
The Homosexual Puzzle

How Courts Deal With Sexual Harassment Claims Brought By Homosexual Plaintiffs

By Michael Sachs

Imagine for a moment two men, Sam and George. These men work at the same office, performing the exact same job. In fact, Sam and George are identical in every way but one: While Sam is straight George is gay. Now imagine further that the exact same coworkers harass Sam and George. These harassers grab Sam and George's genitals and anuses. They draw various sexual pictures on the walls of the bathroom labeled with the two men's names. In fact the harassment suffered by both Sam and George is identical in every way.

It follows that since both have suffered the same harassment from the exact same harassers they both should recover, right? Well, under the law it is clear that Sam, because he is straight, will recover for his claim, but will George? Here the law is not so clear. In fact, whether George is compensated can be determined by simple things such as where he lives or whether he was closeted or out at the time of the harassment. This is true regardless of the sex of the harasser.

While it may seem unjust for the viability of a sexual harassment claim to rest on such simple factors, this is the situation in which homosexual plaintiffs currently find themselves. This is true because, while the Supreme Court of the United States has spoken to various situations involving sexual harassment, it has yet to directly address the issues surrounding homosexual plaintiffs. Without a Supreme Court decision to lead them, courts throughout the country have taken different views of the proper standard. These views range from prohibiting all recovery for homosexual plaintiffs; to looking into the mind of the harasser; to allowing homosexuals to recover whenever heterosexual plaintiffs in the same situation would recover.

The broadest standard, found in the 2002 Ninth Circuit case *Rene v. MGM Grand*, attempts to eliminate all differences between homosexual rights and heterosexual rights under sexual harassment law. It is this standard that the Supreme Court should adopt. This standard clears up many of the troubles courts currently face when a claim is brought by a homosexual plaintiff. Additionally, this case is the most fair in its application, treating all plaintiffs equally regardless of their particular sexual orientation.

The Evolution of Sexual Harassment Law

Generally, employers who fail to hire or discharge an employee or deprive an individual of employment opportunities because of that individual's "race, color, religion, sex or national origin" are acting unlawfully, according to Title VII of the Civil Rights Act of 1964 (as Codified in 42 U.S.C. § 2000e). This language has created protection from two types of harassment: quid pro quo harassment (where an employee is forced to tolerate sexual harassment to obtain or keep a job, benefit, raise, or promotion) and hostile work environment harassment (where harassment at work unreasonably creates a hostile, abusive, or offensive work environment). It is primarily the second type of harassment that is discussed in this paper.

The term "because of sex" has evolved over the life of Title VII. Initially, Title VII covered only women who were harassed by men. Then, in 1983 the Supreme Court of the United States interpreted the language of Title VII to cover men and women. Finally, in 1998 it was expanded to cover same-sex sexual harassment (when a woman is harassed by a woman or a man is harassed by a man). This 1998 Supreme Court case allowed a straight male to recover for sexual harassment inflicted by his straight male coworkers. The Court found that a plaintiff does not need to demonstrate that the harasser was motivated by sexual desire in order to recover.

Traditionally, homosexual plaintiffs were excluded from all recovery because, as one legal scholar notes, "[t]o discriminate against any individual *because of* that individual's sex can only mean to act upon a bias as to biological sex" (Lex K. Larson, *Employment Discrimination* §168.10[1] at 10-168-58 (2003). (citing *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1974)). In other words, harassment "because of sex" can only mean to harass a person because you hold a bias toward the person's gender.

While this had been the established principle, courts have begun to take a different view of Title VII's language. Some courts have allowed recovery in some circumstances, but not all courts have followed suit. Even those courts that do allow recovery are split on the circumstances under which recovery is appropriate. The courts have generally split into four separate approaches of how to handle a sexual harassment case involving a homosexual plaintiff.

The Four Views

The first view, the "traditional view," can be seen in many cases including *Simonton v. Runyon*. This view follows the traditional belief that if the plaintiff is homosexual then he or she cannot recover. The court reasons that when a homosexual is harassed, the harassment must be because of the plaintiff's sexual orientation. Accordingly, discrimination based upon sexual orientation is not discrimination "because of sex" under Title VII's meaning, and therefore is not recoverable. It does not matter if the plaintiff and harasser are of the same sex or opposite sex. The determinative factor is the plaintiff's sexual orientation. Because this view never allows recovery for homosexual plaintiffs it is the most restrictive all the views.

The second view the "closeted homosexual view," can be seen in cases such as *Centola v. Potter*. This view allows only those homosexual plaintiffs whose coworkers did not know their sexual orientation to recover. While a court following this view agrees that homosexuals harassed because of their sexual orientation cannot recover, the court reasons that if the harassers did not know the plaintiff was homosexual they could not have been harassing the plaintiff because of their sexual orientation. Thus, because the harassment was not due to the plaintiff's sexual orientation, it is harassment "because of sex" as defined by Title VII. Unfortunately, this view places an added requirement on homosexual plaintiffs. While heterosexual plaintiffs need only prove harassment, homosexual plaintiffs must first prove the harassers did not know their sexual orientation, *then* prove the harassment. Despite this added requirement, this view is still broader than the "traditional view" because it allows recovery under some situations.

The third view, the "failure to conform view," can be seen in the case *Nichols v. Azteca Restaurant Enterprises*. Under this view, plaintiffs who are harassed because of their failure to conform to gender stereotypes are able to recover. This occurs where a woman is acting too masculine or a man is acting too feminine. In *Nichols* the male plaintiff's coworkers addressed him as "her" or "she," in part because he carried his tray like a woman. While this view has seen very limited application, one court has stated that, "[conceivably], a [male] plaintiff who is perceived by his harassers as stereotypically masculine in every way *except for his actual or perceived sexual orientation could maintain a Title VII cause of action* alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do." (*Centola v. Potter*, 183 F. Supp. 2d 403, 408-09 (D. Mass. 2002)). Thus, a homosexual male could recover primarily because he has sexual partners of the same sex, which is not stereotypically something that 'real' men do; 'real' men date women. The perception that he is not acting as a 'real' man could allow him to recover. While a court has stated this is conceivable, no court has ever taken this view so far. While this view has rarely ever been applied, even in the narrowest occasions, it still allows more recovery than either of the two preceding views. This is because the court looks to broader issues, such as the type of harassment the plaintiff suffered and if this harassment was due to gender based stereotypes, rather than just the plaintiff's sexual orientation.

The fourth and final approach, the "harassers' actions view," comes from the case *Rene v. MGM Grand Hotel*. Under this approach, the focus of the courts is shifted completely away from the identity of the plaintiff and toward the actions of the harasser. Instead of looking to see whether a plaintiff is homosexual or heterosexual, the court looks to see what type of harassment the plaintiff suffered. If the plaintiff was harassed in a sexual way (harassment focusing on sexual parts of the body), it is irrelevant if the plaintiff was homosexual or heterosexual. Thus, in the *Rene* case itself, where coworkers harassed the homosexual plaintiff by grabbing his genitals or poking his anus through his clothes, the court found the harassment was "because of sex," regardless of the plaintiff's sexual orientation. Accordingly, this is the broadest view. Because the focus is shifted away from the plaintiff, this view is intended treat all plaintiffs, heterosexual and homosexual, equally.

With the various interpretations laid out, the questions become: What are the boundaries between the different standards? And does it make a difference which interpretation the court uses? A number of hypothetical examples will help demonstrate the differences between the various interpretations and their application in different situations. In all of these examples, whether the defendant and plaintiff are of the same sex is irrelevant. In cases involving heterosexual plaintiffs, no matter which view the court follows, the outcome is the same.

Comparing the Different Interpretations: Claims Brought by Heterosexual Plaintiffs

Claims brought by heterosexual plaintiffs fall into two separate categories: those in which both the plaintiff and the defendant are heterosexual, and those in which the plaintiff is heterosexual and the defendant is homosexual.

In cases where the plaintiff is heterosexual and the defendant heterosexual, the alleged harassment consists of sexual comments and sexually based actions. The comments may consist of homosexual epithets, threats of rape, and other sex related comments. The physical actions may include the alleged harasser exposing himself to the plaintiff or touching the plaintiff on his genitals or anus. Under these facts, courts would allow the claim to go forward no matter which interpretation the court uses. Under even the most stringent standard, as found in the “traditional view,” the plaintiff could recover. Because the plaintiff is heterosexual, the claim avoids the problems implicated by claims of homosexuals. These were the facts found in a 1998 Supreme Court case, which stated that a heterosexual plaintiff could recover for sexual harassment inflicted by harassers of the same sex even when the harassers lack sexual desire.

In cases where the plaintiff is heterosexual and the defendant is homosexual the harassment is actionable, regardless of the interpretation a court uses. Because the plaintiff is heterosexual the court does not encounter any of the problems found in claims brought by homosexual plaintiffs. Furthermore, when the plaintiff and defendant are of the same sex, and the defendant is homosexual, the court can assume the defendant acted because of sexual desire. Since sexual desire motivated the violation, it allows courts to analogize the harassment to harassment by a male directed at a female based on sexual desire. This type of harassment clearly falls under the meaning of Title VII’s “because of sex.”

Claims Brought by Homosexual Plaintiffs

While the view used by the court for claims brought by heterosexual plaintiffs does not alter the outcome, the view the court follows becomes important when a homosexual plaintiff brings the claim. This type of case falls primarily into one of two different categories: a case in which the harasser is unaware of the plaintiff’s sexual orientation, or a case in which the harasser knows the plaintiff’s sexual orientation. The sexual orientation of the harasser does not change the outcome of any of these examples.

In an example where the plaintiff is homosexual, but the harasser does not know this, the alleged harassment consists of both sexually charged words and actions. These actions can include touching of the genitals or anus.

Under the “traditional view” the claim would fail. A court adopting this view would find the plaintiff’s sexual orientation determinative, saying that because the plaintiff is homosexual, the harassment was based on the plaintiff’s sexual orientation not because of the plaintiff’s sex.

The opposite outcome occurs under both the “closeted homosexual view” and the “harasser’s actions” view. Under the “closeted view,” the facts of this hypothetical are particularly important. A court adopting this interpretation would allow a claim to go forward because the defendant was not aware that the plaintiff was homosexual; therefore, the harassment could not have been due to the plaintiff’s sexual orientation. Since the harassment was not due to the plaintiff’s sexual orientation, it must have occurred because of the plaintiff’s sex.

Like the “closeted homosexual view,” the “harasser’s actions view” would allow a plaintiff to recover. However, unlike the “closeted homosexual view,” the “harasser’s actions view” focuses on the actions of the alleged harasser rather than the harasser’s motivations and knowledge. This view focuses on the areas of the body targeted by the harasser. If the actions targeted an area of the body related to sex, such as the

genitals or anus, the court would interpret the actions to be “because of sex” and allow the claim to go forward.

What about cases where the plaintiff is homosexual and the defendant knows that? This alters the outcome under the “closeted homosexual view” but not under the “harasser’s actions view” or the “traditional view.”

Under the “traditional view” the plaintiff’s sexual orientation is still the determinative factor. Because the plaintiff is homosexual, the harassment is “because of” sexual orientation not “because of sex,” and thus the claim must fail.

As seen above, the “closeted homosexual view” focuses on the harasser’s knowledge. But because the harasser’s knowledge changes, the analysis under this view changes. When a defendant knows the sexual orientation of the plaintiff, the court views the harassment as motivated by sexual orientation. When a court views the harassment as motivated by sexual orientation, the plaintiff cannot recover. Under the “harasser’s actions view,” the plaintiff would still be able to recover. Because the court focuses on the type of harassment, and the harassment still involves areas of the body related to sex, the plaintiff can still recover.

In many cases, including the hypothetical ones described above, *where* a plaintiff brings his or her suit can be the determining factor. Say George and Sam live in an area of the country that follows the “harasser’s actions view.” Both would recover. On the other hand, if they live in an area that follows the “traditional view,” Sam would recover while George would not. In an area following the “closeted homosexual view,” Sam would recover, while George’s recovery would depend on whether his coworkers knew his sexual orientation. Finally, under the “failure to conform view,” Sam would still recover where as George may or may not. If the court takes a wide view, allowing failure to conform just based upon George’s failure to conform to the stereotype that men date women, he would probably recover. On the other hand, if the court takes a narrow view of “failure to conform,” George’s recovery would depend on whether he displayed numerous mannerisms, actions, or styles of speech that are stereotypically feminine.

Until the Supreme Court of the United States addresses this issue and clears up these differences, inconsistent legal decisions will continue to be made.

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