



## Can you be sexually harassed behind your back?

It might be obvious, but it seems a bit difficult to win on a claim for [sexual harassment](#) where all of the harassment occurs behind your back (and by "behind your back", I mean situations where the harassing behavior occurs when the complaining employee is not physically present to experience or hear what is happening).

The [Fourth Circuit Court of Appeals](#) addressed this issue in [Pueschel v. Peters](#), 577 F.3d 558 (4th Cir. 2009), in a unanimous decision written by Judge [Roger Gregory](#) in which Judges [M. Blane Michael](#) and [Robert Bruce King](#) joined.



The [Fourth Circuit](#) didn't have much difficulty reaching the conclusion that, for any claim alleging a hostile work environment (including sexual harassment), you can't succeed if *all* of the misconduct about which you complain occurred *at work* when you *were not at work*.

### Twenty Eight Years of Litigation!!!

This case grows out of an incredibly long history of litigation (including several different lawsuits and appeals (some of which were successful)) filed by Ms. Pueschel against her employer, the Federal Aviation Administration ("FAA"). The litigation started in 1981 and ended with this Fourth Circuit decision in 2009 (I am not kidding, and I am not sure this decision marks the end of *all* of her litigation).

I'll fast-forward past the first decade or so of litigation. In 1994, Ms. Pueschel went on leave without pay ("LWOP") from her job at the FAA after she claimed to suffer a "stress-related episode at work". She claimed that this required her to leave work permanently. She remained on LWOP until she was terminated in 1999 because of her inability to work, and she never returned to work at the FAA.

Ms. Pueschel filed a number of discrimination administrative charges between 1997 and 1999, and the key allegation that I will focus on in this article was that she was subjected to a hostile work environment in 1997 and 1998 (keeping in mind that she was not at work after 1994). Ms. Pueschel claimed that the hostile work environment was based on her gender and disability, and based on the fact that she had filed charges of discrimination against the FAA. These charges led to a lawsuit in which the trial judge

### [Links](#)

[Drew Capuder's Employment Law Blog](#)  
[Capuder Fantasia PLLC](#)  
[Drew M. Capuder](#)  
[Gina Fantasia](#)  
[Contact Information](#)  
[Directions](#)

### [Blog Article Categories](#)

[Age discrimination](#)  
[Arbitration](#)  
[Attorney's fees](#)  
[Back and front pay issues](#)  
[Blog technical stuff](#)  
[Disability discrimination](#)  
[Disparate impact](#)  
[Drew Capuder](#)  
[Emotional distress damages](#)  
[Employment policies](#)  
[Equal pay](#)  
[Evidence issues](#)  
[Family and Medical Leave Act \(FMLA\)](#)  
[Federal Cases \(but not US Supreme Court\)](#)  
[Federal Courts](#)  
[Fourth Circuit](#)  
[Harless wrongful discharge](#)  
[Hostile work environment](#)  
[Intentional infliction of emotional distress](#)  
[Jury verdicts](#)

# Can you be sexually harassed behind your back?

granted the FAA's motion for [summary judgment](#) on Ms. Pueschel's hostile work environment claim under [Title VII of the Civil Rights of 1964](#).

So the Fourth Circuit had to decide whether Ms. Pueschel had a viable hostile work environment claim based on her gender and her disability and her prior charges of discrimination.

I described Ms. Pueschel's claim at the beginning of this article as "[sexual harassment](#)" for the sake of convenience to describe the issue, but her [hostile work environment](#) claim was more complicated than that. She alleged that co-workers were making ugly, profane, and degrading comments about her, and the comments were not "sexual" in a conventional sense. The insults were that she was a "fucking bitch", "nothing but a bitch", a "useless bitch", and other similar statements.

## Fourth Circuit's Analysis

The first important thing about the Fourth Circuit's analysis is that it assumed that a hostile work environment claim can be predicated on any protected characteristic under the employment discrimination laws. It described the basic requirements (*prima facie* case) of a hostile work environment claim, and said the plaintiff must demonstrate that the alleged conduct:

- was unwelcome;
- resulted because of her *gender, disability, or other protected activity*;
- was "sufficiently severe or pervasive" to alter the conditions of her employment; and
- was imputable to her employer.

(my emphasis is added). Some courts have questioned whether hostile work environment claims can be based on any characteristics other than gender and race. But the Fourth Circuit's language in element 2 above ("based on gender, disability, or other protected activity") clearly recognizes that a hostile work environment may be motivated by most or all of the protected characteristics under the employment discrimination laws. That means that hostile work environment claims in principle may be based on gender (conventional sexual harassment), race (racist comments), disability, age, national origin, and religion.

The second important thing about the Fourth Circuit's analysis is that it concluded--perhaps stating the obvious--that Ms. Pueschel could not prevail on her hostile work environment claim because she left her FAA employment permanently starting in 1994, and all of the abusive conduct occurred *at work* in 1997 and 1998 *after her employment ended*. In other words, she was not present at work, so the insulting statements *at work* could not create a hostile or abusive *work* environment for her.

## Lingering Issues

The holding in this case does not mean that the plaintiff-employee must always be physically present while offensive workplace behavior is occurring. Abusive conduct may be relevant and admissible in various settings where the plaintiff is not physically present, but these circumstances will generally require that the plaintiff still be employed at the

[Labor unions](#)  
[Limitations periods](#)  
[National origin discrimination](#)  
[Pending legislation](#)  
[Pleading requirements](#)  
[Prompt remedial action](#)  
[Punitive damages](#)  
[Religious discrimination](#)  
[Result for employee](#)  
[Result for employer](#)  
[Retaliation claims](#)  
[Sex discrimination](#)  
[Sexual harassment](#)  
[Sexual orientation](#)  
[Summary judgment](#)  
[Title VII of the Civil Rights Act of 1964](#)  
[US Legislation](#)  
[US Supreme Court](#)  
[Vacancies](#)  
[WV Human Rights Act](#)  
[WV Legislation](#)  
[WV Supreme Court](#)

## Can you be sexually harassed behind your back?

time of the events. Here are the scenarios where the conduct may still support a hostile work environment claim (and I'll use sexual harassment conduct as the example):

- Boss makes sexually offensive statements about female employee (plaintiff) while plaintiff is not present, but another employee later tells the plaintiff about the statements. Courts don't have a lot of trouble concluding that this sort of after-the-fact knowledge about the harassing statements contributes to a hostile work environment.
- Boss makes sexually offensive statements about plaintiff, no one ever tells plaintiff, and boss denies ever making *other* sexually offensive remarks *directly to the plaintiff*. Under those circumstances, even though the boss's statements did not contribute to a hostile work environment for the plaintiff, the statements outside of the presence of the plaintiff are likely to be admissible on the disputed issue of whether the boss ever made sexually offensive statements directly to the plaintiff.
- Boss sexually harasses *other women* (other than the plaintiff) outside the presence of the plaintiff. That harassment *may* be admissible in plaintiff's case under 2 circumstances: (a) plaintiff claims to have been told about that harassment while she was still working for employer, and she credibly claims her after-the-fact knowledge contributed to the hostile work environment, and (b) even if plaintiff did not learn about it after the fact, the harassment of *other women may* be admissible on the disputed issue of whether the boss sexually harassed the plaintiff.

Written by [Drew M. Capuder](#) © ([contact information](#)); Voice: 304-333-5261; July 20, 2010

This is a PDF copy of my article originally published on my blog at:

<http://capuderfantasia.com/blog/2010/06/can-you-be-sexually-harassed-behind-your-back/>

*This article is copyright protected (©) in favor of [Drew Capuder](#) and [Capuder Fantasia PLLC](#). You are authorized to copy, duplicate, distribute, email, download, and print this article as long as you do not alter this article, and as long as you do not obscure the portions of this article which indicate that it was written by [Drew Capuder](#) for [Drew Capuder's Employment Law Blog](#).*