

There is no such thing as a "license to harass"

To establish an unlawful hostile work environment, an employee must prove, among other factors, that the workplace was *subjectively* offensive. Some employers misinterpret this requirement as meaning that an employee who participates in sexual banter, off-color jokes, or shares intimate details of her personal life is asking to be harassed.

Case in point? In [*EEOC v. Joe Ryan Enterprises \(M.D. Ala. 3/28/13\)*](#), the employer attempted to defend against a sexual harassment lawsuit by arguing that it had a "license" to harass the plaintiff, presumably because of her earlier participation in similarly offensive misconduct in the workplace. The district court was not having any of that argument, and granted the EEOC's motion to prohibit the employer from raising that defense:

The Court has come across no authority to support Joe Ryan's proposition that the defenses of "license" and "ratification" apply in a sexual harassment/constructive discharge context....

Still, even if the Court were to entertain this defense, it is clear that what Joe Ryan has argued is a far cry from the traditional defenses of "license" and "ratification." Indeed, in its opposition brief, Joe Ryan claims that Ms. Brown's "eager, enthusiastic and contributory participation to the acts and language she now complains of" evidences her purported "license" and "ratification" of the discriminatory conduct she endured while employed with Joe Ryan.

In Joe Ryan, the employee allegedly hung a sexually suggestive cartoon in a work trailer. Just because an employee engages in some workplace banter, however, does not mean that she acquiesces to all forms of sexual misconduct, such as being called a "whore" (one of the allegations in the case).

Employers need to build these concepts into their workplace anti-harassment training. Employees need to understand that some participation in sex-based workplace hijinks does not create a license to harass in perpetuity. No one can tell where someone draws his or her personal line of inappropriateness, and trying to make that decision for someone else can only result in trouble (i.e., a lawsuit) down the road.