

Gause, John P

From: Gause, John P
Sent: Tuesday, May 18, 2010 3:03 PM
To: Beauchesne, Robert D
Cc: Ryan, Patricia; Lelli, Barbara; Tizon, Angela; Dion, Michele
Subject: RE: Guidance if you please...

Good point, Bob. Although *Forrest* explicitly did not decide the exact issue here (footnote 4), it did suggest (first paragraph cited below) that “jilted lover” harassment of a more general nature—including derogatory language that is not specific to C’s sex—is “because of sex” if it is motivated by the fact that the former partner broke off the relationship. This would be like coworker A harassing a coworker B because coworker B refuses to date A. The New York District Court case, *Babcock v. Frank*, 729 F.Supp. 279, 288 (S.D.N.Y. 1990), cited in *Forrest*, has the following to say on it (in the context of a quid-pro-quo case):

The Court of Appeals' decision in *Carrero v. New York City Housing Authority* confirms that an employer who exacts a penalty because of his employees' rejection of his initial sexual advances commits illegal sex-based discrimination cognizable under Title VII. *Carrero*, 890 F.2d 569, 579. To the same logical degree, “[a]n employer who threatens a penalty if the employee will not *continue* the physical relationship is using gender as the basis for job benefits,” *Kepler*, 715 F.Supp. at 868 (emphasis added). To assume as a matter of law that the latter is discrimination predicated not on the basis of gender, “but on the basis of the failed interpersonal relationship,” *see Kepler*, 715 F.Supp. at 869, is as flawed a proposition under Title VII as the corollary that “ordinary” sexual harassment does not violate Title VII when the employer's asserted purpose is the establishment of a “new interpersonal relationship.” Under either scenario, it is the sexually coercive and unwelcome nature of the employer's behavior, directed at a member of the opposite sex, that gives rise to the violation.

Thus, in your case, if the female coworker was taunting the male coworker (even without saying anything derogatory about men) because he broke off the relationship, it would be “because of sex.”

John

From: Beauchesne, Robert D
Sent: Tuesday, May 18, 2010 2:28 PM
To: Gause, John P
Subject: RE: Guidance if you please...

Thanks John. But what about situations where the derisive language is directed at the Complainant's choice of female company ('slut' 'skank') or comments about his hickey, rather than male oriented terms directed at him? Bob

From: Gause, John P
Sent: Tue 5/18/2010 11:13 AM
To: Beauchesne, Robert D
Cc: Lelli, Barbara; Ryan, Patricia
Subject: RE: Guidance if you please...

5/18/2010

Bob,

I used to feel the same way (conduct based on failed break-up is generally not “because of sex”), but the First Circuit clarified in late 2007 that bad break-up cases can be “because of sex” if the conduct is gender specific (e.g., calling the woman you broke up with sexually derogatory names). I am pasting below the (rather long) quote from the First Circuit’s decision in *Forrest v. Brinker Intern. Payroll Co.*, LP, 511 F.3d 225, 229-230 (1st Cir. 2007). I think we should follow this decision.

John

In cases involving a prior failed relationship between an accused harasser and alleged victim, reasoning that the harassment could not have been motivated by the victim's sex because it was instead motivated by a romantic relationship gone sour establishes a false dichotomy. Presumably the prior relationship would never have occurred if the victim were not a member of the sex preferred by the harasser, and thus the victim's sex is inextricably linked to the harasser's decision to harass. To interpret sexual harassment perpetrated by a jilted lover in all cases not as gender discrimination, but rather as discrimination “ ‘on the basis of the failed interpersonal relationship’ ... is as flawed a proposition under Title VII as the corollary that ‘ordinary’ sexual harassment does not violate Title VII when the [] asserted purpose is the establishment of a ‘new interpersonal relationship.’ ” *Babcock v. Frank*, 729 F.Supp. 279, 288 (S.D.N.Y.1990)(internal citations omitted). Whether a harasser picks his or her targets because of a prior intimate relationship, desire for a future intimate relationship, or any other factor that draws the harasser's attention should not be the focus of the Title VII analysis. Instead, improper gender bias can be inferred from conduct; if the harassing conduct is gender-based, Title VII's requirement that the harassment be “based upon sex” is satisfied.^{FN4} See *Oakstone v. Postmaster General*, 332 F.Supp.2d 261, 271 (D.Me.2004)(holding that there is a “difference for Title VII purposes between non-gender based and gender-based harassment;”); see also *Perks v. Town of Huntington*, 251 F.Supp.2d 1143, 1157 (E.D.N.Y.2003)(holding that employees are not barred from invoking the protection of Title VII merely because of a previous relationship with the harasser).

FN4. We do not reach the question, as it is not present in this case, of whether there are ways to establish harassment based upon sex in failed romance hostile work environment cases other than by evaluating the gender-specific nature of the harassing conduct.

The magistrate judge conceded that “retribution after a failed romantic relationship” may rise to the level of Title VII harassment, but found that “[i]n this case, while the language Vashaw is alleged to have directed toward the plaintiff was certainly gender-specific ... [Forrest] does not proffer evidence of sexual advances by Vashaw, physical touching of a sexual nature or the type of activities found by the [*Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183 (11th Cir.2001)] court to have the potential to cross the line into Title VII harassment.” A raft of case law, however, establishes that the use of sexually degrading, gender-specific epithets, such as “slut,” “cunt,” “whore,” and “bitch,” with which Vashaw barraged Forrest at work, has been consistently held to constitute harassment based upon sex.” See, e.g., *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000-01 (10th Cir.1996) *230 (finding it “beyond dispute” that plaintiff subjected to “vulgar and offensive epithets” such as “whore,” “bitch” and “curb side cunt” could establish Title VII sexual harassment claim even though abuse may have been motivated by gender neutral reasons) (internal citations omitted); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 965 (8th Cir.1993)(noting that “a female worker need not be propositioned, touched offensively, or harassed by sexual innuendo” in order for a sexual harassment claim to lie and holding that names such as “bitch,” “slut,” and “cunt” directed to female employee amount to harassment based on her sex); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir.1990)(“[T]he pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.”).

There is no analytically defensible reason to draw a line in the sand in “failed relationship” cases

between this type of sexually harassing conduct and sexual advances, physical touching, or any other conduct that has been held to be harassment based on sex pursuant to Title VII.^{FN5} Nowhere does prior case law suggest that certain types of discriminatory behavior, held to constitute gender-based harassment in other cases, may not constitute gender-based harassment when the parties had previously engaged in a romantic relationship.

From: Beauchesne, Robert D
Sent: Monday, May 17, 2010 2:46 PM
To: Gause, John P
Subject: Guidance if you please...

John, I spoke to Barb regarding one of my cases and she suggested I contact you since the issue does seem to occur relatively frequently. My case involves a male Complainant who, after ending a relationship with a female co-worker, was constantly taunted by her (said he was with 'sluts' the prior night, commented on 'skanks' giving him hickeys that were 'gross like he was'...) until he finally walked off of the job and refused to return because she was still there. It seemed pretty clear to Barb and me that the harassment was not 'because of sex,' but rather because of the bad break up, but I find that parties have hard time understanding this nuance. Do you have any boilerplate or citations that might make this a little clearer? Thanks, Bob