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Ninth Circuit finds that yelling and bullying in the workplace that adversely affects women may be gender discrimination even if not sexual in nature or gender specific.

Men's Temper Tantrums That Bother Women May Be Sex Discrimination

By Margaret Hart Edwards

Screaming and yelling by men at work may now be sex-based discrimination if women at work find the behavior more intimidating than men do. On September 2, 2005, in *E.E.O.C. v. National Education Association*, (No. 04-35029), the Ninth Circuit Court of Appeals ruled that the "reasonable woman" standard applies to workplace abusive conduct, even if there is no sexual content to the behavior. This decision significantly expands the types of behaviors that may furnish a basis for a claim of discrimination.

Three women working for a labor union, the National Education Association, sued for gender discrimination claiming that the NEA created a sex-based hostile work environment for them through the conduct of an interim assistant executive director who frequently "screamed" at female employees in a loud and profane manner, with little or no provocation, shook his fists at them, stood behind an employee as she worked, and lunged across the table at another. The conduct was not sexual, nor was it marked by sexual language, gender-specific words, sexual stereotypes, or sexual overtures. While there was evidence that the same director raised his voice with men on occasion, and once frightened a male subordinate, male employees seemed to deal with that abuse with banter, and did not express the same fear of the director, did not cry, become panicked or feel physically threatened, avoid contact with

the director, call the police, or ultimately resign, as did one woman.

The claims of the three women and the Equal Employment Opportunity Commission (EEOC) were dismissed on summary judgment by the Alaska District Court. The plaintiffs appealed to the Ninth Circuit. The Ninth Circuit ruled that the district court committed error when it said that there must be behavior of a sexual nature or the motive for the behavior must be animus towards members of one sex to be sex-based discrimination. The Ninth Circuit said, "There is no legal requirement that hostile acts be overtly sex- or gender-specific in content, whether marked by language, by sex or gender stereotypes, or by sexual overtures." The real question, the court said, is whether the behavior affected women more adversely than it affected men. This question can be analyzed two ways:

- Is the effect of the behavior qualitatively different, and
- Is the amount of the behavior quantitatively different.

Different Effects of Abusive Conduct on Women and Men Equals Disparate Treatment

Under the "reasonable woman" standard devised in an earlier case, *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the qualitative differences in the subjective and objective effects of the behavior are the

way to determine whether men and women were treated differently. Because women found the behavior subjectively more intimidating than men did, and reasonable women would do so, the conduct treats women differently. That it may not have been the director's intent to treat women differently does not matter. What matters is the effect of the behavior, both subjectively, and objectively. While the court did not clearly differentiate the subjective from the objective, it took the extremity of the reactions of the plaintiffs to the director's behavior as evidence that the behavior was objectively more intimidating to women. One woman resigned; another filed a police report, a third did not put in for payment of overtime she worked because she was "too scared."

Different Amounts of Abusive Conduct Directed at Men and Women May Equal Disparate Treatment

The quantitative difference turns on whether women were more frequently exposed to the abusive behavior than men. The NEA pointed out that as a teachers' union, most of its employees were women, and women had more contact with the particular director. This argument did not prevail, because, as other courts have ruled, an unbalanced distribution of the sexes and the fact that some men were harassed, does not defeat a showing of differential treatment. The court did not say how many instances of abusive treatment would be enough, reserving that as a question for the jury. It did say that it was possible that in some cases quantitative differences in abusive treatment of men and women could be too slight to survive summary judgment.

Significant Expansion of the Law

This decision is a significant extension of the law of gender-based discrimination because it takes facially neutral, if undesirable, behaviors, and looks at how they differently affect women. Previous cases, such as *Ellison*, and *Steiner v. Showboat Operating Co.*, 25 F3d 1459 (9th Cir. 1994) had involved behavior that had obviously sexual content. In *Ellison*, a male employee relentlessly pursued a female employee he wanted to date. In *Steiner*, a crude casino pit boss used sexual epithets, and explicit references to women's bodies and sexual conduct. In the NEA case, the court expanded the same model of legal analysis to conduct that was simply abusive, but without the sexual content. With this expansion employers can now expect to see allegations of the kind in the NEA case show up in more discrimination and harassment cases.

This case means that when employers permit abusive behavior in the workplace, their toleration carries a higher risk. If the abusive behavior will be actually and reasonably perceived as disadvantageous by women, the behavior may be discrimination. There is no theoretical reason why the standard set in this case could not be further extended to race or other forms of discrimination. Finally, the court's logic raises the question of whether the case would have come out the same way if the director engaging in the abusive behavior was a woman. Given one of the Ninth Circuit's remarks, perhaps not. The court said, "this case illustrates an alternative motivational theory in which an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men."

Practical Prevention Steps

As a practical matter, this decision suggests that employers should take the following steps to prevent claims like those of the plaintiffs in this case, by doing the following:

1. Take firm disciplinary action against abusive workplace behavior, and document the disciplinary action. Termination of repeat offenders may be necessary to avoid potential liability.
2. Adopt workplace policies that prohibit abusive, bullying behavior, and enforce the policies.
3. Make sure that discrimination prevention training includes the concept that abusive conduct that is not gender-specific could be gender-based discrimination, if the conduct has a subjectively and objectively more adverse effect on women.

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