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Same-Sex Harassment Can Be Actionable

In a recent decision, the Michigan Court of Appeals held that an employer can be liable for hostile work environment sexual harassment between employees of the same sex. In Robinson v. Ford Motor Co., No. 271395 (October 30, 2007), the male plaintiff alleged that a male co-worker sexually harassed him, not only by blatant intimate touching but also by exposing himself to the plaintiff. Ford asked the trial court to dismiss the complaint on the grounds that "sexual horseplay by a heterosexual male directed against another male fell outside the [Michigan Elliot-Larsen Civil Rights Act] definition of sexual harassment." The trial court refused to dismiss the case, and Ford appealed.

The Michigan Supreme Court has yet to decide whether same-sex hostile work environment claims are actionable under Elliott-Larsen. The Court of Appeals held in this case, though, that Elliott-Larsen's definition of sexual harassment does not exclude same-sex harassment. The Court's holding is consistent with the United States Supreme Court's opinion in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) that same-sex harassment is actionable under Title VII of the Civil Rights Act of 1964.

The Court of Appeals also rejected Ford's argument that since the alleged harasser was a heterosexual male, his harassment of the plaintiff did not pertain to having sexual relations, and therefore, the conduct was not actionable under Elliott-Larsen. The Court held that Elliott-Larsen's definition of sexual harassment includes conduct "of a sexual nature" that is unrelated to sexual desire or gratification. In this case, the court found that the plaintiff had alleged conduct of a sexual nature that would be actionable.

The Court of Appeals concluded its decision by addressing an issue that the trial court had not considered. The Court stressed that even if same-sex harassment is actionable under Elliott-Larsen, the plaintiff still had the ultimate burden of proving that the alleged harasser's actions were motivated by the plaintiff's sex. Relying upon Oncale, the Court found that to prove the conduct was motivated by the plaintiff's sex, the plaintiff must either: (1) prove that the harasser was acting out of sexual desire; (2) prove that the harasser was motivated by general hostility to men in the workplace; or (3) show comparative evidence of how the harasser treated men as opposed to women in the workplace. The Court of Appeals remanded the case to the trial court to consider whether the plaintiff had presented sufficient evidence that the harassment he allegedly suffered was because of his sex.

There are several important points that employers should take away from this case. First, employers should "think outside of the box" when addressing issues of sexual harassment in the workplace. Actionable harassment can include conduct that an employer may not have traditionally considered a violation of Elliott-Larsen. Second, employers should train supervisors to recognize less common examples of sexual harassment, such as a male harassing a male or a female harassing a male. Third, employers should review their sexual harassment policies to ensure that they encourage employees to report all incidents of harassment. For instance, since a male employee may be too embarrassed to report being harassed by another male, or by a female, the policy should stress that investigations will be conducted as confidentially as possible. Attorneys in Butzel Long's Labor Group are available to provide on-site training to address same-sex and other harassment issues.

For more information on this or any labor and employment matter, contact the author of this E-Bulletin as indicated below, or any member of Butzel Long's Labor and Employment Law Practice Group.

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