## 10.5 Civil Rights—Title VII—Hostile Work Environment—Harassment Because Of Protected Characteristics—Elements

The plaintiff seeks damages against the defendant for a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment while employed by the defendant. In order to establish a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the plaintiff was subjected to [slurs, insults, jokes or other verbal comments or physical contact or intimidation of a racial nature] [sexual advances, requests for sexual conduct, or other verbal or physical conduct of a sexual nature] [*conduct affecting other Title VII protected characteristics*];

2. the conduct was unwelcome;

3. the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff’s employment and create a [racially] [sexually] [*other Title VII protected characteristic*] abusive or hostile work environment;

4. the plaintiff perceived the working environment to be abusive or hostile; and

5. a reasonable [woman] [man] in the plaintiff’s circumstances would consider the working environment to be abusive or hostile.

Whether the environment constituted a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment is determined by looking at the totality of the circumstances, including the frequency of the harassing conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with an employee’s work performance.

**Comment**

The elements of this instruction are derived from *Fuller v. City of Oakland, California*, 47 F.3d 1522, 1527 (9th Cir. 1995). The language in the instruction regarding the factors used to determine whether a working environment was sufficiently hostile or abusive is derived from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

This instruction should be given in conjunction with other appropriate instructions, including Instructions 10.6 (Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense); 10.7 (Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based On Negligence); and, if necessary, 10.12 (Civil Rights—Title VII—“Tangible Employment Action” Defined).

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

“A plaintiff must show that the work environment was both subjectively and objectively hostile.” *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004); *see also Fuller*, 47 F.3d at 1527 (citing *Harris*, 510 U.S. at 21-22). For the objective element, the Ninth Circuit has adopted the “reasonable victim” standard. *Ellison v. Brady*, 924 F.2d 872, 878-80 (9th Cir. 1991). Therefore, if the plaintiff/victim is a woman, element five of the instruction should state “reasonable woman,” and if the plaintiff/victim is a man, “reasonable man.” *Ellison*, 924 F.2d at 879, n.11; *see also Reynaga v. Roseburg Forest Prods*., 847 F.3d 678, 687 (9th Cir. 2017) (conducting objective inquiry from perspective of reasonable member of applicable ethnic group); *Fuller v. Idaho Dept. of Corr.*, 865 F.3d 1154, 1158 (9th Cir. 2017) (holding that because women are disproportionately victims of rape and sexual assault, “a jury armed with common sense and an appropriate sensitivity to social context could reasonably conclude that the actions of [a female plaintiff’s supervisor, siding with the alleged male rapist over plaintiff,] were because of her sex”).

In determining whether the harassment was sufficiently severe or pervasive, the fact finder should consider all circumstances, “including those incidents that do not involve verbal communication between the plaintiff and harasser, physical proximity, or physical or sexual touching,” including interactions between the harasser and third persons. *Christian v. Umpqua Bank*, 984 F.3d 801, 810–11 (9th Cir. 2020) (citing *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008)). When harassment is of the “same type of conduct,” “occurred relatively frequently,” and was “perpetrated by the same individual,” that harassment should be evaluated together when assessing its severity. *Id*. at 810 (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 120–21 (2002)).

Targeting specific individuals with hostile conduct is not required to establish a Title VII violation. *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974, 979 (9th Cir. 2023) (holding that “repeated and prolonged exposure to sexually foul and abusive music” falls within a broader category of auditory harassment that can pollute a workplace and violate Title VII). Further, an employer cannot claim as a defense that it is an equal opportunity harasser, *i.e.*, male and female plaintiffs can coexist in the same Title VII action. *Id*. (observing that the rule also applies in the context of race discrimination).

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