

## DON'T CALL IT A COMEBACK: THE "RETURN" OF WORKPLACE CIVILITY RULES

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Dear Susan,

*I have to tell you about a situation that has been occurring between John and myself. But it's not what you think! Well, maybe it is. I don't know. I'm hoping that, as our supervisor, you can help me. To put it bluntly, he likes to pick on me, and I don't like it. For example, whenever you give me feedback in the team meetings, John sends me texts afterwards saying things like, "wow, sick burn!" or "yikes! can't you get it together?!" He always adds an "LOL" at the end, but I don't think it's funny. And sometimes, in the breakroom, he moves my stuff around to different tables when I get up to grab a drink or microwave something. He also keeps using the office instant messenger to send me emojis during the day—like poking fingers, waving hands, rolling eyes, or the smiley with its tongue sticking out. I've asked him to stop, but he keeps telling me I'm overreacting or that I need to "take a chill pill." When I walk into a room where he is with other people, they all stop talking and then burst out laughing. I'm really frustrated, Susan, and tired of him making fun of me. It boils down to him being mean and annoying and I'd like it to stop. Can you help?*

*Sincerely, Potential Lawsuit Waiting to Happen*

### WHAT IS CIVILITY ANYWAY?

Unfortunately, scenarios like this are all too common in many workplaces. Employers have tried to combat this type of "annoying" behavior by instituting workplace civility policies requiring employees to treat each other with respect, harmony, and pleasantness in the work environment. By

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printing this expectation in the company's code of conduct while also weaving the concept into the ideals of daily business practices, it can serve as a valuable deterrent to workplace harassment.

From a practical standpoint, this is sound reasoning. When employees understand they are *required* to be polite and courteous to one another, they are more likely to do so. And because harassment is the opposite of acting polite and courteous, civility policies may work to stop a serious problem before it even starts.

## **CIVILITY RULES TOOK *PERSONA NON GRATA* STATUS**

However, somewhere along the way, workplace civility rules became legally problematic. This shift might have started with the 1998 U.S. Supreme Court decision in *Oncale v. Sundower Offshore Svcs., Inc.*, in which the Court held that Title VII is not a "general civility code for the American workplace." Indeed, as Justice Scalia wrote, "petty slights, minor annoyances and simple lack of good manners" are not legally actionable. As a result, employers began to focus their training efforts more on minimizing their own liability than enforcing civility. After all, if simply failing to be polite doesn't trigger legal liability, why should an employer focus valuable training time on the topic?

An even more powerful blow to workplace civility rules came from the National Labor Relations Board's expansive interpretation of the 2004 *Lutheran Heritage Village-Livonia* decision. The Board determined that a workplace rule would violate the National Labor Relations Act (NLRA) if it could be reasonably construed to prohibit protected activity. The *Lutheran Heritage* standard began to transform what had been facially neutral workplace policies into unfair labor practices. The Board began finding NLRA violations where there could be *some* chance—no matter how small—that an employee could construe a company policy as prohibiting activity protected by Section 7.

For the past several years, employers have been left to perform the mental gymnastics of anticipating how a rule *might* be construed by an employee to possibly dissuade them from participating in protected activity, no matter how slight the chance. For example, a policy requiring employees to have "harmonious" dealings with their coworkers was suddenly problematic when applied to the scenario that

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typically occurs when a union forms in the workplace. Because a union election is likely to be disruptive to a workplace, the union-friendly Board concluded that employees might feel they would be breaking a rule by engaging in election-related activity that could bring about disharmony. Fearful of getting swept up in the *Lutheran Heritage* precedent and violating federal law, cautious employers deleted workplace civility policies out of handbooks.

## THE TIDE HAS CHANGED

All of that changed in 2017. First, the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace released a report finding that—spoiler alert—harassment continues to be an insidious and prevalent problem in the workplace. Its findings in terms of workplace civility, however, were troubling.

According to the Select Task Force, much of the modern focus on avoiding legal liability when training managers and workers has had little success as an effective prevention tool. According to the task force, this type of training does little to enforce or reinforce the importance of workplace civility.

The Select Task Force recommended, then, that effective training should be holistic in nature. It encouraged employers to provide the type of workplace civility training that promotes “respect and civility in the workplace,” instead of focusing specifically on eliminating unwelcome or offensive behavior that is based on characteristics protected under employment non-discrimination laws. The task force also recommended that employers “should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted.” This frank and basic view harkens back to the origins of workplace civility: the novel concept that employees treating each other in a respectful and courteous manner can help to curb workplace harassment.

The second shoe dropped in December 2017 when the NLRB overturned *Lutheran Heritage* and gave a significant boost to civility rules (among others). In *The Boeing Co.*, the newly constituted Board highlighted flaws in the reasoning of *Lutheran Heritage*, which had required employers to all but omit any civility expectations in the workplace. First, the

Board recognized that “employees are disadvantaged when they are denied general guidance regarding what standards of conduct are required and what treatment they can reasonably expect from coworkers,” creating unstable and undesirable work environments. Employers may also lose their competitive advantage in recruiting and retaining top talent.

Next, the Board acknowledged that employers often have legitimate business purposes for establishing civility rules. For example, it pointed to rules aimed at maintaining order in the workplace, and rules meant to protect the company from liability by prohibiting conduct that, if permitted, could result in liability. It found such goals to have reasonable, legitimate business justifications to support a workplace civility policy.

The Board further articulated new guidelines for evaluating employment policies, rules, and handbook provisions. Maintaining rules that require employees to abide basic standards of civility will be considered lawful if: (1) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (2) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Following the *Boeing* decision, you should feel comfortable reincorporating any of the facially neutral workplace civility policies that you had scrapped over the past few years.

## **BUT WHAT ABOUT TITLE VII?**

At first blush, it might seem that the shift to focusing on the importance of workplace civility might conflict with Title VII precedent. Indeed, *Oncale* and its progeny have steadfastly held that Title VII is not a workplace civility code—petty slights and lack of good manners are still not legally actionable. Nothing in the report by the EEOC’s Select Task Force nor the NLRB’s *Boeing* decision have eroded the bedrock reasoning in these Title VII cases.

Instead, it appears workplace civility has returned as a prophylactic measure against workplace harassment. Disobeying a workplace civility rule will not automatically be elevated to the level of a Title VII violation. However, knowing that such behavior could be considered a violation of company policy might serve as a deterrent to that behavior. An employee may still be disciplined for policy violations. Having civility rules in place and providing

training that focuses on creating a harmonious work environment just might work to stem the more problematic harassment claims.

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