

## Same Sex Harassment Claim Against Straight Male Supervisor Cannot Be Dismissed, Says Second Circuit

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The Second Circuit Court of Appeals recently ruled that a male employee's claim for sex discrimination under Title VII against his male supervisor could go forward, reversing the district court's ruling in favor of the employer. According to the plaintiff, a certain supervisor at the food manufacturing company where he worked constantly made vulgar comments toward him and other male employees regarding fellatio and using homosexual slurs. In addition, the supervisor frequently grabbed or hit the male employees in their genitalia. There was no evidence that either the supervisor or employee was homosexual (You can view the court had to say about the supervisor's behavior by downloading a PDF of the [unpublished opinion here](#). \*A note to our readers: The opinion contains potentially offensive language). The Supreme Court has previously described three ways a plaintiff might make out a case for same sex harassment: (1) the harasser is homosexual (and presumably motivated by sexual desire); (2) a victim is harassed in such sex-specific and derogatory terms by someone of the same sex as to make it clear that the harasser is motivated by general hostility to the presence of someone of the same sex at work; or (3) there is direct comparator evidence about how the alleged harasser treats members of both sexes in the workplace differently. Here, the court found that a reasonable jury might find actionable harassment under the third example (comparator evidence) because the supervisor's actions and reprehensible behavior was directed primarily at males, and not females. Further, the touching of another's genitalia constitutes "one of the most severe forms of sexual harassment," wrote the court. Thus, there was a triable issue as to the "severe and pervasive" element of sexual harassment as well. While employers often think of sexual harassment as males harassing females or even females harassing males, this case is a good reminder that employers must be diligent regarding harassment in all its forms, including the same sex variety. As long as behavior is motivated *because of the victim's sex*, courts may well view it as harassment regardless of the genders of the parties involved.

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