



The GSH 60-Second Memo

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Beware of Offensive Workplace Banter; It Could Cost an Employer in a Harrassment Lawsuit, Whether the Plaintiff Hears It or Not

By: Philip S. Holloway, Esq.

Mary is one of only six women working side by side in a department with thirty male colleagues. Mary is an average employee; she does not exceed expectations, but she does not fall below them either. She keeps her head down and does her job. Unfortunately, some of Mary's male co-workers are not so inconspicuous. These co-workers constantly make negative sexist comments about women. Some of these comments are made in Mary's presence but directed at one or more of her fellow female employees. Still others are directed at one or more of Mary's female co-workers, but Mary never hears these comments. Never, however, are these comments directed specifically at or to Mary. In fact, many of these male co-workers' comments are directed at no one in particular.

For months, Mary puts up with these comments, until she cannot take it anymore. She complains to management, but her complaints fall on deaf ears. Mary eventually files a Title VII claim in federal court, alleging sexual harassment due to a hostile work environment. Mary would seem to have a sizeable obstacle to successfully prosecuting her case. Specifically, how can she demonstrate that the offensive conduct was severe and pervasive enough to alter her working conditions when she did not personally witness much of the offensive conduct? Is her case dead in the water without such evidence? According to the Fourth Circuit Court of Appeals, Mary's case may survive if she can produce affidavits or other evidence from her fellow female employees that detail the offensive remarks directed at them, but not overheard by Mary.

In [Ziskie v. Mineta, 547 F.3d 220 \(4th Cir. 2008\)](#), the Fourth

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Circuit Court of Appeals (covering Maryland, North Carolina, South Carolina, Virginia, and West Virginia) examined a case very similar to *Mary's*. In *Ziskie*, the plaintiff was a female air traffic controller who sued her employer under Title VII, alleging a hostile work environment based on plaintiff's gender. To support her claim, the plaintiff alleged that, (1) non-gender based profanity and other crude behaviors were commonplace; (2) there were sexist comments directed to other female employees or not directed to anyone in particular; (3) plaintiff's supervisors gave preference to male employees in making their schedules; and (4) she was frequently treated with hostility by a number of her male co-workers. The plaintiff heard some of the sexist comments directed at other female employees; other comments she did not hear. The comments that she did not hear were described in affidavits of other female employees. The plaintiff submitted these affidavits as support for her claim of a hostile work environment. The district court, in granting the defendant's motion for summary judgment, found that the offensive language and conduct described in the affidavits of plaintiff's co-workers and not experienced by plaintiff firsthand had no bearing on her Title VII claim.

The Fourth Circuit Court of Appeals reversed the district court's ruling in *Ziskie*, rejecting the district court's contention that only conduct directed at the plaintiff could be considered in evaluating a claim for a hostile work environment. Rather, the Fourth Circuit found that evidence of a general atmosphere of hostility towards those of the plaintiff's gender is considered in the examination of the circumstances. Specifically, the Fourth Circuit stated, "evidence about how other employees were treated in that same workplace can be probative of whether the environment was indeed a sexually hostile one, *even if the plaintiff did not witness the conduct herself.*" *Id.* at 225. (emphasis supplied).

Even in jurisdictions where the conduct in *Ziskie* would be insufficient to support a hostile work environment claim, employers need to be wary. In the Seventh Circuit (covering Illinois, Indiana and Wisconsin), for example, the Court has held that, although the impact of "second-hand harassment" is "obviously" not as great as harassment directed at the plaintiff, such incidents "do have some relevance in demonstrating the existence of a hostile work environment." *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997).

The *Ziskie* decision underscores the importance that employers must place on educating their employees and policing their employees' conduct. If an employee can use allegedly offensive conduct that he/she did not even witness, as evidence in a harassment case, then employers must be ever vigilant in preventing such offensive conduct. Employers must make sure to vigorously and consistently enforce their zero-tolerance sexual harassment policies. If the policy does not state that employees should not make offensive comments, even if such comments are not directed at an individual, then the policy should be immediately amended to include such a prohibition. Taking such steps could make the difference between winning and losing a harassment lawsuit, especially if one is in the Fourth Circuit.

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