10-C | THE ELEMENTS OF A HOSTILE ENVIRONMENT CLAIM

The elements of an environmental claim are:

1. Membership in a protected group: established by a statement of gender. The complaining employee may be of the same gender as the alleged harasser(s);

2. Sex based: the conduct need not be sexual in nature, but must be "because of sex;"

3. Unwelcome: normally requires proof that the employee complained of the conduct or that the employer knew of the offensive conduct; and

4. Severe or pervasive: the conduct must, both objectively and subjectively, alter the conditions of employment and create an abusing working environment:

> The Supreme Court in *Faragher* and *Ellerth* set forth a two-pronged affirmative defense that, if satisfied, in some instances permits an employer to avoid liability even if an employee establishes a prima facie case of environmental harassment. The affirmative defense does not apply where there was a tangible employment action.

Prong 1 The employer exercised reasonable care to prevent and correct promptly any harassment:

Generally satisfaction of this prong requires that the employer have and disseminate a formal policy prohibiting harassment that includes a complaint procedure that allows an employee to bypass the offending supervisor. Courts will consider the policy, the employee's complaint, if any, and the employer's response. Analysis of this prong includes the promptness and effectiveness of the employer's response (where a complaint was made) and the employer's compliance with its policy prohibiting harassment.

Prong 2 The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise:

Generally, if an employee fails to come forward with a complaint, the courts typically find the employee unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer. Fear of retaliation is not an excuse.

(American Bar Association // Section of Labor and Employment Law
Equal Employment Opportunity Committee // EEO Law Basics // Spring 2006)