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Same Sex Sexual Harassment: Overview and Investigative Challenges

By Laurie J. Wiedenhoff, Esq.

When many employers think about sexual harassment, they conjure up a pretty standard image - the boorish boss making a pass at his subordinate; the lone female employee amidst of a sea of sexual comments and vulgarities. However, there is a growing trend in the realm of sexual harassment and it does not fit that notion -- more men are filing cases of sexual harassment. The EEOC reports that in 2008, 13,867 sexual harassment charges were filed with the EEOC and state or local agencies nationwide, an increase of 11% from the prior year and the highest level since Fiscal Year 2002. Of the total sexual harassment charges, 16% were filed by men - up from 12% in the late 1990s. While, in some of those cases, men are claiming that the harasser is a woman, in others they are alleging harassment by other men. This article addresses the latter of these two situations.

Generally, employers will face three scenarios involving possible same sex harassment. First, there is alleged harassment because of the victim's sex. This can be thought of as "traditional" sexual harassment, but with the victim and harasser(s) being of the same sex rather than different sexes. Second (and related to the first scenario), there is alleged harassment because the victim does not conform to "typical" perceptions of gender. Finally, there is alleged harassment because of the victim's sexual orientation. Only the first and second scenarios are possibly actionable under Title VII; the third is not.

The United States Supreme Court officially recognized same sex harassment over a decade ago. When the Supreme Court decided *Oncale v. Sundowner Offshore Servicers* in 1998, and emphatically clarified that nothing in Title VII "bars a claim of discrimination 'because of ... sex' merely because the [two

employees] are of the same sex," it provided three general, instructional avenues by which same sex harassment could constitute sexual discrimination under Title VII:

1. By showing via "credible evidence" that the alleged harasser was homosexual;
2. By demonstrating that the alleged harasser was motivated by general hostility to the presence of the same gender in the workplace; or
3. By offering direct, comparative evidence about how the alleged harasser treated members of both sexes differently in a mixed-sex workplace.

As to the first avenue of proof, in the years since *Oncale*, courts have clarified that the key determination is not whether the harasser is homosexual (after all, what constitutes "credible evidence" of homosexuality?), but whether the harassing conduct is motivated by "sexual desire," regardless of the alleged harasser's claimed sexual orientation. Although courts will determine whether "sexual desire" was a motivating factor on a case-by-case basis, some factors found persuasive by courts are physical touching of intimate areas and sexual advances by the harasser towards other employees.

The *Oncale* court made clear the methods of proof listed above is not all-inclusive and, in fact, courts since *Oncale* have expanded the scope of actionable same sex harassment to include other types of harassment, such as when harassment based on the victim's perceived noncompliance with sexual stereotypes. In other words, employers can be held liable when one employee harasses another for such things as not being "man enough" or "feminine enough."

However, employers should note that Title VII does not cover instances of same sex harassment when the harassment is based on the actual or perceived homosexuality of the victim. Such harassment is not considered to be "because of [the victim's] sex," but rather because of the victim's sexual orientation. This sort of harassment currently is not actionable under federal law, although some states, such as Wisconsin, have fair employment laws prohibiting discrimination on the basis of sexual orientation. Sometimes the lines between what is and is not actionable sexual harassment can blur, making a practicable distinction difficult to draw between harassment based on the perception that the victim does not conform to gender stereotypes and harassment based on the perception that the victim is homosexual. Regardless, it should go without saying that neither type of harassment should be condoned or tolerated in the workplace.

The key question in any lawsuit concerning same sex harassment will be whether the alleged harassment was "because of . . . sex." Thus, behavior that has sexual overtones will not necessarily be "because of . . . sex" if motivated by another basis, such as personal dislike for the victim. Although the harassing conduct in such instances should not be tolerated by any employer, the conduct will not form a basis for Title VII liability. Similarly,

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courts will look at the total circumstances when determining the nature of the conduct. As the *Oncale* court famously pointed out, it may not be harassment when a football coach slaps his players' behinds when the players are coming off of the field, but it may be a completely different story if the coach does that in the office to his assistant, regardless of whether that assistant is male or female. Employers should therefore not chalk up such behavior between employees as mere "locker room" behavior or "horseplay."

When investigating allegations of same sex harassment, employers should follow the same investigative steps as with sexual harassment allegations concerning employees of different sexes. Yet, employers may find additional hurdles and pitfalls when investigating allegations of same sex harassment. First, employers should not read too much into the Supreme Court's wording about "credible evidence" of the harasser's homosexuality. Asking alleged harassers if they are homosexual, whether directly or indirectly, is not a wise course of action. Although attitudes towards and acceptance of homosexuality is improving, some employees may react negatively to what they perceive as an "accusation" of being homosexual, making them even less likely to cooperate in the investigation. Moreover, in states with laws against discrimination based on sexual orientation, employers may open themselves up to liability by asking about an employee's sexual orientation directly or indirectly. For instance, should an employer learn that an employee - one who has not been open about his or her sexuality in the workplace - is homosexual, and that employee later brings a state claim of sexual orientation discrimination, the employer no longer can rely, as a defense, that it had no knowledge of the employee's protected class status.

Although same sex harassment is not common, it does exist, and the first step in successfully dealing with same sex harassment investigations is to abandon any preconceived notions of what is or is not sexual harassment. Each situation and investigation will have its own quirks and complications. But so long as employers approach these situations with an open mind and the same caution and sensitivity with which they (hopefully) handle sexual harassment investigations involving employees of different sexes, they should have a successful investigation and help shield themselves from liability in the process.

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