

# ANNOYING AND IRKSOME BEHAVIOR DOES NOT CONSTITUTE SEXUAL HARASSMENT

by Carolyn Buccerone

The New Jersey Law Against Discrimination<sup>1</sup> will not replace potential plaintiffs' responsibility to curb unwanted annoying and irksome behavior. On Aug. 4, 2008, the New Jersey Supreme Court addressed this responsibility with its decision in *Godfrey v. Princeton Theological Seminary*.<sup>2</sup> In its decision, the Court held that conduct that is merely annoying and irksome will not constitute a sufficient basis for a hostile work environment claim based on sexual harassment under the LAD.

In *Godfrey*, students of the Princeton Theological Seminary could not maintain a claim against the seminary under the LAD for the conduct of a seminary tenant who asked the students out on dates and sent the students presents, as such actions were not severe and pervasive enough to create a discriminatory hostile environment under the statute.

William Miller, an alumnus of and contributor to the seminary, resided in on-campus housing close to the main campus. Miller came in contact with plaintiffs Beth Godfrey and Jennifer Bayne Kile on numerous occasions over the course of their time at the seminary. Miller would see Godfrey at seminary-run events where he would approach her and ask her to attend concerts, go to lunch, or attend church. On one occasion, Miller sent a package to Godfrey's dorm room with a lengthy card enclosed detailing information about his personal life and a box of note cards. Miller also left multiple messages on Godfrey's answering machine trying to convince her to go on a date with him.

Miller had similar but less frequent interactions with Kile. He attempted to contact Kile while she was studying abroad, and also sent her a package containing a greeting card and gifts, including a devotional book.

Both Kile and Godfrey reported their concerns to the seminary administration. During Godfrey's conversation

with Kathy Cook Davis, student relations director, Godfrey learned of past complaints about Miller. The seminary offered limited response to their concerns. Based on this response, Kile and Godfrey decided to seek legal counsel and file a complaint for sexual harassment against the seminary.

At trial, the seminary's motion for involuntary dismissal was granted. A majority of the Appellate Division affirmed the trial court's ruling, finding that no reasonable fact finder could conclude that the plaintiffs had been subjected to severe or pervasive conduct. A unanimous Supreme Court affirmed the Appellate Division, stating that "[a]lthough socially inept, and, no doubt, annoying, Miller's conduct did not approach sexual harassment. Persons who are socially tone deaf are not, by that characteristic, necessarily the equivalent of sexual harassers."

In assessing the plaintiffs' claims, the Court relied on the standard set forth in *Lehmann v. Toys 'R' Us*.<sup>3</sup> *Lehmann* requires a plaintiff asserting a hostile work environment claim premised on sexual harassment to show that the complained of conduct "was...severe or pervasive enough to make a...reasonable woman believe that...the conditions of employment are altered and the working environment is hostile or abusive."<sup>4</sup>

The Court also noted that whether the conduct is "severe or pervasive"

involves consideration of the totality of circumstances surrounding the complaint.<sup>5</sup> Such consideration includes examination of: "the frequency of all 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."<sup>6</sup>

Finally, the Court noted that in determining whether conduct was severe or pervasive the "cumulative effect of the various incidents" must be considered.<sup>7</sup> The Court also stated that "whether harassing conduct makes a work environment hostile is assessed by use of a reasonable-person standard..."<sup>8</sup>

Applying the plaintiffs' claims to this standard, the Court found that it "had no doubt that the trial court and the appellate majority correctly regarded the totality of the evidence as falling short of severe or pervasive conduct that a reasonable woman would determine to constitute sexual harassment." The Court noted that the "plaintiffs' subjective responses to the allegedly harassing conduct do not control, or otherwise affect, the determination of whether the conduct is severe or pervasive, which requires application for the reasonable-woman standard." The Court also found that "[a]lthough socially inept and, no doubt annoying, Miller's conduct did not approach sexual harassment."

It went on to state that:

It is important...that neither of these women used her own authority to tell Miller to 'go away.' They cannot rely on the prospect of a money damages award from the Seminary to replace their own obligation to simply tell Miller that they had no interest in him romantically or even as a casual acquaintance. To allow the LAD to replace such basic human interaction trivializes the purpose for which the LAD was established.

In addition to finding that Miller's conduct itself was insufficient to form the basis of a claim, the Court found that the plaintiffs' "reliance on [the school administrator's] experiences with Miller twenty years previous [was] misplaced....Plaintiffs can garner no support from their attempt to rely on the

experiences of unnamed other females who did not come forward as part of Plaintiffs' case."

Therefore, the Court not only focused on the fact that Miller's conduct on its own was insufficient to meet the severe and pervasive standard, it also found that mere mention of similar prior conduct did not elevate Miller's action to meet this standard.

The Court's decision highlights potential plaintiffs' responsibility to personally curb unwanted contact similar to that engaged in by Miller, and to warn potential plaintiffs that it will not permit the LAD to replace this responsibility. It is unclear whether the Court would have found Miller's actions met the severe and pervasive standard if the plaintiffs had been more forceful with their rejection of Miller, and Miller had continued in his pursuits. Whether the Court's decision will actually limit the types of claims filed in this manner remains to be seen. ■

#### Endnotes

1. N.J.S.A. 10:5-1 to -49.
2. *Godfrey v. Princeton Theological Seminary* (A-64-07).
3. *Lehmann v. Toys 'R' Us*, 132 N.J. 587 (1993).
4. *Lehmann, supra* 132 N.J. at 603-04 (emphasis omitted).
5. *Taylor v. Metzger*, 152 N.J. 490, 506 (1998).
6. *Green v. Jersey City Bd. of Educ.*, 177 N.J. 434, 447 (2003).
7. *Lehmann, supra*, 132 N.J. at 607.
8. *Id.* at 603-04, 612.

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