

Title VII Case Study Analysis

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to Title VII and Sexual Harassment. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

I. Overview

The purpose of this material is to assist educators in understanding the federal and state law pertaining to discrimination on the basis of sex and sexual harassment, Title VII, 42 USC 2000e *et. seq.* and N.H. RSA 354-A (“Law Against Discrimination”). This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

II. Title VII, 20 USC 1681(a) and the Law Against Discrimination, RSA 354-A

A. Title VII

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. 2000e.

Sexual harassment is a form of discrimination that violates Title VII. “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
2. Submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

29 C.F.R. 164.11(a).

In interpreting this law, courts have identified two fundamental forms of sexual harassment: quid pro quo harassment and hostile work environment.

Quid pro quo harassment involves “a supervisor us[ing] employer processes to punish a subordinate for refusing to comply with sexual demands.” This form of harassment “involves explicit and tangible alterations in the terms or conditions of employment.” Perez-Cordero v. Wal-Mart Puerto Rico, 656 F.3d 19 (1st Cir. 2011) (citations omitted).

“Harassment that creates a sexually hostile and abusive work environment is actionable when it is sufficiently severe and pervasive to effect constructive alterations in the terms or conditions of employment.” Perez-Cordero v. Wal-

Mart Puerto Rico, 656 F.3d 19 (1st Cir. 2011). To prevail on a hostile work environment claim, a plaintiff must establish that:

1. He is a member of a protected class;
2. He was subjected to unwelcome sexual harassment;
3. The harassment was based upon sex;
4. The harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and create an abusive work environment;
5. Sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and that he in fact did perceive it to be so; and
6. That some basis for employer liability has been demonstrated.

Id.

B. The Law Against Discrimination

Under New Hampshire's Law Against Discrimination, employers are prohibited from: 1) refusing to hire or employ an individual on the basis of (among other things) sex, or 2) from terminating the employment of an individual on the basis of sex, or 3) discriminating against an employee in compensation or in terms, conditions or privileges of employment, on the basis of sex, unless based on a bona fide occupational qualification. RSA 354-A:7, I. In addition, harassment on the basis of sex constitutes unlawful sex discrimination. RSA 354-A:7, V.

Unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature constitute[s] sexual harassment when:

- (a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- (b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

RSA 354-A:7, V(a)-(c).

III. Case Studies

1. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

Facts: Faragher was employed for 5 years. She had three immediate Supervisors. While she was employed, two of her immediate supervisors “repeatedly subjected Faragher and other female” employees “to uninvited and offensive touching, by making lewd remarks, and by speaking of women in offensive terms.” On one occasion, one of the supervisors said that he would “never promote a woman,” and another supervisor said to Faragher “Date me or clean the toilets for a year.”

In addition, one of the supervisors would “put his arm around Faragher, with his hand on her buttocks, and once made contact with another female [employee] in a motion of sexual simulation. He made crudely demeaning references to women generally, and once commented disparagingly on Faragher’s shape. During a job interview with a woman he hired . . . [he] said that the female [employees] had sex with their male counterparts and asked whether she would do the same.”

On one occasion, the other supervisor tackled Faragher “and remarked that, but for a physical characteristic he found unattractive, he would readily have sexual relations with her. Another time, he pantomimed an act of oral sex. Within earshot of the female [employees, he] made frequent, vulgar references to women and sexual matters, commented on the bodies of female [employees], and at least twice told female [employees] that he would like to engage in sex with them.”

Faragher did not complain to higher management about her two supervisors. Two months before her resignation, another female employee complained about the two men. That complaint was investigated, and the two employees were disciplined.

Faragher resigned and filed suit against her employer and her immediate supervisors, alleging violations of Title VII.

Query: Was Faragher subjected to sexual harassment?

If so, did the complaint by the other female employee and the response by her Employer mitigate against her injuries?

Held: For Faragher. The harassment was pervasive enough to support an inference that the employer had knowledge or constructive knowledge of the harassment. The harassment continued for a substantial period of time (at least

5 years) before the complaint was filed; the employer should have acted prior to that time.

2. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

Facts: Ellerth was employed for 14 months. A few months after she was hired, while on a business trip with another employee – who had the authority to make hiring and promotion decisions subject to the approval of his supervisor, but who was not Ellerth’s immediate supervisor – invited Ellerth to the hotel lounge. Ellerth felt compelled to accept the invitation. While there, the employee made “remarks. . . about her breasts,” and when she did not respond, he told her to “loosen up,” and “warned” that he could “make [her] life very hard or very easy at [work].”

After she had been employed for one year, Ellerth was being considered for a promotion and the employee expressed reservations during the promotion interview because she was not “loose enough. The comment was followed by his reaching over and rubbing her knee.” Ultimately, Ellerth received the promotion; when the employee called to tell her that she was promoted, he told her that she would be working with men who “certainly like women with pretty butts/legs.”

During her last month of employment, Ellerth called the employee and asked permission to include a customer’s logo in a fabric sample. He responded “I don’t have time for you right now, . . . unless you want to tell me what you’re wearing.” A few days later she called to ask permission again; the request was denied, and he also asked whether she was “wearing shorter skirts yet, . . . because it would make [her] job a whole heck of a lot easier.”

Shortly after that incident, Ellerth’s immediate supervisor spoke with her about returning telephone calls to customers in a timely fashion; in response, she quit. Her letter of resignation listed reasons other than the above incidents. Three weeks later, she sent a letter indicating that she had quit because of the other employee’s behavior.

While she was employed, Ellerth did not inform anyone about the employee’s conduct, despite knowing that her employer had a policy against sexual harassment. She intentionally kept the information from her immediate supervisor because he would have a duty to report any sexual harassment.

Ultimately, she filed suit, alleging violations of Title VII.

Query: Was Ellerth sexually harassed?

Was her employer liable for any harassment? Why or why not?

Can she recover for sexual harassment, even if she did not suffer any adverse consequences?

Held: For Ellerth. Despite the fact that she did not report the above incidents, the conduct was severe and pervasive enough to create a hostile work environment. An employee who refuses unwelcome and threatening sexual advances of a supervisor, but who suffers no adverse and tangible job consequences, can recover against the employer.

3. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

Facts: Oncale, a male, worked with 8 other men, two of whom were his supervisors. On several occasions, three of the men, including the two supervisors, subjected him to sex-related actions and lewd conversations in the presence of the other coworkers. On one occasion, one of the men threatened him with rape, and the other two physically assaulted him in a sexual manner.

Oncale complained about the actions, but his employer took no remedial action. Eventually, Oncale quit. He filed suit against his employer, alleging discrimination.

Query: Can an individual recover for sex based discrimination when the alleged perpetrators are of the same gender?

Held: Sex discrimination consisting of same sex sexual harassment is actionable under Title VII.

4. Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).

Facts: In June 1997, White was hired by her employer. She was the only female employee. In September 1997, White complained that her immediate supervisor had repeatedly told her that women should not be working in her department. He had also made insulting and inappropriate remarks to her in front of her other colleagues. After an internal investigation, the supervisor was suspended for 10 days and was required to attend a sexual-harassment training session.

On September 26, White was told about the discipline. That same day, she was reassigned to another position. She was told that this occurred because other co-workers had complained that she was given a position that should have gone to a more senior employee.

On October 10, White filed a complaint with the Equal Employment Opportunity Commission. She claimed that the reassignment constituted unlawful gender-based discrimination and retaliation for her earlier complaints.

In early December, she filed a second complaint, claiming that another employee had placed her under surveillance and was monitoring her daily activities.

A few days later, White had a disagreement with her immediate supervisor; he told the other employee (his supervisor) that White had been insubordinate. White was immediately suspended without pay. White invoked grievance procedures, which led to a determination that she had not been insubordinate. She was reinstated and received backpay. She filed an additional retaliation charge with the EEOC based on the suspension.

Thereafter, White filed suit against her employer, alleging violations of Title VII. She claimed that the change in job responsibilities and the suspension without pay constituted retaliation.

Query: Would the conduct in question deter a reasonable worker from making or supporting a charge of discrimination?

Held: For White. The scope of Title VII's antiretaliation provisions extend beyond work-place related or employment related retaliatory acts and harm. The antiretaliation provision protects individuals from retaliation that produces an injury or harm.

Two of the actions amounted to retaliation: the reassignment to another job and the suspension without pay. Reassignment of job duties is not automatically actionable, but is actionable when a reasonable person would believe that the reassignment was materially adverse.

5. Perez-Cordero v. Wal-Mart Puerto Rico, 656 F.3d 19 (1st Cir. 2011).

Facts: Perez-Cordero was hired as a butcher at Wal-Mart's Sam's Club store in Humacao, Puerto Rico, in 1998. In the summer of 2000, Santiago transferred from another department within Sam's Club to become Team Leader of the store's meat department. As Team Leader, Santiago had some supervisory authority over Perez-Cordero.

Early in her tenure as Team Leader, Santiago would schedule her lunch breaks to coincide with those of Perez-Cordero. She would ask him "every day" where he was planning on eating lunch, and would often appear at his lunch table and ask to share a table with him. Perez-Cordero said that "everywhere I went to go have lunch she would show up; even McDonald's, Wendy's, Los Chinos, La Plazoletta."

Initially, lunch time conversations between Santiago and Perez-Cordero were exclusively work related. Ultimately, however, Santiago began sharing details about her private life, that led Perez-Cordero to believe that she was

interested in pursuing a romantic relationship with him. In addition, Perez-Cordero learned that his coworkers were gossiping about him due to the attention that Santiago was showing him. On one occasion, two female coworkers confronted him and inquired whether he “had something to do with her,” and whether he knew that Santiago liked older men. These comments made Perez-Cordero uncomfortable. As a result, he began trying to avoid Santiago at lunchtime; he would bring his own lunch or would tell her he was going to Wendy’s when he actually went to McDonald’s.

In August 2000, Santiago told him that she was a single mother seeking a man with whom she could settle down, and asked Perez-Cordero whether he wanted to be that man. Perez-Cordero told Santiago that he was in a committed relationship with a woman whom he planned to marry. That same week, Perez-Cordero invited his girlfriend to lunch and introduced her to Santiago. Santiago later told Perez-Cordero that meeting his girlfriend made her feel “guilty” because “when I have something with you then I will know who your woman is.” Santiago made this remark in front of 2 other employees. Perez-Cordero told her “Don’t play like that, it is very ugly.”

Following this incident, the two coworkers told him that Santiago wanted to have a relationship with him, and that she had been discussing it with other females. Perez-Cordero told them that he had no interest in a relationship with Santiago, but he began feeling pressured when they asked him follow up questions like “are you sure you don’t like anything about her?”

Santiago then began supervising Perez-Cordero more strictly than other employees, and began pressuring him to improve his performance, even though the quality of his work had not deteriorated. She assigned him tasks that had previously been shared among all employees in the meat department, or which required several employees to complete. She consistently assigned him to work the closing shift, which had previously been rotated among all employees. That shift required more work than other shifts and prevented him from participating in daily departmental meetings. She also reallocated the duties of the closing shift, which had Perez-Cordero performing additional cleaning tasks on top of his normal tasks.

On September 17, 2000, Santiago called Perez-Cordero several times at work, although she had the day off. She told him that she had his evaluation in her hands, and that she was expecting sales of \$10,000 to \$15,000 and she wanted to ensure that everything was okay in the refrigerators and that the cleaning was done, because she was going to check his work the next day.

On September 19, 2000, Santiago yelled at Perez-Cordero in front of his co-workers when he arrived at work. She was upset because he failed to dispose of some boxes from the previous day. This was the only time that he

was ever yelled at during his employment at Sam's Club. He reported this incident to the Meat Manager, Santiago's supervisor.

The next day, Santiago approached Perez-Cordero while he was dressing for work at his locker. The custom among store employees was to greet each other with a kiss on the cheek. However, Santiago grabbed Perez-Cordero "and forcefully sucked on his neck." Perez-Cordero was "shocked" and "surprised" by her actions, and was unable to say anything to her. Santiago turned to another employee and "whispered a comment to him in which she implied that Perez-Cordero had become sexually aroused by her greeting." Perez-Cordero reported the incident to the Meat Manager and indicated that he was "uncomfortable with the hostile manner in which he was being treated by Santiago."

The Meat Manager indicated that he had spoken with Santiago the previous day about the yelling incident, and was reluctant to speak with her again.

Three days later, on September 22, Perez-Cordero again met with the Meat Manager and requested official action. By September 25, the Meat Manager had still not taken any action, and Perez-Cordero informed him that if he was unable to resolve the problem, he would take the complaints further up the chain of command. The Meat Manager indicated that he would convene a meeting the following day.

When Perez-Cordero arrived for the meeting, he was surprised to discover that the meeting was not to resolve his complaints, but was for a disciplinary proceeding, known as "coaching." The session had been initiated by Santiago, because Perez-Cordero had failed to follow directions and regulations. At the end of the session, the Meat Manager informed Perez-Cordero that he was not going to file Santiago's disciplinary form, but that Perez-Cordero should resolve his problems with Santiago by "going out with her, take advantage of the situation."

Later that day, Perez-Cordero spoke with the area supervisor, who then brought Perez-Cordero to speak to the store manager. The store manager said that he would "deal with the situation" and sent Perez-Cordero home for the day because he was not "feeling very well emotionally." He also organized a meeting with Perez-Cordero, Santiago and the Meat Manager for September 29. Perez-Cordero also faxed a memorandum to the store's human resources manager, expressing concerns about Santiago's treatment towards him and detailing the steps that he had taken to resolve the matter.

At the September 29 meeting, Perez-Cordero raised the following concerns:

1. "Misunderstanding? Disrepect?
2. Blackmailing, harassment of a sexual nature and persecuted.
3. My emotional health and my job stability without mentioning the family.
4. Let them measure with the same ruler.
5. Sam's policy and laws regarding trainings.
6. Remarks made to her by Emilio (I'm sure he got an erection).
7. I am current taking medication to be able to sleep and I've even had problems of a . . . [sic]."

Santiago apologized for making the remarks to the co-worker (number 6, above). Perez-Cordero accepted her apology, but did not feel comfortable continuing to work under Santiago's direction. He requested that either he or Santiago be transferred from the meat department. Perez-Cordero was told that because he had involved HR, the matter was out of the store manager's hands and Perez-Cordero was instructed not to take any further actions until Monday, October 2.

Perez-Cordero did not receive any response from HR regarding his fax.

On October 2, Perez-Cordero again spoke with the store manager, who instructed him to "leave things like that." He blamed Perez-Cordero for having "built an ugly situation" and told him that it was "easier to find a new butcher than to find a team leader." He also informed Perez-Cordero that Santiago would be disciplined.

Santiago continued to supervise Perez-Cordero. Perez-Cordero thought that was a very difficult time, where Santiago was trying to kick him out. She continued to place him on the closing shift, and denied him six weeks of required training, as well as his requested vacation time.

In the meantime, Perez-Cordero filed a charge of discrimination with the Department of Labor; when the store was notified of the charge, Santiago was transferred from the meat department.

During the time the harassment occurred, Perez-Cordero began seeing a psychiatrist and was diagnosed with post-traumatic stress disorder.

Perez-Cordero filed suit, alleging discrimination on the basis of sex, in violation of Title VII. The district court dismissed the claims against the employer, and Perez-Cordero appealed.

Query: Did Santiago's conduct create a hostile work environment?

Held: For Perez-Cordero. As to the hostile work environment claim, the

court found that Perez-Cordero had established that he was a member of a protected class (male), that the harassment was unwelcome, that the harassment was based on sex – when harassment that is motivated by a failed attempt to establish a romantic relationship, the victim’s sex is “inextricably linked to the harasser’s decision to harass” – the harassment was severe and pervasive because he was threatened with a negative evaluation, Santiago attempted to initiate a disciplinary proceeding, and berated his performance in front of coworkers. Finally, the harassment was offensive to Perez-Cordero.

The court also found that Perez-Cordero had established that he had engaged in a protected activity and subsequently suffered an adverse action causally linked to his protected activity. Here, Perez-Cordero engaged in two protected activities: He filed a complaint with the Department of Labor on October 3, 2000, and he reported Santiago’s conduct to the Meat Manager, area manager and store managers in September and October 2000. There was sufficient evidence to survive a motion for summary judgment that Santiago’s harassment escalated in response to Perez-Cordero’s complaints. As a result, the court reversed the order dismissing Perez-Cordero’s claims.

6. Roderick v. New Hampshire Hospital, 2000 DNH 26 (D.N.H. Jan. 28, 2000).

Facts: Roderick was hired on February 24, 1995. On August 13, 1995, she met another employee, who was filling in for her department. He worked in her department the next day as well, and at his request, Roderick joined him on a patio by the cafeteria during her break. As they talked, the employee introduced the topic of pornographic movies. Roderick attempted to steer the conversation to a different subject. The employee “kissed [her], touched her breast, and attempted to remove her shirt.” She told him that his conduct was inappropriate and directed him to stop.

He then went over to the patio fence, and telling Roderick that he wanted to show her something, asked her to join him. Thinking that he was going to point out his new vehicle, which they had been talking about, she complied. Instead, he “exposed and forced plaintiff to touch his genitals.” She pushed him away, told him he should return to his wife, and went back to work.

Approximately half an hour later, he gave plaintiff a handwritten note with his address and phone number on it. “The note said ‘When you are ready to keep up with the Big Boy I will give you directions. (Ha Ha) Throw away after reading.’” She reported him to human resources.

Her employer began an immediate investigation, and she was instructed to call the police if he bothered her at home. She was also instructed to contact her supervisor if she suffered any retaliation from any coworkers.

Ultimately, the employee was put on paid leave, pending resolution of the complaint against him. The investigator concluded that he behaved inappropriately in the work environment. Formal discipline was recommended.

Two days after the incidents occurred, Roderick was given a letter of warning due to a substantiated incident where she fell asleep on the job. In November, shortly before the investigation concluded, she was placed on paid administrative leave, pending completion of an investigation into another incident. That investigator concluded that the incident was unsubstantiated.

Shortly after the investigation into the sexual harassment complaints concluded, Roderick was terminated “for failing to meet the established work standard during her probationary period. The letter cited [her] poor judgment, failure to maintain appropriate interpersonal boundaries, and the “falling asleep” incident.

She filed suit, alleging a violation of Title VII.

Query: Is a single incident of harassment severe enough to constitute actionable sexual harassment?

Is a 3 month time period for completion of an investigation reasonable?

Is the employer liable for sexual harassment or did it take prompt and appropriate remedial action?

Held: For the plaintiff (motion for summary judgment denied). While a single, isolated incident is rarely sufficient to create an abusive working environment, certain incidents, such as a sexual assault, will be sufficient to create a hostile work environment.

Since the employee was not a supervisor of Roderick, the employer will only be liable for harassment if an official representing the employer knew, or in the exercise of reasonable care, should have known, of the harassment’s occurrence, unless that official can show that he/she took appropriate steps to stop the harassment.

“Factors in assessing the reasonableness of remedial measures may include the amount of time that elapsed between the notice and remedial action, the options available to the employer, possibly including employee training sessions, transferring the harassers, written warnings, reprimands in personnel files, or termination, and whether or not the measures ended the harassment.”

With respect to the length of the investigation, in this case, three months

was not unreasonable. There were no witnesses to the incident, and the other employee denied the allegations. The employer also began investigating immediately after receiving the complaint.

The court also noted that the employer is required to take steps reasonably likely to stop the harassment and the hospital's actions did stop the harassment.

However, it was unclear whether the hospital properly responded to prior allegations against the same employee. As a result, the employer's motion for summary judgment was denied.

7. Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011); 2011 LEXIS 913.

Facts: Thompson and his fiancé, (Ms. Regalado), were both employees of North American Stainless. Regalado filed a charge of sex discrimination with the EEOC. Thompson did not engage in any activity in support of Regalado's claim. Three weeks after receiving notice of Regalado's charge, the employer fired Thompson. Thompson then filed a charge with the EEOC, and eventually sued the employer in Federal Court under Title VII, claiming that the employer fired him in order to retaliate against Regalado for filing her charge with the EEOC.

Query: Does Thompson have standing to file an action against the employer when he had not engaged in any activity protected by the statute, either on his own behalf or on behalf of Regalado?

The lower federal courts granted summary judgment to the employer, reasoning that third-party retaliation claims were not permitted by Title VII.

Held: For Thompson. The United Supreme Court ruled that if the facts alleged by Thompson were true, then the employer's firing of Thompson violated Title VII because Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct. A reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired. The Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful.

Note: Consider where to draw the line with respect to a "person aggrieved" for purposes of Title VII standing. The Court's opinion in Thompson suggests that the claimant must be within the "zone of interests" protected by Title VII. The employer argued that allowing third-parties to have Title VII standing under these circumstances will place the employer at risk any time if fires an employee who happens to have a connection to a different employee who filed a charge with the EEOC. The Court recognized the difficulty that would

arise with some situations, but reasoned that “the significance of any given act of retaliation will often depend upon the particular circumstances.”

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