Christianity and Law intersect within the federal law of employment discrimination. See, e.g., Luke 10:25-37. For this reason, the following presentation on "hostile working environment" transcends law and covers important issues of culture, history, religion, psychology, and sociology. The following speech was delivered with overhead projector and slides before a general audience of about 50 people on September 17, 2009.

"A Speech On Hostile Work Environment"[1]

By
Roderick O. Ford, J.D.

Good morning.

First and foremost, I would like to extend a word of gratitude to the City of Tampa Office of Human Rights and to Director Ken Perry for inviting me to participate in this seminar.

I am excited to be here with you this morning, because I get to talk to you about what I believe is the most interesting area of Human Resources and Labor & Employment law-- the law of hostile work environment.

The presentation that I give this morning focuses on the law of workplace harassment as it has evolved in the federal courts pursuant to Title VII of the Civil Rights Act of 1964. But it will also touch upon other federal and state laws as well.

I like this area of employment law-- because it is the proverbial Shepard beating back the wolves from the throats of the sheep:

-- Its central purpose is to inject morality and social justice into the workplace.

-- And it is one of the few areas of the law where lawyers get to make passionate legal arguments that takes into human rights and the legislative purpose of federal anti-discrimination

[1] This is a re-print of the speech on the law of hostile work environment presented by Roderick O. Ford to members of general public on September 17, 2009. This event was sponsored by the City of Tampa Office of Human Rights and the U.S. Equal Employment Opportunity Commission and held at the Ragan Park Community Center in Tampa, Florida .

and labor law and policy.

In order to understand the law of "Hostile Work Environment", it is necessary to thoroughly comprehend the social problems for which the law was enacted to provide a remedy.

That social problem, fundamentally, revolves around a free market system where women, racial & ethnic minority groups, religious minority groups, and members of other minority groups have sought to move out of occupational fields (typically lower-paying service sector, agricultural, or industrial jobs) and into higher-paying white collar or skilled trade jobs that have historically been dominated by white Americans….

Prior to 1964, there was no national legislation that guaranteed equal employment opportunity to members of racial, ethnic, religious or national origin minority groups. During the 1970s, the decade following the passage of Title VII of the Civil Rights Act of 1964, widespread affirmative action programs were then, for the first time, opening up the doors of economic opportunity to all members of the American workforce.

Generically speaking, the law of workplace harassment was designed, fundamentally, to protect these minority group members from being forced off of their jobs through workplace practices that humiliated, demeaned, insulted, and even physically assaulted them.

Historically, African Americans in the South… were the most frequent victims of racial harassment in the workplace.

During the 1970s and 80s, sexual harassment against women began to overshadow racial harassment, with the vast majority of "hostile work environment" cases being classified as sexual harassment cases during this period.

Meanwhile, harassment against disabled workers became a national problem, and thus the ADA[2] was enacted in 1990. And harassment claims by older workers also began to percolate up to the federal circuit courts.

Today, following the September 11, 2001 terrorist attacks in Washington, D.C. and New York, harassment of Muslim Americans and Americans of Middle Eastern origin has become epidemic. And a new minority group-- the gay & lesbian community-- which is still not recognized as a protected group under Title VII, is nevertheless asserting their right to fair and humane treatment in the workplace as well.

The central purpose of state and federal antidiscrimination laws is to provide equal opportunity to all workers regardless of race, color, ethnic origin, age, disability, sex, (and in the case of local ordinances, sexual orientation) to all members of the workforce.

This means that every able-bodied man or woman who has the requisite qualifications and who are willing to work should not be denied (1) fair hiring opportunities; (2) training opportunities; (3) promotion opportunities; (4) economic remuneration (fair pay opportunities);

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[2] Americans With Disabilities Act.

and (5) other terms and conditions of employment.

Now, one of the critical contributions that the Law of Hostile Work Environment has made to American jurisprudence is that it included the term "psychological well-being" within the legally-operative phrase "terms, conditions and privileges of employment," which is the statutory language found in Section 703 of Title VII.

What this means is that, in addition to providing all American workers with equal tangible economic benefits, such as fair pay and equal training, etc., employers also have an obligation to ensure that working conditions are not diminished through severe or pervasive ridicule and insult that are based upon color, religion, race, national origin or gender.

Unlike many areas of the law, the Law of Hostile Work environment provides no one-size fits all definition of workplace harassment. Justice Thomas, writing for the majority in the Supreme Court decision of *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002), gave the following description of hostile work environment as follows: "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct…. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."[3] And the Eleventh Circuit Court of Appeals, e.g., in the case of *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), stated that "[w]hether … harassment at the workplace is sufficiently severe and pervasive to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of circumstances."[4]

As you can see, the courts have not given us a clear-cut definition of "Hostile Work Environment."

One thing is clear: one cannot adequately differentiate between what is or what is not a hostile work environment without understanding (1) mores & folkways; (2) habits & traditions; (3) the meaning of colloquial slang & ethnic slurs; and the, and (4) sociology & history of protected groups to which the victimized employee belongs.

Thus, the law of "hostile work" environment is a fact driven phenomenon. Human resources professionals, investigators, lawyers, and judges must thoroughly examine the facts of each case, and then make a judgment call-- based upon their understanding of morality, social justice, history, and the legislative purpose of Title VII-- in order to determine whether or not a given set of facts constitute a hostile work environment.

The law of hostile work environment is designed, first and foremost, to regulate prejudice in the workplace.

The word prejudice is derived from the Latin work *praejudicum*.

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[3] Id. at 2073.
[4] Id. at 904.

To the ancient Romans, this word meant a precedent-- a judgment based on previous decision and experiences.

Later, the term, in English, acquired the meaning of a judgment formed before due examination and consideration of the facts-- a premature or hasty judgment.

Today, the word prejudice means: ***"A feeling, favorable or unfavorable, toward a person or thing prior to, or not based on, actual experience."***

As previously mentioned, the law of hostile work environment is designed, first and foremost, to regulate prejudice in the workplace.

This does not mean that this law is designed to change minds and hearts; but, it does mean that this law is designed to modify and change behaviors.

Prejudicial behaviors fall into five broad categories:

1. Antilocution: this is where person with prejudices freely express their feelings with other like-minded persons who share their views. Most persons with prejudices rarely go beyond this mild form of antisocial action. However, whenever they express their prejudiced feelings in conversations at the workplace, legal problems may arise later, especially if they are ever called upon to make key personnel decisions involving a diverse group of employees.

2. Avoidance: this is where persons go out of their way to avoid speaking to or associating with members of the disliked group. In the workplace setting, this can be very problematic when diverse members are on the same work teams or depend upon each other for information, input or guidance.

3. Discrimination: this is where an individual openly and intentionally takes official steps to exclude, separate, segregate, deny benefits to, or subordinate employees because of their membership in disliked groups. Examples of this form of discrimination includes refusing to hire or promote someone because they their race, sex, or religion.

4. Physical Attack: this typically results from frustration and hatred; an employee is physically battered or assaulted because of their membership in a disliked group.

5. Extermination: this is typified by lynchings and massacres. A historical example of extermination is the Hitler regime's treatment of German Jews during the 1930s and 40s. In the modern workplace, signs of extermination-- as expressions of hatred against disliked minority group members-- may be displayed. Such symbols include "nooses," which is directed against African Americans; or Swastikas or other forms of racist graffiti.

Each of these factual phenomena help us to understand how prejudices can impact the workplace. Most cases involving hostile work environment claims contain facts that fit into one or more of these five types of negative prejudicial behaviors.

It is easy to see why the average American worker may legitimately feel that her or she has been subjected to a hostile work environment.

For example:

The Hispanic worker, who overhears his or her non-Hispanic co-workers speaking derisively about Latinos;

OR

The Muslim worker who is ostracized by fellow non-Muslim co-workers who appear to be avoiding him or her because of religion;

OR

The female worker who is criticized on a daily basis for frivolous reasons by a male supervisor whom she recently filed a sexual discrimination complaint against;

OR

The African American worker who goes to work and sees a noose hanging over his or her chair---

It is easy to see why these workers may legitimately feel that they have been made to work in a hostile work environment.

This is because the average American worker's understanding of "hostile work environment" is more analogous to the Webster's Dictionary definition of harassment: *Webster's New World Dictionary* states, for example, that the word "harass" means "to worry or trouble [to harass a person with questions; to be harassed with many debts] . 2. To trouble by attacking again and again [to harass an enemy with nightly raids]" *Webster's* next defines "harassment" as "1 the act of harassing 2 the condition of being harassed."

However, a critical problem area in American employment jurisprudence is that the legal definition of "Hostile Work Environment" does not mean the same thing as the average American workers' understanding of "harassment," which is more similar to a dictionary definition of the term.

The legal definition of "hostile work environment" consists of 5-parts and 4 sub-parts.

The five-part test is: (1) an employee belongs to a protected group; (2) was subjected to unwelcome harassment; (3) harassment was based upon [protected status]; (4) affected term, condition or privilege of employment; and (5) a basis for holding the Employer liable

Further, in determining whether the harassment affected a "term, condition, or privilege" of employment, there is a four-part subtest, courts will look at: (1) frequency of the conduct; (2) severity of the conduct; (3) whether the conduct was physically threatening; (4) whether such conduct unreasonably interferes with employee's work performance

What this means is that a worker may very well have been "harassed" in the ordinary understanding and definition of the word "harassment." But because the circumstances of their case does not satisfy the 5-part test for the legal definition of "hostile work environment," that individual may very not have an actionable claim.

Under Title VII of the Civil Rights Act of 1964, a "hostile Work Environment" claim can be made on the basis of: Race, Color, Religion, National Origin, and Sex.

This is also true of all of the other federal or state laws as well. For example, the Americans with Disabilities Act requires evidence that the harassment was based upon the employee's disability. The Age Discrimination in Employment Act requires evidence that the harassment was based upon age. And he same is true where an employee is harassed because he or she tries to attain FMLA [Family and Medical Leave Act] benefits or benefits covered ERISA [Employee Retirement Income Security Act]; or because he is a whistleblower under OSHA [Occupational Safety & Health Act].

Again, in order for harassment to be actionable under these and other similar federal and state laws, there must be sufficient evidence to demonstrate that the reason for the harassment was because of (a) the employee's protected characteristic or (b) the employee engaged in a protected activity. Protected activity harassment is also called "retaliatory workplace harassment."

As I previously discussed, prejudice may take on many forms, such as physical violence.

What is important to understand is that the law of "hostile work environment" does not exist in isolation from other state laws, such as the common law of (1) assault; (2) battery; and (3) intentional infliction of emotional distress.

What this means is that even if a particular set of Harassing Activities does not fit within the definition of a hostile work environment under Title VII, for example, it may nevertheless violate other laws.

Employers are under a duty to conduct a reasonable background investigation to ensure that its employees are fit and do not possess characteristics likely to place others within a zone of foreseeable danger.

Hence, an employer who is aware of an applicants prior convictions for sexual assault, e.g., may be opening itself to liability (Negligent Hiring) if it placed that person into a position where co-employees stand a high likelihood of being victimized. Similarly, if an employer finds out about a person's violent propensities after the person is already hired, then the employer could become liable (Negligent Retention) for retaining such individuals as employees in the workplace, following incidents of co-worker assault or battery.

In the early years of Title VII, from 1965 to 1980, most hostile work environment claims were racial harassment claims. Most of these claims came from the federal circuits in the South: Virginia, Maryland, North and South Carolina, Texas, Louisiana, Mississippi, Florida, Georgia, Alabama, Arkansas, Tennessee, and Kentucky.

Today, legal scholars refer to these early cases as the "Southern Jurisprudence," because during the early years Title VII jurisprudence took shape largely in southern federal courts. And

the law of hostile work environment during these years were synonymous with racial harassment. Today, a significant percentage of the nations' racial harassment claims still comes from this part of the country.

During the early years of civil rights implementation and affirmative action, the U.S. Equal Employment Opportunity Commission (EEOC) needed to take an aggressive position on ensuring that African American employees would receive fair and just treatment after they integrated into workplaces, work sections, and departments that had previously all-white. The EEOC took the lead in remedying "hostile work environment" claims during the late 1960s and early 1970s.

Consider, for example, the following three EEOC administrative decisions from the early 1970s:

1. EEOC Dec. No. 71-99 (Dec. 24, 1970): "Reasonable cause exists to believe that employer violates Title VII by maintaining working environment in which racial insults, in form of supervisors' habitual reference to Negro employees as 'niggers,' is countenanced….

"With respect to the supervisor's language, the Commission states:

'An employer is responsible for the behavior of its agents within the course of their employment. It is also obliged under this Act to maintain a working atmosphere free of racial intimidation or insult. Failure to take steps reasonably calculated to maintain such an atmosphere violates the Act…."

2. EEOC Dec. No. 72-0779 (Dec. 30, 1971): "Reasonable cause exists to believe that employer violated Title VII by failing to take reasonable steps to remedy effect of incident in which Caucasian assistant supervisor called employee 'Nigger,' since Act requires employer to maintain working environment which is free of racial intimidation….. 'The Supervisor of the department admits that he dropped his 'investigation' of the matter when the Caucasian [supervisor] enied making the remark… In light of the foregoing evidence we infer that the racial epithet was uttered by supervisory employee, that Respondent's management had knowledge of the fact, failed to take reasonable steps to remedy its effect and thus discriminated against Charging Party because of his race within the meaning of the Act."

3. EEOC Dec. No. 72-1561 (May 12, 1972): "Reasonable cause exists to believe that employer violated Title VII by tolerating atmosphere of intimidation in which Negroes and Spanish surnamed Americans as a class were subjected to barrage of racial and ethnic 'jokes' and derogatory restroom wall graffiti….

"The charging parties also allege that the employer has tolerated an atmosphere in which racial and ethnic 'jokes' are freely made by employees, and racially derogatory remarks are written on restroom walls. The incidents go uninvestigated and the perpetrators unpunished….

"The Commission states:

"Title VII requires an employer to maintain an atmosphere free of racial and ethnic intimidation and insult. That requirement includes positive action where positive action is necessary to redress or eliminate employee or supervisory intimidation."

The 5th Circuit's landmark 1971 decision in *Rogers v. EEOC* (1971), was the very first

court decision that interpreted Section 703 of Title VII to include 'hostile work environment' as a valid cause of action." This case involved a claim of racial harassment against a Spanish surnamed woman. In *Rogers vs. EEOC,* the court said:

> "We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination…"
> "Therefore, it is my belief that employee's psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, or privileges of employment' in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination...."[5]

The key development in this case is that a federal court, for the first time, recognized an employees' emotional or psychological well-being as being a term, condition, or privilege of employment. This language has gone on to mold and shape later court decisions on "hostile work environment" both at the U.S. Supreme Court level as well as the lower federal court and state court levels.

As previously stated, there are five legal elements, and four sub legal elements to a "hostile work environment" claim:

The five legal elements are (1) an employee belongs to a Protected Group [race, color, sex, national origin, or religion-- Title VII] [Disability-- ADA; Age-- ADEA]; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based upon [protected status]; (4) the harassment affected a term, condition or privilege of employment; and (5) employer liability (or a basis for holding the employer liable); employer knew, or should have known about the harassment, and failed to take appropriate action.

The four sub-legal elements are that when determining whether a term, condition or privilege of employment has been negatively impacted, the courts will look at the (1) frequency of the conduct; (2) severity of the conduct; (3) whether the conduct was physically threatening; and (4) whether such conduct unreasonably interferes with Employee's work performance

The year 1998 was a watershed moment in the law of hostile work environment, and particularly for sexual harassment cases. In that year, U.S. Supreme Court decided three major cases: (1) *Faragher v. City of Boca Raton* (1998); (2) *Burlington Industries, Inc. v. Ellerth* (1998); and (2) *Oncale v. Sundowner Offshore Services* (1998)

Prior to 1998, the only Supreme Court decision on the tort of sexual harassment was the case of *Meritor Sav. Bank v. Vinson* (1986). In *Meritor,* the Supreme Court promulgated a very broad principle on the question of "Employer Liability":

Employers will not always be automatically liable for sexual harassment simply because it was committed by a supervisor.

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[5] Id. at 238.

What this meant was that lower-level courts would need to look at whether or not the supervisor had acted with the course and scope of his employment. But what the Supreme Court left unresolved in its 1986 *Meritor* decision was the question:

Under what circumstances would an employer be responsible for the actions of its supervisor?

[Or, stated differently]

When is a supervisor acting outside of the course and scope of his employment?

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In 1998, the Supreme Court answered these questions in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc., v. Ellerth* together.

Both cases hold that a supervisor is always aided by his agency relationship whenever he commits sexual harassment-- regardless of whether (1) quid pro quo type or (2) sexual harassing type-- because a supervisor has been given authority to direct & control the employees, for the benefit or detriment of the employer; and because the employer can reasonably anticipate the possibility of a variety of forms of anti-social harassment and can take steps to prevent such harassment from occurring.

However, the Court also gave Employer's the right to assert an Affirmative Defense. This affirmative defense is that:

Where an employer has an anti-harassment reporting policy, and the employee unreasonably fails to report the harassment, then the employer cannot not be held liable for the harassment;

[or]

The employer immediately takes steps to correct the harassment after it finds out about the harassment, then the employer cannot not be held liable for the harassment.

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The Supreme Court, however, limited this employer affirmative defense by the "tangible employment action exception" doctrine.

The Court also established the doctrine that if a supervisor's harassment culminates into a tangible employment action, such as a demotion or termination, then the employer cannot rely on an Affirmative Defense and will be held strictly liable.

On the other hand, where the supervisor commits harassment, but that harassment does not culminate into a tangible employment action--such as a demotion, cut in pay, termination-- then the employer would be able to avail itself of the affirmative defense.

In the case of *Oncale v. Sundown Offshore Services* (1998), the Supreme Court adopted a categorical rule that included same-sex harassment-- such as *male-on-male,* or *female-on-female*-- harassment as cognizable claims under Title VII.

The lower-level federal appellate court cases continue to refine the *Faragher/ Ellerth* decisions. These lower level court cases provide clear and specific points tailored toward unique fact patterns that may be helpful to human resources professionals, investigators, and attorneys. For example, *Watson v. Blue Circle* (11th Cir. 2003), the court ruled that actual notice of harassment to the employer is established where the employee proves that she reported the harassment in accordance with the employer's published policy. It ruled that simply printing and distributing an anti-harassment policy to employees are not enough: "…where there is ineffective or incomplete policies, the employer remains liable for the conduct that is so severe and pervasive as to confer constructive knowledge."[6] And, finally, it ruled that an employee may present evidence to challenge the effectiveness of an employer's anti-harassment policy, such as evidence showing that the employer fails to adequately investigate or fails to respond to allegations of sexual harassment in the workplace, in a timely manner.

Without going into very many details on religion-based harassment, I would like simply to point out that the same five-part test/ and four-part sub test, which applies to Sexual Harassment cases, also applies to harassment based on religion. An example of a Religious-based harassment claim can be found in the case of *Rivera v. Puerto Rico Aqueduct & Sewer Authority* (1st Cir. 2003

The same five-part test/ and four-part subtest, which applies to sexual harassment cases, also applies to harassment based on disability, arising under the Americans With Disabilities Act. An example of a disability-based harassment claim can be found in the case of *Fox v. General Motors Corp*. (4th Cir. 2001).

And finally, the same five-part test/ and four-part sub test, which applies to racial and sexual harassment cases, also applies to harassment based on age, for cases arising under the Age Discrimination In Employment Act (ADEA). Example of a age-based harassment claim can be found in the cases of *Crawford v. Medina General Hospital* (6th Cir. 1996); *De La Vega v. San Juan Star, Inc.* (1st Cir. 2004); and *MacKenzie v. City and County of Denver* (10th Cir. 2005)

LESSONS FOR EMPLOYEES

The wisdom and experience of Title VII case law makes clear that an employee who is harassed should not suffer in silence but should immediately report that harassment.

When reporting that harassment, employees should put it in writing and state clearly and specifically what type of harassment they are complaining about; e.g., sexual harassment; racial harassment, etc.

If an employee is not sure about how to report the harassment or when to report the

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[6] Id. at 1260.

harassment, he or she should seek professional assistance both inside of the company and outside of the company. This professional assistance may come from Human Resources professionals, EEOC and similar EEO investigators, and employment attorneys.

If there is an employee handbook, employees should keep a copy of it and read it carefully, preferably during the first few weeks of employment so that they will be familiar with the employer's policies and procedures.

The employee should report any harassment to the employer by following the employer's stated policies and procedures. As the 11th Circuit has held, taking this step automatically establishes that an employer has been placed on notice of the harassment but failed to take proper action.

Finally, because a "hostile work environment" is difficult to define, and occurs over a extended period-- including several months or even several years-- an employee who believes that he or she is being harassed should keep a detailed journal of harassing workplace incidents and the dates and times when those incidents were reported, for future reference.

LESSONS FOR EMPLOYERS

Title VII case law also makes clear that employers should have an anti-harassment policy with adequate reporting procedures. Both the Supreme Court and the 11th Circuit have made clear that these policies must have substance; must address all forms of discrimination and harassment, and must have adequate reporting procedures.

By failing to have such a policy, an employer is almost tacitly admitting that it condones antisocial behaviors such as racial and sexual harassment.

Second, the employer should thoroughly distribute its policy to all employees, and have each employee sign off on an acknowledgment form stating that he or she received and read the employer's anti-harassment policy.

Third, the employer should state in its harassment policy that an employee has more than one avenue to report harassment. For example, if the harasser is the supervisor, then the employee should be able to report the harassment to a Human Resources officer or to the next higher level supervisor.

And finally, the Employer should keep a track record of its disciplinary actions in order to show that it does take harassment seriously, that it immediately investigates claims of harassment, and that it does mete out effective and appropriate discipline.

CLOSING REMARKS

This concludes my presentation on "Hostile Work Environment."