

BOORISH BEHAVIOR OR ACTIONABLE SEXUAL HARASSMENT: WHAT TO DO WHERE TO GO?

This space was last used by this author to describe rights in the workplace most employees don't realize they have. We discussed employers' responsibilities to protect employees from sexually charged discriminatory workplace behavior. Employers are required to publish and train on a sexual harassment policy, and to tell their employees how to make complaints, and who to go to for help. Such a policy is required by the courts to protect employees. It may also protect employers from liability. Employees are charged under the law with using complaint procedures they reasonably know about and understand.

Employers are not expected to guarantee employees will never encounter an off-color joke, a one time arm or shoulder pat, the occasional uninvited neck massage, or even the crude sexually benign comment. However, if they are to protect themselves against liability, employers must show they have taken constructive steps to educate their workplaces and protect against such things. If this is news to you, and you are being treated to unwelcome sexually explicit behavior in the workplace, you need to gain a better understanding of your rights.

Human resources professionals with limited legal experience and knowledge often fall short in ensuring employees understand their rights to be protected from harassing sexual behavior, and protected from retaliation should they complain. Offensive behavior is treated differently in the eyes of the law depending upon whether the conduct is "boorish" and ungentlemanly, or sufficiently sexually charged and offensive to constitute sexual harassment. It is also important to distinguish whether the harasser is a "co-worker" or a "supervisor." A supervisor's sexual harassment may be actionable regardless of the company's efforts to educate the rank and file.

How to deal with the workplace "boor" shouldn't be a perplexing question; even though boorish behavior is not viewed by the courts as sexual harassment. Courts have ruled that sexual harassment laws are not intended to be a "general civility code for the American workplace." Sexual harassment usually involves more seriously offensive behavior. Can boorish behavior create a risk of a sexual harassment lawsuit for the employer? Of course! Should employees complain about behavior even if it may be unfriendly or crass "manly" or "macho" behavior? Absolutely! What should you do in the event no sexual harassment policy exists, and no one is available to complain to; or worse, the only person to complain to is the harasser? What if, despite an existing policy and your use of available complaint procedures the sexual harassment continues? The answers to these questions are particularly challenging for the employee victim. Your options become more difficult, and may include considering ending your employment if the behavior is perverse enough to force this decision upon you, or getting a lawyer, or both.

According to the New World Webster's Dictionary a "boor" is a "rude" or "ill-mannered" person. You may have worked with such cads. This is the person who rarely

speaks without using an expletive, usually the “f” word; refers to women using derogatory terms; who thinks the double entendre is a laughing matter; or who is known (usually about the workplace) to say embarrassing things about anatomy, clothing fit, or dating escapades, all of which are dismissed with a giggle and an “Oh, stop it!”

Though this type of behavior, if it is unwelcome should be complained about (preferably in a dated writing) in EVERY instance, sexual harassment takes a more “pervasive” or “severe” form. Federal law prohibits employers from discriminating “against any individual with respect to terms, conditions or privileges of employment, because of such individual’s sex.” This law makes it illegal to discriminate in the workplace on the basis of sex (i.e. because you are a woman), and requires the affirmative steps discussed above. The Supreme Court, in interpreting Title VII of the Civil Rights Act, has ruled that “when the workplace is permeated with discriminatory intimidation, ridicule, and insult [of a sexual nature] sufficiently severe or pervasive to alter the conditions of the victim’s employment, and create an abusive working environment, Title VII is violated,” thereby creating the sexual harassment laws. Sexual harassment is unwelcome sexual behavior (comment, gesture, touching) in the workplace, which is so severe (lewdness or sexually intimate touching) or pervasive (relentless) so as to make your ability to do your job impossible. The law provides remedies to compensate victims of sexual harassment for what they have lost economically and/or emotionally as a result of such conduct. These remedies include payment of lost wages and the value of lost benefits; loss of future income if you can’t find another job quickly or can’t find a replacement job paying the same wages/salary and benefits; and reimbursement for “non-economic” harm, such as the value a jury would assign your embarrassment, humiliation and/or emotional distress resulting from the sexually inappropriate and offensive workplace behavior.

Eradicating every workplace sexual nuance is not what this law intends. Reforming the workplace “boor” is not the primary focus of these laws; though the boor generally learns his behavior has associated risks to his own employment security. This law exists to protect you from severe or relentless sexually offensive behavior, which you do not have to tolerate, and its purpose is to end such workplace conditions. More importantly, if you have been harmed financially or emotionally, this law ensures you have a forum within which to seek redress.