

FIGHTING BACK: LEGAL OPTIONS FOR SAME-SEX HARASSMENT VICTIMS

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ABSTRACT

Recent court rulings on gender nonconformity discrimination afford gays and lesbians a modicum of protection from same-sex harassment in the workplace. Nine Circuit Court decisions were analyzed to identify the parameters of this protection. The analysis revealed that the courts have drawn a fine line when distinguishing between discriminating legally, based on sexual orientation, and illegally, based on gender nonconformity. The evidence and proof the courts used to define this line are discussed. The article concludes with recommendations aimed at assisting employees who have been victimized by same-sex harassment.

Same-sex harassment permeates the American workplace. Many gays and lesbians endure almost daily harassment, serving as targets of cruel jokes, obscene mail, bigoted slurs, offensive cartoons, and physical threats [1]. The number of same-sex harassment cases reaching the courts remains a relatively small percentage of total harassment cases, partially because many victims fear the

social consequences of publicizing their abuse. Yet the behaviors displayed in same-sex harassment cases are often even more aggressive and intense than in cases of heterosexual harassment. For example, an employee of an offshore oil rig, Joseph Oncale, was repeatedly molested by his male co-workers—and even two supervisors. In one incident, several co-workers held him down while one placed his penis on the victim's head; in another, they forced a bar of soap between his buttocks and announced plans to rape him [2]. These incidents, brought to light in Oncale's suit against his employer, Sundowner Offshore Services, Inc., show how vicious same-sex harassment can be [3].

Exacerbating the problem is the fact that same-sex harassers often downplay the severity of their behavior by calling it "horseplay" rather than assault. They do not consider their actions to be sexual harassment because they are not sexually attracted to the victims. Yet such treatment undeniably causes its victims unbearable amounts of distress, often leaving them completely demoralized. Many feel forced to leave their jobs, as Oncale eventually did, in order to avoid any further physical or sexual abuse.

What protections do such victims have in this country? While Canada and the majority of European Union countries have federal laws that bar all forms of sexual harassment targeted against homosexuals, the protection afforded to gays and lesbians in the United States is more limited. This article describes the legal rights of these victims by describing the legal limitations and offering options that U.S. victims of same-sex harassment can take to legally redress their complaints.

Gay Americans are not entirely without rights. Certain states, such as California, view any form of discrimination based on sexual orientation (including sexual harassment) to be a violation either of a law or a constitutional right. Therefore, residents of these states can successfully sue their employers if victimized by same-sex harassment. Unfortunately, there are still many states, including Texas and Arkansas, where discrimination against gays and lesbians is entirely legal. However, recent developments in case law have given gays and lesbians who live in these states some hope. Clever attorneys have combined two Supreme Court decisions to argue that federal Equal Employment Opportunity law prohibits discrimination against a subset of homosexuals who act or dress contrary to gender norms. In the following paragraphs we describe the legal foundation for this argument.

LEGAL PRECEDENTS

The federal law that bars sexual harassment at the workplace in the United States is Title VII of the 1964 Civil Rights Act. However, this law does not include sexual orientation as a protected classification. Therefore, many lower courts long believed that Title VII offered no legal protection from same-sex harassment. The Supreme Court ruling in *Oncale* changed this belief. While the court of appeals ruled for the employer, the Supreme Court overturned this ruling, concluding that same-sex harassment does indeed fall under Title VII's purview [3].

The *Oncale* ruling makes it clear that victims of same-sex harassment can successfully lodge a Title VII complaint. Title VII's protection, however, is limited to situations in which the victims can prove that the harassment was gender-based; that is, it occurred because of their sex [3]. The *Oncale* court provided three illustrations of how victims can prove this: 1) establish that the harasser's conduct was motivated by a sexual desire; 2) demonstrate that the harasser's conduct was motivated by hostility to the presence of someone of that sex at the workplace; and 3) show that the harasser treated men and women differently in a mixed-sex work environment [3].

The legal protection from same-sex harassment afforded to gays and lesbians by the *Oncale* ruling fails to cover instances of harassment that are all too common, namely, those that are triggered by the harassers' animosity toward gays and lesbians. Underlying much of this animosity are the harassers' beliefs that the victims do not adhere to appropriate gender stereotypes (e.g., gay men do not act like "real men" should act). The issue of gender stereotyping discrimination was addressed by the Supreme Court in *Hopkins v. Price Waterhouse*, a case that did not involve same-sex harassment [4]. The plaintiff, Ann Hopkins, alleged that she was denied a partnership at Price Waterhouse because her employer had given credence to the stereotyped images of how a woman should look and behave. She had been called "macho" and "masculine," was told she needed "a course at charm school," and was instructed to walk, talk, and dress in a more feminine fashion and to wear makeup, have her hair styled, and wear jewelry if she wanted to make partner. The Supreme Court noted that such comments were sexually discriminatory, stating, "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" [4, at 258]. The court thus ruled for the plaintiff, stating that employers may not legally take adverse actions against employees based on gender stereotypes.

During the past ten years, plaintiffs have begun using the *Hopkins* precedent to argue that same-sex harassment can be a form of gender stereotyping if gays or lesbians are harassed because of their gender nonconformity. This legal argument has been applied with varying degrees of success, and this article presents the factors that appear to help or hinder the plaintiffs' chances of winning. All nine same-sex harassment cases heard by the circuit courts of appeals during the past ten years are reviewed.

THE LEGAL TEST FOR GENDER NONCONFORMITY DISCRIMINATION

To prevail in same-sex harassment claims of gender nonconformity discrimination, plaintiffs must meet a three-pronged test. First, they must prove that the harassers perceived their behavior to be gender nonconforming. Second, they must prove that this perception was the root cause of the harassment. And

third, they must prove that the harassment was sufficiently pervasive to cross the legal threshold.

Proving that Their Behavior Was Perceived as Gender Nonconforming

Being perceived as a gay or lesbian is not tantamount to being perceived as gender nonconforming. The plaintiffs must provide evidence that they behaved in a manner that was perceived as being atypical for members of their sex. Plaintiffs were able to successfully make this argument in seven of the nine cases reviewed. For instance, in both *Kay v. Independence Blue Cross* and *Doe and Doe v. City of Belleville*, the plaintiffs were gay males who were perceived as effeminate because they wore earrings [5, 6]. In *Nichols, Sanchez, and Lizarraga v. Azteca Restaurant Enterprises*, the plaintiff was a server who was perceived as effeminate because he carried his serving tray “like a woman” and because he refused sex with a female co-worker [7].

Plaintiffs’ attempts to meet this test were unsuccessful in two cases. In *Vickers v. Fairfield Medical Center*, the plaintiff was a private-duty police officer whom his co-workers perceived as gay [8]. He did not argue that his work behavior was gender nonconforming. Rather, he argued that in the eyes of his harassers, his *sexual practices* did not conform to the traditionally masculine role. The court believed that the *Hopkins* precedent was not sufficiently broad to encompass gender nonconforming behaviors that occur *outside* the workplace, such as sexual practices. It thus ruled for the defendant, noting that a ruling for the plaintiff would have the effect of amending Title VII to encompass sexual orientation as a prohibited basis for discrimination, since all gays and lesbians, by definition, fail to conform to traditional gender norms in their sexual practices. The court warned that gender stereotyping should not be used to bootstrap protection for sexual orientation into Title VII [8].

In *Medina v. Income Support*, the plaintiff was a heterosexual woman who was harassed by her lesbian supervisor [9]. She did not argue that she was harassed because she failed to behave like a stereotypical woman, but, she claimed rather, that she was harassed because she did not behave like a stereotypical woman who worked at this company, who according to her, was a lesbian. The court concluded that gender nonconformity pertained to the failure to adhere to the norms of one’s gender, not to the norms of a certain sexual orientation. Because the plaintiff actually conformed to female gender norms, the court ruled in the company’s favor [9].

Proving that the Perception of Gender Nonconformity Was the Root Cause of the Harassment

Being perceived as gender nonconforming does not, by itself, establish a Title VII claim; the victim must also prove that this perception *caused* the harassment.

Defendants frequently argued that the harassment was not motivated by the victim's gender nonconformity, but rather, by a bias against the victim's sexual orientation. While gender nonconformity discrimination is unlawful, sexual-orientation discrimination is not. When adjudicating claims of this nature, the courts attempted to determine which of these two causes was operative.

In making this determination, the courts scrutinized the nature of the harassment and its immediate cause. To prevail, plaintiffs had to prove that their harassers perceived them as effeminate or "butch" and that this perception precipitated the harassment. Plaintiffs were successful in three cases. In *Nichols*, the victim argued that the slurs directed at him were cast in female terms, thus proving that he was perceived as effeminate [7]. He was constantly referred to as "she" and "her," mocked for carrying his serving tray "like a woman," and called a "faggot" and a "female whore" [7, at 865]. The court agreed that he was perceived as effeminate and concluded that this perception was the immediate cause of his harassment since the defendant failed to offer any alternative explanations for this behavior [7].

At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act . . . Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he didn't conform to their gender based stereotypes, referring to him as "she" and "her." And, *the most vulgar name-calling directed at Sanchez was cast in female terms* [italics added]. We conclude that this verbal abuse was closely linked to gender [7, at 869].

In *Rene v. MGM Grand Hotel*, the plaintiff claimed that his harassers perceived him to be effeminate because of his "openly gay" manner [10]. Over the course of a two-year period, his supervisor and several of his co-workers harassed him on an almost daily basis. They whistled and blew kisses at him, called him "sweetheart" and "muneca" (Spanish for doll), gave him sexually oriented joke gifts, and forced him to look at pictures of naked men having sex. His co-workers touched his body like they would a woman's body, and on numerous occasions they grabbed him in the crotch and poked their fingers in his anus through his clothing. The court concluded that the plaintiff's gender nonconformity was the only possible reason to account for such treatment [10].

There would be no reason for Rene's co-workers to whistle at Rene "like a woman," unless they perceived him to be not enough like a man and too much like a woman. That is gender stereotyping, and that is what Rene meant when he said he was discriminated against because he was openly gay [10, at 1066].

In *Doe and Doe*, the plaintiff was a 16 year-old boy who was hired by the city to cut grass and weeds at a cemetery [6]. He claimed that he was sexually harassed by

male co-workers because he wore an earring. The daily abuse was both verbal and physical. He was constantly called a “fag” and a “queen,” was asked if he were a boy or a girl, and was threatened with sexual abuse [6, at 564]. The verbal taunting turned physical when a co-worker grabbed his testicles and announced, “Well, I guess he’s a guy” [6, at 564]. The court ruled for the plaintiff, stating that one may reasonably infer that the plaintiff was harassed because his harassers believed that wearing an earring did not conform to male standards [6].

The courts ruled in favor of the defendants in three cases when it was evident that the harassment was triggered by events that were unrelated to gender nonconformity. In *Spearman v. Ford Motor Company* [11] and *Hamm v. Weyauwega Milk Products* [12] the triggering events were work-related altercations. In *Spearman*, the plaintiff was a gay male who was sexually harassed on numerous occasions [11]. For instance, a co-worker called him a “little bitch” and told him that he hated his “gay ass” [11, at 1081]. Another incident involved graffiti on the bulletin board that stated: “AIDS kills faggots dead . . . RuPaul, RuSpearman” [11, at 1081]. The plaintiff claimed that the use of vulgar, sexually explicit insults and the graffiti reflected his harassers’ views that he was too effeminate to fit the male image at Ford. The court ruled for the defendant, however, noting that the occurrence of sexually stereotypical remarks at work does not inevitably prove that the harassment was triggered by sexual stereotypes. While he was perceived as effeminate, it was not this perception that triggered the slurs. Rather, his harassers used such language to express their anger at him over work-related conflicts that were triggered by his work performance, not by his gender nonconformity [11].

In *Hamm*, the victim was called a faggot and a girl scout and one of his co-workers threw things at him and threatened to snap his neck [12]. The plaintiff argued that his harassers thought he did not fit the sexual stereotype of a man because they believed (falsely) that he was having a sexual relationship with a male co-worker. The defendant prevailed, however, by successfully arguing that Hamm’s co-workers harassed him because they were frustrated with his inability to correctly do his job and with his instigation of problems and rumors at the plant [12].

The defendant prevailed in *Howell v. North Central College* by successfully arguing that the harassment was triggered by the victim’s remarks concerning homosexuality [13]. The plaintiff was a member of the university’s woman’s basketball team, which comprised several lesbians. During a team luncheon, the plaintiff voiced her opposition to homosexuality. Following this incident, she claimed that her playing time was decreased in favor of an inferior player because she resisted the “lesbian doctrinarian” [13, at 718]. Additionally, the coach told her that she was not allowed to wear ribbons in her hair because it was “too feminine.” The court ruled for the defendant because the harassment had been

precipitated by the plaintiff's beliefs regarding homosexuality, not by her gender stereotypical behavior (e.g., her insistence on wearing a hair ribbon) [13].

Proving that the Harassment Was Sufficiently Pervasive to Cross the Legal Threshold

There was one case, *Kay v. Independence Blue Cross*, in which the plaintiff was able to meet the first two prongs of the legal test, yet still lost because the harassment that he experienced was insufficiently severe or pervasive [5]. The plaintiff was a gay male who claimed that he was harassed because he wore an earring. A flier was left on his desk that said, "A real man in the corporate world would not come to work with an earring in his ear. But I guess you will never be a real man" [5, at 49]. In addition, a female co-worker stated, "I'm glad that there's a real man on the floor" (referring to an employee who was replacing a water bottle cooler in front of the plaintiff) [5, at 49]. Despite these comments, the court ruled for the defendant because the harassment constituted only a sporadic use of abusive language that falls short of the threshold needed for gender stereotyping liability under Title VII [5].

CONCLUSIONS AND RECOMMENDATIONS

The aim of this article is to identify the legal protections for victims of same-sex harassment at the workplace. Our review found that the courts have clearly accepted the argument that same-sex harassment violates Title VII when the harassment is more than sporadic and is linked to perceptions of gender nonconformity. To prevail in court, same-sex harassment victims must prove that their conduct *at the workplace* was viewed as gender nonconforming and triggered the harassment.

One may conclude that while victims of same-sex harassment have some legal protection under federal law, a significant gap remains in this protection. Specifically, federal law fails to protect many employees from the actions of homophobes who take delight in verbally and physically harassing these employees because of their sexual orientation. A number of judges noted their disdain for this state of affairs. For example, the judge in *Vickers* stated that while the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, the claim does not fit with the prohibitions of the law [8]. And in *Bibby v. Philadelphia Coca Cola Bottling Company*, the judge noted that harassment on the basis of sexual orientation has no place in our society. It is morally reprehensible whenever and in whatever context

it occurs [14]. The judge pointed out, however, that Congress has not yet seen fit to provide protection against such harassment [14]. Thus, while the courts are understandably reluctant to expand protected classes in the absence of legislation, they recognize the need for new legislation that properly addresses this critical issue.

Such legislation has become a possibility with the reintroduction of the Employee Non-Discrimination Act (ENDA) in the U.S. House of Representatives in 2007. The bill would outlaw workplace discrimination against gays and lesbians by making it illegal to fire or to refuse to hire or promote employees because of their sexual or gender identities. It would also render same-sex harassment unlawful if triggered by homophobia. The enactment of this law would be the fairest and most-effective solution to this problem, since it is a federal law covering nearly all U.S. employers. While Congress has rejected this bill several times since 1995, ENDA's 2007 version stands a better chance of passing than its predecessors because of the Democratic Party's 2006 gains in both houses of Congress. However, few believe that the bill would garner enough votes to override an almost-certain presidential veto. It therefore appears unlikely that the current state of law will change during the current administration.

In the absence of federal legislation, nineteen states, 167 cities and counties, and the District of Columbia have taken the initiative to pass their own sexual orientation antidiscrimination laws [15]. Moreover, in eight other states, public sector employees enjoy the protection of executive orders or other personnel regulations prohibiting discrimination based on sexual orientation [1]. Until recently, this included gay and lesbian federal employees, who were protected under an executive order issued by President Clinton in 1997. Executive Order 13087 survived a House of Representatives attempt to block it in 1998. But it has since lapsed under the current administration, which publicly supports the policy, yet refuses to enforce it [16, 17]. The restoration of these protections, like the enactment of ENDA, is not likely to happen under the present administration.

When seeking redress through the courts, gay and lesbian harassment victims must select a legal strategy appropriate to their circumstances. Since Title VII offers no protection against same-sex harassment triggered by homophobia, victims of such harassment should seek redress through state or local anti-gay discrimination statutes. In localities lacking such laws, victims have two options. First, claims can be disguised as gender nonconformity harassment. While this may be seen as a bizarre form of legal subterfuge, it does give victims an effective way to assert their rights. A second option is to reframe their suits to a more general legal claim that would apply to their circumstances, such as assault and battery, defamation, intentional infliction of emotional distress, or invasion of privacy.

What help is available to guide gay and lesbian harassment victims through this morass of legal complexity? Several advocacy groups exist to assist them in this

situation, including the National Center for Lesbian Rights, the ACLU's Lesbian and Gay Rights Project, and Lambda Legal, which has regional offices providing help desks and phone hotlines that gay and lesbian discrimination victims can contact for assistance (www.lambdalegal.org/help). These sources can offer victims support and advice that may help curtail the harassment. They can also provide information on filing same-sex harassment claims, as well as put potential plaintiffs in touch with attorneys experienced in handling such claims.

Fortunately, same-sex harassment victims are no longer alone in their fight for civil treatment at the workplace. Many organizations have taken steps in an effort to help win this fight, as 87 percent of Fortune 500 companies now include sexual orientation in their nondiscrimination policies [18]. We hope that the combined efforts of lawmakers and work organizations will ultimately lead to the eradication of this problem.

ENDNOTES

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