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PERSPECTIVE

Horrible bosses: Does the law allow you to be a jerk at work?

By Rob Hudock

Former employees of Scott Rudin have alleged the prominent Hollywood and Broadway producer engaged in extreme workplace conduct, including shouting, intimidation, throwing objects at employees, and destroying office equipment.

Rudin, who has since announced he is “stepping back” from production to “work on personal issues,” is no doubt feeling the heat in the public sphere. But does his alleged conduct necessarily constitute illegal workplace harassment?

You may be surprised to learn that the answer is no, and that not all workplace “harassment” is illegal. As one court states in this context, “being a jerk is not illegal.”

Anti-harassment laws, such as harassment provisions within the California Fair Employment and Housing Act and Title VII of the federal Civil Rights Act, do not prohibit all workplace conduct that may be fairly characterized as “harassing.” As multiple California courts have stated, the California FEHA “is not a civility code.”

The most common type of unlawful harassment is “hostile work environment” harassment, which Rudin’s alleged conduct may have been. Unlawful hostile work environment harassment is conduct that is both:

(1) “so severe or pervasive” as to “alter the conditions of the victim’s employment and create an abusive working environment” for that victim, and

(2) “based on” or “because of” an employee’s characteristic within a category specified in the anti-harassment law as being protected.



New York Times News Service

Producer Scott Rudin, center, at Radio City Music Hall in New York, June 11, 2017.

An example of severe harassing conduct is offensive touching, while pervasive conduct is conduct that occurred at least somewhat regularly over several years. Examples of protected categories include sex/gender, race, and national origin. The categories protected under the FEHA are “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status.”

Rudin’s alleged conduct was certainly inappropriate, but was it illegal? It may have been sufficiently severe or pervasive collectively across the workplace, but the relevant inquiry is whether

conduct to which an individual employee claimant was exposed was sufficiently severe or pervasive to constitute a hostile work environment for that employee.

Then, even if conduct to which the employee was exposed was sufficiently severe or pervasive, that by itself does not establish illegality. To constitute unlawful harassment, the conduct to which the employee was exposed — either through conduct directed at him or her, or at another employee or employees that the employee claimant personally observed — must also have been based on or because of a protected characteristic of the employee claimant, or in the case of conduct directed at other employees, a shared protected characteristic.

To illustrate these concepts, consider one former Rudin assistant’s allegation, as reported in the *Hollywood Reporter*, that Rudin “threw a baked potato at his head” for not knowing that a certain person was in the office lobby. Was this alleged conduct unlawful harassment?

More information is needed to answer that question. An employee who was not present for this alleged incident, or was present but did not share the protected characteristic claimed to be the basis of the alleged conduct, could not use evidence of that conduct to show a hostile work environment for his or her own harassment claim.

If the former assistant alleged only this one incident as a basis for a harassment claim, it may

or may not be sufficiently severe (which could possibly depend on whether the potato hit him), but it would definitely not be sufficiently pervasive.

Even if Rudin threw and hit the former assistant with an object twice a week for two years, and therefore would be both severe and pervasive, it would not necessarily be unlawful harassment. If it was shown that Rudin threw objects at him not because, for example, he is a man, or Asian-American, but instead because he simply did not like him personally; or, he threw objects at both male and female employees of multiple races (so-called “equal opportunity harassment”.) his object-throwing

would not be illegal harassment based on gender or race.

If in those circumstances it was also shown that Rudin’s alleged object-throwing was not based on or because of any other protected characteristic of the assistant, that conduct would not constitute unlawful harassment (although it could be otherwise unlawful, such as civil or criminal assault and/or battery).

While in most instances bullying can also be called harassment, workplace bullying not connected to a protected characteristic is not illegal under anti-harassment laws. Some states’ anti-harassment laws reference category-neutral bullying. California regulations provide that harassment train-

ing must include instruction and discussion such bullying, but California law goes no further regarding that.

Category-neutral bullying has not been declared unlawful under any anti-harassment law. “Microaggressions” have been defined as “common, everyday slights and comments” that relate to characteristics that define one’s identity, such as gender/sex, race, and ethnicity. If we accept this definition, microaggressions are by definition conduct based on or because of a protected characteristic. However, it could be difficult for a claimant to show that “common everyday comments” are based on or because of a protected characteristic. The

conduct that some consider to be microaggressions may not be sufficiently severe or pervasive to constitute unlawful harassment.

Under Hollywood’s limelight, it’s unlikely Rudin will escape the consequences of his alleged poor behavior, and major publications are covering the story extensively. But if these stories bring to mind any memories of your own horrible bosses and the potential for action against them, just know that it’s a tall hill to climb. ■

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