Legal Update Article

Fourth Circuit Clarifies Scope of Title VII Same-Sex Workplace Harassment

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Same-sex harassment in the workplace under Title VII of the Civil Rights Act is not strictly limited to the three scenarios in the U.S. Supreme Court's seminal 1998 opinion in *Oncale v. Sundowner Offshore Services*, a three-judge federal appeals court panel has held in *Roberts v. Glenn Indus. Grp., Inc.*, No. 19-1215, 2021 U.S. App. LEXIS 15224 (4th Cir. May 21, 2021).

In the case before it, where a male employee was subject to sex-based remarks combined with physical assaults that were not overtly sexual, the Court reversed the district court's grant of summary judgment.

Background

Glenn Industrial, a company specializing in underwater inspection and repair services to utility companies, hired Chazz Roberts in 2015 as a diver's assistant. Roberts worked in an all-male environment and alleged he was subject to homophobic, derogatory, and sexually explicit comments. He said that he was harassed "pretty much every time" he was around his supervisor. In addition, the supervisor physically assaulted him on various occasions, including slapping his safety glasses off his face, knocking his helmet off, pushing him, and putting him in a chokehold.

Roberts complained to higher ranking employees in the company about his supervisor's behavior but was told to "suck it up." He also complained twice to the company's HR manager, who was the CEO's wife; however, he did not complain directly to the CEO, despite the company's policy requiring all complaints of sexual harassment be reported to the CEO. Following these complaints to the HR manager, the company did not discipline or counsel Roberts' supervisor.

Shortly after making his complaints, Roberts was involved in two workplace safety incidents. Following the second incident, the CEO instructed that Roberts be removed from the worksite and returned to headquarters, where he and Roberts met. The CEO directed Roberts to take a few days off. During this meeting, Roberts did not mention any mistreatment, harassment, or discrimination. Roberts was terminated and the CEO later claimed he terminated Roberts based on the two safety incidents, which he considered to be very serious.

Roberts filed suit against the company, alleging claims for same-sex harassment and retaliation in violation of Title VII. Finding that the claims did not fall within the three specific situations set forth in *Oncale*, 523 U.S. 75, for actionable same-sex harassment, the district court granted summary judgment to the company on the harassment claim. The district court also granted summary judgment to the company on the retaliation claim, because the decisionmaker (the CEO) did not have actual knowledge of Roberts' complaints, concluding there was no causal connection between Roberts' complaints and any adverse action. The district court further concluded that the company had

otherwise identified a legitimate, non-retaliatory reason for his termination — violation of the company's safety policies.

Fourth Circuit's Opinion

On appeal, the Fourth Circuit panel affirmed the district court's grant of summary judgment in favor of the company on the retaliation claim, finding Roberts had not established the CEO had actual knowledge about his complaints and because there was no causal link between Roberts' complaints and his termination.

However, the Court vacated the district court's grant of summary judgment on the harassment claim, holding that actionable same-sex harassment was not limited strictly by the scenarios in *Oncale*.

In *Oncale*, the Supreme Court recognized that same-sex harassment is actionable under Title VII and identified three "evidentiary routes" by which a plaintiff could establish a claim for same-sex harassment:

1. Where there is "credible evidence that the harasser [is] homosexual" and the harassment involves "explicit or implicit proposals of sexual activity";
2. Where the "sex-specific and derogatory terms" used indicate "general hostility to the presence of [the victim's sex] in the workplace"; and
3. Where the evidence shows that the harasser treated members of one sex worse than members of the other sex in a "mixed-sex workplace."

The district court found that none of these scenarios were applicable to Roberts, because no evidence suggested that Roberts' supervisor was homosexual or was generally hostile toward men in the workplace, and because Roberts worked in an all-male environment.

The Fourth Circuit reversed, finding, "Nothing in *Oncale* indicates the Supreme Court intended the three examples it cited to be the only ways to prove that same-sex sexual harassment is sex-based discrimination." While the circuit's 2019 unpublished, per curiam opinion could reasonably appear to suggest that the *Oncale* scenarios were exclusive, the Court cited favorably several opinions from other circuits that have refused to restrict same-sex harassment to the scenarios set forth in *Oncale*.

The Fourth Circuit also found support in the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). That case made clear that a "plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes." Moreover, the Fourth Circuit found the district court erred by disregarding the physical assaults Roberts suffered because they were "not of a sexual nature," as there is no requirement under Title VII that only sexual-based assaults can support a claim of a hostile work environment based on sex.

Although the physical assaults Roberts suffered were not overtly sexual in nature, and his supervisor did not make explicit or implicit proposals for sexual activity, this did not preclude a claim for same-sex harassment, the Court concluded.

Takeaways

This opinion provides additional clarity on a developing sub-issue of sexual harassment jurisprudence. Same-sex harassment claims can exist even where the harasser is not homosexual and where there does not appear to be general hostility toward one gender

in the workplace. Moreover, it is possible for acts of physical harassment to support a sexual harassment claim, even if not overtly sexual, where accompanied by other sexually charged commentary. Comments that are "homophobic, derogatory, and sexually explicit" are unacceptable and managers need to take prompt and remedial action when placed on notice of inappropriate conduct. Here, the HR manager and other supervisors were aware, and they failed to take any action. Making comments like "Suck it up" are unacceptable responses.

Employers need to train managers on how to respond properly to these types of complaints and not allow stereotypes regarding male-on-male complaints to hinder necessary remedial actions. In addition, employers need to ensure their harassment training is current and their harassment policies and handbooks are up to date. Managers and supervisors should be adequately trained to recognize and respond to allegations of harassment in the workplace.

Please contact a Jackson Lewis attorney with questions related to sexual harassment or discrimination in the workplace, training for management and employees, and other preventive practices.