Pyrrhic Victories

Insights
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(Labor Letter, March 2013)
King Pyrrhus of Epirus defeated the Roman army in the battle of Asculum, but at great cost. His comment, "Another such victory would utterly undo me," applies to employment litigation.

Lawyers are justly proud when they win a difficult discrimination or harassment case. But after a couple of hundred thousand dollars in legal fees, disruption at work, and harm to reputation, an employer may decide that a few more similar "victories" could shut them down.

Therefore, as every CEO knows . . . the best lawsuit win is to avoid an EEOC charge or lawsuit in the first place.

A federal judge recently ruled that an atmosphere of moronic and foul behavior would not, standing alone, establish same-sex harassment. The court wrote that:

The court agrees with the EEOC that Mike's and Painter's language crossed the line of social acceptability, even in an all male work environment. But, this court is unwilling to assist in the creation of a general rule that will expose all employers to Title VII suits like this one. The mission of EEOC is an important one, but it does not include the cleaning out of all boorish slobs in the workplace. Bad facts sometimes make bad law, but it will require action by Congress to take Title VII over the great divide that now exists between bad language and same-sex harassment . . . . A public policy against offensive language, if constitutional, would make the courts into world policemen.

Great! I agree with the court.

But, let's be clear . . . the foolishness going on in this workplace was unacceptable . . . . this behavior didn't fit into the *"boys will be boys"* category.

There was a culture of horseplay and off-color badgering in the all-male warehouse where [Plaintiff] Doe worked. Not only would the language used by many employees shock a bishop in his robe, but it would have been unpleasant and offensive to any person of tender sensibilities.

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*Doe says that in late 2004 or early 2005 this warehouse banter rose to an intolerable level….According to Doe, in 2005, Mike first referred to him as a "faggot," and made similar comments almost every day up until 2007,,, Doe says that Mike's comments included: "come here, fag," "hey homo," "look who's here, d**k s**ker," and "why does your breath always smell like a**?" … According to Doe, Painter made similar comments….Doe alleges that Painter regularly and routinely used expressions like: "faggot," "queer," "homo," "d**k s**ker, "fairy," "a** breath," and go behind the tank and do what [you] do to other men." … Such nasty talk, in and of itself, does not prove that the people who engage in it, and who aim it at others, actually believe, or have any reason to believe, that their listeners are actually homosexual or have homosexual propensities. The expression "a** breath" has no homosexual connotation. It sounds more like a comment on someone's halitosis.*

** * **

Doe was not the only person with whom this word game was played. Doe does not dispute this fact… Doe is 5'10" and weighs between 190 and 220 pounds. He has tattoos on his arms. He, as well as other male employees, wore earrings. Doe was married and had children. Doe did not carry himself like a woman or act in a manner that could even remotely be described as feminine. Doe testified in his deposition that he was "just as much of a man as anyone else" and that he gave this impression to everyone, including his coworkers. Mike and Tipton both testified that Doe did not look or carry himself in any way that would suggest femininity. Doe even bragged about his way with women. He gave no one any reason to doubt his manhood. He did nothing and said nothing to suggest that he was homosexual.

It's easy to say that this behavior could never happen in your workplace … but could it? What had the employer done to prevent this behavior?

The U.S. Court of Appeals for the 5th Circuit made similar conclusions after similar conduct allegedly occurred in a construction workplace:

[Supervisor] would call [Employee] "faggot" and "princess" and would approach him from behind and stimulate having sexual intercourse while [Employee] bent over to perform job duties. [Supervisor] allegedly exposed himself to [Employee] numerous times. There is, however, no evidence that either man was homosexual….

However, obtaining this favorable decision probably cost the employer hundreds of thousands of dollars in fees. And even after the 5th Circuit threw out the lower court's decision, articles still continued to trash this respected company. I wonder if the complained-of employees and supervisors still work there?

Our Advice?

1. Don't assume that it cannot happen to you.

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2. Men calling each other "gay" and acting like idiots is not okay just because they aren't really harassing each other over sex.
3. In blue-collar workplaces of the past, some disputes were settled with fists. But this is not the 70s and the 80s. Employers will get sued.
4. Even in the roughest work setting, do more than post a "No Harassment" policy. Train supervisors and make sure employees understand that even if they pump out septic tanks for a living, they had better act "professionally."
5. Try to strike a balance. Sure it's the real world, but none of us think that the behavior described above is okay. Things didn't become that way overnight. These businesses are probably good companies, but what could they have done to prevent this behavior?
6. The bottom line is that common sense is not common. We cannot focus simply on instructions *"to not discriminate against or harass workers."* We have to make employees understand that the goal is not to get as close as possible to unacceptable behavior without tipping over into unlawful harassment or discrimination. Academic as it sounds, we have to train and expect all personnel to use that not-so common sense and to behave professionally.

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