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Michael T. Zugelder
Old Dominion University, mzugelde@odu.edu

Paul J. Champagne
Old Dominion University

Steven D. Maurer
Old Dominion University

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DEALING WITH HARASSMENT IN ALL OF ITS FORMS

MICHAEL T. ZUGELDER, J.D.

PAUL J. CHAMPAGNE, PH.D.

STEVEN D. MAURER, PH.D.

Old Dominion University, Virginia

ABSTRACT

Workplace harassment in its many forms presents an increasingly serious challenge for employers, in terms of legal liability and its potential negative effect on employee behavior. This article reviews workplace harassment with attention to the affirmative defense that the Supreme Court has authorized and the factors the courts have considered in deciding whether the defense has been established. That analysis in turn is applied to a discussion of specific actions organizations might take to prevent harassment and create a more positive and effective organizational environment.

Of all the forms of discrimination prohibited by federal law, harassment remains one of the most pervasive and persistent problems in the workplace. Although harassment based on gender remains the most frequent type, workplace harassment can take a wide variety of other forms, including race, age, religion, ethnicity, and even disability, and since the early 1990s a growing number of claims based on these forms have been brought before the federal courts.

This article examines harassment that goes beyond claims based on gender and presents the legal principle of an “affirmative defense” as a basis for reducing

legal liability, and also as a way to promote an organizational climate in which employees are less likely to experience harassing behaviors.

We begin by discussing the legal definition of workplace harassment and use research on sexual harassment to outline what is known about the detrimental effects of harassment on outcomes in the workplace. We look at the elements of an “affirmative defense” and summarize the legal history. We then analyze contemporary forces contributing to potential harassment based on demographic characteristics other than gender. Finally, we describe how the principles of an affirmative defense can be used to develop employer policies and practices that serve to create a harassment-free workplace for all employees.

DEFINITION OF WORKPLACE HARASSMENT

In an early guidance on harassment, the Equal Employment Opportunity Commission (EEOC) recognized and defined sexual harassment as “unwelcome advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” when submission is tied to continuing employment or advancement on the part of the employee [1]. The commission ultimately recognized two forms of sexual harassment as illegal under Title VII. The first of these, “quid pro quo,” involves explicit or implicit requests for sexual favors, while the other, hostile environment, results from cartoons, jokes, personal ridicule, and other behaviors that have the “purpose or effect of unreasonably interfering with job performance” [1]. Although quid pro quo applies only to charges of sexual harassment, in the wake of *Meritor v. Vinson* [2], cases involving hostile environment based on demographic characteristics other than gender began to appear and continue to come before the federal courts.

For many employers, the primary concern associated with harassment is the potential adverse financial and public relations effects of federal lawsuits. The magnitude and financial effect can be shown by recent EEOC statistics which show that in fiscal year 2006, the commission received 23,034 workplace harassment charges and recovered more than \$59.8 million in monetary benefits for charging parties, not including unreported millions awarded through litigation [3]. Perhaps more important, evidence that this problem is becoming worse was revealed in EEOC’s 10-year data, which shows that the number of meritorious charges (i.e., charges with outcomes favorable to charging parties and/or charges with meritorious allegations) has grown by 53 percent from 3,336 in 1996 to 5,109 in 2006 [3].

In addition, a growing body of research evidence finds that harassment can present a host of detrimental effects on workplace outcomes important to an employer’s bottom line. These effects were documented by Willness, Steel, and Lee in a recent meta-analysis of 41 studies of more than 45,000 victims of sexual harassment [4]. For instance, these authors found that victims report significantly

negative levels of satisfaction with coworkers ($r_c = -.316$), supervisors ($r_c = -.285$), and the job itself (global satisfaction, $r_c = -.245$). These negative levels of satisfaction with the job and the social aspects of work were also accompanied by signs of detachment, such as significantly negative relationships between harassment experiences and organizational commitment ($r_c = -.249$) and significantly positive relationships with both work withdrawal (i.e., behaviors such as lateness, absenteeism, and neglectfulness associated with avoiding work tasks, $r_c = .161$) and organizational withdrawal through behaviors such as quitting, retiring, or choosing to be laid off ($r_c = .236$). Beyond the potential detrimental effects of these perceptions on corporate performance, Willness et al. also demonstrated that employers are likely to incur greater health-care and operating costs associated with the significantly negative relationships noted between harassment experiences and workgroup productivity ($r_c = -.221$) and worker well-being factors such as mental and physical health ($r_c = -.273$ and $-.247$, respectively) [4]. While this study focused on sexual harassment, it seems only reasonable to expect that harassment based on factors such as race, religion, disability, age, etc., will, over time, come to present a similar set of hazards to corporate performance.

Clearly, harassment presents two fundamental problems to employers. The first is the legal liability, but beyond that are the adverse effects on employee behavior. The question is: How does an organization respond to legal claims and, at the same time, reduce, if not eliminate, harassment in any form? We examine this question beginning with an overview of the affirmative defense and how the main elements of this concept have been applied to harassment that goes beyond sexual harassment.

Creation of the Affirmative Defense

The application of this concept to claims of sexual harassment comes from the two widely cited U.S. Supreme Court decisions, *Burlington Industries v. Ellerth* [5], and *Farragher v. City of Boca Raton* [6]. While the facts of the cases differ slightly, the ruling of the Court was much the same in each.

In *Ellerth*, the Court took the view that, based on agency principles, an employer should be strictly liable for sexual harassment by a supervisor with immediate authority over an employee. However, when the only issue is hostile environment, the employer is entitled to an affirmative defense, provided that 1) reasonable care was taken to prevent or correct the harassing behavior, and 2) the employee failed to take advantage of the available mechanisms, such as a strong policy prohibiting the behavior and providing sanctions [5].

Similarly, in *Farragher*, the Court took the view that an employer is vicariously liable for actionable discrimination caused by a supervisor but subject to an affirmative defense that looks at the reasonable care taken to prevent harassment as well as the employee's failure to take advantage of corrective opportunities as

stated in the firm's official policy [6]. In other words, if the organization has an appropriate policy and the employee decides not to use it, the employer may not be liable, assuming that the only charge is hostile work environment.

So what, then, is an affirmative defense and when might it be used? As a general rule, if the charge is that the employee has been subjected to a hostile, intimidating, and offensive work environment caused by a supervisor, the employer may not be liable if there is a strong and readily available anti-harassment policy and the employee does not use the policy. If these two elements exist, the employer is generally entitled to summary judgment and the case is disposed of without further review. This is the case only when the supervisor's harassing behavior resulted in no tangible (negative) employment action, such as discharge, demotion, and undesirable job reassignment, and the employee's claim is entirely based on a hostile work environment.

In the wake of *Burlington* and *Farragher*, the EEOC wasted no time in providing written guidance incorporating these decisions' principles for strict liability and the application of affirmative defense. What was surprising, however, was the breadth of the Commission's application of the sexual harassment affirmative defense to other types of harassment claims [7]. The majority opinion in *Burlington* had indeed suggested that the defense was appropriate for all harassment claims under Title VII, including race, gender, national origin, and religion. However, the Commission interpreted *Burlington* as authorizing the defense across the board; not only for Title VII harassment claims, but also for age and disability harassment claims brought under the Age Discrimination in Employment Act and the American with Disabilities Act, respectively.

The following section explores decisions of the federal courts that have considered application of the affirmative defense to other forms of harassment. From an employer's perspective, the problem is that since most of the cases involve summary judgment, there is no extended opinion.

In each of these cases, what is clear, however, is that affirmative defense will be affirmed by the courts when the company had a published policy, employees had various ways to report problems, and appropriate actions were taken once the problem had been reported. When the policy is not well-designed, or worse, not adhered to or followed, affirmative defense will almost certainly be denied.

Race/Color Discrimination

It is well-known that the fundamental purpose of Title VII was to eliminate workplace discrimination suffered by African-Americans. Conduct such as racial slurs, jokes, and derogatory comments based on race or color are strictly prohibited under the law, and after more than forty years of litigation, one might think that racial discrimination and harassment would be under control. In fact, just the opposite is true, and discrimination against other groups, most notably Hispanics, has also become a major area for litigation. In a strange twist of fate,

even more African-American employees now claim that they suffer discrimination because preference is given to Hispanics. The reason for this, according to John Travina of the Mexican Defense League, is because some employers believe that since many Hispanics are recent immigrants, they will be less likely to assert their rights in the workplace than are black citizens [8].

In terms of the data, Commission records indicate that from 2000 to 2005 more than 170,000 claims based on race were received. During that same period, monetary benefits totaled more than \$430 million. In addition, when EEOC-sponsored litigation related to race claims is considered, more than 51 percent involved a claim of harassment in addition to more traditional racial discrimination. Even though the Commission does not maintain a statistical breakout of claims found meritorious strictly on the basis of harassment, it is clear that this has become a major issue for the federal courts [9].

For example, in *Burrell v. Crown Central Petroleum, Inc.*, the court found that the affirmative defense had been established because the employee, a telex operator at a gas and oil facility, failed to use established policies for reporting the offensive behavior [10]. Concluding that it would be difficult to imagine what more the employer could have done to provide for a meaningful opportunity to avoid harassment and thereby promptly provide remedial action, the court in this decision specifically noted the company's multiple harassment policies, the fact that these policies provided various means for reporting problems, the fact that they had been communicated and posted throughout the refinery, and, ultimately, the fact that there had been substantial training provided by the employer. In fact, one of Crown's policies was one modeled after the EEOC guidance of 1999 prohibiting all forms of discrimination across the board, including harassment [10].

Similarly, in *Watson v. City of Topeka*, a middle manager in a city public works department sued based on racial slurs, a derogatory slide presentation, and sundry nonverbal abuse by his supervisor [11]. The court here denied summary judgment, arguing that a rational jury could find that the workplace was permeated with racial-discriminatory verbal and nonverbal behavior. However, and without a detailed discussion of the city's policy, the court concluded that the city was entitled to the affirmative defense because the plaintiff had failed to complain about the harassment he allegedly suffered [11].

The opposite result, however, occurred when the facts showed that an employer, even with a well-worded published policy, failed to follow through with an investigation in good faith. For example, in *Gaskins v. BFI Waste Service*, a jury verdict of \$2,600,000 was affirmed for racial harassment claims asserted by two African-American drivers of the employer's waste services company [12]. In denying the defendant's assertion of the affirmative defense, the court in this case ruled that although the employer had anti-harassment policies in its handbook and these policies were also posted where employees could see them, the employer had failed to act on complaints, had not reasonably investigated complaints that

had been made, and had waited an unreasonably long period of time for any resolution of the problem. For these reasons, the employer's policy and procedure were viewed as defective, and the jury's rejection of the affirmative defense was upheld [12].

Summary judgment based on the affirmative defense was also denied in *Hightower v. Roman* [13]. There the plaintiffs, two African-American laborers in the employer's caulking company, detailed daily derogatory racial epithets and other derogatory physical and verbal behavior, and filed suit for racial harassment. Although the employer had a reporting policy, it was found egregiously defective because it provided no multiple channels of reporting, the only channel being to the immediate supervisor who in this case was the source of the harassment. Because the policy was ineffective, the affirmative defense was denied [13].

Similarly, in *Hardy v. U.S.F. Reddaway, Inc.*, African-American dock workers described multiple incidents of racial discrimination, racial graffiti, hangmen's nooses, and other forms of racial harassment [14]. In denying the affirmative defense, the court noted that the instances of racial harassment had been reported on a number of occasions and that even if the employees had not reported each specific instance of harassment, that was forgiven in this case because the employer had failed to investigate the claims that were reported and had allowed a culture of racism to exist within the company [14].

Finally, the employer's policy and its failure to investigate were both grounds for denying the affirmative defense in *Walker v. Thompson* [15]. In this case, two African-American employees sued, asserting that they had suffered racial epithets and offensive remarks and comments over the course of several years. Ultimately, the employees resigned and filed EEOC claims. The employer asserted the affirmative defense based on a posted policy and a failure to report. In denying summary judgment, the court noted the evidence was in conflict as to whether any policy specifically addressing racial harassment was distributed, and whether the employer had seriously used care in investigating racial harassment claims [11].

National Origin

National origin discrimination occurs when an employee is treated less favorably because s/he comes from a particular place or because others believe that the person has a particular ethnic background. This form of discrimination can also occur when a person is treated less favorably at work because of marriage or other association with someone of a particular nationality. Here too, harassment in the form of ethnic slurs that create a hostile work environment based on national origin can be a problem, and what makes this especially interesting and complex is the obvious overlap between national origin and race/color, as well as religion, as in the case of Muslims [16].

The first hostile environment claim of any kind recognized by a circuit court was based on national origin. In *Rogers v EEOC*, the Fifth Circuit ruled that a Hispanic employee in an optometrist's office had a valid claim of hostile environment arising from the office's practice of segregating its Hispanic customers [17].

Since 2000, the Commission has seen a steady flow of these kinds of charges. During fiscal years 2000-2006, more than 58,000 claims were filed, including 9,046 in 2002 alone, and more than \$126 million has been awarded. As is true in all areas, the EEOC does not differentiate between harassment and discrimination. However, more and more of the claims finding their way into the federal courts have the former as the focus [18].

In the wake of the Sept. 11 attacks, the EEOC has pursued litigation in a number of cases in which persons of Middle Eastern origin or of Muslim faith have claimed national origin harassment. For example, in *EEOC v. Plaza Operating Partners, Ltd., d/b/a The Plaza Hotel, Fairmount Hotels & Resorts, Inc.*, a settlement of \$525,000 was accepted by twelve employees who alleged that managers called them Osama, Al Qaeda, and Taliban, and that an antidiscrimination policy had not been distributed [19]. Also, in *EEOC v. Pesce, Ltd.*, an upscale Houston restaurant agreed to pay \$150,000 to an Egyptian-born general manager who was required to change his name and pass for something Latin [20].

However, beyond these settled cases, the federal courts have been involved. For example, in *Simoudis v. Ford Motor Co.*, Ford successfully obtained summary judgment based on the affirmative defense [21]. In this case, a Greek-American employee contended that he was subject to a hostile work environment as a result of disparaging comments and jokes about his heritage, and specifically was discriminated against by Ford for filing workers' compensation claims. The trial court disagreed, and the court of appeals affirmed that decision noting that Ford did act to prevent harassment, including providing mechanisms employees could use to bring complaints for national origin hostile environment. The plaintiff had never once filed a hostile environment claim with the company [21].

Likewise, in *Esiscopo v. General Motors Corp.*, GM was awarded summary judgment for a situation in which the plaintiff, a naturalized citizen born in Italy, worked for GM for more than 30 years, but asserted that for six years in the wake of the bombing of the Alfred E. Murrah Building in Oklahoma City, fellow employees and ultimately his supervisor repeatedly exposed him to ethnic slurs, threats, and attempted assaults [22]. The man filed his charge with the EEOC, filed a grievance with GM, and ultimately voluntarily retired. Finding that GM had a long-standing policy against harassment based on national origin and also finding that the plaintiff had failed to make use of the policy, the affirmative defense was proven and the case dismissed [22].

On the other hand, an employer's claim of affirmative defense was denied in *Sefiane v. Wal-Mart Stores* [23]. Sefiane, an assistant manager of Moroccan descent, complained that his supervisor had subjected him to degrading ethnic

slurs, humiliation, and abuse before others. In denying the company's summary judgment motion based on the affirmative defense, the court stated that there remained a genuine question of fact in terms of whether Wal-Mart had taken reasonable care to prevent and correct the supervisor's allegedly ongoing harassing behavior. It was further evident to the court that Wal-Mart took no action against the supervisor in question, and instead transferred the plaintiff to a night shift [23].

In another action, the employer was denied summary judgment and the affirmative defense as a matter of law. In *Collins v. CNF Services Co., Inc.*, Collins was an accountant for CNF Services for 23 years [24]. After the Sept. 11 attacks, she complained of repeated racial comments and epithets and other harassing treatment by her co-workers, including one with supervisory responsibilities. She complained to management, requested a transfer, and ultimately took medical leave and was terminated. The court held the matter appropriate for trial and denied the employer's summary judgment motion, noting that the plaintiff had made a complaint and that the employer had failed to address the harassment and correct the matter [24].

Age

Clearly, one of the greatest potential growth areas in discrimination charges is that associated with claims filed by workers over age 40 under the Age Discrimination in Employment Act (ADEA) of 1967. The basis for this probable growth in discrimination claims is rooted in three factors. First, labor force statistics reveal that workers over age 55 make up the fastest growing segment of the U.S. labor force and that, by 2010 more than 50 percent of the U.S. labor force will be 40.6 years old and will therefore fall under the protections of the ADEA [25]. Thus, simple demographics reveal that employer exposure to such claims is growing by virtue of the fact that over-40 workers occupy a large and rapidly growing segment of the work force.

Second, and perhaps more ominously, studies indicate that discrimination against older workers is socially acceptable. This is rooted in the notion that, although discrimination based on sex and gender is clearly unacceptable, discrimination against older workers [26] does not seem to carry the same taboo status in society and the workplace [27] and is even seen by employers and workers to be politically correct and justifiable because older people have had their day [28]. Such attitudes clearly indicate that older workers may be subject to intentional discrimination and can expect little sensitivity to their concerns about employer practices affecting them adversely.

Finally, evidence exists that older workers realize that they are being discriminated against. For instance, a 2003 study by AARP reported that fully two-thirds (67%) of employed workers aged 45 to 74 who completed the survey viewed discrimination as a fact of life and that this perception was even more commonly

held (72%) by Blacks and Hispanics [29]. Overall, such findings indicate that workers are increasingly aware of age discrimination and are therefore increasingly likely to translate this awareness into relief through the courts [29].

Taken together, these three factors may explain why ADEA claims now constitute more than 22 percent of the claims handled by the EEOC and are growing year by year. Of particular importance to this discussion is the fact that many such charges pertain to adverse impact claims that raise the question of whether an affirmative defense can or should be used to defend against such allegations.

Although the EEOC recognizes a claim under the ADEA for hostile environment, its guidelines do not address it, and the courts are in conflict. Even though the majority of the federal appellate courts that have had the opportunity to consider the claim have rejected it, the Second, Sixth, and Ninth Circuits have considered hostile environment age claims to be viable. Of note here is the decision in *Crawford v. Medina General Hospital*, in which a hospital billing employee in her 50s alleged that the hospital violated the ADEA by creating a hostile work environment as a result of derogatory and age-related comments made by her supervisor [30].

In terms of lower court decisions, a Texas district court, in *Ocampo v. Laboratory Corp. of America*, ruled that a clinical service representative for Lab Corp. could not proceed with a hostile age claim arising from supervisor age-based abuse because the company policies were unequivocal in forbidding harassment, offered multiple avenues to complain, and provided prompt and effective investigation [31]. Further, because Ocampo had never filed a complaint, the affirmative defense was conclusively established [31].

Likewise, a North Carolina district court, in *Oleyar v. County of Durham*, ruled that the affirmative defense was applicable to an ADEA hostile environment claim made by a terminated county employee over age 50 [32]. The court found that both elements of the affirmative defense were present, since the employer had policies in place prohibiting discrimination, as well as a grievance and appeal process. The plaintiff was familiar with the policies and procedures but had never filed a formal grievance [32].

On the other hand, in *Tate v. Main Line Hospitals, Inc., et al.* the court recognized the viability of a hostile environment claim based on age and rejected the affirmative defense in a case brought by a senior nurse [33]. The court noted that the hospital maintained no anti-harassment policy or complaint procedure, and had failed to take corrective action when the claims were reported [33].

Disability

When Congress enacted the Americans with Disabilities Act (ADA), it estimated that about 43 million people in this country had a disability covered by this law. Still, most anti-harassment policies only mention handicapped harassment in

passing. Yet recently, courts have interpreted the ADA to require employers to protect qualified disabled workers from a hostile environment (a/k/a harassment) based on a disability. Clearly, employers need to ensure that they are not leaving themselves open to these claims [34].

Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in terms of any condition of employment. The ADA mirrors Title VII in terms of coverage, and the standards also apply to federal sector employees under Section 501 of the Rehabilitation Act. Here again, the statistics should be of concern. Between 2000 and 2006, the Commission received more than 109,000 complaints of discrimination based on disability. Of these, approximately 60 percent were found to be without cause, but more than 3,000 claims were successful, and a bit more than \$290 million in monetary benefits was awarded [35].

One of the earliest decisions that recognized hostile environment based on a disability as a viable cause of action was brought before the court in *Fox v. General Motors* [36]. Here, an employee who had maintained several jobs at GM for twelve years sustained a back injury requiring disability leave. During periods when he was able to return to work, harassment occurred and continued, including a barrage of verbal harassment, insults, and supervisor conduct that prevented the provision of accommodations for his injuries. The case was tried, and the plaintiff was awarded \$200,000 in damages, which included emotional distress [36].

In *Davis-Durnil v. Village of Carpentersville, Illinois*, a female police officer failed to establish a hostile environment claim when she was placed on administrative leave for posttraumatic stress disorder [37]. Although finding no cause for action, the court did say that an affirmative defense would have applied because the department had an established harassment policy that the officer failed to use. Conversely, in *Arrieta-Colon v. Wal-Mart Puerto, Inc., a/k/a Wal-Mart Store 1854*, a jury verdict with punitive damages was levied on the company for failing to correct a disability harassment problem known to the employer [38]. The firm's utter failure to correct the harassment reported by the employee was found to justify the trial court's exclusion of any consideration by the jury of the affirmative defense [38].

Religion

Finally, when it comes to worker complaints of religious discrimination and harassment, the numbers over the past few years have jumped dramatically, driven, as noted earlier, primarily by claims of retaliation against Muslims, of whom an estimated 5 million to 7 million live in the United States. But in a much more gradual trend, complaints of discrimination involving religion have mounted—up 85 percent over the past decade. As more and more employees have

become aware of their rights under Title VII, a survey sponsored by the Society for Human Resource Management found that 20 percent of respondents had seen an increase in the number of requests for accommodation over the past five years. In addition, 20 percent were aware of employees attempting to convert co-workers, and more than 33 percent said there were now many more religions represented in their work forces [39].

Even though the number of cases brought by employees before the EEOC constitute a relatively small percentage of overall workplace discrimination complaints, they are rising at a much faster rate than virtually any other type of claim. Consider the statistics. Since 2000, almost 14,000 complaints have been received, including 2,340 charges in 2005 alone. During that time, merit resolutions have averaged slightly more than 20 percent of cases and more than \$42 million has been recovered on behalf of charging parties and other aggrieved individuals. Add to this the monetary benefits obtained through litigation. This increase reflects the growing interjection of religion into the workplace, and it creates a new set of challenges, including the potential for many more charges of harassment. Some employers have adjusted by promoting religious tolerance, but others have not, and litigation has become increasingly common [40].

For example, in *Apelbaum v. Northeast Illinois Regional Commuter Railroad Corp.*, Apelbaum, a naturalized citizen of Israel and of Jewish faith, complained of eleven instances of religious discrimination and hostile environment incidents [41]. However, the case was dismissed on summary judgment based on the affirmative defense. The railroad had an undisputed, established, equal employment policy that was provided for the plaintiff, but he did not use its procedure and filed no reports of harassment [41].

Conversely, a summary judgment based on the affirmative defense was denied in *EEOC v. Preferred Management Corp.* [42]. Here, the health-care employer failed to address complaints of religious harassment and, in addition, provided no training and had no policy. In its opinion, the court found that the affirmative defense could not be used.

DISCUSSION

As the literature clearly shows, the problem of illegal workplace harassment based on a hostile and offensive work environment now goes far beyond just sexual harassment. Today, just about any person who belongs to a protected class under federal law may bring a viable claim of harassment against his/her employer, and this litigation can result in embarrassing judgments and substantial monetary awards. The question is: What should an organization do, not only to protect itself, but also to prevent harassing behavior from occurring in the first place?

First, it is important to realize that policies designed to address sexual harassment need to be extended to all forms of harassment, and these policies need to be

followed. All of the suggestions offered by the EEOC in its early Guidance on Sexual Harassment should be extended to other harassment based on race/color, ethnicity, religion, age, and disability. Also, harassment prevention training should be ongoing and not an action that the company takes once.

Training of supervisors should be upgraded to sensitize people about harassment as a general issue. Specifically, supervisors should learn how to identify harassing behaviors and differentiate them from something that may be innocent and nonthreatening. They need to understand how to investigate and act on complaints and to not make matters worse by ignoring or dismissing an employee who brings forward a complaint. Further, if an outside vendor is used instead of company personnel, it is important to ensure that the provider does, in fact, have on staff subject matter experts who can update the course content to reflect changes in the law [43].

In addition to these approaches to harassment prevention and correction, organizations probably should consider other, even more proactive steps to prevent harassment. For example, to identify problems before they fully develop, firms might engage in an ongoing process of harassment auditing [44]. This would include selected interviews with managers and first-line supervisors, as well as direct observation. In addition, questionnaires, such as those shown in Table 1, might be used. In the event that questionnaires reveal potential harassment, employers should take immediate action to stop the behavior and correct whatever situations precipitated it.

Although a survey may help identify potential problems, it would not necessarily eliminate the risk of litigation. It may well be, for example, that an employee has been subjected to religious, age, or other harassment and doesn't report it in the survey out of fear that his/her anonymity might be compromised and that retaliation would follow. Even so, getting information early is crucial to prevention of harassment, for by the time a complaint is filed, the situation may have become so severe that it's nearly too late to correct the problem.

Beyond the use of human resource auditing and assuming that prevention is the firm's goal, what else can be done? One approach would be to encourage the creation of an atmosphere of respect across the organization. A cornerstone of this approach relies on a clear and consistent message that all managers are responsible for ensuring that employees from all walks of life are treated with respect and are able to enjoy a harassment-free work environment.

For example, to promote a harmonious work environment and also to maintain a professional atmosphere, Marathon Oil Corporation has a published policy prohibiting all forms of harassment that create an offensive work environment [45]. This includes, but is not limited to, insulting, intimidating, or discourteous conduct, as well as derogatory jokes or comments relating to race, color, religion, sex, age, disability, national origin, sexual orientation, or any other protected status under applicable employment law. At The Health Care Group, all managers are provided with a statement of policy that stresses that THCG believes that

Table 1. General Harassment Awareness
(Examples of Questions*)

| Situation: | Are you currently aware of or have you recently observed this behavior within the organization? (Please circle your answer.) | |
|---|--|----|
| Religious Harassment | | |
| 1. Managers/employees remark that all people of a particular religious background have some common negative trait. | YES | NO |
| 2. Managers/employees make fun of religions and customs. | YES | NO |
| 3. Managers/employees tell derogatory religious jokes or post/show religious cartoons. | YES | NO |
| 4. Managers/employees make disparaging remarks about specific religious leaders. | YES | NO |
| Age Harassment | | |
| 1. Managers/employees make fun of others because of their age. | YES | NO |
| 2. Managers/employees make disparaging remarks about some worker that relate to his/her age (refer to someone as the "old lady"). | YES | NO |

*Similar questions should be asked about race, gender, and other forms of harassment.

employees should be able to enjoy a workplace free from all forms of discrimination and harassment [46].

Another preemptive approach to supervisor harassment would be to alter the culture and empower all employees to act as responsible citizens in creating a harassment-free workplace. Indeed, because employees often witness hostile acts by other supervisors, a logical approach to controlling such acts is to ensure that everyone understands both their rights and obligations in reacting to what they see. In an analysis of the key issues that affect the ability of observers to act responsibly and effectively in dealing with sexual harassment events, Bowes-Sperry and O'Leary-Kelly suggested that the beginning point in effective observer

involvement relies on a well-informed ability to determine whether workplace events are truly harassment events that require an active response [47]. While Bowes-Sperry and O'Leary-Kelly posed this issue as a beginning point in dealing with sexual harassment, it seems at least as great an issue for employees who must determine whether to become involved based on the often-subtle and sometimes socially acceptable forms of harassment found in supervisory decisions and behaviors. Thus, a logical beginning point for preventing supervisory harassment is to ensure that all employees, not just supervisors, are made acutely aware of the nuances and particular characteristics of the many forms of workplace harassment.

In addition to promoting the ability of workers to distinguish harassment from more benign events, Bowes-Sperry and O'Leary-Kelly suggested that corporate leaders should take steps to support the ability and willingness of observers to act on potential harassment situations [47]. In particular, they suggest a need for corporate policies and training activities that address employee uncertainties regarding their obligations and risks as observers of harassment behavior. Overall, their arguments suggest that harassment activity can be greatly diminished through corporate efforts to create an environment in which employees understand that intervention behavior is part of their work role and that involvement in preventing harassment is seen as a positive action on behalf of the organization, rather than an act of dissent.

CONCLUSION

Harassment based on claims involving hostile and offensive work environment on the part of supervisors continues to be a significant problem for American firms. Beginning with claims of sexual harassment, the problem has evolved into charges of hostile environment based on race, ethnicity, age, disability, and religion. To aid employers in addressing this issue, we examined the potential sources of harassment by various classes of workers and presented the legal elements of an affirmative defense as the basis for preventing and defending against hostile environment harassment by supervisors.

On the one hand, there is clearly significant legal liability. But it is also true that hostile environment harassment affects employee behavior in a number of important ways. Establishing the elements of an affirmative defense can reduce legal liability, while other more proactive actions that focus on prevention would also seem to be important and would in many ways be consistent with the spirit of affirmative defense.

ENDNOTES

1. Guidelines on Discrimination Because of Sex, 29 C.F.R. Sec. 1604.11(a).
2. *Meritor v. Vinson*, 477 U.S. 57 (1986).
3. EEOC, Harassment Charges FY 1997–FY 2006, available from <http://www.eeoc.gov/stats/harassment.html>

4. C.R. Willness, P. Steel, and W. Lee, A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment, *Personnel Psychology*, 60, 127-162, 2007.
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Direct reprint requests to:

Michael T. Zugelder
College of Business and Public Administration
Old Dominion University
Norfolk, VA 23529
e-mail: mzugelde@odu.edu