

# PRACTITIONERS' NOTES

## MEDIATION OF A SEXUAL HARASSMENT CLAIM

*Robert Lewis*\*

### I. SEXUAL HARASSMENT

The best definition of sexual harassment is that it is unwelcome sexual attention that causes the recipient distress and results in an inability to function effectively on the job.

### II. SEVERE OR PERVASIVE?

Where the harasser is a co-worker of the harassed employee, the Supreme Court has held that employers are liable if: (1) the harassment was severe or pervasive, (2) the employer knew or should have known of the harassment, and (3) the employer failed to take prompt remedial action.<sup>1</sup>

The article in the December 31, 2005 *New York Times* sports section headlined "U.S. Women Accuse a Coach of Harassment," recounts the story of an Olympic bobsled candidate who alleged that at the start line of a race, her coach commented on how good she looked in

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1. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 788-89 (1998); *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 752, 765 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 70-71 (1986).

her speed suit, patted her on the buttocks, and tried to kiss her on the lips.<sup>2</sup> Subsequently, an arbitrator ruled that the coach's actions did not violate the United States Bobsled and Skeleton Federation's sexual harassment policy.<sup>3</sup> Did the coach's actions constitute severe harassment under the law?

Not all workplace conduct with sexual undertones is severe enough to be actionable. A number of courts have held that conduct similar to that of the U.S. women's bobsled coach is all too commonplace in today's America to be classified as discriminatory.<sup>4</sup>

In a suit against Madison Square Garden, a former figure skater cheerleader for the New York Rangers hockey team alleged that after a game, her supervisor solicited her for sex at a bar and put his tongue down her throat.<sup>5</sup> In dismissing her complaint, the court held that while in some instances a single act can create a hostile work environment, such single acts must be "extraordinarily severe" to be found actionable.<sup>6</sup>

In another case, the complainant stated that her supervisor told her, "[y]ou are looking very beautiful."<sup>7</sup> While acknowledging that such words may show a flirtatious purpose, the court found that the supervisor's flirtation did not rise to the level of sexual harassment.<sup>8</sup>

Of course, every case has to be analyzed based on its unique facts. It is clear that employers need not apply Victorian standards of etiquette in considering whether the conduct is severe. Rather, as one court put it, sexual harassment must be analyzed against the background of "contemporary American popular culture in all its sex-saturated vulgarity."<sup>9</sup>

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2. Wina Sturgeon & Lynn Zinser, *U.S. Women Accuse a Coach of Harassment*, N.Y. TIMES, Dec. 31, 2005, at D1.

3. Juliet Macur, *For U.S. Skeleton Team, Racing Will be the Easy Part*, N.Y. TIMES, Feb. 13, 2006, at D1.

4. See, e.g., *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) ("A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks . . ."); *Jennings v. Univ. of N.C., at Chapel Hill*, 444 F.3d 255, 272 (4th Cir. 2006) (rejecting Plaintiff's argument that the "sexual banter" she heard during practice for two years amounted to sexual harassment).

5. *Prince v. Cablevision Sys. Corp.*, 95 Fair Empl. Prac. Cas. (BNA) 1305, 1311 (S.D.N.Y. May 6, 2005).

6. *Id.* at 1312 (quoting *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2000)). Subsequently, the plaintiff amended her complaint to include additional allegations of sexual misconduct. This time, the court denied the defendants' motion to dismiss because the additional allegations buttressed the original complaint. *Prince v. Madison Square Garden*, 427 F. Supp. 2d 372, 376-77 (S.D.N.Y. 2006).

7. *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 584 (11th Cir. 2000).

8. *Id.*

9. *Bakersville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

### III. PRACTICE AS DEFENSE COUNSEL

During my years of practice, I advised many employers on sexual harassment matters. In one of the cases I litigated, I was representing a large supermarket chain. The female plaintiff was working part-time in the produce department and was harassed by a male co-worker.

The plaintiff filed suit against the company in federal district court for subjecting her to a sexually hostile work environment.<sup>10</sup> At trial, she testified that her co-worker had stood behind her and placed his hands at her sides and made back and forth sexual motions behind her while he pinned her against the table.

The main issue in the case was whether the supermarket had knowledge of the incident.<sup>11</sup> The plaintiff's attorney argued that the store manager had constructive knowledge because the harassment was so severe that the manager should have known of it. I argued that the company did not have knowledge because the produce department, where the plaintiff worked, was in the back of the store, a long way from the store manager's office. Although the jury awarded her \$139,000, my subsequent argument to the court prevailed, reducing the award to \$10,000.<sup>12</sup> The Third Circuit Court of Appeals affirmed.<sup>13</sup>

### IV. MEDIATING SUPERVISORY HARASSMENT

In June 2000, I retired from Jackson Lewis. After training in mediation techniques, I applied for placement on the rosters of state and federal courts, and advertised my availability in bar association journals. Soon after, the cases started to come in.

One case involved a class action by the EEOC against the partners of a law firm. This was the first time the EEOC had sued a New York City law firm. A female attorney and clerical workers complained that they were repeatedly subjected to sexually explicit comments by some of the firm's partners, two of whom had pornography on their computer screens. By the end of the day, the parties had agreed on a settlement, which included compensation for lost wages to the attorney complainant who had allegedly been forced to resign, and sensitivity training for the firm's partners, staff, and associates.

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10. *Stewart v. Weis Mkts., Inc.*, 890 F. Supp. 382, 386 (M.D.Pa. 1995).

11. *Id.* at 390-91.

12. *Id.* at 400.

13. *Stewart v. Botsford*, No. 95-7415, 1996 U.S. App. LEXIS 14998, at \*1 (3d Cir. May 7, 1996).

The law involving supervisory harassment states that employers are strictly liable for a supervisor's conduct, provided it is severe or pervasive, and culminates in a tangible employment action such as demotion or discharge. However, an employer can avoid liability by proving both elements of an affirmative defense:

- (1) *that it exercised reasonable care to prevent and promptly correct the harassment; and*
- (2) *that the plaintiff employee unreasonably failed to take advantage of preventive opportunities provided by the employer.*

This is termed the *Faragher/Ellerth* affirmative defense, from the names of the two cases in which the Supreme Court articulated it.<sup>14</sup> Simply stated, the first prong concerns the behavior of the defendant employer: whether it had an effective policy and procedure for preventing harassment and handling complaints. The second prong concerns the behavior of the complainant: whether he or she unreasonably failed to take advantage of the employer's policy and procedure. The defendant employer bears the burden of proof on both elements of the defense.

I recently mediated another Eastern District sexual harassment case involving a company on Long Island, New York. Two former female employees had filed charges with the EEOC, claiming that the company's president repeatedly used graphic and offensive language in the workplace. One of the employees charged that the president had stated he would like to have sex with her, commented about her sexual relations with her husband, and joked about the fact that she probably does not perform enough oral sex on him.

The EEOC uses media strategy as part of its litigation game plan. It may place an article in the local press, and it may arrange for a report of the case to be aired on national television news broadcasts, where the complainant is interviewed.

At the opening of the mediation, I was taken aback upon learning that on the day before the mediation, the company president had filed two state court suits for defamation against the two complainants in the EEOC case. The suits were based on a television news broadcast arranged by the EEOC publicizing the complainant's lawsuit. The

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14. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

president complained that his reputation had been damaged when his family and friends viewed the broadcast. He sought \$15 million in compensatory and punitive damages. Given this background, and the extreme hostility between the parties, I was unable to settle the case.

There is, however, another chapter to the story. When the EEOC learned of the defamation law suits, it informed the magistrate judge and moved to amend its complaint to add a retaliation claim, which was granted. The case is pending in federal court.

#### V. MEDIATION IN PRACTICE

Should you engage in mediation? Some defense attorneys have expressed reluctance to mediate in EEOC cases, where mediation is voluntary. I believe these attorneys do their clients a serious disservice by litigating without first trying mediation.

Assume you and your adversary have been having discussions regarding settlement of a matter, but so far have been unsuccessful. One of you may suggest mediation and propose names of possible mediators. If both sides agree on a person, the proposed mediator will be called concerning his or her availability and, if it is a private mediation, fees.

When I am asked whether my prior management background has handicapped my selection as a mediator, I answer that, to the contrary, it has enhanced it. Plaintiffs' attorneys will sometimes select me because they believe that I have high credibility with the employer and its counsel, due to my prior experience.

When I am chosen to mediate, I communicate with both sides by phone or letter, explaining the need to submit a pre-mediation statement summarizing the background and the status of the dispute. The statements are confidential, and for my eyes only. After I read the statements, I generally research the legal issues. Under certain circumstances, I may meet separately with counsel before the mediation, or I will make pre-mediation phone calls to counsel and inquire as to the position and responsibility of the management representative who will accompany him or her to the mediation.

#### VI. PRACTICAL CONSIDERATIONS

What happens if the management representative is not present at the mediation or does not have full authority to settle? In one reported case, the court ordered mediation when a female employee filed a sexual

harassment complaint against a food chain in the Eastern District of Missouri.<sup>15</sup>

At the mediation session, company counsel was accompanied by the local regional manager, whose settlement authority was limited to \$500.<sup>16</sup> Any settlement amount above \$500 had to be authorized by the company's general counsel, who was not present at the mediation.<sup>17</sup>

When the mediation did not result in a settlement, plaintiff's counsel filed a motion for sanctions for failure to mediate in good faith.<sup>18</sup> The court awarded sanctions of \$1300 against the company and a similar amount against local counsel.<sup>19</sup> The court explained that a decision-maker must be personally present because, without his presence, he learns only what local counsel chooses to relate.<sup>20</sup> Because the general counsel was not present at the mediation, sanctions were warranted.<sup>21</sup>

If I learn from my pre-mediation phone calls to company counsel that the management representative planning to attend does not have full authority to settle, I will not mediate. Similarly, if I learn that the company has employment liability insurance and that the insurance adjuster will not be attending the mediation, I will adjourn, pending the adjuster's attendance.

## VII. ROLE OF MEDIATOR

A typical mediation opens with a joint session. Counsel and their clients will be introduced if they haven't previously met during discovery. I will make opening remarks describing the process. I state that after the joint meeting I will be meeting separately with each side, noting that all information disclosed to me during these private caucuses will be held confidential. Confidentiality fosters an atmosphere of trust, which is essential to mediation. Mediation would not be nearly as effective if the parties were not assured that their discussions with the mediator would remain private.

Following my opening remarks, the parties are given an opportunity to make opening statements. Usually that is done by the attorneys. The remarks should be addressed to the opposing side rather than the

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15. *Nick v. Morgan's Foods*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000), *aff'd*, 270 F.3d 590 (E.D. Mo. 2001).

16. *Id.* at 1058.

17. *Id.*

18. *Id.* at 1059.

19. *Id.* at 1064.

20. *Id.* at 1062.

21. *Id.* at 1063.

mediator.

### VIII. MISTAKES IN MEDIATION

I was recently asked to do a training session for EEOC trial attorneys on mistakes by plaintiffs' counsel in employment law mediation. Among the matters I discussed was the failure to have the complainant describe the incidents alleged in the complaint. Often, the attorney describes the incidents and the complainant remains mute or just nods her head. In my opinion, this is a mistake. Rather, I ask the complainant to tell her story first, and then have the attorney briefly outline the issues or summarize her statement. By having the complainant take the lead and describe the incidents, the company's representative and insurance adjuster can visualize what impact the claimant's testimony would have on a jury if the case does not settle.

After the opening statements, I will meet privately with each side, usually starting with the plaintiff. The private caucus permits counsel to argue his or her position outside the presence of his adversary. During the first caucus, I seek to clarify the points made during the parties' opening statements. In subsequent caucuses, I seek to nail down plaintiff's demand in monetary and other terms, and then ascertain defendant's offer, which more often than not is on the low side. I then engage privately in "shuttle diplomacy," seeking to bridge the gap between the parties.

### IX. ADVANTAGES OF SETTLEMENT

During the caucuses, I will point out to the employer the indirect costs of litigation, such as time, stress, distraction from business productivity, and the possibility of unfavorable publicity. I remind the employee and counsel that settlement avoids the expense and risks involved in a lengthy litigation, and allows the employee to move on with his or her life, both mentally and emotionally.

A word of advice: In caucus, although you will want to convince the mediator of the strength of your side to enable him or her to persuade the other side to settle, do not lose credibility with the mediator by overstating your chances of prevailing in litigation. A good approach is to state that you believe you would prevail, while indicating that you are interested in a reasonable settlement.

During the caucuses, I am often asked to convey a candid, neutral assessment of the dispute—an evaluation of the likely outcome or value of a legal claim or defense if it were adjudicated. I do not hesitate to do

so when asked. At some point, to achieve settlement, I may have to tell plaintiff's counsel that I believe his or her case is weak, or suggest to defense counsel that it is unlikely that his or her contemplated motion for summary judgment would be granted. I do this by explaining my opinion and the caselaw that supports it.

Most mediations settle in a day or less. If not, I may continue to mediate by phone (I once settled a case after 30 days of daily phone calls). I persevere, persist, and do not give up until I am convinced it is hopeless. Even if the mediation fails, it is often useful in narrowing the issues. Indeed, in these failed mediations, I am sometimes told a year later that the case settled.

#### X. PREVALENCE OF SEXUAL HARASSMENT

Sexual harassment is still prevalent in today's society. You read about it in the daily press, and a week does not go by without a new case being reported. The Olympic story is one example.<sup>22</sup> On the whole, sexual harassment is rising.<sup>23</sup> Indeed, last year the EEOC received nearly 13,000 sexual harassment complaints, and surveys show no decrease in the prevalence of unwanted sexual attention despite over twenty years of litigation.<sup>24</sup>

#### XI. CONCLUSION

I have often been asked how I like my second career as a mediator. My response has always been positive. Every mediation is different, and it is challenging to devise creative solutions for the different scenarios. The most gratifying part is the opportunity to help people come from conflict to resolution.

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22. *See supra* text accompanying notes 2-4.

23. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT CHARGES, <http://www.eeoc.gov/stats/harass.html> (last visited Oct. 24, 2006) (showing an increase in sexual harassment complaints).

24. *Id.*