

## SEXUAL HARASSMENT AND HOMOSEXUALITY

The prohibition of Title VII of the Civil Rights Act of 1964 against sex discrimination does not protect transsexuals where the plain meaning of the prohibition implies that it is unlawful to discriminate against women because they are women and against men because they are men. In the context of Title VII's prohibition against discrimination, sex means membership in a class delineated by gender; it does mean sexual orientation, preference, identity, affiliation, or behavior. Plakio v. Congregational Home, Inc., 902 F.Supp. 1383 (D. Kan. 1995). People who are asked because they are homosexual or are perceived as homosexual are not protected by Title VII anymore than people who are harassed for having brown eyes; being homosexual does not deprive someone of protection from sexual harassment under Title VII, but is merely irrelevant to it. Vandevanter v. Wabash Nat'l Corp., 887 F.Supp. 1178 (N.D. Ind. 1995).

However, many courts have held that same sex sexual harassment that consists of homosexual advances is made on the basis of gender and may be actionable under Title VII. For example, when a homosexual supervisor makes offensive sexual advances to a subordinate of the same sex, and not doing so to employees of opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to the treatment. EEOC v. Waldon Books Co., 67 FEP 1446.

Nothing in the body of Title VII limits its protection to heterosexual harassment. On the contrary, the language of the statute is non-exclusive creating a broad rule of workplace equality. Therefore, Title VII encompasses circumstances such as a male employee's claim that he was sexually harassed by his male supervisor. Moreover, Title VII protections are invoked if a bisexual supervisor singles out employees of one sex for harassment. Raney v. District of Columbia, 68 FEP 1620.

A female employee can establish that harassment of her was based upon sex by showing that her harasser harassed only women and thus did not treat men in a similar fashion; and, therefore, ruling that homosexual sexual harassment can violate Title VII. McCoy v. Johnson Controls World Services, 67 FEP 1763.

The case of a male employee who claimed that he was discharged for refusing the sexual advances of a male supervisor presents the obverse of the coin of heterosexual harassment which is prohibited under Title VII. Wright v. Methodist Youth Services, 25 FEP 563 (D.C. Ill. 1981).

However, distinguishing between harassment of individuals of the same sex by homosexuals or bisexuals and harassment by heterosexuals, courts have held that no viable Title VII claim was stated against a man for a hostile environment created by male co-employees who tormented him with sexually offensive comments and physical assaults absent allegations of homosexuality. Title VII requires that the harassment be because of the victim's sex. Therefore, heterosexual male on heterosexual male conduct does not fit within the purview of the statute. McWilliams v. Fairfax County Board of Supervisors CA, 69 FEP 1082.

## **EMPLOYER LIABILITY**

Employer liability may depend on whether the alleged sexual harassment is classified as quid pro quo or hostile environment. In a case of hostile environment sexual harassment, liability may hinge on whether the employer had actual or constructive knowledge of the harassment and on the reasonableness of the employer's response once it learned of the harassment.

Generally speaking, an employer will be liable to employees who suffer economic harm as a result of quid pro quo harassment if the harasser had actual authority to alter the victim's work conditions, regardless of whether the employer had knowledge of the harassment when it occurred.

In hostile environment sexual harassment, employers are liable only if they knew or should have known about the harassment and they failed to take prompt and reasonable remedial action to correct the situation. See Meritor case.

## **RETALIATION**

Title VII prohibits retaliation against an employee who files a discrimination charge or who opposes discriminatory employment practices. If an employer retaliates after an employee files a charge or sexual harassment, a second charge for retaliation may be filed. The prohibition also protects employees who have communicated an intent to file a charge, who have testified on behalf of a co-worker who filed a sexual harassment charge, who have refused to testify on behalf of the employer, or who have filed charges against other employers. Employees who are not the direct victims of sexual harassment, but who oppose it or report it on behalf of another employee also are protected by Title VII from retaliation. Conduct that disrupts the workplace or that seriously affects the opposer's job performance is not protected.

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