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Marianna E. Carlucci Frank D. Golom

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Juror perceptions of female-female sexual harassment: do sexual orientation and type of harassment matter?

Marianna E. Carlucci and Frank D. Golom

Marianna E. Carlucci is an Assistant Professor and Frank D. Golom is an Assistant Professor of Applied Psychology, both at the Department of Psychology, Loyola University Maryland, Baltimore, Maryland, USA.

Abstract

Purpose – *The purpose of this paper is to investigate how mock jurors perceive female-female sexual harassment.*

Design/methodology/approach – *Participants read a case vignette depicting female-female workplace sexual harassment where the sexual orientation of the harasser (lesbian vs heterosexual) and type of sexual harassment (approach vs reject vs generalized) were randomly assigned across participants. Participants were asked to make a liability determination for the case. They were also asked to rate the unwanted conduct on several legally relevant dimensions (e.g. severity, pervasiveness, and unwelcomeness).*

Findings – *Results revealed that the sexual orientation of the harasser is an important factor used to make legal decisions in same-sex sexual harassment cases. Participants found the same conduct to be more severe, pervasive, unwelcome, and threatening when the harasser was lesbian than when she was heterosexual. As hypothesized, female participants found more evidence of discrimination than male participants.*

Research limitations/implications – *These findings illustrate biases mock jurors may hold when making legal decisions in female-female sexual harassment cases.*

Practical implications – *Results are discussed in the context of decision-making models and possible future directions and interventions are explored.*

Originality/value – *The findings extend the literature on female same-sex sexual harassment.*

Keywords *Prejudice, Sexual orientation, Discrimination, Juror decision-making, Legal decisions, Same-sex sexual harassment*

Paper type *Research paper*

Same-sex sexual harassment cases began to show up in American courts in the 1990s (Wayne *et al.*, 2001). Courts denied many of these claims citing that males could not sexually harass males and females could not sexually harass females (Foote and Goodman-Delahunty, 2005). For example, in *Garcia v. Elf Atochem North America* (1994), the court ruled that the sexual harassment of a man by his male supervisor was not actionable through Title VII, the act that prohibits discrimination based on race, color, religion, sex, or national origin, even though the plaintiff complained of inappropriate touching of his genitals by a group of same-sex co-workers. Even more telling is the 1996 decision in *McWilliams v. Fairfax County Board of Supervisors*, where the court ruled that the sexual behavior perpetrated against the victim was “utterly despicable” (p. 1196; plaintiff alleged numerous physical assaults in which a same-sex co-worker placed his finger in victim’s mouth to simulate an oral sex act, a co-worker placed a broomstick in plaintiff’s anus, and a co-worker fondled him at their place of employment), but still denied the sexual harassment claim citing that both the “alleged harassers and the victim are heterosexuals of the same-sex” (p. 1195). The issue was settled in 1998 when

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Joseph Oncale took his same-sex sexual harassment case to the Supreme Court. The Court held that same-sex sexual harassment was actionable through the Title VII of the Civil Rights Act of 1964 (1991).

Not much research has been conducted to understand how jurors make liability and compensation decisions in different types of same-sex harassment. In fact, most sexual harassment research has focussed on investigating the most common form of sexual harassment, namely opposite-sex sexual harassment that usually takes place between a male harasser and female victim (Baker *et al.*, 1990; Hartnett *et al.*, 1989; Wiener *et al.*, 1995). Less research has focussed on women harassing men (Paludi, 1990) and even less on same-sex sexual harassment. This lack of information on research where females are the harasser is problematic for two reasons. First, although women harassing men is typically a rare occurrence, the growing number of women in the US labor market (US Department of Labor, 2014) means that more and more individuals will find themselves working and building relationships with women of different demographic backgrounds, perspectives, and worldviews than they have in the past, providing a platform for personal and professional relationships, encounters and situations that may not have been prevalent or possible decades earlier (Foote and Goodman-Delahanty, 2005). Such relationships can also lead to a number of unique compromising situations, including less traditional forms of sexual harassment.

Second, evidence suggests that same-sex sexual harassment does in fact occur. In one report, 21 percent of male federal employees reported experiencing same-sex sexual harassment (US Merit Systems Protection Board, 1981, 1995) and 3 percent of female federal employees reported experiencing same-sex sexual harassment (US Merit Systems Protection Board, 1981). Though these figures may seem low, underreporting may be a problem in fully assessing the prevalence of same-sex sexual harassment (Foote and Goodman-Delahanty, 2005). A victim of same-sex sexual harassment may feel embarrassed about reporting unwanted sexual behavior by a co-worker or supervisor, especially if the sexual harassment is being inflicted by a person of the same-sex. Apart from harming workers, same-sex sexual harassment is costly to institutions. Indeed, one study found that the cost of same-sex sexual harassment in the US Army was over \$95,000,000 (Faley *et al.*, 2006). Given the influx of same-sex sexual harassment claims in the courts and the burden it can create for an organization, it is important to investigate how jurors might make decisions in these kinds of cases (Bennett-Alexander, 1998).

Typically, harassment cases are differentiated by the type of behavior the harasser displays. For example, *quip pro quo* harassment occurs when a harasser attempts to sexually coerce the victim (e.g. through threats or bribery), whereas gender harassment and unwanted sexual attention are defined as contributing to a hostile work environment (Equal Employment Opportunity Commission (EEOC); O'Leary-Kelly *et al.*, 2009). Stockdale *et al.* (2004) describe three types of hostile work environment as approach-based, reject-based, or generalized sexual harassment. Approach-based harassment is rooted in the harasser's sexual interest toward the victim. This behavior involves both verbal and non-verbal harassment of the victim. The harasser in this approach-based harassment was intent on making romantic advances toward the victim. Reject-based harassment is aimed at demeaning the victim due to their gender. Again, this behavior involves both verbal and non-verbal harasser of the victim. The behavior is aimed at degrading the victim rather than showing sexual interest, a key component of reject-based harassment. In generalized harassment, harassment is not directed toward the specific victim but rather toward men or women in general.

The focus of the current study is on juror decision-making in same-sex sexual harassment cases when both the harasser and the victim are female. Researchers have only recently begun to focus on same-sex sexual harassment. Most of these studies have concentrated on male-male sexual harassment (DeSouza and Solberg, 2004; Stockdale *et al.*, 2004), including the role of victim sexual orientation as a predictor in juror decision-making. For example, in a 2004 study, DeSouza and Solberg manipulated the sexual orientation of the victim in a male-male harassment case and found that participants rated the harassment as more severe and needing further investigation when the victim was homosexual rather than heterosexual, suggesting that the sexual orientation of the parties involved does factor into the decision-making process.

Research on juror reactions to female-female sexual harassment, however, is less clear. Wayne *et al.* (2001) gave participants a case vignette that depicted a co-worker hostile work environment case. The gender of both the harasser and the victim were manipulated across study conditions, resulting in two opposite-gender cases (male harasser-female victim; female harasser-male victim) and two same-sex cases (male harasser-male victim; female harasser-female victim). Across all conditions, both male and female participants perceived same-sex cases as more inappropriate, serious, and offensive. In fact, qualitative comments made by jurors in the same gender cases were seen as angrier and more punitive than in the opposite-gender cases (Wayne *et al.*, 2001). Male jurors also issued more guilty verdicts to the same-sex cases than the opposite-gender cases, and female jurors gave more guilty verdicts in the female harasser-female victim condition than in the male harasser-female victim condition. Wayne *et al.* concluded that individuals were biased against same-sex sexual harassment in part because traditional sex roles dictate that relationships between members of the same gender are neither normal nor natural, and therefore are subject to enhanced scrutiny and punishment. A degree of anti-gay bias was also present in juror responses, although the sexual orientation of the harasser or the victim was not fully specified in the stimulus materials.

More recently, DeSouza *et al.* (2007) conducted a cross-cultural investigation of female-female same-sex sexual harassment. Unlike previous studies, they manipulated both the sexual orientation of the victim of the harassment and the perpetrator of the harassment. Participants read a vignette that depicted a case where one woman gave the victim unwanted sexual attention along with other sexually harassing behaviors (e.g. telling sexual jokes). The results showed that heterosexual dyads were seen as least likely to constitute sexual harassment, warrant investigation, and to be punishable compared to the other conditions. Compared to US participants, Brazilian participants also found the scenario where both the harasser and the victim were lesbian to be more harassing and in need of investigation.

Taken together, these findings suggest that same-sex harassers are seen more negatively than opposite-sex sexual harassers, particularly when homosexuality is implied or inferred. Sex role theories might expose underlying mechanisms in how people make decisions in same-sex sexual harassment cases. One reason for these findings might be the way people perceive these types of situations. Giuffre and Williams (1994), for example, found that sexual interactions (e.g. flirting, sexual innuendo) between members of the opposite-sex were seen as normal whereas sexual interactions between members of the same-sex were seen as atypical. Thus, jurors in same-sex sexual harassment cases may judge the same behavior as more severe than opposite-sex sexual harassment case, in part because of anti-gay prejudice (Wayne *et al.*, 2001). In addition, Fiske and Glick (1995) suggest that same-sex harassment is not likely to fit observers' stereotypes about typical sexual harassment cases because most of our interactions are with members of the opposite-sex. The same behavior may be more easily interpreted as unwelcome or negative and rated as more sexually harassing when it involves members of the same-sex. This could be particularly true for women, since female gender stereotypes often depict women as passive and not necessarily sexually aggressive (Heilman, 2012; Wayne *et al.*, 2001).

Previous research has not directly examined the conceptual underpinnings of jurors' bias against same-sex sexual harassment cases. However, expectations and stereotypes regarding normative sexual activity, even in a same-sex harassment context, suggest that the type of harassment engaged in by the harasser could influence juror decision-making in same-sex cases, thereby shedding light on why jurors make more negative evaluations of same-sex sexual harassment when one or both parties are lesbians.

On the one hand, it may be that anti-gay attitudes are driving reactions to female same-sex harassment when one or both of the individuals involved is a lesbian, as Giuffre and Williams (1994) suggest. On the other hand, juror reactions may be driven by gender stereotype violations, as work by Fiske and Glick (1995) implies. Lesbian harassers may be judged more harshly than heterosexual female harassers in general, but this effect could be especially pronounced in situations where lesbians are not simply engaged in same-sex harassment, but also when they are violating traditional gender stereotypes of women as gentle and permissive by acting particularly aggressively (i.e. telling lewd jokes vs directing unwanted sexual attention).

The purpose of the current study is to further investigate how jurors make decisions in female same-sex sexual harassment cases. Specifically, the current study varied the sexual orientation of the harasser (heterosexual vs lesbian) as well as the kind of harassment experienced by the victim (approach vs reject vs generalized). Consistent with previous research:

H1. We expected that participants would judge the misconduct as more harassing on several legal dimensions when the harasser was a lesbian as compared to when the harasser was heterosexual.

H2. We predicted that this should be particularly true for female participants rather than male participants.

As previous research suggests that women may be more likely to view the cases as sexual harassment (Blumenthal, 1998; Rotundo *et al.*, 2001) or hand down guilty verdicts (Wayne *et al.*, 2001) when a woman harasses a woman (Wayne *et al.*, 2001). Due to the dearth of literature on harassment type in same-sex research, no specific predictions were offered, although we did expect approach-based harassment to be judged more harshly. That is, lesbian women who assert their sexuality (approach) may be judged more harshly simply because they are lesbians (due to anti-gay prejudice).

Method

Participants

Participants ($n = 283$) were 83 (29 percent) male and 189 (67 percent) female undergraduate students from a southeastern university. Participants completed the study online for course credit. Most participants were hispanic (70 percent). In total, 17 percent worked full-time while 43 percent worked part-time. In total, 33 participants (11 males, 21 females, 1 undefined) were excluded from analyses because they did not spend a minimum amount of 2-minutes on the case vignette. The final sample included 250 participants.

Design

A 3 (sexual harassment type: approach vs reject vs generalized) \times 2 (sexual orientation of the harasser: heterosexual vs lesbian) between-subjects design was used.

Procedure

Participants were randomly assigned to one of six experimental conditions. Each participant read a case vignette depicting female-female sexual harassment. Participants were randomly assigned to one of three sexual harassment patterns (approach vs reject vs generalized). The sexual orientation (heterosexual vs lesbian) of the harasser in each vignette was also varied across participants. After reading the case vignette, participants answered a series of questionnaires aimed at assessing their perceptions of the case and their legal decisions of the case.

Vignette and type of harassment manipulation

The vignette was created to depict a workplace harassment situation. Participants were given background information about the place of work, background information about the women in the vignette, a summary of the harassment conduct, and finally the complaint that was filed by the alleged victim. Participants were given a vignette depicting one of three types of sexual harassment: approach, reject, and generalized (Stockdale *et al.*, 2004). In the approach-based harassment, the harasser physically cornered the victim, put her arms around the victim's waist, and said, "you look and smell great, baby." The intent was to communicate sexual interest. In the reject-based harassment, the harasser physically cornered the victim, but said, "you'd look much better with a bigger pair of t**s, little boy." The intent was to humiliate the victim as an inadequate representative of their gender. Finally, in generalized harassment, the harasser made degrading comments about women ("just telling the ladies about this really hot nurse I saw"), but not directing her comments toward the victim herself. The intent was to demean women, but not a particular victim.

Measures

Liability determination. Participants were given the same instructions jurors are given in real cases when making liability determinations. Specifically, participants were instructed to assess the case facts in light of legally relevant dimensions (e.g. victim subjected to unwanted conduct, conduct was severe, pervasive, or persistent). Participants were asked to make a liability decision with an attached confidence rating scale where they could denote on a scale from 1 (not at all confident) to 9 (very confident) how confident they were in their decision.

Legal elements. We asked participants to answer questions regarding the conduct in each vignette using criteria the EEOC put forth to define sexual harassment. Specifically, the criteria are that the behavior is unwelcome, pervasive, severe, threatening, and discriminatory. Immediately following the case vignette, participants read a legal definition of hostile work environment (from the EEOC) sexual harassment. Participants were asked to rate how severe, pervasive, and unwelcome the conduct was from the perspective of a reasonable person, instructions that real jurors receive in sexual harassment cases. Participants were also asked to rate the behavior regarding how threatening it was and whether the behavior was discriminatory. Finally, participants were asked if the behaviors they read about constituted hostile work environment, as defined by the EEOC. For each legal element the participant was asked how much of a quality (e.g. pervasiveness) there was in the case they read. Participants answered all questions were on a 1 (not very) to 9 (very) scale.

Manipulation/attention checks. Participants were asked to answer five true or false questions about the case at the end of the study. This ensured that participants paid attention and read the case vignette thoroughly, which included information about the harasser's sexual orientation and type of harassment.

Results

Manipulation checks

Participants completed five questions to test their accuracy for details contained in the case vignette. Participants performed adequately with 80 percent correctly reporting that the harasser was a lesbian in the lesbian condition and 75 percent reporting that the harasser was heterosexual in the heterosexual condition. Analyses were completed only with participants that passed the manipulation check.

Liability

Participants provided a verdict either for the plaintiff or the defendant. In addition, participants rated their confidence in their liability decision from 1 (not at all confident in the verdict) to 9 (very confident in the verdict). Liability was recoded into a variable that included each participants' liability determination (liable = -1, not liable = 1) multiplied by their confidence in that decision (thus creating a -9 to +9 scale). Although this technique has been used in sexual harassment research to understand more clearly how jurors are making decisions in these cases (Wayne *et al.*, 2001), previous work also shows that recoding liability and confidence into one variable by multiplying them leads to non-normal distributions. Indeed, after visually inspecting the liability by confidence variable it was clear that the distribution was bimodal. As a result we used a non-parametric test to look for differences between the lesbian condition and the heterosexual condition. An Independent-Samples Mann-Whitney U Test was conducted and no significant results were found. The results, however, are in the hypothesized direction. Specifically, participants found more liability when the harasser was lesbian ($M = -2.19$) than heterosexual ($M = -1.00$), with larger negative numbers indicating more liability.

Legal elements

A univariate analysis of variance was conducted using each legal element as the dependent variable with sexual orientation of the harasser, gender of respondent, and the type of sexual harassment as between-subjects variables (See Table I). A main effect of sexual orientation of the harasser was

Table 1 Harasser sexual orientation main effects

	<i>Lesbian</i>	<i>Heterosexual</i>	<i>F</i>	<i>p</i> <	η^2
Pervasive	6.19 (1.9)	5.71 (2.0)	6.74 (1,228)	0.01	0.029
Severe	5.99 (1.8)	5.64 (2.1)	4.21 (1,228)	0.05	0.018
Unwelcome	6.69 (1.8)	6.36 (2.1)	8.29 (1,228)	0.01	0.035
HWE	6.83 (1.8)	6.16 (2.3)	10.28 (1,224)	0.01	0.044
Threat	6.41 (2.0)	5.92 (2.3)	7.72 (1,225)	0.01	0.033

Note: Means range from 1 (not at all likely) to 9 (very likely)

found for pervasiveness, $F(1,228) = 6.74$, $p < 0.01$, $\eta^2 = 0.029$, with participants finding the conduct to be more pervasive if the harasser was lesbian ($M = 6.19$) than if she was heterosexual ($M = 5.71$). A similar main effect of sexual orientation of the harasser was found for severity, $F(1,228) = 4.21$, $p < 0.05$, $\eta^2 = 0.018$. Participants found the same behavior to be more severe when the harasser was lesbian ($M = 5.99$) than when she was heterosexual ($M = 5.64$). A main effect of harasser sexual orientation also emerged for unwelcomeness, $F(1,228) = 8.29$, $p < 0.01$, $\eta^2 = 0.035$, with participants finding the same behavior to be more unwelcome if the harasser was lesbian ($M = 6.69$) than if she was heterosexual ($M = 6.36$). There were no interaction effects for type of harassment or gender of respondent. These results support *H1* (Table 1).

Discrimination

A univariate analysis of variance was conducted using discrimination as the dependent variable with sexual orientation of the harasser, gender of respondent, and the type of sexual harassment as between-subjects variables. A main effect of gender emerged for discrimination, $F(1,225) = 5.76$, $p < 0.02$, $\eta^2 = 0.025$. As expected, female participants ($M = 5.88$) found more evidence of discrimination than male participants ($M = 4.93$). These results support *H2*.

Hostile work environment

A univariate analysis of variance was conducted using hostile work environment as the dependent variable with sexual orientation of harasser, gender of respondent, and type of sexual harassment as between-subjects variables. A main effect of sexual orientation of the harasser was found for hostile work environment, $F(1,224) = 10.28$, $p < 0.01$, $\eta^2 = 0.044$, where participants saw more evidence of hostile work environment sexual harassment when the harasser was lesbian ($M = 6.83$) than when she was heterosexual ($M = 6.16$). These results support *H1*.

Threat

A univariate analysis of variance was conducted using threat as the dependent variable with sexual orientation of harasser, gender of respondent, and type of sexual harassment as between-subjects variables. A main effect for threat emerged for the sexual orientation of the harasser, $F(1,228) = 7.72$, $p < 0.01$, $\eta^2 = 0.033$, with participants finding more evidence of victim threat when the harasser was lesbian ($M = 6.41$) than when she was heterosexual ($M = 5.92$). A significant sexual orientation of the harasser by gender interaction emerged for the element of threat, $F(1,228) = 4.31$, $p < 0.05$, $\eta^2 = 0.019$. Indeed, when the harasser was lesbian, female participants ($M = 6.25$) saw more evidence of threat than male participants ($M = 5.08$). These results support *H1* and *H2*.

Discussion

The purpose of the present study was to understand the role that the sexual orientation of the harasser (heterosexual vs lesbian) and the type of sexual harassment (approach vs reject vs generalized) play in mock jurors' perceptions of same-sex sexual harassment. Participants were asked to make legally relevant decisions about the conduct in the case vignette. Our analyses included legal concepts (liability) as well as more specific-legal elements of hostile work

environment, as defined by the EEOC (i.e. whether conduct was severe, pervasive and unwelcome). We predicted that participants would judge misconduct as more harassing on several dimensions when the harasser was a lesbian as compared to a heterosexual harasser (*H1*). This prediction was strongly supported. Participants used sexual orientation of the harasser as a key component when judging the unwanted behavior, with lesbian harassers getting more negative ratings on all legal elements of sexual harassment. The current study also manipulated the type of harassment experienced by the victim (approach vs reject vs generalized), but we failed to find any differences regarding participants' decisions for types of sexual harassment.

Collectively, the data suggest that participants are sensitive to the sexual orientation of the harasser. The current study looked at several legally relevant dimensions of sexual harassment. When participants made decisions regarding the legal elements necessary for evidence of sexual harassment, they found the same behaviors to be more indicative of sexual harassment when the harasser was a lesbian than when she was heterosexual. Specifically, participants saw the same behavior as more severe, pervasive, unwelcome, and threatening when the harasser was a lesbian than when she was heterosexual. Participants also found more evidence of hostile work environment when the harasser was a lesbian than when she was heterosexual. Previous court decisions have established that the sexual orientation of the harasser should not be used as a diagnostic tool for making legal decisions in sexual harassment cases (*Oncale v. Sundowner Offshore Services*, 1998). However, mock jurors in this study saw sexual orientation of the harasser as one of the most important factors in making their decisions about this case.

Two additional legal elements – evidence of hostile work environment and discrimination – were included as variables of interest. As expected, gender of the participant played a role in how the unwanted behaviors were perceived with women seeing more evidence of discrimination than males (*H2*). This result supports previous research that shows that female participants see female-female sexual interactions as more negative than do men (Wayne *et al.*, 2001). Results of perceived threat also give credence to the theory that female participants see atypical sexual conduct between women as more negative than their male counterparts. In this study, there was a significant observed interaction between sexual orientation of the victim and the gender of the respondent. Indeed, female participants saw more evidence of threat than male participants, especially when the harasser was a lesbian. Combined, these results tentatively suggest that women may be more likely to judge female-female interactions as sexual harassment than males. More research should focus on how men and women perceive same-sex sexual harassment cases. Overall, type of sexual harassment had little impact on participant perceptions of sexual harassment when making decisions about the case.

Juror decision-making

Juror decision-making is a complex process whereby jurors process case information through their own lenses. Jurors include their own experiences, values, and biases when making decisions in legal cases, sometimes using extra-legal information in their decisions (Bornstein and Greene, 2011; Winter and Greene, 2007). The findings of this study suggest that mock jurors hold biases that determine how they make decisions in female-female sexual harassment cases. Indeed, participants in this study were given legal instructions to make their decisions, and they still saw sexual orientation as an important determinant when making decisions about unwanted conduct in the case presented. Understanding juror decision-making models may shed light on our results.

One reason for our findings may be that jurors use cognitive shortcuts, or heuristics, to make decisions. Research shows that low-effort information processing leads to the use of stereotypes, which may be particularly problematic in same-sex sexual harassment cases (Macrae *et al.*, 1994). If mock jurors have a difficult time making legally accurate decisions, it is not farfetched to assume that real jurors could use the same incorrect heuristics about sexual orientation to make decisions in these kinds of cases (Bornstein and Greene, 2011). Although research shows that jurors are often unable to ignore inadmissible evidence (Stebly *et al.*, 2006) or may override legal instructions to make decisions based on their own thoughts and feelings about the case (Smith, 1991), one remedy for this problem could be the use of special instructions in same-sex sexual harassment cases where jurors are told not to consider the sexual orientation of the parties.

Limitations and future directions

Although this study has the potential to make significant contributions to the literature on same-sex sexual harassment, there are several limitations to consider. First, the sample was somewhat homogenous as most of the sample identified as hispanic and heterosexual. Future research on same-sex sexual harassment should include a sample of gay, lesbian, or bisexual participants. Perhaps these participants will be more comfortable with the behaviors displayed by people of the same-sex and see less evidence of harassment than their heterosexual counterparts. Second, although use of mock jurors is commonplace in the social sciences, it is important to understand that the decisions made by individual jurors could change if deliberations were involved. Thus, future research should focus on simulating real-world cases in a setting that facilitates juror interaction and decision-making. Third, we did not find any significant differences between the types of sexual harassment (approach, reject, and generalized). Though these scenarios were created using typology from previous research (Stockdale *et al.*, 2004), we did not pilot test them before use. Also, we did not include a type of sexual harassment that could serve as a control group, limiting the information gathered in the current study.

The current study expanded the same-sex sexual harassment literature by looking at how mock jurors perceive female-female sexual harassment. It also illustrates the need for further research in this area. For example, researchers should focus on ways to offset the impact that sexual orientation of the harasser has on jurors in these kinds of cases. One way to do this may be to make jurors aware of their implicit biases. In fact, research shows that when people are made aware of their implicit biases and the detrimental effects such biases can have on judgments, they can often correct them (Greene *et al.*, 2007). Additionally, having mock jurors deliberate during legal decision-making could attenuate the effects of heuristic or low-effort processing. Future research should begin to test these and other interventions that might theoretically limit the impact of in same-sex sexual harassment cases.

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Corresponding author

Marianna E. Carlucci can be contacted at: MECarlucci@loyola.edu

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