

As courts define same-sex harassment, beware behavior that crosses a line

Ever since the United States Supreme Court decided its first same-sex harassment case, employers have struggled to define what is illegal same-sex harassment and what's not. Now the 2nd Circuit Court of Appeals has provided some employer guidance in a case involving male-on-male harassment.

Same-sex harassment can lead to court—even without a sexual motive.

Recent case: Jeffrey sued his employer after enduring what he described as his supervisor's outrageous same-sex harassment. Jeffrey claimed that over several years, his boss regularly grabbed Jeffrey's crotch, made sexual comments and generally picked on him. Jeffrey recounted numerous sexually oriented insults and derogatory statements such as "faggot, get the shovel and clean out the drain." Plus, Jeffrey said

that during a work-related argument, the supervisor grabbed Jeffrey's testicles.

Jeffrey also described his supervisor's behavior toward other male employees. They, too, were allegedly subjected to grabbing and touching of their private parts. Women, however, were apparently never targeted and were able to go about their business without interference.

The trial court tossed out Jeffrey's case, reasoning that because neither Jeffrey nor the supervisor were homosexuals, the behavior Jeffrey described wasn't related to Jeffrey's sex or sexuality. The court said it was merely crude and unprofessional.

The 2nd Circuit Court of Appeals disagreed. It pointed out that Jeffrey's sex likely was a factor in the harassment, since women weren't similarly singled out. The court sent the case back for a jury trial. It also noted that if what Jeffrey said was true, the supervisor's behavior could meet the test for pervasive or severe harassment.

The court also rejected the employer's argument that it wasn't liable because Jeffrey hadn't complained about his supervisor. Jeffrey told the court that he spoke with several other managers about the problem and had either been told there was nothing that could be done about it or was simply ignored. (*Barrows v. Seneca Foods Corporation*, No. 12-970, 2nd Cir., 2013)

What is same-sex harassment?

According to the Supreme Court in *Oncale v. Sundowner Offshore Service*, the landmark 1998 case on same-sex harassment, a worker charging he endured a same-sex hostile work environment must show that he suffered discrimination "because of his sex" and that the harassment was "severe and pervasive." He can do this by showing any of the following:

- The alleged harasser was a homosexual and harassed a member of the same sex in such a way that it might be presumed the action was motivated by sexual desire.
- The alleged victim was harassed in such sex-specific and derogatory terms by someone of the same

gender to make it clear that the harasser was motivated by general hostility to the presence of someone of the same gender in the workplace.

- The alleged harasser treated members of the opposite sex better than those of the same sex, as demonstrated by a direct comparison.

Final note: Of course, sensible employers should ban all physical contact in the workplace. No good can come of it—even if a court wouldn't consider it sexual harassment or hostile. Why risk a lawsuit?