

1993

Some Thoughts on Harassment: A Gay Male Perspective

Marc A. Fajer

University of Miami School of Law, mfajer@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles

 Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Marc A. Fajer, *Some Thoughts on Harassment: A Gay Male Perspective*, 4 *Md. J. Contemp. Legal Issues* 199 (1993).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Some Thoughts on Harassment

A Gay Male Perspective

Marc Fajer*

It does seem a bit strange to have a Women in Legal Education Panel in which you have four women speaking and then have a man comment on what they said. I guess my answer to that is to work with Okianer's floral arrangement metaphor:¹ while I appear to be a white daisy, I suppose, sticking with the metaphor, I am in fact a pansy. But seriously, I would like to thank Karen Czapanskiy for including me in the process here and trying to include gay and lesbian perspectives in thinking about harassment. What I want to do today, rather than commenting specifically on the other speakers, is to make a couple of suggestions for thinking about harassment policies based on gay and lesbian experiences in the Academy. I will then add a concluding thought about talking about these problems.

One issue that I think is important to think about when drafting harassment policies is situations in which the intersections work in both directions; that is, where the power vectors run both ways. The easiest example of this is a harassment situation where you have a white female complainant and a man of color as the complaineé or the defendant. In this situation, a story about sexual harassment clearly is believable and a story about racism clearly also is believable. You have to worry about taking both things into account when examining the situation. This kind of issue is a particular problem, I think, in cases involving claims against gay men. I am not going to suggest that no

* Associate Professor, University of Miami School of Law. I wish to thank Mary Coombs, Lynne Henderson, and Mamie Mahoney for thoughtful discussions with me on these difficult issues.

¹ See Okianer Christian Dark, *Using a Pluralistic Perspective to Develop an Anti-Harassment Policy*, 4 MD. J. CONTEMP. LEGAL ISSUES 171 (1993).

such harassment exists. I know of enough stories to know that there is a significant amount of harassment by gay men in the Academy and it's a serious problem that needs to be dealt with. However, there is also a problem in that non-gay men, at least some of them, tend to be a little over-sensitive on these issues. There are claims that are arising based on a supposedly gay supervisor making eye contact with a non-gay man. The military is where I think we are going to see this issue play out.

Within the next few months we are going to see the new President desegregating the military and, simultaneously, Pat Schroeder is trying to put into place harassment policies for the military.² I think we are going to see, as both of these happen, a disproportionate number of claims by non-gay enlisted men against supposedly gay peers or supervisors. This is where the shower conversation we had the other night came up.³ The idea that once the military is desegregated, people are going to suddenly start harassing you in the shower and risk physical violence seems silly to me. It seems to me that what's going on is that the straight enlisted personnel imagine what *they* would do if there were three naked women in the showers with them, and they don't want to be treated that way. I think that's really at the heart of this issue. They can suddenly imagine what it might be like to be harassed and they don't want to be. I also suggest, for those of you who have trouble teaching harassment issues to men, that if you use gay hypotheticals, straight men suddenly understand what harassment might be about.

What might we do about this? I think one thing we might do is make explicit in any "reasonable victim" standards we put into these policies that "reasonable" does not include racism, and "reasonable" doesn't include homophobia.⁴ Part of what the decision maker needs to do is sort out claims arising from these other problems as well as from genuine sexual harassment.

² I gave this speech in January, 1993, before the President decided to abandon his campaign promise to allow openly gay people to serve in the military. Since then, of course, Congress and the President adopted a policy that only allows us to serve under extremely limiting conditions. See, e.g., Clifford Kraus, *Gay-Troops Policy is Passed by House*, N.Y. TIMES, (Sept. 29, 1993), at A9.

³ See Carolyn Heilbrun, *Another Kind of Sexual Harassment*, 4 MD. J. CONTEMP. LEGAL ISSUES 183 (1993). I find all of this discussion about showers appearing in the newspapers sort of amusing. On one level, you want to say, "Excuse me, you have been in the shower with us since you were eleven; you know you can live with that."

⁴ In other words, when we determine whether the harassment occurred, looking from the perspective of a "reasonable victim," we treat discomfort caused by homophobia or racism as *per se* unreasonable.

This issue shows up in the hate speech area as well. I think increasingly we are seeing fights between traditionally disadvantaged groups, Asian-Americans and African-Americans in Los Angeles, African-Americans and Jews in New York, gays and almost every religious group. Just a side note: I find it amusing that the Catholic Church operates by something you might think of as executive orders on these issues and the Protestant churches seem to vote. By contrast, the Jewish conservative rabbis recently came out with a very strange document suggesting that it was okay for gay people to be part of the congregation but they couldn't become rabbis and they couldn't get married, and it was up to individual congregations whether to let them be in contact with children or to read from the Torah at services. In the best fashion of my religion, this was issued with three concurrences and one dissent.⁵ One can imagine situations in which conversations about this kind of document or about the Pope's statements about homosexuality lead to interaction between gay people and religious groups in which what you might think of as hate speech flows in both directions cheerfully and loudly. I think we need to think through how we are going to handle these situations where you have two traditionally disadvantaged groups attacking one another.

The second general point is that I think we need to be concerned not just with the intentional wrongs that are addressed by the early versions of the association's new policy, that is, sexual harassment and forms of verbal harassment. We also need to be thinking about non-intentional climate creating problems. At the drafting sessions, we talked a lot about education. We might think about finding ways explicitly to put a call for education and thought about climate problems into any policy that we have. This involves situations in which, without any intent to harm, we use terms or hypotheticals in class, or where students make comments in class, which have the unintended consequence of making it more difficult for other people to participate. This shows up frequently in discussions of gay issues. In my classroom, where I am out, I think students know better than to snicker when we talk about gay issues. Nevertheless, it is quite apparent in talking to gay students that often when gay issues are mentioned in other classes, a lot of laughter and jeering goes on in the classroom which often is not explicitly repudiated from the front of the room. The result of this is a climate in

⁵ See, Joel Roth, *On the Halkhic Status of Homosexuality: A Statement of Policy*, UNITED SYNAGOGUE REV., Fall, 1992, at 19.

which the gay students who are closeted are told in no uncertain terms that they should not come out and that it is dangerous to do so. This climate also gives permission to the non-gay students to engage in anti-gay harassment of various sorts. I know this shows up on our campus at the very least in the form of students making anti-gay jokes deliberately within the hearing of gay students all the time to make them feel uncomfortable.

Another example of this unintentional harm: I had some students from BLSA come up to me some years ago complaining about one of my colleagues who apparently uses the word “niggardly” a lot in class. They said that he has to know this is bothersome. I said, “Well actually, I don’t think he has to know, because it wouldn’t have occurred to me at first that it would be bothersome.” Now the point here is not whether the word itself is a problem — it has different roots and so forth — but whether that repeated use of the word in the classroom setting — “niggardly, niggardly” — as you might imagine, might be somewhat jarring to a person of color sitting in the room. It is very important to try to find a way to communicate about these things.

I am not advocating censorship codes or a list of things you can’t say in the classroom — I would be terribly frightened about that. I am advocating finding ways to talk about these things or finding ways for dialogue to happen. One of the alternatives I will suggest to the Commission on Diversity is the use of a double blind complaint system where students, for example, could write up things they find bothersome in the classroom, explaining why they find them bothersome, not including their names or the name of the faculty person involved. These observations could be submitted and circulated to the faculty so that they could find out what’s going on. Again, the point isn’t censorship — it’s not that people can’t be offensive in the classroom. My coming out in the classroom is offensive to a lot of people and I know that. The point is that many of us don’t want to be offensive accidentally. I don’t mind being offensive on purpose, but I don’t want to say things that are hurting people without knowing it — it interferes with the educational experience.

My final point is that conversations about this stuff are incredibly hard. I sat in a room with a dozen people, some of whom I knew before and respected, and all of whom I respect a great deal after having talked about these things. Most of us, as is true of most of you here today, share similar concerns about these issues. It’s incredibly hard to talk about these things and to agree on

anything about them even if you have some basic notion that is similar about where you are trying to get. I want again to give a couple of examples from my own set of intersections about things that make all of this hard. As a white professor, talking about issues of race in the classroom is terrifying for me. I don't know when I am going to be stepping on somebody. My students of color often are nervous about jumping in on these issues, so I find myself conducting a discussion about racism with white students as a white professor in front of students of color. I am afraid that we are saying very offensive things and don't know it and that I am not handling the discussion well. Yet, it seems to be important that I at least attempt to engage in this dialogue in the classroom.

As the only openly gay faculty member at my school, I am the primary mentor for the gay students and often develop close emotional relationships with these kids who come in and have to bare their souls to me over and over again. I know the difficulty of trying to define lines where I may or may not be attracted to a student or the student may or may not be attracted to me. This mentor/student relationship creates very, very difficult problems of knowing how to deal with gay students, yet I have to be there for them because there is no one else.

I know as a gay person in this society that the First Amendment is very important. We seem to be the only people these days who win First Amendment cases, and it is desperately important for us to be able to talk about who we are. Thus, I find myself moving toward a First Amendment absolutist position sometimes, because I know how much protection it gives me. On the other hand, as a Jew aware of the history of Jewish people, I am reminded of Paul Johnson's statement that the one thing the history of the Jews says clearly is that racial slurs, when unchecked, often lead to violence.⁶ It is frightening to have to deal with that particular contradiction.

My last thought is that one thing we all have to spend time doing is thinking about ways to make conversations about uncomfortable subjects as comfortable as possible so that we reach Professor Heilbrun's solution⁷ and are able to talk openly in all our environments.

⁶ See PAUL JOHNSON, A HISTORY OF THE JEWS 475 (1987).

⁷ See Heilbrun, *supra* note 3.