

## Was the boss “merely crude”, or was he sexually harassing her?

[Sexual harassment](#) claims frequently require judges and juries to distinguish between "merely crude" behavior, which doesn't violate the employee's rights, and "[sexual harassment](#)", which does. The [Fourth Circuit Court of Appeals](#) addressed that issue in *EEOC v. Fairbrook Medical Clinic, PA*, -- F.3d -- (4th Cir. 2010) ([opinion at Fourth Circuit's site](#)), and didn't have a lot of trouble concluding that the conduct in issue could reasonably be viewed by a jury as [sexual harassment, ruling in favor of the employee](#). One of the key issues was whether the conduct was "severe or pervasive" enough to constitute a "[hostile work environment](#)". The unanimous opinion was written Judge J. [Harvie Wilkinson III](#), joined by Judges [Andre M. Davis](#) and [C. Arlen Beam](#) (from the Eighth Circuit).

### Doctor on Doctor Harassment at Fairbrook Medical Clinic

Dr. John Kessel was the owner of Fairbrook Medical Clinic in South Carolina, and was accused by a former female doctor at the clinic, Dr. Deborah Waechter, of sexually harassing her. Dr. Kessel was Dr. Waechter's supervisor. Dr. Waechter worked for him for 3 years and quit, allegedly over a broad range of sexually explicit statements made during most of those 3 years (I'll discuss the specifics below).



### Dr. Waechter's Lawsuit

Dr. Waechter then filed a charge of discrimination with the [EEOC](#), alleging that Dr. Kessel's behavior created a "hostile work environment", and the EEOC then filed suit on behalf of Dr. Waechter against Dr. Kessel's clinic under Title VII of the [Civil Rights Act of 1964](#).

After discovery was conducted. Fairbrook Medical Clinic filed a motion for [summary judgment](#), and the federal trial judge granted it. The trial judge reasoned that the offensive conduct was "not particularly frequent," mostly involved "the type of crude jokes that do not run afoul of [Title VII](#)," did not cause Dr. Waechter to miss work or feel "severe psychological stress," and did not include inappropriate touching or physical threats.

The [Fourth Circuit](#) reversed and sent the case back for trial, concluding that the [EEOC](#) on behalf of Dr. Waechter had presented evidence from which a jury could have reasonably concluded that Dr. Kessel's behavior was severe or pervasive enough to create a [hostile work environment](#).

### Issues on Appeal

The central issues for the [Fourth Circuit](#) to address on appeal were whether Dr. Kessel's conduct (a) was based on Dr. Waechter's gender and (b) was "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work

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environment."

Fairbrook Medical Clinic made two familiar arguments that arise frequently in [sexual harassment](#) claims: (a) Kr. Kessel was just a "rude & crude" kind of guy who wasn't really making expressly sexual comments aimed at Dr. Waechter's gender, and (b) even if the behavior was expressly sexual, Dr. Kessel's comments weren't frequent and severe enough to create a [hostile work environment](#).

## Dr. Kessel's Comments Were "Based On" Dr. Waechter's Gender

Since [sexual harassment](#) law requires that the behavior be based on the plaintiff's gender, sometimes these claims fail because the comments consist of profanity or crude behavior that doesn't really target someone's gender. For example, statements or jokes that include profanity are sometimes not viewed as [sexual harassment](#) by the courts, because they are not "sexual comments" targeting someone's gender.

But the [Fourth Circuit](#) "easily dismissed" Dr. Kessel's characterization of his behavior. The [Fourth Circuit](#) made a number of observations about Dr. Kessel's conduct that helped define his behavior as "sexual" and targeted at Dr. Waechter's gender:

- Dr. Kessel used "sex-specific and derogatory terms" intended to "demean women";
- He used "cunt" and "slut" to refer to women at the clinic;
- He talked about "female body parts" in graphic terms;
- Several times he made "explicit or implicit proposals of sexual activity";
- He asked Dr. Waechter if she "had a better libido while she was pumping her breasts" (she had had her second child and was breast feeding);
- He said he thought she was probably a "wild thing" in bed; and
- He asked to "view and pump her breasts".

So the [Fourth Circuit](#) concluded that a reasonable jury could have concluded that Dr. Kessel's comments were "based on sex" and that their intimate nature was intended make women in his employ feel "acutely embarrassed and uncomfortable".

## Dr. Kessel's Comments Were "Severe or Pervasive"

So the next issue was whether Dr. Kessel's comments were "severe or pervasive" enough to create a hostile work environment. That is an important requirement, and many sexual harassment claims fail on it. For example, even if the defendant's conduct was clearly "based on sex", it may not be actionable if it fairly infrequent, or if it is not terribly severe.

The Courts have said that "not all workplace conduct that may be described as "harassment" is severe enough to constitute a [hostile work environment](#). The conduct must be both (1) "objectively hostile or abusive", and (2) the victim must "subjectively perceive it as such". Because Fairbrook Medical Clinic did not dispute the fact that Dr. Waechter subjectively perceived the conduct as abusive (the second requirement), the Fourth Circuit focused on the first requirement: where the conduct was "objectively

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hostile or abusive”.

On this “objective prong” (“objectively hostile or abusive”), the Fourth Circuit noted there is no “mathematically precise test” for figuring out whether the conduct was “objectively hostile or abusive”, and you look at the harassment from the “perspective of a reasonable person in the plaintiff’s position, considering all the circumstances”.

The “circumstances” include the “frequency of the discriminatory conduct”; its severity; whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” The Court should consider the “social context in which particular behavior occurs and is experienced by its target”. The courts should also keep in mind that [Title VII](#) does not impose a “general civility code”, and “merely crude behavior” does not constitute [sexual harassment](#).

On that line between “[sexual harassment](#)” and “merely crude behavior,” the [Fourth Circuit](#) said there is a difference between “generalized” statements that “pollute the work environment” and “personal gender-based remarks” that “single out individuals for ridicule”. Activities like “simple teasing, offhand comments, and off-color jokes, while often regrettable, do not cross the line into actionable misconduct”.

Fairbrook Medical Clinic argued that Dr. Kessel’s behavior was not “severe”, that Kessel was merely “crude”, other employees and patients told off-color jokes, employees in a medical setting deal with “human bodies” every day, and Dr. Waechter sometimes engaged in off-color comments.

The [Fourth Circuit](#) concluded that Dr. Kessel’s behavior was “objectively hostile or abusive”. Dr. Kessel’s remarks were “highly personal”, such as a broad range of comments about the size of Dr. Waechter’s breasts, wanting to see and pump her breasts, asking about her sex drive, speculating that she was a “wild thing” in bed, and comments about his genitals and his wife’s genitals.

The Fourth Circuit rejected the assertion that the context of a medical clinic somehow negates the “severity” of Dr. Kessel’s behavior.

The [Fourth Circuit](#) also rejected the argument that Dr. Kessel’s conduct was “not particularly frequent”. Dr. Kessel’s conduct was “at least a regular occurrence”; he told “foul jokes” 2 or 3 times a month; Dr. Kessel displayed an “image of his penis” 25-30 times with 5 to 10 descriptions of his penis as “Mr. Happy”; and he made comments about Dr. Waechter’s breasts at least 1-2 times a week from December 2005 to January 2006.

Under those circumstances, a “reasonable person” in Dr. Waechter’s position” could have concluded that the “harassment had become a persistent feature of her work environment.”

The [Fourth Circuit](#) also rejected the argument that the harassment did not cause Dr. Waechter to miss work and did not adversely affect her performance (Dr. Kessel acknowledged that she was a very good doctor).

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## Conclusion

The Fourth Circuit's decision is a good resource for looking at that imprecise line between "merely crude behavior" and actionable [sexual harassment](#).

The federal trial judge concluded that there was simply no way a reasonable jury could have concluded this was unlawful [sexual harassment](#), so he dismissed the case. The [Fourth Circuit](#) reversed, and the case will go back to the trial judge to head towards trial.

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