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## SECOND CIRCUIT REVIEW

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# *Evidence of a Hostile Work Environment Under Title VII*

In this month's column, we report on a recent decision by the U.S. Court of Appeals for the Second Circuit in which the court clarified what evidence is sufficient to support a hostile work environment claim under Title VII.

In *Petrosino v. Bell Atlantic*,[1] the Second Circuit, in a unanimous opinion written by Judge Reena Raggi, held that such a claim could be brought even if men and women were equally subjected to the same offensive conduct at work. The court explained that it was required to consider the social context in which harassing behavior occurs and to determine whether the offensive conduct at issue was more demeaning to women than to men. In so ruling, the court reversed the district court, which had held that a work environment could not be found to be objectively hostile to women if vulgar comments and images were directed at both men and women.

## Background

From 1990 to 1999, Lisa Petrosino worked for Bell Atlantic (now known as Verizon) as an Installation and Repairs (I & R) technician at its Edgewater Garage on Staten Island. Ms. Petrosino was the only woman employed as an I & R technician at the garage for the last seven years of her employment. Her job responsibilities involved installing and repairing residential and commercial telephone equipment.

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Ms. Petrosino pointed to two bases to support her hostile work environment claim. First, the work atmosphere at the Edgewater Garage was demeaning toward women in general. Ms. Petrosino's co-workers constantly traded sexually insulting barbs "that conveyed a profound disrespect for women." Further, when Ms. Petrosino repaired terminal boxes located at the top of telephone poles, she routinely found crude sexual graffiti that had been scrawled there by her coworkers. Second, certain specific comments and actions directed at her by her coworkers and supervisors indicated that she was viewed in a negative light because of her gender. For example, some of the vulgar terminal box drawings depicting her and her direct supervisor made remarks that "linked her work deportment to her menstrual cycle" and suggested that she could not handle her job because she was a woman.

Ms. Petrosino further alleged that her repeated requests for promotion were denied because she was a woman. She was consistently told that one of the senior supervisors in the I & R department (who had directed gender-hostile remarks to her) would never permit her to be promoted to a managerial position. Moreover, according to Ms. Petrosino, Bell Atlantic had failed to follow up on her complaints of harassment, including a telephone call she placed to the company's Ethics Hotline.

In January 1999, Ms. Petrosino volunteered to transfer to the Cable Maintenance (CX & M) department because she was told her chances for promotion would be better there. She then learned that she would likely have to work in the CX & M department for at least one year before she would be considered for a managerial assignment, and the formal transfer process could take several months. She resigned from Bell Atlantic in February 1999.

After Ms. Petrosino filed a complaint with the Equal Employment Opportunity Commission (EEOC) in April 1999 and received a "right to sue" letter, she filed a complaint against Bell Atlantic in July 1999. Specifically, she alleged that Bell Atlantic had subjected her to a hostile work environment, failed to promote her and constructively discharged her, in violation of Title VII and state and city laws. She also brought a

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claim for intentional infliction of emotional distress.

The district court granted Bell Atlantic's motion for summary judgment.[2] With respect to the hostile work environment claim, the district court ruled that, although "the alleged conduct is undeniably boorish and offensive," no evidence suggested that the crude behavior about which Ms. Petrosino complained "was motivated by hostility toward Petrosino because of her sex." The court also held that "the conduct alleged by Petrosino [did] not rise to the level of offensiveness or abuse that courts have found sufficient to make out a hostile work environment claim."

The district court dismissed Ms. Petrosino's failure-to-promote claim because she did not identify a specific managerial position for which she applied and was rejected. The district court further held that she could not establish a constructive discharge claim because she had not alleged that Bell Atlantic intended to make her working conditions so intolerable that she resigned. Finally, the district court dismissed the state and city law claims because they were analyzed under the same standards as Title VII claims, and dismissed the intentional infliction of emotional distress claim because the conduct at issue did not meet the requisite "extreme and outrageous" standard.

## The Second Circuit's Decision

Ms. Petrosino appealed to the Second Circuit, and the EEOC submitted an amicus brief in support of her challenge to the district court's ruling on the hostile work environment claim. The Second Circuit reviewed the district court's award of summary judgment de novo. The court reversed and remanded on the hostile work environment claim, but affirmed the district court's dismissal of the promotion and constructive discharge claims.[3]

The most interesting part of the Second Circuit's opinion is its analysis of what constitutes a hostile work environment. As a threshold matter, the Second Circuit noted that the U.S. Supreme Court in *Meritor Savings Bank FSB v. Vinson*,[4] ruled that Title VII's prohibition of employment discrimination based on sex extends to sexual harassment. To establish a sexual harassment claim based on a hostile work environment, a plaintiff must show "(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of [his or] her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile work environment to the employer."[5]

## 'Reasonable Person' Test

The Second Circuit explained that the first element of a hostile work environment claim required the plaintiff to establish that she had been exposed to a work environment that was hostile or abusive in an objective sense. The court disagreed with the district court's conclusion that the "incessant sexually offensive exchanges" and "omnipresent sexual graffiti in the terminal boxes" did not constitute discrimination toward women because they affected "all employees, male and female."[6] The court acknowledged that "a work environment which is equally harsh for both men and women" would not give rise to Title VII liability.[7] The court held, however, that "[t]he mere fact that men and women are both exposed to the same offensive circumstances on the job … does not mean that, as a matter of law, their work conditions are necessarily equally harsh."[8] The court explained that the offensive conduct must be judged from the perspective of a "reasonable person in the plaintiff's position, considering all the circumstances [including] the social context in which particular behavior occurs and is experienced by its target."[9]

The Second Circuit concluded that Ms. Petrosino's claim survived summary judgment because a jury could find that a reasonable person would consider the conduct at issue more offensive to women than to men. The court drew a distinction between the sexual ridicule directed at men and women in Ms. Petrosino's work environment, noting that the offensive banter did not stigmatize men as a group, in part because the men alternated between insulting each other and touting their sexual exploits. In contrast, the offensive comments and graphics uniformly depicted women in a sexually demeaning manner and suggested that women as a group existed for sexual exploitation by men. The court emphasized that "[s]uch workplace disparagement of women, repeated day after day over the course of several years without supervisory intervention, stands as a serious impediment to any woman's efforts to deal professionally with her male colleagues."[10] The court further held that a reasonable jury was not precluded from finding that Ms. Petrosino was subjected to a hostile work environment even though much of the offensive conduct was not specifically directed at her and, indeed, would probably have occurred even if she was not present.

## The 'Ocheltree' Case

The Second Circuit relied on a recent en banc decision by the U.S. Court of Appeals for the Fourth Circuit, *Ocheltree v. Scollon Products Inc.*,[11] to support its conclusion. That case had a similar fact pattern: a female plaintiff had worked in a production shop that was otherwise all male, where she was subjected to constant talk and conduct of a sexual and sexist nature. In *Ocheltree*, the Fourth Circuit, much like the Second Circuit here, rejected an employer's argument that sexual discrimination had not occurred because the offensive conduct in question could have been seen or heard by any of the workers (male or female) in the shop and had offended some of the men. The Fourth Circuit stated that a jury could nevertheless find that the conduct was "particularly offensive to women and

was intended to provoke [plaintiff's] reaction as a woman."[12]

The Second Circuit quoted approvingly Judge M. Blane Michael, the author of the en banc *Ocheltree* decision, who had previously presented the following hypothetical in dissent:

> An African-American plaintiff brings a hostile work environment claim against his employer because of his coworkers' daily use of racial slurs. Surely it would not be a viable defense for the employer to show that none of the racial slurs was specifically directed at the plaintiff and that racial slurs would have been used whether or not the plaintiff was present.[13]

The Second Circuit also adopted the reasoning of Judge Jon O. Newman, who wrote separately in *Brennan v. Metropolitan Opera Association Inc.*[14] Judge Newman observed that "[d]isplays of photos of Blacks being lynched or photos of nude women in sexually provocative poses would not be insulated from Title VII claims simply because the photos were observable by all office employees, White and Black, male and female." The court concluded that common exposure of both male and female employees to offensive behavior did not prevent a female plaintiff from establishing a hostile work environment based on sexual harassment, if a reasonable jury could find the offensive conduct more demeaning of women than men.

The Second Circuit then evaluated the severity and pervasiveness of the challenged conduct. The court emphasized that Title VII did not create a "general civility code" for the workplace and that "[s]imple teasing, offhand comments, or isolated incidents of offensive conduct (unless extremely serious)" were insufficient to establish a hostile work environment. With that caveat, the Second Circuit again stressed the importance of social context. According to the court, a reasonable jury could find the sexually offensive comments and graffiti alleged by Ms. Petrosino to be particularly insulting to women because they consistently cast women "as objects of sex-based ridicule and subjects for sexual exploitation." From that perspective, the jury could consider other evidence of demeaning conduct as part of a larger pattern of sexual harassment. For example, the sarcastic responses from Ms. Petrosino's male coworkers and supervisors when she complained about their conduct and their dismissal of her concerns in gender-based terms (e.g., she, like all women, was too "thin-skinned" to succeed in the I & R department) reinforced the perception that Ms. Petrosino was treated as an object of sex-based ridicule rather than as a professional colleague.

## Conclusion

The Second Circuit's decision is noteworthy in several respects. First, the court's decision implies that the district court's application of Title VII was overly simplistic. The district court's analysis, which required only a determination of whether both sexes were equally exposed to offensive conduct, might have been easier to apply, but the Second Circuit preferred a more searching "totality of the circumstances" standard.

Second, the court also rejected the district court's narrow focus on intent in favor of a broader results-oriented inquiry. That is, the court indicated that it was not sufficient for a district court to determine whether degrading comments were motivated by a speaker's hostility based on gender. Instead, the more relevant inquiry must be how the target of such comments would be affected, in light of the broader social context. The court acknowledged that men and women may react differently to the same loutish behavior. The court's holding evinces a particular sensitivity to the overarching purpose of Title VII, which, according to the Supreme Court in *Meritor,* is "to strike at the entire spectrum of disparate treatment of men and women in employment."

Finally, the Second Circuit foreshadowed an issue to be resolved in the future: "whether, in a case such as this, a 'reasonable person in the plaintiff's position' must be a woman or a person drawn from the public at large."[15] The court decided that it did not need to reach this issue here because a reasonable person, regardless of gender, would have considered the conduct at issue more offensive to women than to men and, therefore, discriminatory based on sex. But, the court's acknowledgement that "some ambiguity in our case law" exists with respect to this issue signals that the court in the future may return to the reasonable person standard to provide further guidance.

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1. Nos. 03-7366, 03-7708, 2004 WL 2177044 (2d Cir. Sept. 29, 2004).
2. *Petrosino v. Bell Atlantic,* 2003 WL 1622885 (E.D.N.Y. Mar. 20, 2003).
3. Ms. Petrosino also appealed from an order by the district court that denied her motion for relief from the award of summary judgment based on newly-discovered evidence pursuant to FedRCivP 60(b), and for sanctions for alleged misconduct in discovery. The Second Circuit affirmed the denial of sanctions and vacated the denial of Rule 60(b) relief on the ground of mootness in light of its remand.
4. 477 US 57, 63-68 (1986).
5. *Petrosino,* 2004 WL 2177044 at *8 (quoting *Mack v. Otis Elevator Co.,* 326 F3d 116, 122 (2d Cir. 2003), cert. denied, 124 SCt 562 (2003), in turn quoting *Richardson v. N.Y. State Department of Corr. Serv.,* 180 F3d 426, 436 (2d Cir. 1999) (internal quotation marks omitted)).
6. Id.
7. Id. at *9 (quoting *Brennan v. Metropolitan Opera Ass'n, Inc.,* 192 F3d 310, 318 (2d Cir. 1999) (internal quotation marks omitted)).
8. Id.
9. Id. (quoting *Oncale v. Sundowner Offshore Servs., Inc.,* 523 US 75, 81 (1998)).
10. Id.
11. 335 F3d 325 (4th Cir. 2003), cert. denied, 124 SCt 1406 and 124 SCt 1411 (2004).
12. Id. at 332.
13. See *Ocheltree v. Scollon Prods., Inc.,* 308 F3d 351, 376 (4th Cir. 2002) (Michael, J., dissenting in part and concurring in the judgment in part), rev'd en banc, 335 F3d 325.
14. *Brennan v. Metropolitan Opera Ass'n, Inc.,* 192 F3d 310, 320 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part).
15. Compare *Torres v. Pisano,* 116 F3d 625, 632 & n.6 (2d Cir. 1997) (using the perspective of a reasonable woman) with *Richardson v. N.Y. State Department of Corr. Serv.,* 180 F3d 426, 436 n.3 (2d Cir. 1999) ("reject[ing] the view of those courts that look to the perspective of the particular ethnic or gender group").