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#MeToo Resonates As States Lower Bar For Harassment Suits

By **Anne Cullen**

Law360 (March 4, 2024, 4:33 PM EST) -- A bill proposed in New Jersey would make it the latest state in a growing body of jurisdictions that are lowering a legal hurdle that workers lodging sexual harassment suits must clear to get their claims before a jury, a trend experts say has its roots in the #MeToo movement.

New Jersey Assembly Bill 2443, which was proposed in January by Democratic Reps. Annette Quijano and Reginald Atkins, would broaden the scope of what kinds of workplace misconduct are considered "severe or pervasive" enough to support a legal claim.

The measure specifically repudiates a Third Circuit decision from 2013 in which a panel said a supervisor purposefully grabbing a subordinate's butt didn't qualify as harassment under the existing test. The proposal also calls out a New Jersey Supreme Court decision from 2008 in which the state justices said two years of unwanted and rebuffed romantic advances didn't count either.

That "severe or pervasive" threshold, cemented by the U.S. Supreme Court in decisions from the 1980s and 1990s, is still the prevailing standard in federal courts and in most state courts to determine whether workplace malfeasance was bad enough to support a legal harassment claim.

But states including California, New York and Maryland have in recent years disavowed or relaxed that requirement in their own anti-discrimination codes in favor of more worker-friendly definitions of harassment that encompass a broader range of misconduct, beyond extreme situations.

Experts said the #MeToo movement is at the heart of this shift, and the momentum that the national awareness campaign generated behind legislative reform efforts is still driving change.

"You saw a lot of different types of laws come out of [the #MeToo movement]. We saw a spate of that happening over the course of probably five or six years, and that's continuing," said Morrison Foerster LLP employment partner Andrew R. Turnbull, who advises employers.

Because of this, Turnbull said he expects the "severe or pervasive" test to be ditched in more states, particularly those that align with California and New York's ideology on workplace issues.

"I suspect we will see more states follow suit," Turnbull said.

More Intuitive Standard

Worker-side attorneys and employment law professors told Law360 that the states making changes in this arena are adopting frameworks more in touch with what the general population considers a violation of workplace anti-discrimination law.

Alan Lescht, founder of D.C.-based worker-side employment firm Alan Lescht & Associates PC, said non-attorneys are often surprised to learn what kinds of workplace malfeasance wouldn't break the law.

"The courts have always made hostile work environment claims very difficult to show, but it's changing, and I think the change in the rule is really mirroring what most people in the country find offensive," Lescht said.

Under federal law and many state statutes, workplace harassment rises to the level of a legal violation when there's either a "quid pro quo" situation — enduring offensive conduct becomes a condition of continued employment — or if the conduct is "severe or pervasive" enough to make the work environment intimidating, hostile or abusive.

By adjusting that latter threshold and making it easier for someone to show their mistreatment ran afoul of the law, it's more likely that harassment cases will overcome the summary judgment phase of litigation and reach a jury.

California **was the first** state to take this step, passing a bill in 2018 that clarified that workplace harassment occurs when a work environment becomes "hostile, offensive, oppressive or intimidating," the conduct "sufficiently offends, humiliates, distresses or intrudes upon its victim" and interferes with the employee's "emotional tranquility," their ability to do their job or their sense of well-being.

Like the New Jersey proposal, California's measure specifically called out court rulings it said were not in line with the new rules.

For example, the measure disavowed a Ninth Circuit decision from 2000 in which a panel said a city phone dispatcher wasn't able to bring a hostile work environment claim over an incident in which a co-worker forced his hand underneath her sweater and bra while she was on a call.

New York followed California's lead in 2019 with an amendment that explicitly removed the severity and pervasiveness-related requirements from its harassment prohibitions. Maryland and Washington, D.C., hopped on board in 2022, and Colorado and Vermont adjusted their own harassment statutes similarly last year.

Democrats from New Jersey are working on a similar plan, and proposals in Minnesota and Virginia have gained traction in past sessions.

Turnbull of Morrison Foerster said some courts have made the "severe or pervasive" hurdle too steep, resulting in counterintuitive rulings.

"There's a lot of different cases out there where courts have used that standard to dismiss claims, which seemingly on objective view you would say, well that seems pretty bad conduct," Turnbull said. "And so you sometimes see kind of absurd results in certain cases, and I think that's gotten the attention of certainly activists and in many cases, lawmakers."

Deborah Tuerkheimer, a professor of feminist legal theory at Northwestern Pritzker School of Law who has written extensively on sexual harassment, said she's encouraged by these updates.

"Many states are thinking a little bit different about what counts and whose suffering matters," Tuerkheimer said.

In her 2021 book, "Credible: Why We Doubt Accusers and Protect Abusers," she makes the case for a revamp of the severity and pervasiveness thresholds, as she told Law360 they screen out misconduct that most people assume would rise to the level of harassment.

"I've presented it to enough audiences to know that it isn't consistent with people's intuitions about what ought to be tolerated in the workplace," Tuerkheimer said.

Litigation Spike is a Question Mark

Emily Martin, the chief program officer at the National Women's Law Center, also expects more states to revisit the "severe or pervasive" requirements. Highlighted by the fact that two states joined this movement just last year — Colorado and Vermont — Martin said there is "an ongoing appetite in the states for strengthening workplace harassment protections that have shown themselves to be outdated and ineffective."

"The momentum around these reforms seems to be growing," Martin said.

While experts said it's too early to suss out the on-the-ground impact of these relatively new state laws, some management-side attorneys predict that the eased standards will usher in many more cases.

"I think it's going to open the floodgates of litigation," said Valerie Samuels of Sassoon Cymrot Law LLC. "I think it's going to make all those calls I get about 'my boss is being a jerk' into lawsuits."

However, employment attorneys said they're not yet seeing litigation spikes in the jurisdictions that have passed these laws. And lawyers who represent workers told Law360 that these legislative changes will mostly alter the success rates of cases that were already going to be filed, rather than translate into more suits.

California's law specifically aims for that goal, as the statute clarifies that, "harassment cases are rarely appropriate for disposition on summary judgment." And the general thrust of the new state laws addressing the "severe and pervasive" test is that judges should view the "totality" of the circumstances to determine whether someone was harassed.

One ill-advised joke, for example, likely wouldn't cut it. But if there is a slew of crude jokes and inappropriate remarks over a long period, that might trigger one of the state laws if they are connected to someone's protected characteristic.

Worker-side attorney Lescht practices in D.C., where lawmakers specifically clarified in a 2022 law that misconduct "need not be severe or pervasive to constitute harassment" and that "no specific number of incidents or specific level of egregiousness is required."

And he said the amendments haven't changed his calculus about what claims to take to court.

"I don't think the severe or pervasive standard ever stopped us from bringing cases, but it's made us more confident that we'll beat summary judgment," Lescht said.

Morrison Foerster's Turnbull said most companies probably don't need to make any proactive changes to their policies and procedures in light of these new state laws. But he said workplaces that tend to let coarse behavior slide may need to consider updates.

"For some companies that might have more of a rough and tumble atmosphere, they may want to take a second look," Turnbull said.

--Additional reporting by Vin Gurrieri and Braden Campbell. Editing by Amy Rowe and Emma Brauer.
