

Louisiana Employment Law Letter

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SAME-SEX HARASSMENT

It's not just about sex anymore

The U.S. Fifth Circuit Court of Appeals in New Orleans recently explained the types of evidence needed to maintain a same-sex harassment claim under Title VII of the Civil Rights Act of 1964 and its counterpart under Louisiana law. In the case, the court clarified that one way an employee who claims to have been sexually harassed by a member of the same sex can prove his case is to show that the alleged harasser is a homosexual.

*The Fifth Circuit looked for guidance from the U.S. Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.* In that 1998 case, the Court recognized that same-sex harassment is prohibited by Title VII if the employee proves the conduct occurred "because of his or her sex." (See "Supreme Court rules in same-sex harassment case," *Louisiana Employment Law Letter*, March 1998, p. 1.)*

*For the first time since *Oncale* was decided, the Fifth Circuit has addressed how an employee may prove that another member of the same sex harassed him "because of his sex," and you might be surprised to learn that it's not just about sex anymore.*

Horseplay or homosexual interest?

Patrick La Day, a reactor technician, worked assignments at various locations for his employer. While working on an assignment out of town, a male supervisor allegedly approached him and his girlfriend, who were sitting in a car, and said, "I see you got a girl. You know I'm jealous."

On another occasion, according to La Day, the supervisor approached him from behind while he was bending over and "fondled" him. The employee claimed he turned around immediately and told the supervisor, "I don't play like that." He reported the second incident to his immediate supervisor the same day. After making the complaint, he alleged that the supervisor spit tobacco on his hardhat and shirt and said, "[T]his is what I think of you."

La Day was later assigned to another project that would have required him to work with the supervisor again. He refused the assignment, and his employer initiated termination proceedings against him.

La Day filed a sexual harassment charge against the company based on the male supervisor's conduct. On receiving the charge, the company began an investigation, which was headed by its vice president of human resources. The investigation revealed that two other employees had made similar complaints against the supervisor:

- One male employee alleged that the supervisor asked him to sit on his lap, told him he had "pretty lips," and suggested the employee perform oral sex on him (in less clinical and more explicit terms). The complaint was made to the personnel manager, who arranged a meeting between the employee and the supervisor. After the meeting, the employee told the personnel manager that "it was a misunderstanding" and requested that she destroy the complaint.
- The other complaint was also made by a male employee to the personnel manager. That employee alleged the supervisor touched his genitals.

La Day then worked on two other assignments for the company, neither of which required him to work with the male supervisor. According to the employee, however, his co-workers insulted him and gave him a hard time because of his earlier conflict with the supervisor. He eventually resigned because he didn't believe he could trust his fellow employees.

La Day also claimed he lost nearly 60 pounds, began drinking heavily, and experienced other health problems he attributed to his experience while working for the company. He was also diagnosed with major depressive disorder and anxiety and was eventually hospitalized, allegedly as a result of the experience.

Not surprisingly, La Day sued the company and the male supervisor, claiming violations of Louisiana and federal law on several grounds, including the alleged sexual harassment. The company and the supervisor asked for dismissal of the lawsuit, which the federal trial court granted on the ground that the former employee didn't produce enough evidence to send the case to a trial. He appealed to the Fifth Circuit, which reinstated his case.

How to tell the difference

In La Day's case, the Fifth Circuit evaluated the burden of proof and evidence needed to maintain a same-sex harassment claim in light of the Supreme Court's 1998 decision. The court explained that in a same-sex harassment case, it must first determine whether the harasser's conduct constitutes "sex discrimination" (*i.e.*, the alleged unlawful activity occurred "because of" the victim's sex). The court observed three ways in which sex discrimination based on same-sex harassment can be shown:

1. evidence that the harasser made "explicit or implicit proposals of sexual activity" with "credible evidence that the harasser was a homosexual";
2. evidence that the harasser was "motivated by general hostility to the presence of [members of the same sex] in the workplace"; or

3. "direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace" (*i.e.*, that the harasser treated members of his or her same sex less favorably than members of the opposite sex).

La Day attempted to support his same-sex harassment claim with the first type of evidence — that the male supervisor made "explicit or implicit proposals of sexual activity" and is a homosexual. The primary question facing the court was "[w]hat kind of proof constitutes 'credible evidence that the harasser was homosexual.'" The court observed that while the Supreme Court offered guidance on "what" an employee must prove in showing same-sex harassment, it didn't offer guidance on "how" he must do it. The court also found very little guidance on the issue in other cases decided since 1998.

While La Day didn't allege that the male supervisor clearly stated a desire to have sexual relations with him, the Fifth Circuit noted that the supervisor allegedly touched him in a sexual manner. The court, however, found stronger evidence of homosexual interest on the supervisor's part. According to the court, a jury could view the supervisor's alleged comment reflecting his jealousy over the employee's heterosexual relationship as indicating that he was sexually interested in La Day.

The Fifth Circuit observed that it isn't possible to specify all the ways an employee might prove the alleged harasser acted out of homosexual interests. But the court listed two types of evidence "that are likely to be especially 'credible' proof that the harasser may be a homosexual":

- evidence suggesting that the alleged harasser attempted to have sexual relations with the employee rather than to simply annoy or humiliate him; and
- evidence suggesting that the alleged harasser attempted to make homosexual advances to other employees.

The Fifth Circuit cautioned that the critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex aren't exposed. The alleged harasser may make sexually demeaning or offensive remarks or putdowns to the employee (and members of the opposite sex) for sex-neutral reasons, but he's far less likely to make sexual *advances* without regard to sex, the court said.

An exception would be a bisexual harasser who makes unwanted advances to men and women. The court also observed that La Day's case didn't involve any evidence that the male supervisor had made sexual advances toward women.

The Fifth Circuit conceded that it's certainly possible the male supervisor engaged in the alleged conduct to annoy or humiliate La Day rather than out of any homosexual interest. But the court determined that a jury should answer that question.

The court recognized that La Day's claim was for hostile work environment sexual harassment (*i.e.*, unwelcome conduct "because of sex" that is severe or pervasive and affects a term or condition of employment). Thus, the employer could have defended against the claim by showing that (1) it exercised reasonable care to prevent and correct sexually harassing behavior and (2) the employee unreasonably failed to take advantage of those opportunities or avoid harm otherwise. The court observed that the employer didn't address or offer evidence to support that defense and thus reinstated the employee's claim. *Patrick La Day v. Catalyst Technology, Inc., and Willie Craft*, No. 01-31049, 2002 U.S. App. LEXIS 16476 (5th Cir. August 15, 2002).

Easy rules for minimizing your risk from sexual harassment claims

Managers and human resources professionals should remember that sexual harassment now comes in all shapes and sizes: *quid pro quo* (i.e., if you don't sleep with me, you're fired), hostile work environment, same sex (male to male, female to female), and opposite sex (male to female, female to male). Here are the best ways to avoid lawsuits and liability for any variety of sexual harassment:

- Implement a sound harassment policy with alternative complaint procedures and a retaliation provision.
- Communicate your policy verbally and in writing to all managers, supervisors, and employees, and obtain a signed acknowledgment that they have received and read and will abide by the policy.
- Train your managers and supervisors, preferably once a year, to recognize and eliminate any conduct that could be considered harassment.
- Train your human resources professionals or other managers and supervisors who are responsible for handling harassment complaints on how to promptly and effectively investigate and resolve them.
- Consistently and equally apply your harassment policy to all your managers, supervisors, and employees.
- Take prompt remedial action to correct any behavior by any person toward any other person in your workplace that's sexual in nature or gender-based or could be considered sexually offensive or discriminatory.

Think about preventing and correcting the harassing behavior, and you'll be in a much better position to ward off and defend against any claims that might arise. And remember, sexual harassment isn't just about a male supervisor making unwanted sexual advances toward a female subordinate anymore. It's about making sure you don't expose the members of one sex to disadvantageous terms or conditions of employment to which members of the other sex aren't exposed.

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