

Discrimination
vs. Incivility

By Corena Norris-McCluney

We must know how to recognize the difference between truly discriminatory conduct and behavior that, while repulsive, may not be actionable, and be prepared to advise our clients on the best course of action.



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Defending the Boor and the Misanthrope

Tom, an African-American employee, complains to his company's human resources department that a female coworker, Jane, constantly refers to him and another coworker, Bill, as "boys." According to Tom, she

frequently greets them with comments such as, "What's going on, boys?" "How are the boys doing?" and "What are you boys up to?" Tom thinks that Jane's actions are inappropriate and believes that Jane is harassing him and creating a hostile working environment. Tom acknowledges, however, that Jane's comments also have been directed toward Bill, who is Caucasian. Has Jane created a racially hostile working environment in violation of the company's anti-harassment policy and federal law? Were her comments based on Tom's race, or did she use the word "boy" in a colloquial sense? Was Jane just an "equal opportunity" offender who behaved in an insulting manner toward everyone, without regard to their race? Courts have and will continue to struggle with how to treat behavior such as Jane's under Title VII.

Although Title VII itself does not expressly prohibit a hostile working environment, the Supreme Court clarified in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that the "terms, conditions or

privileges of employment" language in Title VII is intended to encompass the entire spectrum of disparate treatment based on a protected class. *Id.* at 64. In another case, the Fourth Circuit wrote that "Since an employee's work environment is a term or condition of employment, Title VII creates a hostile working environment cause of action." *EEOC v. R & R Ventures*, 244 F.3d 334, 338 (4th Cir. 2001) (citing *Meritor*, 477 U.S. at 73). Thus, conduct that is based on a victim's membership in a protected class and that is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment' violates Title VII." *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Meritor*, 477 U.S. at 67). In other words, to establish that a plaintiff suffered from a "discriminatorily hostile or abusive work environment," a plaintiff must prove four facts. The first three are that the conduct was (1) unwelcome, (2) based on the plaintiff's membership in a protected class, and (3) sufficiently severe or perva-

sive to alter the conditions of employment and create an abusive atmosphere. *See id.* Fourth, a plaintiff must show that the employer should be liable for this conduct. *See id.* Courts have applied these standards not only to Title VII cases, but also to claims of workplace harassment arising under other federal antidiscrimination laws, such as the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), as well as state laws prohibiting employment discrimination.

Although the standard might seem transparent, courts and attorneys have struggled with exactly what they should consider actionable harassment or discrimination. In an effort to ensure that Title VII does not become a general civility code or a general prohibition against all bad acts, courts have gone to great lengths to distinguish between that conduct which is rude or uncivil and that conduct which alters the conditions of employment, as well as harassment or discrimination in general, as opposed to conduct based on a victim's membership in a protected class. As one federal appeals court put it, "[t]he occasional off-color joke or comment is a missive few of us escape. Were such things the stuff of lawsuits, we would be litigating past sundown in ever so many circumstances." *Ziskie v. Mineta*, 547 F.3d 220, 228 (4th Cir. 2000).

On one end of the spectrum, generally, we can fairly easily classify particularly egregious workplace conduct that is expressly related to an individual's protected status as a potential violation of the law. Likewise, we generally can readily recognize somewhat benign behavior that amounts to mere annoyance at work as conduct that does not create a hostile working environment, particularly when behavior has no apparent link to a person's characteristics as protected under the law. Between these two extremes lies a substantial gray area that is not so clear-cut. These "gray area" cases require highly fact-specific inquiries to determine whether conduct is actionable harassment. As mentioned, these "gray area" cases include cases involving behaviors that we find highly offensive but have not stemmed from someone differentiating among people based on protected class membership.

This article will explore the differences between uncivil conduct and actionable

violations of Title VII, as well as the distinction between those workplaces saturated with bad behavior, as opposed to those that we can consider hostile and in which people treat other people differently based on their membership in a protected class. In addition, this article will provide practical tips for counsel working with employers seeking to prevent improper conduct and strategies for defending harassment claims.

"Harassment" by Whose Standards?

Employees who come to a workplace with assorted ideas and skill sets also come with differing personalities and backgrounds, as well as varying ideas about what is humorous or offensive. In a heterogeneous workplace, employees should expect personality conflicts and grievances in daily interactions. Indeed, courts have recognized that in any setting, personality conflicts are "an inevitable byproduct of the rough edges and foibles that individuals bring to the table of their interactions." *Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 282 (4th Cir.), *cert. denied*, 531 U.S. 871 (2000). Additionally, "[s]ome persons, for reasons wholly unrelated to race or gender, manage to make themselves disliked." *Ziskie*, 547 F.3d at 226.

Those who feel slighted or insulted at work frequently confuse bad behaviors with adverse employment actions and think that the behaviors are actionable. Although some people inevitably will have personality conflicts, will not get along with others, or will just be plain rude, Title VII does not contain, as one court described, a "crude environment" exception. *Equal Employment Opportunity Commission v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008). Moreover, ostracism by coworkers does not constitute an adverse employment action when it has no effect on an employee's ability to perform his or her job. *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000). Instead, something additional must transform an ordinary conflict into actionable harassment or discrimination. As noted in *Hawkins*, the "[l]aw does not blindly ascribe to race [or sex] all personal conflicts between individuals of different races [or genders]. To do so would turn the workplace into a litigious cauldron of racial [or sexual] suspicion." *Hawkins*, 203 F.3d at 282. Nor will the law charge employers "with cleansing their workplace of all

offensive remarks. Such a task would be well-nigh impossible, and would encourage companies to adopt authoritarian traits." *Sunbelt Rentals*, 521 F.3d at 318.

Whose perspective carries the day when it comes to determining whether an employee has been "harassed" under Title VII's standards? Courts have implemented both a subjective and objective test for making this

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determination. In determining whether a behavior is sufficiently severe or pervasive to alter the terms and conditions of a workplace and create an abusive working environment, a behavior must be both "objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787.

Rudeness or Actionable Harassment?

As stated previously, courts expect that some amount of rudeness or incivility will occur in the workplace. In this sense, "Title VII is 'not designed to create a federal remedy for all offensive language and conduct in the workplace' nor [have our courts], under the auspices of Title VII, [attempted to] 'impose a code of workplace civility.'" *Willis v. Henderson*, 262 F.3d 801, 809-10 (8th Cir. 2001) (internal citations omitted). Not every workplace will function harmoniously, "and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard." *Sunbelt Rentals*, 521 F.3d at 315. Courts recognize that "[s]ome rolling with the punches is a fact of workplace life. Thus, complaints premised on nothing more than 'rude treatment by coworkers,' 'callous behavior by one's superiors,' or 'a routine difference of opinion and personality conflict with one's supervisor,' are not actionable under Title VII." *Id.* at 315-16 (internal

citations omitted). Instead, courts require some “material adversity,” because “it is important to separate significant from trivial harms.” *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)). With this in mind, courts do not consider general personality conflicts and snubbing action-

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able under Title VII, and “petty slights, minor annoyances, and simple lack of good manners will not create” a cause of action under Title VII. *Id.*

To maintain the true mission and meaning of Title VII, as practitioners, we must prevent Title VII from being used as a civility code and ensure that it is used to protect the interests that it has been designed to guard—preventing harassment and discrimination on the basis of a protected category.

What Do You Mean by “Boy”?

Undoubtedly, not every bad behavior or action in the workplace should lead to a federal lawsuit. However, even a generic term may carry negative racial or sexual connotations. For instance, the word “boy” might, on its face, seem benign, but its use can have highly offensive racial connotations, depending on “context, inflection, tone of voice, local custom, and historical usage.” *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006). Depending on these factors, the word “boy,” according to the U.S. Supreme Court, “need not be modified by a racial classification” to be viewed as “evidence of discriminatory animus.” *Id.*

As mentioned above, determining whether ambiguous workplace conduct creates an actionable, hostile working environment involves a highly fact-specific

inquiry. In some instances, courts have held that using the term “boy” amounts to harassment, while at other times, courts have just chalked up its use to rudeness. Courts consider additional behaviors and language to determine whether using certain terms in a workplace simply constitute rude, inappropriate behavior, as opposed to discrimination.

The court did just this in *Alexander v. Opelika City Schools*, 2009 WL 3739441 (11th Cir. 2009). In this case, the plaintiff, an African-American male, was referred to as “boy” approximately eight times over the course of two years. Also during the plaintiff’s employment, a supervisor commented on how to tie a noose around a person’s neck in the presence of the plaintiff. The plaintiff admitted that the supervisor had not specifically directed the noose comment to him or another African American. In deciding that Title VII had not been violated, the court noted that Title VII is not a general civility code and “[t]easing, offhand comments and isolated incidents that are not extremely serious will not amount to discriminatory changes in the terms and conditions of employment.” *Id.* at *2. Accordingly, the court determined that the conduct was not severe or pervasive enough to alter the terms and conditions of the plaintiff’s work environment. *Id.*; see also *Cavalier v. Clearlake Rehabilitation Hosp., Inc.*, 2009 WL 33639 (5th Cir. 2009) (affirming decision that using the term “boy” and the phrase “beat the tar off of him” did not amount to racial harassment); *McCann v. Tillman*, 526 F.3d 1370 (11th Cir.), cert. denied, 129 S. Ct. 404 (2008) (finding that using certain racially disparaging terms and phrases, namely “girl,” “boys,” and “n---er b---ch,” did not amount to severe or pervasive harassment); *Ford v. Minteq Shapes and Services, Inc.*, 587 F.3d 845 (7th Cir. 2009) (finding no racial harassment when the plaintiff was referred to as a “black man” and “black African-American” for 14 months, solely prohibited from bringing his grandchildren to the holiday party, told he did not have to worry about losing his job because the company wanted to appear integrated, and once called a “gorilla”).

On the other hand, in *Bailey v. USF Holland, Inc.*, 526 F.3d 880 (6th Cir. 2008), the Sixth Circuit ruled in favor of the

employees. In this case, the plaintiffs, African-American males who worked as dock workers and truck drivers, alleged that over the course of several years, their coworkers frequently referred to them as “boy,” “hey boy,” or “damn it boy,” and also subjected them to other forms of racially charged conduct. *Id.* at 882. The plaintiffs had asked their coworkers to stop referring to them as “boys,” however, the coworkers had responded that they did not mean anything by it, and continued to use the term, clearly aware that the plaintiffs disliked the term. When both employees complained to their operations manager, the employer did not take action. When other complaints were made, the company held a meeting to address “roughhousing,” but never mentioned using the word “boy” to address the African-American employees. Although coworkers engaged in other forms of harassment, much of it involved “persistent taunting... with the word ‘boy.’” *Id.* For instance, when one of the white employees addressed Mr. Bailey as “baby boy,” Mr. Bailey informed him that he preferred not to be called “boy.” In response, the employee said “that the only thing he could think of in response to Mr. Bailey’s request was ‘damn it boy.’” *Id.* The use of the term “boy” continued to increase as the plaintiffs’ complaints increased. In fact, the actions became more hostile and dangerous. One employee told Mr. Bailey “that there were two kinds of boys—cowboys and colored boys.” *Id.* at 883. In addition, the word “boy” was written in the square for the date observing the Martin Luther King Jr. holiday on a calendar in the workroom. Sometime later, an attorney spent time at the facility investigating the complaints. The attorney informed the company that “while the environment likely is not *racially* hostile, it is certainly one in which more sensitive employees can feel uncomfortable.” *Id.* at 884. The company concluded and informed the plaintiffs that no employee had used the word “boy” with “racial animus, nor with any intent to hurt [the plaintiffs’] feelings.” *Id.*

After the plaintiffs filed suit against the company, the Sixth Circuit held that “[i]t is unlikely that, after [the plaintiffs] had spent years complaining about the terms, a white employee could end a sentence to either plaintiff with ‘damn it boy’ and

mean no offense.” *Id.* at 886. Accordingly, after addressing all the elements of a hostile work environment, the Sixth Circuit upheld the district court’s judgment in favor of the employees. *Id.* at 888.

As defense attorneys, we are often presented with scenarios involving one or two instances of name-calling or terms that carry negative connotations. While remaining sensitive to the negative undertones associated with certain words, we must counsel our clients about when the use of certain terms could prove harmful, and perhaps, create liability, distinguishing this type of use, to the best of our ability, from use that is inappropriate but does not rise to the level of actionable harassment. To convert a reference of “boy” or “girl” into a Title VII claim, the word must normally carry some connotation that shows it was meant to demean or harm the individual to whom it referred. In addition, a court will not generally consider use of a term once or twice as warranting action, but when a workplace is permeated with the use of the term and individuals are referenced in this manner on a frequent basis, it might increase the liability risk. This is particularly true when name-calling is combined with other objectionable behavior clearly related to an employee’s protected status.

Flatulence Is Not Actionable

Of a slightly different nature, courts do not often consider employees’ immature behaviors actionable under Title VII, no matter how rude or objectionable they might be. For example, in *Ziskie v. Mineta*, 547 F.3d 220 (4th Cir. 2000), the plaintiff, an air traffic controller with the Federal Aviation Administration, complained that she and all the other female air traffic controllers experienced sexual harassment. The plaintiff essentially complained that four behaviors created a hostile working environment. First, she indicated that the male employees used crude language and engaged in crude behavior, such as “belching” and passing gas in the presence of other employees, including her. *Id.* at 222. The male employees used the terms “d--k head pilot[s]” and “stupidvisor” and once told a female supervisor to “f--k off.” *Id.* Secondly, the plaintiff indicated that other employees made sexist comments about women’s body

parts and clothing, and referred to a former employee as a “chick.” Thirdly, the plaintiff believed that supervisors gave preference to male employees when making schedules. Finally, the plaintiff claimed that she was frequently treated with hostility by a number of her male coworkers.” *Id.* at 223. The plaintiff also testified that she was referred to as a “f---ing moron.” *Id.*

The court reviewed all of the behavior alleged by the plaintiff and noted that the alleged conduct might very well have been hostile, but it was “a far cry from the obviously sex-related conduct” noted in other cases. *Id.* at 227. While the court did not regard “boorishness” as acceptable, it pointed out that “there is a line between what can justifiably be called sexual harassment and what is merely crude behavior. Profanity, while regrettable, is something of a fact of daily life. Flatulence, while offensive, is not often actionable, for Title VII is not a ‘general civility code.’” *Id.* at 228 (internal citations omitted).

While all employers hope that their employees will exhibit professional manners, unfortunately, some employees still will act boorishly or crudely. What is important is that we understand how to distinguish between boorishness and discrimination and appropriately advise an employer when reviewing a particular activity.

The EOO: Equal Opportunity Offender

In an effort to prevent Title VII from becoming a general civility code, some courts have differentiated between individuals who “harass” everyone, treating everybody poorly, and perpetrators who engage in conduct against individuals based on their membership in protected classes. Generally, a court will find wrongs committed by an individual who offends or targets everyone, regardless of protected characteristics, not actionable under Title VII because that individual did not commit the acts based on other individuals’ protected class membership. The equal opportunity offender is generally a crude or rude individual who treats everyone badly. To effectively use this defense, you must establish that the alleged wrongdoer is, in fact, equally offensive to all individuals, irrespective of anyone’s protected characteristic, which can sometimes prove difficult. In some cases, the differences

between equal opportunity offenders and people who create a hostile work environment based on a protected characteristic are matters of degree. In other words, if someone treats everyone badly, but still treats members of a protected group differently or worse than everyone else, the equal opportunity harasser defense might prove unavailable to an employer.

We must counsel our clients about when the use of certain terms could prove harmful, and perhaps, create liability.

For instance, in *Kampmier v. Emeritus Corp.*, 472 F.3d 930 (7th Cir. 2007), the alleged wrongdoer, Lena Badell was a lesbian who made frequent, offensive, sexually perverse comments to the plaintiff and other female coworkers. *Id.* at 934. For example, Ms. Badell made comments such as, “I can turn any woman gay,” or referred to the sexual acts that she performed with her girlfriend or commented about other females’ body parts. The plaintiff also claimed that Ms. Badell “grabbed her buttocks thirty times, hugged her fifty to sixty times, grabbed her around the arms, jumped in her lap ten times, kissed her on her cheek, and rubbed up against her.” *Id.* The employer presented evidence that Ms. Badell had grabbed two male employees’ buttocks and that after a male employee cancelled plans to have dinner with her one night, she told him, “I was waiting and ready for you. If you did not want it and did not want to be bothered by me, then you should have said something.” *Id.* at 940. The male employee testified that by “it,” Ms. Badell was referring to a sexual proposition. Although the employer tried to present Ms. Badell as the “equal opportunity harasser,” the court noted that the harassment endured by the plaintiff was “far more severe and prevalent than the alleged conduct endured by the male employees.” *Id.* Accordingly, the plaintiff had raised a

genuine issue of material fact as to whether Ms. Badell's treatment of her was because of her sex. *Id.*

Using the defense that a wrongdoer has been an equal opportunity offender is much easier when employees with both protected class characteristics and those without them have made similar allegations of wrongdoing by the same perpe-

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trator. For instance, in *Holman v. Indiana*, a husband and wife filed suit against the Indiana Department of Transportation, claiming that the same supervisor had sexually harassed each of them individually on separate occasions. *Holman v. Indiana*, 211 F.3d 399 (7th Cir.), *cert. denied*, 531 U.S. 880 (2000). Mrs. Holman alleged that her male supervisor, Gale Uhrich, had inappropriately touched her, stood too closely to her, asked her to go to bed with him, and made sexist comments, among other things. *Id.* at 401. Mr. Holman, who was also supervised by Mr. Uhrich, alleged that Mr. Uhrich had grabbed Mr. Holman's head while asking for sexual favors. *Id.* On a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the district court dismissed the plaintiffs' Title VII claims "because both plaintiffs were alleging sexual harassment by the same supervisor, they both, as a matter of law, could not prove that the harassment occurred 'because of sex.'" *Holman v. Indiana*, 24 F. Supp. 2d 909, 910 (N.D. Ind. 1998). The court noted that "because Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the 'equal opportunity' or 'bisexual' harasser, then, because such a person is not *discriminating* on the basis of sex." *Holman*, 211 F.3d at 403 (emphasis in original). The equal opportunity harasser "is not treating one sex better (or worse)

than the other; he is treating both sexes the same (albeit badly)." *Id.*

However, even if an alleged offender has equally treated both men and women badly, some courts have held that this is not always an available defense to a discrimination claim. See *Swinton v. Potomac Corp.*, 270 F.3d 794, 807 (9th Cir. 2001) (being an "equal opportunity harasser" provides no escape hatch for liability"), *cert. denied*, 535 U.S. 1018 (2002). In *Swinton*, the plaintiff was an African-American employee who alleged that the workplace was permeated with offensive jokes and slurs about all races and ethnic groups. *Id.* at 800. Although one particular individual was the main perpetrator of the racially offensive jokes, the plaintiff's other coworkers also told racially offensive jokes in the plaintiff's presence. The plaintiff, however, bore the brunt of many of the wrongdoer's jokes. He never directly asked the primary offender or anyone else to refrain from telling the jokes and even socialized with the main perpetrator both at and outside of work. He did, however, indicate that he would often walk away and tell his coworkers that the jokes were "f--ed up." *Id.* Eventually, the plaintiff became fed up with the name-calling and jokes and resigned his employment. *Id.* The Ninth Circuit held that, under these circumstances the plaintiff was not "required to prove that white employees were not subjected to similar harassment." *Id.* at 807. The employer could not "escape liability because it equally harassed whites and blacks," and although the main perpetrator told jokes about both whites and blacks, this did "not excuse the fact that he racially harassed" the plaintiff. *Id.*

Similarly, in *Steiner v. Showboat Operating Co.*, the alleged perpetrator was consistently offensive and abusive to both men and women. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). However, the perpetrator's abuse of women was different in that it "relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct." *Id.* at 1463. It was clear that the alleged perpetrator was abusive to men, however, his conduct toward women centered on the fact that they were females. Making a distinction between generalized harassment and that which was sex-based, the court noted that it "is one thing to call a

woman 'worthless,' and another to call her a 'worthless broad.'" *Id.* at 1464. The court also considered whether the conduct would have been hostile and offensive to a reasonable woman. Even though the employer tried to argue that the perpetrator was abusive and offensive to both men and women, that defense did not succeed for two reasons. First, the perpetrator's actions toward women were premised on the fact that they were women and were tinged with references to sex and to their gender. Secondly, women reacted differently to the comments and actions of the perpetrator than men. *Id.* While a recognizable defense, the equal opportunity offender defense did not assist the company in escaping liability in this circumstance.

As we can see from these cases, just because an individual harasses people belonging to different protected classes and does not appear to have animus against one over another, before deciding whether a plaintiff can sue under Title VII, courts will examine whether the alleged offender somehow treated a particular class of protected victims more harshly than another, or if a class of victims experienced more pervasive harassment than another, or if persons belonging to a particular protected class reacted differently than others. See *Smith v. Pefanis*, 652 F. Supp. 2d 1308 (N.D. Ga. 2009) (noting that although the defendant groped both male and female employees, his harassment of the male plaintiff was of a different character from harassment of others because the defendant constantly propositioned the plaintiff for sex).

State Legislation: Civility Codes

Although federal law might not create a cause of action for bad workplace behavior or behavior that treats everyone badly, plaintiffs have and will continue to assert claims against their employers based on state common law theories. See *Johnson v. Hondo, Inc.*, 125 F.3d 408, 410 (7th Cir. 1997) (alleging a Title VII claim and common law claims of assault, battery, and intentional infliction of emotional distress based on workplace harassment). In addition to the common law claims that plaintiffs can bring based on hostile or inappropriate conduct in the workplace, a move is afoot to institute the civility code that our federal courts have refused to enforce under Title

VII. Proposed bills designed to prevent and punish workplace bullying or abusive work environments have been introduced in approximately 15 states. The states that have considered this type of legislation include California, Connecticut, Hawaii, Illinois, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Oklahoma, Oregon, Utah, Vermont, and Washington. However, although each of these states has considered such legislation, no state has passed a bill. Whereas Title VII prohibits harassing or discriminating conduct based on certain protected categories, the proposed state legislation would generally prevent “abusive conduct,” defined as “conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests.” See H.R. 374, 96th Gen. Assem., Reg. Sess. (Ill. 2009). This sort of legislation is designed to offer recourse to an individual who is subjected to hostile conduct in the workplace but who has no claim under Title VII or other federal or state discrimination laws.

Practical Advice: Precautionary Measures

Taking an offensive stance by advising employers to take precautionary measures, can, to a certain extent, prevent employees from suing employers. First, don’t wait until states pass legislation mandating workplace civility. Advise employers to take steps to “civilize” their workplaces without the assistance of legislation or courts and to eliminate rude, offensive or uncivil conduct. This will prevent employees from using Title VII as a general civility code. If an employer does not have a policy condemning and prohibiting harassing or bullying conduct, it should have one. This policy should remind employees to behave professionally and refrain from engaging in conduct or behaviors that would tend to offend or isolate individuals.

Second, counsel employers to provide mechanisms through which (a) employees can raise issues regarding inappropriate conduct, (b) employers will investigate and address these complaints, and (c) eliminate negative behaviors, to the extent possible.

Finally, advise employers to do their best to curb demeaning or potentially objec-

tionable conduct, even if it does not rise to the level of actionable harassment under Title VII. For instance, an employer might determine that an employee’s repeated use of the word “boy” to refer to his or her colleagues will unlikely create liability for the employer and might not even require formal discipline, but the employer should still correct and eliminate the conduct.

Practical Advice: Litigation Strategies

In the unfortunate event that an employer finds itself facing Title VII allegations and the conduct does not appear actionable, you have a number of strategies at your disposal in defending that employer.

First, you can show that, although the employer does not condone bad behavior, the plaintiff’s allegations, even if based on inappropriate behaviors, does not warrant action under Title VII. Because Title VII is designed to prohibit a work environment that is “permeated with discriminatory intimidation, ridicule and insult,” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), a plaintiff must demonstrate that the alleged harassment has been so extreme that it altered the terms and conditions of the plaintiff’s employment. Accordingly, through discovery, show that the behaviors did not impact the plaintiff’s work conditions. Clearly distinguish between actionable harassment and mere rude or offensive behavior. Do your research so that you can bring to the court’s attention those cases in which courts dealt with stronger language than the language in your case or more egregious behavior than the behavior in your case and deemed it insufficiently severe or pervasive to amount to harassment.

You can also refute harassment claims by demonstrating that the conduct at issue had nothing to do with a plaintiff’s protected class membership. In some jurisdictions, this might include using the defense that the alleged perpetrator was an equal opportunity offender and showing that the alleged perpetrator offended or treated everyone poorly, irrespective of protected class membership. If this defense is applicable to your case and you do, in fact, intend to argue that an individual has been an “equal opportunity harasser,” beforehand, make sure that this individual actually committed the alleged wrongful acts.

The argument will not prove successful when various individuals have made allegations and various supervisors within an entity have allegedly committed wrongful acts. See *Venezia v. Gottlieb Memorial Hospital, Inc.*, 421 F.3d 468 (7th Cir. 2005) (noting that the defense does not preclude an employer from vicarious liability when employees work in different settings with

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different coworkers and report to different supervisors).

Further, proceed carefully when using this defense. You do not want to imply that an employer permitted offensive and hostile behaviors without trying to eliminate them, simply because an offender treated everyone equally poorly. Moreover, make sure that this defense does not appear manufactured. See *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996) (“It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male work, though is preferred targets were female.”)

Conclusion

We can expect that for as many cases as we receive that involve truly discriminatory and actionable conduct under Title VII and other federal antidiscrimination laws, we will receive just as many, if not more, cases that involve repulsive behavior, but not of the type that rises to the level of a federal case. As defense attorneys, we must vigilantly recognize the difference and advise our clients on the best approach, depending on the severity of the conduct. Legislation, litigation, and policy implementation will not eliminate all bad behaviors in the workplace. The task is to understand the difference between illegal, discriminatory conduct and inappropriate, boorish conduct.

