What is the Difference Between Workplace Bullying and Illegal Sexual Harassment?

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Not all employees who face bullying in the workplace have actionable sexual harassment claims against their employers. Screaming bosses, coworkers who intentionally undermine one another’s success, and supervisors who set what seem like impossibly high standards can make for an objectively “hostile” work environment. But under federal employment discrimination laws, only employees who are bullied or harassed because of their sex can assert claims for sexual harassment against their employers.¹

About Title VII

Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating against employees on the basis of sex in making any employment decisions, but also with respect to the “terms, conditions, or privileges” of their employment. 42 U.S.C. § 2000e-2(a). Discrimination affecting the “terms, conditions, or privileges” of one’s employment has been interpreted to include creation of a “sexually hostile work environment,” which is a legal term of art, through severe or pervasive sexual harassment. To constitute discrimination because of sex, actionable sexual harassment requires showing that the conduct is directed at the victim because of her (or his) gender.

As federal courts have affirmed on many occasions, Title VII is not “a general civility code” that prohibits “all verbal or physical harassment in the workplace.” Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998). Rather, it was designed specifically to protect from discrimination historically marginalized Americans within, or totally excluded from, the workplace. This includes women who, long excluded from the workplace altogether, endured pervasive and unaddressed sexual harassment in previously male-dominated places of employment. As our understanding of gender and sexuality evolved over the late 20th and early 21st centuries, the protections against harassment were extended to all employees, men as well as women, who endured sexual harassment by members of the same or the opposite sex. Unfortunately, because Title VII only bans discrimination on protected bases, it still does not protect employees who are bullied or harassed for reasons other than their sex (or one of the other traits listed in the statute).

What is Considered Harassment in the Workplace? About Equal Opportunity Jerks and Other Bad Bosses

Two common examples of workplace bullying that do not give rise to a legal claim for sexual harassment are what has become known as the “equal opportunity jerk” and employers who single out a particular employee for reasons other than his or her sex.

As the theory goes: A supervisor who bullies all of his or her employees using gender-neutral language or tactics is not in violation of Title VII because he or she treats men and women equally poorly. For example, in Acosta v. Hilton Grand Vacations Company, LLC, Civil Action No. 4:15-cv-00495, 2017 WL 1173583 (D.S.C. Mar. 30, 2017) (slip copy), a female employee’s supervisor “had
a reputation of being rude to everyone, regardless of the individual's gender[.]” *Id.* at *6. Although the supervisor’s comments toward and interactions with the employee were “rude and inappropriate,” they were no different than those directed at male employees and did not in themselves reflect “bias or . . . animus based on . . . gender.” *Id.*

Similarly, employers who single out a particular employee still may not be in violation of Title VII if the employee is singled out for some reason other than his or her sex (or one of the other protected traits listed in the statute). For example, a supervisor who bullies an employee because of a personality conflict or disagreement over the way work should be done is not in violation of the law. Supervisors frequently offer harsh criticisms to their subordinates, call them stupid or incompetent, rail at them for mistakes, shout at them, and make threatening physical gestures toward them. However harmful the supervisor’s words or behavior may be, they will not be grounds for a sexual harassment claim under Title VII, as long as they are not based on the employee’s sex.

For workplace bullying to constitute sexual harassment, the bully must create a “sexually hostile work environment” through sexualized language or behavior. Some ways that bullies create a “sexually hostile work environment” include using gender-based slurs, making constant sexualized jokes or comments, and making unwelcome romantic or sexual advances. For the reasons described above, bullying that is unconnected to an employee’s sex is not actionable under Title VII.

**What Laws Exist to Stop Workplace Bullying?**

In the absence of federal legislation prohibiting generic workplace bullying, several states are considering legislation that would provide severely bullied employees with a claim for damages if they can prove that they suffered mental or physical harm as a result of the bullying. For example, Massachusetts State Senator Jennifer L. Flanagan introduced *Senate Bill 1013*—an act addressing workplace bullying, mobbing, and harassment, without regard to protected class status—in the Massachusetts Legislature in January 2017. Specifically, the act prohibits all “abusive conduct” against employees—even if the conduct is not based on one of the protected traits enumerated in Title VII, such as sex. In fact, the act expressly distinguishes sexual harassment from more general workplace bullying, which lawmakers estimate is four times more prevalent than sexual harassment alone.

Although workplace bullying and sexual harassment often go hand in hand, only one is actionable under existing federal law. Unless and until states pass anti-bullying laws like the one under consideration in Massachusetts, employees’ ability to assert claims against their employers for workplace bullying will be limited to harassment *on the basis of sex* or one of the other protected traits enumerated in Title VII.

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1 This discussion is limited to contrasting bullying and sexual harassment, but the same analysis would apply to distinguishing workplace bullying from racial harassment or harassment on any other basis covered by the anti-discrimination statutes, such as national origin, religion, age, or disability.