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Beyond a reasonable accommodation: Hostile work environment claims under the ADA

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Employers continue to direct their efforts toward providing reasonable accommodations to employees with a disability. A growing number of cases, however, suggest that employers should focus equal attention on ensuring that neither management nor coworkers create a workplace that is hostile or abusive to employees with a disability. Specifically, courts are recognizing claims for a hostile work environment in violation of the Americans with Disabilities Act. Recent case law demonstrates the difficulty an employer likely will confront in attempting to dismiss a hostile environment claim prior to trial. Risk-averse employers, therefore, would be wise to familiarize themselves with the kinds of behaviors that have given rise to such claims in the interest of avoiding litigation under this emerging cause of action.

Until recently, many of the workplace disputes arising under the Americans with Disabilities Act (ADA) have focused on the scope of an employer's obligation to provide a reasonable accommodation to an employee with a disability.[1] Indeed, many employers may have assumed that once they have provided a reasonable accommodation, their obligations under the ADA have been satisfied. Focusing only on providing an accommodation, however, may prove to be shortsighted. Recent case law demonstrates that an employer's obligations extend beyond the singular act of providing a reasonable accommodation to an employee with a disability. In addition to affording a reasonable accommodation, an employer must ensure that the workplace is free from disability-based harassment. Ignoring this separate and distinct obligation may result in a claim for a hostile work environment in violation of the ADA.

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This article will survey the developing landscape of hostile work environment claims under the ADA. First, the legal framework for analyzing these claims will be discussed. Next, this article will review recent case law to derive lessons that can be learned from behaviors that have contributed to hostile work environment claims. Finally, some observations will be offered about preventive measures to minimize the likelihood of litigation based upon this emerging cause of action.

RECOGNIZING HOSTILE WORK ENVIRONMENT CLAIMS UNDER THE ADA

Courts uniformly have recognized that a hostile work environment claim is cognizable under the ADA. This conclusion is supported by the language and intent of the statute, the EEOC's implementing regulations, and case law interpreting the Rehabilitation Act of 1973. Specifically, the language of the ADA proscribes discrimination against a qualified individual with a disability "because of the disability of such individual in regard to . . . other terms, conditions, and privileges of employment."[2] Drawing upon identical language in Title VII, courts have reasoned that a hostile work environment claim, whether based on sex or disability, adversely affects the conditions of an individual's employment and, therefore, is actionable.[3]

As one court observed, it would be illogical to conclude that identical language should be interpreted differently so that individuals would enjoy greater protection under Title VII than under the ADA simply because the discriminatory conduct is gender-based rather than disability-based.[4] Furthermore, failure to permit a claim for a hostile work environment would create a perverse incentive for employers by "making an employer liable for firing a qualified individual because of a disability or its necessary consequences, while leaving untouched the unscrupulous employer who took the 'safe route' by harassing a disabled individual with the intent of making him quit."[5] This result cannot be reconciled with the overarching purpose of the Act to eliminate a broad range of discriminatory conduct that negatively impacts the employment opportunities of individuals because of their disabilities.

In addition to the statutory language, the EEOC's implementing regulations expressly prohibit harassment based on an individual's disability. The regulations make it unlawful to "*harass* or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected [under the Act]."[6] Here, too, courts have found that the concept of a hostile work environment is encompassed within the

broad prohibition against harassment under the ADA.[7] Furthermore, claims for a hostile work environment have been recognized under the Rehabilitation Act.[8] Because the Rehabilitation Act is substantially similar to the ADA, courts have found decisions interpreting the Rehabilitation Act to be persuasive.[9]

Given the emergence of hostile work environment claims under the ADA, employers might be wise to direct their efforts toward understanding the legal framework for analyzing such claims and the factual context in which such claims have arisen, or are likely to arise.

DETERMINING WHETHER A VALID HOSTILE WORK ENVIRONMENT CLAIM EXISTS

Borrowing from Title VII, courts have analyzed hostile work environment claims under the ADA by applying the framework set forth by the Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and its predecessor *Meritor v. Vinson*, 477 U.S. 57 (1986). The framework incorporates both a subjective and an objective standard. To establish a hostile work environment claim, an employee must prove that he or she perceived the environment to be hostile or abusive and that a reasonable person would have perceived the environment to be hostile or abusive. The conduct must be sufficiently severe or pervasive to alter the employee's working conditions, but need not result in tangible psychological harm. A causal link must exist between the hostile or abusive environment that has been created and the employee's disability. Finally, an employee must provide a basis for imputing liability for the hostile work environment to the employer.

RECENT CASE LAW: EMERGING PATTERNS AND LESSONS LEARNED

A review of ADA case law reveals that hostile work environment claims can derive from unlawful conduct engaged in by management, coworkers, or both. The most striking characteristic of the few early cases, however, is the significant role that managers, at all levels, have played in creating a hostile environment. In several of the cases, managers have engaged directly in the harassing conduct. In others, the conduct of managers has exacerbated the harassment by tacitly encouraging further harassing behavior by coworkers of the employee with a disability.

Although only relatively few cases exist, much can be learned by examining some of the fact patterns that have withstood employers' attempts to dispose of hostile environment claims prior to trial.[10] Several of these cases offer multiple lessons for employers that are

interested in avoiding a lawsuit based on a hostile work environment claim. Following is a discussion of some of the lessons that can be gleaned from these cases.

Lesson One: A reasonable accommodation is not a "special favor."

Perhaps one of the greatest frustrations for an employer is to provide a reasonable accommodation and then find itself, nevertheless, facing a lawsuit for a hostile work environment in violation of the ADA. How is it possible that an employer could "do the right thing" and still run afoul of the ADA? Simply put, an employer that provides an accommodation must understand that an employee with a disability has a statutory right to a reasonable accommodation. The accommodation, therefore, should not be regarded by the employer as a "special favor" that the employer has chosen to bestow. An employer that misunderstands the fundamental nature of its obligation, and acts upon that misconception, may find itself in the undesirable position of defending against a hostile work environment claim.

A recent case highlights this point. In *Hudson v. Loretex Corp.*, 6 AD Cases (BNA) 1366 (N.D.N.Y. 1997), the employer allowed the plaintiff, who suffered an epileptic seizure at home, to change his work schedule from the night shift to the day shift.[11] Within a relatively short time after his return to work, and after the accommodation had been made, Hudson was involved in a series of oral exchanges with members of Loretex management. During each exchange, derogatory comments were made about Hudson's disability or need for an accommodation, resulting in a claim for a hostile work environment.

The first incident occurred approximately one week after Hudson's return to work. The general manager of the plant and the assistant general manager initiated a conversation with Hudson by inquiring how he liked the new piece of machinery to which he had been assigned. After Hudson responded affirmatively, the conversation quickly assumed a negative tone when the general manager stated: "You should be a little more grateful, we changed your shift because you were supposedly sick. This has affected many people!" Hudson then acknowledged that he was grateful, but that he did not want to be reminded repeatedly of the accommodation. The general manager purportedly had the last word by stating: "I just never want you to forget it." The remarks made by management were loud enough to be overheard and allegedly triggered similar comments over the next few months by Hudson's coworkers, who accused Hudson of receiving special treatment based on a purported illness.

Several subsequent encounters occurred, during which Loretex management continued to reference Hudson's medical condition and the accommodation that had been provided for him. After accusing Hudson of breaking the glass covering of a gauge on his equipment, the general manager ended the confrontation on the shop floor by stating: "First you can't work your shift because you say you are sick, and now you're breaking things." A follow-up to that discussion, initiated by Hudson, took place in the assistant general manager's office, where the manager told Hudson that his work was not impressive and that Hudson was disliked by everyone. The manager then reminded Hudson that he had "been good to [Hudson] and given [Hudson] a break." One day after these exchanges, Hudson was fired for intentionally breaking the gauge cover, without being given an opportunity to speak with the individual who purportedly witnessed this misdeed.

The court denied Loretex's motion to dismiss the complaint, reasoning that the totality of the evidence, including the emotional effects Hudson allegedly experienced, was sufficient to state a claim for a hostile work environment. Based on the facts presented, it is arguable that the failure of Loretex management to recognize Hudson's legal right to a reasonable accommodation accounted for the growing hostility between the two parties, which ultimately undermined their relationship and created a hostile work environment. This case demonstrates most clearly that, as with all antidiscrimination laws, the long-term success of the ADA depends upon the ability of employers to reshape attitudes in the workplace. It is imperative, therefore, that employers begin that process now.

As *Hudson* teaches: In the spirit of cooperation, it would be ideal for employers and employees to acknowledge the positive efforts extended by each toward the other in arriving at a reasonable accommodation. Failure by an employee to acknowledge an employer's efforts, however, does not give a manager the right to chastise, denigrate, or otherwise harass the employee for failing to show the "proper gratitude" or "indebtedness." Employers that do not heed this lesson may well lay a foundation for a lawsuit by an aggrieved employee that could have been avoided.

Lesson Two: When managers speak, coworkers tend to listen.

Employers that fail to realize that managers can exert significant influence over the workplace environment will likely confront this reality in the context of a lawsuit, particularly when the influence has been negative in tone. Once again, *Hudson* offers a valuable lesson.

In support of his complaint, Hudson included evidence that coworkers contributed to the hostile work environment by engaging in verbally abusive conduct. Specifically, Hudson claimed that, in at least one instance, pejorative comments were made by management about his "phony illness" in circumstances in which it was likely that such remarks could be overheard by his coworkers. Perhaps not coincidentally, a pattern of similar comments by coworkers began. These comments by coworkers were considered by the judge in denying Loretex's motion to dismiss the complaint.

Similarly, in *Davis v. York International, Inc.*, 2 AD Cases (BNA) 1816 (D. Md. 1993), an employee, who was diagnosed with multiple sclerosis, sued her employer, alleging, among other things, that she had been subjected to a hostile work environment. Davis's complaint contained a lengthy list of allegations pertaining to harassing conduct by her manager as well as coworkers. Specifically, Davis alleged that her manager "mimicked and ridiculed her speech and her gait, . . . perpetuated and enhanced myths about [her] and MS, fostered an atmosphere of resentment and pity among [her] coworkers, . . . and denigrated her abilities in private and in front of fellow employees." The court considered all the evidence, and denied York's motion for summary judgment on Davis's claim that York violated the ADA by subjecting her to a hostile work environment.

One could argue about whether, as a factual matter, management's conduct triggered the harassing behavior by both Hudson's and Davis's coworkers. The essential lesson, however, should not be missed: A manager speaks with authority. If a manager speaks in disparaging and demeaning terms either to or about an employee with a disability, or acts toward an employee with a disability in a manner that ridicules his or her disability, other employees may be influenced and may replicate the manager's behavior. It is critical, therefore, that employers train managers to act professionally and with respect for all employees, including employees with a disability. Furthermore, professionalism dictates that if issues arise concerning an employee's disability or reasonable accommodation, a discussion with the employee should be conducted in private and, likewise, in a professional manner.

Lesson Three: Resolve any doubts about an employee's disability sooner rather than later.

When an employer extends a reasonable accommodation to an employee with a disability, managers should be assured that the employer is satisfied that the accommodation is needed. In addition, an employer must communicate its support for the requested accom-

modation. Failing to properly communicate with managers and to alleviate lingering doubts may breed contempt for the employee with a disability, and result in a workplace that is hostile to the employee.

Haysman v. Food Lion, Inc., 893 F. Supp. 1108 (S.D. Ga. 1995), provides a good example. In that case, the employer extended itself beyond the mandates of the ADA and provided an accommodation that would not have been required under the statute or its implementing regulations.[12] Specifically, Food Lion created a temporary light duty position of store "greeter" for Haysman that was designed to accommodate his lifting and sitting restrictions.[13] Despite these extraordinary efforts, Food Lion ultimately faced a claim for a hostile work environment based on a pattern of conduct that purportedly denigrated Haysman because of his disability.

During the period that he held the position of greeter, Haysman alleged, he was subjected to verbal abuse and other conduct by various members of management. In particular, the store manager berated Haysman in the presence of his coworkers and accused Haysman of "snowballing" Food Lion with his disability. The assistant store manager allegedly used profanity toward Haysman and stated that he would "ride [Haysman] until he quit." He also told Haysman that he must work "every minute of his shift" regardless of pain or his physician's instructions. Lastly, Haysman claimed that he was assigned to work the most undesirable shift even though his position as store greeter could be performed at any time.

The court offered an interesting insight into management's conduct, observing that the alleged comments by the store manager and assistant store manager appeared to reflect doubt on their part that Haysman actually was injured to the extent he claimed. Despite this doubt, neither manager directed inquiries to the company regarding the nature and extent of Haysman's medical condition or the need for an accommodation.

Haysman offers a valuable lesson about the reciprocal rights of employers and employees. True, an employee with a disability has a statutory right to a reasonable accommodation.[14] It is equally true, however, that the EEOC's regulations afford an employer the right to obtain documentation of an employee's disability and need for an accommodation.[15] Once an employer has made a determination that a reasonable accommodation is required, the employer should communicate the decision to management in a clear and affirmative fashion. Of course, any communication must be limited to only those supervisors and managers who need to know the scope of any restrictions on the employee's work and any accommodations to be

provided.[16] In addition, all such communications should be made in a manner that protects the privacy interests of the employee with a disability.[17] By responsibly exercising its rights under the ADA and effectively communicating with management, an employer can eliminate unwarranted suspicions and avoid the kinds of behavior that are likely to foster a hostile work environment.

Lesson Four: Harassment that is directed at either the employee's disability or the consequences of an employee's disability is equally impermissible.

Courts have made clear that the ADA does not guard against all hostile workplaces, but rather only those that are hostile because of an employee's disability. Courts, nevertheless, have rejected attempts by employers to draw arbitrary distinctions between a hostile work environment based on an employee's disability and a hostile work environment based on the effects of that disability. In short, the courts have shown a willingness to look beyond the specific harassing conduct and focus on the underlying cause of the conduct.

In *Haysman*, for example, Food Lion argued that the reason for any "friction" between Haysman and management was not Haysman's disability. Rather, the friction arose because Haysman "constantly complained, rarely worked his scheduled hours, overstated his physical complaints, and wanted to avoid work." The court suggested that Food Lion's proffered justifications might reflect stereotypical notions about disabilities and the way in which individuals with disabilities purportedly behave. The court further observed that Food Lion's argument tends to obscure the central issue, which is whether the problems perceived by management resulted from Haysman's disability.

Significantly, the court recognized Food Lion's legitimate interest in disciplining its employees for poor performance or other workplace improprieties. The court emphasized that if Haysman's absences and other problems were the result of his disability, Food Lion could have discharged him by showing that these problems prevented him from performing the essential functions of the greeter's job and that no reasonable accommodation exists. On the other hand, the court made clear that "an employer is not free to harass or abuse a disabled individual over the direct consequences of his disability any more than the employer is free to call him a 'gimp' or other epithets." Because a reasonable juror could draw a causal connection between management's behavior toward Haysman and Haysman's disability, the court declined to grant summary judgment on the hostile work environment claim.

Likewise, the court in *Hendler v. Intelecom USA, Inc.*, 963 F. Supp. 200 (E.D.N.Y. 1997), squarely rejected an attempt by the employer to circumvent a hostile work environment claim by elevating form over substance. In that case, Hendler, who suffers from asthma, had requested a smoke-free environment. The company's president, who had hired Hendler and was aware of his asthma, allegedly ignored Hendler's request that employees be directed to refrain from smoking in common areas and in Hendler's presence. On one occasion, the president stated that "[w]e have solved the smoking problem, Scott, Phil and Steve [Hendler] will start smoking." He also told Hendler to "cut it out with the smoking . . . Just get through it. Grow up." On other occasions, a coworker referred to Hendler as a "smoking Nazi" and a "pain in the ass nonsmoker."

Intelecom argued that the comments were not disability-based, but rather related to the fact that Hendler was a nonsmoker. To the contrary, Hendler reasoned that these comments were related to his disability, and in particular his difficulty in breathing. Agreeing with Hendler, the judge explained that "an employee confined to a wheelchair who is chided about not being able to climb the stairs is being harassed on the basis of his disability regardless of the fact that the comments are directed at the environment or his ability to function under the working atmosphere." The judge, thus, declined to accept Intelecom's position that a causal connection did not exist between Hendler's disability and the workplace comments.

Haysman and *Hendler* teach that employers must be careful in assessing whether comments directed toward an employee with a disability are motivated by the employee's disability. Employers must probe the parties involved to discern the underlying motivation for the conduct and take prompt and effective remedial action. Failure to recognize this kind of workplace dialog as potentially discriminatory can lead to a costly lawsuit.

Lesson Five: Don't assume that everyone shares your "humor."

As Justice O'Connor made clear in *Harris,* conduct that is "merely offensive" will not give rise to a claim for a hostile work environment. Indeed, one "joke" is not likely to form the basis for a successful claim of a hostile work environment.[18] On the other hand, the Court acknowledged that "discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment" will give rise to an actionable claim. Employers should not assume, therefore, that conduct that purportedly involves "only joking" can never serve as the basis for a hostile work environment claim.

For example, the evidence in support of a hostile work environment claim in the *Hendler* case consisted primarily of comments made by the company's president and Hendler's coworkers that referenced Hendler's complaints about tobacco smoke. Despite Intelecom's urging, the court refused to dismiss the comments as irrelevant to Hendler's claim. Instead, the judge reasoned that the comments may have been unwelcome and offensive to Hendler. Significantly, the judge reached this conclusion even though Hendler acknowledged his belief that some of the comments were intended in jest.

The court's decision in *Hendler* suggests that risk-averse employers should recognize that it is difficult to discern when "joking" is welcome, particularly when the "joking" is directed toward an employee with a disability. Because remarks that are intended as jokes may be received differently by different individuals, an employer that tolerates "joking" about an employee with a disability runs a substantial risk that boundaries for acceptable workplace behavior will be crossed and a lawsuit will follow.

Employers may argue that it is difficult to achieve a balance between creating a "humorless" workplace and a discriminatory workplace that is hostile to employees with a disability. The challenge posed to employers, however, is greatly exaggerated because much humor exists that does not rely on individual characteristics such as disabilities, gender, race, color, ethnicity, age, or religion. The ADA requires nothing more than adopting an approach that is other-oriented. The lesson here may be stated fairly succinctly: It does not matter what the "joker" (the individual who jokes about an employee with a disability) subjectively intended. Instead, what matters is whether the employee with a disability might find such "joking" unwelcome and sufficiently severe or pervasive to create a hostile work environment. Managers and employees, therefore, must learn to think about the impact of their comments upon the person to whom they are directed, regardless of their subjective intent. Adopting an other-oriented approach can help avert many problems that might otherwise arise in the workplace.

CONCLUSION

At present, case law addressing claims of a hostile work environment under the ADA is in its infancy. Despite the early stage of development, the few existing cases highlight the ease with which an employer can find itself litigating a hostile work environment claim. Following are a few preventive measures that may assist employers that are interested in minimizing the risk of such a lawsuit:

1. Expand the scope of employee training to address broader issues of harassment, including harassment on the basis of disability.
2. Explain the premise of the ADA and the underlying rationale for providing reasonable accommodations. In particular, emphasize that a reasonable accommodation is not a "special favor." Rather, an employer's duty to provide a reasonable accommodation is one means of ensuring that an employee with a disability has the same opportunity to excel in the workplace as any other, nondisabled, employee. A reasonable accommodation, therefore, is simply a means of leveling the playing field by modifying the manner or time in which work is performed and tasks are accomplished.
3. Assume that an employee with a disability, like any other employee, wants to maintain a long-term relationship with the company.
4. If an employee requests a reasonable accommodation, obtain the desired documentation and communicate, in a positive tone, the decision to provide the accommodation.
5. If questions arise concerning an employee with a disability, address the matter promptly, privately, and in a professional manner so that the dialog does not devolve into disparaging remarks or encourage spiteful behavior. While resolving any disputes, take precautions to protect the privacy interests of the employee with a disability.
6. Request that management be alert to "workplace humor" that reflects disrespect for individuals with a disability, regardless of whether the workforce presently includes employees with a disability.

NOTES

1. See, e.g., Michel Lee, "Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual and What Accommodations Are Courts Really Demanding?" 13 *The Labor Law.* 149, 177-93 (and cases cited therein) (1997).

2. 42 USC §12112(a)(1994).

3. See, e.g., *Hendler* (cited on p. 105) at 200, 207-08.

4. *Haysman* (cited on p. 103) at 1092, 1106.

5. Id. at 1106-07.

6. 29 CFR §1630.12(b) (1996) (emphasis added).

7. See, e.g., *Haysman* (cited on p. 103) at 1106.

8. See, e.g., *Easley v. West*, 4 AD Cases (BNA) 1323 (E.D. Pa. 1994), aff'd without op., 85 F.3d 611 (3d Cir. 1996).

9. See, e.g., *Haysman* (cited on p. 103) at 1106.

10. But see *Allen v. GTE Mobile Communs. Serv. Corp.*, 6 AD Cases (BNA) 1063, 1066 (N.D. Ga. 1997) (granting summary judgment in favor of employer where employee's evidence of harassment included a suggestion by two coworkers that plaintiff should be tested for dyslexia and a comment by another coworker that "because he was having a bad day, he should not go near a window or else he 'might jump out, like [plaintiff].'"); *McClain v. Southwest Steel Co.*, 6 AD Cases (BNA) 1381, 1384 (N.D. Okla. 1996) (granting summary judgment in favor of employer on plaintiff's hostile work environment claim where coworkers referred to McClain, who was being treated for depression and hypertension, as "crazy and/or as a lunatic" and discussed individuals taking Prozac or seeking treatment at the local mental health facility; McClain's supervisor allegedly acted in a "hateful" manner toward him and asked him "what the f***'s wrong with you."); *Chua v. St. Paul Fed. Bank for Sav.*, 5 AD Cases (BNA) 786, 789 (N.D. Ill. 1996) (granting summary judgment in favor of employer where "work environment included a good deal of joking about many employees," including Chua's limp).

11. In this motion to dismiss the complaint, the court summarily concluded that "[t]here is little question" that Hudson's medical condition constitutes a disability within the meaning of the Act and that he is a member of the protected class.

12. Observing that "Food Lion is quite correct that they were not required to accommodate Haysman by creating a position for him, nor were they required to make this temporary position permanent" (citations omitted).

13. In this motion for summary judgment, the court found that a genuine issue of material fact exists as to whether Haysman's medical condition constitutes a disability within the meaning of the ADA.

14. The Act expressly provides that an employer discriminates, and thereby violates the statute, either by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer]," 42 USC §12112(b)(5)(A), or by "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such [employer] to make reasonable accommodation to the physical or mental impairments of the employee or applicant." 42 USC §12112(b)(5)(B)(1994).

The EEOC's regulations explain that reasonable accommodations "usually take the form of adjustments to the way a job customarily is performed, or to the work environment itself." 29 CFR §1630, app., Background (1996).

15. 29 CFR §1630, app., §1630.9 (1996) ("When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.") The courts have affirmed the rights of employers to request and obtain documentation that substantiates an employee's claim of disability and the need for reasonable accommodations. See, e.g., *Miller v. National Casualty Co.*, 61 F.3d 627 (8th Cir. 1995) (affirming summary judgment in favor of employer where, after

repeated requests, employee failed to provide medical documentation that specifically disclosed her manic depression and requested reasonable accommodations).

16. 29 CFR §§1630.14(b)(l)(i),(c)(l)(i), and (d)(l)(i) (1996).

17. Id.

18. See *Henry v. Guest Servs. Inc.*, 4 AD Cases (BNA) 1761, 1764-65 (D.D.C. 1995) (granting summary judgment in favor of employer where employee's only evidence of harassment by management was a "Peanuts" cartoon that he found in his mailbox, which made light of the condition of depression, and a statement by a coworker that "[t]hey shouldn't have done that. They shouldn't have put it in his box." Plaintiff also failed to provide evidence that management knew of harassment by coworkers but failed to take remedial action), aff'd without op., 98 F.3d 646 (D.C.Cir. 1996).