to know the decisions in your jurisdiction and possible shifts in the way that the courts there interpret the law. This will allow you to anticipate a court’s response to a motion for a summary judgment and better prepare your client for the realities of defending them.

Harassment Cases Involving Schools and Peer Bullying

The United States Court of Appeals for the Second Circuit has upheld a summary judgment ruling in favor of a school district finding that it did not violate Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the Fourteenth Amendment by allegedly failing to protect a student from peer-to-peer sexual harassment. See *R.S. v. Bd. of Educ. of the Hastings-on-Hudson Union Free Sch. Dist.*, 371 F. App’x 231 (2d Cir. Apr. 9, 2010). Under Title IX, the plaintiff needed to show “(1) that the School District acted with deliberate indifference to sexual harassment (2) that was so severe, pervasive, and objectively offensive that it effectively barred access to an educational opportunity or benefit.” S.S. and her parents claimed that the Hastings-on-Hudson Union Free School District did not respond properly to three e-mails sent to her from the account of a classmate, M.X. The e-mails were profane, critical of her appearance, and sexually suggestive, but when confronted, M.X. denied sending them. He claimed that another student had gained access to his e-mail, and the school provided him with another account and password. S.S. stopped receiving e-mails, but the sender was never identified, which caused her considerable anxiety.

The Second Circuit agreed with the district court’s finding that the plaintiff had

presented insufficient evidence for a reasonable jury to find that the harassment was so severe and pervasive that it denied her access to educational resources and opportunities. Citing the Supreme Court and its own precedent, the court noted that although “appalling conduct alleged in prior cases should not be taken to mark the boundary of what is actionable,” an unknown number of online arguments and one five-minute, face-to-face conversation never reported to the school district did not rise to the level of actionable sexual harassment under federal law. The court also dismissed the plaintiff’s equal protection claim for the same reason. 371 Fed App’x at 233–34.

Notably, in two recent cases addressing peer sexual harassment, federal juries returned conflicting verdicts. In May, a U.S. district court jury in Arkansas returned a verdict in favor of Fayetteville School District in a Title IX peer sexual harassment lawsuit. See *Wolfe v. Fayetteville, Ark. Sch. District*, 648 F.3d 860 (8th Cir. 2011) (affirming the district court jury verdict). The jury rejected the student’s attorney’s reliance on a “pattern-of-conduct” theory that had been used successfully in a prior case. A federal jury in Michigan, however, returned an \$800,000 verdict against Hudson Area Schools. See *Patterson v. Hudson Area Schs.*, 724 F. Supp. 2d 682 (E.D. Mich. 2010). In that case, the plaintiff also relied on the “pattern-of-conduct” theory, but the Michigan jury found Hudson Area Schools liable for failing to do enough to protect a student from years of peer-to-peer, sex-based bullying. Notably, the district court judge overturned the verdict. *Id.*

The Educated Plaintiff

Today’s world is all about sharing information through social media, websites, and blogging. A successful attorney should be in tune with what is going on, online. For example, the EEOC website provides a definition of harassment as well as examples of what is and what is not harassment under the law. The EEOC educates the individual that “Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.”



The EEOC goes on to inform individuals what actually is considered offensive conduct: “offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.” According to the EEOC website, the harasser can be the victim’s supervisor, a

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supervisor in another area, an agent of the employer, a coworker, or a non-employee; the victim does not have to be the person harassed but can be anyone affected by the offensive conduct; and unlawful harassment may occur without economic injury to, or discharge of, the victim.

A friend, an attorney, or a website may advise a potential plaintiff to document his or her potential claim. He or she may or may not report the sexual harassment to his or her employer and then proceed to file a charge with a state or federal agency, take a case to court, or both.

Creating Success

Once educated, your goal is not simply to obtain a dismissal: our job includes more. We should create success through productive and harassment-free workplaces. To that end, our jobs involve becoming educators. Our clients benefit exponentially when they are educated, prepared, and goal oriented. We can offer our clients tangible preventive measures and solutions to *create* successful workplaces.

Communication with a Client

Help me help you. As attorneys and “counselors,” we should not only advise clients in best practices, but also demonstrate our

ability to listen critically and to construct practices that fit each employer’s needs. For example, if your client tells you that it has a casual office environment and encourage office jokes, back rubs, and inter-office dating, you may consider sitting down one-to-one with the managers to discuss best practices and ways that they can still maintain that casual office environment even by eliminating those back rubs. It is your job to educate them on potential liabilities.

In California, an employer is strictly liable for quid-pro-quo harassment by a supervisor toward an employee. In addition, an employer is strictly liable for a hostile work environment created by a supervisor. A “supervisor” is anyone having authority from the employer to hire, transfer, suspend, lay off, recall, promote, assign, reward, or discipline other employees, or the responsibility to direct them, if such decisions or recommendations require the use of independent judgment.

An employer is responsible for the acts of sexual harassment in the workplace when the employer knew, or should have known, of the harassment and failed to stop it. An employer can avoid this vicarious liability if the employer can show that it took immediate and appropriate corrective action after learning of the harassing conduct by the coworker. Similarly, an employer may be vicariously liable for the acts of customers, clients, vendors, and other non-employees who sexually harass the company’s employees if the employer knows, or should have known, of the conduct and failed to take immediate and appropriate corrective action. In cases involving such claims, courts will consider the extent of the employer’s control and any other legal responsibility that an employer may have for the conduct of the non-employees.

Instituting Policy Is Not Tedious and It Is Necessary

Prevention is the best tool to eliminate harassment in the workplace. You should encourage employers to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that they will not tolerate unwelcome, harassing conduct. They can do this by establishing effective complaint or grievance processes, providing antiharassment training to their manag-

ers and employees, and taking immediate and appropriate action when an employee complains. Employers should strive to create environments in which employees feel free to raise concerns and feel confident that employers will address those concerns.

All employers should maintain a policy that prohibits sexual harassment. All employees should receive a copy of this policy. The policy should include the procedure for reporting instances of harassment. An employer must designate at least two persons to receive and to respond to harassment claims. It is unreasonable to expect a victim to report the alleged harassment to the individual engaging in the harassing conduct. All persons to whom employees will make reports should receive training on how to respond to complaints of harassment. A policy should also state clearly that a company will not tolerate any kind of retaliation against an employee who reports an instance of alleged harassment. For example, a well-crafted policy will define clearly a company mantra against harassing conduct in bold letters:

“The company does not condone any harassment (sexual or otherwise) of its employees. All employees, including managers, will be subject to severe discipline, up to and including immediate discharge, for committing any act of harassment.”

A policy should go on to identify the individual or individuals within a company to whom the employee should report, state that the company will complete an investigation and that no employee will endure retaliation or discipline for pursuing a good-faith complaint of harassment

Additionally, a policy against fraternization among supervisory personnel and their employees is, in many circumstances, advisable. Commonly individuals who have been involved in consensual sexual relationships with supervisors do allege harassment in the event that employers take adverse employment actions against them. Such relationships also can lead to complaints of preferential treatment and often adversely affect employee morale, focus, and productivity.

Most states require employers to display a poster that includes information about the illegality of sexual harassment. An employer must place the poster in a prom-

inent and accessible location. In addition, employers must prepare an information sheet on sexual harassment and ensure distribution of that information to all employees. Employers in California may, however, choose to distribute the California Department of Fair Housing and Employment publication #185 (available at <http://www.dfeh.ca.gov/>) instead of preparing their own information sheets. This requirement supplements any policy in an employee handbook or any posted policy. Many states, including California, also require employers to provide sexual harassment training to supervisory employees, and companies should have policies in place to institute this accordingly.

Investigation Procedures

Investigation is the second tool of employers. Failing to investigate an allegation can become detrimental to an employer faced with a harassment cause of action. The EEOC encourages employees

to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation. If you believe that the harassment you are experiencing or witnessing is of a specifically sexual nature, you may want to see EEOC's information on sexual harassment.

Even a simple investigation can demonstrate measures by an employer to rectify an allegation and to *create* that productive work environment.

An employer should take immediate and appropriate action when it knows or should have known that sexual harassment has occurred. An employer must take effective action to stop any further harassment and to ameliorate any effects of the harassment. A proper investigation should (1) fully inform a complainant of his or her rights and any obligations to secure those rights, and (2) fully and effectively investigate the allegations. An employer should initiate a thorough, objective, and complete investigation immediately. The investigator should interview those with information on the matter and make a determination about whether harassment happened. An employer should provide, as appropriate, information on the results of the investigation and the action that an employer takes to the alleged victim, as well as to other parties directly concerned. If accusations prove true, an employer should take prompt, effective remedial action. First, an employer should take appropriate action against the harasser, and the victim should receive information about the action that the employer took. Second, an employer must take steps to prevent any further harassment. Third, an employer must take

appropriate action to remedy the complainant's damages, if any.

Supervisors should immediately convey all complaints and inappropriate behavior to designated individuals within a company. These individuals will organize and direct all investigations. Supervisors should not undertake an investigation of improper behavior until speaking with one of the designated individuals within a company.

Conclusion

The key to *preventing* future harassment claims is *creating* a maximal productive environment. You should actively counsel your clients on the policy making, awareness, and investigative procedures that go into creating the structure for a productive work environment. However, because defense counseling frequently begins only after someone files a claim against an employer or one of its employees, your representation often can involve damage control. Given the broad spectrum of facts usually presented in a harassment claim, the wise defense counsel should narrow in on the scope of a claim, remember that the "severe or pervasive" requirement still exists, and use both state and federal precedent to build the foundation for a successful motion for a summary judgment. 