

Michigan Supreme Court Holds that Gender-Based Conduct or Communication that is Not Sexual in Nature is Not Sexual Harassment

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In *Haynie v. State of Michigan*, the Plaintiff filed a complaint alleging only that she was sexually harassed while employed by the Defendant in violation of Michigan law. Plaintiff did not allege that she was also discriminated against based on her gender, nor did she allege violations of Federal law. Without going into much factual detail, the Court noted that the offensive conduct involved plaintiff and another capitol security officer, which ended with the two officers shooting and killing one another. The personal representative of the plaintiff's estate filed a complaint for sexual harassment alleging that plaintiff was subjected to hostile and offensive comments about her gender by the other officer, that the plaintiff complained to her supervisors, and that the defendant failed to take prompt remedial action.

Defendant filed a motion to dismiss the claim. The plaintiff admitted that the alleged offensive conduct was not sexual in nature, but instead was gender-based and therefore, constituted sexual harassment. After reviewing the claim, the Michigan Supreme Court disagreed with the plaintiff and held that because the alleged conduct was non-sexual in nature, the proper recourse would have been a gender discrimination lawsuit, and not a sexual harassment claim. The Court noted that plaintiffs who bring a gender discrimination lawsuit against their employers will need to meet the specific elements of that claim, which differ from the elements of a sexual harassment claim. In rendering its opinion, the Court expressly overruled that portion of its prior decision in *Koester v. Novi* that allowed non-sexual, gender-based conduct or communications to form the basis of a sexual harassment claim under Michigan law.

The Court based its ruling on the express statutory language found in Michigan's Elliott-Larsen Civil Rights Act (ELCRA). This statute defines "discrimination because of sex" as including sexual harassment. The statute then defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." The key word in this definition for the Court was "sexual". The Court stated that sexual harassment is always sex discrimination; however, not every incident of sex discrimination will constitute sexual harassment. That is, if the incidents of sex discrimination are not "sexual" in nature, and rather are strictly gender-based, then that conduct will not constitute sexual harassment as defined under the express language of Michigan's statute.

In response to criticism from the dissent, the majority was quick to point out that it is not concluding that hostile work environment claims are limited only to those claims of a sexual nature. The only ruling from the Court is that those plaintiffs seeking damages for "sexual" harassment under Michigan's ELCRA, which expressly defines sexual harassment, must come forward with some evidence of conduct or communication of a "sexual nature". The Court did not address the issue of whether the ELCRA recognizes a claim for hostile work environment based on anything other than sexual harassment. The Court also rejected federal cases allowing for sexual harassment claims based on non-sexual gender discrimination, noting that the Court has departed from federal law on the issue of sexual harassment in the past and that the definition of "sexual harassment" in the ELCRA is more specific than the language in the federal law, Title VII.

While this opinion provides helpful language for employers defending sexual harassment lawsuits filed under Michigan law when the conduct is not sexual in nature, it in no way diminishes an employer's obligation to ensure that all employees understand that discrimination or harassment based on an employee's sex, race, age, religion, or any other

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protected classification is expressly prohibited. Discrimination on the basis of gender is still prohibited under both Michigan and Federal law. Anti-discrimination and anti-harassment policies should be maintained and enforced, with employers investigating all complaints and taking prompt remedial action when necessary.

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