All kinds of sexual harassment on trial

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Body

Two questions bedevil sexual harassment lawsuits: What constitutes harassment under the civil rights laws, and when should a company be liable for it? The Supreme Court takes up both issues this term, beginning today with the case of Oncale vs. Sundowner and the subject of "same sex" sexual harassment.

To appreciate the difficulties and stakes, consider a recent appeals court decision about twin 16-year-olds who landed summer jobs with the yard crew from hell. "J. Doe" was overweight - the crew took to calling him "fat-boy." "H. Doe" wore an earring - the crew dubbed him "fag" and "queer" and constantly asked, "Are you a boy or a girl?" One member of the crew -Dawe, "a former Marine of imposing stature" - allegedly alternated between urging H to "go back to San Francisco" and offering to take him "out to the woods" and "get him up the --." One day, H claims, Dawe told him he was "going to finally find out if you are a girl or a guy," grabbed H's testicles, and conceded, "Well, I guess he's a guy." H and J quit and sued their employer (but apparently not Dawe) for sexual harassment.

The trial court threw the case out, but in an opinion laden with admiring citations to controversial feminist Catherine MacKinnon, the court of appeals reversed. The court held that H had been illegally "singled out" for abuse "because the way in which he projected the sexual aspect of his personality . . . did not conform to his co-workers' view of appropriate masculine behavior." The co-workers' motive was discriminatory under Title VII of the Civil Rights Act of 1964, the court explained, because "their intent was to humiliate H as a man." As for J? his claim was reinstated, too. Though mostly he was called "fat-boy" (by Dawe, not the court), there was "one exception" - he once was asked whether he had gotten poison ivy from intimacy with his brother. Further, the court found a "suggestion" that J might have been called "bitch" or "queer," and held that his brother's treatment could have "rendered the working environment hostile" for J.

With regard to brother H, both the court's premises are mistaken. H was not "singled out" for abuse. Rather, Doe is the rare case with a perfect control group - twin brother J, who was identical in all material respects except that he did not wear an earring to "project the sexual aspect of his personality." Yet J also was abused. The plain implication is that the motive for Dawe's harassment was not "sexuality, " but that Dawe was a bully and H and J were young and vulnerable. Each boy had a distinguishing feature, H's earring and J's weight. That became the focus of the abuse, but it was not the motive.

As for the court's second premise - that the abuse was actionable because Dawe sought to humiliate H "as a man" - this is men's goal in countless encounters, some playful, some nasty, which neither participant considers discrimination "because of" sex. That is, to say that humiliation of another "as a man" is actionable discrimination

is to sweep in a broad range of conduct that few people believe the civil rights laws, or the federal courts, should be bothering with. Indeed, the overbreadth of the rule formulated in the case of brother H is demonstrated in the rule's first subsequent application - reinstatement of the claim of brother J, the "fat-boy."

The same-sex harassment case before the Supreme Court this week involves more sexual, physical conduct than experienced by the brothers Doe. But the Doe case reflects three concerns that the court will be wrestling with in Oncale: How to avoid further "tortification" of the discrimination laws? How to draw a bright-line rule to guide lower courts and prospective litigants? And most fundamentally, when, if ever, is same-sex harassment employment discrimination "because of" sex within the meaning of Title VII?

Many childish and nasty things happen in the workplace (as elsewhere); childish and nasty conduct often turns to the subject of sex or involves physical contact. People ought to be treated with respect at work (as elsewhere), and severe mistreatment of a co-worker should be grounds for termination. Improper physical contact or the threat thereof can be grounds for civil suit or even criminal prosecution.

The civil rights laws, however, have a special concern - ending employment discrimination on the basis of sex (and race and certain other characteristics). In cases involving "conventional" man-on-woman sexual harassment, the courts have struggled to define conduct that discriminates "because of" sex without sweeping in behavior that is foolish, malicious, or even tortious, but that does not warrant invoking the civil rights laws. In same-sex harassment cases this line-drawing problem is particularly acute, as the Doe case shows.

A bright-line rule adopted by some courts to contain same-sex harassment cases, and which the Supreme Court is likely at least to consider, would limit suit to instances where the harasser is homosexual. One court taking this approach has suggested that the employer could still win, however, by showing that the harassment was not "because of" the aggressor's sexual interest, but instead occurred because of his "puerility," "perversion," or "insecurity," or because he wanted to tweak a co-worker who was "shy" or a "prude."

This approach does not suffer the overbreadth and vagueness of the Doe decision, and is closer to the general understanding of the term "sexual harassment," which implies advances of a sexual nature. But it raises some interesting questions of its own. For instance, will employers defend same-sex harassment cases by putting on evidence that the aggressor, even if homosexual, "had no interest in that man"? Will salient evidence include whether the malefactor was monogamous, preferred blondes, etc.? If so, imagine the parameters of pre-trial discovery. Then there is the riddle of the bisexual harasser: Since he would as soon have relations with a woman as a man, is he ever harassing "because of" gender? (The federal court of appeals for the District of Columbia has twice said the answer is no.)

A deeper problem with this approach is that in "conventional" man-on-woman harassment cases, sexual interest has never been the test. Title VII prohibits sex discrimination, not sexual discrimination, and it most certainly would be no defense to man-on-woman harassment that the supervisor abused his subordinate because she was "shy," or a "prude," or because he was puerile or perverted. Indeed, these are probably among the principal motives for man-on-woman sexual harassment.

Ultimately, then, this week's same-sex harassment case should cause the Supreme Court to consider and explain more than it ever has in the past when sexual harassment is "because of" sex. The implications could reach well beyond same-sex harassment.

Consider, for instance, the large class of discrimination cases that involve comments, jokes, or pornographic displays not directed toward the plaintiff, but which she hears or sees and (understandably) finds offensive. (One federal appellate court is about to sit in special session to consider whether white men may sue for discriminatory comments about blacks and women.) These "bystander" cases recently have drawn fire from free-speech advocates, who contend that the First Amendment prohibits using Title VII to ban speech in the workplace merely because it offends some listeners. The New Republic ran a lengthy cover article by Jonathan Rauch last spring

arguing that the First Amendment effectively bars hostile work environment suits. Mr. Rauch drew on the work of UCLA professor Eugene Volokh, who has argued that the First Amendment requires limiting liability for offensive speech to statements purposely directed at the plaintiff alone.

This First Amendment concern is interesting, but could be averted at least in part by the statutory language the Supreme Court will be considering in the same-sex harassment case: Title VII's focus on discrimination "because of" sex. In the sexual harassment cases before the Supreme Court to date, the plaintiff was the intended target of discriminatory statements and acts; one could reasonably conclude that she was targeted "because of" her sex. In many of the "bystander" cases, by contrast, the callow male co-workers would have acted as they did with no women in the office. That is, they did not act as they did "because of" their women co-workers, they acted "without regard to" them. That, indeed, was their offense.

The current confusion in the law of sexual harassment results partly from the Delphic Supreme Court decision nearly 12 years ago that first recognized Title VII suits for sexual harassment. This year -with Oncale and the case on employer liability, Faragher vs. Boca Raton, scheduled for later in the term - the court has an unparalleled opportunity to bring clarity to an area bursting with litigation, and uncertainty. The 1997 Supreme Court term could, and should, be the defining year in the law of sexual harassment.

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