

Post-Oncale: Same Sex Harassment Claims Under Title VII

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I. *Oncale v. Sundowner*

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), resolving conflict among the Circuits, the Supreme Court held, for the first time, that same-sex harassment claims are cognizable under Title VII. The Court made clear, however, that in order to state a claim, the plaintiff must prove that the conduct at issue was not merely “tinged with offensive sexual connotations,” but actually constituted discrimination “*because of sex.*”

In the context of a same-sex harassment claim, the Court provided three alternative avenues for establishing that the conduct at issue is “because of sex”: (1) the harasser is motivated by sexual desire; (2) the harasser is motivated by a general hostility to the presence of persons of his or her sex in the workplace; or (3) there is evidence demonstrating that members of the opposite sex were treated differently by the harasser (such as where someone is harassed “in such sex-specific and derogatory terms” as to reveal an antipathy to persons of the plaintiff’s gender.)

A. The “Because of Sex” Requirement

1. “Motivated By Sexual Desire”

Although the Supreme Court offered at least three possible alternatives for establishing the “because of sex” requirement, post-*Oncale*, viable sexual harassment claims generally have been found only in those cases where there is evidence that the harasser was “motivated by a sexual desire.”

a) “Motivated By Sexual Desire” Element Established

Dick v. Phone Directories Co., Inc., 397 F. 3d 1256 (10th Cir. 2005). Reversing summary judgment in favor of defendant in a case brought by a female plaintiff alleged harassment by female co-workers, Tenth Circuit held that under *Oncale*, “one way, but by no means the only way, a plaintiff in a same-sex sexual harassment suit may demonstrate that the harassing conduct was motivated by sexual desire . . . is to establish both that the harassing conduct constitutes an explicit or implicit proposal for sexual activity and that her harasser is homosexual. But a plaintiff need

not . . . establish that her harasser is homosexual in order to demonstrate that the harassing conduct was motivated by sexual desire.” Here court found evidence that co-workers touched the plaintiff’s “intimate parts,” engaging in same-sex sexual conduct with others in the workplace and shoved a sex toy into the plaintiff’s face” was sufficient for a jury to find conduct was motivated by sexual desire.

La Day v. Catalyst Technology, Inc., 302 F. 3d 474 (5th Cir. 2002). Reversing summary judgment in favor of the employer, Fifth Circuit found that a same sex harassment claim was stated where the alleged harasser approached the plaintiff from behind while he was bending down and “fondled his anus.” The plaintiff described the contact as similar to “foreplay with a woman” and immediately told the alleged harasser not to touch him that way because “I don’t play like that.” Relying on the nature of the alleged touching and that the alleged harasser had stated, “I see you got a girl. You know I’m jealous,” Court concluded that there was sufficient evidence of the harasser’s homosexuality to survive summary judgment.

Mota v. University of Texas Houston Health Science Center, 261 F. 3d 512 (5th Cir. 2001). Affirming jury verdict in favor male plaintiff who was subjected to repeated, aggressive and overt sexual advances by male harasser.

Shepherd v. Slater Steels Corp., 168 F. 3d 998 (7th Cir. 1999). Reversing summary judgment in favor of defendant, Seventh Circuit found there was sufficient evidence of the male harasser’s alleged sexual interest in male plaintiff based on evidence that harasser repeatedly remarked that he found the male plaintiff handsome, exposed his penis four to five times weekly, and rubbed himself to an erection while threatening to sexually assault the plaintiff.

Mann v. Sovereign Bank, 290 F. Supp. 2d 190 (D. R.I., 2003). Harasser’s own statements concerning her sexual preferences and limited physical contact towards plaintiff (hugging the plaintiff, complimenting plaintiff on a necklace, hair and clothes and rubbing plaintiff’s head on one occasion) were sufficient to establish that harasser was “motivated by sexual desire” allowing plaintiff to “narrowly” escape summary judgment on the “based on sex” element. However, Court still dismissed, finding allegations to be “minor league” and not “sufficiently severe or pervasive to withstand summary disposition.”

Fry v. Holmes Freight Lines, Inc., 72 F. Supp. 2d 1074 (D. Mo., 1999). District Court denied defendant's motion for summary judgment, finding there was a genuine issue for trial about whether the conduct of co-workers was "visited upon plaintiff because he was a man." Court relied on allegations of persistent sexual propositions (such as asking plaintiff questions on a daily basis, such as "Do you want to take it in the butt?"), epithets (such as calling plaintiff "Sally" and referring to him as "everybody's bitch") and offensive touching (such as kissing and caressing plaintiff's neck or grabbing his genitals) to conclude there was sufficient evidence to suggest that one or all of the harassing co-workers "may be oriented toward members of the same sex."

b) "Motivated By Sexual Desire" Element Not Established

Pedroza v. Cintas Corp. No. 2, 397 F. 3d 1063 (8th Cir. 2005). Upholding summary judgment for the employer, female employee who alleged female supervisor grabbed employee's face and attempted to kiss her on the mouth and cheek, attempted to hold employee's hand, pointed to her own buttocks and telling employee to "kiss it," said "kiss my ass" when employee asked for help, blew kisses at employee and saying that she didn't have a husband, did not establish that conduct was "motivated by sexual desire." Further court rejected argument that bawdy, locker room behavior is not commonplace among females and thus a jury could more readily infer actual sexual desire based on statements or acts by females.

James v. Platte River Steel Co., Inc., 113 Fed. Appx. 864 (10th Cir. 2004). Affirming summary judgment for employer because plaintiff failed to establish that alleged same sex harassment was "because of sex." Although the harasser jumped on plaintiff's back, stuck his tongue in plaintiff's ear, grabbed plaintiff's private parts, called plaintiff "bitch" and made obscene and vulgar statements with sexual connotations, the plaintiff admitted that he "had no clue why the coworker singled him out for harassment."

McCown v. St. John's Health System, Inc., 349 F. 3d 540 (8th Cir. 2003). Affirming summary judgment in favor of defendant, male plaintiff could not sustain a claim of harassment based on male supervisor's "grabbing McCown by the waist, chest and buttocks; grinding his genitals against McCown's buttocks in simulated intercourse; telling McCown to 'squeal like a pig, or a woman,' and making other lewd comments; attempting to stick the handle of a shovel and a tape measure in McCown's anus; and kicking McCown in the buttocks," because there was no evidence that supervisor has motivated by sexual desire and plaintiff has

testified that harasser was just trying to “irritate him” because “that’s just how he was.”

Mowery v. Escambia County Utilities Authority, 2006 U.S. Dist. LEXIS 5304, 2006 WL 327965 (N.D. Fla., 2006). Court granted summary judgment against male employee who alleged harassment based on conduct of male co-workers, including vulgar comments suggesting that the plaintiff was a homosexual. Viewed in the context of a blue-collar water/sewage company, comprised mostly of males, conduct was deemed horseplay and not motivated by sexual desire.

Smith v. County of Humboldt, 240 F. Supp. 2d 1109 (N.D. Cal., 2003). Female plaintiff alleged that female supervisor brushed up against her in restroom, touched plaintiff’s cheekbone, tried to sit next to plaintiff at lunch and hit plaintiff to get her attention. Granting summary judgment for employer, the Court found that “Plaintiff [did] not produce any evidence to support her theory that the harassment was because of sex.” Plaintiff’s “bald assertion” that she believed her supervisor was a lesbian because of her hairstyle was insufficient “to establish that [harasser] was a lesbian or that her actions toward [the plaintiff] were motivated by sexual desire. Additionally, “[t]he handful of incidents alleged by [plaintiff], many of which do not involve any touching, but simply involve being spoken to or approached, are insufficient to establish that the harassment was objectively so severe or pervasive that it is actionable.”

Budenz v. Sprint Spectrum, 230 F. Supp. 2d 1261 (D. Kan., 2002). Granting, in part, employer’s motion for summary judgment because plaintiff could not show that harassment was “because of sex.” Plaintiff’s belief that the harasser was homosexual and motivated by sexual desire was purely speculative and plaintiff could not name any other co-workers that were touched by harasser in a similar fashion. In addition, there was no evidence that harasser treated men differently than women, but only that he treated plaintiff differently than all other employees.

English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 840 (E.D. Va., 2002). Granting summary judgment for defendant, District Court found that there was no evidence that male co-worker’s sexual comments, poking and pressing his genitals against male plaintiff’s was motivated by sexual desire. Rather, Court noted that the work “atmosphere was akin to a male locker room where [the harasser] was known for his lewd behavior and even occasionally enlisted other co-workers to carry out his obnoxious pranks.”

2. “General Hostility” Towards Plaintiff’s Gender

- a) “General Hostility” Element Established
- b) “General Hostility” Element Not Established

Baugham v. Battered Women, Inc., 211 Fed. Appx. 432 (C.A. 6, 2006). Female plaintiffs alleged that a lesbian supervisor who was involved romantically with higher level female executive created a hostile work environment through public displays of affection with female executive and by making rude, sexual comments. Upholding summary judgment for the employer, the Sixth Circuit found that there was no evidence that the harasser’s conduct was motivated by general hostility to the presence of women in the workplace, noting “[m]ost of Plaintiffs’ allegations of harassment, however, are devoid of sex-specific or derogatory terms and have absolutely nothing to do with the fact that Plaintiffs are females.”

Linville v. Sears, Roebuck and Co., 335 F. 3d 822 (8th Cir. 2003). In the absence of any evidence that male supervisor was motivated by hostility towards men, district court properly granted summary judgment for employer, despite supervisor’s repeated conduct of hitting the male plaintiff in the scrotum with the back of his hand.

3. Gender Based Disparate Treatment

- a) “Disparate Treatment” Element Established
- b) “Disparate Treatment” Element Not Established

Noto v. Regions Bank, 84 Fed. Appx. 399, 2003 U.S. App. LEXIS 25516 (5th Cir. 2003). Fifth Circuit affirmed summary judgment against female plaintiff who alleged sexual harassment against female supervisor “had gay friends,” hugged and kissed plaintiff on the cheek, and said “I love you.” Although plaintiff contended evidence supported inference that supervisor was “motivated sexual desire,” in rejecting claim, Court relied on fact that supervisor hugged, kissed and said “I love you” to both female and male employees.

E.E.O.C. v. Harbert-Yeargin, Inc., 266 F. 3d 498 (6th Cir. 2002). Reversing a jury verdict in favor of plaintiff construction worker Joseph Carlton, a divided panel of Sixth Circuit concluded there was no evidence to support that a male supervisor’s conduct of touching Carlton’s genitals on multiple occasions was “because of sex.” Rather, majority concluded that what went on was “gross, vulgar, male horseplay.” The dissenting judge argued that the jury verdict should be affirmed because “[t]estimony was presented that

males were being treated differently from females,” as female office employees were not subjected to similar lewd conduct.

Lack v. Wal-Mart Stores, Inc., 240 F.3d 255 (4th Cir. 2001) Reversing a jury verdict, Fourth Circuit, applying Virginia law, but following *Oncale* and federal decisions, held that male employee’s harassment claim should be dismissed because supervisor directed lewd and vulgar sexual comments gestures to male and female employees on an equal basis.

Holman v. Indiana, 211 F. 3d 399 (7th Cir. 2000). Here a husband and wife who reported to the same supervisor each asserted claims of sexual harassment, alleging that their male supervisor had propositioned each of them for sex. Affirming summary judgment in favor of defendant employer, the Seventh Circuit stated, “Title VII does not cover the ***equal opportunity or bisexual harasser***, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly)...[i]t is for Congress to decide whether to address bad workplace behavior that cannot be labeled discriminatory. It is not the province of federal courts to expand the language of a statute that is clearly limited.”

English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 840 (E.D. Va., 2002). Granting summary judgment for defendant, District Court found that there was no evidence that male co-worker’s sexual comments, poking and pressing his genitals against male plaintiff’s was based on sex where harasser’s behavior “was also directed to the few women in the office as well. Moreover and more importantly, evidence that [harasser’s] obnoxious behavior was directed more at men than women cannot, standing alone, constitute discrimination because of sex.”

Brown v. Henderson, 115 F. Supp. 2d 445 (S.D. N.Y., 2000) (because harassing behavior was directed at both male and female plaintiffs, conduct was not “because of sex.”)

Romero v. Caribbean Restaurants, Inc., 14 F. Supp. 2d 185 (D. P.R. 1998) (alleged harasser exhibited lewd behavior in front of both sexes and thus did not reserve his “tasteless comportment” for male employees; thus conduct was not “because of sex”).

4. “Because of Sex” Established by Other Means

Whether viewed as “mavericks” or “judicial activists,” the judges of the Ninth Circuit have found the “because of sex” requirement to be satisfied in ways that were not discussed in *Oncale* and have been rejected by other federal courts.

a) Sex Stereotyping

Nichols v. Azteca Restaurant Enterprises, Inc., 256 F. 3d 864 (9th Cir. 2001). Reversing district court bench trial verdict, Ninth Circuit held that *Price Waterhouse* supported harassment claim brought by a male employee who was effeminate. “Because of sex” element established by evidence showing that male coworkers harassed plaintiff for walking and carrying his tray “like a woman,” referred to plaintiff as “she” and “her” and directed vulgar name-calling at him, such as “faggot” and a “fucking female whore.”

b) Conduct of A “Sexual Nature”

Rene v. MGM Grand Hotel, Inc., 305 F. 3d 1061 (9th Cir. 2002). The Ninth Circuit reversed a summary judgment in favor of MGM in a case involving same sex harassment against an openly gay man. Although there was considerable evidence that the harassment was based on the plaintiff’s sexual orientation (including his testimony that he was targeted because he is gay) and there was no evidence that any of the harassers was “motivated by sexual desire,” a divided Ninth Circuit held that because the plaintiff was “singled out from his other male co-workers” and was subjected to conduct of a “sexual nature,” including grabbing his crotch and poking his anus, he had established a claim for harassment “because of” his sex..

II. Harassment Because of Sexual Orientation

Federal courts (including the Ninth Circuit) uniformly agree that Congress intended the term “sex,” as used in Title VII, to mean “biological male or biological female” and not one’s sexual orientation.

A. Evidence of Anti-Gay Motive Fatal To Claim

Hamm v. Weyauwega Milk Products, Inc., 332 F. 3d 1058 (7th Cir. 2003). Affirming summary judgment for employer because alleged harassment was rooted in coworkers’ perceptions of his sexual orientation, not the plaintiff’s failure to conform to gender-based stereotypes.

King v. Super Service, 68 Fed. Appx. 659 (6th Cir. 2003). Affirmed district court's grant of summary judgment in favor of employer because evidentiary record demonstrated that plaintiff was harassed because male co-workers thought, "whether correctly or not," that plaintiff was gay, and not because he was male.

Bibby v. Phila. Coca Cola Bottling Co., 260 F. 3d 257 (3rd Cir. 2001). Affirming summary judgment in favor of employer, Third Circuit held that Plaintiff who was physically battered, and subjected to comments such as, "everybody knows you're gay as a three dollar bill," "everybody knows you're a faggot," "everybody knows you take it up the ass," and called a "sissy" failed to state a claim, noting that while "[h]arassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment."

Spearman v. Ford Motor Co., 231 F. 3d 1080 (C.A. 7, 2000). Affirmed grant of summary judgment for employer where evidence indicated that the plaintiff's male co-workers directed stereotypical statements at him to express their hostility to his perceived homosexuality, not to harass him because he is a man.

B. Evidence of Anti-Gay Motive Not Fatal To Claim

Rene v. MGM Grand Hotel, Inc., 305 F. 3d 1061 (9th Cir. 2002). See discussion above.

Nichols v. Azteca Restaurant Enterprises, Inc., 256 F. 3d 864 (9th Cir. 2001). See discussion above.

Schmedding v. Tnemec Co., Inc., 187 F. 3d 862 (8th Cir. 1999). Although, district court dismissed same sex harassment claim where plaintiff alleged that was "perceived as homosexual" and "patted on the buttocks; asked to perform sexual acts; given derogatory notes referring to his anatomy; called names such as 'homo' and 'jerk off'; and was subject to the exhibition of sexually inappropriate behavior by others including unbuttoning of clothing, scratching of crotches and buttocks; and humping the door frame to [his] office," Eighth Circuit reversed, holding, "simply because some of the harassment alleged includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is [not] thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation."