

Encouraging Courts to Think Practically About Workplace Harassment

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Susan Grover & Kimberley Piro, *Consider The Source: When the Harasser Is the Boss*, 79 **Fordham L. Rev.** 499 (2010), available on [SSRN](#).

In their excellent essay, Susan Grover and Kimberley Piro propose that courts explicitly consider whether a harasser is the target's co-worker or the target's supervisor in deciding whether harassment is sufficiently severe or pervasive to constitute actionable harassment under Title VII. Grover and Piro argue that the same harassment will have a different effect on a reasonable employee – a core part of determining if the harassment is severe or pervasive – depending on whether the harasser is the target's co-worker or the target's supervisor. The key point – that a supervisor's direct power over an employee makes criticism or harassment from a supervisor much more harmful to the target's employment than the same behavior by a co-worker – is virtually unassailable.

The essay identifies an important doctrinal issue. However, its power is that it raises a practical issue relevant to many workplace harassment disputes and considers how courts ought to address the practical issue through existing doctrine. Rather than create an exotic problem and suggest that courts alter doctrine to address it, the essay makes a very precise point and offers a real prescription for addressing the point. The prescription can be incorporated very easily by courts into their analyses of current harassment cases because it does not require the extension, alteration or reinterpretation of Supreme Court doctrine. The authors implicitly suggest that courts should already be taking the status of the harasser into account when evaluating the severity or pervasiveness of the subject harassment because doing so is already consistent with the Supreme Court's Title VII doctrine. That may not be the flashiest legal scholarship, but it is very important and worthy of note as a TILL (Thing I Like Lots).

As Grover and Piro explain, courts must address two questions in harassment cases. The first focuses on whether actionable harassment exists. The second focuses on whether the employer should be liable for the harassment. The Supreme Court has indicated how the second question is affected by whether the harasser is a co-worker or a supervisor, both in discussing the distinction between *quid pro quo* and hostile work environment harassment and in creating the *Faragher/Ellerth* affirmative defense that may be available when a supervisor triggers a hostile work environment. However, the Court has been far less specific regarding how the first question is affected by the harasser's status.

The Court limits actionable hostile work environment harassment to severe or pervasive harassment. Severe or pervasive harassment is harassment that alters the conditions of the employee's employment. However, in defining what harassment will be actionable, the Court has tended to focus on how abusive the subject harassment was. Doctrine suggests that courts consider the totality of the circumstances when determining if the harassment is sufficiently abusive to be deemed actionable.

The authors note that whether a harasser is an employee's supervisor or merely a co-worker ought to matter in determining whether the subject harassment is abusive enough to alter the conditions of the employee's employment. One premise of the argument is that co-worker harassment can be handled in ways that supervisor harassment cannot. For example, a target can usually ignore a co-worker's abuse without direct reprisal. However, a supervisor's harassment cannot be so easily ignored. An employee

must listen to one's supervisor if only to take instruction regarding legitimate aspects of one's job duties. Indeed, as the authors note, refusing to listen to one's supervisor may lead to legitimate discipline. In addition, the workplace conditions for an employee may be affected indirectly depending on the identity of the harasser. When the harasser is a supervisor, other workers may feel freer to harass the target than if the harasser were merely another co-worker.

However, according to the authors, most courts appear to look only at the content of the harassment the target endures rather than the identity of the harasser. The totality-of-the-circumstances test focuses on the abuse the target suffers and whether that abuse alters the conditions of employment. If, as the authors suggest, a reasonable employee feels more abused if harassed by the employee's supervisor than if harassed by the employee's co-worker, the identity of the harasser is important. Indeed, the identity of the harasser would matter precisely because the harasser's identity may significantly increase the level of abuse suffered and determine whether the conditions of employment have been altered. Consequently, courts should specifically consider the identity of the harasser when determining if actionable harassment has occurred.

The essay provides a good and tight argument. It does not provide an exhaustive treatment of the issue and need not have done so. Certainly, the essay could have been longer and could have explored whether the harasser must be the target's supervisor or merely need be someone higher in the workplace hierarchy than the employee, such as a supervisor in a different division, with the power or influence to make the victim's employment more difficult than a regular co-worker could. However, such extended treatment was not necessary.

The essay took an issue of practical concern to those harassed in the workplace and explored both how courts have approached the issue and how current doctrine allows courts to approach the issue more properly. More essays of this type should be welcome both inside and outside of the academy. To the extent that law ought to be understandable by the public and should sensibly resolve real issues facing by those in situations regulated by the law, focusing on practical issues and making the doctrine sensibly consistent with the real world is plenty enough reason to write an essay and plenty enough reason to suggest that others read such an essay.

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