

SAME-SEX HARASSMENT: HOW HOSTILE DOES IT HAVE TO BE?

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Introduction

In 1980 the Equal Employment Opportunity Commission (EEOC) issued regulations on sexual harassment in the workplace under Title VII of the Civil Rights Act (29CFR1604.11). These guidelines were upheld in 1986 by the Supreme Court in its landmark *Meritor Savings v. Vinson* ruling. These guidelines have since been broadened to include harassment based on race, color, religion, pregnancy, national origin, genetic information, and age (EEOC.gov, 2013). Same-sex harassment was recognized by the Supreme Court in its 1998 *Oncale v. Sundowner Offshore Services, Inc.* decision.

Same-sex harassment is worthy of study for several reasons. Gay, lesbian, bisexual, and transgender persons (LGBT) are estimated to be between 5% and 10% of the population (Domestic Partnership, 2011). Increasingly, more employees are coming out of the closet. This is likely due to a variety of contemporary events such as the legislation in a number of states legalizing same-sex marriage and outlawing LGBT discrimination (McVeigh, R., 2009). Some twenty states now protect sexual orientation and another ten states protect LGBT state/public employees (Buckley and Green, 2012). There has also been a great deal of media attention pertaining to LGBT rights issues, not to mention various LGBT related Movies and TV shows. Moreover, a greater number of private and public sector organizations are publishing diversity policies that are inclusive of LGBT (Colgan, et al, 2007). All of these events have no doubt had some influence on the doubling of same-sex harassment charges with the EEOC over the last five years (Ed., 2012).

Additionally, there has been comparatively little recent research on court interpretations of the harassment guidelines as it applies to same-sex harassment since *Oncale v. Sundowner Offshore*

Services, Inc. (1998). In fact, Kirshenbaum (2005) speculated that it would be important to know in what way the lower courts would interpret the Supreme Court's conservative ruling in *Oncale*.

Given its controversial nature, the complexity of regulations on the subject, and growing number of lawsuits, it would be helpful to review the case law since *Oncale*. In particular, the review should focus on the conditions under which same-sex harassment is actionable and the EEOC's definition of hostile environment. It is these two areas where there is the most confusion and litigation.

To that end, a LEXIS-NEXIS key word search yielded over 60 cases at the appeals court level (chosen because the legal principles are more settled and accepted than at the district level) since *Oncale v. Sundowner Offshore Services, Inc.* (1998). Over 40 usable cases were identified and examined for guiding principles. Cases cited are representative or highlight special issues/circumstances that assist in determining when same-sex harassment is actionable or when the hostile environment is breached. Recent district court cases were included to highlight current trends or special situations consistent with higher level court rulings. Recommendations for administrators and legislators are provided.

LEGAL BASIS FOR SAME-SEX HARASSMENT

In *Oncale* (1998) a roustabout on an eight-man oil platform crew was forcibly subjected to brutal sex-related conduct by some of his male-co-workers in the presence of the crew. A male co-worker also assaulted him in a sexual manner and threatened him with rape. When made aware of this conduct, management took no action (*Oncale v. Sundowner Offshore Services, Inc.*, 1998).

In reversing the lower court's decision denying the claim, The Supreme Court noted that Title VII does not prohibit all verbal or physical harassment in the workplace:

“it is directed only at discrimination...because of...sex. The critical issue... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. As we emphasized in *Meritor* and *Harris*, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the conditions of the victim’s employment” (*Oncale v. Sundowner Offshore Services, Inc.* at 85).

In *Oncale*, the Supreme Court delineated three avenues by which victims may proceed with a same-sex harassment claim. They are explicit or implicit proposals for sexual-related activity, behavior motivated by a general hostility toward a particular gender, or evidence that the sexes were treated differently in the workplace (*Oncale v. Sundowner Offshore Services, Inc.*, 1998). Each will be reviewed in turn.

Sexual Overtures

Patrick LaDay vs. Catalyst Technology (2002) is an often cited case. A reactor technician experienced several incidents of sexual harassment by his supervisor for about thirty days. After observing the passion marks left by his girlfriend, the supervisor stated “I see you got a girl. You know I am jealous” (*Patrick LaDay vs. Catalyst Technology* at 480). On another occasion, the supervisor caressed his rear as a heterosexual male would when fondling a female while he was bent over working. The supervisor would also ask him to sit in his lap and would tell him that he had “pretty lips” and that he could “suck his dick” (*Patrick LaDay vs. Catalyst Technology* at 481).

After rebuffing these advances the supervisor allegedly spit tobacco on him saying “this is what I think of you” (*Patrick LaDay vs. Catalyst Technology* at 481). The court found sufficient evidence to demonstrate that he was a homosexual given that the harasser stated he was jealous of the plaintiff’s girlfriend, the conduct contained explicit overtures for sex, and that he had made sexual advances previously to two other male employees (*Patrick LaDay vs. Catalyst Technology*, 2002).

Recently, a coffee station worker at an upscale Italian restaurant in Manhattan was subjected to homosexual advances and acts for nearly three years by his supervisor who was openly gay (*Arturo Caravantes v. 52rd Street Partners*, 2012). His supervisor made many sexual comments such as “let me kiss it” and “let me suck it” (*Caravantes v. 52rd Street Partners* at 16). He would also frequently touch the victim at his workstation in a sexual manner such as putting his hand down his pants and groping him or forcing him to endure oral sex on nearly a daily basis (much of this was caught on video tape) even though he objected. Given that the supervisor was a self-admitted homosexual and the conduct was clearly homosexual sex-related acts the court concluded that the because of sex standard had been met.

Redd v. New York State Division of Parole (2012) is a case where the sexual overtures were more subtle. Over a five-month period, a female parole officer endured sexually-related touching by a female supervisor. The supervisor first brushed up against her breasts in such a way that she spilled the water she was carrying, then a few months later she came up to her and felt her breasts and then did it again, sometime later, in in front of another parole officer. The supervisor (was not her direct supervisor) repeatedly called her to her office and would go out of her way to visit the victim at her office. There was no direct evidence that the female supervisor was a lesbian. However, the victim inferred that all of the conduct was homosexual advances. The

court agreed that any reasonable person would draw the same inference and allowed the case to go forward (*Redd v. New York State Division of Parole*, 2012).

Similarly, in *Cherry v. Shaw Coastal*, (5th Cir. 2012), an instrument man on a survey team had a manager subject him to an array of homosexual advances for over six months. These included the supervisor brushing up against the victim, asking him to take his shirt off, to wear cut-off jeans, and suggesting that he take his pants off as well. All of these actions were made to be known that they were unwelcome. The plaintiff also began receiving text messages such as “I want cock”, “your too sexy”, “you drive me insane”, “your sexy voice puts me to slumber”, “you don’t need to wear any clothes”, and “you can wear my underwear” (*Cherry v. Shaw Coastal*, at 186). The harasser regularly touched the victim “like I do my wife” he said” (*Cherry v. Shaw Coastal*, at 189). This included caressing his leg, shoulder, rubbing his hair and on at least one occasion placed his hand on the plaintiff’s buttocks.

Even though the supervisor was married and not a known homosexual, the Fifth Circuit of Appeals felt that the evidence presented by the plaintiff was by its very nature were clearly sexual advances. As a result the appeals court vacated the district court’s ruling for the defendant (*Cherry v. Shaw Coastal*, 2012).

Conversely, not all sexually-related behavior indicates overtures for sex. For example, in *Wasek v. Arrow Energy Services* (6th Cir. 2012), one of the workers found that he could get the victim upset with sexually explicit stories when they roomed together during a trip. Back on the job, he began making numerous sexually-related comments and actions toward him such as “you’ve got a pretty mouth,” “boy you have pretty lips,” and “you know you like it sweetheart” (*Wasek v. Arrow Energy Services* at 688). He told him many sexual explicit stores, jokes, and fantasies, and he would also grab the victim’s rear or poke him there with a hammer handle or a

long sucker rod. The plaintiff argued that he was bisexual and was “coming on” to him but provided no proof that he was bisexual. Given the context of the harassment one could not conclude the actions were not serious propositions for sex. As a result, the summary judgment of the district court was upheld (*Wasek v. Arrow Energy Services*, 2012).

Gender Hostility and Unequal Treatment of Sexes

Of the three cases found, two were related to gender hostility but were also intertwined with the sexes being treated differently. This makes sense in that if there is general hostility toward a particular gender, then, the natural tendency would be to treat that gender differently than the preferred gender.

Chavez v. Thomas & Betts Corporation (2005) is an illustrative case. A female supervisor at a manufacturing facility routinely harassed the women under her. In particular, the plaintiff testified that for the year she reported to her, she made humiliating comments about her in front of men regarding her intimate body parts, with whom and how she had sex, and the kinds of sex toys she used. The supervisor often had men guess what kind of underwear she was wearing and to determine if they could see through her pants and shirt. Men were encouraged to harass her. She once wanted to know if the victim’s hair color matched her public hair.

Physical harassment included her publicly stating that the plaintiff’s “bra is probably prettier than mine” and then reaching over and pulling open her shirt exposing her chest and bra (*Chavez v. Thomas & Betts Corporation* at 405). The plaintiff quickly closed her shirt and felt humiliated and embarrassed (*Chavez v. Thomas & Betts Corporation* at 405). On another occasion she came up behind her and pulled open her pants exposing her underwear to coworkers. Witnesses testified that the supervisor was very hostile and bitter toward all women and usually referred to them as “bitches” (*Chavez v. Thomas & Betts Corporation*, 2005). However, she treated men as respected

colleagues. Not only was there evidence of gender based hostility but there was also unequal treatment of the sexes. Consequently, the Tenth Circuit of Appeals upheld the jury verdict for the plaintiff (*Chavez v. Thomas & Betts Corporation*, 2005).

In another case, a female IS supervisor over the course of a year would berate, criticize, and scream at her only female computer operator during meetings (*Margaret Piston v. County of Monroe*, 2012). She would call her a “bitch” in front of others and go on daily screaming rants. She told others not to ask her for assistance, made her work longer hours, gave training opportunities only to males, and once made a comment about her bra in front of male colleagues. Other than the bra remark there was nothing sexual about the harassment. Male employees did not experience similar treatment. The district court denied summary judgment on the basis of the hostility shown her as a female and the unequal treatment of the genders (*Margaret Piston v. County of Monroe*, 2012).

The Sixth Circuit of Appeals sustained a jury verdict in a case of unequal gender treatment at Harbert-Yeargin (*EEOC v. Harbert-Yeargin, Inc.*, 2001). At Harbert-Yeargin, several hourly workers’ testicles were grabbed on several occasions by their male supervisor. Other touching incidents occurred several times daily. Coworkers taunted one of workers for filing a complaint with various sexually related actions and comments. Female workers were never inappropriately touched (*EEOC v. Harbert-Yeargin*, 2001).

Sex Role Stereotypes

The federal appeals courts generally allow a fourth avenue based on nonconformance with sex-role stereotypes by which same-sex harassment cases may also be litigated (*Schwenk v. Harford*, 2000; *Rosa v. Park West Bank & Trust Co.*, 2000). This rationale has been derived from the Supreme Court’s now famous *Price Waterhouse v. Hopkins* decision in 1989. In *Price Waterhouse*

(1989), a female manager was denied partnership because she was too “macho” and that she needed to walk, talk, dress, and style her hair more femininely and to wear make-up and wear jewelry (*Price Waterhouse v. Hopkins*, 1989). The court noted that “ as for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group” (*Price Waterhouse v. Hopkins* at 251).

Glenn v. Brumby (2011) is such a case. After working as an editor in the Georgia General Assembly’s Office for many years under medical supervision began transitioning from a man to a woman. He first came dressed as woman at company Halloween party. She was told by her supervisor that her appearance was inappropriate because he was a man dressed up as a woman and to leave the party. When she objected she was further told that “it’s unsettling to think of someone dressed in women’s clothing with male sexual organs inside that clothing and a male in women’s clothing is unnatural” (*Glenn v. Brumby* at 1316). Sometime later when she was ready to proceed with gender transition and dressing as a woman at work she was told that her “intended gender transition was inappropriate, that it would be disruptive and that some people would view it as a moral issue, and that it would make her coworkers uncomfortable” (*Glenn v. Brumby* at 1316). She was then terminated. The Eleventh Circuit of Appeals in affirming the summary judgment for the victim found that there was no other basis for the termination than nonconformity with gender stereotypes (*Glenn v. Brumby*, 2011)

In *Nichols v. Azteca* (2001) a male waiter, even after complaining to management, endured harassment from co-workers because he carried his serving tray like a woman. The Ninth Circuit of Appeals reversed the summary judgment for the defendants and allowed the case to go forward on the basis gender stereotype harassment (*Nichols v. Azteca*, 2001).

In *Powell v. Wise Business Forms, Inc.* (2009) a machine operator who worked for a producer and distributor of business forms was harassed for 13 years because he acted too much like a woman and did not conform to the male stereotype. His mannerisms were effeminate in the way he dressed, sat, walked, groomed, and his interests. He was called Princess, Rosebud, and fag. Comments were often made to him about filing his nails, the way he sat, walked, and dressed. Harassing messages eventually began appearing in the bathroom. In remanding the case the appeals court noted that while some of the harassment was because he was gay (not protected conduct) much of it was due to the fact that he did not conform to the male stereotype which is protected conduct (*Powell v. Wise Business Forms, Inc.*, 2009).

However, often as not, the harassment is because the person is gay or lesbian rather than being stereotype based as occurred in *Simonton v. Runyon* (2000). In this case, a postal worker suffered severe harassment in terms of derogatory comments, name calling, graphic pictures, and the like all because of his sexual orientation. No proof was offered that it was because of gender stereotyping. As a result the summary judgment for the employer was upheld (*Simonton v. Runyon*, 2000)

SAME-SEX HOSTILE ENVIRONMENT

EEOC guidelines on sexual harassment state: “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature...when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment” (29CFR1604.11).

It is the third definition that deals with hostile environment cases and is the focus of this article. These guys apply to same-sex harassment as well once the plaintiff has demonstrated that she/he has an actionable case because of sex. Hostile environment guidelines deal with cases where unwelcome sexually related conduct has been made unwelcome and has then adversely affected a worker's work performance or has created an abusive work environment where a worker feels humiliated, threatened, or abused. In the remainder of this article we examine court cases that define and interpret this third definition of hostile sexual harassment as it apply to same-sex cases.

In *Faragher v. City of Boca Raton*, the Supreme Court articulated the factors to be considered in interpreting the EEOC guidelines and determining hostile environment claims filed under Title VII (*Faragher v. City of Boca Raton*, 1998). First, it must "be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive" (*Faragher v. City of Boca Raton*, at 286). Next, all facets of the circumstances must be reviewed, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" (*Faragher v. City of Boca Raton*, at 286).

The Supreme Court did note that "Title VII does not prohibit genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and the opposite sex. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment" (*Faragher v. City of Boca Raton*, at 286). The *Faragher* Court when on to say that the guidelines when properly applied would filter out "the ordinary tribulations of the work place, such as the

sporadic use of abusive language, gender-related jokes, and occasional teasing (*Faragher v. City of Boca Raton*, at 286).

Physical Contact

Findley, et al. (in press) point out that the courts have generally found physical contact to be the most serious form of sexual harassment and takes only a few incidents to create an abusive work environment.

In *Redd v. New York State Division of Parole* (2012) reviewed above, even though the three touching incidents were over a fifteen month span the court stated “the repeated touching of intimate parts of an unconsenting employee’s body is by its nature severely intrusive and cannot properly be characterized as abuse that is minor” (*Redd v. New York State Division of Parole* at 183). As a result the summary judgement for the defense was vacated and the case was allowed to go to trial. Obviously, more severe and humiliating forms of physical contact such as requiring sex acts that a restaurant worker in *Arturo Caravantes v. 52nd Street Partners* (2012) had to bear to keep his job creates a hostile work environment.

Hostile Environment

Patrick LaDay vs. Catalyst Technology, 2002

other cases cite the following...friendly gestures to a same-sex subordinate such as bring her food but did not engage in any hint of sexual innuendo not proof of homosexuality....subjective belief the harasser was gay not enough...being harassed or humiliated because they think the person is gay is enough...in this case action was sexual in nature and there were two previous incidents enough to show supervisor was gay...the anal touching and other actions were arguably severe and need not have been frequent enough to be pervasive...hostile environment....remanded...

Cherry v. Shaw Coastal, (5th Cir. 2012)

Supervisor was married...clearly because of sex..witnesses..deliberate and unwanted touching of intimate body parts can constitute severe sexual harassment....Harvil v. Westward Commons, 433 F.3d 428 (5th Cir. 2005)...one touch was enough La Day v. Catalyst Technology, 302 F.3d 474 95th Cir. 2002)...

EEOC v. Harbert-Yeargin

the touching incidents severe...other actions occurred nearly every day...severe and frequent...evidence that his performance was adversely affected as well...

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