

INSIGHTS

## “Why Matters” – In Texas, Proving Same-Sex Harassment “More Complicated” than Proving Opposite-Sex Harassment

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On April 6, 2018, the Texas Supreme Court issued a decision assessing what evidence is necessary to support an actionable same-sex sexual harassment claim. In an opinion totaling over 100 pages, the six-justice majority and two-justice dissent sparred over the applicable legal standard and its effect on evidence that a middle-school teacher was subjected to extensive “rude, crass, and hostile” behavior by a co-worker. While the case was in the context of public employer immunity from suit under the Texas Commission on Human Rights Act (“TCHRA”), it (1) sets the applicable legal standard for same-sex sexual harassment claims under Texas law; (2) excludes certain actions from the protected activity standard for retaliation claims; and (3) explores how courts should consider evidence in determining whether claims should be allowed to proceed to trial. The majority opinion is available [here](#) and the dissenting opinion is available [here](#).

### Proving Same-Sex Sexual Harassment

The majority and dissent agreed that Title VII protects employees from harassment specifically “because of” their sex and that words or actions with “sexual content or connotations” may or may not meet that standard. However, the majority and dissenting justices sharply disagreed on the legal standard for proving “because of” sex. The majority held that “[m]otivation, informed by context, is the essential inquiry,” whereas the dissent reasoned that the issue is “*whether* the defendant harassed the plaintiff ‘because of’ her gender, not *why* the defendant harassed the plaintiff ‘because of’ her gender.”

The majority looked to the United States Supreme Court’s first decision holding that sexual harassment could be between members of the same gender – *Oncale v. Sundowner Offshore Services, Inc.* – for three examples of how an employee could demonstrate same-sex sexual harassment. The Texas Supreme Court held that, even with evidence of specific sexual comments, gestures, and other actions, the employee could not demonstrate that the harassing actions were (1) motivated by the harasser’s sexual desire for the employee; (2) motivated by the harasser’s general hostility to women in the workplace; or (3) disproportionately aimed at the employee and other women. Instead, the Court focused on the harasser’s “personal animus” toward the employee and the harasser’s “significant, similar inappropriate conduct toward both male and female co-workers” as evidence that the harassing conduct was not based on the employee’s gender.

The dissent – like the intermediate appellate court – reasoned that the harasser’s sexual comments, particularly those specifically referring to the employee’s female anatomy, could be (as determined by a hypothetical reasonable jury) “because of” the employee’s sex. The majority disagreed, holding that references to female anatomy were insufficient to demonstrate actionable sexual harassment without evidence of the harasser’s unlawful motivation. Instead, the majority argued, context was crucial to showing the harassing conduct was “because of” sex. With respect to same-sex sexual harassment, “prov[ing] the harasser’s conduct is motivated by gender is more complicated in same-sex harassment cases because the inferences that arise from words and conduct are not necessarily the same when the harasser and victim are the same gender.”

#### **Retaliation: Grievance Letters Must Link Motivation to Gender to be Protected Activity**

The Court also concluded the employee failed to raise jurisdictional evidence sufficient to waive governmental immunity to her retaliation claim. Because the School District presented evidence adequate to rebut any prima facie presumption of discrimination, the employee was obligated to provide evidence that the School District’s explanation was pretext in order to maintain her claim.

Notably, the majority determined that a thirteen-page grievance letter submitted by the employee to the school’s principal, portraying “four dozen incidents of harassment,” was not protected activity. The letter described “bullying,” “embarrassing,” and “rude” conduct, but was insufficient to put the School District on notice that the employee was complaining about gender-based harassment. Accordingly, any actions taken by the School District between the submission of the employee’s grievance letter and her filing a charge of discrimination with the Equal Employment Opportunity Commission could not be unlawful retaliation.

#### **Court Expanded Sufficiency of Evidence Standard**

To reach trial, the employee needed to demonstrate that TCHRA’s waiver of governmental immunity applied. Relying on a standard that “mirrors that of a traditional summary judgment,” the Court asked whether the employee raised issues of material fact that are best answered by a jury.

A key difference between the majority and dissenting opinions was the treatment of harassing behavior that was facially neutral, not sexual, in tone. The majority put strong emphasis on reading all harassing behavior in the context of a larger story, accusing the dissent of cherry-picking “raunchy details” to find a question of fact. By contrast, the dissent took the position that evidence of gender-based harassment gave context and background to other instances of harassment that may not appear gender-based on the surface.

#### **Potential Impact for Employers**

The Court’s decision effectively heightens the burden for plaintiffs to demonstrate same-sex sexual harassment under the TCHRA, possibly resulting in the filing of such claims shifting to federal court rather than state court. Because the Court’s decision departs from trends in federal case law, employers should continue to assess potential liability for sexual harassment claims under the more expansive Title VII standards established by federal courts.