



# Employment

## Law Briefing

Insights on Legal Issues in the Workplace



### INSIDE ...

Can an employer be held liable for same-sex harassment?

Employee need not be pregnant to claim PDA discrimination

Location of employee's worksite key to FMLA eligibility

When a smaller pay raise constitutes an "adverse employment action"

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# Can an employer be held liable for same-sex harassment?

The answer is yes, provided the worker was harassed because of his or her sex. A case in point is *Chavez v. Thomas & Betts Corp.*, where the Tenth Circuit upheld a \$500,000 jury verdict against an employer.

## The allegations

A female factory worker alleged that her supervisor — who was also female — harassed and humiliated her in front of co-workers, made inappropriate sexual remarks about her and physically assaulted her.

Specifically, the worker testified that her supervisor commented in front of male co-workers about the worker's body parts, her sexual partners, how they allegedly had sex and what kinds of toys they used. The supervisor frequently asked men to guess what kind of underwear the worker was wearing and whether they could see through her pants and shirt, and once asked her whether her hair color matched. Other supervisors often observed this harassment but failed to intervene or report it.

The worker also testified that the supervisor once pulled open the worker's shirt, exposing her chest and bra to co-workers, and another time pulled her pants open, exposing her underwear to co-workers. Another supervisor observed this conduct but didn't report it.

## Management ignores complaints

Two co-workers testified that the supervisor regularly directed sexually charged, humiliating and hostile comments toward women in the workplace but not toward men. She was hostile and bitter toward women and regularly called them "bitches," while being much more congenial toward men in the workplace. The co-workers complained to management, but it took no action.

Similarly, the human-resources manager was indifferent to the worker's complaints about the supervisor's conduct. Although management told

the worker that it would investigate, no credible investigation took place until months later.

The production supervisor recommended firing the supervisor, expressly warning in two memos to the HR manager that:

- ☛ Her conduct was unacceptable,
- ☛ Continuing her in a supervisory position would be detrimental to the workplace,
- ☛ She had already caused one employee to lodge a sexual-harassment complaint, and
- ☛ She undermined management's efforts to maintain a safe work environment.

The company took no action in response to the memos.

## Employer appeals verdict

After a one-week trial, the jury awarded \$500,000 in compensatory and punitive damages against the company, and it appealed.

The Tenth Circuit noted that Title VII bars same-sex harassment arising from a hostile work environment, but a plaintiff must prove that the conduct wasn't "merely tinged with offensive sexual connotations but actually constituted discrimination because of sex." To determine whether same-sex harassment arising from a hostile work environment had occurred, the Tenth Circuit applied a two-prong test.

The first prong was to determine whether the harasser's conduct constituted discrimination because of sex. To determine this, the court had to decide whether evidence existed from which a jury could infer that the plaintiff had been harassed because she was a woman.

The critical issue was whether members of one sex were exposed to disadvantageous employment terms or conditions to which members of the other sex were not exposed. One way to prove that same-sex discrimination was "because of sex" is for a plaintiff to produce direct, comparative evidence about how the harasser treated males and females differently in a mixed-sex work environment.



The Tenth Circuit found sufficient evidence to support the jury's finding that the worker was harassed because of her sex. In particular, evidence supported the reasonable inference that the supervisor treated men and women differently.

Having met the first prong, the Tenth Circuit turned to the second prong: whether the challenged conduct met Title VII's standards for a hostile work environment. A hostile work environment exists if the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

The conduct must be judged by both a subjective and an objective standard. To determine whether an environment is hostile, courts must look at all the circumstances, including the "frequency of the discriminatory conduct; its severity;

whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

The Tenth Circuit found sufficient evidence to support the jury's finding that the worker suffered sexual harassment under Title VII, resulting in a hostile and abusive work environment. In addition, the court held that punitive damages were justified because the company failed to respond properly to workers' complaints.

### An expensive lesson

Why did the company ignore the workers' complaints and the production supervisor's strongly worded memos? The court's opinion doesn't say. Obviously, the alleged conduct was unacceptable and should have been investigated. For its failure to act, the company paid \$500,000 in damages, plus its own and the worker's legal fees — an expensive lesson indeed. 🏢

## Conduct must actually constitute sex discrimination

The U.S. Supreme Court first held that same-sex sexual harassment in the workplace can be held actionable as sex discrimination under Title VII in *Oncale v. Sundowner Offshore Services*.

That case arose when a man employed as a roustabout on an eight-man oil-platform crew in the Gulf of Mexico alleged that male co-workers had forcibly subjected him several times to humiliating sex-related actions in the presence of the rest of the crew. Specifically, a male co-worker had physically assaulted him in a sexual manner and had threatened to rape him. After his complaint to supervisory personnel produced no remedial action, he quit his job, believing that he would have been raped or forced to have sex.

In a unanimous opinion written by Justice Scalia, the Court held that workplace sexual harassment can be actionable as sex discrimination under Title VII even when the harasser and the harassed employee are of the same sex. The harassing conduct needn't be motivated by sexual desire to support an inference of employment discrimination. But a plaintiff who brings a same-sex claim must prove that the conduct wasn't merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex.

The Court noted that Title VII doesn't cover genuine but innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex. Nor does Title VII require either asexuality or androgyny in the workplace. Rather, Title VII forbids only behavior so objectively offensive as to alter the conditions of the victim's employment.

Moreover, the conduct's offensiveness has to be judged in the social context in which it occurs. So a professional football player isn't sexually harassed when his coach smacks him on the buttocks as he runs on the field, even if the same behavior would be considered abusive if done to the coach's secretary — male or female — in his office.

Employers must be on guard to prevent roughhousing, teasing and hazing in the workplace, because these activities can easily be perceived to constitute discrimination on the basis of sex. This conduct can't be tolerated or excused as the workers "only having fun" or in the belief that the conduct is harmless. Otherwise, an employer may find that it faces time-consuming and expensive litigation.

# Employee need not be pregnant to claim PDA discrimination

A former employee alleged that her employer violated the Pregnancy Discrimination Act (PDA) when it refused to rehire her because she might again become pregnant. In *Kocak v. Community Health Partners*, the Sixth Circuit had to decide whether to allow her claims to go to trial.

## Applicant makes claims

An obstetric nurse quit her hospital job because of pregnancy complications. Three years later, the hospital refused to rehire her. She alleged unlawful discrimination based on her past pregnancy. She testified that the personnel manager had asked her whether she was or intended to become pregnant and told her that her former supervisor wouldn't rehire her because her past pregnancy had complicated scheduling.



The hospital claimed that its decision not to rehire was based on legitimate nondiscriminatory reasons: Her co-workers were vehemently opposed to rehiring her and said she was unreliable, difficult to work with and not a team worker.

*The PDA extends Title VII's definition of sex discrimination to include discrimination because of or based on "pregnancy, childbirth or related medical conditions."*

## Trial court throws out lawsuit

The trial court threw out the nurse's lawsuit without a trial on the grounds that the PDA didn't protect her because:

- ❑ She wasn't pregnant when she reapplied for her job, and
- ❑ She didn't bear any children or have any pregnancy-related medical conditions while her application was pending.

The nurse asked the Sixth Circuit to reinstate her suit.

First, the Sixth Circuit noted that the PDA extends Title VII's definition of sex discrimination to include discrimination because of or based on "pregnancy, childbirth or related medical conditions." Further, the PDA requires employers to treat these women the same for all employment-related purposes as it treats "...other persons not so affected but similar in their ability or inability to work."

Second, the Sixth Circuit found that the PDA's legislative history showed that Congress intended the PDA to protect the entire range of childbearing matters. Third, the U.S. Supreme Court has held that the PDA bars employers from discriminating against a woman "because of her capacity to become pregnant." And other courts have held that potential pregnancy is a sex-related medical condition because only women can become pregnant.

So, the Sixth Circuit held that the nurse's PDA claim could survive if she could produce evidence that the hospital refused to hire her because she might become pregnant again. But the court found that she had failed to do so.

### Court finds nondiscriminatory reasons


The Sixth Circuit noted that unrefuted evidence showed that the nurse — both before and during her pregnancy — had been unreliable when it came to scheduling and difficult to contact. So her former supervisor's comment about these past problems was not direct evidence of antipregnancy animus that could justify a trial.

Similarly, the personnel manager's questions about whether she was pregnant or intended to become pregnant didn't constitute evidence of direct discrimination because they were too "abstract" to support a finding of pregnancy discrimination. Moreover, even if these questions had constituted direct

evidence of discrimination, the hospital offered substantial evidence that it would have decided not to rehire her regardless, because evidence showed that she was unreliable and avidly disliked by her peers.

The nurse produced no evidence to rebut the hospital's position or show that its reasons were pretextual. So the court upheld dismissal of her suit.

### Watch your interview practices

When deciding whether to hire or fire pregnant or disabled employees, savvy employers focus on actual job performance rather than on pregnancy or disability. Here, the personnel manager put the hospital in jeopardy by questioning the nurse about her pregnancy intentions. This is an impermissible area of inquiry. Employers should ensure that their interview practices comply with antidiscrimination laws. 

## Location of employee's worksite key to FMLA eligibility

The Family and Medical Leave Act (FMLA) requires employers to grant 12 weeks of medical leave annually to employees with serious health conditions that render them unable to work. But not covered is any employee whose employer has fewer than 50 employees within 75 miles of the employee's worksite.

At issue before the Tenth Circuit in *Harbert v. Healthcare Services Group* was the validity of a Department of Labor (DOL) rule implementing the FMLA.

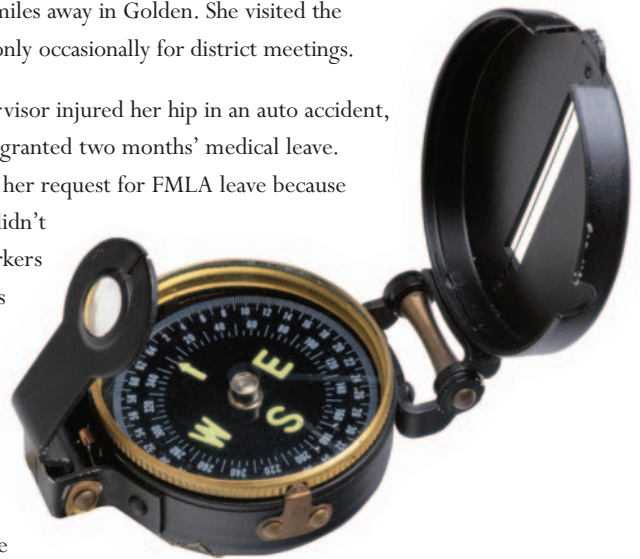
### Joint employers

A Brush, Colo., nursing facility hired a supervisor of housekeeping in 1994. Three years later, the facility contracted out its housekeeping services to a contractor employing about 17,000 employees in 1,300 long-term-care facilities in 42 states. The supervisor became the contractor's employee, yet her duties remained substantially the same as when the facility employed her directly. She continued to work out of the same office at the facility and still reported to its administrator. But she also mailed or phoned reports to the contractor's district manager

more than 75 miles away in Golden. She visited the Golden office only occasionally for district meetings.

After the supervisor injured her hip in an auto accident, the contractor granted two months' medical leave. Then it denied her request for FMLA leave because the employer didn't employ 50 workers within 75 miles of Brush.

The supervisor sued, alleging that she was FMLA eligible because the contractor employed more than 50 employees within 75 miles of its Golden office. The federal trial court relied on a DOL rule that provides: "[W]hen an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports." So the



*Congress intended to balance employees' reasonable medical-leave needs with employers' legitimate staffing interests.*

court held that the supervisor's worksite was in Golden rather than in Brush, and she was eligible for FMLA leave.

### Congressional intent

On appeal to the Tenth Circuit, the contractor argued that the rule was invalid because it was contrary to Congressional intent in enacting the FMLA. All agreed that the supervisor was jointly employed. The court found that Congress intended to balance employees' reasonable medical-leave needs with employers' legitimate staffing interests.

As part of this balance, Congress adopted the 50-in-75 exception for small operations of even a potentially large employer — recognizing an employer's difficulties in reassigning workers to geographically separate facilities. Thus Congress recognized the difficulties even a large employer might have in temporarily replacing employees working at scattered sites.

### Arbitrary and capricious

The Tenth Circuit held that the rule — as applied here — was arbitrary, capricious and plainly contrary to the FMLA's intent. The court reasoned that if this employer granted FMLA leave, it would have had to find a replacement in Brush. The court noted that courts must guard against interpretations that might defeat a statute's purpose.

The Tenth Circuit held that the DOL's worksite definition was contrary to the 50-in-75 exception's underlying purpose. Congress intended that any employer — large or small — that lacked a significant nearby pool of employees to cover for an absent employee shouldn't be required to provide FMLA leave to that employee. So requiring the contractor to grant FMLA leave to the supervisor would be contrary to the statute's intent.

### Consult the rules

Even though this employer was off the hook, the lesson here for employers is to carefully consult FMLA rules before making eligibility determinations. The rules are specific, and courts generally defer to them. Employers don't want to have to invalidate a rule to prevail in a case. 🏠

## When a smaller pay raise constitutes an “adverse employment action”

**D**id an African-American who received a smaller pay raise resulting from her annual employment evaluation suffer an adverse employment action that allowed her to sue for racial discrimination?

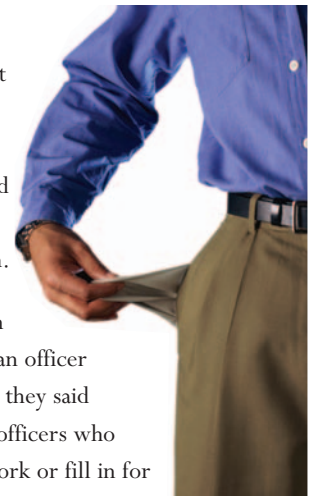
That was the question before the Eleventh Circuit in *Gillis v. Georgia Department of Corrections*.

### Employee alleges bias

The corrections department evaluated its probation officers annually. It gave 3% raises to those who “met expectations,” 5% to those who “exceeded expectations,” and 0% to those who “did not meet expectations.” After the department

evaluated an African-American probation officer as having “met expectations” and gave her a 3% increase, she sued — alleging that she hadn't received the more favorable evaluation because of racial discrimination.

The supervisors had no written criteria for determining when an officer exceeded expectations. Rather, they said they gave the highest rating to officers who volunteered to do additional work or fill in for



somebody in an emergency or staff the front office without complaint during a clerical shortage. Only two white officers had been rated “exceeded expectations.”

The officer had received an “exceeded expectations” rating four years previously, though at that time the rating didn’t merit additional pay. One supervisor once told the officer that no matter what she did on the job, she would never again receive the highest rating.

The officer wrote on her evaluation form that she believed she had been the victim of racial discrimination. When the other supervisor — who regularly used racial slurs in the office — learned of the complaint, she said, “Ain’t [it] like a [expletive slur] to complain.”

### Trial court dismisses

The trial court dismissed the officer’s suit for failing to show that she had suffered an adverse employment action as defined by Title VII. On appeal to the Eleventh Circuit, the officer argued that the monetary difference between meeting expectations and exceeding expectations was almost \$1,000 annually and that this constituted an adverse employment action.

*The Eleventh Circuit cited its previous rulings that actions affecting compensation constitute adverse employment actions.*

The department argued that her raise — though not as high as it could have been — was still a raise and could not be considered an *adverse* employment action. Nor had she received a negative evaluation or lost any pay or benefits. So the department argued that neither law nor logic supported characterizing her favorable evaluation and corresponding pay *increase* as an adverse employment action.

The department also argued that the Eleventh Circuit had previously held — in *Davis v. Town of Lake Park* — that corrective job-performance memos placed in a police officer’s personnel file didn’t constitute an adverse employment evaluation. But the Eleventh Circuit distinguished *Davis* because the memos hadn’t affected the officer’s pay. If they had, the court



stated that it would have ruled that the memos constituted adverse employment actions.

### Appellate court reinstates

The Eleventh Circuit cited its previous rulings that actions affecting compensation constitute adverse employment actions. One case held that denial of a pay raise was an adverse employment action. Another case held that transfer to another job was an adverse employment action because of diminished opportunity for future wage increases even though pay wasn’t immediately decreased.

So the Eleventh Circuit reversed the dismissal and sent the case back to the trial court to consider the department’s argument that the probation officer didn’t deserve an “exceeded expectations” rating.

### Use objective criteria

Obviously any job evaluation is subjective. Employers that tie evaluations to compensation can reduce the chances of litigation by using written objective criteria for ratings. 🏢

# A message to our clients and friends ...

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

*“Above all, we are at your service ...”*



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