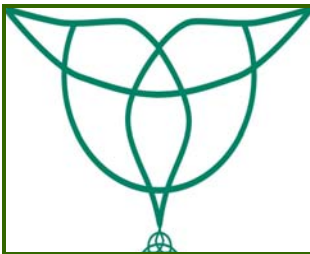




# Triquetra Law

*Dedicated to justice, Responsive to you.*

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Inside this issue:

Article	Page
<i>Sexual Harassment</i>	1
<i>Meeting Charles Hamilton Houston, Jr.</i>	1
<i>Gender Identity &amp; Sexual Orientation</i>	2
<i>Equal Pay for Equal Work</i>	3
<i>About Triquetra Law Offices</i>	4

## Sexual Harassment at Work is Unlawful

### What laws and agencies address sexual harassment at work?

Sexual harassment is prohibited by both federal law ([Title VII](#) of the Civil Rights Act of 1964); and state law ([the Pennsylvania Human Relations Act](#)). The agencies that investigate and enforce these laws are the [Equal Employment Opportunity Commission](#) and the [Pennsylvania Human Relations Commission](#), respectively.

### What is Sexual Harassment?

Sexual harassment happens in many ways. A crucial question in all [sexual harassment](#) cases is whether the words or actions at issue were “unwelcome” to the employee.

### Who is eligible as a victim of sexual harassment?

Employees can assert claims against co-workers, supervisors or customers. The victim as

well as the harasser may be a woman or a man, and the harassment victim does not have to be of the opposite sex. (See Page 2 for more information about same-sex harassment.)

### What kind of activity constitutes sexual harassment?

A successful claim of sexual harassment may include behavior that *substantially and unreasonably interferes* (Cont'd on page 4)

## Triquetra Attends Widener Dred Scott CLE Meets Son of



Triquetra Partner, Sharon R. López, Esq., & Charles Hamilton Houston, Jr.

Triquetra participated in a *Dred Scott* Symposium at the [Widener University School of Law](#) this spring. *Dred Scott* is a famous Supreme Court case that [contributed to the civil war](#) of 1860.

[Sharon López](#) met Charles Hamilton Houston, Jr.: the son of one of the legal architects of the line of cases that resulted in [Brown v Board of Education](#), which desegregated public schools in the United States.

[Dred Scott](#) was a slave in 1858 who tried to use the courts to secure his freedom and failed.

This year, civil rights lawyers and legal academics around the country recognized the 150<sup>th</sup> anniversary of the landmark opinion.

The Lawyers of Triquetra Law focus our practice on ACE:  
**A**ppeals  
**C**ivil Rights  
**E**mployment  
Law & Policy

# ***GENDER IDENTITY, SEXUAL ORIENTATION & EMPLOYMENT DISCRIMINATION***

*By Sharon López, Attorney at Law*

Federal law prohibits employment discrimination when the discrimination is based on sex. The plain language of the statute does not mention sexual orientation. However, many gays, lesbians, bisexual and transgender (GLBT) employees experience harassment and disparate treatment at work.

Even though the statute does not offer specific protection, courts have held that Title VII may provide some protection in isolated situations. The first of these cases is [\*Oncale v. Sundowner Offshore\*](#), which was a unanimous decision of the United States Supreme Court. The court held that sexual harassment by one employee against another employee of the same gender is prohibited under Title VII. Furthermore, sexual desire does not need to be the motivating factor to succeed in a Title VII case.

The *Oncale* case was decided in 1998. However, since *Oncale*, appellate courts have consistently held that Title VII does not prohibit discrimination based on sexual orientation per se. [\*Bibby v. Phila.\*](#) (3d Cir. 2001).

***Same-sex sexual harassment is actionable under Title VII in limited circumstances.***

One way to prove unlawful Title VII harassment is to provide evidence that the harasser's conduct was motivated by a belief that the victim did not conform to gender stereotypes. In other words, the employee is not feminine or masculine enough to meet other employees' gender expectations, and the other employees harass the non-gender conforming employee. Because of hate and fear, the harasser acts to punish the victim's noncompliance with gender stereotypes. This is called "[sex stereotyping](#)."

The tricky aspect of same-sex sexual harassment is that the evidence used to prove "sex stereotyping" may actually be evidence of [sexual orientation harassment](#). The court must distinguish between harassment based on perceived sexual orientation, rather than gender. This was the case with the employee in [\*Kay v. Independent Blue Cross\*](#), decided by the 3rd Circuit in an unpublished 2005 opinion.

In *Kay*, the court looked to the statements of the employee who told others that he believed the harassment at his work was based on his sexual orientation. The court reviewed testimony where co-workers insinuated the gay employee was not a "real man" because he was gay. The court held the evidence supported the fact the harassment was based on the employee's homosexu-



ality rather than his gender. As a result, there was no Title VII violation. Third Circuit Judge Rendell, [Governor Rendell's wife](#), wrote a concurring opinion. Judge Rendell expressed her concern that the court should have decided the case based on the requirement that the harassment must be pervasive and regular for a Title VII violation. She wrote, "The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics."

One scenario for proving sexual harassment based on gender, when the harassed employee is gay, is when an employee changes his or her gender. See [\*Barnes v. City of Cincinnati\*](#).

Federal law may not protect gays, but the Pennsylvania Legislature is presently considering a bill that could provide protection to the GLBT community, [SB 761](#). For more information, please contact the attorneys at [Triquetra Law](#).

# Legal Notes:

## SEEKING EQUAL PAY FOR EQUAL WORK

by Andrea Farney, Attorney at Law

### The History of the EPA.

Prior to 1963, an employer could pay a man more than a woman even though they had the same job. The [Equal Pay Act](#) (EPA) made that practice illegal. Passed one year prior to the historic Civil Rights Act of 1964, the Equal Pay Act makes it unlawful for an employer to pay women and men different amounts for substantially equal work.

### Who is subject to the EPA?

Employers, schools and hospitals with gross annual business of \$500,000 are covered under this law. However, you must timely file your EPA claim or it is lost.

### How do you prove an EPA case?

The key aspect of an EPA claim is showing that there is a sex-based

pay differential for essentially the same job.

Whether an employer intends to discriminate is not relevant.

If an employee shows a pay difference based on sex, an employer has four possible defenses:

- (1) a merit system;
- (2) a seniority system;
- (3) a standard quality and quantity production measure; or
- (4) a factor other than sex.

### When should you file an EPA claim?

You have two years to file an EPA claim after a violation. You may bring claims within three years if the employer committed a “willful” violation.

### What do you get if you win an EPA claim?

Remedies under the EPA include:

- (1) back and front pay up to the amount of the wage difference;
- (2) Liquidated damages equal to the unpaid wages; and
- (3) Attorneys’ fees.

Reinstatement or promotion are also possible remedies.

### Where should you file an EPA claim?

Unlike a Title VII gender discrimination claim, the worker does not need to file a charge with the Equal Employment Opportunity Commission or the Pennsylvania Human Relations Commission to start the action. The Department of Labor enforces the EPA. Therefore, an EPA victim may file directly in federal court. However, in some situations it is best to file an EPA claim along with a Title VII claim.

### A recent Supreme Court ruling on the EPA makes timing important.

The EPA is in the news a lot recently because the United States Supreme Court issued an opinion called [Ledbetter](#). The Court decided that it is when the boss decides to start paying employees differently, not necessarily when the employees receive the unequal pay, that is the key date for filing a Title VII claim.

At [Triquetra Law Offices](#) we counsel clients on EPA and Title VII pay discrimination claims. Contact us at 717-299-6300 for an individualized assessment.

## SUPREME COURT REPORT:

### Ledbetter v. Goodyear Tire

Lily Ledbetter worked for Goodyear Tire Company for 19 years. Over the years, the company started paying her less than the men working in her same position. She discovered the pay discrepancy and filed an EPA claim and a Title VII claim.

On 5/29/07, [Justice Alito](#) delivered a 5-4 decision holding that the date the employer decides to discriminate, not the ongoing issuance of unequal paychecks, is the controlling date for filing a claim. For the dissent, [Justice Ginsberg](#) called upon Congress to correct the Court’s “parsimonious” reading” of the law. [Employment law advocates](#) have started lobbying Congress to change this outrageous interpretation.

Median Weekly Earnings:	
White Men .....	\$715
White Women ...	\$567
African American Women .....	\$491
Hispanic Women	\$410

Source: [U.S. Department of Labor, 2003](#)

## Triquetra Law Offices

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Andrea Farney & Sharon López at Andrea's Pennsylvania admission ceremony in Harrisburg.

**Dedicated  
to  
justice**



**Responsive  
to  
you**

### **Triquetra Learns from Friends of Farmworkers**

Sharon López attended a [Friends of Farmworkers'](#) (FOF) training in June 2007. The training included a wide variety of topics, such as immigration law, [Title VI](#) (Programs receiving federal funding cannot discriminate based on sex, race, national origin, etc.), International Human Rights Law, and the Fair Labor Standards Act. Advocates from four states participated in the practical training.

The faculty included University of Pennsylvania Law Professor, [Sarah Paoletti](#), [Art Read](#), General Counsel for FOF, [Keith Talbot](#), Senior Attorney for the Farmworker Project in New Jersey and [Paul Uyehara](#), from Community Legal Services. [Karen Detamore](#) organized the training and invited DFL to participate. Friends of Farmworkers is a Non-LSC funded program that represents agricultural workers.

Triquetra Law supports the work of FOF through pro bono work, and believes everyone is entitled to due process and fair wages for the hours they work.

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## Sexual Harassment cont'd

### **(Cont'd from page 1)**

with job performance. Offensive conduct can include:

- ◆ Touching
- ◆ Sexual flirtation
- ◆ Sexual advances
- ◆ Verbal abuse
- ◆ Graphic or suggestive comments
- ◆ Inappropriate jokes
- ◆ Sexually suggestive displays and pictures.

**Quid pro Quo: Do this or you lose your job.**

The most blatant form of sexual harassment occurs when an employee must choose between accepting an unwelcome sexual advance or suffering an adverse change in the terms and conditions of her employment.

**When does sexual harassment create a hostile work environment?**

Employees may also establish sexual harassment when they suffer severe or pervasive harassment that affects a term or condition of their work.

These claims are referred to as "hostile work environment" claims.

The U.S. Supreme Court created guidelines that establish an employer's liability. Courts examine:

(1) Who is doing the harassing (whether it is a co-worker or a supervisor); and

(2) Whether the employee has suffered a "tangible employment action," e.g., whether the employee was fired, transferred or demoted.

**What if the employer has a sexual harassment policy?**

If the employee did not suffer an adverse employment action, the employer can assert an affirmative defense against the claim by showing

***"Sexual harassment includes unwelcome sexual advances and requests for sexual favors."***

first that it exercised reasonable care to prevent and correct the offensive behavior, and second, that the employee unreasonably failed to take advantage of any preventive opportunities the employer provided.

If your employer has a sexual harassment policy and you believe you are being harassed, you may want to seek legal advice.

*Triquetra Law concentrates on employee sexual harassment cases.*

*The attorneys at Triquetra complete comprehensive case assessments in sexual harassment matters.*

***Call 717-299-6300 for more information.***