Same-Sex Sexual Harassment: A Legal Assessment with Implications for Organizational Policy

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The legal debate over sexual harassment (SH) has taken an interesting turn concerning the controversial issue of same-sex sexual harassment (SSSH). Until recently, a variety of such cases were decided at the district and appellate court levels with little uniformity in outcome. This disagreement among the courts’ decisions propelled the U.S. Supreme Court, which had turned away several appeals in such cases to grant full review to the SSSH case of Oncale v. Sundowner Offshore Services, Inc., et al. (1996). At issue was whether Title VII of the Civil Rights Act of 1964 could be interpreted to find that the unwelcome sexual conduct of one person toward another person of the same sex could be defined as SH. In a unanimous decision, the high court held that SSSH is indeed actionable under Title VII and that targets of such harassment can win the same remedies as targets of opposite-sex SH. Moreover, the court ruled that the sexual orientation of the perpetrator and/or target is irrelevant to a finding of SH, although it may

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be considered as a contributing factor (Oncale v. Sundowner Offshore Services, Inc., et al., 1998).

For nearly 20 years prior to the Supreme Court ruling in Oncale, more than 40 cases had come before the federal courts with inconsistent results. Further, the decisions were about two to one in favor of considering same-sex cases under Title VII. However, the U.S. Supreme Court was reluctant to entertain the argument, refusing to hear three earlier cases involving SSSH.

To provide some historical perspective of the jurisprudence regarding SSSH, consider the variety of rulings just prior to the Supreme Court’s decision. These cases and other will be discussed in more detail in succeeding sections:

1. The Fourth Circuit ruled that SSSH does not violate Title VII if both parties are heterosexual. However, the court also opined that SSSH is actionable if both parties are homosexual (McWilliams v. Fairfax County Board of Supervisors, 1996).
2. The Fifth Circuit dismissed Oncale v. Sundowner Offshore Services, Inc., et al. (1996) and was reaffirmed by the Appellate Court. However, the case was subsequently appealed and the U.S. Supreme Court granted certiorari review to the Fifth Circuit’s decision.
3. The Sixth Circuit ruled against the actionability of SSSH in Yeary v. Goodwill Industries-Knoxville, Inc. (1997) but was overturned by an Appellate Court that cited a “but for sex” argument. Title VII requires only that a person receives discriminatory treatment from a company or supervisor because of [his or her] sex (Equal Employment Opportunity Commission [EEOC], 1998); the “because of sex” or “but for sex” argument has its origins in this language.
4. The Seventh Circuit proposed dicta in favor of SSSH in Baskerville v. Culligan International Co. (1995) but this ruling was ignored in subsequent cases by lower courts within the circuit.
5. The Eighth Circuit also ruled that SSSH was a Title VII violation, again citing a “but for sex” argument (Quick v. Donaldson Co., Inc., 1996).

In addition to this confounding assortment of rulings, the EEOC provided little in the way of clarification in SSSH cases. Prior to the Oncale decision, the EEOC ruled that the target of SH could be of the same sex as the perpetrator. Specifically, the EEOC stated that “the victim and the harasser may be of the same sex where, for instance, the SH is based on the victim’s sex, and the harasser does not treat employees of the opposite sex the same way” (EEOC Compliance Manual, Section 614.2(b)(3)). In other words, SSSH, according to the EEOC, was actionable but only if it was “because of” the person’s sex that the harassment took place.

However, the EEOC made a point of stating that Title VII does not prohibit discrimination on the basis of sexual orientation. In an example from their compliance manual (Section 615.2), the EEOC (1998) states that “if a male supervisor harasses a male employee because of the employee’s homosexuality, then the supervisor’s conduct would not be sexual harassment, since it is based on the employee’s sexual preference, not this gender.”

Although the Supreme Court decision in Oncale provided some clarification to this murky area of SH law, it also raised some new questions. Therefore, this discussion will review the legal history of SSSH and will address the implications of the high court’s decision for SH policies and procedures. Specifically, the following issues will be addressed: (a) what