# SAVE IT FOR THE BEDROOM:

## INAPPROPRIATE SPEECH AND CONDUCT HAS NO PLACE AT WORK

*By Matthew A. Peluso, Esq.*

When analyzing the persistence of sexual harassment in the workplace, I am reminded of two otherwise unrelated assertions: "We begin by coveting what we see every day" (Hannibal Lecter, in *The Silence of the Lambs,* 1991) and "power tends to corrupt" (Lord Acton, *Letter to Bishop Mandell Creighton,* 1887). Merely because an individual works with someone every day and is attracted to them doesn't mean that those feelings are reciprocated. Also, supervisory authority over a fellow employee doesn't justify or excuse unwanted sexual advances or inappropriate language and conduct in the workplace.

Our country has been steadily moving toward an increasingly diverse workplace over the last 40 years and will continue to do so over the coming decades. Women, minorities and members of the LGBT community now constitute a large segment of the American workplace. In fact, in many professions, women now out-number men at work, with this trend almost certain to increase over the coming decades. Therefore, it is important that all American workers, regardless of their gender or sexual preference, understand, acknowledge and respect the current dynamics of appropriate conduct at work in order to recognize, avoid and prevent sexual harassment.

Yet, over a decade into the 21st century, it is disturbing that sexual harassment continues to occur at an alarming rate in the American workplace. Despite decades of significant legislation and legal precedent at both the state and federal levels, extensive world-wide media attention, and easy access to harassment education and training, far too many American workers still fail, or refuse, to understand how their behavior can be considered sexual harassment by fellow employees. In addition, too many employers continue to ignore and tolerate sexual harassment in their workplaces, despite longstanding controlling federal and state law that clearly prohibits such conduct.

Sexual harassment is generally described as "unwelcome verbal, visual, or physical conduct of a sexual nature that is severe or pervasive and affects working conditions or creates a hostile work environment." *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 – FY 2011* (December 2012). According to Equal Employment Opportunity Commission statistics, there were upwards of 200,000 sexual harassment cases filed with the Commission between 1997 and 2013. Of course, that number does not include cases filed directly in federal court under Title VII of the Civil Rights Act of 1964, or the several hundred thousand state court harassment and discrimination cases filed throughout the country during that same time-period.

The New Jersey Supreme Court has ruled that sexual harassment is a form of sex discrimination that violates both Title VII and the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-1, et seq.* (the "LAD"). *Lehman v. Toys R Us, Inc.,* 132 N.J. 587 (1993). In this state, sexual harassment that creates a hostile work environment is prohibited under the LAD. *Erickson v. Marsh & McLennan Co.,* 117 N.J. 539 (1990). Like the other forms of prohibited discrimination under the LAD, any law enforcement agency that permits sexual harassment to occur is liable for compensatory and punitive damages to the victim.

Not surprisingly, the majority of sexual harassment claims are still filed by women against men. The EEOC has reported that in the 17-year period between 1997 and 2013, women filed over 80% of sexual harassment claims before the Commission. Most of these sexual harassment claims involve unwanted sexual advances and inappropriate touching of women by men at work. A related type of abuse known as "*quid pro quo*" sexual harassment also continues to exist in the American workplace. These types of claims involve adverse-employment retaliation and hostility directed toward the female victim for rejecting the sexual advances of a male supervisor or co-worker.

However, sexual harassment claims brought by men is a concerning trend in the workplace. Such claims increased by over 6% between 1997 and 2013 to account for 17.3% of all sexual harassment claims filed as of 2013. These claims are primarily brought by men against female supervisors, but also include male-male claims of sexual harassment. With the increase of women employees in the workplace and in supervisory positions (especially in the public sector), female-male sexual harassment is, unfortunately, becoming a more common occurrence at work.

Most federal and state discrimination laws, including our own LAD, are intentionally written to be "gender-neutral." Therefore, men are protected against sexual harassment by women and others in the workplace under the same laws that protect women from similar conduct. With the increasing realization of gender-equality in the American workplace comes the equally important obligation of gender-responsibility by all employees.

Many sexual harassment and hostile work environment claims also arise from workplace romances gone bad. Hostility between the ex-partners often becomes toxic and contaminates the entire working environment, especially in smaller police departments. Although there is a long history of successful workplace relationships (statistics indicate that many people meet their future spouse at work), many such relationships (especially short-term "hook-ups") end up creating a hostile working environment for one or both parties to the relationship, as well as for other employees who involuntarily become collateral damage.

Also, although many people have adopted hugging of non-family members as a means of social greeting and parting, it is often not appropriate in the workplace. This type of greeting can both intentionally and unintentionally lead to inappropriate physical contact between co-workers. A hand even innocently placed on an individual, or a comradely embrace of a co-worker, can be misinterpreted by the recipient as offensive or sexual in nature. Since it is never possible to fully know a co-worker's personal and private sensitivities to physical contact, or even their particular state-of-mind on a given day, the rule should be to avoid all hugging or touching of co-workers.

In the case of former San Diego Mayor, Bob Filner, his allegedly friendly embraces of subordinates apparently had the opposite effect on his recipients, who referred to them as the "Filner Headlock." Former Mayor Filner, who was forced to resign as Mayor, ended up being criminally charged for his conduct and ultimately pled guilty to felony false imprisonment and battery charges. In addition, the City of San Diego has settled one sexual harassment case brought by a Filner victim, paying $250,000 to a woman who worked for Filner as his communications director and claimed that he grabbed and made lewd remarks to her, such as asking to see her naked.

The "no-touching" at work rule should also be applied in same-sex interactions as well. With the increasing number of openly gay and lesbian individuals in the American workplace, physical contact between same-sex employees can be as offensive and sexually inappropriate, whether intentionally or inadvertently, as between male and female colleagues.

Law enforcement officers perform a dangerous job, work long hours and deal with tremendous stress. For the most part, these factors create a positive, close and unique bond between law enforcement officers. Unfortunately, they can also be used as a pretext by sexually aggressive and abusive officers to verbally and physically assault, harass, humiliate and intimidate subordinate and fellow officers.

I am currently representing law enforcement officers in this state who have been sexually abused and harassed at work by both higher-ranking and fellow officers through conduct that should only take place on the set of a pornographic film. Harkening back to the days when young female "secretaries" were openly sexually assaulted and chased around desks by their lecherous bosses, my clients confirm that sexual assaults, such as bottom-smacking and breast-groping, as well as patently lewd, and, in fact, disgusting, sexual conversation and comments, continue in many law enforcement agencies.

As an attorney who represents victims of sexual harassment in law enforcement and who also counsels law enforcement agencies on ways to ensure a sexually non-hostile work environment, the best rule is to keep all physical contact (other than hand-shaking), and sexual speech (even alleged jokes) out of the station. Even though an officer may think that he/she is just being funny, complimentary or harmlessly flirtatious, the reality is that one person's joke is another's insult. Further, since sexual conduct and humor have nothing to do with a law enforcement officer's job duties, they should leave such behavior in their bedrooms.

Also, given their sworn duty to uphold the law and to protect citizens, law enforcement officers should never engage in workplace conduct that violates criminal or civil law. As law enforcement officers know, they are held to a higher standard of conduct then civilians. For law enforcement officers to arrest civilians for sexual assault and harassment only to engage in similar conduct back at the station with their co-workers is the type of hypocrisy that doesn't sit well with the public or juries.

There is an old and crude expression about not performing a particular bodily function in the same area where one also eats. When it comes to sexual behavior and language in the workplace, the same logic should apply: Do it somewhere else.

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