Not Funny

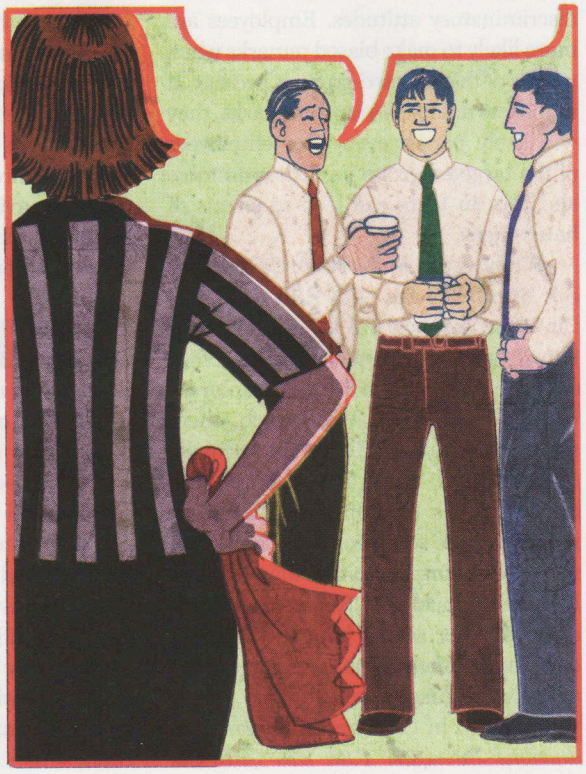
Remove the welcome mat for inappropriate jokes.

By Elaine Herskowitz

Many organizations' anti-harassment policies—even those that adopt zero tolerance—do not address racist comments, ethnic jokes and similar derogatory behaviors that occur at work when no employees object to them.

The policies typically set forth a definition of prohibited conduct that mirrors the standard under federal law. Under that definition, verbal or physical workplace conduct is prohibited if it:

- Is based on sex, race or another statutorily protected characteristic.
- Is unwelcome.
- Causes tangible job harm or a hostile work environment.



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A problem with relying on this standard: It suggests to employees the organization condones workplace conduct that would reasonably be considered offensive but is welcome to the other party or parties. This, in turn, creates risks for the employer.

A February 2008 telephone survey conducted by Novations Group, a Boston-based consulting firm, found that 45 percent of men and 38 percent of women heard sexually inappropriate comments at work in 2007. The survey found that 38 percent of employees between the ages of 18 and 34 heard age-related ridicule while only 16 percent of those over age 55 heard such ridicule. These data suggest that employees are more likely to make inappropriate remarks when in the presence of those least likely to take personal offense.

Employees who make these inappropriate remarks may assume they would not be subject to discipline. However, prudent employers will make clear they will not tolerate workplace behaviors that would reasonably be considered derogatory based on sex, race, age or another statutorily protected characteristic, regardless of whether anyone expresses offense.

Management Intervention

Consider the following scenarios:

- Workers in a small office sometimes make racist remarks and jokes. There are

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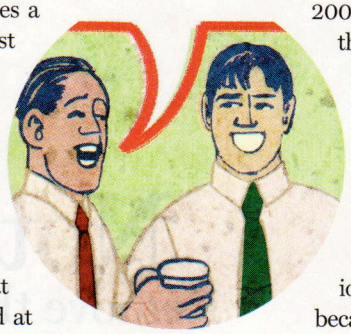
no employees of the targeted group present in the office and no one objects to the comments.

- A few male employees share sexual jokes at work when their female co-workers are not present. The jokes would reasonably be considered derogatory based on gender.
- An employee wears a turban. His co-workers jokingly call him "towel head." The employee does not seem offended and even occasionally refers to himself the same way.
- Two co-workers occasionally e-mail each other jokes that would reasonably be considered derogatory based on race, ethnicity and other statutorily protected characteristics.
- Magazine photos of nude women are posted in the men's locker room at a workplace. No one objects to the photos.

None of the scenarios seemingly presents a case of unlawful harassment, since no one is being subjected to unwelcome conduct. If a manager becomes aware of these sorts of remarks or behaviors, should he or she intervene?

Managers should intervene in these circumstances for several reasons:

- Employees who exchange remarks or engage in workplace behaviors that would reasonably be considered degrading based on sex, race or another statutorily protected characteristic cultivate biased attitudes. This can affect their behavior toward current and future employees of the targeted groups. It also likely contradicts the employer's mission of promoting a respectful workplace.
- An employee offended by a joke or remark might feel uncomfortable expressing offense. If a supervisor made the remark, the employee may feel too intimidated to express offense and may even feel compelled to laugh along.
- An employee may overhear or otherwise find out about a co-worker's or supervisor's remark and take offense. As one court has stated, the fact that an employee "learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment" (*Schwapp v. Town of Avon* 118 F.3d 106 (2d Cir. 1997)).
- Managers effectively endorse bias if they tolerate discriminatory remarks and behaviors.
- If an employee pursues a harassment claim against the organization, that claim will more likely succeed with evidence that managers were aware of but failed to stop discriminatory remarks or behaviors in the workplace even if that conduct was not directed at the employee. As the 10th Circuit has stated, "We have never held, nor would we, that to be subjected to a hostile work environment the discriminatory conduct must be both directed at the victim and intended to be received by the victim" (*EEOC v. PVNF LLC*, 487 F.3d 790 (10th Cir. 2007)).



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Discriminatory Atmosphere

Workplaces traditionally dominated by employees of one sex or race can foster discriminatory attitudes. Employees are more likely to make biased remarks when no one of the targeted group is present. If managers do not stop such remarks, they will likely persist even after employees of the targeted group join the workforce and this, in turn, can lead to claims of harassment.

For example, in *Reeves v. C.H. Robinson Worldwide Inc.* (525 F.3d 1139 (11th Cir. 2008)), Ingrid Reeves was the only female sales representative in her office and one of only two female employees in the Birmingham, Ala., branch where she worked. Reeves alleged that sexually offensive and crude language permeated the work environment. The court noted that the sex-specific profanity was more degrading to women than to men. It therefore held that Reeves could proceed with her sexual harassment claim even though she was not the target of the offensive language.

Similarly, in *Ocheltree v. Scollon Productions Inc.* (335 F.3d 325 (4th Cir. 2003)), Lisa Ocheltree was the only female employee in a costume-production shop in White Rock, S.C. The men engaged in coarse sexual talk and sexual antics. The defendant argued that the male employees' behavior was not based on sex because it was not directed at Ocheltree or women in general because of sex. The court rejected this argument, concluding that the men behaved as they did to make Ocheltree uncomfortable and self-conscious as the only woman in the workplace.

In *Schwapp*, Alvin Schwapp Jr. was the first and only black police officer in the police department in Avon, Conn. He claimed that a series of workplace incidents amounted to unlawful racial harassment. Those incidents included racially hostile comments that he did not experience first-hand but were relayed to him by fellow officers. The court found that all of the challenged incidents were relevant to Schwapp's claim, regardless of whether they were directed at Schwapp. Even incidents occurring before Schwapp's tenure at the police department could not be ignored, according to the court.

First Amendment Implications

Some might claim that employers should be mindful of employees' First Amendment rights and refrain from suppressing workplace speech if no employee has objected to it. Private employers are not subject to the constitutional restrictions applied to government employers, but even government employers should not have difficulty justifying restrictions of workplace speech that would reasonably be considered degrading based on race, sex or another statutorily protected characteristic.

In *Connick v. Myers* (461 U.S. 138 (1983)), the Supreme Court ruled that when a public employee speaks about matters of personal interest rather than of public concern, and the employer reacts by taking disciplinary action, courts generally will not review the wisdom of that action. The Supreme Court made clear that employers in such circumstances "should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."

Furthermore, courts have suggested that speech can more readily be restricted in a workplace because employees are a "captive audience" and cannot easily avoid it. Courts also have recognized that preventing workplace harassment and eradicating discrimination are compelling government interests, thereby justifying restrictions of workplace speech.

Severe discipline often would be an inappropriate response to bad jokes.

Nuanced Standard

In light of the risks of tolerating offensive remarks and behaviors in the workplace, should organizations simply adopt "zero-tolerance" policies?

While such an approach may seem forceful and administratively convenient, it is neither practical nor effective. An inflexible zero-tolerance policy requires discharge or other severe discipline for any violation, even a first offense. Yet in many cases, severe discipline would be a disproportional and inappropriate response.

More effective anti-harassment policies set forth a standard that lies between the extremes of zero tolerance and prohibition of conduct amounting to a violation of federal law. A more nuanced standard prohibits verbal or physical workplace conduct that would reasonably be considered denigrating based on sex, race, religion or another statutorily protected basis.

For example, the U.S. Chamber of Commerce offers guidelines for creating appropriate anti-harassment policies. The samples prohibit verbal or physical conduct "that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion,

▶ Online Resources

For more about harassment, see the online version of this article at www.shrm.org/hrmagazine for links to SHRM articles on current practices and trends.

For other resources on employment law, visit www.shrm.org/law.

gender, national origin, age or disability." Similarly, the EEOC's anti-harassment policy for its own workforce prohibits "hostile or abusive conduct based on race, color, religion, sex—whether or not of a sexual nature—national origin, age, disability, sexual orientation or retaliation, even if the conduct has not risen to the level of illegality." (EEOC Order No. 590.005, "Prevention and Elimination of Harassing Conduct in the Workplace.")

Employers should make clear they will undertake corrective action to stop such behavior even if no one expresses offense. The corrective action would be tailored to the severity of the behavior, taking into account the nature, degree and circumstances of the behavior as well as past history of similar misconduct.

For example, a verbal warning may be all that is required to address a first or second utterance of an offensive remark in the workplace. On the other hand, repeated remarks of this sort should result in more serious discipline.

Discussions of realistic scenarios can help clarify the conduct that violates the employer's policy.

Managers aware of racially or sexually offensive behavior in the workplace may intuitively realize they should not wait for a complaint before intervening. However, a warning will carry little weight in the absence of a policy making clear that disciplinary action will be undertaken if the behavior does not stop, regardless of whether any employees express offense.

Training

Training helps employees understand the line between appropriate and inappropriate workplace behavior. Discussions of realistic scenarios can help clarify the conduct that violates the employer's policy.

As part of a useful exercise: Have small groups of employees classify a variety of workplace behaviors as green, yellow or red light, meaning appropriate, questionable or inappropriate. The trainer can then lead discussion of the reasons why an employee should not engage in verbal or physical workplace conduct that would reasonably be considered derogatory based on race, sex or another statutorily protected characteristic even if the other party in the interaction does not seem offended.

By distributing and enforcing a carefully worded anti-harassment policy and by providing training on harassment prevention, employers can diminish the likelihood of claims. More important, these measures can help foster a productive work environment where all employees treat each other with dignity and respect. HR