Be Nice, or Be Sued

Publication
3.25.06

Until recently, "harassment" in the workplace was only unlawful if it was based overtly on sex, or race, or national origin, or some other protected category under the discrimination laws. The most familiar type of harassment was that based on sexual banter or come-ons, but cases based on insults, slurs or epithets relating to sex, race, ethnicity have become more common as well. Otherwise, a boss' yelling at a subordinate, or co-workers' teasing or taunting of a colleague, did not qualify as a violation of the civil rights laws. So long as the boss was an "equal opportunity jerk" and the workplace bully an equal opportunity abuser, they and their employees generally could count on escaping liability under Title VII and other antidiscrimination laws.

In a recent case, however, the 9th Circuit held that abusive behavior by a supervisor may violate Title VII even though it is not sexual in nature, so long as members of one gender suffer more from it than members of the other gender. As will be illustrated, the 9th Circuit's approach is a bit clumsy, and it remains to be seen whether other courts will adopt it. Nonetheless, it opens the door for harassment lawsuits to be brought under Title VII for a supervisor's abusive behavior and co-worker bullying that is free of race-, ethnic-, or gender-based content.

This column will highlight some of the problems with the 9th Circuit's attempt to attack this issue under Title VII, as well as the difficulties that likely would accompany the enactment of statutes prohibiting harassment generally in the workplace.

This article appeared in the Spring 2006 issue of the *Employee Relations Law Journal*.