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Recent Developments: McWilliams v. Fairfax County Bd. of Supervisors: Title VII Hostile Environment Sexual Harassment Claims Cannot Be Sustained Where Both Alleged Harasser and Victim Are Heterosexuals of the Same Sex

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*McWilliams v.
Fairfax County Bd. of
Supervisors:*

**TITLE VII HOSTILE
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In *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), the United States Court of Appeals for the Fourth Circuit held that hostile environment claims of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII") cannot be sustained where both the alleged harasser and victim are heterosexuals of the same sex. In so holding, the court left open the possibility that sexual orientation could be both an element of and a defense to sexual harassment claims.

Plaintiff Mark McWilliams was employed by the Newington Facility of the Fairfax County Management Transportation Agency ("EMTA") as an automotive mechanic. Beginning in 1989, McWilliams was besieged by a variety of offensive conduct carried out by a group of his coworkers known as the "lube boys." The activities of the lube boys included teasing and physical assaults such as blindfolding McWilliams, simulating oral sex, and fondling him. In addition, sex permeated the atmosphere at EMTA: copies of *Playboy* were displayed in the bathrooms; and centerfold pictures and off-color cartoons were circulated around the workplace. McWilliams complained to his supervisors about some of these activities. In October 1992, McWilliams informed EMTA management that he had been sexually abused

and filed charges with the Equal Employment Opportunity Commission ("EEOC").

In July of 1993, the EEOC issued a right-to-sue letter. McWilliams then filed suit against the County and several supervisors in the United States District Court for the Eastern District of Virginia alleging workplace discrimination under Title VII and violation of equal protection rights under 42 U.S.C. § 1983 (1988). Before trial, the district court granted defendants' motion for summary judgment concluding that neither the County nor the supervisors had actual or constructive knowledge of the conduct of the "lube boys." McWilliams appealed and the United States Court of Appeals for the Fourth Circuit reviewed the dismissal *de novo*.

The court began its analysis by rejecting McWilliams's Title VII claim of sexual harassment. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1194-95 (4th Cir. 1996) (citing Title VII). Title VII condemns employer discrimination against an individual "because of" the individual's sex. *Id.* (citing Title VII). There are two types of sexual harassment claims under Title VII: (1) *quid pro quo* harassment -- requiring sexual favors in exchange for benefits of employment, and (2) "sexually-oriented harassment by one's fellow employees sufficiently egregious to create a 'hostile workplace environment' that is knowingly tolerat-

ed by the employer.” *Id.* at 1195 (quoting Title VII) (emphasis added). Significantly, the court noted that McWilliams’s claim involved only hostile environment harassment. *McWilliams*, 72 F.3d at 1195. The elements of hostile environment sexual harassment are: (1) the conduct was unwelcome, (2) the harassment was based on the “sex” of the alleged victim, (3) the harassment was “sufficiently pervasive or severe to create an abusive working environment,” and (4) there is some basis for “imputing liability to the employer.” *Id.* (citing *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987)).

Defendants claimed McWilliams failed to prove that the defendants knew or should have known of the lube boys’ conduct and, thus, there was no basis for imputing liability. *McWilliams*, 72 F.3d at 1195. The court, however, declined to address that issue and instead held that McWilliams’s hostile environment claim failed for “the more fundamental reason” that such claims cannot prevail where both the alleged harassers and the alleged victim are the same sex and heterosexual. *Id.* In reaching this conclusion, the court analyzed the language of the statute. *Id.* at 1195-96. Specifically, the court examined the phrase “because of the [target’s] ‘sex’” and determined that same sex heterosexual conduct is beyond the scope of the statute. *Id.* 1195-96. The court also noted that to extend the

phrase to include such behavior would be to create “unmanageably broad protection of the sensibilities of workers simply ‘in matters of sex.’” *Id.* at 1196. The court acknowledged that a law covering such conduct might be needed, but emphasized that Title VII was not the appropriate law. *Id.*

The court similarly rejected McWilliams’s equal protection claim under 42 U.S.C. § 1983 for gender discrimination. *Id.* (citing 42 U.S.C. § 1983). The court concluded that such a claim under 42 U.S.C. § 1983 was identical to a hostile workplace claim under Title VII and therefore failed for the same reasons. *Id.*

The court next rejected McWilliams’s substantive due process claim under 42 U.S.C. § 1983. *Id.* at 1196-97 (citing 42 U.S.C. § 1983). McWilliams claimed that as a result of actual physical assaults he was deprived of his substantive due process rights under 42 U.S.C. § 1983. *Id.* at 1197 (citing 42 U.S.C. § 1983). The court first noted that, in determining liability under § 1983, principles of *respondeat superior* do not apply. *Id.* Since the defendants did not participate in the abuse, the only remaining potential for liability would be if culpability by tacit condonation could be shown. *Id.* at 1197. The court, however, rejected this possibility, finding that McWilliams failed to establish that either the county or any of McWilliams’s supervisors knew or should have known of the physical abuse.

Id. at 1197-98. Finally, the court rejected McWilliams’s claim that deficiencies in the county’s training program amounted to “policy-as-effective-cause” because he failed to show that there was a direct causal link between the deficiencies and the injuries he sustained. *Id.* at 1198.

In sum, the court of appeals affirmed the district court’s dismissal of McWilliams’s claims. *Id.* The court held that hostile environment sexual harassment claims under Title VII and equal protection claims of gender discrimination under 42 U.S.C. § 1983 cannot be sustained where the alleged harasser and victim are heterosexuals of the same sex. *Id.*

In his dissent, Circuit Judge Michael criticized the majority for characterizing the defendants’ actions as mere “meanness and horseplay.” *Id.* Title VII is violated, the dissent asserted, whenever a person abuses a co-worker out of sexual interest or desire. *Id.* This, the dissent maintained, could be established by the acts of the defendants. *Id.* While conceding that sexual orientation could be relevant to a charge of sexual harassment, the dissent argued that evidence of sexual orientation should not be required as an element of a Title VII claim. *Id.* The dissent expressed concern that the majority holding will shift the focus in such cases to a pursuit of the “‘true’ sexual orientation” of the harasser, rather than an inquiry into what

occurred. *Id.*

In *McWilliams v. Fairfax County Board of Supervisors*, the United States Court of Appeals for the Fourth Circuit held that hostile environment claims of sexual harassment under Title VII cannot be sustained where both the alleged harasser and victim are heterosexuals of the same sex. The court's holding effectively makes sexual orientation an element of a hostile-environment sexual harassment claim under Title VII. Although the court merely contemplated requiring a plaintiff to prove homosexuality in same sex cases, the court

left the door open for inquiry into sexual orientation in any sexual harassment case. This is troublesome because, as the dissent warns, the decision may shift the focus in sexual harassment cases to pursuits of the defendants' true sexual orientation. Also left open is the possibility that sexual orientation could become a defense to claims of sexual harassment. For example, a man charged with sexually harassing a female co-worker may be able to raise homosexuality as a defense. Moreover, while declaring that harassing conduct of a sexual nature directed at same

sex co-workers is insufficient to show actual sexual orientation, the court failed to provide the lower courts with a workable standard by which the lower court might determine whether a person is a homosexual.

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