Fact Sheet on Workplace Harassment Claims Under the ADA

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Between 1992 and 1997, approximately 12 percent of claims filed under Title I of the Americans with Disabilities Act raised issues of workplace harassment. *See* Holland M. Tahvonen, *Disability-Based Harassment: Standing and Standards for a "New" Cause of Action*, 44 Wm. & Mary L. Rev. 1489, 1489 (2003) (hereinafter *Disability-Based Harassment*). The consequences of harassment are significant. As one author has explained:

> Supervisors and co-workers who are uncomfortable with people with disabilities, who are prejudiced, or who simply want to feel superior, use harassment to convey the message that workers with disabilities do not belong, and, often enough, the verbal and physical abuse causes its intended result: the targeted individual leaves the job. In other situations, a person with an observable disability does not even pursue employment. The consequences are idleness, poverty, and pervasive social exclusion of people with disabilities.

Mark C. Weber, *Workplace Harassment Claims under the Americans with Disabilities Act: A New Interpretation*, 14 Stan. L & Pol'y Rev. 241, 242 (2003) (footnotes omitted) (hereinafter *Workplace Harassment Claims*). While it is increasingly well-settled that hostile work environment claims are actionable under the ADA, the difficult standards used to assess Title VII hostile work environment claims have been applied in the ADA context. *Id.* at 241. As a result, courts have rejected large numbers of these claims, including those involving offensive name-calling, verbal humiliation, and even threats of bodily harm. *Id.*

This Fact Sheet will discuss hostile work environment claims under Title I of the ADA, including judicial and EEOC recognition of the claim, the elements of such a claim, and proof issues. The Fact Sheet will also discuss

the possibility of asserting claims for unlawful coercion and intimidation in the workplace under Title V of the ADA.

I. Is A Hostile Work Environment Claim Actionable Under Title I of the ADA?

While the Supreme Court has not definitively addressed the issue, four appellate courts have now concluded that claims of workplace harassment are actionable under Title I of the ADA. *Lanman v. Johnson County*, ___ F.3d ___, 2004 WL 3017258 at *2-*3 (10th Cir. Dec. 30, 2004); *Shaver v. Independent Stave Co.*, 350 F.3d 716, 719-20 (8th Cir. 2003); *Flowers v. Southern Regional Physician Services, Inc.*, 247 F.3d 229, 234-35 (5th Cir. 2001); *Fox v. General Motors Corp.*, 247 F.3d 169, 175-76 (4th Cir. 2001). The Sixth Circuit appeared also to implicitly recognize this claim. *Keever v. Middleton*, 145 F.3d 809, 813 (6th Cir.), *cert. denied*, 525 U.S. 963 (1998); *accord Coulson v. The Goodyear Tire & Rubber Co.*, 31 Fed. Appx. 851, 858 (6th Cir. 2002). Other appellate courts have assumed, without deciding, that the ADA includes a claim based on hostile work environment. *E.g.*, *Silk v. City of Chicago*, 194 F.3d 788, 803-04 (7th Cir. 1999); *Walton v. Mental Health Ass'n of Southeastern Pennsylvania*, 168 F.3d 661, 666-67 (3d Cir. 1999). A number of district courts also have recognized the vitality of such claims. *E.g.*, *Johnson v. City of New York*, 326 F. Supp.2d 364, 371 (E.D.N.Y. 2004) (collecting district court cases in Second Circuit); *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653, 662-63 (D.P.R. 1997); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1106-07 (S.D. Ga. 1995). Notably, no federal court appears ever to have held that a person with a disability cannot assert an ADA claim based on a hostile work environment. *See Walton*, 168 F.3d at 666 n.2.[1]

Courts have found that a hostile work environment claim arises from 42 U.S.C. § 12112(a), which provides that covered employers shall not "discriminate against a qualified individual with a disability because of the disability of such individual in regard to ... terms, conditions, and privileges of

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[1] The courts have similarly held that disability-based harassment claims are cognizable under the Rehabilitation Act and the Fair Housing Act. *E.g.*, *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364-65 (8th Cir. 2003) (Rehabilitation Act and Fair Housing Act); *Hiller v. Runyon*, 95 F. Supp.2d 1016, 1022-23 (S.D. Iowa 2000) (Rehabilitation Act).

employment." *See Lanman*, 2004 WL 3017258 at*2; *Shaver*, 350 F.3d at 720; *Flowers*, 247 F.3d at 175; *Fox*, 247 F.3d at 233. This language essentially mirrors the language in Title VII, 42 U.S.C. § 2000e-2(a)(1), which the Supreme Court has held to give rise to a cause of action for workplace harassment. *See Lanman*, 2004 WL 3017258 at *2; *Shaver*, 350 F.3d at 720; *Flowers*, 247 F.3d at 233; *Fox*, 247 F.3d at 175. Since the ADA was enacted after the Supreme Court's holding that the analogous provision of Title VII protects against workplace harassment, and since the remedial purposes of Title VII and the ADA are similar, the courts have held that the ADA should be interpreted consistently with Title VII, and, thus, have allowed harassment claims to proceed under 42 U.S.C. § 12112(a). *See Lanman*, 2004 WL 3017258 at *3; *Shaver* 350 F.3d at 720; *Flowers*, 247 F.3d at 233-34; *Fox*, 247 F.3d at 175-76.

The Equal Employment Opportunity Commission (EEOC) similarly has indicated that workplace harassment is actionable under Title I of the ADA. *See* EEOC, *Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the ADA*, Q&A ## 18-20 (Oct. 20, 2004) (hereinafter *EEOC Q&A About Intellectual Disabilities*); EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, Notice No. 915.002, Section II (June 18, 1999) (hereinafter *EEOC Enforcement Guidance on Vicarious Liability*).

II. What Standards Are Used to Assess Hostile Work Environment Claims Under Title I?

Courts that have acknowledged hostile work environment claims under the ADA have essentially adapted the standards for such claims used under Title VII and indicated that the following factors must be evaluated:

- Is the person protected against disability-based harassment under the ADA?

- Was the person subject to unwelcome, disability-based harassment that affected a term, privilege, or condition of employment, i.e., did it rise to the level of actionable harassment?

- ♦ Will the employer be subject to vicarious liability?

A. Is the Person Protected Against Disability-Based Harassment?

The initial question that must be addressed is who is protected from disability harassment in the workplace. The statutory language on which courts have founded the harassment claim prohibits discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112(a). To show he is qualified, an individual must demonstrate that he can perform the essential functions of the job with or without reasonable accommodation. 42 U.S.C. § 12111(8). If a harassment claim is premised on Section 12112(a), the plain language of the statute appears to require that a plaintiff establish that he is "qualified" for the job. Yet, the qualification element appears irrelevant in such claims.

While it is certainly appropriate to require a person to establish that he is qualified for the job if his claim is based on a failure to hire or promote or a wrongful termination, it is less clear that a lack of qualification for a job should excuse disability-based harassment. "[H]arassing behavior is not justifiable simply because the subject of that harassment lacks the specific qualifications for a particular position." *Disability-Based Harassment*, 44 Wm. & Mary L. Rev. at 1500. "Although an employer may legitimately distinguish between candidates or employees, it is difficult to imagine the circumstances under which an employer would be justified in harassing an employee." *Id.* at 1502. Further, in the Title VII context, there is no requirement that a plaintiff in a harassment lawsuit establish his qualifications to perform the job. *Id.* at 1500.

The case law is unclear as to whether a plaintiff must show he was qualified for the job in a harassment claim or, rather, whether it is sufficient if he establishes that he is a person with a disability. While the Tenth Circuit recently expressly stated that a plaintiff in an ADA harassment claim must establish that she is a qualified person with a disability, it ultimately rejected the claim on the basis that the plaintiff did not have a disability and did not reach the qualification issue. *Lanman*, 2004 WL 3017258 at *3-*6. The Fourth Circuit indicated that the individual must be a "qualified person with a disability" to pursue an ADA harassment claim. *Fox*, 247 F.3d at 177. The Eighth Circuit first indicated that the plaintiff must be a "member of the class of people protected by the statute," but then went on to indicate that the plaintiff

also must be a "qualified individual with a disability" to establish a claim under 42 U.S.C. § 12112(a). *Shaver*, 350 F.3d at 720.

In contrast, the Fifth Circuit indicated merely that the plaintiff must "belong[] to a protected group" to establish a harassment claim under the ADA and, apparently, never addressed the issue of whether the plaintiff was qualified for the job. *Flowers*, 247 F.3d at 235, 236 n.6; *accord Gowesky v. Singing River Hosp. Systems*, 321 F.3d 503, 509-11 (5th Cir.), *cert. denied*, 540 U.S. 815 (2003). One commentator has suggested that the Fifth Circuit's language would merely require a plaintiff to establish he has a disability, *see Disability-Based Harassment*, 44 Wm. & Mary L. Rev. at 1499-1500, though it is also possible to conclude that the "protected group" language means a person protected because he is a qualified person with a disability.

Even if the person need not show that he is qualified, many harassment claims falter on the inability of the individual to show that he has a "disability" under the ADA, *i.e.*, that he has an impairment that substantially limits one or more major life activities; that he has a record of such a substantially limiting impairment; or that he is regarded as having such a substantially limited impairment. *See* 42 U.S.C. § 12102(2). Given the increasingly narrow construction of the term "disability" by the Supreme Court, harassment plaintiffs – like all ADA plaintiffs – often have difficulty establishing that they have a "disability" protected by the ADA. *See Disability-Based Harassment*, 44 Wm. & Mary L. Rev. at 1505-11.

Sometimes, verbal harassment may be argued to show that the employer regarded the employee as having a disability. Courts, though, may disregard such statements as evidence that the plaintiff was regarded as having a disability if the statements are not closely linked to the disability or if, for example, they more likely reflect personality conflicts. In *Lanman*, the Tenth Circuit rejected the plaintiff's hostile work environment claim, concluding that her co-workers' statements that she was "nuts" or "crazy" did not demonstrate that management regarded her as having a mental disability. *Lanman*, 2004 WL 3017258 at *1, *4. Similarly, in *Reinhart v. Shaner*, No. 02-T-1315-N, 2004 WL 419911 (M.D. Ala. Feb. 9, 2004), the court held that an employee with petit mal epilepsy, controlled by medication, was not "regarded as" having a disability based on the fact that his supervisor called him "dumbo," "retard," and "slow in the head," among other things. *Id.* at *4-*5.

The court held that there was no evidence to show that the name-calling was related to the plaintiff's epilepsy." *Id.* at *5; *see also Gowesky*, 321 F.3d at 508 (emergency room physician treated for hepatitis C did not establish she was regarded as having a disability based on supervisors' remarks that called into question her fitness to practice emergency room medicine); *Roberts v. Dimension Aviation*, 319 F. Supp.2d 985, 990 (D. Ariz. 2004) (holding that insults did not support claim that plaintiff was "regarded" as having a disability).

B. Was the Person Subject to Actionable Harassment?

Harassment is not a *per se* violation of either Title VII or the ADA. Courts have emphasized "that anti-discrimination laws do not create a general civility code." *Shaver*, 350 F.3d at 721. *See also Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1102-03 (Title VII “does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.”); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 688 (8th Cir. 1998) (citation omitted), *cert. denied*, 526 U.S. 1004 (1999) ("Conduct that is merely rude, abrasive, unkind, or insensitive does not come within the scope of the law" ... “the ordinary tribulations of the workplace, such as the sporadic use of abusive language ... and occasional teasing are not actionable."

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court held that a plaintiff must prove the following to establish a viable Title VII hostile work environment claim based on sexual harassment: (1) that the conduct was unwelcome; (2) that the conduct had "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"; (3) the conduct was based on the plaintiff's sex; and (4) the harassment was "sufficiently severe or pervasive " so as to alter the conditions of the person's employment and create an abusive working environment. *Id.* at 65-67.

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court clarified *Meritor Savings Bank*'s discussion as to when harassment is sufficiently severe or pervasive as to result in a violation of Title VII. The Court explained that the standard for determining whether conduct is harassing is both subjective and objective. *Id.* at 21-22. The plaintiff must show that she

subjectively perceived the conduct as hostile or abusive and must establish that an objective "reasonable person" would view the environment as hostile and abusive. *Id.* This is not "a mathematically precise test." *Id.* at 22. Rather, the court must examine the conduct based on the totality of circumstances, including frequency, severity, physical or verbal nature of the conduct, and the extent to which it interfered with work performance. *Id.* at 23. These factors have been used to assess ADA harassment claims as well. *See Flowers*, 247 F.3d at 236; *Fox*, 247 F.3d at 178.[2]

The fact-specific nature of harassment cases makes it difficult to discern clear standards as to whether the conduct will rise to the level of severity and pervasiveness sufficient for liability and/or damages. The following details from the three key appellate decisions on disability-based harassment demonstrate the difficulty of drawing bright lines in this area:

> *Flowers* – The Fifth Circuit upheld the jury's finding of liability where the plaintiff, a woman who was HIV-positive and employed as a medical assistant, presented evidence that: (1) her supervisor, who had been a close friend, began intercepting her phone calls and eavesdropping on her conversations about learning of her HIV status; (2) the company president refused to shake the woman's hand and called her insulting names; (3) she was subjected to four random drug tests within a one-week period; and (4) she was lured to meetings under false pretenses

[2] The "reasonable person" standard has been criticized "for failing to address the unique concerns of harassment victims." *Disability-Based Harassment*, 44 Wm. & Mary L. Rev. at 1513 (footnotes omitted). Arguably, persons without disabilities do not have the same perspective as individuals with disabilities and may view the alleged harassing behavior differently. *Id.* at 1515. Yet, adoption of a "reasonable person with a disability" standard reflects the paternalistic idea that people with disabilities are somehow less rational and more sensitive than non-disabled people. *Id.* at 1516. Further, it is not clear that amending the objective element of the harassment standard will have any particularly positive impact on the outcome, as the Ninth Circuit's adoption of a "reasonable woman" standard in Title VII sex harassment cases has seemingly had little real impact on outcomes. *Id.* at 1513-14, 1518-19 (footnotes omitted).

during which she was reprimanded. 247 F.3d at 236-37. However, the court overturned the jury's damage award on the basis that the plaintiff failed to present any evidence of "actual injury," and thus she was only entitled to nominal damages. *Id.* at 238-39.

Fox – The Fourth Circuit upheld the jury's verdict in favor of the plaintiff, an employee with a back injury who several times took disability leave and returned to work on restricted light work duty. The plaintiff's supervisors and co-workers took pictures of the tasks he performed to attempt to prove they were no different than tasks he refused to perform due to his disability; the plaintiff and others on light duty were referred to as "handicapped MF's" and "911 hospital people"; a foreman crudely addressed his restrictions at a meeting; his supervisors encouraged other employees to ostracize workers with disabilities and prevent them from working by not giving them necessary materials; and he was assigned to work that his supervisors knew he could not perform, resulting in physical harm (*i.e.*, aggravation of his injury). 247 F.3d at 173-74, 178-79.

Shaver – The Eight Circuit held that summary judgment was appropriate for the employer on the plaintiff's disability harassment claim. 350 F.3d at 721-23. Before he began working for the defendant, as a result of an operation to remedy his nocturnal epilepsy, a part of the plaintiff's brain was removed and replaced by a metal plate. *Id.* at 719. The defendant disclosed this information to his co-workers. *Id.* at 722. Some of his co-workers called him "stupid," stated he was "not playing with a full deck," and routinely referred to him as "platehead." *Id.* at 721. The court held that this conduct could not objectively be viewed as hostile and abusive. *Id.* The court emphasized that there was no evidence that the conduct resulted in any psychological treatment of the plaintiff, no evidence that the conduct was "explicitly or implicitly threatening," and no evidence that the harassment was physical in nature. *Id.* at 722.

There are, however, certain minimum criteria that are important in ascertaining whether the harassment is actionable. First, the harassment must be based on the person's disability. "[A]n employee must demonstrate that the allegedly harassing conduct was motivated by a bias towards the employee's protected status." *Trepka v. Bd. of Educ.*, 28 Fed. Appx. 455, 461 (6th Cir. 2002). In *Trepka*, the Court of Appeals upheld the grant of summary judgment for the employer in a harassment case on the basis that the plaintiff failed to produce evidence that the negative comments and actions were attributable to her mobility disability rather than, for example, the supervisor's personal dislike of the plaintiff. *Id.* at 461-62. Similarly, in *Walton*, the Third Circuit indicated that the supervisor's conduct might have been offensive, but there was no evidence it was attributable to the plaintiff's disability rather than the poor working relationship between the plaintiff and her supervisor. 168 F.3d at 667; *see also Johnson*, 326 F. Supp.2d at 371-72 (where supervisor's acts reflected a "clash of personalities" with plaintiff, there was no harassment). So, too, in *Gowesky*, the Fifth Circuit suggested that many of the plaintiff's supervisor's comments relating to the plaintiff's treatment for hepatitis C were legitimate inquiries into the plaintiff's ability to return to work as an emergency room physician. 321 F.3d at 509-10.

Second, it is important that the harassment actually take place in person in the workplace. In addition to observing that many of the supervisor's comments in *Gowesky* could be viewed as legitimate inquiries into the plaintiff's ability to return to work as an emergency room physician while treated for hepatitis C, the Fifth Circuit also stressed that all but a few of the comments occurred via telephone or in writing -- not in the workplace. 321 F.3d at 510-11. The court suggested that such off-site comments could not be viewed as harassing "because a harassment claim, to be cognizable, must affect a person's working environment." *Id.* at 510.

Third, name-calling, by itself, generally is not sufficient to create a hostile work environment for which an employer can be held liable. *See Workplace Harassment Claims*, 14 Stan. L. & Pol'y Rev. at 249 n.78 (noting research that two-thirds of Title VII harassment claims based on "stray remarks" are dismissed). In *Coulson*, the Sixth Circuit concluded that verbal abuse of the employee based on his short stature and psychiatric disability (including "loony toon," "wacko," "crazy" and "Rambo" did not amount to a hostile work environment). 31 Fed. Appx. at 858. Similarly, in *St. Hilare v. Minco Products, Inc.*, 288 F. Supp.2d 999 (D. Minn. 2003), the court granted

the employer's summary judgment motion on the harassment claim asserted by a man with Tourette's Syndrome whose co-workers called him "strange," "retarded," "immature," and a "whiner." *Id.* at 1006-07. The court concluded that the plaintiff's co-workers' "incivility and poor judgment" were the "ordinary tribulations of the modern workplace." *Id.* at 1007. Since the comments did not interfere with the plaintiff's performance (and, in fact, he was promoted four times during the period and received very good evaluations), there could be no viable harassment claim. *Id.*

Finally, incidents that can be deemed "isolated" generally will not result in liability unless they are particularly extreme or severe; "the incidents must be "'sufficiently continuous and concerted in order to be deemed pervasive.'" *Johnson*, 326 F. Supp.2d at 371 (citation omitted). For example, in *Miller v. Taco Bell Corp.*, 204 F. Supp.2d 456 (E.D.N.Y. 2002), the court granted summary judgment for the employer on the ADA harassment claim of an employee with a hearing impairment who claimed that co-workers teased her and covered their mouths as they spoke (to prevent her from lip-reading). *Id.* at 465. The court concluded that "such actions might be offensive," but "they were clearly sporadic in nature and not so objectionable" as to alter the plaintiff's conditions of employment. *Id.*

In the end, it is important to understand that the "severe or pervasive" standard establishes a high bar to success in harassment claims under both Title VII and the ADA. *Workplace Harassment Claims*, 14 Stan. L. & Pol'y Rev. at 248-49

C. When Will the Employer Be Subject to Vicarious Liability?

Under Title I of the ADA, only the covered employer is subject to liability. The law does not allow individual liability against supervisors or co-workers in their individual capacities for damages. *E.g.*, *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 178 (3d Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003); *Silk*, 194 F.3d at 797 n.5. Courts have established varying standards for imposition of liability on employers in harassment cases, depending on: (1) whether the harassment was by the plaintiff's supervisors or co-workers; and (2) if the harassment was by the plaintiff's supervisors, whether it resulted in a "tangible employment action."

1. Vicarious Liability for Supervisor Harassment

The Supreme Court established the standard for employer liability in cases involving harassment by supervisors in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In those decisions, the Court held:

- An employer will be strictly liable for supervisor harassment that "culminates in a tangible employment action ...." *Ellerth*, 524 U.S. at 765; *accord Faragher*, 524 U.S. at 808. An employer will be liable in those circumstances regardless of what, if any, actions it took to prevent or correct the harassment.

- If the harassment by a supervisor does not result in a tangible employment action, an employer can assert an affirmative defense to liability. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. This defense requires the employer to prove both: (1) that it "exercised reasonable care to prevent and correct promptly any ... harassing behavior," and (2) that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *accord Faragher*, 524 U.S. at 807.[3]

[3] When the claim involves harassment by a "proxy" of the employer, the employer will be subject to strict vicarious liability regardless of whether the harassment resulted in a tangible employment action. *See Faragher*, 524 U.S. at 789-90. "In such circumstances, the official's unlawful harassment is imputed automatically to the employer" and the employer cannot assert the *Ellerth*/*Faragher* affirmative defense. *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § VI.A; *accord Faragher*, 524 U.S. at 789-90. Employer proxies include the president or other corporate officers, the owner, or partner. *Faragher*, 524 U.S. at 789-90 (collecting cases).

a. Who Is a Supervisor?

Given that vicarious liability will be imposed upon employers for supervisor harassment more readily than co-worker harassment, it is initially important to determine whether the harasser is the employee's supervisor. The EEOC has indicated that, since vicarious liability for supervisor harassment is predicated on the authority vested by the employer in the supervisor as its agent, the supervisor's authority "must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § III.A. The EEOC noted that it is the person's job function -- not his title -- that matters. *Id.* The EEOC identified two alternative elements to determine whether an individual qualifies as the employee's supervisor: (1) if the individual has authority to undertake or recommend tangible employment decisions affecting the employee, or (2) the individual has authority to direct the employee's daily work activities. *Id.* An individual who is temporarily authorized to direct the employee's daily work activities will be considered his supervisor during that time period. *Id.* § III.A.2. However, a person who simply conveys others officials' instructions relating to the employee's work assignments and reports back to those officials will not be considered a supervisor. *Id.*

b. What Is a "Tangible Employment Action"?

If it is determined that a supervisor is involved in the harassment, it must then be determined whether the employee was subject to a "tangible employment action" so as to impose strict liability on the employer. The Supreme Court explained that a tangible employment action is one that "constitutes a significant change in employment status ...." *Ellerth*, 524 U.S. at 761. Unfulfilled threats are not sufficient to constitute a tangible employment action. *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § IV.B. The Supreme Court indicated that the following factors are indicative of a tangible employment action:

- ♦ It requires an official act of the company.
- ♦ It is usually documented in official company records.

- ♦ It may be subject to review by higher level officials.

- ♦ It usually requires formal approval by the company and use of its internal processes.

- ♦ It usually inflicts direct economic harm on the employee.

- ♦ It generally can be effected only by a supervisor or other person acting with the company's authority.

See Ellerth, 524 U.S. at 762; *accord EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § IV.B.

Tangible employment actions include: hiring, firing, failing to promote, demotion, undesirable reassignment, or an action that causes a significant change in benefits or compensation. *See Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 808; *accord EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § IV.B. However, not all negative employment actions will be deemed "tangible" to impose strict liability on employers. *E.g. Conatzer v. Medical Professional Bldg. Services Corp.*, 95 Fed. Appx. 276, 279-80 (10th Cir. 2004) (placement of the plaintiff on probation for 90 days, issuance of a written reprimand, and changing schedule to more weekend work were not "tangible employment actions" that precluded the affirmative defense because there was no suspension or loss or reduction of pay or benefits, and the schedule change lasted only a few weeks).[4]

In *Pennsylvania State Police v. Suders*, ___ U.S. ___, 124 S. Ct. 2342 (2004), the Supreme Court addressed the issue of whether a constructive discharge, *i.e.*, working conditions so intolerable that a reasonable person felt compelled to resign, *id.* at 2354, constituted a "tangible employment action" so as to subject the employer to strict liability.[5] The Court agreed with the EEOC

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[4] A challenged employment action that is not deemed "tangible" may still be relevant to establish evidence that the employee was subject to a hostile work environment. *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § IV.B

[5] *Suders* and its implications for disability harassment cases are

and lower courts that an employer may be liable under anti-discrimination laws for a constructive discharge. *Suders*, 124 S. Ct. at 2352. However, the Court held that the employer should be allowed the affirmative defense established in *Ellerth* and *Faragher* in constructive discharge cases absent an "official act" by the employer because, unlike (for example) the official action that results in an actual discharge, the agency relationship between the misconduct and the plaintiff's resignation often is less certain. *Suders*, 124 S. Ct. at 2355.[6]

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discussed in detail in a July 2004 TA Question, which is available on the NAPAS web site.

[6] The Court cited with approval two appellate decisions as appropriate examples of when the affirmative defense should and should not be permitted in constructive discharge cases. *Suders*, 124 S. Ct. at 2356. In *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003), the court allowed the employer to assert the affirmative defense in a case in which the plaintiff alleged constructive discharge based on the supervisor's repeated sexual comments and sexual assault. The Court noted that this was "'exactingly the kind of wholly unauthorized conduct for which the affirmative defense was

c. Does the Employer Have Any Defense When A Tangible Employment Action Is Involved?

Although an employer cannot raise an affirmative defense when harassment culminates in a tangible employment action, the employer may contest the claim by producing evidence of a legitimate, non-discriminatory reason for the action. At that point, the plaintiff (as in any other discrimination case) must prove that the reason advanced is pretextual and designed to hide a discriminatory motive. *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § IV.C. There will, however, be a strong inference in a harassment case that the tangible employment action is the result of discrimination (because the harasser likely could not act with an objective motive). *Id.* Even if the tangible employment action is determined not to be discriminatory, the plaintiff may still recover for the harassment that preceded it, subject to the employer's affirmative defense established in *Ellerth* and *Faragher*. *Id.*

d. How Can An Employer Establish Its Affirmative Defense?

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designed[.]'" *Suders*, 124 S. Ct. at 2356 (quoting *Reed*, 333 F.3d at 33). In contrast, the employer was not allowed to present the affirmative defense in *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), *cert. denied*, ___ U.S. ___, 124 S. Ct. 2909 (2004), in which the plaintiff, after complaining about sexual harassment by a supervisor, was transferred but told that "'her first six months [in the new post] probably would be hell," and that it was in her "'best interest to resign.'" *Suders*, 124 S. Ct. at 2356 (quoting *Robinson*, 351 F.3d at 324).

When no tangible employment action has resulted from a supervisor's harassment, the employer will still be subject to vicarious liability for the supervisor's harassment unless it can establish the affirmative defense outlined in *Ellerth* and *Faragher*. This affirmative defense requires the employer to establish: (1) that it exercised reasonable care to prevent and correct promptly any harassment; *and* (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.[7]

In determining the first prong of the affirmative defense (*i.e.*, that the employer undertook reasonable care to prevent and promptly correct harassment), courts will look at whether the employer established, disseminated, and enforced an anti-harassment policy and complaint procedure, including:

- ♦ distributing a copy of the policy and procedures to all employees, re-distributing it periodically, and posting it in central locations and employee handbooks;
- ♦ training all employees about their rights and responsibilities;
- ♦ assuring that the policy clearly explains prohibited conduct;
- ♦ providing protection against retaliation for complaints;

[7] While an affirmative defense may fail, it may act to limit damages. For example, damages will be limited if the employer can establish that a reasonably prompt complaint would have reduced the harm (though it would not have eliminated it). *See Ellerth*, 524 U.S. at 765; *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § V.B.

- clearly describing the complaint process;

- assuring that the complaint process is effective (including not imposing rigid requirements; providing accessible points of contact for the initial complaint; designating at least one official outside the employee's chain of command to take complaints; and informing employees about time frames for filing charges of unlawful harassment with the EEOC or state agencies and that the time to do so begins with the last date of harassment rather than the resolution of the company's internal complaint process);

- protecting confidentiality of complainants to the extent possible;

- providing for a prompt, thorough, and impartial investigation of complaints (including providing for interim protections during the course of investigation, such as transfer of the alleged harasser); and

- assuring that the employer will take prompt, corrective action if it determines harassment has occurred (including both measures to stop the harassment and to correct the effects of harassment).

EEOC Enforcement Guidance on Vicarious Liability, *supra*, § V.C.1.a-f.[8] The courts may also look at other factors, such as the employer's efforts to screen applicants for supervisory jobs, to correct harassment regardless of internal complaints, to train management personnel, and to maintain records relating to harassment. *Id.* § V.C.2.

[8] A union grievance process, an arbitration or mediation process, or a federal agency's EEO complaint procedure do not constitute a valid complaint procedure for purposes of this affirmative defense. *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § V.C.1. n.57.

Whether the employer can satisfy the first prong of the affirmative defense ultimately will depend on the specific facts of the case. *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § V.C. Even the best policies, if not implemented, will not shield an employer from vicarious liability for harassment. *Id.* Further, if an employer responded to the employee's harassment claim properly, but ignored prior complaints about the same harasser, the employer has not exercised reasonable care. *Id.* Alternatively, the lack of a formal policy and complaint procedure will not necessarily preclude a successful defense, particularly for a small employer, if the employer can show that it exercised reasonable care through other means. *Id.* § V.C.3.

The second prong of the employer's affirmative defense (*i.e.*, whether the employee unreasonably failed to take advantage of any preventative or corrective measures afforded by the employer or otherwise avoiding harm) is similarly fact dependent. Courts will look primarily at whether the employee failed to complain. *EEOC Enforcement Guidance on Vicarious Liability*, *supra*, § V.D.1. However, this does not require the employee to file a complaint immediately after a relatively minor incident. *Id.* An employee also may not be held accountable for failure to complain if they legitimately feared retaliation, if there were obstacles to making a complaint, of if there was a reasonable basis to believe that the complaint process was ineffective. *Id.* § V.D.1.a-c. Further, even if the employee failed to use the company's complaint process, the employer will not be able to establish its affirmative defense where the employee made other efforts to avoid harm, such as filing an EEOC or state administrative complaint or union grievance. *Id.* § V.D.2.

2. Vicarious Liability for Co-Worker Harassment

While employers are vicariously liable for discriminatory harassment by supervisors (subject to an affirmative defense), a plaintiff must show that the employer was negligent in order to hold it liable for harassment by the plaintiff's co-workers. *Silk*, 194 F.3d at 804; *accord Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004); *see also Faragher*, 524 U.S. at 789 (collecting cases). Thus, the employee must demonstrate that management officials knew or reasonably should have known about the harassment and failed to take reasonable steps to remedy the harassment once it was on notice. *Petrosino v. Bell Atlantic*, 385 F.3d 210, 225 (2d Cir.

2004); *Wyninger*, 361 F.3d at 976; *EEOC Q&A About Intellectual Disabilities*, *supra*, Answer # 19.

III. Is Workplace Harassment Actionable Under Title V of the ADA?

The case law on workplace harassment under the ADA indicates that the cause of action stems from Title I, 42 U.S.C. § 12112(a), the analog to the statutory basis for harassment claims under Title VII of the ADA. However, the ADA includes a unique provision that might offer an alternative (and, perhaps, less problematic) basis for establishing liability for workplace harassment. Title V of the ADA provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by this chapter.

42 U.S.C. § 12203(b). Arguably, verbal abuse and physical harassment "are highly effective tools of coercion and intimidation" and interfere with an employee's work. *Workplace Harassment Claims*, 14 Stan. L. & Pol'y Rev. at 251.

The potential benefits of using Title V as an avenue to pursue workplace harassment claims are several. First, a person need not show that he is either "qualified" for the job or that he has a "disability" as defined by the ADA. Any "individual" can assert a claim under 42 U.S.C. § 12203. *Workplace Harassment Claims*, 14 Stan. L. & Pol'y Rev. at 259-60. Second, individual supervisors and employees could be held liable under this provision. *Id.* at 261-62. Third, there arguably is no basis to import the "severe or pervasive" standard of actionable harassment since 42 U.S.C. § 12203(b) is not linked to a change in the terms or conditions of employment. *Id.* at 253.[9] However, at

[9] Courts have found violations of analogous provisions in the Fair Housing Act and the National Labor Relations Act based on one or two acts of

least one court imported the Title I harassment standards into a claim for workplace coercion and intimidation under 42 U.S.C. § 12203(b). *Martini v. A. Finkl & Sons Co.*, No. 96 C 0756, 1996 WL 667816 at *13 (N.D. Ill. Nov. 15, 1996).

One potentially significant hurdle to the use of Section 12203(b) to challenge workplace harassment is that it requires a showing that the misconduct interfered with the exercise or enjoyment of a "right granted or protected by" the ADA. 42 U.S.C. § 12203(b). It is not clear whether the "right" granted or protected by the ADA is the affirmative right to work with a disability, rather than simply the negative right to be free from discrimination. One author has argued that this provision should be construed expansively, reasoning that rights protected by the ADA include:

> taking a job on an equal basis, working every day the same way that others work, and participating as an equal in the workplace .... Co-worker and supervisor conduct that harasses – under a common sense, not a Supreme Court, definition of that word – interferes with those rights. It coerces workers with disabilities to give up their entitlements under the ADA and go home. In other words, a worker exercises ADA rights at work simply by being there.

Workplace Harassment Claims, 14 Stan. L. & Pol'y Rev. at 252.

In *Brown v. City of Tucson*, 336 F.3d 1181 (9th Cir. 2003), the court addressed a claim for workplace coercion, interference, and intimidation under 42 U.S.C. § 12203(b). In *Brown*, the employee, a woman with depression, alleged that her supervisors engaged in various acts to interfere with her work performance. Applying the "hostile work environment" analysis of Title VII claims to the employee's Section 12203(b) claim, the district court granted summary judgment for the employer. *Id.* at 1188. The appellate court

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intimidating or coercive conduct. *See Workplace Harassment Claims*, 14 Stan. L. & Pol'y Rev. at 256-57 (citing cases).

reversed that ruling. The court indicated that, if a hostile work environment claim analogous to Title VII is actionable under the ADA, it would be founded in 42 U.S.C. § 12112(a) rather than Section 12203(b). *Id.* at 1190. The court effectively concluded that a claim under Section 12203(b) is not equivalent to a hostile work environment claim. *Id.* at 1190-93. The court repeatedly stressed that the ADA's anti-interference provision "cannot be so broad as to prohibit 'any action whatsoever that it any way hinders a member of a protected class,'" *id.* at 1192, 1193 (citation omitted), and concluded that some of the plaintiff's allegations (*e.g.*, complaining about her limited work hours and telling her she was "goofing off") did not give rise to actionable claims under that provision. *Id.* at 1193. The court, though, held that, at minimum, the provision "prohibits a supervisor from threatening an individual with transfer, demotion, or forced retirement unless the individual forgoes a statutorily protected accommodation." *Id.* On that basis, the court concluded that the plaintiff's allegations that her supervisor demand that she stop taking her medications and face demotion or forced retirement if she did not give up her accommodation were sufficient to state a claim under Section 12203(b). *Id.*

IV. Practice Tips

In advising a person with a disability about his or her right to be free from harassment, advocates should note such person's duty to take prompt action in the face of harassment and to maintain detailed information about it, including:

- keeping a log with information about the harassment, including dates, times, places, and potential witnesses;
- discussing the situation contemporaneously with family, friends, or others in the person's support network;
- informing the harasser that his or her conduct is not welcome;

- informing supervisors (or, in the event the employee's direct supervisor is involved in the harassment, informing other management officials in the chain of command, about the harassment); and

- contacting the person at the company who is responsible to handle harassment complaints or otherwise following the complaint procedure set forth in any anti-harassment policy.

In considering or litigating a harassment claim, advocates need to do a thorough factual investigation, including determining:

- whether an anti-harassment policy exists and, if so, its contents and procedures (such a policy usually can be found in the personnel manual or obtained from the human resources office);

- who was involved in the harassment (employer proxies; supervisors; co-workers);

- whether the harassment resulted in a tangible employment action;

- the severity and pervasiveness of the harassment (reviewing the frequency of the conduct; the physical or verbal nature of the conduct; the severity of the conduct; and whether, and to what extent, it interfered with work performance);

- whether the harassers had histories of harassment of other employees and, if so, what, if any, actions the employer took to stop the harassment;

- whether the employer disseminated and clearly explained policies that prohibit disability discrimination, including harassment;

- ♦ whether the employer provided training to management officials and employees relating to harassment;

- ♦ whether the employer had in place appropriate complaint procedures to address harassment and uses those procedures, including prompt investigations and appropriate remedies;

- ♦ whether the employer knew or should have known about the harassment; and

- ♦ how the employee responded to the harassment (complain or pursue other remedies).

Finally, for the reasons discussed above, advocates should consider asserting claims for violation of 42 U.S.C. § 12203(b) as well as 42 U.S.C. § 12112(a).

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