



McKENNA
EMPLOYMENT BULLETIN
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**EEOC PROSECUTES SINGLE
COMPLAINANT HOSTILE ENVIRONMENT
CASE**

In E.E.O.C. v. Central Wholesalers, Inc., 2009 WL 2132348 (July 21, 2009), a district court in California found that a genuine issue of material fact precluded summary judgment in a Title VII hostile environment case brought by the EEOC on behalf of an African American female former employee. According to the employee, her male co-workers repeatedly used profanity and racially derogatory terms, regularly referred to women as “bitches”, viewed pornography in the office and two of the employees also kept blue-colored mop-head dolls hanging from nooses in their offices. The court determined that a reasonable jury could find that the alleged gender and race-based harassment was sufficiently severe or pervasive to alter the conditions of the employee’s employment and create an abusive atmosphere.

While the majority of the cases filed by the EEOC involve multiple complainants, the EEOC does file on behalf of individual complainants, particularly where the conduct appears particularly egregious.

**SAME GENDER SEXUAL HARASSMENT
VIOLATES TITLE VII WHEN BASED ON
SEXUAL DESIRE**

In Ellsworth v. Pot Luck Enterprises, Inc., 2009 WL 1579718, the district court in Tennessee addressed a same sex harassment case. There, the employee filed the claim arising from his male coworkers’ propositions and crude sexual comments. The plaintiff argued that the alleged harassment was based on sex, not sexual orientation. In addition, the plaintiff argued that because all the alleged harassers were undisputedly homosexual, it could be inferred that their conduct was based on sexual desire and, therefore, sex. The employer argued that Title

VII does not apply to sexual orientation.

On summary judgment, the District Court found in favor of the employee. The District Court, relying on the U.S. Supreme Court’s ruling in Oncale v. Sundowner Offshore Servs., Inc., held that that Title VII extended to the employee’s same-sex harassment claim because the employee alleged harassment based on sex, rather than simply sexual orientation.

The Oncale v. Sundowner Offshore Services case is still good law. It held that Title VII permits sexual harassment suits brought by plaintiffs regarding harassers of the same sex in three situations: (1) when the harassing conduct is motivated by sexual desire; (2) when the conduct is the result of a general hostility to a certain sex in the workplace; or (3) when a plaintiff offers comparative evidence about differential treatment in a mixed-sex workplace. Regardless of which of these three circumstances applies, the plaintiff must always prove that the conduct was not merely tinged with offensive sexual connotations, but actually constituted “discrimination ... because of sex.”

**USE OF MALE STEREOTYPE CAN
RESULT IN SEX DISCRIMINATION
AGAINST MALES**

In Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009), a male employee charged his former employer and supervisors with sex discrimination alleging they had pressured him to resign based on a sex stereotype regarding the propensity of men to sexually harass their female co-workers. The Court held that the male employee established facts giving rise to an inference of discriminatory intent. The male employee provided evidence that his male supervisor commented on the propensity of men to engage in sexual harassment. The Court held that an inference of discriminatory intent may be established by the employer’s offensive comments

about others in the employee's protected group or the sequence of events leading to the employee's discharge. The male supervisor made the statement that "you probably did what [the female colleague] said you did because you're male." The employee argued he met his burden by producing both this evidence showing his male supervisor made what could be construed as an offensive comment about the propensity of men to harass sexually their female colleagues and evidence that the employer and supervisors failed to investigate properly the charges of sexual harassment lodged against the male employee. Those charges led directly to the employee's forced resignation.

The Court found that the male supervisor defended his decision to credit the female employee's allegations of sexual harassment by pointing to the propensity of men, as a group, to sexually harass women. The Court held that when employment decisions are based on offensive sex stereotypes, a reasonable jury could infer the existence of discriminatory intent. The Court further held that fear of a lawsuit does not justify an employer's reliance on sex stereotypes to resolve allegations of sexual harassment, discriminating against the accused employee in the process. The Court held that a jury could reasonably construe the male supervisor's statement as persuasive evidence that he pressured the employee to resign because of the male supervisor's discriminatory assumptions about the propensity of men to sexually harass their female co-workers.

The Court also held that the male employee's assertion that the male supervisor and employer's efforts to verify the female co-worker's accusations could also be construed by a reasonable jury as further evidence that the male employee's forced resignation resulted from facts giving rise to an inference of discriminatory intent. The male supervisor conducted no investigation himself as to the serious allegations made by the female co-

worker. Nor did he have his deputy investigate. Nor did he ask the Equal Employment Opportunity Officer to investigate. The Court held that a reasonable jury could infer from the inadequacy of the male supervisor and employer's investigation that the defendants relied solely on sex stereotype and clearly not on the outcome of a reasonable investigation undertaken in response to the fear of a lawsuit when forcing the male employee to resign.

FLIRTATIOUS COMMENTS BY MALE SUPERVISOR TO MALE EMPLOYEE DID NOT CONSTITUTE SEXUAL HARASSMENT

In Corbitt v. Home Depot U.S.A., Inc., 2009 WL 1981383(11th Cir. 2009), a male supervisor told an employee that he liked how the employee dressed, that he liked the employee's pants, that the employee's hair was beautiful, and that he liked the employee's green eyes. The Court held these comments may not have been appropriate workplace conversation, but they were not actionable statements under Title VII.

The Court held that flirtation is part of ordinary socializing in the workplace and should not be mistaken for discriminatory conditions of employment.

The Court found that while the male employee may have been subjectively more uncomfortable because a presumably gay man made the flirtatious comments, this did not factor into the objective component of the Title VII analysis.

Comment: The question arises from this case as to how it will affect situations where male supervisors make flirtatious comments to female employees.

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