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Employers' Greatest Enemy: Second-Hand Evidence in Hostile Work Environment Claims

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I. INTRODUCTION

"MY supervisor told a dirty joke that was degrading to women while I was standing right there. He also made a pass at Susie down the hall—she told me. And five years ago he had an affair with one of the secretaries." All too often this is the type of testimony defense attorneys encounter when they conduct discovery in hostile work environment cases. Despite the Supreme Court's ruling that discriminatory or harassing conduct must be so severe or pervasive that it alters the plaintiff's working environment, more and more courts are allowing unsubstantiated and second-hand accounts into evidence.[1]

Attorneys who regularly represent employers in discrimination and harassment suits have been troubled by the evidentiary allowances of the lower courts in hostile work environment claims, and for good reason. Jerome R. Watson and Richard W. Warren addressed the evidentiary issues encountered in racially hostile work environment claims.[2] They stated what many defendants have already found to be true, namely that when multiple plaintiffs allege similar race-based comments, each plaintiff's experiences are permitted to support the claims of co-plaintiffs that the work environment was hostile.[3]

Under the heading "Limited Relevance and/or Inadmissible," the authors point to *Turner v. Honeywell*, a Seventh Circuit decision affirming the dismissal of a racially hostile work environment claim by an African-American female employee.[4] The plaintiff in *Turner* alleged that the word "nigger" was frequently used in her department.[5] Because she never heard the term used, and because there was no evidence of any other discrimination that had a racial animus, summary judgment for the defendant was appropriate.[6] Second-hand evidence of racial slurs was not enough to independently create a hostile work environment without the plaintiff showing something more.[7] That this case was used to support the proposition that second-hand evidence is sometimes found to have limited relevance shows the scarcity of case law supporting defen-

1. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).
2. Jerome R. Watson & Richard W. Warren, *"I Heard it Through the Grapevine": Evidentiary Challenges in Racially Hostile Work Environment Litigation*, 19 LAB. LAW. 381 (2004).
3. *Id.* at 407.
4. Turner v. Honeywell, Micro Switch Div., 54 F. App'x 236 (7th Cir. 2002); Watson & Warren, *supra* note 2, at 415.
5. *Turner*, 54 F. App'x at 238.
6. *Id.*
7. *Id.*

dant employers.[8] This case is unique because the plaintiff initiated a hostile work environment claim even though she had *never* been personally discriminated against. More often, plaintiffs who sue have experienced one or two incidents of discrimination and then try to substantiate their hostile work environment claim with the type of second-hand evidence the plaintiff relied on in *Turner*.

Watson and Warren list certain types of second-hand evidence that are "susceptible" to motions *in limine*:

- Incidents about which plaintiff did not hear about during her employment. (Relevancy, more prejudicial than probative.)
- Incidents about which plaintiff only heard—arguably, these incidents do not affect plaintiff's work environment. (Relevancy, more prejudicial than probative and lack of foundation objections.)
- Incidents occurring before and after plaintiff's employment—these incidents could not possibly affect plaintiff's work environment. (Irrelevant, more prejudicial than probative.)
- Incidents with no racial implications—do not meet the requirement that the harassment be racial in nature. (Irrelevant, prejudicial.)
- Secondhand evidence where the underlying incidents consist of hearsay or unknown circumstances. (Hearsay, relevancy, lack of foundation.)
- Coworker assertions unsupported by an affidavit—these lack the appropriate foundation to be considered proper evidence of a racially hostile work environment. (Hearsay, lack of foundation.)
- Incidents occurring to others where plaintiff has failed to demonstrate a nexus between them and the conduct affecting him—for example, in some jurisdictions, the court would require a plaintiff to demonstrate that a coworker's failure to promote claim, if used as evidence of a hostile work environment, has some tie-in to plaintiff's work environment. (Irrelevant, prejudicial.)
- Incidents not directed at plaintiff. (Relevancy, prejudicial.)
- Incidents that fall outside the statute of limitations period. (Irrelevant, prejudicial.)
- Secondhand evidence that supports discrimination as opposed to a harassment claim—unduly harsh discipline, failure to hire or wrongful termination based on race. (Irrelevant, prejudicial.)[9]

The authors merely note that defendants "should aggressively attack virtually all second-hand evidence through the Rules of Evidence. These objections work before some courts, but others deny them. A plaintiff's greatest ally is the totality of the circumstances approach. . . ."[10] In short, the authors identify evidentiary objections that might be made to combat second-hand evidence, but they do not provide an adequate analysis of the case law.

This Comment addresses evidentiary issues in hostile work environment claims from the defendant's perspective. Section II summarizes the

8. *See* Watson & Warren, *supra* note 2, at 415.
9. *Id.* at 415-16.
10. *Id.* at 416.

current status of hostile work environment law in terms of the statute and United States Supreme Court decisions. It then illustrates several of the evidentiary problems that often arise by setting out an example case. Section III addresses the most obvious problem with second-hand evidence—relevance and probative value under Federal Rules of Evidence 401 and 403. The fourth section identifies prerequisites that some courts independently require before they admit second-hand evidence, namely that the third person be a member of the plaintiff's same protected class or that the plaintiff be aware of the second-hand evidence during the time she was allegedly subjected to a hostile work environment. The next section addresses attempts to attack second-hand evidence as inadmissible character evidence of defendant-individuals, or for the witness' lack of personal knowledge. Section VI examines hearsay arguments and discusses decisions allowing hearsay offered for its effect on the speaker. Practical problems and the consequences of allowing second-hand evidence into trials are addressed throughout.

In examining the case law, an alarming pattern of admissibility emerges. The end determination can only be that much tougher adherence to the Rules of Evidence and more standard procedures for handling second-hand evidence are needed in order to preserve the basic function of our civil legal system—compensating truly injured parties in an effort to make them whole again.

II. HOSTILE WORK ENVIRONMENT CLAIMS GENERALLY

A. THE LAW

According to the landmark Civil Rights Act of 1964, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11] In 1986 the United States Supreme Court expanded its interpretation of the statute's protections according to a regulation promulgated by the Equal Employment Opportunity Commission ("EEOC").[12] The Court held, in *Meritor Savings Bank v. Vinson*, that Title VII protects employees from having to work in "a discriminatorily hostile or abusive work environment."[13] For the past twenty years courts have struggled to identify and adjudicate Title VII claims alleging hostile work environments.

Eight years after it recognized a hostile work environment cause of action, the Supreme Court provided guidance on how to handle such claims in *Harris v. Forklift Systems, Inc.*[14] For a plaintiff to have an actionable hostile work environment claim, conduct in the workplace must

11. 42 U.S.C.A. § 2000e-2(a)(1) (West 2006).
12. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66; *see also* 29 C.F.R. § 1604.11(a) (1985).
13. *Meritor*, 477 U.S. at 66.
14. 510 U.S. 17, 21 (1993).

be *objectively* hostile such that a reasonable person would find the environment hostile or abusive.[15] The plaintiff must also *subjectively* believe that the work environment is hostile or abusive.[16] Even if both of those conditions are met, to violate Title VII the conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[17]

In determining whether a hostile work environment exists, lower courts are instructed to consider relevant factors such as: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[18] Some courts refer to this framework as the "totality of the circumstances" approach.[19] Whether the conduct affected the plaintiff's psychological well-being is another relevant factor that may be considered.[20] The Court explicitly stated that "merely offensive" conduct does not establish a hostile work environment.[21]

One must wonder whether the Supreme Court realized that its holding in *Harris* would be used to allow plaintiffs who experienced only isolated and sometimes neutral remarks to present cumulative evidence detailing how their co-workers were treated and how their co-workers perceived the workplace. Requiring that conduct be "severe or pervasive" indicates that the discriminatory conduct must be egregious or nearly constant, but lower courts have not held to the Supreme Court's exacting standard.[22] The specified factors—frequency, severity, unreasonable interference, and physical threat or humiliation—similarly seem to require a high level of hostility or abuse.[23] Again, despite the Supreme Court's framework, lower courts have struggled to apply the factors consistently. The result is a number of cases among the different circuits with widely varying and often opposite results. The disparate holdings are frequently tied to the breadth of discovery and admissibility of second-hand evidence involving non-plaintiff third persons.

B. A Typical Case Example

The myriad of defense successes and failures in hostile work environment claims are best understood through illustration. *Wanchik v. Great Lakes Health Plan, Inc.* is a Sixth Circuit case that demonstrates some common evidentiary problems.[24] The defendant employer's attempt to

15. *Id.* at 21.
16. *Id.* at 22.
17. *Id.* at 21 (quoting *Meritor*, 477 U.S. at 67).
18. *Id.* at 23.
19. *See, e.g.*, Jackson v. Quanex Corp., 191 F.3d 647, 659 (6th Cir. 1999).
20. *Harris*, 510 U.S. at 22.
21. *Id.* at 23.
22. *See Meritor*, 477 U.S. at 67.
23. *See Harris*, 510 U.S. at 23.
24. Wanchik v. Great Lakes Health Plan, Inc., 6 F. App'x 252 (6th Cir. 2001).

exclude evidence of incidents directed towards the plaintiff's co-workers was partially successful.[25] The female plaintiff, former Chief Executive Officer ("CEO"), brought a Title VII hostile work environment claim based on sexual harassment.[26] In an effort to survive the employer's motion for summary judgment, the plaintiff presented the affidavits of other female employees detailing their experiences in the workplace.[27] While some of the affidavits were signed, others were unsigned—purportedly because the women worried their careers would be adversely affected.[28] The district court excluded the unsigned affidavits under Federal Rule of Civil Procedure 56(e).[29] It also excluded the signed affidavits relating to events the plaintiff did not know about while she was employed by the defendant.[30]

On appeal, the Sixth Circuit upheld the exclusion of the unsigned affidavits.[31] The defense's victory in excluding the second-hand evidence was quickly cut short when the court found that the district court erred in excluding some of the signed affidavits.[32] Even though the plaintiff was unaware of the events involving the other women while she claimed to have been subjected to a hostile work environment, the appeals court found that a hostile work environment can be created when discriminatory acts are directed at the plaintiff's class as a group, rather than the plaintiff individually.[33] Because the plaintiff had heard rumors that other women had been harassed, she was not "unaware" of the events, despite the fact that she did not know the details or have proof that the alleged harassment had actually occurred.[34] The court acknowledged that the experiences of the other women were "even more appalling and abusive than those personally experienced by plaintiff."[35]

The court stated, "Her awareness, however peripheral, of how her male co-workers treated the entire protected class contributed to her perception of a hostile work environment."[36] Thus, summary judgment on the sexually hostile work environment claim was improper because a material issue of fact existed as to the pervasiveness of the improper conduct.[37] The *Wanchik* court's statement was so broad as to include the plaintiff's receiving even the most peripheral rumors as grounds for admitting sec-

25. *Id.* at 261.
26. *Id.*
27. *Id.* at 256.
28. *Id.*
29. *Id.* at 261.
30. *Id.*
31. *Id.*
32. *Id.* The opinion states: "[T]he District Court also ignored the properly executed statements that corroborated plaintiff's description of Great Lakes as a vulgar and sexist workplace . . . because 'plaintiff admits she was unaware of these incidents of sexual harassment during her employment.' In this, the court erred as a matter of record." *Id.* (citation omitted).
33. *Id.*
34. *Id.* at 262.
35. *Id.* at 261.
36. *Id.* at 262.
37. *Id.*

ond-hand evidence.[38] For example, the plaintiff "knew there was something with Nancy Rich and Howard," and that knowledge was adequate to make evidence of the incidents included in the rumors admissible.[39] In fact, the number and frequency of the rumors the plaintiff heard lowered the level of severity the plaintiff had to show accompanied the incidents directed towards her personally.[40] Apparently, higher frequency equals less severity in the Sixth Circuit.

The Sixth Circuit's opinion makes it seem as though the plaintiff suffered severe discrimination herself, but that is not the case. When the plaintiff was the CEO, the company was bought out.[41] The incoming President and CEO of the acquiring company advised the plaintiff that she would retain her title but that he would be in charge, apparently because the plaintiff was struggling to relinquish her decision-making authority.[42] A male colleague in senior management told the plaintiff he suspected the action was because the plaintiff "was not male and Jewish."[43]

The plaintiff claimed that from that point forward she was not included in executive meetings, she was deprived of decision-making power, her decisions were not implemented, and she was not allowed to make a meaningful contribution to the company.[44] In other words, she was frozen out of management. The plaintiff charged the defendant with maintaining a "sexist and vulgar environment through inappropriate humor and conduct."[45] The signed affidavits the Sixth Circuit found admissible included claims by co-workers that two senior management members made sexual statements and advances towards them.[46] Meanwhile, the only incidents of sexual discrimination the plaintiff claimed to have experienced herself were male members of upper management behaving disrespectfully towards women generally by "telling lewd jokes, describing sexual fantasies, and denigrating women's bodies" in the plaintiff's presence.[47] One inappropriate comment was also made directly to the plaintiff when she was chewing on her necklace.[48] In its analysis the court failed to determine the amount of time the plaintiff spent working with the offending co-workers, how often she was required to engage with them in the course of her job, or how isolated or frequent the jokes and

38. *Id.*
39. *Id.*
40. *Id.* at 263 (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.")).
41. *Id.* at 255.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 256.
46. *Id.*
47. *Id.* at 260-61.
48. *Id.* at 262. One man told her that chewing on her necklace caused him to think about him having "his balls in [her] mouth." *Id.*

comments were.[49]

The statements in the *Wanchik* case were unquestionably inappropriate and sexually charged. But do they rise to the level of the severe or pervasive harassment envisioned by the Supreme Court in *Meritor* and *Harris*?[50] Is this the type of environment—one filled with sexist jokes, comments, and rumors of inappropriate behavior—one that the employer should have to pay for?[51] Employers everywhere should be outraged that summary judgment was not granted for the defendant on these facts. The circuit court's evidentiary ruling created the possibility that on remand the plaintiff could recover for the sexual advances made towards her co-workers since the few stray comments the plaintiff heard herself were nothing more than "mere offensive utterance[s]."[52] Most importantly, rumors should not be the basis for admitting evidence, as rumors do not cause awareness. Once a company or an office reaches a certain size, rumors of all sorts are bound to develop, whether based on truth or on disgruntled employees' speculations about why co-workers have reached their current status. Rumors together with a few stray comments or jokes should not withstand summary judgment.

III. IS SECOND-HAND EVIDENCE EVEN RELEVANT?

A. THE RULES OF EVIDENCE

Basic knowledge of the Federal Rules of Evidence suggests that the strongest argument against admitting second-hand evidence is that it is simply irrelevant to whether the plaintiff, him or herself, was subjected to a hostile work environment. A successful hostile work environment claim, as outlined in *Harris*, requires that the alleged conduct be both objectively and subjectively offensive.[53] Regardless of whether the plaintiff believes the environment is subjectively offensive, the objective requirement indicates that the trier of fact should consider whether a reasonable person having the same experiences as the plaintiff would consider the work environment hostile or abusive.[54] Seemingly clear is that details of events not involving the plaintiff are irrelevant to this

49. *See id.*

50. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986); *see also* Harris v Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

51. *Cf.* Burnett v. Tyco Corp., 203 F.3d 980, 981, 985 (6th Cir. 2000). In *Burnett*, the plaintiff experienced three incidents of harassment directed towards her personally during a six month period. *Id.* at 981. One incident amounted to a battery, in which the alleged harasser placed a pack of cigarettes inside her tank top and brassiere strap. *Id.* The two other incidents were categorized as "merely offensive remarks." *Id.* at 985. Once the alleged harasser handed plaintiff a cough drop and said, "Since you have lost your cherry, here's one to replace the one you lost." *Id.* at 981. The other comment regarded a shirt worn by plaintiff reading "Deck the Malls." The alleged harasser said to plaintiff, "Dick the malls, dick the malls, I almost got aroused." *Id.* But, the Sixth Circuit still affirmed summary judgment for the defendant on grounds that the incidents did not create an environment sufficiently severe to constitute a hostile work environment. *Id.* at 985.

52. *See Harris*, 510 U.S. at 23.

53. *Id.* at 21-22.

54. *See id.*

determination.[55]

Rule 401 of the Federal Rules of Evidence states that relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[56] Rule 402 goes on to deem all relevant evidence admissible.[57] However, Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[58] The requirement that one of the listed dangers or considerations must *substantially* outweigh the probative value of the evidence makes it necessary for the judge to perform a balancing test in determining whether to admit the evidence.[59]

Because most courts find that events involving third persons have "any tendency" to support the plaintiff's claim, evidence of discriminatory acts directed towards people other than the plaintiff should most logically be excluded under Rule 403.[60] The danger of unfair prejudice to the defendant-employer when third person evidence is admitted is considerable, especially when the plaintiff attempts to present evidence of discrete, isolated acts against several different individuals.[61] The jury may have difficulty understanding *why* they are being asked to evaluate the context and severity of what happened to someone other than the plaintiff. More importantly, this evidence is confusing because the jury may not realize that it must independently decide *whether* the incidents involving other employees actually happened at all. Also, quite possibly, if not probably, the jury will hear how the plaintiff's co-workers feel that their work environment was altered by their experiences and forget that the plaintiff's working environment, and not his co-workers' working environment, is at issue. Thus all three dangers enumerated in Rule 403 are present when evidence of acts directed at third persons is admitted.[62] Depending on the circumstances of the particular case, defense counsel may wish to argue that the three considerations outweigh the evidence's probative value as well.[63]

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55. *See, e.g.*, Stewart v. Houston Power & Lighting Co., 998 F. Supp. 746, 755 (S.D. Tex. 1998) ("Several of the alleged incidents do not even involve [the plaintiff], but relate to other women. These events do not meet the requirement that she personally was subject to unwelcome sexual harassment.").

56. FED. R. EVID. 401.

57. FED. R. EVID. 402.

58. FED. R. EVID. 403.

59. *See id.*

60. *See id.*; *see also* FED. R. EVID. 401.

61. *See* FED. R. EVID. 403.

62. *See id.* (unfair prejudice, confusion of the issues, misleading the jury).

63. *See id.* (undue delay, waste of time, needless presentation of cumulative evidence).

B. The Rule 403 Balancing Act

The Seventh Circuit articulated how the Rule 403 balancing test functions in *Wyninger v. New Venture Gear, Inc.*, a case in which the plaintiff brought a hostile work environment gender discrimination claim.[64] Wyninger attempted to introduce evidence of another employee's earlier discrimination claim against the employer, but the district court found the evidence was inadmissible.[65] The Seventh Circuit, reviewing the trial court's decision for abuse of discretion, found that the district court did not abuse its discretion in excluding the evidence because several dissimilarities between the plaintiff's and the witness's experiences existed.[66] The other employee had worked in a different department from the plaintiff and was subjected to a different employment decision that was made by different supervisors.[67] In deciding to exclude the evidence, the trial judge determined that the dangers of undue delay and confusion of the issues substantially outweighed the probative value of the other employee's experience.[68] *Wyninger* indirectly points to an additional reason so many district court admissions of co-worker evidence are not reversible error on appeal: the appellate courts review the district courts' Rule 403 balancing analysis for *abuse of discretion*.[69] To constitute reversible error, the district court must have based its decision on an erroneous conclusion of law, or on facts that could not rationally lead to the district court's decision.[70] This high level of deference to the lower court's ruling requires an egregious error, and appellate courts are often unwilling to find that such an error occurred.[71]

The Seventh Circuit's opinion specifically mentions one of the problems with presenting second-hand evidence to the trier of fact—it forces the parties to try a "case within a case."[72] Not only do jurors have difficulty separating in their minds incidents that directly impacted the plaintiff's work environment from second-hand incidents that may or may not have had an effect, but jurors must also evaluate the evidence regarding the second-hand incidents themselves. Jurors must decide (1) whether they believe the event actually happened; (2) whether the details of the event were accurately presented to them; (3) what information the plaintiff knew about the event while he was allegedly subjected to a hostile work environment; (4) what effect, if any, the information had on the

64. Wyninger v. New Venture Gear, Inc., 361 F.3d 965 (7th Cir. 2004).
65. *Id.* at 975. The plaintiff's attempt was based upon a motion to consider newly discovered evidence, but the circuit court's review of the district court's exclusion of the evidence is based on the dissimilarity of the plaintiff's and the other employee's situations. *See id.* That the evidence was offered late is treated as a bonus reason that the evidence was properly excluded. *See id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 974.
70. *See, e.g., id.*
71. *See id.*
72. *Id.* at 975.

plaintiff's perception of his working environment; and (5) what effect, if any, the information would have on a reasonable person's perception of the working environment. While jurors probably realize that they must consider the last two questions, unless the lawyers and the judge do a thorough job of explaining it to them, most jurors probably do not realize that they must also answer the first three questions.

Focusing on second-hand evidence also places a heavy burden on the defense counsel. Not only must the defendant to be prepared to rebut evidence about how the plaintiff was treated, but also evidence about incidents involving third persons who do not have a direct stake in the case. This adds volumes of discovery to pre-trial efforts, provides cause for multiple motions and hearings, and unnecessarily lengthens and confuses the trial itself. From the defendant's perspective, the practice of investigating and presenting second-hand incidents causes the process to be an inefficient waste of time and resources on matters that are only tangentially related, if at all, to the plaintiff's claim. Because of the investment necessary to defend against not only the plaintiff's, but also third persons' experiences, employers may choose to settle the case. Thus, even without a trial, the plaintiff has the opportunity to recover a windfall and be compensated for incidents in which he was not even involved.

C. Examples of Partially Successful Irrelevance Arguments

While no court has categorically excluded second-hand evidence on relevance grounds, some decisions provide examples of at least partially successful 403 arguments by defendant-employers. Some cases are included in this discussion for the quality of the trial courts' reasoning, even though the appeals courts may have found error on review.

In a Seventh Circuit case in which the plaintiff claimed a racially hostile work environment based on the conduct of his supervisor, the district court did not abuse its discretion in excluding evidence of racial comments by the plaintiff's co-workers.[73] The evidence was confusing to the jury, prejudicial, cumulative, and irrelevant to the plaintiff's claim that he was harassed by his supervisor because his supervisor was not present when the comments were made.[74]

While at first blush this decision seems like a coup for employers within the Seventh Circuit, the holding is limited because the plaintiff was not claiming co-worker harassment.[75] In a footnote the court indicates that if the plaintiff had claimed a hostile work environment based on harassment by his co-workers, rather than his supervisor, then "the pervasiveness of coworker conduct could show the employer's constructive *notice* of the harassment (presumably even if the plaintiff is not present)."[76] Further, when the claim is based on both co-worker and supervisor con-

73. Mason v. S. Ill. Univ. at Carbondale, 233 F.3d 1036 (7th Cir. 2000).
74. *Id.* at 1042.
75. *Id.* at 1044-45.
76. *Id.* at 1046 n.8.

duct, then "all instances of harassment by all parties are relevant to proving that his environment is sufficiently severe or pervasive."[77] The appeals court made clear that for third-person incidents of racism to be relevant to the plaintiff's hostile work environment claim the plaintiff must have known about the incidents while he was employed.[78] Language near the end of the opinion indicates that if the plaintiff had known of the comments by co-workers while he was employed, and if the co-workers had made comments in the presence of the plaintiff's supervisor, then the comments would have been relevant to show the supervisor's motives in allowing a racially hostile environment.[79]

In *Jackson v. Quanex*, a Sixth Circuit racially hostile work environment case, the circuit court found that the trial court erred in granting judgment as a matter of law for the defendant.[80] The district court excluded evidence offered by the plaintiff about racial incidents that were not directed at the plaintiff and that occurred outside the plaintiff's presence.[81] The trial judge found that the evidence was *irrelevant* to the plaintiff's hostile work environment claim.[82]

In finding error, the appellate court quoted the Supreme Court's statement in *Meritor* that employees should be protected from "working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[83] The opinion then quoted the Second Circuit: "[T]he fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor can impact the work environment."[84] The Sixth Circuit further found that the district court adopted too narrow a view of hostile work environment claims, requiring that every member of the protected class experience personal and racial singling out before a plaintiff could sue for a racially hostile work environment.[85]

Despite the trial court's misstatement of the facts required to prove a prima facie case sufficient to withstand a motion for judgment as a matter of law, the district court's evidentiary ruling disallowing the plaintiff's attempt to introduce evidence of racial incidents involving co-workers has merit. At the end of the plaintiff's presentation of her case, in ruling on the defendant's motion, the district court found that allowing additional African-American employees from the plant to testify would be cumulative presentation of evidence in light of testimony that had already been heard.[86] The district court judge stated, on the record:

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77. *Id.* at 1045 (citing the totality of circumstances approach endorsed by the Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).
78. *Id.* at 1046; *see also* Burnett v. Tyco Corp., 203 F.3d 980, 981 (6th Cir. 2000).
79. *Mason*, 233 F.3d at 1047.
80. Jackson v. Quanex, 191 F.3d 647, 659 (6th Cir. 1999).
81. *Id.*
82. *Id.* at 659, 661.
83. *Id.* at 660 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986)).
84. *Id.* at 661 (quoting Schwapp v. Town of Avon, 118 F.3d 106, 111-12 (2d Cir. 1997)).
85. *Id.* at 659-60.
86. *Id.* at 656; *see also* FED. R. EVID. 403.

> As I understand what you are telling me, the testimony of Critton [sic], Macomb [sic], Copeland, Fouts, would be cumulative or along the same lines of the testimony of Darlene Solomon . . . . That is not setting the tone of the work environment. You can't strain [sic], in my view, a series of isolated incidences, discrete incidences and dots and build a case of hostile environment. . . . And the fact that there is a subjective feeling by any minority group in a plant, that is an unhappy place to work in and are mistreated, standing by itself is irrelevant to this.[87]

This ruling does not seem unreasonable or unduly narrow. Instead, it asserts that the case centers on the *plaintiff's* work environment and whether the *plaintiff* should recover from the defendant for the work environment she experienced. The Sixth Circuit disagreed, concluding that incidents must be aggregated to assess the cumulative effect of all of the incidents taken together in order to adhere to the Supreme Court's "totality of the circumstances" approach.[88]

In practice, the Sixth Circuit's methodology is detrimental to the case of any employer defending a hostile work environment claim. True, the racially charged incidents in *Jackson* were serious—they included graffiti, vandalism, threats, and alteration of machines to create safety hazards.[89] However, the court's broad statements provide authority for future courts to allow small bits of information regarding isolated incidents to be admitted into evidence and somehow be glued together to create a hostile work environment. This decision creates a danger that in future cases isolated and minor incidents will be accumulated to create the "equivalent of" a single severe incident where the workplace hostility is much less severe than the incidents in *Jackson*.[90] The district court's evaluation of the record simply makes more logical sense.[91]

In a third case, from a district court in the Ninth Circuit, a female, African-American former sheriff's deputy alleged a race- and gender-based hostile work environment.[92] In its opinion denying the defendant's Motion for Summary Judgment, the California district court stated:

> Evidence of conduct which was directed at plaintiff, occurred in her presence, or affected conditions in her workplace is relevant to a continuing violation of plaintiff's right to be free of an abusive work environment. Plaintiff's evidence regarding racism and sexism in the department generally, such as testimony by former employees about racist jokes they heard and racist events that took place in areas where plaintiff was not assigned, are not relevant to this inquiry, although such evidence is relevant to the issue of the employer's knowledge and duty to correct.[93]

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87. *Jackson*, 191 F.3d at 656.
88. *Id.* at 660.
89. *See id.* at 652-57.
90. *See id.*
91. *See id.* at 656.
92. Anthony v. County of Sacramento, 898 F. Supp. 1435, 1440 (E.D. Cal. 1995).
93. *Id.* at 1446 n.15.

While this ruling appears to be helpful to defendants trying to exclude second-hand evidence, its significance was reduced later in the opinion when evidence regarding racist graffiti in the men's locker room was admitted.[94] Because the plaintiff was a member of the Black Deputy Sheriff's Association (the organization targeted by the graffiti), and because employees talked about the graffiti, evidence about the graffiti was admissible.[95] Evidence regarding the way African-American inmates were treated was also permitted because on at least one occasion it caused the plaintiff's job to be more difficult than it would have been otherwise.[96]

Employers can craft several arguments against admitting second-hand evidence based on the reasoning in these cases. When the plaintiff alleges harassment by a supervisor, employers should argue that harassment by co-workers should not be admitted to prove the plaintiff's work environment was hostile.[97] From the *Anthony* opinion, defendants can argue that evidence about the general work atmosphere or about events that occurred outside the plaintiff's work area are not relevant to the hostility of the plaintiff's work environment.[98] Even if these specific relevance arguments do not help the defendant's case, employers should always argue that second-hand evidence is irrelevant to the plaintiff's claim and that it is unfairly prejudicial.

D. Relevant to What?

Some courts are willing to go to great lengths in order to admit second-hand evidence. Such evidence is routinely admitted on the grounds that it is relevant to either a peripheral issue in the case or a question related only to liability or damages.

A district court in the Eighth Circuit stated that evidence of harassment and discrimination towards employees other than the plaintiff is relevant to the issues of (1) whether the employer maintained a hostile work environment; (2) whether the employer intended to harass and discriminate against the plaintiff's class; and (3) whether the employer's reasons for refusing to discipline the alleged harasser/discriminator were pretextual.[99] All three of these issues go to employer liability, not to whether the plaintiff's work environment was actually hostile.

Another case from the Eighth Circuit, *Williams v. ConAgra Poultry Co.*, involved a racially hostile work environment claim brought by a for-

94. *Id.* at 1448 n.20.

95. *Id.*

96. *Id.* at 1448-49. Evidence was presented that excessive force was used against African-American inmates and that at least one white employee bragged about his use of physical violence against African-American inmates. *Id.* at 1441. The plaintiff was also sent in alone to subdue an African-American inmate who had been provoked, apparently into a dangerous rage, by racist comments. *Id.*

97. *See, e.g.*, Mason v. S. Ill. Univ. at Carbondale, 233 F.3d 1036, 1041-42 (7th Cir. 2000).

98. *Anthony*, 898 F. Supp. at 1446 n.15.

99. Weyers v. Lear Operations Corp., 232 F. Supp. 2d 977, 997 (W.D. Mo. 2002), *rev'd on other grounds*, 359 F.3d 1049 (8th Cir. 2004).

mer employee, an African-American male.[100] Ruling on a motion *in limine*, the trial court excluded evidence of a previous employee's successful verdict against the employer, but did not decide whether to allow testimony regarding the events underlying the previous suit.[101] At trial, the plaintiff's witnesses were permitted to testify about the incidents involving the plaintiff and also about the events that gave rise to the earlier case.[102] Female African-American employees testified about their individual experiences, such as being physically "manhandled" by a supervisor and being treated poorly for not responding to white supervisors' sexual advances.[103]

On appeal, the Eighth Circuit found that the women's testimony was *irrelevant* to whether the plaintiff's environment was subjectively hostile because he was not aware of the events while he was employed.[104] The court refused to find error on the grounds that the other witnesses' testimony made the plaintiff's testimony about his working environment more credible.[105] It was also deemed probative as to management's motives in firing the plaintiff.[106] The court stated, "Evidence of widespread toleration of racial harassment and disparate treatment condoned by management was relevant to its motive in firing [plaintiff]."[107] The testimony was held relevant on the issue of whether the plaintiff was eligible for punitive damages on his harassment claim as well.[108] These peripheral issues of employer motive and whether punitive damages should be awarded are separate from the main issue—whether the plaintiff's work environment was so severe or pervasive that it altered his working conditions.[109]

One district court within the Tenth Circuit held that slurs directed at third persons are relevant as evidence of the general work atmosphere, and are thus admissible in the plaintiff's hostile work environment claim.[110] This result had been earlier endorsed by the circuit itself: "A finding of pervasiveness or severity need not rest solely on actions aimed directly at plaintiff, however, but may also consider harassment of others in the workplace."[111] The circuit court decision involved evidence about how a doctor treated Latino, African-American, and female patients poorly in comparison to Caucasian and male patients, and its relevance to a hostile work environment claim by the doctor's minority employees.[112]

100. Williams v. ConAgra Poultry Co., 378 F.3d 790, 792 (8th Cir. 2004).
101. *Id.* at 793.
102. *Id.*
103. *Id.*
104. *Id.* at 794.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).
110. Watson v. City of Topeka, 241 F. Supp. 2d 1223, 1232 (D. Kan. 2002).
111. Nieto v. Kapoor, 268 F.3d 1208, 1219 n.7 (10th Cir. 2001). This case was based on a § 1983 claim because the defendant was a doctor at a public hospital.
112. *Id.* at 1214.

Thus, evidence of how the doctor treated patients was admitted in a suit brought by his employee.[113]

In another case, the Tenth Circuit reversed the district court's grant of summary judgment for the defendant-employer on the grounds that when a plaintiff seeks to hold the employer liable for harassment by a co-worker, as opposed to a supervisor, the plaintiff's case should survive summary judgment if there is a genuine issue of material fact as to whether the employer knew or should have known about the alleged harasser's inappropriate behavior.[114] Incidents of sexual harassment by the same employee who allegedly harassed the plaintiff that were "similar in nature and near in time to his harassment of [the plaintiff]" should have been admitted for the purpose of proving the employer had notice that the work environment was hostile.[115]

These few cases admitted second-hand evidence to show employer intent, possible pretext for an employment decision, credibility of the plaintiff's testimony, availability of punitive damages, the general work atmosphere, or employer notice of the harassing activity. Aside from possibly the amorphous general work atmosphere concept, all of these issues are severable from the central issue: whether the work environment actually experienced by the plaintiff was hostile. The simplest way to avoid unfair prejudice to the defendant, confusion of the issues, and waste of time that results when evidence about these peripheral issues is introduced at trial is to bifurcate hostile work environment cases. First, evidence should be presented about only those incidents that involved the plaintiff directly. Then, the jury should determine whether or not that evidence proves that the plaintiff was subjected to a hostile work environment. Only if the jury answers this first question in the affirmative should second-hand evidence have a chance to be admitted on the subsequent issues, such as motive, employer knowledge, and employer liability. This structure would help the jury more clearly understand the evidence related to the plaintiff, and it would limit the use of second-hand evidence to the peripheral issues for which it is admitted.

IV. COURT-IMPOSED PREREQUISITES TO ADMISSION OF SECOND-HAND EVIDENCE

Several courts have created their own approaches to determining whether to admit second-hand evidence in hostile work environment cases. These methods provide basic guidelines for use within the Federal Rules of Evidence framework regarding relevance and probative value. While a more strict application of the Federal Rules themselves would be best, these attempts to restrict second-hand evidence are commendable. The most common requirements are that third-person victims be members of the plaintiff's same protected class, that the plaintiff have been

113. *Id.* at 1219.
114. Hirase-Doi v. U.S. W. Commc'ns, Inc., 61 F.3d 777, 784 (10th Cir. 1995).
115. *Id.*

aware of third-person incidents during the time he alleges he was subjected to a hostile work environment, or both. A section about the Third Circuit, which does not require plaintiff awareness during employment, is also included.

A. Limits Based on the Protected Class of the Third Persons

In *Melton v. Five Four, Corp.*, a white male employee brought a Title VII hostile work environment suit claiming that the defendant-employer discriminated against minorities.[116] The plaintiff claimed that the bar and restaurant at which he worked routinely limited the number of minority customers admitted under the pretext that many would-be minority customers did not meet dress code requirements.[117] Meanwhile, white customers were allowed to enter when wearing similar clothing.[118] Although the plaintiff complained about the discriminatory admittance policy and posited that implementing the policy was a condition of his employment that made his working environment hostile, summary judgment was granted for the defendants.[119] The white plaintiff was not a member of the minorities' protected classes, and thus could not introduce evidence that they were discriminated against.

A similar holding was reached by the Fourth Circuit in *Childress v. City of Richmond.*[120] In *Childress*, a group of white male police officers claimed that their supervisor created a hostile work environment by making discriminatory remarks about women and about African-American officers.[121] The plaintiffs claimed that their supervisor's comments disrupted their working environment and caused tension in their relationships within the police force.[122] The district court dismissed the case for lack of standing and was affirmed on appeal.[123] The white males were not permitted to sue for the supervisor's hostility towards women and minorities.

These two cases demonstrate a requirement that may seem inherent in the hostile work environment scheme but that is not often discussed in courts' opinions: second-hand evidence must involve discrimination against third persons who are members of the same protected class as the plaintiff. Because the plaintiffs were both white males, they were each prohibited from introducing evidence that people in different race and gender classes were discriminated against. A district court in the Second Circuit has provided the most clear statement of this requirement: "[T]he other employees targeted must be in the same protected class as the

116. Melton v. Five Four, Corp., No. 99 C 1274, 2000 U.S. Dist. LEXIS 638, at *2 (N.D. Ill. Jan. 25, 2000).
117. *Id.*
118. *Id.* at *5.
119. *Id.* at *18-24.
120. 134 F.3d 1205, 1207 (4th Cir. 1998).
121. *Id.* at 1206-07.
122. *Id.* at 1207.
123. *Id.*

plaintiff for the hostile work environment claim to withstand a motion to dismiss."[124]

B. Plaintiff's Awareness of the Incidents Involving Third Persons While Working in the Allegedly Hostile Work Environment

If a person does not know about something, then that something does not affect the person's perception of his environment. This should seem self-evident, however, much has been written by courts considering evidence of incidents not involving the plaintiff about whether the plaintiff must have known about the incidents for them to have affected her work environment. At least one circuit allows the evidence to be presented and then requires the trier of fact to determine whether the plaintiff was aware of the incidents. Another circuit does not require plaintiff awareness at all.

1. Awareness Required

In *Hirase-Doi v. U.S. West Communications, Inc.*, the Tenth Circuit refused to admit evidence that a plaintiff's co-workers were harassed because the plaintiff was not aware of the conduct "during the time that she was allegedly subject to a hostile work environment."[125] Citing the United States Supreme Court's decision in *Harris*, requiring the work environment be both objectively and subjectively hostile, the circuit court found that the subjective requirement means that the plaintiff must have been aware of any other incidents of harassment for them to have contributed to the plaintiff's subjective perception of a hostile work environment.[126] The Tenth Circuit also found that the plaintiff may rely on evidence about incidents she was aware of to show that it affected her "general work atmosphere."[127]

The magistrate judge in *Moore v. Metropolitan Water Reclamation District*, discussed below, denied a motion *in limine* to exclude evidence in a gender-based harassment and hostile work environment claim that one of the plaintiff's co-workers had been sexually harassed.[128] Although the co-worker only experienced one incident of harassment, the court found that the incident was relevant to the plaintiff's hostile work environment claim so long as the plaintiff knew about the incident "at or around the time the harassment occurred."[129] The opinion indicates that both the

124. Smith v. AVSC Int'l, Inc., 148 F. Supp. 2d 302, 310 (S.D.N.Y. 2001). *Cf.* Cruz v. Coach Stores, Inc., 202 F.3d 560, 572 (2d Cir. 2000) (finding that incidents of gender and race discrimination could each exacerbate the effect of the other).

125. Hirase-Doi v. U.S. W. Commc'ns, Inc., 61 F.3d 777, 782 (10th Cir. 1995).

126. *Id. See also* Stewart v. Houston Power & Lighting Co., 998 F. Supp. 746, 755 (S.D. Tex. 1998).

127. *Hirase-Doi*, 61 F.3d at 782.

128. Moore v. Metro. Water Reclamation Dist., No. 02 C 4040, 2004 WL 2958769, at *7-8 (N.D. Ill. Nov. 22, 2004).

129. *Id.*

plaintiff's awareness of the incident and the timing of the incident bear on the weight of the evidence.[130] Although the opinion states that the probative value of the incident is not substantially outweighed by the danger of unfair prejudice, the judge declined to make a final determination on the evidence's admissibility until trial.[131]

2. *Awareness Required But Is Determined by Trier of Fact—Second Circuit*

The Second Circuit allows some evidence of incidents that happened outside the plaintiff's presence and that were not directed at the plaintiff, but requires the plaintiff have been aware of those incidents during the time his or her work environment was allegedly hostile.[132] In *Schwapp v. Town of Avon*, a racially hostile work environment claim, the Second Circuit reversed summary judgment in favor of the defendant on the grounds that second-hand knowledge of a racist comment can affect the work environment of a member of the protected class discriminated against by the comment.[133]

The circuit court also found that the district court erred in refusing to consider evidence of specific instances of racially discriminatory conduct that related to other minority groups and that happened *before* the plaintiff began working for the defendant employer.[134] Evidence of these events should have been considered at the summary judgment stage, although the court noted that they "may be of limited probative value."[135] The Second Circuit further stated that whether the plaintiff was aware of the incidents, whether awareness of those incidents caused the plaintiff to subjectively perceive conduct directed at him as making his work environment hostile or abusive, and whether such awareness would cause a reasonable person to perceive his work environment as hostile or abusive were questions that should be relegated to the trier of fact.[136]

The Second Circuit's holding is problematic. Should awareness and its effect on both the subjective and objective perception of the plaintiff's work environment as hostile or abusive be left to the trier of fact? In jury cases, any information about incidents the plaintiff learned of second-hand will likely affect the jury's overall evaluation of the workplace. A limiting instruction seems inadequate to keep the jury from considering evidence that other people were harassed or discriminated against while making its determination on whether the work environment was in fact

130. *Id.*

131. *Id.*

132. *See* Schwapp v. Town of Avon, 118 F.3d 106, 111-12 (2d Cir. 1997).

133. *See id.* at 111.

134. *Id.* at 112. Unlike courts in the previous section, the Second Circuit allows second-hand evidence about conduct directed at different protected classes than the plaintiff's.

135. *Id.*

136. *Id.*

hostile to the plaintiff.[137] Any incidents involving the plaintiff become less isolated, both by definition and in terms of general human perception, when additional occurrences are presented.

Allowing the jury to decide whether or not the plaintiff was aware of other incidents unnecessarily exposes the jury to evidence that is highly prejudicial to the defendant. While the jury could easily find that a few unrelated incidents are not pervasive or severe enough to create a hostile work environment, the jury would have much more difficulty finding for the defendant when faced with minor incidents directed at the plaintiff plus a series of several incidents directed at other people in the workplace. From a quantitative standpoint, the more incidents presented, the more likely a hostile work environment existed. Qualitatively, the courts appear unconcerned with prohibiting evidence of incidents substantially more egregious than those the plaintiff experienced.[138] Thus, one offhand comment to the plaintiff plus one very severe incident, for example a noose hanging at a co-worker's workstation, may constitute a hostile work environment claim for the plaintiff. Should not the worker in whose workspace the noose was hung recover from the employer, as opposed to the plaintiff, who experienced one derogatory remark?

3. *Awareness Not Required—Third Circuit*

The Third Circuit has done away with even the minimal awareness threshold for the admittance of second-hand evidence.[139] In *Hurley v. Atlantic City Police Department*, a Title VII gender-based discrimination and hostile work environment case, the Third Circuit found that the district court did not abuse its discretion in admitting the testimony of four women about harassment in the department that the plaintiff did not witness and that the plaintiff *did not even become aware of until after filing the lawsuit.*[140] What is more, eight male officers were permitted to testify regarding comments co-workers made about women and derogatory terms used to describe women behind their backs.[141] These statements were made outside the plaintiff's presence, the plaintiff was unaware of them until after filing suit, and they were made when there were no women present at all.[142] Still more damaging to the defendant's case, the court also admitted evidence about incidents of harassment beyond the statute of limitations, as far back as nine years before the statutory period.[143]

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137. *See, e.g.*, Nash v. U.S., 54 F.2d 1006, 1007 (2d Cir. 1932) (explaining that the limiting instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else").

138. *See* Jackson v. Quanex, 191 F.3d 647, 652-57 (6th Cir. 1999).

139. *See* Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 107-10 (3d Cir. 1999).

140. *Id.* at 108.

141. *Id.*

142. *Id.*

143. Hurley v. Atlantic City Police Dep't, 933 F. Supp. 396, 410 (D.N.J. 1996).

At trial, the district court stated that the evidence was admitted primarily because "it was crucial to the jury's evaluation of the work environment at the ACPD."[144] The court stated that some evidence was admitted for the purpose of proving liability, whereas other evidence was admitted for the limited purpose of helping the jury understand the liability evidence.[145] All three types of evidence (other women's experiences, the general attitude of male officers towards women, and events outside the statute of limitations period) served several purposes according to the district court:

> [The evidence] allowed the jury to gain insight into the motives, attitudes, and intentions of the defendants. It gave them the opportunity to evaluate the adequacy of management's response to Hurley's complaints during the statutory period. It provided the jury with a sense of whether the events that took place during the statutory period were anomalous or accidental, or instead were part of a "pervasive and severe" pattern.[146]

According to the district court, disallowing the evidence would have limited the jury to seeing only a piece of the plaintiff's experience at the department, and in its view the jury needed to hear the whole story to be able to put the liability evidence into perspective.[147] The district court believed that admitting the evidence and providing a limiting instruction to the jury regarding what evidence could be used as a basis for liability adequately balanced the parties' competing interests.[148]

In addressing its balancing of the second-hand evidence's probative value against the risk of unfair prejudice, the district court found that the risk did not substantially outweigh the probative value, and that any prejudice was corrected by the limiting instruction and the context of the case.[149] Further, the district court opined that the humiliation the plaintiff was subjected to, as shown by the evidence of sexual harassment directed at her individually, was so severe that the prejudice was "insignificant."[150]

The trial court stated that evidence that other women were harassed showed that the conduct towards the plaintiff was not isolated and that the plaintiff's experience was not unique.[151] This rationale is puzzling in two respects. First, the plaintiff's situation was most definitely unique. She was the first female sergeant in the department.[152] The district court recognized this fact, yet it bore little importance on the court's analysis of the evidence.[153] The experiences of one other female police officer, a

144. *Id.*
145. *Id.*
146. *Id.* at 411.
147. *Id.*
148. *Id.*
149. *Id.* at 413.
150. *Id.*
151. *Id.* at 411.
152. *Id.* at 405.
153. *See id.* at 401

prosecutor, and two payroll employees regarding incidents of gender harassment can scarcely be called comparable to the plaintiff-sergeant's treatment in her position as the first female supervising officer.[154] More importantly, the plaintiff did not know of the incidents involving the four other women until after she filed suit, negating the possibility that those incidents contributed to her working environment.[155] Second, why should it matter whether the jury believes that the plaintiff's complaint was not unique? The plaintiff is the only woman who filed suit and the only woman to be compensated should the jury find against the defendant.

On appeal, the Third Circuit failed to recognize these faults in affirming the lower court, finding the harassment of other women relevant because it could show that the plaintiff's working conditions were altered.[156] Incidents that plaintiff did not know about, whether in the form of specific acts of harassment or a general sexist attitude, were admissible because they were probative on the issue of whether the employer's stated reasons for its employment actions were merely pretext.[157] The evidence was also probative on the issues of whether the employer knew or should have known that its anti-harassment policy was unheeded, and whether the harassment was in fact sexually discriminatory.[158] The plaintiff's knowledge was unnecessary because the evidence showed motive and aided the jury in its determination of employer liability.[159] And while the circuit court found that the district court erred in admitting evidence about incidents that occurred six to nine years beyond the statute of limitations period, the error was determined harmless.[160]

The Third Circuit allows the most widespread evidence, both in terms of the type of second-hand evidence (other employees who were harassed, testimony about locker room conversations not made in the presence of any member of the plaintiff's protected class) and in terms of the value assigned to the evidence. By not requiring the plaintiff to even have knowledge about other incidents during his or her period of employ-

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("As women increasingly enter workplaces historically reserved for men, particularly those which value traditionally 'male' virtues such as physical strength and courage, it is not surprising that some male employees will by word or deed display their displeasure at this female 'intrusion.' An employer cannot sit back and adopt a 'boys will be boys' attitude when this happens; it must move promptly and forcibly to make it clear to the entire workforce that conduct which demeans women or makes them feel unwelcome will not be tolerated.")

154. *See id.* at 410.

155. *See id.*

156. Hurley v. Atlantic City Police Dep't, 174 F.3d 75, 110 (3d Cir. 1999).

157. *Id.*

158. *Id.* at 111.

159. *Id.*

160. *Id.* at 112. The determination that the error was harmless seems at odds with the general attitude of the court's opinion that every little bit helps the jury more fully understand the liability-provoking incidents. The plaintiff's case was permitted to be built brick by brick, including these remote incidents at the foundation. As such, the jury's interpretation of later events could have been tainted by hearing of the earlier conduct.

ment, the Third Circuit allows an attenuated chain of inferences to lead to the conclusion that a hostile work environment existed based on separate, isolated incidents considered together as whole. In allowing this wide breadth of evidence, the focus is on punishing the employer, as opposed to compensating the victim. Yet in the process of punishing the employer, one victim is allowed to recover a windfall.

The *Hurley* decision also represents another of the more practical problems with admitting second-hand evidence: the plaintiff is not required to join the victims of the other incidents as co-plaintiffs. In essence, the plaintiff has the good fortune of not being the only employee to have experienced unpleasant behavior and is allowed to use the other victims to bolster his or her own claim. One co-worker does not have standing to sue on behalf of another, but these cases result in giving single plaintiffs the chance to indirectly reap monetary awards based on others' humiliation or discomfort.

V. INFREQUENTLY USED EVIDENCE RULES

Some evidentiary objections can only be made in certain circumstances. When the alleged harasser is included as a defendant in addition to the employer, he or she can argue that past conduct is inadmissible character evidence. In other cases, depending on the source and path of the rumor mill, defendants may be able to object that witnesses lack personal knowledge about the second-hand events.

A. Inadmissible Character Evidence[161]

In one early gender-based hostile work environment claim, while ruling on the defendant's motion for new trial (by both the defendant-employer and the defendant-individual alleged harasser) following a jury verdict in favor of the plaintiff, the trial court refused the argument that "prior bad acts" towards former and present employees should not have been admitted into evidence.[162] The trial court had admitted evidence of two prior claims against the alleged harasser (but not the details of the incidents leading to the claims) that happened seven and ten years earlier, and the plaintiff was also permitted to read into evidence a stipulation regarding a third claim against the alleged harasser.[163] The trial court also admitted evidence regarding the individual defendant's alleged harassment of three other women.[164] Both the defendants argued that the evidence should have been excluded because the two prior claims were remote in time, because the prior incidents were not similar in nature to the conduct the plaintiff complained about, and because of the danger of unfair prejudice.[165] The defendants' arguments centered around Federal Rules

161. *See* Fed. R. Evid. 404(b).
162. Webb v. Hyman, 861 F. Supp. 1094, 1109 (D.D.C. 1994).
163. *Id.* at 1110.
164. *Id.*
165. *Id.*

of Evidence 403 and 404(b).[166]

Regarding the defendants' 403 arguments, the trial court found that testimony by three women who had been harassed "within the past few years" was relevant and also highly probative.[167] The court noted the difficulty in showing that the employer had discriminatory intent, and that other incidents of harassment help to show both intent and the existence of a hostile work environment.[168] On the point of liability, the evidence was relevant to whether the employer had notice of the work environment's hostility under the plaintiff's supervisor, and also on the issue of whether the employer took prompt and appropriate remedial measures.[169] The court found two of the women were treated similarly to the plaintiff, and the third woman was allowed to testify that attractive women generally received preferential treatment in the workplace.[170]

The district court found that the defendants did not present adequate case law to support their argument that the evidence should have been excluded as inadmissible character evidence.[171] Addressing the employer's attempt to analogize to a criminal case in which a new trial was granted after evidence of an arrest two and a half years earlier was admitted, the court found that the prejudice of a prior arrest was "qualitatively greater than any risk of prejudice from an EEOC complaint."[172] The court believed that its limiting instruction sufficiently minimized any danger of unfair prejudice.[173] Also, the defendants in *Webb* were given and took advantage of the opportunity to present rebuttal witnesses.[174]

This failed attempt to exclude "prior bad acts" was only a decision by one district court. Another court might exclude the prior complaints under Rule 404(b). For example, in a case where the alleged harasser was recently hired, the defendant-employer might succeed in excluding the evidence because incidents not occurring at the present workplace could not have provided notice to the employer, and could not show the employer's intent. Or, the employer could try to sever the claim against the alleged harasser.

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166. *Id.* *See* FED. R. EVID. 403, 404(b). Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trail, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

167. *Webb*, 861 F. Supp. at 1111.
168. *Id.*
169. *Id.* at 1109.
170. *Id.* at 1111.
171. *Id.* at 1110.
172. *Id.*
173. *Id.* at 1112.
174. *Id.*

B. Lack of Personal Knowledge[175]

Discussed above, in *Schwapp v. Town of Avon*, the Second Circuit required the plaintiff to have been aware of second-hand incidents while he was allegedly subjected to a hostile work environment.[176] While the court allowed evidence of second-hand incidents that the plaintiff knew about, some statements regarding those incidents were excluded because the witnesses did not have personal knowledge.[177] Portions of the affidavits of two witnesses for the plaintiff that made only conclusory statements regarding race discrimination and a racially hostile work environment were properly excluded.[178] The witnesses' statements were inadmissible because the witnesses did not have personal knowledge of any specific instances of racially discriminatory incidents.[179]

In another case, regarding a female firefighter's claim that co-workers told her that another firefighter disparaged her behind her back, the Second Circuit stated, "[A]ssertions made by [plaintiff] only on information and belief, for example, would not be admissible through her at trial, for testimony as to facts must generally be based on the witness's personal knowledge."[180]

Based on these decisions defendants may be able to limit testimony about second-hand evidence to events the witnesses actually perceived first-hand. Thus, the plaintiff would not be able to testify about the details of events he did perceive in person. By strictly limiting the testimony of all witnesses to events they have personal knowledge about, the plaintiff would be required to locate and depose witnesses who were present when the events occurred—the middlemen in the rumor chain.

VI. HEARSAY ARGUMENTS

When a hostile work environment plaintiff claims she learned about other incidents of harassment from third persons, one of the evidentiary hurdles that quickly comes to mind is hearsay. Particularly when the plaintiff herself testifies about what she heard, a defense objection may be sustained because second-hand statements are inadmissible to prove the truth of the matter asserted in the statements.[181]

Some courts have admitted these second-hand statements under an exception to the hearsay rule that the statements are not offered to prove the truth of the matter asserted, but to show the statements' effect on the listener—here, the plaintiff.[182] These rulings are troubling because, by allowing the statements into evidence for this limited purpose, the courts

175. *See* Fed. R. Evid. 602.
176. *See* Schwapp v. Town of Avon, 148 F.3d 106, 111 (2d Cir. 1997).
177. *Id.*
178. *Id.*
179. *Id. See also* Fed. R. Evid. 602.
180. Howley v. Town of Stratford, 217 F.3d 141, 155 (2d Cir. 2000).
181. *See* Fed. R. Evid. 801, 802.
182. *See* Fed. R. Evid. 801 advisory committee's note, subdiv. C.

are not requiring sufficient evidence that the events actually happened. While false rumors may have made the plaintiff's work environment subjectively hostile, falsities cannot be the basis for finding objective hostility or abuse.

A. Potentially Successful Hearsay Arguments

In *Gordon v. Southern Bells, Inc.*, the plaintiff claimed gender discrimination and a hostile work environment.[183] The district court denied the defendant's motion for summary judgment on the hostile work environment claim.[184] In doing so, the court addressed the admissibility of the plaintiff's statements that she heard rumors regarding the company's vice president and co-owner to the effect that he was having an affair with someone from the office.[185] The vice president and co-owner implicated by the rumor was one of the men who allegedly harassed the plaintiff.[186]

The court ruled that the plaintiff's testimony about the rumors was inadmissible hearsay that would not be considered on summary judgment, nor at trial.[187] But the court was careful to point out that had the plaintiff deposed witnesses and obtained affidavits supporting the substance of the rumors, then the evidence would have come in.[188] The *Gordon* court also excluded as inadmissible hearsay testimony by a witness for the defendant that some of the plaintiff's co-workers said there had been no improper conduct.[189]

In support of its exclusion of the hearsay-based testimony, the district court cited to a 1999 Seventh Circuit opinion, *Minor v. Ivy Tech State College*.[190] In *Minor*, the Seventh Circuit excluded testimony in the plaintiff's deposition that she had heard rumors in the workplace that her alleged harasser had engaged in sexual relationships with other employees.[191] The court went on to include guidance to the district courts concerning this type of evidence: "Courts must be particularly assiduous to enforce the hearsay rule in sexual harassment cases in order to protect the privacy both of alleged victims and alleged harassers against scurrilous rumors (designed to coerce either settlement or abandonment of the suit) regarding their sex lives."[192] While this limitation is tailored to rumors about sexual harassers, it could be extended to all hostile work environment claims.

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183. Gordon v. S. Bells, Inc., 67 F. Supp. 2d 966, 969 (S.D. Ind. 1999).
184. *Id.*
185. *Id.* at 978.
186. *Id.* at 970.
187. *See id.* at 978.
188. *Id.* This is another example of how important the middleman can be to the plaintiff's case. Only if the middleman testifies can the second-hand evidence come in. *See infra* notes 194-200 and accompanying text.
189. *Gordon*, 67 F. Supp. 2d at 978.
190. *Id.* (citing Minor v. Ivy Tech State Coll., 174 F.3d 855, 856 (7th Cir. 1999)).
191. *Minor*, 174 F.3d at 857.
192. *Id.*

Another successful hearsay argument occurred in a case in which an employee who managed the academic fellowship program at Columbia University brought a gender and age discrimination hostile work environment suit against the university.[193] The plaintiff attempted to introduce into evidence responses to an anonymous survey completed by prior fellows.[194] The Second Circuit held the surveys were inadmissible hearsay.[195]

In a later Second Circuit case, *Whidbee v. Garzarelli Food Specialties, Inc.*, the plaintiff alleged a racially hostile work environment under 42 U.S.C. § 1981, rather than under Title VII.[196] The district court found that alleged incidents of harassment that did not occur in the plaintiff's presence were not probative on the issue of whether the plaintiff experienced a hostile work environment.[197] The court cited *Schwapp v. Town of Avon* for the proposition that second-hand evidence is less probative than comments and events that the plaintiff perceived first-hand.[198] On appeal, the Second Circuit wrote that the district court missed the main point of *Schwapp*—that a determination on probative value should not be made when ruling on a motion for summary judgment.[199] Of more interest, the Second Circuit stated, "[I]t is possible that the statements reported to the plaintiff and not supported by affidavits are inadmissible hearsay."[200] While not conclusive, this statement lends support to defendants' hearsay arguments.

In still another Second Circuit case, a female firefighter, also a commanding officer, experienced first-hand animosity from a male firefighter about her inability to perform her job and inappropriate references regarding how she received her officer position.[201] She complained that she had been told by other firefighters that the co-worker made disparaging and undermining remarks outside her presence as well.[202] The court noted that the plaintiff's testimony that other firefighters told her that the alleged harasser made comments about her probably would not be admissible at trial because it would be hearsay if offered to prove that the alleged harasser actually made the statements.[203]

Federal Rule of Evidence 802 clarifies that hearsay is not admissible unless allowed by an exception found elsewhere in the Rules.[204] Rule 801 excludes certain statements from the definition of hearsay itself.[205]

193. Olle v. Columbia Univ., 136 F. App'x 383 (2d Cir. 2005).
194. *Id.* at 384.
195. *Id.*
196. 42 U.S.C. § 1981 (2000); Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 (2d Cir. 2000).
197. *Whidbee*, 223 F.3d at 71.
198. *Id.*
199. *Id.*
200. *Id.*
201. Howley v. Town of Stratford, 217 F.3d 141, 154-55 (2d Cir. 2000).
202. *Id.*
203. *Id.* at 155.
204. FED. R. EVID. 802.
205. *See* FED. R. EVID. 801.

Because the plaintiff's statements in *Howley* that a firefighter told her what the alleged harasser said do not fit an exemption or exception to the hearsay rule, they are inadmissible hearsay.[206] However, the middleman (the firefighter who actually heard the statements while they were being made) could testify notwithstanding the general prohibition on hearsay because the statements would fall into an exemption to the hearsay definition—admission of a party opponent—presumably only so long as the alleged harasser was joined as a defendant.[207] Even then, the defendant-employer would have an argument that the statements should not be admitted to show employer liability, but should only be admitted against the defendant-harasser.

If the middleman refuses to testify, then the plaintiff is left with nothing but rumors that discriminatory comments were made about her, and with no means to substantiate the rumors in a way to overcome the hearsay rule. Seemingly odd is that the missing hearsay witness could in effect make or break the plaintiff's hostile work environment claim.

More common than the *Howley* situation are cases where the plaintiff seeks to introduce second-hand statements about *other* employees or about a protected class generally—statements that do not single out and are not directed at the plaintiff. The problem for the plaintiff becomes how to get around the two links (at a minimum) in the chain of information leading to the plaintiff. But, why should the plaintiff have an opportunity to recover based on hearing about events experienced by co-workers at all?

Let us call the harasser "Person A," his target "Person B," and the plaintiff "Person C." Person A makes a crude comment to Person B. Person B, understandably offended, turns to Person C for empathy and sympathy. One would imagine the conversation to frequently be the basic story: "Woe is me." The problem is that Person C is the one who sues. But the story told to the jury is more along the lines of "Woe is Person B." The attenuated logic in this situation is unique to hostile work environment claims. The same chain of inferences is not permitted in personal injury cases, where perhaps the driver of a car in an accident had been in a previous accident. The newly injured party cannot call the previously injured party to testify, and then recover based on the defendant's bad driving in both accidents. The plaintiff ought to only be able to recover for damage to him or herself, whether the damage is caused by an abusive work environment or by a car accident.

B. Hearsay Offered for Its Effect on the Listener

The Advisory Committee's note to Rule 801 adheres to the common law principle that utterances and conduct offered to prove their effect on the listener are not hearsay.[208] In the following cases second-hand state-

206. *See Howley*, 217 F.3d at 154-55.
207. *See* Fed. R. Evid. 801(d)(2).
208. *See* Fed. R. Evid. 801 advisory committee's note.

ments were admitted over hearsay objections to show their effect on the listeners.

1. *Moore v. Metropolitan Water Reclamation District of Greater Chicago*

In *Moore v. Metropolitan Water Reclamation District of Greater Chicago*, the plaintiff alleged sexual harassment, a sexually hostile work environment, and also retaliation.[209] The magistrate judge granted a motion *in limine* to exclude testimony by the plaintiff's co-worker regarding incidents that did not involve the plaintiff,[210] and also "any testimony based on rumors, gossip, and information [witness] heard after she left the . . . plant."[211] But the magistrate judge failed to specify the specific grounds for excluding the testimony after discussing the defendant's arguments that the testimony was irrelevant, unduly prejudicial, lacked foundation, and based on hearsay.[212] The motion was denied as to testimony by the witness regarding incidents that involved the plaintiff.[213]

The magistrate judge also denied the defendant's motion *in limine* to exclude evidence of a conversation allegedly overheard by one of the plaintiff's co-workers.[214] The conversation, between three male co-workers, allegedly involved a discussion regarding who would be the first person to receive oral sex from the plaintiff.[215] The witness who overheard the conversation relayed its substance to the plaintiff.[216] The magistrate judge found that the information was relevant because the plaintiff knew about it, and found that it was not hearsay because it was not offered to prove the truth of the matter asserted, but for its effect on the listener.[217]

This hearsay ruling was especially detrimental to the defendant's case because, by allowing the witness to testify that he told the plaintiff about the conversation, and what the conversation was about, evidence about the conversation was admitted without first being proven true.[218] Surely one would anticipate, even expect, that a co-worker reporting gossip to its target may use words quite different from those actually used and may even embellish the substance of the conversation. More importantly, should the plaintiff be allowed to recover on hearsay not offered to prove the truth of the matter asserted, but for its effect on her as a listener? This implies that even *untrue* rumors can create an actionable hostile

209. Moore v. Metro. Water Reclamation Dist. of Greater Chi., No. 02 C 4040, 2004 WL 2958769, at *1 (N.D. Ill. Nov. 22, 2004).

210. *Id.* at *8. The court excluded statements by the witness about sexually harassing incidents that were unrelated to the plaintiff, (such as, "I have been in a situation where my ass was grabbed."). *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at *9.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

work environment claim. Some courts have apparently lost sight of the Supreme Court's statement that "conduct must be extreme to amount to a change in the terms and conditions of employment."[219]

2. *Velez v. QVC, Inc.*

In *Velez v. QVC, Inc.*, the district court found that a group of several plaintiffs who passively heard about discriminatory events involving other employees could show that their work environment was affected by the comments.[220] The defendant attempted to exclude the plaintiffs' statements that co-workers told them about other incidents of discrimination as inadmissible hearsay.[221] Like the magistrate judge in *Moore*, the *Velez* court found that the statements were offered to show their effect on the listeners, and therefore were not hearsay.[222]

The *Velez* court's reasoning allows the potential for rumors to cause a hostile work environment without evidence that the underlying rumor-sparking incidents actually happened. The context in *Velez* involved plaintiffs repeating what co-workers had told them.[223] The court did not seem concerned with ensuring the accuracy of the stories told to the plaintiffs, but only the effect of the stories on the plaintiffs.[224] If the stories are untrue, then objectively there can be no effect on the plaintiff's work environment.

The *Velez* court structured a two-part requirement to admit evidence of events plaintiffs learn of second-hand.[225] First, the plaintiff "must show subjective awareness of the discrimination directed at others. The court must be able to assess whether the discrimination claimed, in fact, detrimentally affected the plaintiff."[226] Second, the plaintiff must show a nexus between the discrimination directed towards the third party and the discrimination aimed at the plaintiff.[227] Expanding on the second requirement, the court stated, "The relevant inquiry is [w]hether . . . in light of . . . incidents [directed at other employees], the incidents [that the plaintiff] experienced more directly would reasonably be perceived and [were] perceived, as hostile or abusive . . . ."[228] In other words, whether the events the plaintiff learned of second-hand caused incidents the plain-

219. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

220. Velez v. QVC, Inc., 227 F. Supp. 2d 384, 411-12 (E.D. Pa. 2002).

221. *Id.* at 411.

222. *Id.* at 411 n.23 (citing FED. R. EVID. 801(c); West v. Phila. Elec. Co. 45 F.3d 744, 751 (3d Cir. 1995)). *West* allowed evidence of an incident of racial discrimination that the plaintiff learned about while employed by the defendant to show the effect of the incident on the plaintiff as well as the employer's knowledge that the work environment was racially hostile. *West*, 45 F.3d at 757.

223. *Velez*, 227 F. Supp. 2d at 411 n.23.

224. *See id.*

225. *See id.* at 410.

226. *Id.*

227. *Id.* at 411.

228. *Id.* (quoting Schwapp v. Town of Avon, 118 F.3d 106, 112 (2d Cir. 1997)) (alterations in original) (internal quotation omitted).

tiff him or herself experienced to be perceived as more hostile or abusive than if the plaintiff had been unaware of the third-party incidents.

After quoting the distilled nexus requirement from *Schwapp*, the court elaborated on *Schwapp*'s emphasis that "summary judgment may be inappropriate, because this inquiry involves factual issues best resolved by the trier of fact."[229] This elaboration on the requirement provides the most potent description of the extent to which the court is willing to allow second-hand evidence:

> Under this approach the court retains the flexibility to evaluate complex employment environments, like QVC, where ostensibly "different" types of discrimination may actually be inextricably linked. For example, an employer who discriminates against some on the basis of national origin, others on the basis of race, and a third group on the basis of gender, may really be discriminating against anyone who is not a white male. *See Rauh v. Coyne,* 744 F. Supp. 1181, 1183 (D.D.C. 1990). Therefore, under certain circumstances, considering the claims of all three groups as separate and distinct from each other would fail to yield a comprehensive picture of a common environment that might be hostile to members of different protected classes for equally impermissible reasons.[230]

In applying the nexus requirement to the particular facts, the court continued:

> Whether an inference of discrimination is appropriate under the circumstances may depend on factors such as: (1) whether the discriminatory acts directed at others were undertaken by the same decisionmaker who is alleged to have discriminated against plaintiff, (2) whether the acts directed at plaintiff and those directed at other employees occurred in close temporal proximity, and (3) whether the type of discrimination complained of by plaintiff and that directed at other employees is similar in nature or kind. In other words, could a reasonable jury conclude that under the circumstances the discrimination of which the plaintiff complains is sufficiently similar in time, nature, and kind to that suffered by other employees to disclose the perpetrator's signature.[231]

The problem with the court's framework is that the time, nature, and kind of the discrimination directed towards other employees are only factors to be considered, not strict requirements. Only if other discriminatory incidents are *required* to be similar to the plaintiff's experience in time, nature, and type will the incidents truly bear relation to one another.

The court's requirement that other discriminatory acts be similar in nature and kind to those experienced by the plaintiff conflicts with the court's allowance of evidence that employees not in the plaintiff's protected class were discriminated against.[232] While the "nature" of the dis-

229. *Id.* at 411.
230. *Id.*
231. *Id.* at 412.
232. *See id.* at 411.

crimination could be the same, for example derogatory comments or insulting graffiti, the "kind" of discrimination seems to point to the class discriminated against, such as women or African-Americans.[233] In *Velez*, the incidents experienced first-hand and incidents directed toward other employees tended to center around minorities being treated less favorably than Caucasian employees, and a collective belief of several employees, including the plaintiffs, that the defendant had lightened their skin tone in advertisements.[234] Perhaps the similarity and group presentation of the *Velez* plaintiffs' claims caused the court to overlook the breadth of its language in setting out factors to be considered in the nexus determination.

VII. CONCLUSION

BIFURCATION AND MORE UNIFORM STANDARDS ARE THE ANSWERS.

As the discussion of the case law indicates, many courts admit second-hand evidence over defense objections. Some decisions allow the evidence upon finding that the unfair prejudice to the defendant does not substantially outweigh the probative value of the evidence on the hostile work environment issue.[235] Other courts reject relevance arguments because the evidence is probative to peripheral issues in the case that go to employer liability or the amount of damages that can be awarded. While second-hand evidence may be relevant to these determinations, particularly when the plaintiff alleges a hostile work environment based on harassment by a co-worker, these elements need not be proved initially. The unfair prejudice of the evidence would be greatly reduced by first admitting only evidence that directly relates to the plaintiff and allowing the trier of fact to determine whether or not the plaintiff suffered an objectively and subjectively hostile work environment. If not, the trial should end. If so, then the trial should proceed to the issues of liability and damages. Bifurcating trials in this manner would increase efficiency, reduce the cost to the parties and the courts, and decrease the effect of unfairly prejudicial second-hand evidence on the defendant.

In arguing for bifurcation, or for a Rule 403 objection, defendants must argue that second-hand evidence confuses the jury by requiring them to evaluate incidents that do not involve the plaintiff for truthfulness, possible effect on the plaintiff, and probable effect on a reasonable person in the plaintiff's position. Second-hand evidence requires that mini-trials be held within the plaintiff's trial. If the plaintiff succeeds in convincing the jury that the events involving third parties created a hostile work environment, the third parties who were the true victims of those incidents are not compensated. Instead, the plaintiff receives a windfall. And finally,

233. *See id.* at 411-12.
234. *Id.* at 412-13.
235. *See* FED. R. EVID. 403. *See, e.g.*, Mason v. S. Ill. Univ. at Carbondale, 233 F.3d 1036, 1045 (7th Cir. 2000).

even if a limiting instruction is issued, the unfair prejudice of the evidence cannot be sufficiently diluted to prevent the jury from using it to hold the defendant liable—even if it is held liable to the wrong person.

Too few defendants bring up lack of personal knowledge when faced with second-hand evidence. The personal knowledge objection should be made before any hearsay objection so that the substance of the testimony is attacked prior to the form. When the witness only heard about a discriminatory or harassing incident, then the witness is unqualified to testify about the incident because he did not perceive it. Only if the personal knowledge objection is overruled should the defendant argue hearsay. If the plaintiff responds that the statements are offered for their effect on the plaintiff-listener, then the defendant must vigorously oppose the statements on the grounds that allowing rumors to create a hostile work environment without proof that the rumored events are true would be illogical.

The solution to the disparity among the circuits is to have a more concrete standard for the admission of second-hand evidence. In conjunction with the practice of bifurcating trials, during the first phase a blanket rule should be instituted that only incidents the plaintiff perceived first-hand may be presented. This would include words the plaintiff heard, inappropriate actions the plaintiff saw, and also the plaintiff's perception of more concrete evidence such as graffiti and inappropriate cartoons that are in view in the workplace. Only after the initial determination is made on the evidence directly involving the plaintiff should second-hand evidence be argued for its value in helping the jury determine the peripheral issues.

Employers must be aggressive when responding to hostile work environment claims. Bifurcation of the issues should be pursued early in the case so that discovery can proceed accordingly. Until the legislature or the Supreme Court adopts a uniform rule for its admission, second-hand evidence must be vigorously attacked for both its substance and technical form.

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