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# 4th Circuit breaks new ground on same-sex sexual harassment claims

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*In a case involving same-sex sexual harassment, the U.S. 4th Circuit Court of Appeals (whose rulings apply to all South Carolina employers) recently partially reversed a district court's grant of summary judgment (dismissal without a trial) to the employer. The appeals court issued the ruling as a published decision, meaning it has precedential effect (authority for subsequent cases) in the circuit, which also includes Maryland, North Carolina, and Virginia.*

***Facts***

Glenn Industrial is a North Carolina-based business providing underwater inspection and repair services to utility companies. In July 2015, the company hired Chazz Roberts as a dive tender or diver's assistant. He signed the employee handbook, which included a policy requiring all sexual harassment complaints to be reported to the CEO.

Andrew Rhyner supervised Roberts. From the beginning of his employment and continuing throughout his tenure, Roberts alleged the supervisor referred to him as "gay" and used sexually explicit and derogatory remarks toward him, creating a hostile work environment based on sex. Rhyner also physically assaulted Roberts twice.

Roberts complained to (1) Rhyner's boss on at least four occasions, (2) another supervisor who witnessed the conduct, and (3) Glenn Industrial's HR manager, who was the CEO's wife. He never complained to the CEO. Rhyner was never disciplined or counseled.

Roberts suffered a work-related accident and consequently spoke with the CEO on several occasions but never mentioned the harassment. After the last conversation, he was sent home as not fit for duty and never called back to work. He filed a charge alleging sex discrimination and retaliation and then followed with a lawsuit.

***4th Circuit's analysis***

**Employer retaliation.** The 4th Circuit agreed with the district court Roberts couldn't proceed with his retaliation claim because:

- The CEO had no knowledge of the sexual harassment claims;
- Even if he did have knowledge, the three month's long delay between the protected activity and the adverse decision was too long to support a causal relationship between the complaint and the termination; and
- Roberts' safety violation supported a legitimate, nonretaliatory reason for his discharge.

**Same-sex sexual harassment.** In granting summary judgment to the employer, the district court relied on the U.S. Supreme Court's 1998 decision in *Oncale v. Sundowner Offshore Services*. The 4th Circuit pointed out it hadn't addressed the issue of same-sex sexual harassment in a published decision since *Oncale* and took the opportunity to do so here.

The 4th Circuit found an individual may establish a same-sex sexual harassment claim with evidence of sex stereotyping and further recognized additional forms of proof beyond those identified in *Oncale*:

- There's credible evidence the harasser is homosexual and the harassing conduct involves explicit or implicit proposals of sexual activity;
- The alleged harassment's sex-specific and derogatory terms indicate general hostility toward the presence of the victim's gender in the workplace; and
- Comparative evidence shows the harasser treated members of one sex worse than members of the other sex in a mixed-sex workplace.

The 4th Circuit indicated the district court also needed to look more closely at the assault allegations to assess whether they happened because of Roberts' sex.

***Lessons for employers***

First, while Glenn Industrial was able to prevail on the retaliation claim partly because the CEO (the decision maker) had no knowledge of the harassment claims, such facts may not always exist.

More important, the 4th Circuit now gives employees filing same-sex sexual harassment claims the support to argue there are different ways and means and ways to keep their claims alive. They aren't limited by the *Oncale* factors. They can argue an individual perceived as not conforming to traditional sex stereotypes will likely be able to get past a request for summary judgment.

Finally, and while not discussed in the case, you should review your harassment policies because the Equal Employment Opportunity Commission (EEOC) and some courts have made clear employees should have multiple avenues or ways/persons/places to complain about workplace harassment. A single person, number, or place to file a complaint won't be enough.

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