

Take Same-Sex Harassment Claims Seriously

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By Allen Smith

Same-sex advances may be box-office gold this week as "Brüno" became the most well-attended movie in the nation in its first week, but they can prove costly in the workplace. The U.S. Equal Employment Opportunity Commission (EEOC) takes claims of same-sex harassment seriously, and on July 13, 2009, announced that it had settled a claim of same-sex harassment with Haydon Brothers Contracting Inc. in Springfield, Ky.

Employers and HR professionals also should take claims of same-sex harassment seriously, Shaffin Dato, a Venable LLP attorney in New York, told *SHRM Online*, particularly, he added, as some of the stigma of bringing same-sex harassment claims diminishes and helps make such claims more common.

Extremely Obscene Comments Alleged

In settling its Title VII claim of same-sex harassment with Haydon Brothers Contracting Inc., the EEOC claimed that the company had allowed a male employee to be sexually harassed by his supervisor.

"The supervisor subjected the victim to constant, extremely obscene comments, sexual innuendos and propositions, and implied physical threats and abuse," the EEOC said in a release. "The harassment was so pervasive that the victim began to be afraid that he might be sexually assaulted by his male supervisor."

When the employee complained about the treatment, he allegedly was told, "This is a construction site; this kind of thing goes on all the time."

"This employer utterly failed in its obligation to protect this employee from sexual harassment, as required by law, causing needless harm to him," said Laurie Young, the EEOC's regional attorney for the agency's Indianapolis District Office.

Although the EEOC does not compile statistics specifically on same-sex harassment claims because the agency does not track the sex of the alleged harasser, the percentage of men alleging harassment has risen from 11.6 percent in 1997 to 15.9 percent in 2008, the most recent year for which statistics are available. This increase may be due partly to a rise in same-sex harassment claims.

In 1998, the U.S. Supreme Court clarified that Title VII prohibits same-sex harassment in *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75, and the EEOC has vigorously pursued same-sex harassment claims ever since, including the following agreements with:

- Long Prairie Packing Co. in Long Prairie, Minn., which in 1999 settled the EEOC's first male-on-male sexual harassment class action by agreeing to pay \$1.9 million.
- Burt Chevrolet and LGC Management in Colorado, which agreed in 2000 to pay \$500,000 to settle the claim that 10 former salesmen were persistently subjected to same-sex harassment by male managers.
- A Texas car dealership, Ron Clark Ford Inc., which agreed in 2002 to pay \$140,000 to settle a same-sex harassment claim alleging that male employees were subjected

to groping and lewd sex-based remarks by male managers.

- Babies "R" Us, which promised in 2003 to pay \$205,000 and implement training to resolve a claim that one of its male employees at Toys "R" Us in Paramus, N.J., was the target of unwelcome and derogatory comments by other men and that his behavior was mocked because he did not conform to societal stereotypes of how a male should appear or behave.
- Carmike Cinemas, which agreed in 2005 to pay \$765,000 to settle a claim that a male supervisor in Raleigh, N.C., groped young men, made advances and requested sexual favors of teenagers on the job, which was the largest damages amount in an EEOC teen harassment lawsuit.
- Hill Brothers Construction, which decided in 2007 to pay \$225,000 to settle male truck drivers' claims of same-sex harassment in Mississippi.
- United Healthcare of Florida, which agreed in 2007 to pay \$1.8 million to settle a same-sex harassment and retaliation lawsuit claiming that a former male regional vice president repeatedly verbally harassed a male former top senior account executive in Sunrise, Fla.
- The Wyndham Hotel chain, which decided in 2008 to pay \$370,000 to resolve claims of same-sex teen harassment, allegedly by a male resort manager at its Birch Bay Resort in Blaine, Wash.
- Dillard's, which on June 11, 2009, agreed to pay \$110,000 to resolve a claim that a male supervisor at a mall in Orlando, Fla., engaged in verbal and physical sexual harassment of a male sales associate and a young dockworker when the supervisor allegedly exposed himself, propositioned the men, and made sexually explicit and derogatory comments.

In many of the settlements, the employees asserted that their claims of same-sex harassment were not taken seriously.

For example, in the Wyndham Hotel chain case, one employee asserted, "I was humiliated by what was happening to me at work—everyone knew, and many people just laughed about it. It was really hard to talk about what happened to me, reporting it to the EEOC, but it was worth it."

'Horseplay'

Anecdotally, Ernest Haffner, a senior attorney with the EEOC in Washington, D.C., told *SHRM Online* that most same-sex harassment claims are filed by men.

If some of the same comments or behavior were made by the alleged harassers toward a woman, courts typically "would not question" whether there was unlawful harassment based on gender, added Dianna Johnston, EEOC assistant legal counsel. But if the same behavior is between men, courts "seem to have a harder time to find it's based on sex" and sometimes conclude it instead is "horseplay."

"The whole problem with 'horseplay' and 'roughhousing' is that because of the reasonable person standard, it's easy to cross the line," cautioned Regina Petty, an attorney with Fisher & Phillips in San Diego. Two reasonable people might interpret the horseplay very differently, she explained—one might not be bothered by it, while the other might be "highly offended by it."

Haffner also cautioned that there does not have to be sexual desire in order for there to be unlawful same-sex harassment, although he described cases where sexual desire is present as "the easiest" to prove.

Male Gender Stereotyping Claims

Nevertheless, employees also may claim unlawful harassment based on animosity because of the person's gender or unlawful gender stereotyping.

For example, in *Nichols v. Azteca Restaurant Enterprises Inc.*, 256 F.3d 864 (2001), the 9th U.S. Circuit Court of Appeals ruled that an employee was unlawfully harassed in violation of Title VII when male co-workers and a supervisor verbally harassed him because they thought the employee was "effeminate and did not meet their views of a male stereotype."

The 9th Circuit said that throughout his tenure at the restaurant, Antonio Sanchez "was subjected to a relentless campaign of insults, name-calling and vulgarities. Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as 'she' and 'her.' Male co-workers mocked Sanchez for walking and carrying his serving tray 'like a woman' " and taunted him with obscene pejoratives.

Transsexual's Claim

Haffner noted that Jimmie Smith, a lieutenant in the Salem, Ohio, Fire Department, also won a claim of unlawful harassment after he informed his employer about his gender identity disorder and planned treatment to physically transform from male to female. Smith soon was fired, and he sued under Title VII, claiming that the same theory of sex stereotyping that the Supreme Court set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to sex stereotypes of how a man should look and behave.

The 6th U.S. Circuit Court of Appeals agreed (*Smith v. Salem, Ohio*, 2004 FED App. 0262A (2004)), stating that "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior." Moreover, the court stated, "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."

Investigate

Vicki Kuhn, PHR-CA, an HR manager in Wichita, Kan., and a member of the Society for Human Resource Management's (SHRM) Employee Relations Special Expertise Panel, said she receives same-sex harassment complaints frequently, estimating, "I probably receive same-sex harassment complaints on a 1-5 ratio with opposite-sex complaints."

There are, of course, some employees that cry "sexual harassment" as a smoke screen when they are being disciplined or terminated for performance problems, she noted. Those complaints still should be investigated thoroughly, but, she said, "it certainly doesn't lend to the credibility of the complainant."

Sometimes, HR will "discover in the course of the investigation that the complainant has made insensitive or even homophobic comments, and you have to consider if their complaint can be validated or is based on their own prejudices. You can get into the sticky situation where the accuser is actually the harasser."

Of course, federal law does not presently prohibit discrimination based on sexual orientation, though some state laws and local ordinances do. Petty said she'd rather not have "employers try to distil the fine-point differences," particularly with the availability in many areas of local law causes of action for sexual orientation discrimination, as well as gender stereotyping claims under Title VII.

Female-on-Female Harassment

Not all same-sex harassment claims are brought by men, added Gayla Crain, an attorney

in Dallas with Spencer Crain Cabbage Healy & McNamara.

Crain had to defend a claim where a female manager was accused of harassing female subordinates because the female manager supposedly favored male colleagues and "picked on" a female employee about how she dressed, her hairstyle and jewelry, and her personal life. The employee never heard the manager make similar comments to male employees. Unlawful same-sex harassment doesn't have to involve any touching but may just consist of "constant verbal abuse," she cautioned.

Handle Complaints the Same

Not everyone is seeing a spike in same-sex harassment claims. Dave Koesters, SPHR, an HR manager with MANCOR Indiana in Anderson, Ind., as well as a member of the SHRM Employee Relations Special Expertise Panel, said he hasn't yet gotten a same-sex harassment complaint. But he said if he did get one, it would be handled the same as any other harassment complaint.

"Our harassment policy states harassment of any type will not be tolerated," Koesters noted, recommending that employers reinforce the prevention of harassment of any kind, including same-sex harassment, on a regular basis through training and in team meetings.

"If someone is getting to the point where their behavior could be construed as offensive, I always step in and make the person aware that their behavior could be considered offensive," he said. "A good HR person spends time interacting with all employees and is usually aware of these situations and can intervene before they become a serious matter that would be detrimental to their company. It's good, old-fashioned HR and keeping a pulse on your organization."

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