Case Law Update: Sexual Harassment, Where Are We Headed?

By Helen B. Bloch

Imagine someone works at a job where that person is continually subjected to groping, simulated sex acts and sexually-charged language. Sounds like that person is experiencing sexual harassment as defined by the EEOC ("Harassment can include…unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature"). But, based on recent decisions, that may not be how the federal court defines it.

The Seventh Circuit recently upheld a lower court's order requiring Rosebud Farm Stand, a Chicago grocery store, to pay more than $500,000 to Robert Smith, a former employee in its meat department. *See Smith v. Rosebud Farm, Inc.*, No. 17-2626, decided August 2, 2018. One of the claims Smith brought to trial was sex discrimination in violation of Title VII of the Civil Rights Act of 1964. Smith alleged in his lawsuit that his male coworkers repeatedly grabbed his genitals and buttock, groped him, simulated sex acts, and even reached down his pants.

Rosebud appealed the sexual harassment verdict, arguing that Smith failed to show he was discriminated against *because of his sex*. Rosebud asserted all the men who worked behind the meat counter were subjected to similar treatment. Therefore, the harassment did not rise to the level required under Title VII because it was not based on Smith's gender.

To support its position, Rosebud cited two cases in which plaintiffs failed to prove that the same-sex harassment they experienced was discriminatory. In *Lord v. High Voltage Software Inc.*, 839 F.3d 556 (7th Cir. 2016), the plaintiff complained that male coworkers slapped him on the buttocks and reached between his legs. The court held that not all unwanted sexual contact, including the touching of genitals and buttocks, constitutes discrimination under Title VII: Plaintiffs must show that working conditions are worse for men than for women.

In Rosebud, the court explained what Smith needed to establish to succeed on his claim: The conduct he experienced was more than unwanted sexual touching or taunting- he had to show that he was harassed based on his sex. Thus, the Seventh Circuit stressed an important boundary line: "Title VII is an anti-discrimination statute, not an anti-harassment statute."

The court distinguished between "sexual horseplay" and sex discrimination. In *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663 (7th Cir. 2005), the plaintiff's male coworker physically assaulted him on four separate occasions. He shoved Shafer's face into his clothed crotch and forcibly simulated oral sex; he placed Shafer's hand on his crotch and made it seem as if Shafer was masturbating him; he seized a handful of Shafer's chest hair in the locker room; and he bit Shafer's neck. Even in a case with such egregious unwanted sexual contact, the court maintained that workplace harassment is not automatically considered sex discrimination simply because the words and actions have sexual overtones. Surprisingly, the judges ruled that sexually explicit roughhousing among men is not conduct to which a reasonable person would find severely hostile or abusive.

In this recent Seventh Circuit Rosebud case, Smith prevailed on his sex discrimination claim by offering direct comparative evidence that only men experienced the kind of treatment that he did. In *Shafer*, the evidence suggested that the offending coworker harassed members of both sexes. In contrast, since only men were harassed in Rosebud's mixed-sex workplace, a reasonable jury could conclude that Smith's coworkers would not have harassed him if he had been female.

In pleading cases following *Rosebud*, it begs the question as to whether when representing women one needs to establish that the offender did not also inappropriately touch or harass similarly situated males in order to establish sex discrimination. Certainly the court made clear that when representing males one must introduce evidence that the offender did not also sexually harass female employees. To avoid a double standard, it appears that whether representing a male or a female in a sex discrimination matter one should plead that the offender did not also harass a person of the opposite gender.

What about our community? The Jewish community is no stranger to sexual harassment. Whether in the workplace, in the Jewish schools, at camp or a Mikvah, Jewish perpetrators of sexually inappropriate acts have made headlines. Jewish Community Watch was created in the last decade to bring awareness of and to help prevent sexual abuse. Among other initiatives, it created a Wall of Shame to expose offenders. The Jewish Women's Foundation in New York recently started training courses to produce the first group of certified harassment prevention trainers to serve the Jewish community. In fact, training has been lead by a woman Fran Sepler who the EEOC selected to develop its national curriculum on safe and respectful workplaces.

The #MeToo social media movement put a national focus on sexual harassment and gender discrimination in a variety of industries, calling for change in how we think about respect, equality, and dignity in the workplace. Even the state of Illinois is moving forward. Governor Bruce Rauner recently signed legislation requiring sex education courses in public schools to include more education on sexual harassment in the workplace and on college campuses.

I am a product of Jewish day school education. My high school sex education consisted of a course for girls on *taharat hamishpacha*, the laws of family purity involving a woman's menstruation cycle. The course culminated in a trip to the Mikvah, a ritual bath. I don't think much has changed by way of sex education in the orthodox Jewish schools.

Many of the kids in our orthodox Jewish schools will face a secular work environment. Today's orthodox Jewish day schools are doing a fabulous job of integrating STEM (Science, Technology, Engineering, Mathematics) into the curriculum. But are we doing a disservice to our kids who attend orthodox Jewish schools if their schools do not teach them what constitutes sexual harassment, as is done in the public schools—what it means to have bodily autonomy and what constitutes consent—and that they have a right to speak-up if they feel uncomfortable in a situation in which they are faced with unwanted comments of a sexual nature and certainly unwanted touching?

It's clear the times are changing. But will the Jewish community keep up?

Helen Bloch founded the Law Offices of Helen Bloch, P.C. in 2007. As a general practice, her firm helps companies, Fortune 500 executives, and others in a variety of matters, with a special emphasis on the employment and business arena, workers' compensation, and defense of City of Chicago municipal code violations. Commonly, Helen assists a client negotiate a severance package with a former employer and afterward helps that client open a business, where she then becomes the business' attorney. Helen is First Vice President of the Decalogue Society of Lawyers, and serves on the Alliance of Bar Associations for Judicial Screening.