Same-Sex Harassment Not Always Straightforward

An appeals court recently ruled that a heterosexual employee can suffer same-sex harassment at the hands of another heterosexual employee. Experts say the case underscores the need for HR to look at same-sex harassment policies in broad terms, and train employees accordingly.

By Mark McGraw

A New York appeals court's ruling offers further evidence that same-sex harassment doesn't necessarily have to be based on an employee's actual or perceived sexual orientation, according to experts.

After a district court found no indication that Marion, N.Y.-based Seneca Foods employee Jeffrey Barrows had been discriminated against on the basis of his gender, a Second Circuit appeals court recently overturned that decision, citing Barrows' treatment at the hands of supervisor Victor Sanabria as "direct comparative evidence [of] how the alleged harasser treated members of both sexes in a mixed-sex workplace."

The treatment that Sanabria -- a heterosexual male and Barrows' boss -- allegedly afforded male workers included regularly making vulgar comments aimed at them, grabbing Barrows' testicles during a work-related argument, and hitting Barrows and other male employees in the crotch on various occasions, according to court documents.

Barrows apparently grew tired of such behavior, and eventually filed a sex discrimination suit against the company.

At issue in same-sex harassment claims such as Barrows', the appeals court noted, is "whether members of one sex are exposed to disadvantageous terms or conditions of employment [e.g., a hostile work environment] to which members of the other sex are not."

The appeals court provided two other examples of evidence that could meet that requirement. For instance, a harasser is homosexual and thus presumably motivated by sexual desire. Or, a victim is harassed in "sex-specific and derogatory terms by [someone of the same gender] as to make it clear that the harasser is motivated by general hostility to the presence of [someone of the same gender] in the workplace."

The Seneca Foods case doesn't necessarily expand harassment liability for employers, but "it may very well expand the consciousness of employers and HR professionals as to what the law has been since *Oncale v. Sundowner Offshore Servs. Inc.* was decided," says Miriam Edelstein, a Philadelphia-based attorney in the labor and employment group of national law firm Reed Smith.

The Supreme Court's 1998 decision in that precedent-setting case held that Title VII's protection against workplace discrimination '"because of ? sex' applied to harassment between members of the same sex."

"In a world where most people do not walk around expressly identifying themselves as sexist," continues Edelstein, "the cornerstone of evidence that plaintiffs use to demonstrate intentional sex discrimination ? including harassment ? is that members of one sex were treated less favorably than the other."

And, that harsh treatment needn't extend to multiple employees of one sex to constitute same-sex harassment, adds Maria Danaher, a Pittsburgh-based attorney with national labor and employment law firm Ogletree, Deakins, Nash, Smoak & Stewart.

"The appeals court didn't require [in its opinion] that [Sanabria] treated all men one way, and didn't treat women the same way," she says. "The court was just offended with the way he treated this particular man."

The decision in the Barrows case may not signal the beginning of a trend, "but it should be a wake-up call for employers and HR," she says. "It seems there are circumstances in which the harassment is so extreme that the court takes an approach that it's got to do something."

As evidenced by the Barrows decision, companies and HR professionals must consider the issue of same-sex harassment in increasingly broader terms, continues Danaher.

"This kind of decision doesn't change anything in terms of the way companies and HR craft harassment policies. What it does do is change the way we view a productive, cooperative workforce," she says. "There used to be such a bright line in same-sex harassment cases, and it seemed to be that [such cases] had to involve someone who's gay. But now it doesn't matter. That's not the primary factor anymore."

As written, most companies' anti-harassment policies would prevent same-sex harassment along with opposite-sex harassment, notes Edelstein.

The more pertinent issue beyond simply drafting anti-harassment policies, she says, is to provide employees with "specific training on these policies, to have a level of understanding beyond what they merely think and assume."

Many employers, continues Edelstein, "simply have employees sign an acknowledgement page of a policy or handbook to document the employer has put a policy in place and communicated it. But for assurance that employees actually understand the policies, signing a form after reading ? or not reading ? words on a page does not hold a candle to actually engaging employees in meaningful dialogue about the policies."

Mark Spring, a Sacramento, Calif.-based partner of Carothers DiSante & Freudenberger, agrees that the Seneca Foods case doesn't broaden the legal definition of sexual harassment. The decision does, however, offer employers and HR a reminder that their focus cannot be "on traditional norms for purposes of analyzing same-sex cases."

Male same-sex cases are "sometimes treated by management and human resources as mere horseplay or 'guys being guys,' but Seneca Foods is not the first case to make clear that such cases must not be so easily dismissed," says Spring, noting that the prohibitions in an employer's anti-harassment policy should be ? and often are ? broader than the law.

Employers don't have to ? and shouldn't ? wait for a violation of Title VII or similar state law before taking action to immediately correct or remove an employee whose conduct is offending co-workers or others in the workplace, he adds.

"In fact, assuming [the organization has] the proper policies to back them up, any conduct that is found to be sexually offensive, regardless of whether it is directed at a certain gender, directed [at] both genders, or only directed to members of the same gender as the harasser, should be investigated and appropriate corrective action should be taken immediately to get it to stop," says Spring.

"At this point," he concludes, "the best thing HR professionals can do is to review their employers' anti-harassment policies to make sure [they are] broad enough to allow them to take such actions, even when the harassment is not necessarily gender-specific."

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