The Ever-Evolving Claim of Sexual Harassment

By Jody M. Florence and R. Todd Creer

If you were asked to define the concept of sexual harassment in a single sentence, what would you say? What type of conduct would you include in your definition? Who would be included as potential harassers or victims? Given the fact-intensive inquiry of sexual harassment claims and the countless scenarios which presently may give rise to liability, responding to such an inquiry would likely prove difficult. Indeed, a brief review of the prima facie case reveals the often complex and surprising variations of this evolving claim.

The Basics

Plaintiffs bring sexual harassment claims under Title VII of the Civil Rights Act of 1964, which makes it an "unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Nevada's antidiscrimination statute, NRS 613.330, also prohibits sex discrimination and discrimination on the basis of perceived or actual sexual orientation.

The prohibition against discrimination on the basis of sex was hastily added to Title VII in the House of Representatives, 110 Cong. Rec. 2577-2584 (1964), and courts were left with little legislative history to guide its application. While early cases rejected the theory that women were subjected to sex discrimination when they suffered adverse actions after rebuffing sexual demands, *see, e.g., Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974) (holding that a woman who was reassigned after refusing to have sex with her supervisor was subject to a controversy merely "underpinned by the subtleties of an inharmonious personal relationship"), this narrow view was soon rejected by courts willing to recognize that prohibited sex discrimination encompassed the concept of sexual harassment. *See Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (holding that Barnes "became the target of her superior's sexual desires because she was a woman"); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (relying upon lower courts' application of guidelines adopted by the Equal Employment Opportunity Commission in 1980 interpreting Title VII to include sexual harassment as a form of sex discrimination, 29 C.F.R. § 1604.11, to determine that Title VII prohibits sexual harassment).

Today, in order to establish a *prima facie* case of sexual harassment, a plaintiff must show that (1) she was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. Under this analysis, courts have recognized harassment claims where a male supervisor made employment benefits contingent upon the fulfillment of unwelcome sexual advances, i.e., "traditional quid pro quo harassment." *See, e.g., Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999). Moreover, courts have recognized sexual harassment claims in hostile environments where coworkers harass other coworkers, subordinates harass their supervisors and vice versa, and customers harass employees. *See, e.g., Switzer v. Rivera*, 174 F. Supp. 2d 1097, 1104 (D. Nev. 2001) (finding hostile work environment where the plaintiff's coworkers pressed their bodies against her, commented on her breasts and buttocks, and imitated male appendages with food products); *Miscimarra v. Home Depot U.S.A., Inc.*, No. 04-17021, 2006 WL 3486995 (9th Cir. Dec. 4, 2006) (unpublished) (reversing summary judgment on sexual harassment claim where female supervisor brushed up against male subordinate and made unwanted comments about his appearance); *Pappas v. J.S.B. Holdings, Inc.*, 392 F. Supp. 2d 1095, 1103-06 (D. Ariz.

2005) (denying summary judgment where supervisor was "repeatedly subjected to discourteous, boorish, mean-spirited treatment by certain of her male co-workers" including being called sexual epithets); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992) (finding genuine issue of fact where customers stared at employee and made sexual comments about her appearance).

The type of conduct which forms the basis of a sexual harassment claim continues to evolve, however, and the fact patterns are becoming more varied and complex.

The Variations

In 1998, the Supreme Court decided *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). In that case, the Court addressed the issue of whether same-sex harassment is actionable under Title VII. Oncale, a roustabout on an eight-man drilling crew stationed on an oceanic oil platform, claimed that his male coworkers sexually harassed him in violation of Title VII. Oncale contended that his coworkers forcibly subjected him to sex-related, humiliating acts, physically assaulted him and threatened him with rape. The trial and Fifth Circuit courts held that because Oncale was a male, he had no cause of action for harassment by male coworkers. The Supreme Court disagreed, pointing out that "'it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.'" *Id.* at 78 (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)). While recognizing that "male-on-male sexual harassment . . . was assuredly not the principal evil Congress was concerned with when it enacted Title VII," the Court found no justification for excluding same-sex harassment from statutory coverage. *Id.* at 79.

The *Oncale* Court explained that harassing conduct need not be motivated by sexual desire to be unlawful. Courts analyzing same-sex harassment both before and after *Oncale* have recognized actionable claims where the harassment is premised not upon sexual desire, but instead upon the victim's failure to conform to sexual stereotypes. *See, e.g., Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated, and abrogated in part by Oncale* (explaining that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex").

In *Nichols*, the Ninth Circuit addressed whether a male food server was sexually harassed by other male work-

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ers who subjected him to a "relentless campaign of insults, name-calling, and vulgarities" by repeatedly referring to him as "she," "her," "doll" and "fag," and mocking him for walking and carrying his serving tray "like a woman." 256 F.3d at 870. The plaintiff argued that he was harassed because he is effeminate and failed to conform to a male stereotype. He contended that such conduct is actionable sexual harassment just as the gender stereotyping in *Price Waterhouse v. Hopkins* was actionable sex discrimination. *See* 490 U.S. 228, 250 (1989) (holding that a woman who was denied partnership in an accounting firm because she was not feminine enough had stated an actionable sex discrimination claim under Title VII). The Ninth Circuit agreed that the *Price Waterhouse* analysis "applies with equal force" to a man who is harassed for acting too feminine. *Nichols*, 256 F.3d at 874-75.

Despite this focus on sexual stereotyping as a motive for harassing conduct, the Ninth Circuit has also *ignored* the motivation for harassment in other cases—such as *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) and *EEOC v. National Education Association*, 422 F.3d 840 (9th Cir. 2005). In *Rene*, the Court disregarded the plaintiff's admission that he believed he was subjected to harassing conduct by his male coworkers because of his openly gay sexual orientation—a classification which is not protected by Title VII. The Court determined that Rene's sexual orientation was irrelevant to the harassment analysis as long as he could prove discrimination "because of sex." *Rene*, 305 F.3d at 1063-64 (stating the employee's sexual orientation "neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant"). Focusing on the alleged physical nature of the harassment (which included touching and caressing Rene like a woman, grabbing his crotch, and poking fingers in his anus), the Court found that Rene was clearly subjected to severe and pervasive sexual conduct and that he was singled out in comparison to other men in the workforce. *Id*. at 1065, 1067. According to the Ninth Circuit, this was sufficient to demonstrate discrimination because of sex without regard to Rene's sexual orientation or the motivation of the harassers. *Id*. at 1067-68.

The Ninth Circuit also surprised employers and their counsel in *EEOC v. National Education Associatio*n, 422 F.3d 840 (9th Cir. 2005). There, female employees of an Alaskan union alleged that their supervisor, Thomas Harvey, frequently shouted in a loud, profane, public, and hostile manner at female employees. Harvey would also make physically threatening gestures at the women and invade their personal space. None of the behavior was overtly sex- or gender-related and some of the conduct was actually directed at male employees. The trial court held that because "there is no evidence that any of the exchanges between Harvey and Plaintiffs were motivated by 'lust' or by 'sexual animus toward women as women,'" Harvey's conduct was not "because of sex" or discriminatory. *Id*. at 845.

The Ninth Circuit pointed out that while sex or gender specific conduct "is one way to establish discriminatory harassment, it is not the only way: 'direct comparative evidence about how the alleged harasser treated members of both sexes' is always an available evidentiary route." *Id*. at 844 (quoting *Oncale*, 523 U.S. at 80-81). The Court relied upon *Oncale*'s determination that the "ultimate question . . . is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,'" to find that the plaintiffs did not need to prove that Harvey "had a specific intent to discriminate against women or to target them" as women. *Id*. (quoting *Oncale*, 523 U.S. at 80). Instead, because "Title VII is not a fault-based tort scheme" and is "aimed at the consequences or effects of an employment practice" instead of an employer's or coworker's motivation, the ultimate question, according to the Court, was whether Harvey's behavior affected women more adversely than it affected men. *Id*. at 844-45. Because the female employees reacted more severely to the supervisor's conduct than the male employees by crying, calling the police and resigning, sufficient evidence existed for a jury to determine whether the females were subjected to objectively different qualitative and quantitative levels of harassment. *Id*. at 844-47.

Conclusion

Sexual harassment claims have certainly come along way since the 1980s. While we know that employees are protected from harassment without regard to their gender or position, it is difficult, especially in the Ninth Circuit, to draw bright lines with regard to what type of conduct will give rise to liability. It is likely that sexual harassment claims will continue to evolve in the coming years. **C**

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