

Borderline harassment worry? Take it seriously before it escalates into a lawsuit

There's a fine line between horsing around and true sexual harassment. But if you ignore that line—or guess wrong about whether a supervisor has crossed the line—you may find yourself at the mercy of a jury.

The best approach is to investigate every complaint and take quick action even in borderline cases.

Recent case: John Cherry worked on a survey crew. Almost immediately, his male supervisor began making Cherry uncomfortable. He said his boss regularly complimented his looks. Plus, Cherry said, the supervisor brushed up against him whenever the opportunity arose. Cherry claims he told the supervisor to keep his comments and his body to himself.

Then the text messages began. The first was a simple sexual proposition. A few days later came another: “ur 2 sexy. U drive me insane.” Other suggestive texts followed.

In addition, Cherry said the supervisor began touching him while they drove to survey sites, even going so far as to stroke his buttocks. Once, when Cherry fell asleep while riding to a work site, the boss touched his hair and rubbed his shoulders. Finally, the supervisor invited Cherry to stay overnight at his house and suggested Cherry could “wear my underwear.”

Cherry and another supervisor began complaining up the chain of command. At each step, they were met with comments that the behavior was just “horsing around.”

Even HR seemed powerless to intervene. It concluded that there was not enough evidence to support a harassment complaint and that it was “one word against the other.”

Finally, Cherry was allowed to transfer. But the supervisor continued to make Cherry feel uncomfortable, so Cherry resigned. Then he sued.

A jury concluded he had been the victim of same-sex harassment, based on the supervisor's apparent sexual interest in Cherry. But the judge rejected the verdict, so Cherry appealed.

The 5th Circuit Court of Appeals reinstated the jury's verdict. It reasoned that there was plenty of evidence that this wasn't innocent horseplay, but rather true same-sex sexual harassment based on a supervisor's apparent sexual interest in a subordinate.

It also concluded that the company ignored Cherry's complaint when it refused to take it seriously, making it liable for supervisory harassment. (*Cherry v. Shaw Coastal*, No. 11-30403, 5th Cir., 2012)

Final note: Same-sex harassment cases require some evidence that the harasser is motivated by sexual desire rather than merely trying to humiliate the object of the harassment. In this case, that evidence consisted of the text messages and testimony from another employee, who described the supervisor's touching as akin to how he touched his wife. The company's argument that Cherry was overly sensitive to homo-erotic joking wasn't

persuasive.

Advice: You don't want to be in the business of determining whether conduct is sexually oriented or merely humiliating. Ban all such conduct. After all, none of it is productive or appropriate in the workplace, no matter the motive.