J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 9(1) 39-53, 2000-2001

THE AMERICANS WITH DISABILITIES ACT AND THE HOSTILE WORK ENVIRONMENT

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ABSTRACT

To date the appellate courts have not explicitly recognized the hostile work environment as a cause of action under the Americans with Disabilities Act. They have not done so even though the language in Title VII that created the hostile work environment is identical to language found in the Americans with Disabilities Act. This article reviews the hostile work environment under Title VII and proposes the elements for a hostile work environment under the Americans with Disabilities Act.

Title VII of the Civil Rights Act of 1964 established a cause of action not only for discriminatory acts with tangible employment consequences, but also one for hostile work environment [1]. Title VII provides "[i]t shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin" [2]. The hostile work environment was first established as a cause of action in race discrimination cases [3]. The Supreme Court in *Meritor Savings Bank v. Vinson* recognized that a hostile work environment was also actionable in sex discrimination cases [4, at 73]. In establishing this rule the Court borrowed from race-based hostile environment cases [3; 4, at 65-66; 5-8].

The Americans with Disabilities Act (ADA) was passed in 1990 [9]. One of Congress' purposes in passing the ADA was to eliminate discrimination against persons with disabilities in employment, as such people had historically been discriminated against in the employment area [9]. Hence, Title I of the act provides

that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions or privileges of employment" [9, § 12112(a)].

Both Title VII and the ADA use the words "terms, conditions or privileges of employment." This indicates, and some courts have implicitly acknowledged, that both Title VII and the ADA created a cause of action for discrimination based on the hostile work environment [10]. Although the elements for a cause of action for hostile work environment based on sex or race are well established, the elements for hostile work environment based upon the ADA are not. Many of the elements for both should be the same; therefore, while some courts have implicitly acknowledged that such a cause of action exists, no case to date has explicitly adopted the hostile work environment and the elements for it. The following sections focus on the ADA, the hostile work environment as defined by race and sex, and the hostile work environment under the ADA.

AN OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions or privileges of employment" [10].

The ADA covers employers, employment agencies, labor organizations, or joint labor-management committees [9, § 12111(2)]. Employee is defined as "an individual employed by an employer," and an employer is a person or company who employs 15 or more people for 20 or more weeks out of the year [9, § 12111(4)&(5)(A)]. The term employer under the ADA excludes the federal government [9, § 12111(5)(B); 11; 12].

An applicant or employee is a qualified individual under the ADA if s/he has a disability but can perform the essential functions of a job, with or without reasonable accommodation [9, § 12111(8)].

Disability

The *Equal Employment Opportunity Commission* (EEOC) *Guidelines* define disability as "[a] physical or mental impairment that substantially limits one or more of the major life activities of [an] individual" [12, § 1630.2(g)]. A physical or mental impairment is "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory

(including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities" [12, § 1630.2(h)]. Major life activities are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" [12, § 1630.2(l)].

"Substantially limits" encompasses one who is either unable to perform or significantly restricted in performing a major life activity. The determination of the limitation is affected by the nature and severity of the impairment; the duration or expected duration of the impairment; and its permanent or long-term impact [12, § 1630.2(j)].

In *Sutton v. United Air Lines, Inc.,* (discussed elsewhere in this volume) the Supreme Court restricted the meaning of disability, stating that "substantially limits" requires a person actually, at the time, to be substantially limited in a major life activity, not hypothetically or potentially limited [13].

Essential Function

In determining an essential function, the ADA gives some deference to the employer's definition. According to the EEOC, an essential function is a fundamental job duty of the position. Evidence that establishes a function as essential includes the employer's definition of the position and a written job description, how much time is devoted on the job to that function, the consequences if that function is not performed, and the work experience of past and current incumbents in that or similar jobs [12, at 1630.2(n)].

Discrimination

The term "discriminate" includes "limiting, segregating, or classifying . . . an employee in a way that adversely affects the opportunities or status of . . . [the] employee because of the disability of [that] employee" [9, § 12112(b)]. Furthermore, the employer may not use "standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability; or that perpetuate the discrimination of others who are subject to common administrative control" [9, § 12112(b)]. Any qualification standard, employment test, or selection criteria that screen out persons with disabilities is discrimination, unless the standards, tests, or criteria are demonstrated as job-related for the position and are "consistent with business necessity" [9, § 12112(b)]. For example, failing to accommodate for a disability when administering tests is discriminatory; in other words, a test may not be given in a way that measures only the disability and not the skills and aptitude of the person taking the test.

While the employer may not exclude or deny jobs or benefits to a person who is qualified because of disability, an employer is not required to hire or promote an

individual with a disability unless that person is otherwise qualified for the job [9, § 12112(b)].

Reasonable Accommodation

It is also discrimination if the employer fails to make reasonable accommodations, or denies employment opportunities because of the need to make reasonable accommodation, unless to do so would impose an undue burden on the business operations of the employer. The EEOC regulations define reasonable accommodation as "modification or adjustment to the work environment," or to the way in which work in that position is usually performed, that would enable a person with a disability to perform the job [12, § 1630.2(o)]. The regulations also state that the modifications or adjustments must encompass access by a disabled employee to the benefits and privileges of the position that nondisabled employees are able to access [12, § 1630.2(o)]. Examples of reasonable accommodation include making existing buildings and offices accessible to, and usable by, persons with disabilities, "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities" [9, § 12111(9)].

In determining the appropriate reasonable accommodations, the employer may be required to "initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation" [12, § 1630.2(o)]. During this process the employer may enquire as to the "precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations" [12, § 1630.2(o)]. In *Hendricks-Robinson v. Excel Corporation,* the court stated the employer must work with the employee in a flexible way to determine what accommodations can be made in the existing job or, if necessary, what jobs are available for employee reassignment [16]. Reassignment, the court stated, may be required if reasonable accommodations do not allow an employee to perform the essential functions of the job. Reassignment, however, does not require creation of a job, bumping a person out of a job, making a temporary job permanent, or promotion of the disabled employee [16, at 693; 17]. It does require the employer make a reasonable effort to work with the employee to determine an appropriate reassignment. The employee with the disability, moreover, must be capable of performing the essential functions of the new position with or without reasonable accommodations [16, at 694-695].

The employee also has a duty under the ADA to work with the employer to determine what a reasonable accommodation would be [18]. In *Templeton v. Neodata Services, Inc.,* an employee who refused to provide an employer with documentation to enable the employer to determine the appropriate reasonable accommodations was found to be out of compliance with the ADA.

Undue Burden

The following factors determine whether an accommodation is an undue hardship: 1) the net cost of the accommodation after any tax credits, deductions, or outside funding; 2) the overall financial resources of the employer; 3) the type of operation the employer has, including "the composition, structure and functions of the workforce," and the geographic location and association of the facilities; and 4) "[t]he impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business" [12, § 1630.2(p)].

Medical Examination

The ADA also prohibits an employer from conducting a medical examination before a decision to hire is made, and from inquiring whether an employee has a disability. A medical examination and inquiry is permitted, nonetheless, if it is "shown to be job related and consistent with business necessity" [9, § 12112(d)]. Voluntary medical examinations, moreover, are permitted as part of an employee health program available to all employees. It is important to note that the information from these examinations must be treated confidentiality. The information may be given to supervisors and managers only when they need to know an employee's work restrictions in order to make reasonable accommodations [9, § 12112(d)].

AN OVERVIEW OF THE HOSTILE WORK ENVIRONMENT

Relying on the phrase "terms, conditions or privileges of employment" [20], the Supreme Court concluded that Congress intended to establish more than an action for discrimination based on tangible loss of an economic character [21] for sex discrimination [20, at 64; 22]. Citing the *EEOC Guidelines'* definition of actionable workplace conduct to include "[unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" [20, at 65; 23], the Court found harassment leading to noneconomic injury could violate Title VII in sexual harassment cases [20, at 65-66; 24].

Elements

The elements for hostile environment cases are unwelcome conduct, requests for "sexual favors, and other verbal or physical conduct of a sexual nature," and conduct must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive work environment" [20, at 65-67]. In *Harris v. Forklift Systems, Inc.,* the Court stated the conduct must be

"severe and pervasive enough to create an objectively hostile or abusive work environment—[one] a reasonable person would find hostile or abusive;" and one the victim subjectively found to be hostile or abusive [25, at 21]. In *Harris,* the Court held that psychological harm to the victim was not a necessary element, but a factor to be considered. Other factors include "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" [25, at 23]. The *Meritor* opinion further stated that courts must consider the totality of the circumstances in determining whether sexual harassment based on a hostile work environment has occurred; including the "nature of the sexual advances and the context in which the alleged incidents occurred" [12, § 1604._(b); 20, at 69].

The Court also relied on race and national-origin cases to define the level of offensive conduct necessary to qualify as a hostile work environment [20, at 64]. It found the conduct must go beyond mere teasing or "isolated incidents" (unless extreme) to rise to the level of altering the "conditions of employment" [20, at 67; 26]. In *Faragher v. City of Boca Raton,* Justice Souter stated that the Court developed these severe standards to ensure that "Title VII [would] not become a 'general civility code,'" and that generally the courts of appeals have heeded this message [27, at 2283-2284; 28].

Employer Liability Supervisory Harassment

If the supervisor harassing the employee is the owner, or so high up in the business as to be treated as the employer's proxy, the employer has been held strictly liable for the hostile work environment [25, at 17, 19; 27, at 2284; 29; 30]. Moreover, an employer is held strictly liable for supervisory harassment of employees, if the harassment results in a tangible employment action. A tangible employment action is one that affects the hiring, firing, promotion, compensation, or work assignment of an employee. The above are not subject to the affirmative defense [20, at 70-71; 27, at 2284; 31-34].

In *Faragher,* the Court held employers are strictly liable for the hostile work environment created by supervisors, subject to an affirmative defense. The defense consists of two necessary elements: "That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, [and] that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" [29, at 2290-2293; 31, at 2270]. The Court stated that evidence of reasonable care under the first element of the defense could include an anti-harassment policy coupled with a complaint procedure [29, at 2293]. The antiharassment policy, moreover, must allow the employee to bypass a harassing supervisor [29, at 2293].

Employer Liability for Co-Worker Harassment

An employer is liable for co-worker harassment only if the employer either knew about the harassment or should have known about it, and if the employer failed to remedy the situation. This standard is universally accepted by courts for both race and sex-based co-worker created hostile work environments [27 (approving standard for co-worker harassment); 35; 36].

THE HOSTILE WORK ENVIRONMENT AND THE ADA

In addition to the requirement that a person be a qualified individual with a disability, the principal element for a cause of action for a hostile work environment under the ADA is discrimination in terms, conditions, or privileges of employment. This element requires showing that: 1) the individual was subjected to unwelcome harassment; 2) the harassment was based on the individual's disability; and 3) the harassment was sufficiently severe or pervasive to alter the conditions of the individual's employment and created an abusive working environment. The environment must be shown to be both subjectively and objectively hostile. To demonstrate the severe and pervasive nature of the harassment, the following factors should be considered: 1) psychological harm to the victim; 2) the frequency of the discriminatory conduct; 3) the severity of the discriminatory conduct; 4) whether the conduct was physically threatening or humiliating or a mere offensive utterance; 5) whether the conduct unreasonably interfered with an employee's work performance; and 6) whether the employee was harassed by administrative procedures based on his/her disability.

Employer liability should be determined exactly as the Court laid out in *Faragher.* If the supervisor who was harassing the employee is the owner, or so high up in the business to be treated as the employer's proxy, the employer would be held strictly liable for the hostile work environment [27, at 2284, citing 25, at 19; 29; 30]. An employer would also be held strictly liable for supervisory harassment of employees, if the harassment results in a tangible employment action. A tangible employment action is one that affects the hiring, firing, promotion, compensation, and work assignment. These two situations are not subject to the affirmative defense [27, at 2284, citing 20, at 70-71; 31-34].

Employers would be strictly liable for the hostile work environment created by other supervisors subject to an affirmative defense. The defense consists of two necessary elements: "That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, [and] That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" [27, at 2290-93; 31]. The Court stated evidence of reasonable care under the first element of the defense could include an antiharassment policy coupled with a complaint

procedure [27, at 2293]. The antiharassment policy, moreover, must allow the employee to bypass a harassing supervisor [27, at 2293].

An employer is liable for coworker harassment only if the employer either knew about the harassment or should have known about it and the employer failed to remedy the situation [27, at 2275, 228_; 35; 36].

APPLICATION OF THE HOSTILE WORK ENVIRONMENT UNDER THE ADA

While no appellate court has yet explicitly recognized a cause of action for hostile work environment under the ADA, arguably three have done so implicitly, and others have assumed a cause of action without deciding. In *Keever v. City of Middletown,* the Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment for the city [40]. Keever was a city police officer who suffered injury on the job to his neck, back, shoulders, and legs while arresting criminal suspects. As a result of his injuries, Keever missed between 17 to 26 days of work a year, and the city refused to allow him to use injury leave for these absences. After confrontations with the department over his absences, Keever retired and was awarded a 45 percent disability pension. Keever then sued claiming he was harassed because of his disability and his disability related absences. He also claimed the police department failed to accommodate his disability when it refused to assign him to the "less stressful" 11 p.m. to 7 a.m. shift [40, at 810-811]. The appellate court stated that Keever failed to establish "any facts concerning whether the harassment he claims took place was severe enough to create an objectively hostile work environment" [40, at 813]. By applying the facts to the element of a severe and pervasive work environment and applying the objective-person standard, the Sixth Circuit implied that a cause of action exists for hostile work environment under the ADA.

In an unpublished decision, *Williams v. Boeing Co.,* the Court of Appeals for the Ninth Circuit also applied the facts to the elements and found no hostile work environment [41, at *2]. Williams suffered from diabetes. He alleged he was terminated from Boeing because management was dissatisfied with the disability requirements that he eat at his workstation and that he use the bathroom frequently. In this case the court found Williams failed to provide specific dates and instances of harassment and so did not prove the harassment was severe and pervasive. Again, the court implied that a cause of action exists for hostile work environment under the ADA. It should be noted that this is an unpublished decision; there is no definitive rule in this circuit.

Moreover, the Ninth Circuit, in *Baumgart v. State of Washington,* assumed without deciding that a claim for harassment or hostile work environment was cognizable under the ADA [42, at *1]. This was also an unpublished table opinion and was decided seven months after *Williams* [41]. Baumgart, a

social worker, requested accommodation for her disability of allowance to work part-time instead of full-time. The court determined that this accommodation would be an undue burden on the employer. The court found the plaintiff failed to establish a hostile work environment by failing to show that "particular statements or incidents of harassment [were] 'sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment'" [42, at *1].

The Court of Appeals for the Eighth Circuit also presented contradictory holdings. In *Cody v. Cigna Healthcare, Inc.,* the court again indicated a hostile work environment existed under the ADA by simply applying the facts without stating it did not endorse this cause of action [43]. Cody, a nurse, worked for Cigna reviewing records at various doctor's offices in St. Louis. She claimed she suffered from anxiety and depression and that the requirement that she go into "dangerous" areas of the city exacerbated her condition. After a meeting with the executive director, Cody's supervisor confronted her and threatened that "she would suffer the consequences" of going over her head. Cody also found a cup labeled "alms for the sick" on her desk. Coworkers later reported incidents of bizarre behavior by Cody, such as sprinkling salt to keep away evil spirits to references about guns. The executive director met with Cody and observed a noticeable bulge in her purse. He then requested she take a leave with the requirement that she undergo a psychiatric evaluation and counseling. Cody's security access card was then deactivated and confiscated. Upon departure Cody could not open any of the doors [42, at 596-597]. The Court stated "[i]n all constructive discharge and *harassment* cases under the ADA . . . the plaintiff must first make out a prima facie case of discrimination or face dismissal of her claim" [43, at 598, emphasis added]. In determining that Cody did not suffer a hostile work environment, the court stated that Cody failed to establish that she was disabled under the ADA [43, at 598-599].

The implied finding of hostile work environment in *Cody* was short-lived. The Eighth Circuit just five months later decided another hostile work environment case brought under the ADA. In *Wallin v. Minnesota Department of Corrections,* the court stated it would assume without deciding that a cause of action existed for hostile work environment under the ADA [44, at 687-688]. The court concluded that harassment under the ADA must be based on the disability [44, citing 45]. In this case the court found the conduct complained of was not so severe and pervasive to rise to the level of a hostile work environment [44, at 688]. In justification of his claim, however, Wallin pointed "to numerous incidents of friction between himself and his coworkers" [44, at 688]. The court, however, found only three of these incidents of alleged harassment related to Wallin's disability of depression and alcoholism. The first was the suggestion that Wallin's seeing a psychologist was a good method to get vacation; second was a series of drawings of psychiatrist's beds on Wallin's calender on the days he was on leave for depression; and third was an obscene comment from a coworker about

Wallin's alcoholism. The court found these incidents were isolated and did not rise to the level of being severe and pervasive. Thus, Wallin's hostile work environment claim failed [44, at 688].

The Eighth Circuit stated in *Cannice v. Norwest Bank* that the "ADA provides that an employer covered by the act 'shall not discriminate against a qualified individual with a disability because of the disability in regard to . . . terms, conditions and privileges of employment.'" Cannice suffered from depression. The alleged harassment consisted of close monitoring by supervisors, including moving his desk closer to the supervisor, and close monitoring of bathroom breaks. Cannice also related an incident when a group leader tossed a tissue onto his desk labeled "crying towel" [46, at *1-2]. The court noted, however, that the ADA says nothing explicit about the hostile work environment cause of action, and the court declined to decide the issue on this case [46, at *1]. Once again the court found the plaintiff did not meet the requirement that the offensive conduct be based on the disability. In other words, the court did not find the harassment so severe and pervasive that it rose to the level necessary for a hostile work environment [46, at *1-*2].

The Eighth Circuit again stated it was unsure whether a cause of action existed under the ADA for a hostile work environment in *Moritz v. Frontier Airlines, Inc.* [47]. In this case the plaintiff failed to establish that she was a qualified individual under the ADA. The court held that one must establish as a prerequisite a prima facie case that the person is both disabled and qualified to perform the essential functions of the job, with or without reasonable accommodation, and suffered adverse employment action as a result of the disability. Only after this is established may an individual move on to the additional elements of a hostile work environment [47, at 786]. Part of Moritz' duties as a station agent for Frontier included working the ticket counter and gate. Moritz was diagnosed with multiple sclerosis and had weakness in her left leg. This prevented her from adequately performing the gate duty of assisting passengers on and off the plane [47, at 785-786]. The court found the gate duties, including assisting the passengers on and off the plane, were an essential function of the position. Moritz could not perform this duty without the assistance of another employee. Applying the undue burden defense to reasonable accommodation, the court concluded that, as Frontier was a start-up airline, it could not reasonably accommodate Moritz. The court found that the cost of providing an employee to assist Moritz would not be reasonable. Therefore, because Moritz could not perform the essential functions of the position, with or without reasonable accommodation, she was not a qualified individual under the ADA. The court then dismissed her complaint for failure to establish the element of a qualified individual with a disability [47, at 787-788]. The differing applications by the Eighth Circuit under the ADA—one decision applying the ADA hostile work environment and the other three disavowing and at the same time applying it—does not leave the attorneys or lower courts with a clear path to follow.

The Court of Appeals for the Fifth Circuit also failed to either recognize or disavow the hostile work environment under the ADA as a cause of action. In *McConathy v. Dr. Pepper/Seven Up Corporation,* the court stated it would proceed as if the hostile work environment cause of action existed [48], but that "[t]his case should not be cited for the proposition that the Fifth Circuit recognizes or rejects an ADA cause of action based on hostile environment harassment" [48, at 563]. In *McConathy,* the plaintiff suffered from temporomandibular joint disease and had two surgeries as a result. McConathy's supervisor told McConathy she used too much of her health care benefits and she should not take any more time off. After a third, but unrelated, surgery, the supervisor began excluding McConathy from meetings and instructed her staff not to inform her of business projects. McConathy was eventually laid off due to a restructuring at Dr. Pepper. Here the court found it unnecessary to establish the hostile work environment because the plaintiff failed to establish conduct so severe or pervasive as to alter the conditions of her employment and create an abusive work environment [48, at 563].

Stating it did not find the current case an appropriate one in which to find hostile work environment as a cause of action, the Court of Appeals for the Tenth Circuit followed the long line of circuit courts that did not either affirm or disaffirm this as a cause of action [49]. In *Anthony v. City of Clinton,* the plaintiff, a police officer, suffered from depression. Prior to his diagnosis in 1996, Mr. Anthony's performance was rated as "very good" or "satisfactory" on his annual reviews. After Anthony returned to work after a hospital stay for depression, his supervisor increased supervision of him, subjected him to "verbal abuse," and criticized his work The *Anthony* court found the plaintiff failed to establish the conduct was sufficiently severe or pervasive to alter the conditions of employment and make the work environment abusive [49, at *3].

The Court of Appeals for the Third Circuit likewise did not recognize a cause of action for a hostile work environment based on the ADA. In *Walton v. Mental Health Association of Southeastern Pennsylvania,* the court noted that the language in Title VII that created a cause of action for a hostile work environment was virtually the same as that found in the ADA [50, at 666, relying on 51]. Walton suffered from depression, had been hospitalized many times for it, and missed from 21 to 50 days of work a year. Walton was terminated due to her most recent absence, which began on October 26, 1993 and was scheduled to end on January 10, 1994. Walton alleged harassment by her supervisor, claiming he required she perform nonessential duties she could not perform, repeatedly calling her when she was hospitalized to see when she would return to work, and informing Walton's co-workers not to give Walton information about her job while she was gone. The Third Circuit stated:

> In the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose—to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner

> of proof under one statute should inform the standards under the others as well. Indeed, we routinely use Title VII and ADEA caselaw interchangeably, when there is no material difference in the question being addressed [50, at 666, quoting 52].

Moreover, the court asserted "[t]his framework indicates that a cause of action for harassment exists under the ADA" [50, at 666]. Nevertheless, the court concluded it would assume without deciding that the cause of action exists. The court did note that a district court in the Third Circuit had recognized this cause of action [50, at 667, referring to 53]. Moreover, it referred to the Sixth Circuit's decision in *Keever* as recognition by a circuit court of the existence of the hostile work environment cause of action under the ADA. In application, the court concluded Walton had failed to show the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment [50, at 667].

The Court of Appeals for the Seventh Circuit, in *Silk v. City of Chicago,* also assumed (without deciding) that a cause of action existed under the ADA for a hostile work environment [54, at *1]. The court found Silk had failed to show the environment was so severe or pervasive that it constituted a hostile work environment [54, at *12-*13]. The court also referred to the affirmative defense as set out by *Faragher* and implied Silk also did not sufficiently inform his superiors of the alleged harassment. There was no mention of whether the first element of the affirmative defense, that the employer exercised reasonable care to prevent and acted promptly to correct any harassment, was met [54, at *11-*12]. It appeared from the facts, however, that the hostile environment in this case may have been severe and pervasive enough to avoid summary judgment and justify submission to a jury. Silk suffered from severe sleep apnea, which condition required he be assigned to a stable shift. For example, Silk, who was a police officer, alleged that after accommodation for his disability limited him to working the day shift he was subjected to constant derogatory and hostile comments from coworkers and supervisors. He complained his employment ratings fell, he was forced to quit his second job, and he was harassed administratively by not being assigned patrol cars to supervise. This resulted in increased coworker and supervisory hostility. Moreover, he was physically threatened by a coworker on one occasion, and by a supervisor on another. And, after the report of the threat, the other harassment continued unabated [54, at *2-*3]. In this case many material facts appear to be in dispute; however, the Seventh Circuit did not remand the case for further proceedings. This could be due to the confusion over the status of an ADA hostile work environment cause of action, or perhaps it is the reluctance of the Seventh Circuit to be the first to definitively find such a cause of action.

Additionally, the court noted that at least two other circuits had accepted a cause of action for hostile work environment under the ADA, referring to the Sixth-and Eighth-circuit cases cited above [54, at *9]. It is interesting to note that the Eighth

and Ninth circuits have handed down conflicting decisions on the existence of the hostile work environment under the ADA. This exemplifies the confusion among the circuits and even within a circuit on this issue.

CONCLUSION

The courts should clear up this confusion by establishing a hostile work environment as a cause of action under the ADA. As the Third Circuit noted, Title VII of the Civil Rights Act of 1964 also does not explicitly establish a cause of action for hostile work environment. The language, however, on which the hostile work environment is based under Title VII is identical to that in the ADA: it shall be unlawful to discriminate based upon the "terms, conditions, or privileges of employment." This indicates Congress intended to create a cause of action for a hostile work environment under the ADA. Congress knew this cause of action existed under Title VII when it passed the ADA. This is exemplified by the Court when it stated in *Faragher* that "the force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding" [27, at 2275, 2286]. This demonstrates that Congress approved this cause of action before the ADA was passed. This is further evidenced by the fact that the *Meritor* decision came out in 1986 [20], while the ADA was not passed until 1990 [9]. It is probable, considering these facts, that Congress deliberately used the same language in the ADA to effect the same result.

The appellate courts, however, are either unwilling to follow this reasoning or are waiting for the right case. In the meantime, the district courts and attorneys are assuming this is a cause of action, as is evidenced by the number of cases at the appellate level [55]. The hostile work environment factors outlined above, as well as the Supreme Court decision restricting disabilities, will ensure the ADA does not become "a general civility code" [27, citing 20, at 70-71]. Therefore, the appellate courts should take this opportunity to recognize this cause of action.

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ENDNOTES

1. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (1994); *Rogers v. EEOC,* 454 F.2d 234 (5th Cir. 1971) cert. denied, 406 U.S. 957 (1972). It is important to note that a hostile work environment can result in tangible acts if a person is constructively discharged as a result of the harassment.
2. 42 U.S.C. § 2000e-2(a)(1).
3. *Rogers v. EEOC,* 454 F.2d 234 (5th Cir. 1971) cert. denied, 406 U.S. 957 (1972).

4. 477 U.S. 57 (1986).
5. *Firefighters Institute for Racial Equality v. St. Louis,* 549 F.2d 506 (8th Cir.) cert. denied, sub norm.
6. *Banta v. United States,* 434 U.S. 819 (1977).
7. *Gray v. Greyhound Lines, E.,* 545 F.2d 169 (D.C. Cir. 1976).
8. The Court also looked to *EEOC Guidelines* on sex discrimination, 29 C.F.R. § 1604.11(a) (1985).
9. The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(b) (1994).
10. See *Cannice v. Norwest Bank Iowa N.A.,* 189 F.3d 723 (8th Cir. 1999); *Baumgart v. Wash.,* 189 F.3d 472 (9th Cir. 1999) (unpublished table decision); *Anthony v. City of Clinton,* 185 F.3d 873 (10th Cir. 1999) (unpublished table decision); *Williams v. Boeing Co.,* 166 F.3d 1219 (9thy Cir. 1999) (unpublished table decision); *Walton v. Mental Health Ass'n of S.E. Pa.,* 168 F.3d 661 (3rd Cir. 1999); *Wallin v. Minn. Dpt't of Corrections,* 153 F.3d 681 (8th Cir. 1998); *Silk v. City of Chicago,* 1999 WL 804008 (7th Cir. 1999).
11. The federal government is covered by the Vocational Rehabilitation Act, which provides virtually the same protections as the ADA. Moreover, Congress intended the case law developed under the Vocational Rehabilitation Act to be applicable to cases under the ADA.
12. Regulations to Implement the EEOC Provisions of the ADA, 29 C.F.R. § 1630.2(g) App. (1999).
13. *Sutton v. United Airlines, Inc.,* 119 S. Ct. 2139 (1999).
14. It should be noted that EEOC guidelines are regulations passed by a federal agency (EEOC) and thus they do not have the force of law, but are generally given deference by the courts.
15. *Dalton v. Subaru-Isuzu Automotive, Inc.,* 141 F.3d 667, 674 (7th Cir. 1998).
16. *Hendricks-Robinson v. Excel Corporation,* 154 F.3d 685 (7th Cir. 1998).
17. See also *Dalton v. Subaru-Isuzu Automotive, Inc.,* 141 F.3d 667 (7th Cir. 1998) (holding that an employer may designate light-duty positions as temporary and reserve them for temporarily disabled employees); *Mengine v. Runyon,* 114 F.3d 415 (3rd Cir.1997) (stating an employer is not required to create a job for a disabled employee).
18. *Templeton v. Neodata Serv., Inc.,* 162 F.3d 617, 619 (10th Cir. 1998) (quoting *Beck v. Univ. of Wis. Bd. of Regents,* 75 F.3d 1130, 1135 (7th Cir. 1996)).
19. *Hankins v. Gap, Inc.,* 84 F.3d 797, 801 (6th Cir. 1996) (quoting 12, § 1630.2(d)).
20. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 63 (1986) (citing 42 U.S.C. § 2000e-2(a)(1)).
21. Referred to as quid pro quo harassment, see 20, at 65.
22. (20, citing *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 70o2, 797, n. 13 (1978) quoting *Sprogis v. United Airlines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971)).
23. (20, citing EEOC Guidelines on Discrimination because of Sex, 29 C.F.R. § 1604.11(a) (1985)). The Court state that EEOC guidelines "while not controlling upon the courts . . . constitut[ed] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" [20, (quoting *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-42 (1976))].
24. *Rogers v. EEOC,* 454 F.2d 234 (5th Cir. 1971) cert. denied 405 U.S. 957 (1972).
25. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993).
26. *Henson v. Dundee,* 682 F.2d 897, 904 (11th Cir. 1982).

27. *Faragher v. City of Boca Raton,* 119 S. Ct. 2276 (1998).
28. *Oncale v. Sundowner Offshore Serv. Inc.,* 118 S. Ct. 75 (1998).
29. *Burns v. McGregor Electronic Indus., Inc.,* 955 F.2d 559, 564 (8th Cir. 1992).
30. *Torres v. Pisano,* 116 F.3d 625, 634-35 (2nd Cir.) cert denied, 118 S. Ct. 563 (1997).
31. *Burlington Indus., Inc. v. Ellerth,* 119 S. Ct. 2257, 2269 (1998).
32. *Anderson v. Methodist Evangelical Hosp.,* 464 F.2d 723, 725 (6th Cir. 1972).
33. *Kotcher v. Rosa and Sullivan Appliance Ctr.,* 957 F.2d 59, 62 (2nd Cir. 1992).
34. *Steele v. Offshore Shipbuilding, Inc.,* 867 F.2d 1311, 1316 (11th Cir. 1989).
35. *Torres v. Pisano,* 116 F.3d 625, 633 (2nd Cir. 1997).
36. *Karibian v. Columbia Univ.,* 14 F.3d 773, 780 (2nd Cir. 1994).
37. Employer liability is treated as a separate element for ease of understanding.
38. *Sutton v. United Air Lines, Inc.,* 119 S. Ct. 2139, 2152 (1999).
39. *Murphy v. United Parcel Serv. Inc.,* 119 S. Ct. 2133 (1999).
40. *Keever v. City of Middletown,* 145 F.3d 809 (6th Cir. 1998).
41. *Williams v. Boeing Co.,* 166 F.2d 1219, No. 97-36098, 1999 WL 50882, *1 (9th Cir. Jan 15, 1999) (unpublished table decision).
42. *Baumgart v. State of Washington,* 189 F.3d 472, No. 98-35172, 1999 WL 535795, *1 (9th Cir. July 23, 1999) (unpublished table decision).
43. *Cody v. Cigna Healthcare, Inc.,* 139 F.3d 595 (8th Cir. 1998).
44. *Wallin v. Minnesota Dept. of Corrections,* 153 F.3d 681.
45. *Smith v. St. Louis Univ.,* 109 F.3d 1261, 1264 (8th Cir. 1997).
46. *Cannice v. Norwest Bank,* Nos. 98-2230, 98-2305, 1999 WL 608644 (8th Cir. Aug. 13, 1999).
47. *Moritz v. Frontier Airlines, Inc.,* 147 F.3d 784.
48. *McConathy v. Dr. Pepper/Seven Up Corporation,* 131 F.3d 558 (5th Cir. 1998).
49. *Anthony v. City of Clinton,* 185 F.3d 873, No. 98-6188, 1999 WL 390927, at *3 (10th Cir. June 15, 1999).
50. *Walton v. Mental Health Association of Southeastern Pennsylvania,* 168 F.3d 661 (3rd Cir. 1999).
51. *Patterson v. McLean Credit Union,* 491 U.S. 164, 180 (1989).
52. *Newman v. GHS Osteopathic, Inc.,* 60 F.3d 153, 157 (3rd Cir. 1995).
53. *Vendetta v. Bell Atlantic Corp.,* No. 97-4838, 1998 WL 575111 (E.D.PA. Sept. 8, 1998) (not reported in F.Supp. 2d).
54. *Silk v. City of Chicago,* No. 98-1155, 1999 WL 804008, *1 (7th Cir. Oct. 8, 1999).
55. See also *McClain v. Southwest Steel Co.,* 940 F.Supp 295 (N.D. Okla. 1996); *Gray v. Ameritech Corp.,* 937 F.Supp. 762 (N.D. Ill. 1996); *Fritz v. Mascotech Automotive Sys. Group,* 914 F.Supp. 1481 (E.D. Mich. 1996).

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