

Rhode Island Court Considers Harassment and Discrimination Claims Involving Alleged Harasser and Victim of the Same Sex

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The U.S. District Court for the District of Rhode Island recently considered the application of Title VII of the Civil Rights Act of 1964 and the Rhode Island Fair Employment Practices Act (FEPA) in the context of an alleged harasser and victim who are members of the same sex. The court determined that the worker's claims failed because (1) Title VII does not protect against discrimination based on sexual orientation, (2) the worker failed to establish a claim for sexual harassment based on a hostile work environment, and (3) the worker could not establish a claim for retaliation.

When the male plaintiff began working as a Rhode Island Department of Transportation (DOT) inspector, a male coworker was tasked with training him. The plaintiff claimed that from the start, the coworker and other employees made lewd and sexually suggestive comments and gestures to him, including some that he believed intimated a desire to engage in sexual conduct with him. The record showed, however, that the plaintiff also routinely made inappropriate gestures, engaged in sexualized conduct, and, on several occasions, threatened the coworker. The plaintiff acknowledged that harassment among coworkers was "pretty typical" at his workplace, though he claimed that this coworker's conduct had been extreme.

The plaintiff complained to his supervisor about the coworker's conduct. In response, the DOT investigated the complaint and then transferred the plaintiff to a different DOT project. After the transfer, the DOT received reports of several other incidents allegedly involving the plaintiff and his former coworkers. As a result, the DOT placed the plaintiff on paid administrative leave and, following further investigation, terminated his employment.

The plaintiff filed a grievance with the union and later filed a lawsuit against the DOT, the coworker, and others. The plaintiff asserted claims under federal and state laws for discrimination on the basis of his heterosexuality, sexual harassment due to a hostile work environment, and retaliation for reporting the harassment. He also made clear that he was not asserting a claim for discrimination based on his sex, but only for discrimination on the basis of his status as a heterosexual. For that reason, the court determined that his Title VII claims failed, holding that Title VII, on its face, does not protect against discrimination based on sexual orientation.

The court then turned to the plaintiff's state-law discrimination claims under the FEPA, which prohibits discrimination based on sex, as well as discrimination based on sexual orientation, gender identity or expression, and other categories. Interestingly, the court analyzed those claims together with the plaintiff's claims under state and federal law for sexual harassment based on a hostile work environment. The court found that although the plaintiff had succeeded in demonstrating a "lack of decorum" at the DOT, he had failed to show that he had been subjected to unwelcome sexual harassment that was severe and pervasive. The court held that the alleged conduct was based *not* on the coworker's sexual desire for the plaintiff, as alleged, but, rather, was the result of a rivalry between the two men. The plaintiff himself admitted that he thought the coworker was joking and was not serious about the alleged sexual propositions.

The court relied on evidence that sexualized comments and behavior had been common in the parties' workplace, and that the plaintiff's frequent involvement in the type of comments about which he later complained suggested that the conduct had not been unwelcome or hostile. The court found it "undisputed that a culture of inappropriate behavior prevailed at the DOT," and held that the plaintiff, "while clearly often the target of animosity from his coworker, nevertheless partook in this atmosphere." Further, the court found the conduct was not severe or pervasive because "[l]ooking realistically at the social context of an organization such as the DOT, one expects a certain level of salty language and inter-personal rivalry." Therefore, the court held, the DOT was a "less-sensitive social context," in which the alleged conduct amounted only to inappropriate utterances, and did not rise to the level of a hostile work environment.

The plaintiff also claimed that his transfer to another location, which had added some time to his commute, was a retaliatory, adverse action, though it had not resulted in a change in pay or seniority and had been approved by the union. The plaintiff admitted that when he accepted the job with the DOT, he did not know at which location he would be working. Therefore, the court ruled that the transfer could not have constituted an adverse employment action.

Key Takeaways

The Rhode Island federal court granted summary judgment against the plaintiff on his claims of sex discrimination by a member of the same sex; however, essential to the court's decision was the worker's own inappropriate conduct, as well as the acknowledgement of his participation in a culture of inappropriate conduct at his workplace. The court did not rule on whether Title VII might apply to prohibit sex

discrimination when the alleged harasser and victim are of the same sex. Further, the court avoided a complete analysis of the worker's FEPA claims for discrimination based on sexual orientation, and instead considered them with the Title VII claims for sexual harassment due to hostile work environment, because that was how the parties had briefed the issues.

Employers should be aware that the Rhode Island FEPA protects against discrimination due to sexual orientation and gender identity or expression, in addition to the protection from sex discrimination provided by federal law. Because of the facts in this case and the arguments advanced by the parties, the additional state protection did not matter, and the court found that no hostile work environment had been present. Had the facts differed and been more favorable to the worker, however, a Rhode Island court could conceivably have found the employer liable for same-sex harassment or discrimination on the basis of sexual orientation.

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