RUDE & BOORISH BEHAVIOR vs. ACTIONABLE HARASSMENT: When Does Bad Behavior Rise to the Level of Discriminatory Conduct?

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I. INTRODUCTION

The genesis for this presentation was the accompanying excellent article on hostile work environment claims, titled “Defending the Boor and Misanthrope,” which we have reprinted for you with permission from the author and the Defense Research Institute. The focus of the article is hostile work environment claims under Title VII of the Civil Rights Act of 1964, and it provides a very comprehensive discussion of the difference between truly discriminatory conduct that will support a hostile work environment claim, on the one hand, and behavior in the workplace that ranges from rude to repulsive and disgusting by most norms but which may not be actionable under Title VII, on the other hand.

Today’s presentation will address in more summary fashion the required elements of a hostile work environment claim, and the legal standards established by the U.S. Supreme Court to guide lower courts in their evaluation of such claims. We will also survey a sampling of fact patterns from actual hostile work environment cases. While the standards articulated by the Supreme Court appear relatively straightforward at first blush, there is a bewildering array of decisions by the lower courts in this area of the law. Each case involves highly fact-specific inquiries and requires an analysis of the totality of the circumstances. As a result, it is hard to draw “bright line” distinctions in this area of the law: what is indisputably boorish, offensive workplace behavior by societal norms may be viewed by one court as actionable hostile work
environment discrimination under Title VII, while similarly offensive behavior is deemed by another court to be clearly outside the scope of Title VII’s protection. By the conclusion of today’s presentation, hopefully we will have a better collective understanding of how to differentiate between varying levels of “incivility” in the workplace, so that you can more effectively recognize, monitor and abate workplace behaviors that have the potential to evolve into hostile work environment claims.

II. STANDARDS FOR JUDGING HOSTILE WORK ENVIRONMENT CLAIMS

Under Title VII, it is an unlawful employment practice for an employer to discriminate against an employee with respect to his/her “compensation, terms, conditions or privileges of employment, because of the individual’s race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(a)(1) [emphasis supplied]. Although the statute does not expressly prohibit a hostile working environment, the U.S. Supreme Court has interpreted Title VII’s terms broadly to include hostile work environment claims, when the offensive conduct in question “has the purpose or effect of unreasonably interfering with an individual’s work performance or creates an intimidating, hostile, or offensive working environment.” Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). Among the factors that courts should consider when analyzing hostile work environment claims is the frequency of the allegedly discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it interferes with the plaintiff’s work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Title VII’s prohibition against hostile work environments is directed at unwelcome conduct that meets two primary requirements. First, the harassment of the victim must be based on the victim’s membership in a protected class (e.g., the victim’s sex, race, age, religion). A
key issue in any Title VII case, including a hostile work environment case, is whether the plaintiff, as a member of a protected class, has been exposed to disadvantageous or abusive terms or conditions of employment because of membership in that protected group. If the nature of an employee’s environment, however unpleasant, is not due to a protected characteristic of the employee – i.e., if the employee cannot demonstrate that the harassing conduct at issue was directed at the employee because of his/her race, sex, etc. – then the employee has not been the victim of unlawful discrimination under Title VII as a result of that environment.

Second, the harassing conduct on which a hostile work environment claim is based must be so severe, pervasive and “objectively offensive as to alter the ‘conditions’ of the victim’s employment.” Id. at 80-81. “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview.” Harris, 510 U.S. at 21 (1993). Title VII does not prohibit all verbal or physical harassment in the workplace. It is not intended to reach “genuine but innocuous differences in the ways men and woman routinely interact,” Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75, 81 (1998), nor is it concerned with simple teasing, offhand rude or offensive comments, occasional horseplay, sexual flirtations, social slights, personality conflicts per se, or petty grievances or differences of opinion among co-workers. The Supreme Court has made clear that standards for judging hostile work environment claims must be sufficiently demanding to ensure that Title VII does not become a “general civility code for the American workplace.” Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998).

The plaintiff in a hostile work environment case must show that the work environment was both objectively and subjectively hostile, “one that a reasonable person would find hostile or
abusive and one that the employee did perceive as being hostile and abusive.” *Faragher*, 524 U.S. at 788. The objective severity of harassing behavior must be judged from the perspective of a reasonable person in the plaintiff’s position, considering all of the circumstances. “That inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target …. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” *Oncale*, 523 U.S. at 81-82.

**III. CASE SUMMARIES**

*Ziskie v. Mineta*

547 F.3d 220 (4th Circ. 2008)

The plaintiff in this case, Cynthia Ziskie, worked as an air traffic controller (ATC) and alleged, among other things, that she and other female ATCs were subjected to a continuing atmosphere of harassment and on-the-job intimidation by male ATCs with the acquiescence of management. She also alleged that she had been retaliated against for complaining about the harassment. Among the conduct that she complained of was:

- “unremitting” use of profanity and crude language by the male ATCs
- “mass flatulence” and other crude behavior such as belching
- sexists comments, some of which plaintiff heard and others of which were reported to her by co-workers, e.g., a male controller talked about a party where women were wearing “tit-teasing sweaters”; referring to a former female co-worker as a “chick” who had breast enhancement; making fun of a female controller’s breasts when she was pregnant; and male ATCs telling female co-workers that they should be taking care of their children instead of working
- hostile treatment by a number of male co-workers such as a male controller who loudly questioned how Plaintiff kept her job, and a supervisor telling her to quit because her husband worked.
Ziskie also claimed that her supervisors gave preference to male employees in making their schedules, when she was moved to a full time schedule and denied an extension of her previous part-time schedule so that she would be able to make childcare arrangements. As a result, she called in sick for eight straight weeks every Thursday and Friday (days she previously had off), and was then reprimanded for abuse of sick leave.

Ziskie filed an internal complaint with the agency’s Civil Rights Office, which made a formal finding that no discrimination had occurred because both males and females at the center used profanity and other offensive language, and plaintiff had failed to demonstrate that any of the harassment was caused by her gender or by her sexual harassment allegations. The agency also found that plaintiff’s claim of retaliation and the letter of reprimand she received were due to her abuse of sick leave, not her assertion of her rights.

Ziskie then filed a Title VII action in the U.S. District Court for the Eastern District of Virginia. The District Court granted summary judgment for the defendant on the issue of a hostile work environment stating that Ziskie’s treatment was not pervasive or severe enough to create an abusive work environment. Summary judgment was also granted for the defendant on the retaliation claim on the ground that Ziskie had not shown an adverse employment action taken against her or a causal connection between her protected activities and any asserted adverse action.

Ziskie then appealed to the 4th Circuit Court of Appeals. The appeals court reversed and remanded the case to the trial court, based on an evidentiary issue, but nonetheless commented extensively on the evidence that had been presented and found it lacking. After reviewing all of the behavior that formed the basis of the hostile work environment claim, the appeals court noted that it was a “far cry” from severe sex-related conduct that had been found actionable in other
hostile work environment cases. While the court did not believe “boorishness” in the workplace was acceptable, it noted 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.” The court also observed that flatulence, while offensive, is not often actionable, citing to the Supreme Court’s admonition that Title VI is not a “general civility code.” In addition, the court stressed that it was not enough for the conduct to be simply offensive, hostile, or the result of personality conflicts, the evidence must “allow a reasonable jury to conclude that her [Ziskie] mistreatment was due to her gender.” It appeared that Ziskie did not get along with her fellow workers in part because of their resentment over the fact that she took four-day weekends while the others worked full weeks. In the court’s view, the situation tended to show harassment due to personality conflicts but the state of affairs had little to do with gender.

_Ulibarri v. State of New Mexico Corr. Acad._

2006-NMSC-09, 139 N.M. 193, 131 P.3d 43

This case involved a hostile work environment claim brought by a female plaintiff under the New Mexico Human Rights Act, rather than Title VII. The claim was based on conduct by a male co-worker whom she perceived to be her superior, including the male employee telling plaintiff he had been thinking of them together; mentioning to her that she had beautiful eyes; telling her she smelled good; sending her virtual flowers and chocolates with personal messages; and inquiring on a work related driving trip whether she wanted to go to a romantic bed and breakfast, and asking her whether she wanted to “mess around” and have a romantic relationship with him. The court held that the incidents were relatively isolated and not sufficient to establish a hostile environment.
Borrowing from United States Supreme Court decisions and language often repeated by the Tenth Circuit Appellate and District Courts, the New Mexico Supreme Court found that the New Mexico Human Rights Act, similar to Title VII, cannot be a statute creating “a general civility code” and “requires neither asexuality nor androgyny in the workplace…” The court emphasized that it certainly understood a person may feel uncomfortable with comments such as those from the male employee, however “simple discomfort over a short period of time is not sufficient to alter the terms and conditions of employment.” The court affirmed summary judgment in the employer’s favor, noting that in the absence of additional facts, the relatively isolated incidents of which plaintiff complained were not sufficiently severe or serious to support a hostile environment claim.

*Harsco Corp. v. Renner*

475 F.3d 1179 (10th Cir. 2007)

In this case, the female plaintiff brought a claim for a sexually hostile work environment due to the actions of her co-workers, which included incidents of oinking and barking noises; referring to plaintiff as a “bitch”; comments about her weight; comments suggesting sexual acts between plaintiff and male co-workers; spitting tobacco on her car; physically blocking Plaintiff from going to the bathroom; physically blocking plaintiff from driving home after work and comments on her personal sexual life. Plaintiff complained to her supervisor multiple times over a long period of time. While the company did take minimal efforts to talk to the employees about sexual discrimination and to allow Plaintiff to use a bathroom in another building, the harassment continued.
Applying a “totality of the circumstances” test, the court affirmed the lower court in finding that plaintiff presented sufficient evidence to demonstrate that the discrimination she underwent was due to her sex. The court reasoned that many of the comments were regarding plaintiff’s alleged sexual performances with other inspectors. As well, there were several gender-based comments and physical actions by the co-workers that were only exhibited against plaintiff. The court emphasized that “juries ought not find prohibited harassment merely based on ordinary socializing, such as intersexual flirtation.” However, comparing the facts of this case to other hostile work environment cases decided in the Tenth Circuit, the court concluded that the gender-based hostility toward the plaintiff was severe and pervasive enough from both an objective and subjective standpoint to constitute much more than ordinary workplace behavior.

_Strishock v. Swift & Co._


The male plaintiff in this case brought a claim for a sexually hostile work environment under Title VII due to incidents involving his male supervisor. Plaintiff brought a birthday cake to his office to celebrate his birthday. His supervisor wrestled him to the ground, bound his limbs, pulled his pants down, spanked him, wrote “Happy Birthday” on his bare buttocks and smashed cake in his face. The supervisor then left him bound for his co-workers to see and took photographs which were shown to additional co-workers. Plaintiff did not complain to the company; however a fellow co-worker complained and reported the supervisor after the incident. Plaintiff then claimed that the other employees treated him with hostility and blamed him for the resulting termination of the supervisor. Plaintiff alleged emotional distress stemming from the hostile environment.
The court once again emphasized that in order for alleged sexual harassment to be actionable under Title VII, the discrimination must be based on sex. While the court held that same-sex sexual harassment claims could be viable, there were no facts alleged that could lead the court to conclude in this situation that Plaintiff was harassed because of his sex. “[I]f the nature of an employee’s environment, however unpleasant, is not due to his gender, he has not been the victim of sex discrimination as a result of that environment. ‘Male-on-male horseplay,’ for example, is not actionable sexual discrimination unless it is so ‘severe or pervasive to create an objectively hostile or abusive work environment.’” Instead, the court labeled the behavior as “boorish or childish” in a shocking manner that could constitute civil assault, but refused to turn Title VII into a “general civility code for the American workplace.” Plaintiff’s claim for a sexually hostile work environment was therefore dismissed as the actions only amounted to horseplay in the perception of the court.

_Beseau v. Fire Dist. No. 1_


In another case involving male-on-male horseplay, a male firefighter brought a hostile work environment claim based upon alleged harassment by his supervisor. All but one of the firefighters who worked under the supervisor were male. It was common in the station for the firefighters to curse, joke and make sexual comments. Specific incidents between plaintiff and his supervisor included his supervisor jumping into his bed and acting like he was having sex with him; references and actions by the supervisor suggesting masturbation; comments on sexual activities with Catholic school girls upon learning plaintiff attended a Catholic school; comments on plaintiff’s sexual activities with his wife; and touching plaintiff in a seductive manner.
The court noted that for plaintiff to demonstrate a sexually hostile work environment it was necessary for the actions and comments of the supervisor to be “motivated by a sexual desire” toward plaintiff. While noting that “[t]hese crude efforts at jocularity or domination do not appear appropriate even in an all-male work environment,” the court found no evidence that the supervisor’s behavior, albeit improper, was motivated by sexual desire or sexual prejudice. Therefore, the court concluded that a reasonable jury could not find that there was an abusive work environment under the law governing Title VII, and granted summary judgment in the employer’s favor.

*Pumphrey v. Lifescan, Inc.*


In this case a female employee brought a claim for a hostile work environment under Title VII due to incidents arising from her work under a male supervisor, who went on “ride with” outings with the plaintiff to monitor her work. On one occasion he called a waitress an “old coot”. He told plaintiff that he tended to make women cry and had fired a couple of women for being “too emotional.” He showed plaintiff a box of extra-large condoms and stated that those were his size. He also showed plaintiff sexual performance dietary supplements, complained about his wife getting pregnant during their first time together, and, on one occasion, asked plaintiff where his nuts were while “touching his groin area” when searching for his recently purchased snack bag of peanuts. Plaintiff did complain to the employee phone line, and the company warned her supervisor and appointed a mentor to him; however, plaintiff claimed that when the alleged harassment did not end, she simply did her best to ignore it.
The District Court emphasized that to survive summary judgment on a claim alleging a sexually hostile work environment, the plaintiff would have to show that a “rational jury” could find that the workplace was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.

[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. Thus, the court must filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender related jokes, and occasional teasing, so that the anti-discrimination laws do not become a general civility code.

The court concluded that plaintiff’s allegations were not sufficiently severe or pervasive to constitute actionable hostile work environment under Title VII, because Plaintiff had not shown that the harasser treated male employees differently or that the “harassment” was due to her sex. In addition, the court noted that subjectively Plaintiff could not have perceived her environment as hostile if she ignored it as she stated she did.
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 race, and (3) sufficiently severe or pervasive.
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. 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 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
Accordingly, the court determined that the term "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]earing, 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" 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 cowboy 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. Minea, 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.

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 employer presented evidence that 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
The equal opportunity offender is generally a crude or rude individual who treats everyone badly.
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 objectionable 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 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.