



THE MONITOR

A Quarterly Publication by Johnson Fistel, LLP • Summer 2021



SAME-SEX HARASSMENT UNDER TITLE VII: BROADLY ACTIONABLE UNDER DEVELOPING JURISPRUDENCE

A growing preponderance of judicial decisions have recalibrated and clarified federal sexual harassment protections over the course of the last two decades, including whether and to what extent workers are federally protected from harassment by persons of the same gender.

In a seminal 1998 opinion, the U.S. Supreme Court held in *Oncale v. Sundowner Offshore Services* that Title VII of the Civil Rights Act of 1964—i.e., the federal law that protects covered employees from discrimination “because of sex,” among other protected classifications—proscribes and makes actionable same-sex sexual harassment. The High Court further held that harassing conduct need not be

motivated by sexual desire to support an inference of discrimination, and proffered three [theoretical] evidentiary routes that a same-sex discrimination plaintiff might pursue in order to prove Title VII discrimination on the basis of sex: 1) evidence of general hostility toward the presence of the plaintiff’s gender in the workplace, 2) comparative evidence about how the alleged harasser treated members of both sexes, and 3) credible evidence that the harasser was homosexual.

This year, the Fourth Circuit made a salient clarification: such same-sex harassment is not strictly limited to the three evidentiary scenarios offered in *Oncale*. In *Roberts v. Glenn Indus. Grp., Inc.*,

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a male plaintiff alleged that he was subject to homophobic, derogatory, and sexually explicit comments at work. Citing the three evidentiary pathways identified in *Oncale*, the trial court granted summary judgment in favor of the employer-defendant because the employee-plaintiff worked in an all-male environment and no evidence suggested 1) that the alleged harasser was homosexual or 2) that there was general hostility toward men in the workplace. The Fourth Circuit reversed, reasoning that “[n]othing in *Oncale* indicates the Supreme Court intended the three examples it cited to be the only ways to prove that same-sex sexual harassment is sex-based discrimination.” The Fourth Circuit cited the Supreme Court’s 2020 decision in *Bostock v. Clayton County*—which held that a Title VII plaintiff may prove same-sex harassment where the plaintiff was perceived as not conforming to traditional gender stereotypes—as an example of an alternative evidentiary pathway available to Title VII plaintiffs.

A number of other circuit courts have reached comparable conclusions. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066 (9th Cir. 2002) (“So long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63, 264 (3d Cir. 2001) (recognizing a potential cause of action when same sex harassment is based on failure to con-

form to sex stereotypes, and noting that “other ways in which to prove that harassment occurred because of sex may be available”); *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444, 455–56 (5th Cir. 2013) (en banc) (“[E]very circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive, in nature.”); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) (finding that *Oncale*’s examples were illustrative, not exhaustive); *Pedroza v. Cintas Corp.*, 397 F.3d 1063, 1068 (8th Cir. 2005) (finding that *Oncale* set forth a non-exhaustive list including three possible evidentiary routes to show harassment was based on sex); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (same). See also *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763–66 (6th Cir. 2006) (acknowledging the availability of another form of proof

based on sex stereotyping).

These decisions reflect an important sea change in the growing body of modern Title VII jurisprudence, one that expands and considers the litany of factual and legal circumstances that might give rise to discrimination “because of sex” under federal law. Put simply, there are many different factual scenarios that protect employees under Title VII, including the scenario where employees are forced to work in a hostile work environment or suffer discrimination and/or harassment by members of their own gender.

If you have been illegally victimized by your employer or another person in the workplace, please contact us for a free consultation and case evaluation. You may telephone us at (619) 230-0063 or e-mail us at contactus@johnsonfistel.com.





JOHNSON FISTEL HELPS SECURE \$38 MILLION ALONG WITH VALUABLE CORPORATE REFORMS FOR TWITTER, INC.

On July 27, 2021, Vice Chancellor Paul A. Fioravanti granted final approval of a stockholder derivative settlement which resolves stockholder derivative litigation pending in the Delaware Court of Chancery, as well as in the U.S. District Court for the District of Delaware. Johnson Fistel serves as co-lead counsel for plaintiffs in the consolidated derivative action pending in the District of Delaware.

The derivative actions were brought against certain current and former directors and officers of Twitter and allege that these individuals breached their fiduciary duties by issuing materially false and misleading statements about Twitter's user growth and user engagement prospects, including by misrepresenting and concealing relevant user metrics. The derivative actions also allege that certain defendants sold their Twitter stock before the truth was finally revealed to the public.

The settlement approved by the Vice Chancellor resolves all of the derivative actions by providing releases to the defendants named in the derivative

actions in exchange for a payment to Twitter in the amount of \$38.0 million. In addition to the cash consideration, Plaintiffs, through counsel, successfully negotiated robust governance reforms tailored to address and prevent the recurrence of such misconduct, including, *inter alia*, the: (1) imposition of internal review and assessment obligations on the Disclosure and Audit Committees in connection with the Company's publicly disclosed, non-financial user metrics and additional or alternative measures of user activity for disclosure, addressing allegations that are at the heart of the Derivative Actions and the Related Securities Class Action; (2) creation of a Chief Compliance Officer responsible for managing and overseeing the Company's ethics and compliance programs, internal controls, and employee training in risk assessment and compliance; (3) enhancements to the Company's insider trading policy, including the prohibition of short sales, trading in publicly-traded options and other derivative securities, pledging Twitter securities as collateral for loans, and trading by

Section 16 officers during quarterly blackout periods and special blackout periods as determined by a Compliance Officer; (4) maintenance of a clawback policy; (5) establishment of procedures and criteria for selection of future independent director nominees, including consideration of underrepresented populations; and (6) adoption of stock ownership guidelines for directors equal to at least two times the director's annual cash retainer in the prior year.

Attorneys Frank J. Johnson, Michael I. Fistel, Jr., and Mary Ellen Conner led the prosecution of the litigation for Johnson Fistel and helped achieve this superb result on behalf of plaintiffs and Twitter.

In re Twitter, Inc. Shareholder Derivative Litigation, No. 1:18-cv-00062-VAC-MPT (D. Del.)

Verma v. Costolo, et al., No. 2018-0509-PAF (Del. Ch.)

Bassett Family Trust v. Costolo, et al., No. 2019-0806-PAF (Del. Ch.)



ESTATE PLANNING: WHY IT'S NEVER TOO EARLY TO THINK ABOUT YOUR FUTURE

- **Why you need an Estate Plan**

You have worked hard to provide for your family and loved ones, and they are depending on you for their protection and security. But as this past year has shown, we live in uncertain and challenging times, and even the best intentions might not be enough.

It's not always comfortable to openly discuss your personal finances, your retirement goals, or think about what might happen to your wealth if you die, so many of us put off estate planning and having those difficult conversations...sometimes until it's too late.

If there's nothing in place when you die, the state will determine how your assets are to be distributed and who will take care of your children, and their decision making process is not the same as yours. Their process is also slow, expensive and completely public.

And even if you have a will or trust in place, those documents may be outdated and in need of a slight tune up or major overhaul. You may want to include support for a charitable cause

that's close to your heart. If you have children from a previous relationship, you will also need to consider what would happen to them if anything happens to you.

Here are some important things to consider when it comes to planning for your estate and future:

- **Why you probably need more than a Will**

A Will is a good starting point if you don't have anything else in place. Your Will essentially designates where you want your assets to go upon your death. In certain cases, a Will might be all someone really needs. But in most situations, an estate needs more. This is especially true for estates with significant assets, highly appreciated property, dependents, and potential liability or estate tax exposure.

- **What's a Trust?**

A Trust can save your property from the time, expense and exposure of the probate process. It can also ensure that all of your children/dependents are provided for if anything happens

to you, and in some cases it can help reduce your estate's risk, liability and tax exposure. A trust can also integrate philanthropic giving in a tax efficient manner. Trusts can be simple and straightforward, or more complex depending upon the needs and goals of the trust's settlors and beneficiaries.

- **What is Asset Protection?**

If you have accumulated significant assets and/or you are engaged in a high-risk profession, your estate may be vulnerable to frivolous lawsuits. An asset protection plan can help insulate your assets from scammers and litigants who are intent upon separating you from your hard earned wealth.

- **Do I need to consider estate tax?**

Many high net worth estates contain highly appreciated property (including private business interests, securities and real estate). If your estate holds substantial assets, there is a possibility it could be subject to substantial gift/estate taxes. A tax mitigation strategy can reduce or avoid tax exposure when highly appreciated assets are passed down to future generations.

- **What about insurance?**

Everyone can benefit from insurance, particularly when the unexpected occurs. But when large, complex estates are added to the equation, insurance coverage is an absolute necessity. Many large estates may not have a great deal of liquidity, and cash can be required to help divide assets, cover taxes and pay other succession costs. Life insurance can provide the funds needed to help your dependents cover these expenses without having to liquidate closely held companies, family heirlooms or sentimental assets.



- **Why you should start making plans today**

Regardless of the size or complexity of your affairs and estate, it is essential that you work with a trusted and experienced attorney who can help protect your wealth from risk and uncertainty, and provide you with the peace of mind that your assets and family are safe and secure.

The attorneys in the Johnson Fistel Estate Planning Group can provide a comfortable, safe and confidential space to craft a comprehensive plan

that will help protect your family and achieve your succession and philanthropic goals. We can also review your existing estate plan and make recommendations based on new regulations and pending legislation.



Johnson Fistel Helps Secure a Significant Victory for Fresh Market Stockholders



Johnson Fistel recently helped secure another impressive achievement for stockholders in *Morrison et al v. Berry et al*, (Case Number 12808, in the Court of Chancery of the State of Delaware) when on July 7, 2021, Vice Chancellor Sam Glasscock III approved a \$27.5 million settlement, ending a stockholder class action over the 2016 \$1.4 billion take-private sale of specialty grocery chain Fresh Market to Apollo Global Management LLC. Vice Chancellor Sam Glasscock III, evidently impressed by the resounding outcome of the novel post-closing damages deal case, described the settlement amount as an “excellent result” for the shareholders, stating that the additional payout of \$0.75 per share was over half of what was potentially achievable in additional merger consideration.

Plaintiffs accused Ray Berry, Fresh Market’s former CEO and Chairman, of acting disloyally in concealing his private communications on terms of Fresh Market’s sale to Apollo, along with the roll over of his equity as part of the deal. Fresh Market’s former President and CEO Richard Anicetti, who succeeded Berry, and former Chief Legal Officer and Senior Vice President, Scott

Duggan, were accused of fiduciary duty breaches and are parties to the settlement.

A sharply contested filing, Johnson Fistel stayed the course throughout the duration of the case, as it ardently fought alongside fellow class attorneys in opposition to the defendants’ multiple attempts to dismiss the suit. Efforts by class counsel helped secure an appeal to and reversal by the Delaware Supreme Court in 2018 of the lower court’s granting of the first motion to dismiss in which the high court agreed with the plaintiffs that the defendant had disclosure deficiencies in its Schedule 14D-9 and was effectively misleading as a result, only to face yet another motion to dismiss by the defendants on remand. Vice Chancellor Glasscock, who watched the parties exchange blows both times the suit came through the Court of Chancery, described the case as full of “extraordinarily heavy [and] hard-fought litigation.” To illustrate, class attorneys fought for and subsequently analyzed some 286,000 documents in total, amounting to roughly 1.5 million pages, before arriving at the \$27.5 million settlement through mediation.

Moreover, class counsel’s efforts in

the litigation preceding the settlement created real “historical clarification of [Delaware] law,” according to the Vice Chancellor, as it helped blaze the trail for future merger challenges following the Delaware Supreme Court’s landmark decision in *Corwin v. KKR Financial Holdings, LLC*. In *Corwin*, the court held that an uncoerced and fully informed vote in favor of a transaction by disinterested stockholders properly invokes the business judgement standard of review. In the wake of the decision, some commentators wondered if the invocation of the business judgement rule for such transactions rendered them essentially irrebuttable. For example, addressing *Corwin*’s impact in the 2016 case, *Singh v. Attenborough*, the Delaware Supreme Court held that when the business judgement rule is invoked in this style of vote, “dismissal is typically the result.” However, when the first motion to dismiss was on appeal in *Morrison*, the Supreme Court of Delaware discovered several holes in the defendants’ disclosures and as a result had omitted several facts that a reasonable stockholder would have found important to the tender offer, leading the court to reverse and remand

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the matter to the Court of Chancery. The Delaware Supreme Court's ruling in *Morrison* made clear that lower courts need to closely examine whether a company's documents support the facts disclosed to the shareholders and in all matters carefully apply *Corwin*, as its application "is important due to its potentially case dispositive impact."

Johnson Fistel also helped forge new pathways to success in litigating *Morrison*, as the favorable outcome is due in part to the innovative use of document inspection rights under Section 220 of Delaware's general corporation law by class counsel to investigate post-closing damage claims and potential disclosure deficiencies. Following the announcement of Apollo's tender offer for The Fresh Market in 2016, class counsel, on behalf of Johnson Fistel's client, demanded books and records in accordance with Section 220, thereby acquiring several key documents such as board minutes and emails between counsel for Fresh Market's founder and counsel for the company. Vice Chancellor Glasscock stated that this was the first time he had seen a Section 220 demand used in such a manner, and fellow class counsel described it as an innovative approach which helped to lay the groundwork for the plaintiff's aiding and abetting claims, the successful appeal to the Delaware Supreme Court, and the ensuing final settlement.

Johnson Fistel partners Frank J. Johnson and Brett M. Middleton served as additional counsel for the sole class representative and lead plaintiff Elizabeth Morrison.

Employment and Labor Litigation

The attorneys at Johnson Fistel have obtained successful and efficient results for both employers and employees in litigating employment disputes, negotiating separations and severances, and evaluating employment policies, practices, and contracts.

Johnson Fistel can help employers and employees with the following issues:

- Minimum Wage & Overtime Pay
- Misclassifications (Employee/Independent Contractor)
- Discrimination, Harassment, & Retaliation
- Employment Contracts, Severance & Separations, & Restrictive Covenants.

Whether you're an employee or an employer, please contact us today to determine whether we may be able to assist you.

Please visit our website for FAQs about employment law: <https://www.johnsonfistel.com/faq/>



Recent Accomplishments

Settlements: Johnson Fistel achieved the following additional notable settlements on behalf of its clients this past quarter:

In re HD Supply Holdings, Inc. Derivative Litigation, No. 1:17-cv-02977-MLB (N.D. Ga.). Johnson Fistel, serving as Co-Lead Counsel, negotiated a settlement which provided HD Supply with significant benefits, including helping to preserve tens of millions of dollars in corporate assets in connection with the company's settlement of a related securities class action that was funded exclusively by insurance proceeds rather than corporate funds, as well as causing the adoption of important corporate reforms, including reforms to the company's insider trading policy.

Mathisen, et al. v. Gowen, et al., Civil Action No. 2:18-cv-05482-CMR (E.D. Pa.). The firm served as a lead negotiator in a settlement involving sweeping corporate

governance reforms to benefit Trevena, Inc., including (i) the establishment of a compliance committee; (ii) enhancements to the Chief Legal Officer and Compliance Officer position; (iii) adoption of an effective training and education program; and (iv) the establishment of a formal written Whistleblower Policy.

In re Twitter, Inc. Shareholder Derivative Litigation, No. 1:18-cv-0062 (D. Del.). See details on Page 3.

Morrison et al v. Berry et al, (Fresh Market) No. 12808 (D. Del.). See details on Page 6.

New Additions

To help meet the needs of the firm's clients, the firm is pleased to announce that it has added two new paralegals to the team in our Marietta, Georgia office: Bridget Morrell and Jennifer Sanders.

Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a “lead plaintiff” under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
Ocugen, Inc.	8/17/2021
Home Point Capital Inc.	08/20/2021
Tarena International, Inc.	08/23/2021
Athira Pharma, Inc.	08/24/2021
Rocket Companies, Inc.	08/28/2021
Rekor Systems, Inc.	08/30/2021
Churchill Capital Corporation IV	08/30/2021
Draft Kings, Inc.	08/31/2021
CarLotz, Inc.	09/06/2021
DIDI Global, Inc.	09/07/2021
James River Group Holdings, Ltd.	09/07/2021
Orphazyme A/S	09/07/2021

Company	Deadline
Full Truck Alliance Co. Ltd.	09/10/2021
Kanzhun Limited	09/10/2021
360 DigiTech, Inc.	09/13/2021
Stable Road Acquisition Corp.	09/13/2021
RenovaCare, Inc.	09/14/2021
BlueCity Holdings Limited	09/17/2021
Coinbase Global, Inc.	09/20/2021
CorMedix, Inc.	09/20/2021
Piedmont Lithium, Inc.	09/21/2021
Oatley Group AB	09/24/2021
Ardelyx, Inc.	09/28/2021
Concho Resources, Inc.	09/28/2021
Activision Blizzard, Inc.	10/04/2021
Zymergen, Inc.	10/04/2021
Iteum Therapeutics PLC	10/04/2021

Portfolio Monitor

Johnson Fistel recognizes that there are inherent risks when investing in the stock market. But the risks that an investor assumes do not, and should not, include the risk that the company or its officers and directors will make false and misleading statements to artificially inflate the company's stock price or sell their own stock based on insider information.

Our Portfolio Monitor is designed to alert institutional and individual investors when one of their investments may be affected by securities fraud, corporate waste, or other wrongdoing. Our Portfolio Monitor is available to both U.S. and foreign investors. There are no minimum portfolio requirements or costs to participate.



In-House Monitoring

Confidential Data Protection

Complimentary Service



For more information call 619.230.0063

Click the link to learn more:

<https://www.JohnsonFistel.com/stockmonitor-free-portfolio-monitoring/>

Our Philosophy



At Johnson Fistel we never shy away from a challenge.

Johnson Fistel is a law firm built on the following five core values: Professionalism, Respect, Integrity, Determination, and Excellence in everything we do. These core values are more than words on a piece of paper; every attorney and staff member at Johnson Fistel embraces them and has PRIDE in everything they do. Each person at the firm affirmatively agrees to these core values on an annual basis and has a plaque in his/her workspace describing what they mean to us, as stated below.

Professionalism

At Johnson Fistel, we believe professionalism – through trust, transparency, and reliability – is critical to developing long-lasting and successful relationships. Not only must our clients trust us to provide excellent legal services in a professional manner, we must trust each other to always do the right thing and to zealously advance our clients' interests. Moreover, we share a collective mission to act professionally and build trust with judges, juries, and our adversaries so that our professional reputation remains synonymous with our core values.

Respect

We strive to demonstrate

high regard for our clients, one another, partners within the legal community, and our ethical obligations as advocates. We value the ideas and beliefs of each of our team members. This principle includes valuing differing opinions and allowing others to express themselves in order to work together toward common goals.

Integrity

There's never a wrong time to do the right thing. At Johnson Fistel, we consistently do the right thing, in the right way, for the right reasons. We take pride in our reputation for having integrity when zealously advocating for our clients. By always acting with integrity, we build trust and confidence with our clients, colleagues, and juries, and respect with judges and adversaries.

Determination

Determination is key to our success. At Johnson Fistel, we do not give up when faced with well-financed opponents or difficult arguments; instead, we rise to the challenge and meet it head on by relentlessly pursuing innovative and persuasive solutions in order to advance the best interests of our clients. It is our determination – our will to succeed and never give up – that separates us from most lawyers.

To succeed, we know that we must exercise the strength of mind and the willingness to exceed client and industry expectations and provide exceptional advocacy, every time.

Excellence

Simply put, we hold ourselves to a higher standard. Average is easy. Excellence is hard. Perfection is always the goal. Whether it's writing persuasive legal arguments, maintaining a strong and prompt communication line with our clients, or vigorously advocating in a courtroom on their behalf, we wholly reject mediocrity and strive for a competitive edge by delivering excellence in everything we do.

We believe we are only as good as our people, and Johnson Fistel recruits only the best and brightest and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch one would expect at a small law firm.

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