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NARROWING THE LEGAL DEFINITION OF "HOMOSEXUAL": ESTABLISHING SEXUAL DESIRE AS A MOTIVE FOR SAME-SEX SEXUAL HARASSMENT

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ABSTRACT

As actionable claims under Title VII of the Civil Rights Act of 1964, the number of same-sex sexual harassment complaints is increasing each year. As a consequence, employers and HR professionals are confronted with establishing whether same-sex behaviors in the workplace rise to the level of being actionable sexual harassment or are merely horseplay. To establish sexual harassment, the complaining party must be able to demonstrate that he or she was treated differently because of his or her sex. Of the three recognized evidentiary routes for establishing same-sex sexual harassment, proving that the harasser was motivated by homosexual sexual desire is the least problematic. This article investigates the evolving court guidance as to what constitutes credible evidence that the harasser was homosexual, and therefore motivated by a sexual desire. To place this topic into proper context, a discussion of same-sex sexual harassment is also provided.

On August 13, 2004, the popular press reported the story that New Jersey Gov. James McGreevey had announced his resignation after revealing he was gay and had had an adulterous affair with another man. Golan Cipel, the man with whom Gov. McCreevey had the same-sex relationship, claimed he was the victim of sexual harassment [1]. Though the matter has yet to be adjudicated, the media

attention it received drew nationwide attention to the issue of same-sex sexual harassment.

Since the Supreme Court's 1998 *Oncale v. Sundowner Offshore Services, Inc.* decision, same-sex sexual harassment has been an actionable form of sex discrimination under Title VII of the Civil Rights Act of 1964 in all states and U.S. territories [2]. The problem that same-sex harassment poses for employers is differentiating whether the conduct in question is merely boorish and humiliating (but not based on the victim's sex) or whether it rises to the level of actionable sex discrimination under Title VII [3]. As will be seen, what is objectionable or distasteful is not necessarily actionable under U.S. employment law.

In regard to sexual harassment, the governing body of law comes from Title VII. This is the part of the Civil Rights Act of 1964 that prohibits employment discrimination on the basis of race, color, religion, sex, and national origin [4]. For any sexual harassment allegation to be actionable, it must first be shown to be a form of discrimination based on the victim's sex. Of the three methods for establishing actionable same-sex harassment, perhaps the easiest one for complaining parties to substantiate is that the harassment was motivated by homosexual desire on the part of the harasser. To give credence to such a claim, some evidence must be presented to establish the sexual preference of the alleged harasser. As will be shown, it is much easier to establish that the unwelcomed behavior of a sexual nature perpetrated by a same-sex supervisor or co-worker was motivated by a sexual animus rather than by other motives. Herein lies the issue, how does an investigator establish the harasser's homosexuality in a legal sense? What is the standard of proof?

The purpose of this article is to examine the standards that are unfolding in the federal court system regarding legal definitions of "homosexual" in framing same-sex sexual harassment determinations. In doing so, a brief review of both same-sex and opposite-sex harassment is provided to facilitate understanding of the issues related to this topic. We also discuss the possible implications that court-denied "homosexuality" has for in-house investigations. To enable the reader to more fully understand same-sex harassment, it is first necessary to examine the nature of sexual harassment as a legal construct.

THE NATURE OF SEXUAL HARASSMENT

For a workplace action alleging same-sex harassment to be actionable under Title VII, it must meet the same legal standards as opposite-sex sexual harassment. Opposite-sex sexual harassment occurs in one of two basic forms: quid pro quo or hostile environment. Consequently, same-sex harassment may also be manifested in these two forms. In either instance, the complaining party must first meet four criteria to establish a prima facie case of unlawful discrimination (see Figure 1).

First, the complaining party must be a member of a protected class. Any party bringing a claim of unlawful discrimination under Title VII must demonstrate that

Figure 1. Standards for Establishing a Prima Facie Case of Sexual Harassment

Quid pro quo	*Hostile environment*
1. The complaining party is a member of a protected class.	The complaining party is a member of a protected class.
2. The conduct of a sexual nature was unwelcomed.	The conduct of a sexual nature was unwelcomed.
3. But for the complaining party's sex, he or she would not have been subjected to the unwelcomed conduct.	But for the complaining party's sex, he or she would not have been subjected to the unwelcomed conduct.
4. The complaining party's acceptance or rejection of the unwelcomed conduct would affect tangible job benefits.	The unwelcomed conduct was so severe or pervasive as to alter the employee's conditions of employment by creating an intimidating and adverse work environment.

s/he is from a class that is protected by that statute if the statute is to apply. If a complaining party cannot establish his/her protected class status, the protections afforded under title VII cannot be invoked. Title VII specifically makes it an unlawful act:

> . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex* [emphasis added by the authors] or national origin [4, §200e2(a)].

In the case of all sex discrimination complaints, including sexual harassment, the relevant class is "sex," which refers to a biological condition and not to an orientation or preference [5]. This becomes confusing in sexual harassment scenarios, and especially same-sex ones, because it is not the sexual preference of the harasser that is the issue here, but rather the victim's sex. The essence of Title VII is that it mandates that all employees be treated the same in the workplace, regardless of race, color religion, sex, or national origin. Thus, Title VII prohibits employees from being treated differently because of race, color, religion, sex, or national origin. As will be explained in detail later, this prohibition against different treatment on the basis of a party's sex applies only to his/her biological sex, not to a sexual preference or orientation To illustrate this distinction, workplace behavior directed against an individual because she is a lesbian is not actionable under Title VII, whereas behavior directed against an individual because she is a woman is.

The second criterion that must be established is that the conduct or behavior in question has to be "unwelcomed" [6]. The complaining party must provide

evidence that his/her participation in the claimed sexual episodes was not voluntary. In essence, the alleged victim must have done nothing, either by word or deed, to encourage the behavior. Verbal objections or avoiding the harasser are usually sufficient to establish the unwelcomeness of the sexually oriented behavior. Perhaps the most compelling indication that the conduct is unwelcomed results when the complaining party files a formal complaint under an employer's anti-harassment policy.

The third criterion is perhaps the most important in all sexual harassment cases. But for the victim's sex, s/he would not have been subjected to the unwelcome conduct. This is the proof that lies at the heart of all sexual harassment (same-sex and opposite-sex) claims, as it makes the connection between the workplace behavior and Title VII's prohibition of different treatment. The operative concept is that the statute clearly prohibits employees being treated differently because of sex. Despite popular beliefs to the contrary, Title VII does not protect individual employees from being treated badly in the workplace, it only prohibits their being treated differently because of race, color, religion, sex or national origin [7]. This same logic applies to sexual harassment, which from a legal perspective is merely a variant of sex discrimination. If it can be demonstrated that an individual would not have been subjected to unwelcomed conduct if s/he were a member of the opposite sex then, and only then, is the harassment actionable under Title VII. Intuitively then, we would expect a female employee could be a potential sexual harassment victim only of a heterosexual male or a homosexual female harasser. A heterosexual male or homosexual female harasser would not have been interested in sexually harassing a male; as a result, the harasser's sexual desires would only be focused on a female. The victim would therefore be subjected to different treatment in the workplace (harassed when male employees were not) because of her sex.

The same phenomenon occurs when the victim is male. A male employee would be the target of sexual harassment only from a heterosexual female or a homosexual male harasser. Due to their respective sexual orientations, neither harasser would be sexually interested in an employee who was female. As a consequence of their respective preferences, only a male employee could be a potential harassment target. A victim then could argue that but for his sex, he would not have been subjected to the harassment in question. In short, he was treated differently in the workplace because of his sex in violation of Title VII. This has become a much more complex allegation, as will be seen later.

To emphasize that the gravamen of sexual harassment is different treatment because of the victim's sex, *Holman v. Indiana* is worth examining. In this case the plaintiffs, Steven and Karen Holman, alleged that their supervisor had sexually harassed each of them individually and on separate occasions, and because they had rejected his sexual solicitations, he retaliated against them [8]. The Court of Appeals for the Seventh Circuit noted that the harasser was unquestionably a bisexual (an individual who had engaged in unwelcomed harassment of both a

male and a female victim) and, therefore, could not engage in an act which was actionable under Title VII [8]. Why? The unwelcomed behavior was not based on the victim's sex. The behavior was obviously unwelcomed by both the female and the male employee, but neither victim was treated differently because of his/her sex. Since different treatment was ruled out, the Seventh Circuit concluded that there could be no violation of Title VII [8]. Although the behavior of the bisexual harasser was clearly abusive and was objected to by both the female and the male victim, neither party was subjected to different treatment in his/her workplace—the treatment of both was equally abhorrent. Note that the inquiry thus far has centered on establishing whether the behavior is sex-based (that is, based on the victim's sex). This is a separate inquiry from whether the magnitude of the behavior in question reaches a level serious enough to become quid pro quo or hostile environment harassment [9].

At the fourth proof, sexual harassment (either opposite-sex or same-sex) dovetails into its two previously mentioned distinctive forms, quid pro quo and hostile environment sexual harassment. Should the victim's acceptance or rejection of the unwelcomed behavior affect tangible job benefits, then the harassment is said to be quid pro quo (literally, "this for that," or often described as "something for something"). Because quid pro quo involves the ability to bestow or withhold tangible employment benefits, the pool of potential harassers is restricted to members of the organization's management [10]. Because the harasser is aided in the harassment by the authority that has been delegated to him/her, the organization is held to the highest standard of liability, vicarious liability [11]. This essentially means that the employer is automatically liable for the harassment perpetrated by the supervisor regardless of whether the employer was even aware of the harassment, or whether the employer took immediate and appropriate corrective action [12].

The other form, hostile environment sexual harassment, occurs when the unwelcomed behavior is "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive work environment" [13, at 21]. To be actionable under Title VII, a sexually objectionable environment must be both objectively and subjectively offensive, "one that 'a reasonable person' would find hostile or abusive, an one that the victim in fact did perceive to be so" [14, at 787; 15]. Here the operative words are "severe" or "pervasive." For any workplace behavior to rise to the level of severity, a single occurrence would directly detract from the employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers [13, at 22]. A physical act, such as sexual assault or physical contact with an intimate body part, usually is sufficient to establish severity of a single occurrence. If the behavior is not sufficiently severe, in and of itself, then it must be pervasive. The harassment must occur frequently enough over time that it unreasonably interferes with an employee's work performance [13, at 22].

It should be noted that the objective severity of harassment is to be evaluated by considering "all the circumstances and not merely those in isolation" [13, at 23]. The mere utterance of an epithet that engenders offensive feelings in an employee does not achieve the level of severity to sufficiently create an objectively hostile or abusive work environment—an environment that a *reasonable person* would find hostile or abusive [17]. It is immaterial that the victim believes his/her work environment is abusive. The federal courts require that the behavior in question must be viewed from the perspective of whether a reasonable person would find his/her working conditions altered by the conduct. In investigating for possible actionable sexual harassment, it is important to remember that "not everything that makes an employee unhappy is an actionable adverse action [18, at 359-360]. In the final analysis, the goal of Title VII is to protect the employee from an abusive work environment, not an unpleasant one [19].

To summarize, the Supreme Court has ruled that "whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina*[*tion*] . . . because of . . . sex'" [2, at 81]. Title VII does not prohibit workplace harassment unless it is based on sex [20]. The Supreme Court, in *Harris v. Forklift Systems, Inc.*, emphasized that harassment does not arise simply "because the words used have sexual content or connotations. The critical issue in actionable sexual harassment, same-sex or otherwise 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'" [13, at 17].

HORSEPLAY AND BOORISH BEHAVIOR versus SEXUAL HARASSMENT

Now we come to the problem that confronts practical managers on a daily basis. When does interpersonal behavior cross the line between horseplay and actionable harassment? Unfortunately, federal courts have not been very helpful in clearly delineating this line. The Supreme Court has said, "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. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview" [17, at 67]. It, therefore, becomes incumbent on any factfinder or investigator to ascertain whether the harassment in question rises to the level of actionable sex discrimination [2, at 75]. Consequently, it is not sufficient to establish that the complaining party was subjected to conduct and behavior that was merely tinged with offensive sexual connotations, but that the actions, "actually constituted discrimination on the basis of sex" [2, at 81]. There are two issues to be resolved in the investigation at this stage: First, is the behavior adequately severe and

pervasive enough to alter the affected employees' conditions of employment; and, second, have the members of one sex been exposed to disadvantageous conditions of employment that members of the other sex have not? [21].

In same-sex harassment, this situation becomes exacerbated, particularly because male workers may often tease co-workers for being effeminate or not manly enough. As is discussed later, some federal courts have begun to view teasing over effeminacy as being different from male-on-male horseplay and given the status of being sex stereotyping—hence protected under Title VII.

ESTABLISHING SAME-SEX SEXUAL HARASSMENT

The Supreme Court, in its *Oncale* decision, sets forth three evidentiary routes by which a same-sex complaining party can show that workplace conduct was based on sex (see Figure 2) [2, at 80-81; 22].

The first, and as previously mentioned, the easiest method for establishing same-sex harassment is accomplished by the complaining party showing that the questionable sexual behavior was motivated by actual homosexual desire on the part of the harasser [23]. In meeting this evidentiary standard, harassment that is motivated by sexual desire, it is necessary for the factfinder to produce credible evidence that the harasser was homosexual [24]. In a strictly legal sense, all sexual harassment, including same-sex, is a form of disparate treatment discrimination which means that it is intentional discrimination. Because it is intentional discrimination, the motive, rather than the behavior itself, becomes paramount at this stage of the sexual harassment analysis. This is why establishing the sexual orientation becomes germane to the analysis.

The second approach entails showing that the harasser was motivated by a general hostility to the presence of the same gender in the workplace [25]. In this regard, same-sex harassment claims make a marked departure from opposite-sex harassment. In most instances, opposite-sex harassment "typically involve[s] explicit or implicit proposals of sexual activity," which creates a presumption that the underlying conduct was based on sex [2, at 80]. If the harassment was *not* motivated by sexual desire, then the complaining party must demonstrate that the harassment was framed in "such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility" toward members of the same

Figure 2. Means of Establishing Same-sex Harassment

1. The harassment was motivated by homosexual desire.
2. The harassment was motivated by a general hostility to the presence of the same gender in the workplace.
3. Direct comparative evidence is provided about how the harasser treated both males and females in a mixed-sex workplace.

gender in the workplace [2, at 80]. This can be demonstrated by the illustration of the so-called "female misogynist." Suppose that a certain female supervisor desires only male subordinates in her department. To accomplish this end, she purposely makes working conditions so abhorrent for female subordinates that they quit or transfer to other departments. This would create a situation by which a heterosexual female would be discriminating against female subordinates (treating them differently on the basis of their sex) for reasons unconnected with sexual activity. Granted, she has created a very abusive work environment for women, but our female misogynist is not motivated by a homosexual sexual desire, only by a desire to have a male-exclusive department.

Finally, the complaining party may provide "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace" [2, at 80]. Here a complaining party may produce evidence regarding the harasser's behavior toward both males and females in a mixed-sex workplace and show that one was treated differently. For example, a male employer who discriminates only against his male employees and not against his female employees; or a female employer who discriminates against her female employees and not against her male employees, may be discriminating against his/her employees "because of" the female employees' sex. This is the same standard applied to an employer (male or female) who discriminates only against his/her employees of the opposite sex [26].

In summary, to establish same-sex discrimination/harassment, the complaining party must prove the alleged harasser's comments were either motivated by sexual desire or that the harasser treated males and females differently in a mixed-gender environment.

DETERMINING ADEQUATE PROOF OF HOMOSEXUALITY

Though the most efficient of the means that the Supreme Court has provided for establishing same-sex harassment is producing "credible evidence that the harasser was homosexual" [2, at 80], the kind of proof that constitutes credible evidence still remains elusive. The Supreme Court provided no further guidance on what constitutes credible evidence. However, as is often the case in such matters, several of the circuit courts of appeal have attempted to fill this void.

The Seventh Circuit has adopted a standard that the complaining party must present evidence that his or her harasser was motivated by sexual desire [27]. Essentially, the harasser must explicitly state his or her desire to have sexual relations with the victim, or make physical gestures suggesting such interest [27, at 1009]. By word and deed, the harasser has clearly indicated that s/he wanted to have a sexual relationship with an employee of the same sex. This line of reasoning has been followed in other circuits as well (see Figure 3) [28, 29, 30, 31].

The Fifth Circuit has recognized that two types of evidence may establish credible proof that the harasser is a homosexual. The first is evidence suggesting

Figure 3. Circuits with Standards for Establishing Homosexuality for Same-sex Harassment Purposes

Circuit Court	*Case*
Third	*Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001)
Fifth	*Noto v. Rregions Bank*, 84 Fed. Appx. 399 (5th Cir. 2003)
Sixth	*King v. Super Service, Inc.*, 68 Fed. Appx. 659 (6th Cir. 2003)
Seventh	*Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000)
Eighth	*McCown v. St. John's Health System, Inc.*, 349 F.3d 540 (8th Cir. 2002)
Eleventh	*Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236 (11th Cir. 1999)

that the harasser intended to have some kind of sexual contact with the plaintiff, rather than merely to humiliate him for reasons unrelated to sexual interest [32]. This is very similar to the standard adopted by the Seventh Circuit, in that the complaining party is attempting to show that the harasser had a sexual interest in him or her.

The second alternative is to prove that though the alleged harasser has not made an overt sexual overture to the complaining party, s/he has made same-sex sexual advances to others—especially to other employees. This approach is consistent with previous guidance that "the critical issue [in actionable sexual harassment] . . . 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" [2, at 80]. The application of this test is simple. Employee "A" alleges that his supervisor had made sexual advances toward him. Additionally, Employees "C" and "B" have complained of the supervisor's sexual interest in them. Because employees "A," "B" and "C" are all male, it is reasonable to conclude that the supervisor may be a homosexual.

HARASSMENT BASED ON SEXUAL PREFERENCE

When discussing same-sex harassment, since such harassment is often initiated because of the sexual preference of the harasser, the issue of sexual orientation inevitably arises. Nothing in Title VII protects a person because of sexual orientation or perceived sexual orientation. Under federal law, the term "sex" means "biological male or biological female," and not one's sexuality or sexual orientation [2, at 81; 33, 34, 35]. Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret "sex" to include sexual orientation [34]. Title VII does not afford a cause of action for discrimination based upon sexual

orientation/preference [36]. Even in circuits where sex-stereotyping (an employee's failure to conform to commonly accepted gender norms) may constitute actionable harassment, discrimination that is motivated by perceived sexual orientation does not [37].

Though this appears to be legal case of hair-splitting, the distinction between sex-stereotyping and sexual orientation/preference deserves further examination, especially since harassing an individual because s/he is a homosexual is not the same thing as sexual harassment—in a strict legal sense. Comments like, "Did you see that fag that moved up on the floor yesterday?" or "You are just so gay," indicate an animus against the victim's perceived sexual orientation, but not his/her sex [37].

When the harassment is clearly connected to the individual's sexual orientation/preference, Title VII does not apply. The Seventh Circuit, in *Spearman v. Ford Motor Corp.*, made three notable points in discussing workplace harassment by males against a male co-worker whom the harassers presumed to be a homosexual [35]. In this case, the complaining party, a black homosexual, alleged that he was subjected to a work environment tainted with epithets regarding his sexual orientation/preference. He was exposed to verbal taunts from his male co-workers, as well as graffiti of a derogatory nature. He subsequently filed an EEO complaint alleging sexual harassment based on sex-stereotyping. The Seventh Circuit in hearing his case noted that "remarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the complaining party's] gender in making its decision" [35, at 1085]. It was further noted that even though the plaintiff's "harassers used sexually explicit, vulgar insults to express their anger at him over work-related conflicts[,] . . . these conflicts did not arise because he is a man[,] . . . and such conduct does not constitute sexual harassment [35, at 1085]. Ultimately, the court concluded, the animosity directed toward the plaintiff was directed toward him because of his apparent sexual orientation, which is different from discrimination on the basis of sex [35, at 1085]. The court's conclusion was that since the harassment was not based upon his sex, the plaintiff had no Title VII complaint [35].

It should be noted that these points are moot in at least thirteen states that already have state statutes providing equal employment protection based on sexual preference. Consequently within the jurisdictions of these states, harassment based on sexual preference would be treated no differently than sexual harassment or racial harassment under federal law.

SEX STEREOTYPING, A NEW TACK

As mentioned previously, in same-sex harassment male co-workers may often tease co-workers for being effeminate or not manly enough. At least four federal

circuits have concluded that this form of harassment does not violate Title VII [28, 35, 38, 39]. However, at least two circuits, the Ninth and the Third, have concluded otherwise by applying sex-stereotyping theory to same-sex sexual harassment.

Under the theory of sex-stereotyping, an employer makes employment decisions based upon preconceived notions of how an individual should behave according to his/her sex, a violation of Title VII. In its 1989 decision, *Price Waterhouse v. Hopkins*, the Supreme Court held that a female who was denied partnership in an accounting firm because she did not match a sex stereotype had an actionable claim under Title VII [40]. The complaining party had been described during a promotion committee meeting as being too "macho," in need of "a course in charm school," "a lady using foul language," and someone who had been "a tough-talking, somewhat masculine hard-nosed manager" [40, at 235]. The complaining party was then advised that she could improve her partnership chances if she would be more feminine in her walk, talk, dress, and appearance [40]. The Supreme Court ruled that in the "specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender" [40, at 250]. If sex-stereotyping can be applied to employment decisions, it would be only a matter of time before it would be applied to sexual harassment.

That time would come in the Ninth Circuit case, *Nichols v. Azteca Restaurant Enterprises* [41]. In *Azteca*, a male waiter was mocked by his male co-workers for, among other things, walking and carrying his serving tray "like a woman." Because the verbal abuse was directed toward the complaining party because he is effeminate, the complaining party's attorney argued that the unwelcomed harassment occurred because of the victim's sex—more actually because of sex stereotyping [41]. The complaining party was not conforming to societal expectation of male behavior and was suffering adverse working conditions because of it.

In a two-to-one decision, the panel of judges accepted this line of reasoning: Sex-stereotyping could be used to establish sexual harassment that is actionable under Title VII to the extent it occurs because of the victim's sex [41, at 874].

In the Ninth Circuit, sexual harassment of an employee because of that employee's failure to conform to commonly accepted gender stereotypes is sex discrimination in violation of Title VII [42]. The Third and Sixth Circuit have also adopted this expanded view [28, 39]. Other circuits have chosen not to extend Title VII's protections to harassment due to a person's sexuality, concluding that the gender stereotyping claim should not be used to "bootstrap protection for sexual orientation into Title VII" [34, 35, 43]. However, until the Supreme Court elects to resolve this controversy, the authors focus on the guidance that predominates in at least four circuits and will leave this issue as being beyond the scope of this article.

As an aside, the use of sex-stereotyping challenges is increasingly being adopted by gay advocacy groups as a means to stifle anti-gay harassment in the workplace and to circumvent employer dress and appearance policies.

CONCLUSION

As a source of potential litigation, same-sex sexual harassment is likely to affect more employers as gay rights groups become increasingly active in workplace rights advocacy. With the potential diminution of societal aversion to homosexual life styles, same-sex claims may be expected to rise. Consequently, it becomes essential for employers to incorporate same-sex issues in their anti-harassment training and prevention policies.

Additionally, those organization officers and staff tasked with enforcement duties and investigation responsibilities under such policies need to be aware of the ever-evolving standards for establishing same-sex claims. The line between harassment based on sex and harassment based on sexual preference/orientation is becoming increasingly blurred; yet only the former remains actionable under federal EEO laws. Because same-sex harassment is more easily established by showing that the harassment was motivated by homosexual desire, it is important that HR professionals who conduct in-house investigations into such matters are fully versed in the current state of the legal environment.

ENDNOTES

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10. *LeGrand v. Area Resources for Community & Human Services*, 394 F.3d 1098, 1101-02 (8th Cir. 2005).
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12. *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1245 (11th Cir. 2004).
13. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).
14. *Faragher v. city of Boca Raton*, 524 U.S. 775, 787 (1998).
15 *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).
16. *Worth v. Tyler*, 276 F.3d 249, 268 (7th Cir. 2001).
17. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).
18. *Montandon v. Farmland Indus. Inc.*, 116 F.3d 355, 359-60 (8th Cir. 1997).
19. *McPherson v. City of Waukegan*, 379 F.3d 430 (7th Cir. 2004).
20. *McCown v. St. John's Health System, Inc*., 349 F.3d 540, 543 (8th Cir. 2002).
21. *EEOC v. Harbert-Yeargin*, 266 F.3d 498, 505 (6th Cir. 2001).
22. *Elmahdi v. Marriott Hotel Services, Inc.*, 339 F.3d 645, 655 (8th Cir. 2003).

23. *Davis v. Coastal Int'l. Sec., Inc.*, 275 F.3d 1119, 1123 (DC Cir. 2002) quoting [2, at 80-81].
24. *Noto v. Regions Bank*, 84 Fed. Appx. 399 (5th Cir. 2003).
25. *McCown v. St. John's Health System, Inc.*, 349 F.3d at, 543.
26. *Wrightson v. Pizza Hut of America*, 99 F.3d 138, 142 (4th Cir. 1996).
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28. *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001).
29. *King v. Super Service, Inc.*, 68 Fed. Appx. 659 (6th Cir. 2003).
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40. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
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