

Sixth Circuit Confirms That Workplace Harassment Based on Sexual Orientation Is Not Unlawful Even When Conduct Amounts to Bullying

May 14, 2012

On May 10, the United States Court of Appeals for the Sixth Circuit held that a male employee could not prevail on a sexual harassment claim against his employer, AT&T, based on his allegation that his male supervisor repeatedly subjected him to inappropriate comments in the workplace. Specifically, he claimed that his supervisor said things to him such as "I like your glasses - you should change your name to Virginia or Margaret" and "Do you not eat? You look like a girl." The supervisor also called the employee a necrophiliac and said in front of others that the employee had sex with dead people.

The employee alleged that the supervisor made these comments because he knew or suspected that the employee was homosexual and was trying to "bring him out of the closet."

As the Court stated, to establish a claim for unlawful hostile work environment sexual harassment, the plaintiff employee must prove that "but for the fact of his sex, he would not have been the object of harassment." In addition, to prove "same sex harassment" (i.e., male on male), the plaintiff must show that the alleged harasser: (1) made sexual advances or acted out of a sexual desire for the plaintiff; (2) was motivated by a general hostility towards the presence of men in the workplace; or (3) treated women more favorably than men in the workplace.

In this case, the Court found the supervisor's conduct to be "crude, bullying and despicable," but not unlawful. There was no evidence that the plaintiff employee was singled out or treated differently than other employees because of his gender. The supervisor never made any sexual advances toward him or indicated a sexual interest in him, and the supervisor did not have a general hostility to men in the workplace. Instead, he was generally rude and disrespectful of all of the employees he supervised.

In addition, as the Court confirmed, harassment or discrimination based on a person's sexual orientation or perceived sexual orientation is not currently actionable under either Michigan or federal law. Therefore, any comments made about someone's actual or perceived sexual orientation cannot serve as the basis for a sexual harassment claim.

What Does This Mean for Employers?

As of today, sexual orientation is not a protected status. However, there is legislation pending in the State of Michigan that could change that. There has been similar legislation proposed in the federal sector. The EEOC has also expressed its belief that "sexual harassment" includes harassment based on sexual orientation and gender identity. Therefore, employers should promptly and thoroughly investigate and respond to complaints made by employees of same-sex harassment and/or harassment based on sexual orientation or gender identity in the same way that they respond to other complaints of sexual harassment. AT&T did just that in this case and the Court found that it responded appropriately.

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