MEMORANDUM

To: Senior Partner

From: Jeff Harrington

Date: November 25, 2003

Re: Hostile Work Environment Claim

QUESTIONS PRESENTED

1. In the ninth circuit, can an employee establish a hostile work environment claim against her employer under 42 U.S.C. § 2000e-2(a)(1), which prohibits discrimination in the workplace based on sex, when over a six month period her coworker's conduct towards her includes sexual nicknames, sexual jokes, whistling, sexual comments, and sexually explicit pictures sent by fax and email?

2. In the ninth circuit, can an employer avoid liability in a hostile work environment claim under 42 U.S.C. § 2000e-2(a)(1) when he knows of the harassment and takes remedial actions over a two and a half month period that include counseling the harasser, asking him to stop the misconduct, warning him that behavior compromising the work environment would not be tolerated, and moving the victim to another office?

BRIEF ANSWERS

1. Probably yes. The plaintiff must show she was subject to *unwelcome* verbal or physical *conduct of a sexual nature*

that was *severe or pervasive* enough to alter the conditions of the victim's employment. The harasser's conduct in this case was sexual in nature and, as evidenced by the plaintiff's request to move to another office, was both unwelcome and sufficiently severe or pervasive to alter the plaintiff's employment conditions.

2. No. An employer who knows of a hostile work environment is liable unless he takes remedial actions reasonably calculated to end the harassment. Such actions are reasonable if they are proportionate with the severity of the conduct, include a disciplinary action, escalate in severity when the harassment does not stop, and remedy the harassment. The defense fails because the severity of the actions did not escalate when the harassment continued, and the actions did not remedy the harassment.

STATEMENT OF FACTS

On March 15, 2003, Theresa Wallace sent the first of three memos to her employer, Rick Docker of Docker, Sullivan, and Sheppard law firm. The memo describes her difficulties with a coworker, Raymond Bennett. For example, in January of 2003 Bennett began daily stopping by Wallace's office to ask her to lunch, to go out for drinks, and to meet on weekends. He often began these conversations with a sexual joke. Wallace's response on

every occasion was she was married and would feel uncomfortable going out with Bennett on a social basis. From mid-November to the date of the first letter, Bennett referred to Wallace as "hot buns," though Wallace expressed dislike of the nickname. To improve the situation with Bennett, Wallace asked to be moved to a different office.

On March 20, Docker met with Bennett and reminded him of the importance of professionalism. He also stated actions compromising the work environment would not be tolerated and that there is no need to be in a coworker's office for any reason not related to work. Docker then sent Wallace a memo describing the same and asking her to remain in her office.

On April 18, Wallace sent Docker another memo stating Bennett had ceased going to her office but had begun whistling from outside her door, making sexual comments to her in the hall, and calling her "babe" and "sweet cheeks." The next day, Docker moved Wallace to an office on a different floor. Docker then met with Bennett again, repeated the reminders of the first meeting and asked him to refrain from all contact with Wallace.

On June 1, Wallace sent Docker a third memo stating Bennett had ceased speaking with her but had begun sending her sexually explicit pictures by fax and email.

DISCUSSION

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on sex. Civil Rights Act of 1964, 42 U.S.C.A. § 2000 (West 2003). Sexual harassment in the workplace is a form of sex discrimination. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Sexual harassment exists in two forms: 1) quid pro quo and 2) as a hostile work environment. *Id.* at 65. As such, a plaintiff may establish a violation of Title VII by showing the existence of a hostile work environment based on conduct of a sexual nature. *Id.* at 66. An employer is liable if he knows or should know of the harassment and fails to remedy it. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 745 (1998).

The Claim: Hostile Work Environment Theory

To prove sexual harassment under hostile work environment theory, the plaintiff must show "1) she was subject to verbal or physical conduct of a sexual nature, 2) this conduct was unwelcome, and 3) the conduct was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment'". *Fuller v. City of Oakland, California*. 47 F.3d 1522, 1527(9th Cir. 1995)(quoting Ellison v. Brady, 924 F.2d 872, 875-76(9th Cir. 1991)). The first two elements

are not at issue because the comments made by the alleged harasser are overtly sexual in nature and the written complaints the plaintiff sent to her employer are evidence that those comments were unwelcome.

Conduct that is severe and pervasive enough to alter the victim's employment conditions must be such that 1) a reasonable person would objectively find hostile or abusive, and 2) the victim subjectively perceived to be hostile or abusive. *Harris v. Forklift Systems*, Inc., 510 U.S. 17, 22 (1993). This standard is intended to be a middle path between allowing action for conduct that is merely offensive, such as occasional crude jokes or epithets that give rise to offense in an employee, and requiring conduct that causes tangible psychological or emotional injury. *Id.* at 21.

Objectively hostile conduct is judged from the perspective of a reasonable person with the same fundamental characteristics as the plaintiff; hence, where the plaintiff is a woman, the conduct must be objectively hostile from the perspective of a woman. *Ellison*, 924 F.2d at 879. Also, the required showing of severity of the harassment varies inversely with the frequency of the conduct. *Id.* at 878. For example, conduct that is physically threatening or involves physical contact would

require less frequency to create an objectively hostile environment than conduct that is humiliating and still less than conduct that is merely offensive. Finally, the degree of harassment is considered to increase when it occurs after an employer's remedial actions because it shows the perpetrator will neither respect such actions nor restrain himself in the future. *Intlekofer v. Turnage*, 973 F.2d 773, 780 (9th Cir. 1992).

In one case, the court found a hostile work environment existed where a plaintiff's coworker, a person she barely knew, pestered her with unnecessary questions, hung around her desk, sent one note saying he "cried over" her and then—after being asked through a friend to leave the plaintiff alone—sent a long, passionate letter describing how he had been "watching" and "experiencing" her. The plaintiff found the harasser's behavior strange enough that she thought he was "crazy" and feared what he might do next. *Ellison*, 924 F.2d at 880.

In another instance, the court found a hostile environment existed where the co-worker's actions over a period of one year included phone calls to the plaintiff's home, requesting permission to go to the plaintiff's house, touching, "highly personal and private suggestions," making an obscene gesture (the finger), and drawing an obscene

picture on the plaintiff's locker (a dildo). These actions were reported by the plaintiff and came interspersed with warnings and counseling by management personnel. *Intlekofer*, 973 F.2d at 780.

In a more recent case, the court called a harasser's use of sexually derogatory names, such as "fucking female whore," at least once a week and often several times a day a "campaign of taunts designed to humiliate and anger." *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 871 (9th Cir.2001). In another case, insults and sexual innuendos, such as "dumb ass woman" and a suggestion of going to the Holiday Inn to "negotiate [a] raise," made in front of co-workers on several occasions over a period of two years was found to create a hostile working environment. *Harris*, 510 U.S. at 19.

In another case, the court specified that "simple teasing, offhand comments, and isolated incidents, unless extremely serious, would not meet the criteria." *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 and 788(1994).

With respect to severity, the present case is distinguished from those above because Bennett's calling Wallace "hot buns," making sexual jokes and sending sexually explicit faxes and emails is not as extreme as touching, calling the plaintiff's home, or using terms like

"fucking female whore." In severity, the facts of this case are closest to those in *Ellison*; however, Bennett's behavior does not have the bizarre quality of the harasser's behavior in *Ellison* and there is no evidence Theresa fears what Bennett might do next. On the other hand, the fact the conduct was daily in frequency and pervasive enough that Wallace felt "there is no escaping his comments, looks, and harassment," means the requisite severity may be less than if the conduct were only occasional. Further, because the conduct did not cease after remedial actions, it is considered to have increased in severity. Finally, Wallace's request to be moved to another office is evidence that she found the actions subjectively hostile and that, consequently, her employment conditions having been altered.

Wallace will succeed in showing a hostile work environment exists because the conduct was very frequent and did not cease after remedial action and because the circumstances were severe enough to alter employment conditions when judged from Wallace's perspective of a married woman.

The Defense: Sufficiency of Employer's Remedial Actions

Where an employer has knowledge of a hostile work environment, he is liable unless he takes remedial actions

reasonably calculated to curtail the misconduct. *Ellison*, 924 F.2d at 880. Such measures must be proportionate to the severity of the conduct and must include a disciplinary action; a mere request to stop is not sufficient. *Id.* at 882. Counseling may be considered disciplinary action when it includes an expression of strong disapproval, a demand to cease, and a threat of stronger action if the conduct does not cease. *Intlekofer*, 973 F.2d at 779. Also, the severity of the actions must escalate when harassment does not stop. *Id.* The reasonableness of the remedial actions is ultimately judged by whether the actions end the harassment. *Fuller*, 47 F.3d at 1528. Finally, the victim should not be punished by having "to work in a less desirable location as a result of the employer's remedy." *Ellison*, 924 F.2d at 882. That is, the actions are to be targeted at the harasser, not the victim. *Azteca*, 256 F.3d at 876

In the *Ellison* case, the employer's remedial actions were found to be insufficient to shield him from liability because the actions contained no disciplinary action such as an expression of strong disapproval, a reprimand, probation, or threat of termination for repeated harassment. Similarly, the court in *Intlekofer*, found the employer liable because the severity of the remedial

actions did not increase when the harasser failed to stop. The plaintiff filed eight reports of specific incidents involving the harasser over a period of 15 months (three within a one-month span). The court found, in such an instance, counseling and attempts to separate the party merely signal to the harasser that his misconduct will be tolerated.

In the present case, Docker's reminder to Bennett of the importance of being professional and visiting Wallace's office for business matters only falls short of disciplinary action. The threat implicit in Docker's statement that actions compromising the work environment "will not be tolerated" would perhaps serve as disciplinary action if it had been effective in ending the harassment. Moreover, the severity of the actions did not increase when the harassment continued. The defense may argue moving Wallace to another office was in escalation in action; however, that action was both inappropriate because it targeted the victim and ineffective in stopping the harassment.

While the employer's response to the first complaint may have been reasonable, his defense will ultimately fail because his subsequent remedial actions did not escalate in severity and did not remedy the harassment.