

## OP-ED: Lessons learned from inappropriate 'locker-room banter'

By: Anthony Kuchulis in Compliance Corner October 26, 2016 3:21 pm

On Oct. 7, the Washington Post reported on a video depicting Donald Trump and Billy Bush having an extremely lewd conversation about women in 2005. Trump's first public response to the video was that "this was locker-room banter – a private conversation that took place many years ago."

The story sparked a national dialogue about gender issues and sexual assault. In the workplace, inappropriate conversations or comments of a sexual nature are often the basis for internal conflict and can result in exposure to civil liability. Below is an outline of how employers could respond if a situation similar to the Trump-Bush conversation arose in their workplaces.

For our hypothetical situation, let's assume the comments at issue were made by a male supervisor, in a semi-private conversation, and were not recorded. Let's further assume that the statements had two components: 1, the supervisor commented that he had tried to date a co-worker and been rebuffed; and 2, the supervisor rated women based on attractiveness. Obviously, this is not what was said in the Trump recording. If any evidence existed that a supervisor had boasted about kissing or sexually touching co-workers (or anyone) without consent, the employer would obviously have grounds to terminate the person's employment immediately.

Upon learning of the statements, an employer should convene an investigation. One of the first steps is to select an appropriate person to conduct the investigation. The investigator should be perceived by others as fair, and should not be subordinate to the alleged wrongdoing. If an employer looks to select a non-employee to serve as the investigator, the individual must be a licensed private investigator or attorney.

The investigator will select the relevant witnesses, including the reporting party ("complainant") and the supervisor that is alleged to have made the comments ("respondent"). The investigator should also question any employees referenced in the statement, or employees mentioned by the complainant or respondent. The employer should consider the need to implement safeguards to ensure a fair investigation, such as placing the respondent on leave during the investigation, especially if the alleged conduct is highly offensive or if there are reasonable concerns that employees will not speak freely if the respondent is still in the workplace.

The statements at issue here should be evaluated as potential gender discrimination, specifically sexual harassment. Sexual harassment takes two forms: hostile work environment and quid pro quo. The first statement at issue, regarding the respondent's advances being rebuffed by a co-worker, raises concerns about hostile work environment and quid pro quo, but we will focus on the latter.

Quid pro quo (Latin: "this for that") involves situations where a supervisor, manager or executive favors or disfavors an employee based on the employee's response to sexual advances. Using our hypothetical

situation, a statement from the supervisor about being rebuffed by a co-worker should raise alarm, especially if the employee reports to the supervisor in any capacity. All future conduct by the supervisor may be colored by the earlier rejection and that could constitute unlawful quid pro quo sexual harassment.

The future conduct by the supervisor directed at the employee need not be severe or immediate to be circumstantial evidence of quid pro quo discrimination. It could be as minor as not assigning the employee a desirable project, or as delayed as six years later suggesting the employee should be fired. For this reason many employers implement policies that forbid supervisors from dating employees, or require that the employer be informed of internal relationships so that it can ensure employees are not making workplace decisions based on a romantic or previous romantic relationship.

The second statement in our hypothetical situation, a supervisor rating women based on attractiveness, primarily raises concerns regarding hostile work environment sexual discrimination. Such discussions, especially at work, would certainly be inappropriate and unprofessional, but to create a hostile work environment the comments must be: 1, severe or pervasive; and 2, objectively offensive.

To illustrate, a severe and offensive comment would be a supervisor boasting about touching or kissing women without consent. That statement, if said once, would very likely cause distress and discomfort among other employees. On the other hand, a mildly offensive comment, if pervasive, can also create a hostile work environment. For example, a supervisor overheard talking about how attractive someone is, without saying more, likely would not create an objectively hostile work environment. But a pattern of statements objectifying women based on their attractiveness would almost certainly be offensive and disruptive.

Once an employer has thoroughly evaluated and investigated the situation, it must determine an appropriate response. The employer should consider the law, but also company policies, values and interpersonal dynamics. The employer's response can range from counseling the supervisor about the issues, drafting a "last chance" agreement or proceeding with termination immediately.

Employers should use this opportunity to confirm that they have policies that forbid discrimination based on sex, or any other protected reason, and policies that clearly outline expectations and values. If an employer is concerned that the supervisor's comments may reflect a larger issue with the company's culture, it should consider employee and management trainings. Above all, stay vigilant; if this can become an issue in a race for the highest office in the land, it can become an issue in your office.

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