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## Employment Law

*Julie A. Bruch*
*O'Halloran Kosoff Geitner & Cook, LLC,* Northbrook

# Same-Sex Sexual Harassment – Is it Just "Male-on-Male Horseplay" or Harassment Because of Sex?

In 1998, writing for a unanimous United States Supreme Court, Justice Antonin Scalia held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Since *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), employers have struggled to distinguish between sexual horseplay among men in the workplace versus unwanted sexual touching or taunting that occurs because of the employee's sex.

The *Oncale* case involved an eight-man crew working on an oil platform in the Gulf of Mexico. *Oncale*, 523 U.S. at 77. Oncale alleged that on several occasions he was forcibly subjected to sex-related, humiliating actions against him by three male coworkers in the presence of the entire crew. *Id.* Two of these men also physically assaulted Oncale in a sexual manner and one threatened him with rape. *Id.* The Supreme Court found that Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women, even when the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex. *Id.* at 78-79. In its ruling, the Court noted that workplace harassment, even between men and women, is not automatically discrimination because of sex merely because the words used have sexual content or connotations. *Id.* at 80. Rather, the critical issue "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." *Id.*

Importantly, the *Oncale* Court clarified that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* Such harassment must be so objectively offensive as to alter the conditions of the plaintiff's employment. *Id.* at 81. The Court identified three non-exclusive types of scenarios where a plaintiff may show same-sex sexual harassment: (1) explicit or implicit proposals of sexual activity where the harasser was homosexual; (2) harassment in sex-specific and derogatory terms by someone of the same sex as to make clear that the harasser is motivated by general hostility to the presence of employees of the same sex as the harasser in the workplace; and (3) direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. *Id.* at 80-81.

The Court ended with additional remarks that have since created an argument that employers have seized upon, stating that "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation" should not be mistaken for discriminatory "conditions of employment." *Id.* at 81. To distinguish such horseplay from actionable harassment, the Court requires "careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Id.* Thus, the Court predicted that "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing and roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Id.* at 82.

Following *Oncale*, the Court of Appeals for the Seventh Circuit addressed same-sex sexual harassment under the third scenario in *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663 (7th Cir. 2005). Thad Shafer worked at Kal Kan Foods without incident from 1989 until June 2001 when a male co-worker, Alan Dill, attacked him. *Shafer*, 417 F.3d at 665. Dill was six inches taller and at least 100 pounds heavier than Shafer and used the difference to his advantage. *Id.* Dill had earlier remarked that Shafer had a "cheerleader ass" that "would look real nice on my d***," and forced Shafer's face down to his crotch while clothed, moving his groin to give the impression that Shafer was performing fellatio. *Id.* A few weeks later, Dill grabbed Shafer's hand and moved it to his crotch while moaning as if Shafer was masturbating him. *Id.* The following month, Dill approached Shafer in the locker room when Shafer was not wearing a shirt and pulled a handful of hair from Shafer's chest. *Id.* Finally, in August 2001, Dill bit Shafer in the neck hard enough to raise welts, but not penetrate the skin. *Id.*

The *Shafer* court initially stated that while Dill may have set out to humiliate Shafer sexually, Title VII does not deal with coworker torts and even though Kal Kan knew that Dill had a history of making sexual remarks, it had no notice of knowledge of Dill attacking other workers physically. *Id.* Addressing the issue of whether Dill's behavior was sex discrimination, the court characterized Dill's four batteries of Shafer as neither severe nor pervasive discrimination based on sex. *Id.* at 666-67. The court found that Shafer failed to establish that the working conditions were worse for men than women and the court concluded that Shafer became a target because he could not defend himself. *Id.* at 666. While not described in the court's opinion, apparently the record showed that Dill "picked on anyone of either sex he could get away with tormenting," thus Shafer could not establish that his encounters with Dill "reflected more than personal animosity or juvenile behavior." *Id.*

More recently, in *Smith v. Rosebud Farm, Inc.*, 898 F.3d 747 (7th Cir. 2018), the Seventh Circuit discussed the distinction between male on male sexual horseplay and actionable same-sex sexual harassment. From 2003 through June 2008, Robert Smith worked behind the meat counter at Rosebud Farm, a local grocery store. Almost immediately and for the next four years, Smith's male coworkers behind the meat counter began harassing him by grabbing his genitals and buttocks. *Smith*, 898 F.3d at 749. They repeatedly mimed oral and anal sex on Smith and each other. *Id.* Smith's supervisor knew about the harassment and even participated once or twice. *Id.*

Smith complained of harassment to no avail and ultimately filed a charge of discrimination with the Equal Employment Opportunity Commission and the Illinois Department of Human Rights. *Id.* Once Smith's supervisor learned of the charge, he told the meat-counter employees to stop "goofing off" and quit the "horseplay." *Id.* at 750. Smith's coworkers responded by banging their meat cleavers menacingly at Smith and passed by him with large knives pointing out of the meat trays they carried. *Id.* Smith later found his car—which he parked in an employee-only gated lot—with slashed tires and a cracked windshield. *Id.* Smith then quit his job due to the "intolerable" working conditions. *Id.*

After receiving a Notice of Right to Sue from the EEOC, Smith filed suit in federal court against Rosebud Farm and its employees. The suit went to trial resulting in a jury verdict in Smith's favor on all claims of $2,407,500 (reduced to $470,000 due to damage caps) plus almost $90,000 in back pay and prejudgment interest. *Id.* Rosebud Farm appealed, arguing that the district court should have granted it judgment as a matter of law on the sexual harassment claim, because Smith failed to prove that his male coworkers discriminated against him because of his sex and instead the other men in the shop engaged in "sexual horseplay," not sex discrimination. *Id.*

Rosebud Farm did not dispute that the harassment was severe and pervasive and was done with the knowledge of the store's general manager. *Id.* Like *Shafer v. Kal Kan Foods, Inc.*, Rosebud Farm instead claimed that Smith failed to prove

that his coworkers harassed Smith because he was male. *Id.* In support of this argument, the employer cited testimony by the male employees that quarters were tight behind the meat counter, butchers often bump into each other during the workday, and the coworkers frequently teased and touched each other, not just Smith. *Id.* at 751. Rosebud Farm argued that this demonstrates that the meat counter culture was one of sexual rough-housing, not sex discrimination. *Id.*

Rejecting this contention and affirming judgment in favor of Smith, the Seventh Circuit distinguished *Shafer* on the basis that unlike Shafer, Smith offered direct comparative evidence that only men, and not women, were groped, taunted, and otherwise tormented. *Id.* at 752. No witnesses recalled seeing female Rosebud Farm employees subjected to the same treatment. *Id.* Rosebud Farm claimed that the direct comparative evidence was insufficient because only male employees worked behind the meat counter. *Id.* The court agreed that if Smith worked in an all-male environment, the fact that only men were touched and groped would not raise an inference of sex discrimination. *Id.* But Rosebud Farm was a mixed-sex workplace where men and women interacted daily and women sometimes worked in the meat department. *Id.* In addition, men also groped each other in the stock room and produce section, not just behind the meat counter. *Id.* Thus, a reasonable jury could conclude that Smith's coworkers would not have harassed him if he had been female. *Id.*

In light of these decisions, when faced with allegations of same-sex sexual harassment and the complaining employee still works for the allegedly offending employer, the first step should be to fully investigate the allegations and take prompt effective action designed to eliminate the harassment. If the alleged harassment is severe or pervasive and the defense strategy is to argue that the offensive conduct was not based on the employee's sex, the second step is to gather evidence (ideally from the plaintiff) that employees of the opposite sex were subject to the same types of offensive behavior. In such a case, the employer should be able to demonstrate that it was a situation of "equal opportunity" harassment that is not actionable under Title VII.

## About the Author

**Julie A. Bruch** is a partner with *O'Halloran Kosoff Geitner & Cook, LLC*. Her practice concentrates on the defense of governmental entities in civil rights and employment discrimination claims.

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