

The Sliding Scale on Sexual Harrassment

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The workplace is an ever-evolving environment that continues to grow and shift from generation to generation. As corporate culture continues to change, the level of acceptable conduct also continues to evolve. What was unacceptable conduct in the workplace 60 years ago may be acceptable conduct today.

Changes such as social culture, relationships between employees, or even the economy can alter the workplace environment, which, in turn, alters what a reasonable person considers acceptable conduct. The workplace is a sliding scale of acceptable conduct and is dependent on culture, environment, and relationships to determine the balance.

Consider the phrase "Babycakes" in the workplace environment. The comment may be commonplace in one workplace environment, while in another workplace environment it may be considered offensive. Out of context, the comment certainly has a negative innuendo; however, it may not be interpreted that way if a certain employee known for 'playful' remarks made the comment to another employee who is not offended by it.

A sexual harassment claim is more than just the sexual comment or conduct — it is also the context and the environment that define it. There are two types of sexual harassment claims in Massachusetts — quid pro quo and hostile work environment claims. The following are the essential elements of each:

While the elements of a quid pro quo claim are relatively straightforward, there are additional factors to consider when evaluating whether a hostile work

Elements of Quid Pro Quo Claim

1. Harasser made unwanted sexual advances or requests, or engaged in conduct of a sexual nature.
2. The victim rejected or submitted to the advances.
- 3(a). Rejection or submission of advances, requests, or conduct is made explicitly or implicitly a part of the victim's employment, or
- 3(b). Rejection or submission of advances, requests, or conduct is used as a basis for employment decisions.

Elements of Hostile Work Environment Claim

1. Verbal or physical conduct is of a sexual nature.
2. Verbal or physical conduct of a sexual nature is not welcomed.
3. The unwelcome physical or sexual conduct has the purpose or effect of creating a hostile, humiliating, or offensive work environment.
4. The unwelcome physical or sexual conduct interferes with the plaintiff's ability to perform his or her job.

environment claim exists. With the ever-evolving and changing culture, these factors are critical to determining the type of work environment employers are providing to the employees.

Under a hostile work environment claim, an employer must consider whether the conduct in question was unwelcome. When one employee calls another employee "Babycakes," the employer must consider the context and environment in which the statement was made relative to the evolving and changing workplace culture. If the employee was a willing participant and contributor to the sexually charged atmosphere in the workplace that spawned the comment "Babycakes," then the employee making the complaint will have failed to demonstrate that the verbal and physical conduct was unwelcome. Therefore, it is very important for a company to continually evaluate the environment

and monitor the conduct of its employees.

Furthering the hostile work environment analysis, an employer must also consider whether the "Babycakes" remark unreasonably interfered with the employee's work performance. This is known as the 'reasonableness' standard. An employee's conduct must be severe and pervasive enough that a reasonable person in the shoes of the victim would constitute it as sexual harassment. This standard allows courts and juries to use common sense and an appropriate sensitivity to social context in determining whether a reasonable person would find the conduct severely hostile or abusive. Moreover, it allows the context and environment to define the nature and extent of the plaintiff's sexual harassment claim.

Another factor that an employer should consider in the hostile work environment analysis is whether the comment "Babycakes" inter-

feres with the work performance of the comment's target. This factor is known as the 'subjective' standard and requires the demonstration that the conduct was intentionally hostile, intimidating, or humiliating in a way that affected performance.

There may be situations where the conduct is offensive to the reasonable person, but not subjectively offensive to the recipient of the comment. Again, consider if a male employee referred to a female employee as "Babycakes." To the objective observer unaware of the relationship between the two employees, the comment may be offensive. However, the comment may also be subjectively non-offensive (not intentionally hostile, intimidating, or humiliating) because the two employees had been friends for years, and comments such as "Babycakes" had been flowing back and forth.

There will always be employee conduct that clearly tips the scale toward either type of sexual harassment. However, case law in Massachusetts demonstrates that courts consider the environment and context when analyzing a plaintiff's claim. By doing so, the sexual harassment claim is balanced against an ever-evolving and changing environment. Therefore, it is critical that employers not only investigate the sexual harassment claim, but also examine the environment and context of the conduct or comment.❖

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