Law Offices of Mary L. Topliff
Workplace Wave

IS IT POSSIBLE TO HAVE AN "ALL IN GOOD FUN" WORK ENVIRONMENT?

By: Mary L. Topliff, Esq.

Most employers would prefer to have a light-hearted, fun atmosphere where employees enjoy working rather than a stifling workplace full of do's and don't's in which employees are fearful to speak to one another. Yet, whenever a big harassment jury verdict hits the newsstands (or the internet), employers are left to ponder whether it's possible to have an open and friendly work environment, lest they be sued.

The good news is that most lawsuits that juries decide involve much more than a one-time joke gone awry or friendly pat on the back. The behavior in the so-called "spanking" case went well beyond most workplace norms. The case was brought by a female field supervisor of a California-based alarm company. The sales unit engaged in a series of planned activities that involved the winners of sales incentives throwing pies at the losers, feeding them baby food, making them wear diapers and spanking their behinds with their competitor's yard signs. The plaintiff had been spanked in this context three times before she quit. Although the defense argued that the plaintiff willingly engaged in the conduct, it was clearly not considered an "all in good fun" activity by the jury who awarded her $500,000.

While we can see that this degrading and humiliating behavior could hardly be couched as friendly office banter, teasing and related behavior can lead to hostile environment claims. The legal standards at play have existed for more than ten years. Generally, a plaintiff must prove that he or she was subjected

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Public Speaking

Ms. Topliff will be teaching a full-day course on Time Off and Leaves of Absence for the California Human Resource Management Institute on October 31, 2006 in Oakland. Contact Ms. Topliff for more details

Ms. Topliff will be speaking at the 2006 California Employment Law Update on October 31, 2006 at the Claremont Resort & Spa in Berkeley. The topic will be Workplace Investigations. Contact Ms. Topliff for registration information to this 2-day event, which begins on October 30.

to verbal or physical conduct of a sexual nature (or based on race, age, national origin or any other protected class), the conduct was unwelcome and was sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment. See, e.g., Ellison v. Brady (9th Cir. 1991) 924 F.2d 872. In examining whether particular conduct in the workplace is severe and pervasive to create an abusive working environment, courts will determine whether it is subjectively and objectively offensive based on the perspective of a reasonable person standing in the shoes of the "victim." Courts will examine a variety of factors in assessing the work environment, such as, the frequency of the conduct, its severity, whether it is physically threatening or humiliating, whether it unreasonably interferes with an employee's job performance and whether it affects the employee's psychological well-being. See, e.g., Harris v. Forklift, Inc. (1993) 510 U.S. 17.

Recently, the California Supreme Court made some headlines by deciding a case involving the television show, Friends. Lyle v. Warner Brothers Television Productions (4/20/06) 06 C.D.O.S. 3258. The case involved frequent sexually graphic comments by certain male writers of the show that were degrading to women in general and to some specific women, but not to or about the plaintiff, who was a writer's assistant. In a surprising decision, the high court found that the conduct did not constitute a hostile work environment because it was not directed at the plaintiff nor did she establish that her work performance was impacted by it. The defense also raised the interesting concept of "creative necessity" to demonstrate that the work environment for this particular television show involved discussions of a sexual nature and the writers needed to be able to engage in these free-flowing discussions as part of the creative process.

While this case is quite favorable for employers in defending harassment claims with similar fact patterns, it clearly does not change employers' overarching obligations to provide a work environment free of harassment and discrimination according to the Fair Employment and Housing Act (FEHA). Moreover, employers are responsible for conduct they know about and conduct they should have known about. Add to that, another recent California Supreme Court case, Carter v. Calif. Dep't of Veterans Affairs (6/7/06), ruled that an amendment to FEHA is retroactive, which states that employers are liable for sexual harassment by non-employees when the employer does not take immediate and appropriate corrective action to end the harassment. Therefore, employers assume the responsibility for the work environments they provide their employees.

With these legal standards in mind, a few general rules of thumb when evaluating a work environment: 1) physical contact that is more than a

handshake, gentle pat on the upper back or a high-five will be viewed more closely and seriously than verbal or visual incidents; 2) behavior that is threatening, intimidating or humiliating is much easier to establish as constituting an abusive work environment; 3) comments, jokes or banter that are offensive or degrading when written down (i.e., without hearing the intonation of the speaker's voice to establish the kidding nature of the comment) will involve heightened scrutiny; and 4) behavior that is directed at or is about the "victim" is more serious than generalized comments.

Here are some observations culled from years of advising employers and conducting harassment prevention training:

- We're dealing with human beings who are unique and imperfect. Our words and actions often have unintended consequences.
- Workplaces are not egalitarian utopias.
- A friendly work team can change quickly with the addition of a new employee, a new supervisor, an employee who has just returned from a long leave of absence, etc.
- We all have internal boundary lines between funny and offensive.
- People can be just plain mean-spirited to those that are weak, different, odd, whiny, goody-two-shoes, or fill in the blank.
- If we could teach people how to have common sense, a lot of attorneys and human resources professionals would be out of work.

To achieve that open and friendly work environment that does not stray into the danger zone, communicate with employees about their responsibilities for carrying it out. Give employees the power and tools to police themselves, but be realistic about their inherent limitations as humans.

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