The January 1995 NRPA Law Review column addressed the issue of employer liability for sexual harassment in the workplace under federal civil rights law. This column reviewed the U.S. Supreme Court’s opinion in the case of *Harris v. Forklift Systems, Inc.*, 113 S.Ct. 1382, 122 L.Ed.2d 758 (1993). In this case, the Supreme Court of the United States qualified the legal definition of a "hostile or abusive work environment" for purposes of evaluating claims of sexual harassment. Specifically, the Court found that "[t]he effect on the employee's psychological well-being is, of course, relevant," but not conclusive "to determining whether the plaintiff actually found the environment abusive." However, as illustrated by the *Faragher* opinion described herein, the victim of alleged sexual harassment must still subjectively perceive the work environment to be abusive, whether or not such abuse effects the employees’ psychological well-being. In addition, this circuit court opinion held that an employer is not liable for a hostile environment if the employer neither knew, nor should have known, of the harassment.

ONCE NOTIFIED, REPRIMANDED AND DISCIPLINED?

In the case of *Faragher v. City of Boca Raton*, 94-4878 (U.S.C.A. 11 Cir. 1996), the United States Court of Appeals for the Eleventh Circuit addressed “several important questions regarding hostile work environment sexual harassment under Title VII.” In this particular instance, two former employees of the defendant city brought claims of sexual harassment alleging their particular workplace was abusive to female lifeguards. The facts of the case were as follows:

Beth Ann Faragher and Nancy Ewanchew worked as ocean lifeguards for defendant City of Boca Raton, Florida (the "City"), in the Parks and Recreation Department's Marine Safety Section. Only four to six of the forty to fifty lifeguards were female. The Marine Safety Headquarters was a small, one-story building with limited facilities, and all of the lifeguards shared the same locker room and shower. The tight quarters and high male-female ratio apparently led to a rambunctious atmosphere among the lifeguards.

During the relevant time frame, defendants Bill Terry and David Silverman acted as supervisors of the ocean lifeguards, Terry as Chief of the Marine Safety Section and Silverman as a Marine Safety lieutenant and then captain. Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and
place reports of disciplinary actions in personnel files; and to interview and select new lifeguards, subject to approval by higher management. Silverman had supervisory authority over the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines.

The Marine Safety Section was organized according to a clear chain of command. Lifeguards reported to Marine Safety lieutenants, and above them to captains; the captains reported directly to the Chief of the Marine Safety Section, who was directly supervised by the Recreation Superintendent; the Recreation Superintendent reported to the Director of Parks and Recreation, who reported to the City Manager. Lifeguards had almost no contact with City officials such as the Recreation Superintendent. Marine Safety Headquarters was in a remote location, far away from City Hall.

Marine Safety Chief Terry subjected both Faragher and Ewanchew to uninvited and offensive touching, and Ewanchew to offensive language as well. For example, Terry would put his arm around Faragher and rest his hand on her buttock. In a particularly egregious example of Terry's touching, Terry pressed himself against Ewanchew's buttocks and simulated sexual movement while the two were at the water fountain. Other female lifeguards similarly were subjected to Terry's uninvited and offensive touching and to his demeaning and offensive comments.

Lieutenant Silverman made offensive comments and gestures to both Faragher and Ewanchew... Silverman also made offensive remarks to other female lifeguards.

Neither Ewanchew nor Faragher complained to Parks and Recreation Department management about Terry's and Silverman's conduct while they were employed with the City or when they resigned. However, they both spoke about Terry's and Silverman's conduct with one of their supervisors, Marine Safety Lieutenant and Training Captain Robert Gordon. In fact, most of the female lifeguards complained to Gordon about Silverman's language and conduct. The lifeguards did not speak with Gordon on a subordinate to superior basis; they spoke with him because they held him in high repute. Gordon did not report the complaints to his supervisor, Terry, or to any other City official.

Ewanchew resigned from her position with the City in April of 1989, saying that she was leaving because she had found a better job. At some time after her resignation, Ewanchew visited Terry and requested re-employment on a part-time basis. She was not re-employed.
Faragher resigned in June of 1990 to attend law school. Her decision to leave was unrelated to the alleged sexual harassment. She did not discourage her sister from applying for a lifeguard position with the City.

In April of 1990, Ewanchew wrote a letter to the City's Director of Personnel complaining that she and other female lifeguards had been sexually harassed by Terry and Silverman while she was employed by the City. The City did not know of Terry's and Silverman's conduct until receiving Ewanchew's letter. The City then investigated Ewanchew's complaint, determining that Terry and Silverman had engaged in some inappropriate conduct. The City reprimanded and disciplined them both.

In 1992, Faragher and Ewanchew sued the City, Terry, and Silverman. Faragher sued the City for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.

The district court entered judgment for Faragher on her Title VII claim against the City finding “Terry's and Silverman's offensive conduct was sufficiently severe and pervasive to alter the conditions of Faragher's employment by creating a hostile work environment.” The district court, however, entered judgment for Terry and Silverman on Ewanchew's claim because she “failed to show actionable sexual harassment under Title VII.” Specifically, the court found that “Ewanchew's request for re-employment after resigning makes it illogical to find a perception of hostility in the work environment on her part.” The district court, therefore, held that Ewanchew had “not satisfied the requirement that an employee subjectively perceive the work environment to be abusive.”

The City and Ewanchew both appealed. The initial issue on appeal was whether “an employee must subjectively perceive the work environment to be abusive at the time that she is employed” to recover under Title VII for hostile environment sexual harassment.

PERCEIVE ABUSIVE WORK ENVIRONMENT?

As cited by the appeals court, “Title VII makes it unlawful to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex.” 42 U.S.C. sec. 2000e-2(a)(1). Further, the appeals court noted that “sexual harassment constitutes discrimination based on sex but is actionable under Title VII only if it alters the terms or conditions of the victim's employment.” Specifically, the U.S. Supreme Court in the case of Harris v. Forklift Systems, --- U.S. ----, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) had held as follows that “Title VII is not violated unless the victim of harassment subjectively perceives the work environment to be abusive, because otherwise the harassment has not altered the conditions of the victim's
employment.”

As to Faragher, the specific issue was, therefore, whether “Terry's and Silverman's conduct, as known to Faragher, was sufficiently severe and pervasive to create an abusive work environment, and that Faragher subjectively perceived her environment as abusive.” In determining whether a work environment is abusive or hostile, the appeals court found “the totality of the circumstances must be considered.” Relevant circumstances include:

- 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.

Applying these factors to the facts of the case, the appeals court found that “Faragher's work environment was abusive, both objectively and subjectively, based solely on the conduct of which Faragher was aware.”

Indeed, the record suggests that it might have been clear error for the district court, having credited Faragher's testimony, to find otherwise. Our review of the record reveals that Faragher was subjected to frequent and severe discriminatory conduct by Terry and Silverman. While some of the conduct might be characterized as "mere offensive utterance," other conduct was physically threatening (for example, being tackled by Silverman) and humiliating (for example, Silverman's comments about Faragher's body, the terms he used to describe women, and his pantomime of oral sex).

We need not catalogue all of the conduct to which Faragher was subjected, for we have no trouble concluding that Terry's and Silverman's conduct, as known to Faragher, was severe and pervasive enough to create an objectively abusive work environment.

The appeals court also found sufficient evidence to support the district court's finding that Faragher subjectively perceived her work environment to be abusive.

In contrast, the appeals court found Ewanchew “did not perceive her environment to be abusive” and, accordingly, “Terry's and Silverman's conduct did not alter the conditions of her employment.” As a result, the appeals court found “the district court did not err in requiring Ewanchew to prove that she perceived her work environment to be abusive during the term of her employment.”

The district court found that Ewanchew did not perceive her work environment to be abusive because her testimony to that effect was not credible and because she asked Terry to re-employ her at some time after she resigned... Furthermore, the court found
that Ewanchew "appears to have tolerated such conduct not because she felt she had to but because it wasn't that important to her."

In addition to these findings based on the credibility of Ewanchew's testimony, the court determined that it would be illogical to find a perception of hostility on Ewanchew's part in light of her request for a part-time job after she left the City's employ.

EMPLOYER'S KNOWLEDGE OF HARASSMENT?

On appeal, the City had contended that “the district court erred as a matter of law in holding the City directly liable for Terry's and Silverman's conduct under Title VII, without regard to whether the City had actual or constructive knowledge of the conduct.” Specifically, the City argued that it may be liable under Title VII for hostile environment sexual harassment “only if it knew or should have known of the sexual harassment and failed to take prompt remedial action.”

Accordingly, the appeals court found that the district court had correctly held that “an employer may be liable in a hostile environment case if either (1) the employer knew or should have known of the harassment and failed to take prompt remedial action, or (2) the harasser acted as the employer's agent.” However, under the circumstances of this case, the appeals court found that the district court had “erred in holding that Terry and Silverman acted as the City's agents in harassing Faragher.”

The district court found that Terry and Silverman were the City's agents based on their supervisory authority and the overall structure of the workplace... We agree that Terry and Silverman were the City's agents for some purposes. But the relevant inquiry is whether they were acting as the City's agents in subjecting Faragher to a hostile work environment... [In other words, the specific issue is] not whether the harasser was an agent generally but whether harasser acted as an agent when he harassed victim.

Faragher does not contend that Terry and Silverman were acting within the scope of their employment when they made offensive remarks and gestures and touched her.

As a result, the appeals court found “no record evidence suggesting that they were acting within the scope of their employment when they harassed Faragher.”

According to the appeals court, “an employer may be directly liable for the existence of a hostile work environment.” Specifically, the appeals court found the following factors were relevant in determining “whether a harasser is acting as the employer's agent in creating a hostile work environment”: 
the supervisor's direct authority over the plaintiff, the overall structure of the workplace, and the relative positions of the parties.

However, in this particular instance, the appeals court found the harassment “consisted of offensive comments, gestures, and touching” which were not within the scope of Terry’s and Silverman’s employment with the City:

An employer also may be directly liable if, the harasser acted as the employer's agent in creating the hostile work environment. Rarely will a supervisor or other employee act within the scope of his employment in creating a hostile work environment...

[A] supervisor is always, in a sense, aided in accomplishing the tort [i.e., personal injury] by the existence of the agency because his responsibilities include close proximity to and regular contact with the victim. However, the common law rule does not use "aided" in such a broad sense. Rather, the employer is liable only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status... Here, however, the offensive remarks, gestures, and touching cannot reasonably be viewed as conduct associated with Terry's and Silverman's status as agents of the City.

The evidence does not support a finding that Terry and Silverman were aided, within the meaning of the common law, in their harassment of Faragher by their agency relationship with the City... If, for example, Terry and Silverman had constructed something offensive and intimidating to women under the guise of trying to improve lifeguard performance, then their supervisory and disciplinary authority would support a finding that they acted as the City's agents in violating Title VII. But Terry's and Silverman's supervisory and disciplinary authority does not support a finding that they were acting within the scope of their employment in subjecting Faragher to offensive language, gestures, and touching.

COMPLAINTS TO HIGHER MANAGEMENT?

The appeals court then considered whether the City could be held indirectly liable for the sexual harassment of its employees. According to the appeals court, “an employer is indirectly liable for hostile work environment sexual harassment if the employer knew or should have known of the harassment and failed to take prompt remedial action.” Further, the court found that “a plaintiff can prove an employer's knowledge of harassment by showing that she complained to higher management.” However, in this particular instance, the district court had found as follows that “Faragher did not complain to higher
management at the City”:

While several lifeguards complained to Lieutenant Gordon, the district court found that he did not rank as higher management in the City and, therefore, that notice to him should not be imputed to the City.

According to the appeals court, “a plaintiff also can prove an employer's knowledge by showing that the harassment was pervasive enough to charge the employer with constructive knowledge.” As described by the appeals court, “the pervasiveness analysis applicable to finding that the work environment was abusive is the same as the analysis required to show the employer's knowledge”:

We agree with the district court that the analyses are the same to the extent that a court must evaluate the totality of the circumstances both in determining whether the work environment was abusive and in determining whether the conduct was pervasive enough to put the employer on notice. But we cannot agree with the district court's apparent belief that simply because conduct is pervasive enough to create an abusive work environment the employer should be charged with knowledge of the conduct. The question of notice to the employer is distinct from the question of the environment's abusiveness. Thus, the district court erred to the extent that it conflated the two inquiries...

There may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it. But this is not such a case. The district court expressly found that the City had no knowledge of Terry's and Silverman's conduct. Neither the district court nor Faragher has pointed to any factual basis for concluding that the City should have known of their conduct. The lifeguards were stationed at a remote location and had little contact with City officials.

Accordingly, the appeals court held that the district court “clearly erred in finding that the City's knowledge may be inferred solely from the fact that the conduct was pervasive enough to create an abusive work environment.” The appeals court, therefore, reversed the district court's judgment for Faragher on her Title VII sexual harassment claim against the City. The appeals court, however, affirmed the district court's judgment in favor of the City which denied Ewanchew's Title VII claim.