

SEXUAL HARASSMENT: PRACTICE POINTER

The Essential Element: “The harassment made me miserable and my work suffered a lot from it.”

“To determine whether a hostile environment claim is actionable, we consider all of the circumstances, which `may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d]’ with the employee’s work performance.” (citations omitted), *Westendorf v. West Coast Contractors of Nevada, Inc.*, ___ F.3d ___ (9th Cir. April 1, 2013).

This decision minimalized the following behavior: “Does ‘Double D’ (a full breasted woman) intimidate you?” “Do women ‘get off’ using (certain tampons),” “Women are lucky, they have multiple orgasms.” The panel found that the plaintiff was at the pertinent location once a week for 3 months and that the commentator co-employee made sexual remarks to her “on only about four occasions.... The harassment was not physical and (the plaintiff) **did not say that her work suffered because of it.**”

The decision cited in comparison *EEOC v Prospect Airport Services*, 621 F.3d 991 (9th Cir. 2010). The core of that decision was that the pestering of a male wheel chair attendant for sex to the point of tears, psychological counseling and discharge met the above standard. While the Westendorf facts included management efforts to prevent an abusive environment, **the key to both decisions** was evidence or lack thereof that “...the work environment was...one that a reasonable person would find hostile and that the victim in fact did perceive it to be so.” *Id.* at 987.

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