

Key Points:

- **Crude conduct isn't always sexual harassment**
- **Behavior must be unwelcome to be sexual harassment**
- **Agencies can use discipline to head off hostile work environment claims**

Lewdness isn't necessarily sexual harassment

By Melissa Turley, **cyber FEDS®** Washington Bureau

WHAT IT IS: WASHINGTON -- Any EEO practitioner would agree that sexual harassment should not be tolerated in the workplace. But what behavior meets that threshold isn't always so clear-cut.

Federal employment attorney Josh Bowers said that "simply boorish or offensive" behavior won't always be harassing. But like Supreme Court Justice Potter Stewart said, "I'll know it when I see it."

"Sexual harassment is treated on a case-by-case basis," Bowers told **cyber FEDS®**. "It depends on the facts of each case. The Equal Employment Opportunity Commission has a low tolerance for invading the space of any person. Work is a place to be productive. It is not a place to be abused or molested."

So, does catcalling qualify as harassment? What about inappropriate gestures or back rubs?

"An agency probably doesn't want employees going around and rubbing each other's shoulders, but that doesn't make it sexual harassment," Bowers said.

What does make the act sexual harassment is if an employee's conduct is:

- * Unwelcome.
- * Related to gender or sex.
- * Interfering unreasonably with complainant's work performance or creates an intimidating, hostile or offensive work environment.

That was the situation in *Gray v. Department of the Interior, National Park Service*, [109 LRP 48581](#) (EEOC OFO 07/24/09). A secretary alleged her supervisor rubbed her shoulders, called her into the office to pick trash up off the floor in front of his desk, and asked a coworker what kind of bra she wore, among other behaviors. These actions occurred over the course of more than three years.

The EEOC found the complainant was subjected to sexual harassment, and the agency could not avoid liability because it failed to respond properly to her harassment claims by not following up with training for her supervisor and by delaying investigation of subsequent harassment claims.

What to do

Agencies need to react quickly and effectively to [avoid liability](#) .

"It's not as if you should wait to meet the legal threshold of what is sexual harassment," Peter Mina, an attorney with Tully Rinckey PLLC, said. "If an employee comes to a manager complaining of sexual harassment, deal with it. What's important is employers don't want to appear to be ignoring what could become a hostile work environment."

Prompt corrective action can have a positive effect and curb liability. In *White v. U.S. Postal Service*, [109 LRP 42533](#) (EEOC OFO 07/07/09), an employee complained she was sexually harassed when a coworker rubbed the lower part of her right leg with his hand. But the EEOC found the agency was not liable for the coworker's conduct because it took immediate, appropriate action. A supervisor conducted a formal investigation of the incident. The coworker apologized and four other employees in the area at the time indicated the interaction was playful.

The agency issued the coworker notice of a seven-day, no-time-off suspension for improper conduct.

Mina suggests a verbal reprimand or, if warranted, a written reprimand that creates a record which an agency could later argue shows an attempt to rectify a hostile work environment.

Like with any employment action, practitioners must consider the [Douglas Factors](#) , established in *Douglas v. Veterans Administration*, [81 FMSR 7037](#) , [5 MSPR 280](#) (MSPB 1981).

Resources on **cyber FEDS®**:

- [Quick Start Guide: Sexual Harassment -- Employee Relations](#)
- [Quick Start Guide: Sexual Harassment -- EEO](#)
- [Checklists Plus+: Preventing and Responding to Sexual Harassment Claims](#)

Also, see [Preventing and Responding to Sexual Harassment in the Federal Workplace](#) in our [online store](#) .

October 14, 2009