Sexual Harassment

by Arthur S. Leonard

Legal responsibility for sexual harassment became a major issue for sexual minorities (lesbians, gay men, bisexuals, transgendered persons) in the United States during the last quarter of the twentieth century, following the development of legal doctrines originally intended to protect women from workplace harassment, using Title VII of the federal Civil Rights Act of 1964 and similar state laws.

The Civil Rights Act of 1964

The U. S. House of Representatives committee that considered the proposed Civil Rights Act heard testimony and collected data about sex discrimination, but decided that the time was not right to include "sex" in the bill. The bill presented to the House forbade discrimination only on grounds of race, color, religion, and national origin.

During floor debate, a conservative Democrat, Representative Howard Smith of Virginia, hoping to sabotage the bill, proposed an amendment adding "sex." The amendment was narrowly adopted, the bill passed the House and was referred to the Senate, where the leadership decided to bypass the normal committee process and allow only limited debate on the floor.

As a result, the inclusion of "sex" in the bill that was enacted was not accompanied by the usual "legislative history" including committee reports and extensive testimony about what Congress intended. The term "sex" was not even defined in the bill. This left an open slate for courts and commentators to consider the implications of outlawing sex discrimination.

The Implications of Outlawing Sex Discrimination

One who thought particularly creatively about this was Catherine A. MacKinnon, a law professor who, in a series of journal articles ultimately published as a book entitled *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979), argued that women who were subjected to demands for sexual favors or to oppressive working conditions because of male resentment of their presence in the workplace in formerly all-male jobs were suffering sex discrimination, because such harassment affected "terms and conditions of employment."

During the 1970s a few courts came to embrace Professor MacKinnon's view, at first in cases where male supervisors made sexual demands on female subordinates, but soon spreading to cases where an oppressive workplace atmosphere made conditions intolerable for female workers.

The *Meritor* Decision

In 1986, the United States Supreme Court issued its first decision on sexual harassment under Title VII, *Meritor Savings Bank, FSB, v. Vinson*, 477 U.S. 57. Writing for the unanimous Court, then-Associate Justice William H. Rehnquist evoked prior decisions holding that Title VII "evinces a congressional intent to 'strike at

the entire spectrum of disparate treatment of men and women' in employment."

The Supreme Court's *Meritor* decision endorsed two theories of sexual harassment that had been suggested by Professor MacKinnon and embraced by some lower federal courts. The "quid pro quo" theory found that unwanted demands for sexual favors under circumstances where the victim reasonably perceived that her refusal would subject her to tangible negative consequences (loss of job, undesirable assignments, denial of promotion, or the like) violated Title VII. The "hostile environment" theory held unlawful harassing conduct "of a sexual nature" that was so frequent and pervasive as adversely to affect the victim's terms and conditions of employment, even if the victim suffered no tangible injury such as job loss or undesirable assignments.

Subsequent decisions by the Supreme Court, such as *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), made clear that only misconduct that was frequent, pervasive, and very severe in nature would violate Title VII in a hostile environment case. As Justice Antonin Scalia commented for the unanimous court in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), Title VII was not intended by Congress to mandate a workplace "civility code," so harassing conduct that merely irritates or discomforts the victim would not violate the statute.

In subsequent decisions, the Supreme Court also worked out rules to govern the questions of when a corporate employer can be held liable for sexual harassment perpetrated by managers, supervisors, and co-workers, and how employers might insulate themselves from liability under Title VII by adopting formal policies against sexual harassment, providing grievance mechanisms to deal with complaints, and remedying justified complaints promptly. These decisions made clear that the purpose of Title VII is mainly remedial, not punitive, although an employer who knowingly allowed severe unlawful sexual harassment to continue might be subjected to punitive damages.

Sexual Minorities and "Quid Pro Quo" Harassment

The newly emerging doctrines of sexual harassment quickly took on special significance for sexual minority employees, but only in limited circumstances. As early as 1980, when the sexual harassment theory was still relatively new, federal courts began to find that same-sex "quid pro quo" harassment violated Title VII. The leading case was *Wright v. Methodist Youth Services*, 511 F. Supp. 307 (N.D. Ill. 1981), where the court reasoned that the male victim had been pressured for sexual favors by a male supervisor who was presumably attracted to men, and thus who would not have subjected a female employee to the same treatment. The underlying theory was that such "quid pro quo" harassment violates Title VII because the victim is singled out because of his or her sex.

Since Title VII is a sex discrimination statute, not a general statute against workplace harassment, only harassment motivated by the sex of the victim violates the statute. The determination by courts that same-sex quid pro quo harassment violates Title VII was relatively uncontroversial, and the theory only failed in cases where the harassing individual was shown to be an "equal opportunity" harasser--one who demanded sexual favors from both men and women. In such a case, the courts felt, the victim was not being singled out because of his or her sex, and so the anti-discrimination principle embodied in Title VII was not relevant.

Sexual Minorities and the Hostile Environment Theory

Application of the hostile environment theory to "same-sex harassment" proved far more complicated and controversial. In these cases, the victim was usually either openly gay, a closeted person believed by others to be gay, or a non-gay person incorrectly perceived by others to be gay.

The harassment would usually take the form of name-calling, derogatory comments and practical jokes, but might escalate to more serious violence, including physical beatings and work sabotage. Some of the time,

the harasser would use language suggesting discomfort with or disapproval for signs of gender-role nonconformity by the victim. That is, derogatory statements would attribute feminine attributes to a man or masculine attributes to a woman. But sometimes it was clear from the context or statements that the harasser's motivation had to do with the victim's actual or perceived homosexual orientation.

Because Title VII does not forbid discrimination on the basis of sexual orientation, the question of whether such conduct created liability to the victim was conceptually difficult. Clearly, harassment motivated solely by the sexual orientation of the victim would be difficult to fit into the hostile environment theory that the Supreme Court had endorsed in *Meritor*, since the victim was being selected based on his or her sexual orientation, not his or her sex. In addition, at least some courts expressed doubt that Title VII would even apply to cases in which men were harassing men or women were harassing women, since, they argued, the statute was intended to protect members of one sex from discrimination by members of the opposite sex.

The *Oncale* Decision

In *Oncale v. Sundowner*, mentioned above, the Supreme Court confronted this argument in a case brought by a male oil rig roustabout who suffered severe harassment of a sexual nature (including a simulated shower-room rape with a bar of soap) from co-workers in an all-male crew. The lower federal courts in the 5th Circuit (whose jurisdiction includes Louisiana, where this occurred) concluded that Title VII did not apply to cases of "same-sex" harassment. The Supreme Court unanimously disagreed, holding that the relevant issue under the statute is whether the victim's sex was the motivation for the harasser's selection of him or her to be the victim.

At the same time, the Court signaled implicit disapproval of a growing trend among some of the lower federal courts to find that unlawful harassment had occurred when the harassing conduct was of a "sexual nature," regardless of the harasser's motivation for selecting the particular victim. The point was that Title VII is a discrimination statute, not a harassment statute. Harassment can be one form that discrimination takes, but not all harassment is unlawfully discriminatory, even if severe and pervasive, when it is inflicted with equal severity regardless of the factors listed in the discrimination statute.

Thus, after *Oncale* it was clear that harassment "because of sex" was covered under Title VII, even if both the harasser and the victim were of the same sex. What remained less clear was whether sexual minority employees who encountered workplace harassment, whether or not of a "sexual nature," could obtain relief under Title VII. How could a plaintiff prove that the harassment was "because of sex" as opposed to "because of sexual orientation?"

The *Price Waterhouse* Decision

An older sex discrimination case provided a theoretical way out of this dilemma. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court dealt with a discrimination claim by a woman who had been denied a promotion to partnership at a large accounting firm. During pretrial discovery, her attorneys had uncovered extensive evidence that some partners had opposed her promotion on the ground that her demeanor and dress were insufficiently "feminine" to meet their image of a "lady partner." The head of her office told her that in order to become a partner she would have to walk, dress, and act more femininely and start wearing make-up and jewelry.

The Supreme Court accepted the plaintiff's argument that this treatment amounted to "sexual stereotyping"--punishing an individual for failing to conform to preconceived notions of appropriate gender role--and that such stereotyping was evidence of unlawful discriminatory motivation under Title VII, since it imposed a barrier to advancement in the workplace and, at least in this case, seemed to be applied only against women.

Seizing upon the *Price Waterhouse* precedent, some attorneys for gay men suffering workplace harassment adopted the sexual stereotyping theory and argued that their clients were being harassed because of failure to conform to male gender norms.

Since the *Oncale* case, sexual harassment cases brought on behalf of sexual minority plaintiffs under Title VII have been most successful when the victims could credibly allege that they were singled out for persecution because of perceived gender non-conformity, in order to draw support from *Price Waterhouse*.

For example, in *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Circ. 2002), a male steward at the hotel, who was gay, complained of a hostile work environment created by his male co-workers, testifying in a deposition that they spoke of him and treated him like a woman. The trial court and a three-judge circuit panel held that his claim was really for sexual orientation discrimination, and dismissed his case. An expanded 9th Circuit panel, reconsidering the matter *en banc*, ruled that he had adequately alleged that he was victimized because of perceived gender non-conformity, and reinstated his case. The U.S. Supreme Court refused to review this ruling, 123 S.Ct. 1573 (2003), which is part of a growing trend in the reported appellate cases.

However, where it seems clear that the plaintiff was victimized because of actual or perceived homosexual orientation and evidence of gender stereotyping was not present, federal courts generally hold that Title VII does not apply. One prominent federal judge, Richard Posner of the 7th Circuit Court of Appeals in Chicago, argued in *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058 (7th Cir. 2003), that the gender stereotyping theory was being overused and misused by the courts to distort the meaning of Title VII, no doubt with the best of intentions when confronted with evidence of outrageously nasty workplace behavior exhibited towards gay employees.

State and Local Statutes

In those states and localities that have outlawed workplace discrimination on the basis of sexual orientation (and, in some places, gender identity or expression), gay employees do not need to resort to the gender stereotyping theory in order to seek redress against being harassed because of their sexual orientation. While civil rights lawyers have traditionally preferred to bring their cases in federal court under federal anti-discrimination laws, doing so in a gay harassment case is a gamble unless there is very persuasive evidence of gender stereotyping; and the gamble need not be taken when state or local courts are available to enforce a more directly applicable statute.

In addition, there are some jurisdictions, such as California, that have concluded that workplace harassment is offensive enough as a matter of public policy to be independently proscribed, regardless whether it is discriminatory in the particular case, and have added to their statutes and regulations accordingly. This was vividly illustrated in *Drummer v. San Francisco Housing Authority*, 2003 Westlaw 22391173 (Cal. Ct. App., 1st Dist., 2003), an unofficially published decision upholding a jury verdict against the City of San Francisco where a female supervisor was accused of sexually harassing both men and women. The city sought to rely on federal cases holding that such "equal opportunity" harassment was not discriminatory and thus not illegal, but the court of appeal pointed out that California's Labor Code included an express ban on workplace harassment apart from its ban on sex discrimination.

Since a substantial portion of the population works in states or localities that have not yet added "sexual orientation" or "gender identity or expression" to their list of proscribed bases for workplace discrimination, the limitations of Title VII as a source of protection against workplace discrimination for sexual minorities remains a problem.

Enactment of the pending Employment Non-Discrimination Act would solve this problem for those who are gay or perceived as such, but would not necessarily protect transgendered individuals. However, there is a growing body of precedent for the proposition that harassment of transgendered persons is almost

invariably motivated by disapproval of gender non-conformity, so the emergent Title VII precedents for that theory may be available in such cases.

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