Office of Compliance

Office of the General Counsel

OOC BROWN BAG LUNCH SERIES
HOSTILE WORK ENVIRONMENT
APRIL 19, 2017

I. Introduction

The Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. §§ 1301 *et seq.*, extends the protection of several anti-discrimination statutes to legislative branch employees, and also prohibits retaliation for protected activity. Many of the covered employees who participate in counseling and mediation at the Office of Compliance allege that they are subject to a discriminatory or retaliatory ***hostile work environment*** ("HWE"). In contrast to disparate treatment claims, in which discrete adverse employment actions taken against the employee are alleged to have been motivated by unlawful discrimination, HWE claims rest on a theory that the employee suffers from harassment because of his or her membership in a protected class, and that the harassment is so severe or pervasive as to alter the conditions of employment.

II. Standards

The Supreme Court has articulated the standards for establishing the existence of a hostile work environment in a series of landmark cases, and those standards have been applied in numerous cases before the OOC Board and the federal courts.[1]

1) Prima Facie Case

a) *Lowery v. Office of the Architect of the Capitol*, No. 10-AC-14 (CV, RP), 2012 WL 6561376 (OOC Board Dec. 12, 2012) – To prove a hostile work environment claim, a plaintiff must show (1) he was a member of a protected group; (2) he was subject to unwelcome harassment in the form of unwelcome verbal or physical conduct involving the protected group; (3) the harassment was based on his membership in the protected group; (4) that the harassment affected a term, condition, or privilege of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) that the employing office knew or should have known of the harassment and failed to take appropriate remedial action.

[1] The courts apply the same standards to Title VII discrimination and retaliation cases arising under the CAA that they apply to cases brought by non-legislative branch employees. Some plaintiffs have argued that the CAA's reference to "all personnel actions" and the inclusion of the term "to intimidate" in the CAA's retaliation provision broaden the scope of prohibited conduct, but courts have rejected that argument. *See Harrison v. Office of the Architect of the Capitol*, 68 F. Supp. 3d 174 (D.D.C. 2014); *Newton v. Office of the Architect of the Capitol*, 905 F. Supp. 2d 88 (D.D.C. 2012).

b) *Hyson v. Architect of the Capitol*, 802 F. Supp. 2d 84 (D.D.C. 2011) (Judge Henry H. Kennedy, Jr.) – Plaintiff must demonstrate that: (1) she is a member of a protected class or engaged in protected activity; (2) she was subject to unwelcome harassment; (3) the harassment occurred because of her protected status or behavior; (4) the harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment; and (5) respondeat superior liability applies.

c) *Floyd v. Office of Representative Sheila Jackson Lee*, 968 F. Supp. 2d 308 (D.D.C. 2013) (Judge Rudolph Contreras) – In a HWE claim based on disability, the plaintiff must show: (1) she is disabled or is perceived as disabled; (2) she was subjected to unwelcome harassment; (3) the harassment occurred because of her disability or the perception that she was disabled; (4) the harassment affected a term, condition, or privilege of employment; and (5) there is a basis for holding the employer liable for the creation of the hostile work environment.

d) *Floyd v. Office of Representative Sheila Jackson Lee*, 85 F. Supp. 3d 482 (D.D.C. 2015) (Judge Rudolph Contreras) – A HWE claim based on retaliation requires plaintiff to proffer evidence that: (1) she engaged in statutorily protected activity; (2) she suffered a hostile work environment; and (3) a causal link connects the two.

e) *Brady v. Livingood*, 456 F. Supp. 2d 1 (D.D.C. 2006) (Judge Richard J. Leon), *aff'd sub nom Brady v. Sergeant at Arms*, 520 F. 3d 490 (D.C. Cir. 2008) – to establish a prima facie case for a hostile work environment based on race, plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment occurred because of his race; (4) the harassment affected a term, condition, or privilege of his employment; and (5) the employer knew or should have known of the harassment, but failed to take any action to prevent it.

2) Altered Conditions of Employment

a) *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) – "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "'terms and conditions of employment.'"

b) *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1996) – For offending conduct to be actionable, "the offending behavior must be sufficiently severe or pervasive to alter the victim's employment conditions and create an abusive working environment."

c) *Koshko v. U.S. Capitol Police,* Nos. 11-CP-136 (CV, DA, FM, RP), 12-CP-19 (CV, DA, FM, RP), 12-CP-27 (DA, FM, RP), 2014 WL 2169027 (OOC Board May 14, 2014) – Employer actions that do not cause objectively tangible harm to the terms or conditions of employment are not sufficiently severe or pervasive for the purposes of a hostile work environment claim.

d) *Lowery v. Office of the Architect of the Capitol*, No. 10-AC-14 (CV, RP), 2012 WL 6561376 (OOC Board Dec. 12, 2012) – The record evidence supported a finding "that the prolonged teasing and mocking took a toll on [Lowery] and interfered with his work" and that he "was subjected to ridicule and derision which made him feel incompetent as a

supervisor." The Board therefore found that the hostile treatment altered the complainant's conditions of employment.

e) *Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008) – To prevail on a hostile work environment claim, "a plaintiff must show that his employer subjected him to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'" (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)). The plaintiff's claims failed in part because they were "not supported by evidence of tangible workplace consequences, whether financial, physical, or professional."

f) *Hyson v. Architect of the Capitol*, 802 F. Supp. 2d 84 (D.D.C. 2011) (Judge Henry H. Kennedy, Jr.) – A work environment, even if objectionable, does not become actionable unless "the offensive conduct 'permeate[s] [the workplace] with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"

g) *Harrison v. Office of the Architect of the Capitol*, 985 F. Supp. 2d 13 (D.D.C. 2013) (Judge Colleen Kollar-Kotelly) – The plaintiff alleged that, after she had filed a number of requests for counseling and initiated an investigation by the Office of the Inspector General, she emailed the investigator to inquire about the status of the investigation, and the investigator included the plaintiff's supervisor on the reply email. The court had already held that the other incidents about which the plaintiff had complained in previous actions did not amount to a HWE, and in this case the court held that the addition of the investigator's email did not help the plaintiff's HWE claim, because it "did not objectively and tangibly alter the Plaintiff's employment[.]" The court reasoned that the email did not reveal any information to the supervisor that the supervisor did not already know by virtue of having been interviewed as part of the investigation into the plaintiff's complaint, and that a reasonable employee would expect her identity and role in a complaint to be revealed to the target of the complaint as part of the investigation.

3) Totality of the Circumstances

a) *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) – "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances. These may 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." No single factor is required.

b) *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) – Whether conduct is objectively severe depends, in part, on "the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office."

c) *Lowery v. Office of the Architect of the Capitol*, No. 10-AC-14, 2012 WL 6561376 (CV, RP) (OOC Board Dec. 12, 2012) – In determining whether a hostile work environment

exists, the Board considers the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance.

d) *Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008) – "To determine whether a hostile work environment exists, the court looks to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance." In this case, the alleged abuse was sporadic, was not tied directly to the plaintiff's protected status, and did not result in any tangible consequences, and the allegations of insult were undercut by the legitimate reasons and constructive criticism offered in letters of counseling and reprimand. Taken together, the totality of the circumstances did not rise to the level necessary to support a hostile work environment claim.

e) *Harrison v. Office of the Architect of the Capitol*, 985 F. Supp. 2d 13 (D.D.C. 2013) (Judge Colleen Kollar-Kotelly) – The objective prong requires the court to evaluate the "the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance." In a series of complaints, the plaintiff alleged what the court called a "string of sporadic events, spread out over time, and involving five separate supervisors and a different division of the Defendant" which, when considered as a whole, did not rise to the level of a hostile work environment.

f) *Dudley v. Wash. Metro. Area Transit Auth.*, 924 F. Supp. 2d 141 (D.D.C. 2013) (Judge Royce C. Lamberth) – A plaintiff may not "string together a series of discrete unexhausted claims of discrimination, largely unrelated complaints from coworkers, minor annoyances, and subjective harms to make a valid claim… The cumulative effect of many de minimis harms is not a workplace filled with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'"

4) Objective and Subjective

a) *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) – A hostile work environment claim requires proof that the environment was objectively hostile or abusive – i.e., an environment that a reasonable person would find hostile or abusive – and which was subjectively perceived as such.

b) *Kemp v. Office of the Architect of the Capitol,* Nos. 13-AC-01 (CV, FL, RP), 13-AC-35 (AG, CV, RP), 2015 WL 4597722 (OOC Board July 22, 2015) – Business judgments may fall outside of the scope of "objectively offensive" employer actions. Here, the Board found that the employer's decision to move the employee's office and to not increase his nor other unit member's grade classifications based on a desk audit were business decisions within the employer's discretion to make. The role of courts is not to second-guess business judgments.

c) *Lowery v. Office of the Architect of the Capitol*, No. 10-AC-14 (CV, RP), 2012 WL 6561376 (OOC Board Dec. 12, 2012) – Comments do not necessarily have to be made

directly to the plaintiff in order to be subjectively hostile. In this case, among other types of hostile behavior, the complainant alleged that he was the butt of frequent jokes, which were made outside of his presence but which he learned about from other coworkers. The employing office argued that these jokes could not be viewed as subjectively hostile because the complainant was not present when they were made, but the Board disagreed: in considering "the totality of the circumstances in this case, especially where [Lowery] was well aware of the continual derisive conduct directed toward him," the Board held that there was substantial evidence supporting the Hearing Officer's finding of a hostile work environment.

d) *Taiwo v. Office of the Architect of the Capitol*, No. 09-AC-106 (CV, RP), 2013 WL 3042381 (OOC Board July 24, 2012) – The speaker's intent is not determinative in deciding whether an environment is offensive. The Board noted that a supervisor's assertion that his comment was not intended to be racially offensive did not by itself excuse his behavior, because the standard focuses on the perception of the reasonable person and the actual perception of the victim.

e) *Baird v. Gotbaum*, 792 F.3d 166 (D.C. Cir. 2015) – Even if the court accepted as true the plaintiff's claims that the employer's alleged actions took a serious toll on her emotional and physical health, "the standard for severity and pervasiveness is nonetheless an *objective* one… Given the objectively immaterial nature of her allegations, the fact that Baird suffered subjective harm is insufficient on its own."

f) *Herbert v. Architect of the Capitol,* 839 F. Supp. 2d 284 (D.D.C. 2012) (Judge Colleen Kollar-Kotelly) – The Supreme Court's "*Meritor-Harris* standard" consists of "an objective component and a subjective component: the environment must be one that a reasonable person in the plaintiff's position would find hostile or abusive, and the plaintiff must actually perceive the environment to be hostile or abusive."

g) *Turner v. U.S. Capitol Police Bd.*, 983 F. Supp 2d 98 (D.D.C. 2013) (Judge Rudolph Contreras) – If the plaintiff is unaware of harassing behavior, it cannot be considered as part of a hostile work environment. "Because conduct that the plaintiff does not perceive as abusive cannot alter the terms and conditions of her employment, conduct that the plaintiff did not know about cannot be used to establish that she was subjected to a hostile work environment." In this case, the plaintiff did not learn about her supervisor's alleged interference with her close-out evaluation until almost 3 years after he ceased to be her supervisor, and that interference therefore could not be considered as contributing to the alleged HWE created by the supervisor.

5) Pleading Requirements

a) *Herbert v. Architect of the Capitol*, 839 F. Supp. 2d 284 (D.D.C. 2012) (Judge Colleen Kollar-Kotelly) – "An employment discrimination plaintiff, like any other, need not set forth 'detailed factual allegations' in his complaint, *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), only sufficient factual content to permit a 'reasonable inference that the defendant is liable for the misconduct alleged,' *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

Significantly, when it comes to hostile work environment claims, the unlawful employment action is the environment itself, viewed as an indivisible whole. Consistent with this framework, a plaintiff asserting a hostile work environment claim is not required to plead 'each element of [his] claim in [his] Complaint,' *Tucker v. Howard Univ. Hosp.,* 764 F. Supp. 2d 1, 9 (D.D.C. 2011), 'nor specify in exhaustive detail each and every component act comprising the allegedly hostile or abusive work environment,' *Graves v. District of Columbia,* 777 F. Supp. 2d 109, 121 (D.D.C. 2011)."

b) *Solomon v. Office of the Architect of the Capitol*, No. 02-AC-62 (RP), 2005 WL 6236948 (OOC Board Dec. 7, 2005) – Because HWE claims require consideration of the totality of the circumstances, courts disfavor the dismissal of such claims "unless the totality of the circumstances can be considered in evaluation of the allegations and sufficiency of the evidence; that is to say, unless discovery has been completed." When entertaining motions to dismiss for failure to state a claim, courts evaluate complaints under the "notice pleading" theory to determine whether the complaint gives the defendant adequate notice of the claims and the grounds on which they rest. Here, the Board reversed the Hearing Officer's dismissal of the complaint, finding that discovery was needed to determine whether the alleged adverse actions rose to the level of being so severe and pervasive as to alter the complainant's working conditions.

c) *Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008) – A plaintiff does not necessarily need to state an explicit claim for "hostile work environment" in order to satisfy the pleading requirements, as long as the facts alleged in the complaint would support such a claim. Although the plaintiff in this case did not expressly make a claim on a "hostile work environment" theory, she did allege "discrimination," which the court noted "in principle includes a hostile work environment theory"; additionally, among the requested relief was reassignment "to a less hostile work environment," and one of the claims was constructive discharge premised on a hostile work environment. The employer acknowledged in its summary judgment motion that the plaintiff "appears to allege that all the events alleged in the complaint caused her to experience a hostile work environment" and responded accordingly. The court therefore determined that the employer was on notice of the HWE claim and was not prejudiced, and allowed the claim to move forward.

d) *Baird v. Gotbaum*, 662 F.3d 1246 (D.C. Cir. 2011) – The plaintiff in her complaint did not segregate those events she claimed constituted a hostile work environment from those that were alleged discrete acts of discrimination or retaliation, but although this lack of segregation "doubtless complicates the court's task, the complication can presumably be cured by insistence on suitably targeted briefing, and is not an independent ground for excluding time-barred claims from the hostile work environment analysis under Rule 12(b)(6)." The court also noted that it could not dismiss the HWE claim "merely because it contains discrete acts that the plaintiff claims (correctly or incorrectly) are actionable on their own."

e) *Reshard v. LaHood*, 443 F. App'x 568 (D.C. Cir. 2011) – The plaintiff originally alleged facts that would arguably give rise to a hostile work environment claim, including

"allegations of an 'environment' of 'direct acts of racial discrimination,' an 'environment of professional suppression' and discriminatory conduct 'deigned to make plaintiff leave the agency,'" which "arguably might have sufficed to place [defendant] on notice of a hostile work environment claim." However, unlike in *Steele v. Schafer* (see above), neither party acknowledged or addressed a HWE claim in their summary judgment filings or at any time over the next 8 years of litigation, and the court found that this delay would cause substantial prejudice to the employer, raising concerns including the vagueness of memory and the staleness or spoliation of evidence. The court therefore rejected the plaintiff's attempt to resurrect such a claim.

f) *Hollabaugh v. Office of the Architect of the Capitol*, 847 F. Supp. 2d 57 (D.D.C. 2012) (Judge Barbara J. Rothstein) – The complaint alleged violations of Title VII, the ADA, and the FMLA, as well as retaliation, followed by a HWE claim stating simply that "The pattern of decisions taken by Defendant's decisionmaking agents resulting in the allegations set forth [in the rest of the Complaint] were unlawful discriminatory and unlawful retaliatory employment practices which created a hostile work environment which deprived Plaintiff of the terms, conditions and privileges of employment respecting a workplace environment free of discrimination and retaliation." The court dismissed the HWE claim without prejudice, holding that the allegation did not contain "sufficient factual matter" supporting a claim that the plaintiff suffered conditions so severe or pervasive as to alter her conditions of employment.

g) *Floyd v. Office of Representative Sheila Jackson Lee*, 968 F. Supp. 2d 308 (D.D.C. 2013) (Judge Rudolph Contreras) – Although the court "ha[d] its doubts" about whether the plaintiff would "ultimately be able to prove" the elements of her HWE claim, and opined that her allegations were "somewhat thin," the plaintiff did allege several instances of "humiliating" and "derogatory" comments that were made about her disability. The court therefore denied the employing office's motion to dismiss, holding that it could not say as a matter of law that the totality of the circumstances alleged by the plaintiff – "which of course cannot be fully known when ruling on a motion to dismiss" – did not amount to a hostile work environment.

h) *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59 (D.D.C. 2011) (Judge Reggie B. Walton) – The plaintiff's HWE claim was comprised of the conclusory allegation that her coworkers "mistreated, harassed, intimidated[,] and disrespected" her, and the only attempted factual support she provided was the "mere assertion that her supervisor and other employees 'harassed [her] with e-mails, text messages[,] and telephone messages demanding that she contact them although she was on leave,'" which the court deemed "insufficient, without more, to adequately plead a hostile work environment claim." The court dismissed the claim without prejudice, thereby affording the plaintiff "a further opportunity to allege more specifically in a subsequent action, if there is a basis for doing so, the instances on which the alleged harassment occurred and the details as to how the content of the text messages and e-mails constituted harassment."

i) *Raymond v. U. S. Capitol Police Bd.*, 157 F. Supp. 2d 50 (D.D.C. 2001) (Judge Ricardo M. Urbina) – Although the plaintiff is not required to establish a prima facie case of

hostile work environment in the complaint, the complaint must allege facts that would be able to support such a claim.

6) Retaliation for Opposing an Alleged Hostile Work Environment

a) *Crawford v. Metro. Gov't of Nashville & Davidson Co., Tenn.,* 555 U.S. 271 (2009) – Opposition to alleged Title VII violations, including harassment, may include speaking out about the misconduct in response to questions during an internal investigation rather than on one's own initiative. In this case, the plaintiff's coworker – not the plaintiff – complained about sexual harassment by a supervisor; the employer launched an internal investigation, during which the plaintiff was asked whether she had observed the alleged conduct. The plaintiff replied that she had, and was later fired, allegedly in retaliation for making that statement. The Supreme Court held that employees who report harassing behavior in response to questions during an internal investigation are protected from retaliation under Title VII's opposition clause, even if they did not initiate the investigation themselves. (The Court did not reach the question of whether the plaintiff would also be protected under the participation clause.)

b) *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19 (D.C. Cir. 2013) – Where a plaintiff claims retaliation for having complained of an alleged hostile work environment, the plaintiff must have had a reasonable and good-faith belief that the workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Even if the practices that the plaintiff opposed are ultimately found not to rise to the level of a HWE, the plaintiff may be able to succeed on a retaliation claim if she reasonably believed that an unlawful HWE existed.

c) *Baird v. Gotbaum*, 792 F.3d 166 (D.C. Cir. 2015) – "A retaliatory failure-to-remediate claim is not actionable unless the underlying incident could itself be actionable… A trivial incident does not become nontrivial because an employer declines to look into it. Title VII is aimed at preventing discrimination, not auditing the responsiveness of human resources departments." In this case, the plaintiff's claim that she was retaliated against for complaining of an alleged HWE failed because "the incidents the [employer] failed to remediate would not themselves constitute a retaliatory hostile work environment" but were instead immaterial slights consisting of "occasional name-calling, rude emails, lost tempers and workplace disagreements – the kind of conduct courts frequently deem unrecognizable under Title VII."

III. Protected Classes/Activity

Hostile work environment claims may arise in two types of contexts: discrimination and retaliation. Plaintiffs raise HWE claims under several of the CAA's anti-discrimination statutes, and the HWE theory may also be raised in support of claims for retaliation, either for exercising rights under specific statutes applied via the CAA, or in violation of the CAA's own anti-reprisal provision.

1) **Discriminatory Hostile Work Environment**
   a) Title VII of the Civil Rights Act of 1964 – race, color, sex,[2] religion, and national origin [42 U.S.C. § 2000e-2]
   b) Rehabilitation Act/Americans with Disabilities Act – disability [29 U.S.C. § 791 / 42 U.S.C. §§ 12112-12114]
   c) Age Discrimination in Employment Act – age (40+) [29 U.S.C. § 633a]
   d) Uniformed Services Employment and Reemployment Rights Act (USERRA) – military service [38 U.S.C. § 4311]

2) **Retaliatory Hostile Work Environment**
   a) Section 207 of the CAA – intimidation, reprisal, or discrimination for having opposed any practice made unlawful by the CAA or participating in any manner in a hearing or other proceeding under the CAA [2 U.S.C. § 1317]
   b) Title VII of the Civil Rights Act of 1964 – retaliation for alleging discrimination based on race, color, sex, religion, or national origin, or for participating in enforcement proceedings [42 U.S.C. § 2000e-3]
   c) Age Discrimination in Employment Act – retaliation for alleging discrimination based on age, or for participating in an investigation or other proceeding [29 U.S.C. § 623(d)]
   d) Uniformed Services Employment and Reemployment Rights Act (USERRA) – reprisal against anyone (whether or not that person has performed service in the uniformed services) for taking action to enforce a protection afforded any person under USERRA, participating in proceedings or investigations under USERRA, or exercising a right under USERRA [38 U.S.C. § 4311(b)]
   e) Family and Medical Leave Act (FMLA) – retaliation for exercising FMLA rights [29 U.S.C. § 2615]

3) **Hostile Treatment Must Be Tied to Protected Status or Activity**
   a) *Lowery v. Office of the Architect of the Capitol*, No. 10-AC-14 (CV, RP), 2012 WL 6561376 (OOC Board Dec. 12, 2012) – The "racial basis of the offending conduct" was not in dispute, as the record was "replete with evidence that [a fellow supervisor's] comments were racially based and fueled the subsequent harassment," and there was testimony that "the harassment directed at [Lowery] was racially motivated where other employees questioned [Lowery's] background, resume, spelling, and pronunciation."
   b) *Sheehan v. Office of the Architect of the Capitol*, No. 08-AC-58 (CV, RP), 2011 WL 332312 (OOC Board Jan. 21, 2011) – Although the complainant's work environment was arguably "hostile" because of the "disruptive and aggressive conduct" of the complainant's coworkers, which the employing office "seemed reluctant or unable to

[2] Courts sometimes distinguish between *sexual harassment* HWE claims (i.e., claims that the plaintiff was subjected to unwelcome sexual advances or similar conduct) and *sex-based discrimination* HWE claims (i.e., claims that the plaintiff was subjected to intimidation, ridicule, and insult because of his or her sex). Both types of claims are asserted under Title VII and the analysis is similar, but certain differences may arise, in particular with respect to either the severity of the conduct or the employer's policies for preventing and addressing each type of conduct, the latter of which is a factor in the affirmative defenses discussed later in this outline.

suppress," the HWE claim nonetheless failed because complainant "was required to establish, not merely that [the employing office] condoned a work environment that was 'hostile' in some generic sense, but rather, that [the employing office] created or condoned a *retaliatory* HWE based on efforts to punish him for engaging in activity protected by the opposition or participation clauses of Section 207. No such showing can be made on the record in the instant case."

c) *Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008) – HWE claims failed in part because none of the comments or actions directed at the plaintiff expressly focused on his race, religion, age, or disability.

d) *Gray v. Foxx*, 637 F. App'x 603 (D.C. Cir. 2015) – Plaintiff alleged that her supervisor yelled at her and belittled her, but failed to show that this treatment was connected in any way to her membership in a protected class.

e) *Hyson v. Architect of the Capitol*, 802 F. Supp. 2d 84 (D.D.C. 2011) (Judge Henry H. Kennedy, Jr.) – The court granted summary judgment in favor of the employing office on plaintiff's HWE claim because she failed to show that most of the alleged incidents were connected to her gender or protected activity. Quoting prior cases, the court noted that "Much of the conduct that Hyson describes may have been unjustified or unprofessional, but 'many bosses are harsh, unjust and rude. It is therefore important in hostile work environment cases to exclude from consideration personnel decisions that lack a linkage of correlation to the claimed ground of discrimination.' … Thus, behavior, even if offensive or hostile, that is not linked to Hyson's gender or protected activity 'cannot be used to support a hostile work environment claim.'"

f) *Harrison v. Office of the Architect of the Capitol*, 68 F. Supp. 3d 160 (D.D.C. 2014) (Judge Colleen Kollar-Kotelly) – To survive summary judgment on a retaliatory HWE claim, a plaintiff must demonstrate a genuine issue of material fact as to whether the alleged incidents were motivated by retaliatory animus. The court cited precedent for the well-established principle that hostile behavior, no matter how unjustified or egregious, cannot support a claim of a hostile work environment unless it is somehow linked to a plaintiff's protected activity or membership in a protected class.

g) *Singh v. U.S. House of Representatives, Comm. on Ways & Means*, 300 F. Supp. 2d 48 (D.D.C. 2004) (Judge Rosemary M. Collyer) – The plaintiff characterized her immediate supervisor as "hostile, patronizing and frequently abusive" and cited several examples of harsh and humiliating treatment, as well as unfriendly behavior by other coworkers. However, she conceded that no one ever made any negative statements relating to her (or anyone else's) race, color, or national origin, and that she never heard anything that she would consider a racial slur. The court held that "there is insufficient evidence for a reasonable jury to conclude that any unpleasantness between Ms. Singh and her fellow Committee members stemmed from Ms. Singh's race, national origin, or color"; the fact that the plaintiff was the only non-white member of the Committee staff, without more, did not suffice to establish the necessary causal connection between plaintiff's protected status and the alleged mistreatment.

h) *Newton v. Office of the Architect of the Capitol*, 840 F. Supp. 2d 384 (D.D.C. 2012) (Judge Royce C. Lamberth) – HWE claim failed because there was "no evidence—direct or indirect—from which a reasonable jury could conclude that the conduct Newton complains of was motivated by her race." The plaintiff's claim relied primarily on her own declaration, and the court noted that summary judgment will usually be granted where a plaintiff relies solely on her own self-serving testimony, unsupported by corroborating evidence, and undermined by other types of evidence.

i) *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) – Hostile work environment claims based on sex discrimination are cognizable even where the harasser and victim are the same sex. The male plaintiff complained that he was "forcibly subjected to sex-related, humiliating actions against him" by male coworkers and that the coworkers "physically assaulted [him] in a sexual manner" and "threatened him with rape." Justice Scalia wrote on behalf of a unanimous Court: "As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion]... because of ... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."

IV. Severe or Pervasive

At the heart of the hostile work environment analysis is a determination of whether the alleged conduct was so severe or pervasive as to alter the conditions of the plaintiff's employment. The courts frequently caution litigants that anti-discrimination laws do not establish a "general civility code" for the workplace, nor do they aim to eradicate all office conflicts or unprofessional behavior.

1) OOC Board

a) *Evans v. U.S. Capitol Police Bd.,* Nos. 14-CP-18 (CV, RP), 13-CP-61 (CV, RP), 13-CP-23 (CV, RP), 2015 WL 9257402 (OOC Board Dec. 9, 2015) – Alternative legitimate explanations for allegedly hostile actions are relevant in assessing whether those actions are sufficiently severe or pervasive. The plaintiff here alleged that his employer created a hostile work environment when it allowed the union to solicit complaints against him, raised 39 disciplinary charges against him (of which only 5 were sustained), and conducted the disciplinary investigation over an extended period. The Board found that these actions were not sufficiently severe or pervasive where the relevant decision makers had not taken part in or condoned the union complaints, where the employer's protocols required the USCP to investigate the allegations against Evans, where the disciplinary charges brought against him were serious, and where the length of the investigation was commensurate with the number of charges raised.

b) *Ingram v. Office of the Senate Sergeant at Arms*, No. 14-SN-15 (CV, AG, DA, RP), 2015 WL 4597721 (OOC Board July 22, 2015) – That actions take place after an employee is no longer physically present in the work environment may undermine claims that those actions were harassing in nature. Plaintiff here immediately stopped working for her employer after receiving notice that she was being terminated under RIF procedures, but prior to the termination effective date. Plaintiff subsequently filed a HWE claim, in support of which she alleged certain acts that occurred both before and after her last day in the office. Because she was no longer physically in the workplace, the Board rejected her claim that the alleged events taking place after she stopped working contributed to a hostile work environment.

c) *Lowery v. Office of the Architect of the Capitol*, No. 10-AC-14 (CV, RP), 2012 WL 6561376 (OOC Board Dec. 12, 2012) – To be deemed pervasive, the incidents of harassment must be more than episodic; they must be sufficiently continuous and concerted. In this case the Board affirmed the Hearing Officer's finding that the alleged conduct, taken as a whole, constituted a hostile work environment. Examples of the conduct included coworkers laughing at the plaintiff as he walked by the break room, ridicule and laughter from coworkers when the plaintiff mispronounced or misspelled words in meetings, the regular use of derogatory comments about the plaintiff, the use of made-up terms and games mocking the plaintiff's manner of speech, and a fellow supervisor's derision of the plaintiff's work product with along with 15-20 other employees on three or four separate occasions. The Board described the conduct as "prolonged teasing and mocking."

d) *Patterson v. Office of the Architect of the Capitol*, No. 08-AC-48 (RP), 2010 WL 2641754 (OOC Board June 23, 2010) – Two discrete actions occurring nearly 4 months apart – alleged denial of access to the EEO/CP process, and the IG's suspension of an investigation into the complainant's allegations of fraud, waste, and abuse – did not constitute "pervasive" conduct for the purposes of a HWE claim.

e) *Wooten v. Office of the Architect of the Capitol*, No. 98-AC-29 (CV, RP), 1999 WL 3497665 (OOC Board Sept. 29, 1999) – Evidence that colleagues had assisted plaintiff and that there had be only a single "off-color" remark made during the plaintiff's employment was sufficient to satisfy the "substantial evidence" standard in support of the Hearing Officer's decision that there was no hostile work environment.

2) Court of Appeals for the D.C. Circuit

a) *Ayissih-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013) – The use of "a deeply offensive racial epithet" by a supervisor could, by itself, be sufficiently severe to constitute a hostile work environment. "As other courts have observed, 'perhaps no single act can more quickly alter the conditions of employment' than 'the use of an unambiguously racial epithet such as "nigger" by a supervisor'" (quoting *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)).[3]

[3] Judge Kavanaugh wrote a separate concurring opinion "to underscore an important point" about the plaintiff's claim. Addressing the "significant question" of whether "one isolated yet severe incident of discriminatory

b) *Singletary v. Dist. of Columbia*, 351 F.3d 519 (D.C. Cir. 2003) – A reasonable fact finder could find that plaintiff was subjected to a hostile work environment because, notwithstanding the availability of appropriate office space, the employer intentionally assigned the plaintiff to work for over a year and a half in a storage room without heat, ventilation, or adequate lighting, where the only access was through a clinic to which the plaintiff did not have keys, the phones often didn't work, and the space contained cleaning equipment and boxes of debris.

c) *Brooks v. Grundmann*, 748 F.3d 1273 (D.C. Cir. 2014) – Plaintiff's colleagues who allegedly created a hostile work environment were described by the court as arguably "unprofessional, uncivil, and somewhat boorish" and "may have been tactless and ill-mannered," but each of the alleged incidents – including several outbursts by those colleagues, criticism about a time and attendance policy, and mixed performance reviews – "fail[ed] to add materially to the alleged aura of hostility," but rather "seem[ed] more like the 'ordinary tribulations of the workplace'… a series of 'petty insults, vindictive behavior, and angry recriminations' that are not actionable under Title VII" which taken together did not "sufficiently demonstrate the sort of severity or pervasiveness needed to prove a hostile work environment."

d) *Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008) – The facts necessary to prove a hostile work environment are a subset of those necessary to prove certain types of constructive discharge claims, but the standards for hostile work environment and constructive discharge claims are not coextensive. Therefore, a finding that a plaintiff failed to prove constructive discharge does not necessarily suffice to warrant rejection of a hostile work environment claim.

e) *Baird v. Gotbaum*, 792 F.3d 166 (D.C. Cir. 2015) – No HWE existed where plaintiff's allegations amounted to no more than "immaterial 'slights'" consisting of "occasional name-calling, rude emails, lost tempers and workplace disagreements—the kind of conduct courts frequently deem uncognizable under Title VII." Despite the alleged pervasiveness of the conduct, the court noted that "The sheer volume of Baird's allegations does not change our conclusion: a long list of trivial incidents is no more a hostile work environment than a pile of feathers is a crushing weight."

3) District Court for the District of Columbia

a) *Newton v. Office of the Architect of the Capitol,* 840 F. Supp. 2d 384 (D.D.C. 2012) ("*Newton I*"); 839 F. Supp. 2d 112 (D.D.C. 2012) ("*Newton II*"); and 905 F. Supp. 2d 88

---

conduct" could be sufficient to establish a hostile work environment under federal anti-discrimination laws, the judge wrote that "To be sure… cases in which a single incident can create a hostile work environment are rare," but the test is "whether the alleged conduct is 'sufficiently severe *or* pervasive' – written in the disjunctive – not whether the conduct is 'sufficiently severe *and* pervasive.' A single, sufficiently severe incident, then, may suffice to create a hostile work environment." The judge cited cases from other Circuits holding that a single act such as a physical assault or a single verbal or visual incident could satisfy the test if sufficiently severe. And while he acknowledged that "It may be difficult to fully catalogue the various verbal insults and epithets that by themselves could create a hostile work environment," he went on to write, "But, in my view, being called the n-word by a supervisor – as Ayissi-Etoh alleges happened to him – suffices by itself to establish a racially hostile work environment… No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans."

(D.D.C. 2012) ("*Newton III*") (Judge Royce C. Lamberth) – Plaintiff failed in three related cases to establish facts that were sufficiently severe or pervasive to constitute a HWE. The court in *Newton I* granted summary judgment for the employing office, holding that the plaintiff's evidence "merely shows 'complaints over undesirable job responsibilities' and her workload—nothing rising to the level of the 'severe and pervasive' behavior necessary to create a hostile work environment… Newton presents no evidence of verbal abuse, intimidation, ridicule or insult." In *Newton II* the plaintiff added to the list of alleged hostile behaviors two classification audits, which, "standing alone or coupled with the earlier conduct described in *Newton I,* simply set out a series of 'isolated instances' occurring over a four-year period" and failed to establish the existence of a HWE. And in *Newton III*, the court held that the additional allegations – supervisors requesting samples of plaintiff's work, referring some difficult cases for attention, and issuing a letter of counseling – "do not come close to portraying a workplace that is 'permeated with discriminatory intimidation, ridicule and insult,' nor do they effectively amount to a 'change in the terms and conditions of employment.'"

b) *Hyson v. Architect of the Capitol*, 802 F. Supp. 2d 84 (D.D.C. 2011) (Judge Henry H. Kennedy, Jr.) – Isolated incidents, even if intimidating or offensive, "do not amount to actionable harassment." Where the only alleged conduct related to a protected class or protected activity was two comments – remarks that the plaintiff was "too delicate" and, with regard to plaintiff's EEO activity, that "she was either with [her supervisor] or against him" – the court found no harassment severe or pervasive enough to constitute an actionable HWE.

c) *Floyd v. Office of Representative Sheila Jackson Lee*, 85 F. Supp. 3d 482 (D.D.C. 2015) (Judge Rudolph Contreras) – Plaintiff alleged that her employer's failure to accommodate her disability and verbal harassment regarding her disability constituted a HWE. The court allowed for the possibility that, if proven, those allegations could qualify as a HWE as a matter of law: "The prolonged denial of a reasonable accommodation can underlie a hostile work environment claim when 'all the circumstances' would support such a claim… That is, when making a hostile work environment determination, the jury can weigh a wrongful denial of accommodation alongside evidence of other harassment, and that other evidence can augment the weight of the denial by suggesting discriminatory animus." However, in this case the plaintiff failed to prove the underlying failure-to-accommodate claim, and "if a plaintiff could not prevail on a standalone failure-to-accommodate claim, the same alleged lack of accommodation could not constitute 'severe or pervasive' harassment for purposes of a hostile work environment claim." The plaintiff was left with nothing to support her HWE claim except a handful of remarks, which, "even inferred to be crude attacks on [plaintiff's] disability, [were] insufficiently 'severe or pervasive' to sustain her hostile work environment claim." Summary judgment was therefore granted in favor of the employing office.

d) *Turner v. U.S. Capitol Police Bd.*, 983 F. Supp. 2d 98 (D.D.C. 2013) (Judge Rudolph Contreras) – In a retaliatory HWE claim, the actions comprising the allegedly hostile work environment necessarily must post-date the protected activity. Here, although the

plaintiff alleged "a long list of acts" committed by her supervisor, only one action – the supervisor's alleged interference with plaintiff's close-out performance rating – occurred after the plaintiff's protected activity. Except in extreme circumstances, a single act is rarely severe or pervasive enough to constitute a hostile work environment, and the court here found that a "meets expectations" close-out evaluation was not materially adverse, much less an extreme single act that could constitute a HWE.

e) *Harrison v. Office of the Architect of the Capitol*, 964 F. Supp. 2d 71 (D.D.C. 2013) ("*Harrison I*"); 964 F. Supp. 2d 81 (2013) ("*Harrison II*"); and 985 F. Supp. 2d 13 (D.D.C. 2013) ("*Harrison III*") (Judge Colleen Kollar-Kotelly) – Plaintiff alleged a "string of sporadic events, spread out over time, and involving five separate supervisors" including reassignment to a different branch, an instruction not to bring a recording device to work, a "minor technical violation" of a procedural rule when processing the plaintiff's request for counseling, a withdrawn proposal to reprimand the plaintiff, and an inquiry as to the procedure for obtaining authorized access to the plaintiff's computer in case the plaintiff was absent from the workplace for an extended period of time. The court held that "no reasonable juror could conclude" that this series of events, "even when considered as a whole, was sufficiently severe or pervasive such that it altered the conditions of the Plaintiff's employment and created an abusive working environment."

f) *Singh v. U.S. House of Representatives, Comm. on Ways & Means*, 300 F. Supp. 2d 48 (D.D.C. 2004) (Judge Rosemary M. Collyer) – The plaintiff alleged that her immediate supervisor was "hostile, patronizing and frequently abusive," and that she was "constantly hostile and hypercritical, kept [Ms. Singh] out of important meetings, interrupted the flow of her work to interpose critical editing, credited all complaints against Ms. Singh, and ignored all praise." Specific allegations included that the supervisor "froze Ms. Singh out of important meetings and humiliated her at those meetings she did attend"; screamed at the plaintiff for leaving the office and failing to answer the phone; and told the plaintiff "'how terrible things were and all the things [the plaintiff] was doing wrong' and, when Ms. Singh asked to be excused to attend a hearing, [the supervisor] allegedly told her 'to shut up and sit down.'" The plaintiff also alleged "additional examples of alleged mistreatment, such as not being assigned a parking space, having difficulty obtaining supplies, being treated 'as if [she] were invisible' by [her supervisor], *i.e.,* she was purportedly overlooked at staff meetings, denied work in areas of her expertise, isolated from other staff members, excluded from high-level meetings, denied opportunities for professional growth, and denied the opportunity to attend the ten-day festivities surrounding her daughter's college graduation because she was released only for the immediate days surrounding the graduation itself." The court noted that "it appears without doubt that Ms. Singh had a rocky working relationship with [her supervisor]" but that "Criticisms of a subordinate's work and expressions of disapproval (even loud expressions of disapproval) are the kinds of normal strains that can occur in any office setting, especially where, as here, the work environment is particularly pressurized and employees are operating within severe time constraints on matters of national import."

g) *Swann v. Office of the Architect of the Capitol*, 73 F. Supp. 3d 20 (D.D.C. 2014) (Judge Christopher R. Cooper) – The plaintiff alleged seven incidents in support of her HWE claim. The court found that four of them were ordinary work-related actions that courts consistently find to be insufficiently severe or pervasive to constitute a HWE: denial of overtime, application of a dress code, termination of the grace period for late arrivals, and a statement made by a member of management during a deposition. The other three incidents – an investigator showing her a picture of the plaintiff wearing a bathing suit, which the plaintiff had posted on her own Facebook page, and asking her to confirm whether the plaintiff was in fact the woman in the photo; a single occasion of male coworkers making sexually explicit comments in the plaintiff's presence; and the lack of a separate female-only locker room – were not threatening, severe, or pervasive, but rather amounted to "the type of isolated daily annoyances and 'ordinary tribulations of the workplace' that courts in this district have held do not give rise to a hostile work environment claim." The court therefore found in favor of the employing office.

h) *Bradshaw v. Office of the Architect of the Capitol*, 856 F. Supp. 2d 126 (D.D.C. 2012) (Judge Beryl A. Howell) – In support of his HWE claim the plaintiff alleged that the employing office was responsible for OPM's denial of his disability retirement benefits and that it refused to provide him with a copy of the supervisor's statement on which the plaintiff alleged OPM's disability decision was based. The court dismissed the claim because, "viewing the Complaint in the light most favorable to the plaintiff, the plaintiff does not allege ***any*** 'discriminatory intimidation, ridicule, and insult' much less intimidation, ridicule, and insult that are 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'"

i) *Rhone v. U. S. Capitol Police*, 865 F. Supp. 2d 65 (D.D.C. 2012) (Judge John D. Bates) – Plaintiff alleged that she was subjected to a retaliatory HWE for her involvement in a class-action discrimination lawsuit against the employing office and for her previous allegations of discrimination based on her race and disability. The court held that the alleged conduct – reduction in job responsibilities and misrepresentation of her job performance to her supervisor— were "not severe enough to sustain a hostile work environment claim. These 'ordinary tribulations of the workplace' are not the kind of claims for which the Civil Rights Act was intended to provide a remedy."

j) *Bolden v. Office of the Architect of the Capitol*, No. Civ. A. 01-251(CKK), 2005 WL 607875 (D.D.C. Mar. 15, 2005) (Judge Colleen Kollar-Kotelly) – Summary judgment was granted in favor of the employing office where the plaintiff's sole basis for his HWE claim was a single act by his employer – the denial of a promotion – rather than any ongoing hostile behavior by others in the workplace. The court held that this discrete act clearly fell outside the boundaries of a HWE claim.

k) *Raymond v. U. S. Capitol Police Bd*., 157 F. Supp. 2d 50 (D.D.C. 2001) (Judge Ricardo M. Urbina) – Where the totality of the circumstances indicated that the plaintiff's fellow officer made an isolated derogatory comment, that the plaintiff received the cold shoulder from other officers, that one day elapsed between the comment and the time the plaintiff left work permanently, and that the employing office promptly disciplined the officer

who made the derogatory comment, the plaintiff failed to demonstrate conduct that was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, and the employing office was entitled to summary judgment.

V. Statute of Limitations

Because hostile work environment claims usually require plaintiffs to demonstrate an ongoing pattern of conduct, they are treated differently from a limitations perspective than cases involving discrete acts of discrimination. For purposes of claims brought under the CAA, as long as at least one incident contributing to the alleged hostile work environment occurred within 180 days prior to the request for counseling, all related incidents may be considered as evidence.

1) Timeliness Standard

a) *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002) – Because hostile work environments are comprised of a series of separate acts that collectively constitute one unlawful employment practice, a hostile work environment claim is not untimely solely because certain contributing acts occur outside of the filing period. The claim may still be timely so long as at least one contributing act occurred within the filing period: "It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." Additionally, the act(s) that did occur within the filing period do not have to be the last act(s): "As long as the employer has engaged in enough activity to make out an actionable hostile environment claim, an unlawful employment practice has 'occurred,' even if it is still occurring."

b) *Rouiller v. U.S. Capitol Police,* No. 15-CP-23 (CV, AG, RP), 2017 WL 106137 (OOC Board Jan. 9, 2017) – "Under the continuing violation doctrine, there is subject-matter jurisdiction over any discrete claims falling within the statutory period for which the plaintiff has exhausted administrative remedies, and any continuing violation claims that collectively constitute a hostile work environment claim, so long as one of the allegedly discriminatory acts underlying the hostile work environment claim occurred during the statutory time period."

c) *Ingram v. Office of the Senate Sergeant at Arms*, No. 14-SN-15 (CV, AG, DA, RP), 2015 WL 4597721 (OOC Board July 22, 2015) – The continuing violation theory does not apply to discrete acts of discrimination. In this case, the complainant alleged discriminatory failures to hire that occurred within the statutory time period, but the Board held that she could not use those discrete employment actions to establish a HWE claim where the other allegedly hostile behavior occurred more than 180 days before she requested counseling.

d) *Singletary v. Dist. of Columbia*, 351 F.3d 519 (D.C. Cir. 2003) – As long as one act contributing to the claim occurs within the filing period, the entire time period of the

hostile environment may be considered, so long as all of the acts are part of the same unlawful employment practice. The timeliness of a hostile work environment claim does not depend on whether the act that occurred within the limitations period was actionable standing alone.

e) *Vickers v. Powell*, 493 F.3d 186 (D.C. Cir. 2007) – "[B]ecause of the unique nature of a hostile environment claim, so long as at least one of the acts that contributed to the hostile environment occurs within the filing period, other acts that also contributed to the claim but that did not occur within the filing period may also be considered."

f) *Floyd v. Office of Representative Sheila Jackson Lee*, 968 F. Supp. 2d 308 (D.D.C. 2013) (Judge Rudolph Contreras) – The plaintiff alleged a pattern of humiliating and derogatory remarks by her employer based on her disability, only one of which – "I don't give a damn about her disability" – allegedly was made within the statutory time period. Although this remark might not have been actionable standing alone, the court held that under *Morgan*, other similar remarks made outside the limitations period could be considered for purposes of the HWE claim.

g) *Turner v. U.S. Capitol Police Bd.*, 983 F. Supp. 2d 98 (D.D.C. 2013) (Judge Rudolph Contreras) – Because HWE claims "involve repeated conduct that does not fully manifest itself on any particular day, a claim is timely so long as one of the acts contributing to the hostile work environment occurred within the 180 day filing period." Because the plaintiff could not identify a single act within the statutory period that "was part of, and contributed to, the same hostile work environment" as the other alleged conduct, her HWE claim was dismissed as untimely.

h) *Schmidt v. U. S. Capitol Police Bd.*, 826 F. Supp. 2d 59 (D.D.C. 2011) (Judge Reggie B. Walton) – The plaintiff's claims survived a 12(b)(1) motion to dismiss where she alleged that the harassing behavior occurred "on an almost daily basis." Drawing all reasonable inferences in favor of the plaintiff, the court found that this allegation sufficiently "suggests that the discriminatory conduct occurred within the statutory window," and that because the plaintiff disclosed the harassing behavior on her request for counseling, she timely exhausted her administrative remedies. (The motion to dismiss was granted on other grounds.)

i) *Ruffin v. Congressional Budget Office*, 79 F. Supp. 3d 246 (D.D.C. 2015) (Judge John D. Bates) – The court dismissed plaintiff's HWE claim for failure to exhaust administrative remedies. The employing office argued that the plaintiff did not raise a HWE claim in counseling or mediation and that the court therefore lacked jurisdiction over such a claim. The court refrained from deciding whether the words "hostile work environment" must appear in a request for counseling or a notice of invocation of mediation, because even if it is possible to allege facts supporting a HWE claim without using the magic words "hostile work environment," that did not happen in this case. The invocation of mediation simply stated that plaintiff "alleg[ed] disparate treatment and unfair compensation because of race, sex, and reprisal," which did not put the employing office on notice of a HWE claim, and the plaintiff did not produce any additional evidence to indicate that he had asserted such a claim in counseling or mediation. The court indicated

that because of the CAA's confidentiality provisions, it would not be proper to conduct a "mini-trial" on what was raised during counseling and mediation, but that the plaintiff must present evidence to the court to show that he provided his employer with adequate notice of a HWE claim in order to establish the court's jurisdiction over such a claim.

2) Relatedness

a) *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002) – the actionable hostile work environment does not include unrelated incidents that occurred outside of the filing period.

b) *Baird v. Gotbaum*, 662 F.3d 1246 (D.C. Cir. 2011) – The principle established in *Morgan* is not "an open sesame to recovery for time-barred violations." Incidents can be considered as part of the same actionable hostile work environment "only if they are adequately linked into a coherent hostile environment claim," such as where they involve the same types of employment actions, occur relatively frequently, and are perpetrated by the same managers.

c) *Vickers v. Powell*, 493 F.3d 186 (D.C. Cir. 2007) – Plaintiff alleged 13 incidents occurring over a span of approximately eight years. The first six incidents were of the sexual harassment variety and were committed by the plaintiff's supervisor at the time. The later alleged incidents were committed by that supervisor's successor and were more discriminatory in nature. However, the court found that the allegations against both supervisors were similar enough in kind that they could reasonably be seen as part of the same hostile work environment. "The line between Mitchell creating a hostile environment through sexual conduct and his deputy-turned successor Bedwell perpetuating the environment by condoning the same is not so well-defined to say that the Mitchell and Bedwell acts have 'no relation' as required in *Morgan*."

d) *Greer v. Paulson*, 505 F.3d 1306 (D.C. Cir. 2007) – Courts may consider incidents alleged to have occurred while an employee was physically absent from the workplace, because "There are various ways in which a hostile environment may extend beyond the physical workplace, and thus contribute to and form part of a hostile environment claim," including communications between the employee and employer occurring over the phone or offsite. In this case, the plaintiff's 16-month absence from the workplace did not necessarily bar consideration of events that took place before or during the absence. However, she failed to produce admissible evidence linking events that took place within the filing period to events that happened earlier; the only evidence she offered was inadmissible hearsay regarding comments that were allegedly made during her absence.

e) *Herbert v. Architect of the Capitol,* 839 F. Supp. 2d 284 (D.D.C. 2012) (Judge Colleen Kollar-Kotelly) – Noting that there is no "bright-line rule" for determining when a variety of different acts may be considered collectively, the court declined to categorically reject consideration of alleged component acts that pre-dated a settlement agreement between the parties or acts that had been deemed insufficient to qualify as discrete "materially adverse" acts of discrimination in a previous lawsuit.

f) *Hyson v. Architect of the Capitol*, 802 F. Supp. 2d 84 (D.D.C. 2011) (Judge Henry H. Kennedy, Jr.) – Plaintiff raised factual allegations in her complaint that supported her HWE claim but that had not been specifically raised in the administrative proceedings at the OOC. The court determined that although some of the allegations had not been administratively exhausted, they could still be considered if related to the exhausted claims. "[P]laintiffs may incorporate non-exhausted allegations into a hostile work environment claim so long as some allegations were exhausted and all of the allegations together form one hostile environment claim … Accordingly, in determining whether [plaintiff's] hostile environment claim can survive summary judgment, the Court will consider all of the allegations in the complaint that could, along with the exhausted allegations, constitute one hostile environment claim."

3) Intervening actions

a) *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002) – An intervening action by the employer may remove contributing actions from inclusion in the hostile work environment.

b) *Vickers v. Powell*, 493 F.3d 186 (D.C. Cir. 2007) – Although roughly half of the alleged incidents comprising the hostile work environment were committed by a successor supervisor, "routine personnel actions such as Mitchell's retirement and Bedwell's promotion cannot be the type of 'intervening action[s] by the employer' that would sever the earlier incidents from the more recent incidents constituting Vickers' hostile environment claim." The court recognized that under some circumstances a change in managers might affect a HWE claim, but in this case there was "nothing in the record that shows that Bedwell's succession was in any way intended to address the environment created by Mitchell's alleged improprieties. To the contrary, Vickers has alleged that her harassment intensified after the change in management." All of the incidents could therefore reasonably be viewed as part of the same hostile work environment.

c) *Greer v. Paulson*, 505 F.3d 1306 (D.C. Cir. 2007) – The plaintiff alleged numerous racially offensive incidents that took place prior to her 16-month absence from the workplace. However, during her absence her entire division was reorganized and she was assigned to a new supervisor whom she had never met. In contrast to the circumstances in *Vickers v. Powell* (see above), the court held that this was more than a routine personnel action, such as a retirement or promotion, and that there was no evidence that the new supervisor was "perpetuating" or "condoning" a racially hostile environment allegedly created by the plaintiff's former supervisor. Therefore, the allegations involving the new supervisor were too "obviously different" from the earlier allegations to form part of the same hostile work environment claim.

d) *Turner v. U.S. Capitol Police Bd.*, 983 F. Supp. 2d 98 (D.D.C. 2013) (Judge Rudolph Contreras) – The supervisor about whom plaintiff complained was removed from her line of supervision, and this intervening action by the employing office severed the single timely alleged incident from those that occurred earlier. The court therefore did not consider the more recent act to be related to the others for purposes of the HWE claim,

and because plaintiff did not identify any other acts occurring within 180 days of her request for counseling that contributed to the alleged HWE, her claim failed.

VI. Coworker Harassment/Supervisor Harassment

The analytical framework for HWE cases differs depending on whether the alleged misconduct was committed by the plaintiff's supervisor(s) or by coworkers with no direct supervisory authority over the plaintiff. In cases of supervisor harassment, the Supreme Court has established a two-part affirmative defense that employers may use to counter hostile work environment claims: namely, that the employer exercised reasonable care to prevent and promptly correct the hostile behavior, and that the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities. However, where the harassers are the plaintiff's coworkers, the plaintiff bears the burden to show that the employer knew or should have known of the harassment and failed to address it adequately.

1) Harassment by supervisors

a) *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) – "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." If no tangible employment action (e.g., firing, demotion, undesirable reassignment) was taken against the employee, the supervisor may raise a two-part affirmative defense, which it must prove by a preponderance of the evidence: (1) the employer exercised reasonable care to prevent and correct the harassing behavior, and (2) the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or otherwise avoid harm. This affirmative defense is not available, however, when the supervisor's harassment culminates in a tangible employment action.

b) *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) – Reiterates the holding of *Faragher* and explains that an employer is subject to strict liability for actionable tangible employment decisions of the supervisor, because the injury caused by those decisions could not have been inflicted absent the agency relationship.

c) *Penn. State Police v. Suders*, 542 U.S. 129 (2004) – A plaintiff who does not allege a tangible employment action "has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard."

d) *Solomon v. Office of the Architect of the Capitol*, No. 02-AC-62 (RP), 2005 WL 6236948 (OOC Board Dec. 7, 2005) – In a footnote, the Board noted that legislative branch employers may avail themselves of the affirmative defenses to HWE claims described in *Faragher* and *Ellerth*.

e) *Lutkewitte v. Gonzales*, 436 F.3d 248 (D.C. Cir. 2006) – Describes the standards set forth in the *Faragher* and *Ellerth* Supreme Court cases, distinguishing between harassment that culminates in a tangible employment action, for which employers are strictly liable, and harassment absent a tangible employment action, for which employers may assert the two-part affirmative defense that (1) the employer exercised reasonable care to prevent and correct sexually harassing behavior and (2) the plaintiff unreasonably failed to take

advantage of preventive or corrective opportunities provided by the employer or otherwise avoid harm.

f) *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013) – In situations where the plaintiff is harassed by his or her supervisors, the supervisors are treated as the employer's proxy, and the employer is vicariously liable unless "no tangible adverse employment action has been taken and the employer proves an affirmative defense: (i) that it exercised reasonable care to prevent and promptly correct the hostile behavior, *and* (ii) that the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities." In this case, the employer argued that it was entitled to the affirmative defense because it fired the plaintiff's supervisor three months after an alleged incident involving the use of a racial epithet, but the court denied summary judgment because "a reasonable jury could find that three-month delay was not 'prompt.'" The employer also did not even attempt to argue that the plaintiff had failed to take advantage of its complaint system, which is a necessary component of the affirmative defense.

g) *Roebuck v. Washington*, 408 F.3d 790 (D.C. Cir. 2005) – Plaintiff appealed from a jury verdict in favor of her employer. The court first held that the plaintiff had not suffered a tangible employment action, which requires a significant change in employment status, where the alleged actions included the locks being changed on the alleged harasser's office door, a memorandum requesting that the plaintiff be transferred (which ultimately did not occur), and the plaintiff being informed that she would be switching duties with a coworker (which also ultimately did not occur). The court also held that the employer provided sufficient evidence for a jury to decide that the plaintiff unreasonably delayed complaining about the harassment, where it took three months from the time the harasser resumed his conduct until the plaintiff complained. "Whether fear and uncertainty made Roebuck's delay in complaining reasonable was for the jury to decide."

h) *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009) – Where the employee posted a copy of the employer's sexual harassment policy on her door and confided in a coworker that she felt she was being harassed, but did not follow the requirement of the policy to "immediately contact" an EEO representative, instead waiting five or six months to file an EEO complaint, the court held that no reasonable jury could find that the plaintiff's delay was reasonable. The court also found that the plaintiff failed to establish that she had a credible fear of retaliation for coming forward that would have justified the delay.

2) Harassment by coworkers

a) *Lowery v. Office of the Architect of the Capitol*, No. 10-AC-14 (CV, RP), 2012 WL 6561376 (OOC Board Dec. 12, 2012) – "Once a hostile work environment is established, an employee alleging harassment by a coworker must still establish that the employer is liable because it knew or should have known of the harassment, yet failed to take prompt and appropriate corrective action." Here, the record contained "ample evidence that [the employer] knew of the continuous discriminatory harassment directed towards [the complainant]." The complainant reported the harassment to first- and second-line

supervisors several times, complained to the EEO, and ultimately went directly to upper management, and some of his coworkers also complained to management about how the complainant was being treated. The employer finally took remedial action approximately 9 months after the complainant first reported the harassment, but the Board described this response as "too little and too late," holding that under the circumstances, the employer had been "well aware of the harassment and under an obligation to remedy it."

b) *Curry v. District of Columbia*, 195 F. 3d 654 (D.C. Cir. 1999) – Employer liability for a coworker's harassment is governed by a negligence standard: "An employer may be held liable for the harassment of one employee by a fellow employee (a non-supervisor) if the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action." In this case, because no supervisor ever heard the allegedly harassing comments, and because the employer "responded quickly and reasonably" once the plaintiff reported the misconduct, the employer was not liable under Title VII.

c) *Raymond v. U. S. Capitol Police Bd*., 157 F. Supp. 2d 50 (D.D.C. 2001) (Judge Ricardo M. Urbina) – Plaintiff argued that the harassing co-worker had a "history of insulting members of the African American race" and that the employer therefore knew or should have known that the co-worker would make a derogatory comment. But because the employer took prompt action to discipline the co-worker, the court found that the employer complied with the requirements of Title VII.