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Can a Gay Man Targeted by Co-Workers Sue for Sexual Harassment? A Recent Federal Appeals Decision Says Yes

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CAN A GAY MAN TARGETED BY CO-WORKERS SUE FOR SEXUAL HARASSMENT?
A Recent Federal Appeals Decision Says Yes

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The U.S. Court of Appeals for the Ninth Circuit has done it again. It issued an opinion that sounds extreme, may be vulnerable to reversal by the Supreme Court, and, yet, is correct.

The case was *Rene v. MGM Grand Hotel*, and the opinion was issued by an *en banc* panel - that is, a large panel of judges reconsidering an earlier, three-judge panel's decision. (Here, the three-judge panel had previously dismissed the claim).

In *Rene*, the *en banc* panel held that a man harassed by his co-workers because he was gay could maintain an action for sexual harassment under Title VII of the Civil Rights Act of 1964, the primary federal anti-discrimination statute.

The Allegations in *Rene v. MGM Grand Hotel*

The plaintiff in the suit, Median Rene, is an openly gay man who worked as a butler in a Las Vegas hotel, on a floor reserved for high-profile and wealthy clients. According to his complaint and evidence obtained during discovery, Rene was subjected to a hostile environment by his fellow butlers--all male--over a two-year period.

Rene filed suit alleging that this harassing behavior violated his rights under Title VII. Title VII prohibits discrimination (including harassment) on the basis of sex, but not on the basis of sexual orientation. Every court to address the issue has agreed with this interpretation of Title VII, and Congress has failed to amend Title VII to add sexual orientation to its list of prohibited characteristics despite several bills that have been introduced over the years.

Accordingly, Rene could not simply allege that he had faced discrimination because he was gay. Rather, to state a Title VII case, he was required to allege that he had faced discrimination "because of sex."

Had he? That was the question for the trial court - which said no, as did the appellate panel. But, as noted above, the *en banc* panel disagreed.

When Does Harassment Occur "Because of Sex"?

What does it mean for harassment to occur "because of sex," as Title VII requires? Surprisingly, given Title VII's long history, the answer to that question is still not entirely clear.

In cases of opposite-sex harassment, the "because of sex" requirement has traditionally been overlooked. Courts have simply presumed that when men harass women they do so because of sex--that is, they wouldn't direct the same conduct at men. And in some cases, that is obviously true: When a straight man makes suggestive comments to a female employee, it is happening in part because she is a woman. He would not do the same to a man.

Five years ago, the Supreme Court heard arguments in *Oncale v. Sundowner Offshore Services*, a case raising the issue whether same-sex harassment could be actionable under Title VII. The Court in that case said yes--as long as it could be proven that the harassment occurred "because of sex." Unfortunately, the Court left partially

unanswered the question of when, exactly, harassment does indeed occur "because of sex."

Applying the "Because of Sex" Test In Same-Sex Harassment Cases

The "because of sex" issue becomes particularly problematic in same-sex harassment cases in which it is not the case that both parties are gay.

But what if there is no evidence as to the perpetrator's homosexuality? Or what if it is clear that a straight man (or woman) is harassing a gay man or woman? Even in these instances, a plaintiff can satisfy the "because of sex" requirement in other ways.

Post-*Oncale* courts have looked to comparative evidence about other victims. They have asked, for example, does the harasser in fact only target victims of one sex? If a straight man targets only gay men, and not straight women or lesbians, one can argue that he is targeting them because of their sex; if they were women, they would not be targeted.

Court applying the "because of sex" requirement have also looked to evidence about the nature of the conduct: was the conduct obviously sexual? If so, one can infer it was "because of sex."

This point ought to help Rene's case - as he alleges that he was the victim of the same kind of demeaning sexual touching that one thinks of as the basis for a more traditional sexual harassment case. Similarly, the sexual gifts and images Rene was given echo traditional sexual harassment cases in which, for instance, men leave sexual photos and items for women in their workplace to find or view.

Finally, courts applying the "because of sex" requirement have also looked to evidence of the harasser's animosity toward particular members of his own sex. Was the harasser policing gender roles by punishing effeminate men? If so, the court can infer that the harassment occurred "because of sex."

Again, this helps Rene: He alleges he was called names that are usually endearments directed towards women, and exposed to the same whistles and blown kisses women are usually the ones to endure. In harassing him as they might harass a woman, Rene can argue, the other butlers were expressing discomfort with his sexuality and punishing him "because of sex."

The Ruling of the *En Banc* Court: Relying on the *Oncale* Decision

In a split decision, the eleven-member *en banc* court upheld Rene's legal theory that harassment may be motivated by sexual orientation, but still be actionable under Title VII. Evidence of the plaintiff's sexual orientation, the panel concluded, is irrelevant to his claim.

A plurality of the panel joined an opinion holding that as long as the conduct is sexual in nature, it is "because of sex." Evidence of the victim's sexual orientation is simply irrelevant. Thus because Rene was subjected to physical attacks, "which targeted body parts clearly linked to his sexuality," the harassment of him was "because of sex."

In *Oncale* itself, the *Rene* plurality explained, the plaintiff was a gay man who worked on an oil rig with no women. For the Supreme Court to find his claim actionable, it must have believed that it was enough for him to show he was discriminated against in comparison to other men.

Using that approach, the panel concluded that Rene, like Oncale, suffered actionable discrimination.

The Concurrence's Differing Approach: Gender Stereotyping Harassment

Three judges concurred in the result, giving the plurality enough votes to overturn the lower court's grant of summary judgment to the employer.Ê But each wrote separately to explicate a different rationale for reaching that result.Ê In Judge Pregerson's view, the proper characterization of Rene's claim is "gender stereotyping harassment." Rene was being punished by his male co-workers for failing to live up to their standards of masculine behavior.

Gender policing is actionable under Title VII. The Supreme Court gave its imprimatur to such a claim in *Price Waterhouse v. Hopkins*. There, the Court held that Ann Hopkins was a victim of sex discrimination when her employer criticized her for being, in essence, insufficiently feminine, in the way she dressed and conducted herself.

The Ninth Circuit applied *Hopkins* in a recent case involving a harassment claim by a gay, male employee. In that case, *Nichols v. Azteca Restaurant Enterprises, Inc.*, the Court concluded that verbal harassment reflecting hostility toward the victim because he was too feminine constituted illegal sex-stereotyping. As a result, the court

concluded, such conduct was a valid basis for a discrimination suit.

The Dissenters' Divergence: Only Sexual Orientation Discrimination, and No More

Four judges dissented from the result in this case, expressing the view that Rene's claim was invalid under Title VII. The dissenters concluded that Rene could not show he was harassed because he was male, but only because he was homosexual. And since Title VII does not forbid sexual orientation discrimination, they would have held that he had no case.

Based on the evidence, the dissenters reasoned, Rene could not avail himself of any of the different ways of proving the harassment was because of sex. The harassers were not homosexual, and there was no evidence that they were generally hostile to the presence of men in the workplace. In addition, because only men worked on the 29th floor of the hotel, there was no direct comparative evidence showing that women were treated better than Rene was. Without any of these pieces of evidence, the dissenters suggested, Rene could not make out a valid claim.

The dissenters also cautioned that a case premised on sex-stereotyping must be based on the way the victim conducts himself on the job. In their view, a man who is homosexual in his private life, but lives up to masculine norms at work, cannot recover for harassment based on sex-stereotyping.

Which Judges Got it Right? The Plurality's Questionable Reasoning

The plurality put forth a potentially valid theory. Nevertheless, it also made some serious missteps that undermine the opinion.

First, the plurality appears at times to equate the term "sex," as used in Title VII, with "sexual." By using these terms interchangeably, it is easy to conclude that any sexual conduct is "because of sex." But the Supreme Court has made clear that "sex," in this context, is interchangeable with "gender." For Title VII's purposes, "sex" refers to one's status as male or female, not to sexual activity per se.

Second, the plurality misspeaks when it claims that it is illegal discrimination to treat some men differently from other men, without regard to how women are treated. To the contrary, what makes discrimination illegal under Title VII is that it only singles out one sex for worse treatment than the other.

Third, the plurality's reading of *Oncale* is probably not warranted, since the Supreme Court in that case did not say that *Oncale* had a valid claim. It only held that the lower court's categorical rejection of same-sex harassment was inappropriate.

Thus, the Court in *Oncale* held that some same-sex harassment cases could be based on same sex harassment - but not that Oncale's own case was necessarily one of them. It then remanded the case to the lower court for a determination whether he was harassed "because of sex." Then the case settled out of court prior to any determination being made: there has still, in short, been no judicial determination as to whether Oncale's allegations described a case of discrimination "because of sex."

For all of these reasons, the plurality opinion is open to criticism.

The Basic Principle Behind the Plurality Opinion May Be Correct

Grabbing a man's testicles, for instance, is something one only does to a man; grabbing a woman's breasts is something uniquely done to women. And in Rene's case, putting a finger into a gay man's anus through his clothes - in a gesture that apparently refers to gay sex between men - occurs not only because the victim is gay, but also because he is a man. A women would be unlikely to face the same treatment, and if she did, it would likely have a different meaning, connoting the harasser's ability to touch her intimately, rather than taunting her for her sexuality.

It is thus in most cases appropriate to draw the inference that sexual touching is done "because of sex."

Of course, there may be unusual cases in which such an inference is not warranted -- for example, the case of the rare equal opportunity harasser who demands oral sex from both his male and female employees. (I discussed the status under the law of the equal opportunity harasser in a prior column.)

Nevertheless, the shortcut the plurality takes, from sexual touching to touching "because of sex," will in most cases be supportable.

Judge Pregerson's Concurrence Offers Another Strong Basis for the Result

There is also another reason to believe the plurality reached the right result, even if its theory has flaws. Judge Pregerson's concurrence puts forth a workable theory for validating Rene's claim, one that supports the plurality's result.

The Supreme Court's validation of sex-stereotyping discrimination in *Hopkins* has been underutilized in the thirteen years since that opinion was issued. In fact, it is a potentially wide-ranging approach to evaluating both opposite- and same-sex harassment claims.

When gay men are harassed by their co-workers for being effeminate or womanly, they are being subjected to harassment on the basis of sex. It is because they are men who do not live up to male standards that they are singled out for maltreatment.

In the same vein, women who are harassed because they do "men's jobs," or wear "butch" hairstyles, or choose to wear pants and not skirts, are being singled out for their failure to live up to standards for women.

Potential Limits and Extensions of the Sex-Stereotype Approach to Evaluating Harassment Claims

The sex-stereotype theory only works, however, if the victim does in fact defy gender stereotypes. A federal court in New York - in the case of *Martin v. New York State Department of Correctional Services* - just dismissed a claim similar to the one in *Rene* because the plaintiff had not proven he was effeminate enough to justify invoking the sex-stereotype theory of harassment. This approach may be what the Supreme Court uses to limit the breadth of the sex-stereotype theory should it decide to hear the *Rene* case.

On the other hand, the sex-stereotype approach could encompass even more than the concurrence lets on, though. Even more broadly, one could argue that all harassment based on sexual orientation is harassment based on sex, since it involves the application of different expectations to men and women.

Harassing men for being gay singles them out for doing something that women are routinely expected to do--namely, sleep with men. That's sex discrimination, plain and simple.

No court has ever acknowledged this result in the context of sex discrimination. However, the Supreme Court applied similar reasoning in *Loving v. Virginia*, when it declared anti-miscegenation laws unconstitutional.

Virginia's law prohibited whites and non-whites from marrying. Virginia argued that the law did not violate the equal protection clause because it was an "equal opportunity" law: It prevented whites from marrying blacks as much as it prevented blacks from marrying whites. The Court, however, held that the law could constitute race discrimination regardless of the fact that it applied to both races.

Sex orientation discrimination discriminates "because of sex" in the same way that the Virginia law - as the Court held - discriminated "because of race." Sexual orientation discrimination is exemplified by a workplace norm, enforced by harassing co-workers, saying that men should only sleep with women and women should only sleep with men. The Virginia law said, similarly, that whites should only marry whites, and blacks should only marry blacks. Both are discriminatory for the same reason. Both the norm and the law, in prohibiting "mixing," constitute discrimination.

Rene and other homosexual plaintiffs should try this theory, as well as others, when they argue that they have faced discrimination not only due to sexual orientation, but also "because of sex."

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