

Same-Sex Harassment: High Court Rules Same-Sex Harassment Is Illegal And Clarifies Standards For All Claims

Some employers pay little attention to dirty jokes, horseplay and locker room antics among male co-workers. But a new U.S. Supreme Court ruling makes it more important than ever to take a closer look at this kind of behavior. The court found that alleged sexual abuse of a male oil rig worker by his male supervisors could constitute illegal sexual harassment. The decision also clarifies the standards that apply to all sexual harassment claims.

Male Employee Abused By Male Co-Workers

Joseph Oncale worked for Sundowner Offshore Services for four months as a roustabout on a Chevron U.S.A. oil platform. Oncale accused two supervisors and a co-worker of physically and verbally harassing him in a sexual manner. Among other things, one supervisor allegedly threatened Oncale with rape and, on another occasion, allegedly pushed a bar of soap into his anus while he was showering. Oncale complained twice to the highest-ranking supervisor on the rig, but the company took no action. He quit soon after the shower incident.

Employee Files Lawsuit

Oncale sued, claiming the supervisors' conduct amounted to sexual harassment. The company argued the behavior was merely locker room horseplay. A lower court threw out the case on the grounds that the federal anti-discrimination law was not meant to prohibit same-sex harassment.

Same-Sex Harassment Is Illegal

The U.S. Supreme Court disagreed. It ruled that sexual harassment laws do protect victims who are harassed by someone of the same sex.⁵ And as in male-female harassment cases, it is irrelevant whether or not the harass-

ment was motivated by sexual desire.

The court made clear that in all sexual harassment cases, the following factors must be present: 1) the harassment must amount to discrimination because of the person's sex; and 2) the conduct must create a hostile work environment.

Harassment Must Be Because Of Sex

With respect to the first factor, the court explained that federal law only prohibits harassment that constitutes discrimination "because of" sex, race, religion, age or other protected characteristics. Therefore, in any sexual harassment claim—regardless of the gender of the parties—the challenged actions must amount to discrimination "because of sex."

To meet this criterion, the behavior in question must cause members of one sex—but not the other—to be exposed to the harassment. As an example, the court said that discrimination would be present if a female employee were harassed by a female co-worker in such "sex-specific and derogatory terms" as to indicate the harasser is hostile to women in the workplace. Oncale will now have to prove he was harassed because of his sex.

When Does Conduct Cross The Line?

In discussing the second factor—that the conduct must be so offensive as to create a hostile work environment—the court said the law doesn't prohibit all conduct of a sexual nature.

As with harassment between men and women, the behavior must be severe enough to alter the conditions of the victim's employment and make it difficult for the person to work.

Plus, the severity of the harassment, whether same-sex or not, must be measured from the point of view

of a reasonable person in the victim's position, considering the social context in which the behavior occurs. So for example, it wouldn't be sexual harassment for a football coach to pat an athlete on the behind as he heads onto the field. But the same behavior by the coach could be abusive if directed at his secretary.

How You Can Protect Yourself

Same-sex harassment is already illegal under California law. But this new decision gives employees the ability to use federal law as well to bring claims for such conduct. And the publicity surrounding the case could generate new charges from straight and gay workers alike.

Preventing same-sex harassment can be tough because it may not always be apparent when an activity crosses the line from harmless to illegal. Here are some steps to take to reduce problems and protect yourself from claims:

1. Maintain a zero-tolerance policy. Your best defense against sexual harassment claims, whether same sex or opposite sex, is to strictly enforce a policy that prohibits any sexually offensive behavior in the workplace. The policy should clearly state that it applies regardless of the gender of the victim or harasser. Employee training about the need to be sensitive to harassment issues, including same-sex harassment, is also critical.

2. Respond promptly to harassment complaints. Immediately act on complaints of same-sex harassment just as you would any other harassment claim. Thoroughly investigate the situation and, depending on your findings, take prompt action to put a stop to the behavior.

3. Be discreet. To encourage employees to be forthcoming, explain that you will conduct the investigation as discreetly as possible and disclose sensitive information on a need-to-know basis only. (See *CEA* February 1998 for details on handling confidential sexual harassment complaints.) ■