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Oncale v. Sundowner Offshore Services: Will Sexual Identity Continue to Regulate Recovery in Title VII Same-Sex Sexual Harassment Cases?

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ONCALE v. SUNDOWNER OFFSHORE SERVICES: WILL SEXUAL IDENTITY CONTINE TO REGULATE RECOVERY IN TITLE VII SAME-SEX SEXUAL HARASSMENT CASES?

By Saul Greenstein[1]

INTRODUCTION

The Supreme Court has decided *Oncale v. Sundowner Offshore Services, Inc.*,[2] ending the federal court system's long struggle with the legality of the extension of Title VII[3] protection against sex discrimination to victims of same-sex sexual harassment. Prior to this historic decision, the circuits were divided over whether same-sex sexual harassment is actionable under Title VII.[4] Most interesting, however, are the situations in which the federal courts were willing to extend Title VII protection. In analyzing these cases in totality, it becomes apparent that, generally, courts have mistakenly used the sexual identities of the harasser and victim, and not the nature of the conduct itself, to determine whether to extend or deny Title VII protection. As a result, "heterosexual" harassers have typically been insulated from suit, even though their conduct may have been more brutal and of a more sexual nature than that of a liable "homosexual" harasser. Moreover, one also finds that the sexual identification of the victim as homosexual has often been used to deny the victim protection, despite the nature and severity of the offensive conduct. However, the Supreme Court, in its very brief opinion in *Oncale,* does not apply this categorical method of analysis. However, the Court does not apply a pure "nature of the conduct" test either, which would have been the most logical extension of Supreme Court precedent, outlined in

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I would like to thank Professor Morton Seiden for teaching me how to write, and Professor Aaron Streiter for teaching me how to argue.

2 1998 WL 88039 (U.S. March 4, 1998).

3 Title VII of the Civil Rights Act of 1964, as amended , 42 U.S.C. 2000e, et seq.

4 The Fifth Circuit is the only circuit that has held that all same-sex sexual harassment is not actionable. *See* Garcia v. Elf Atochem North America, 28 F.3d 446 (5th. Cir. 1994); Oncale v. Sundowner Offshore Services, 83 F.3d 118 (5th Cir. 1996); Myers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995).

Meritor Savings Bank, FSB v. Vinson,[5] and *Harris v. Forklift Systems*.[6] Furthermore, the Supreme Court, in declining to articulate a pure "nature of the conduct" test, fails to ensure that all future victims of same-sex sexual harassment will be protected, as it still allows, albeit to a much lesser degree, the sexual identities of the harasser and victim to regulate recovery.

I. TITLE VII

Title VII of the Civil Rights Act of 1964, as amended, states that an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[7] In an action against an employer, the victim must prove either quid pro quo harassment, meaning that the harassment was linked to an economic benefit for the victim, or that the harassment created a hostile working environment which interfered with the victim's work performance.[8]

Although there is no Title VII prohibition against discrimination based on sexual orientation, the Equal Employment Opportunity Commission's (EEOC) Compliance Manual construes sex discrimination to apply to same-sex sexual harassment:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sexual discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat the employees of the opposite sex the same way.[9]

The manual also states:

> If a male supervisor of male and female employees makes unwelcome sexual advances toward a male employee because the employee is male but does not make similar advances toward

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5 477 U.S. 57 (1986).
6 510 U. S. 17 (1993).
7 42 U.S.C 2000e-2(a)(1).
8 *Meritor*, 477 U.S. at 65.
9 2 EEOC Compliance Manual, § 615.2(b)(3)(1974 & Supp. 1996).

> female employees, then the male supervisor's conduct may constitute sexual harassment since the disparate treatment is based on the male employee's sex.[10]

The Supreme Court has held, however, that the EEOC guidelines are not binding upon federal courts, but rather, are merely persuasive. While the guidelines are "not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort to for guidance."[11] As a result, there has been divergence in the federal courts about whether same-sex sexual harassment is actionable, and if so, under what circumstances, because the courts have differed in the degree of credence given to these guidelines.

II. THE APPLICATION OF TITLE VII TO SAME-SEX SEXUAL HARASSMENT CASES

Rather than divide the cases by circuit, it is useful to divide them into situations. In doing so, it becomes easier to analyze the situations in which courts have extended Title VII protection.

There are four potential situations involving same-sex sexual harassment. In situation one, both the harasser and the victim are homosexual. In situation two, the harasser is homosexual and the victim is heterosexual. In situation three, the harasser is heterosexual and the victim is homosexual, and in situation four, the harasser and the victim are both heterosexual. The following sections will analyze each of these situations individually.

A. HOMOSEXUAL HARASSER, HOMOSEXUAL VICTIM

Those cases in which both the harasser and the victim are homosexual have turned on whether a court finds that the harassment was based on "sex" or on "sexual orientation." The establishment of the victim as homosexual, however, has not automatically negated his chances of a successful lawsuit. In *Swage v. Inn Philadelphia and Creative Remodeling, Inc.*,[12] Warren Swage, a homosexual, was harassed by his

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10 2 EEOC Compliance Manual, § 615.2(b)(3)(1974 & Supp. 1996).

11 *Meritor*, 477 U.S. at 65, *citing* General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976).

12 1996 WL 368316 (E.D. Pa. June 21, 1996).

homosexual supervisor, Spike Doe. Such harassment included "demanding that plaintiff perform the construction/remodeling services in his underwear, fondling and rubbing him, demanding that plaintiff have sex with him, asking for a date with plaintiff, asking to perform oral sex on plaintiff, stating to others that plaintiff is cute, and commenting about plaintiff's anatomy in a lewd and lascivious manner."[13] Mr. Doe also allegedly "insinuated that plaintiff would receive favorable employment reviews if he complied with Doe's sexual demands, whereas if he did not, he would receive unfavorable employment reviews."[14]

As a result, the plaintiff stated causes of action for both quid pro quo and hostile environment sexual harassment. The defendant asserted that the plaintiff's claim was not actionable because both the harasser and the victim were homosexual[15] and therefore, the plaintiff's claim was based on sexual orientation and not on "sex."[16] The court held that whether the plaintiff was harassed because of sexual orientation or sex is an evidentiary issue, and the mere assertion that the plaintiff is a homosexual is not enough for the defendant to have his motion to dismiss granted.[17] As a result, the court determined that the plaintiff had the additional burden of proving at trial that the harassment was based on "sex" and not "sexual orientation."

In contrast to *Swage, Johnson v. Community Nursing Services*[18] held that sexual preference should not be relevant to the question of whether or not a victim is harassed because of "sex." In *Johnson*, a bisexual social worker was harassed by her supervisor, a lesbian, because she started dating a man. Defendant Goicoechea persistently asked the plaintiff to go out with her. When the plaintiff continually refused, the defendant began abusing the plaintiff, often humiliating her in front of co-workers.[19] The court, in finding that the plaintiff has an actionable claim, stated that in same-sex harassment cases, the courts should not acknowledge the sexual orientations of the parties, but should concentrate on "whether the harasser treats a member (or members) of one sex differently from members of the other sex."[20] Moreover:

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13 *Id.* at 2.
14 *Id.*
15 *Id.* at 9.
16 *Id.* at 4.
17 *Id.* at 10.
18 932 F. Supp. 269 (D. Utah 1996).
19 *Id.* at 270.
20 *Id.* at 274.

> While sexual orientation or sexual preference may be a factor in sexual harassment, courts should be careful not to use it to muddy the waters of gender discrimination. If a homosexual male is sexually harassed by his homosexual supervisor because the employee is male, then the employee has a cause of action. The fact that sexual preference may influence the sexual harassment should not be reason to diminish, let alone to invalidate, the fact that a supervisor discriminated against an employee because of the employee's sex.[21]

The court clearly applied a "but for"[22] sex test, which is a relatively lax standard, especially in light of *Swage* which required that plaintiff prove at trial that he was not discriminated against because of his sexual orientation.

B. HOMOSEXUAL HARASSER, HETEROSEXUAL VICTIM

The majority of same-sex sexual harassment cases are those in which the harasser is homosexual and the victim is heterosexual. For the most part, these cases have held that such sexual harassment is actionable.[23] *Yeary v. Goodwill*,[24] is one such case. Yeary, a heterosexual,

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21 *Id.* at 273

22 *Id.* at 274.

23 *See* Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393 (D. Minn. 1996)(denying defendant's motion for summary judgment. "In the context of Title VII sexual harassment claims, we cannot identify any persuasive reason to distinguish 'unwelcome' heterosexual advances from 'unwelcome' homosexual advances. In both circumstances the victims would not be subject to the harassment 'but for' their gender." *Id.* at 401.); Williams v. District of Columbia, 916 F. Supp. 1 (D. D.C. 1996) Actionable claim lies where lesbian harassed heterosexual woman. The "harms resulting from same sex sexual harassment are no less severe than those perpetrated by harassers of the opposite sex." *Id.* at 9.); King v. M.R. Brown, Inc., 911 F. Supp. 161 (E.D. Pa. 1995) (finding actionable hostile environment claim where lesbian harassed heterosexual woman); Ton v. Information Resources, Inc. 1996 WL 5322 (N.D. Ill. Jan. 3, 1996) (Finding actionable quid pro quo claim where questionably homosexual male superior harassed heterosexual male worker); Ecklund v. Fuisz Technology, Ltd., 905 F. Supp. 335 (E.D. Va. 1995)(finding actionable hostile environment claim where lesbian co-worker harassed heterosexual female victim); Joyner v. AAA Cooper Transportation, 597 F. Supp. 537 (M.D. Ala. 1983)(finding actionable claim where homosexual supervisor harassed worker, stating that "homosexual harassment" violated Title VII. *Id.* at 541.); EEOC v. Walden Book Co., Inc., 885 F. Supp. 1100 (M.D. Tenn. 1995)(finding actionable claim where homosexual supervisor harassed worker. "When a homosexual

part-time cashier was harassed by his homosexual co-worker at Goodwill Industries-Knoxville, Inc.[25] This conduct included "offensive and harassing" speech, "physically touch[ing] the plaintiff in an offensive manner" and twice calling the plaintiff at home and making "lewd and obscene remarks."[26] On the day that Yeary reported it to the company's president, he was fired.[27]

The court held that the plaintiff had an actionable Title VII claim,[28] equating it to the very prevalent situation where a heterosexual male harasses a female victim.

> [This case] is about an employee making sexual propositions to and physically assaulting a coworker because, it appears, he finds that coworker sexually attractive. This is a scenario that has been found actionable countless times over, when the aggressor is a male and the victim is a female. Likewise, there is no serious question that the same scenario would be actionable in the less

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supervisor is making offensive sexual advances to a subordinate of the same sex and not doing so to employees of the opposite sex, it absolutely is a situation where, *but for the subordinate's sex*, he would not be subjected to that treatment. *Id.* at 1103-04 (emphasis added)). *See also* McCoy v. Macon Water Authority, 958 F. Supp. 962 (M.D. Ga. 1997); Caldwell v. KFC Corp., 966 F. Supp. 1209 (D. N.J. 1997). In contrast, *see* Torres v. National Precision Blanking, 943 F. Supp. 952 (N.D. Ill. 1996)(holding that same-sex sexual harassment is never actionable, regardless of the orientations of the harasser and victim); Schoiber v. Emro Marketing Co., 941 F. Supp. 730 (N.D. Ill. 1996) (all same-sex sexual harassment is not actionable- "Nothing in Title VII directs the court to allow same gender sexual harassment claims, and to do so would be to move away from Congressional intent. Simply put, same-gender sexual harassment does not and cannot occur, as a matter of law, 'because of' the victim's 'sex." *Id.* at 738.); Oncale v. Sundowner Offshore Services, Inc. 83 F.3d 118 (5th Cir. 1996) *rev'd,* 1998 WL 88039. (The Fifth Circuit found that all same-sex sexual harassment claims are not actionable, even where victim's coworkers "restrain[ed] him while Lyon's placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises." 83 F.3d at 118-19.) *See also* Mayo v. Kiwest Corporation, 898 F. Supp. 335 (E.D. Va. 1995); Fox v. Sierra Development Co., 876 F. Supp. 1169 (D. Nev. 1995); Fredette v. BVP Management Associates, 905 F. Supp. 1034 (M.D. Fla. 1995).

24 107 F.3d 443 (6th Cir. 1997).

25 *Id.* at 444.

26 *Id.*

27 *Id.*

28 *Id.* at 448.

> typical case where the aggressor is a female and the victim is a male. Consequently, we find no substantive difference between either of those situations and that present here.[29]

While holding for the plaintiff, the Court concluded that "it is not necessary for this court to decide today whether same-sex sexual harassment can be actionable only when the harasser is homosexual."[30] Instead, the court found that "when a male sexually propositions another male because of sexual attraction, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male--that is, 'because of sex."[31] This case, while clearly protecting heterosexual victims of homosexual harassers, could be viewed as also protecting homosexual victims of homosexual harassers, as such harassment would be viewed as "sex-based" as opposed to "sexual-orientation based."

Wrightson v. Pizza Hut of America,[32] in contrast to *Yeary*, finds a defendant liable only in situations in which the harasser is homosexual and the victim is heterosexual. In *Wrightson*, the victim, an employee at Pizza Hut, was subjected to harassment by his homosexual supervisor and co-workers. This harassment included "sexual advances," interrogations "about why he did not wish to engage in homosexual activity" and repeated touching "in sexually provocative ways."[33] The conduct was reported to the restaurant's managers, who had actually witnessed such conduct. The managers, however, never took a formal action against the harassers,[34] although they did hold a brief meeting in which they told the harassers to stop harassing the plaintiff and that their actions violated federal law.[35]

The evidence of the case did establish, however, that the harassing conduct was directed toward all heterosexual, male employees at Pizza Hut and that it was not directed toward other homosexual male employees. Pizza Hut then advanced a brilliant argument that the plaintiff did not have a claim because he was being discriminated against because of his sexual orientation as a heterosexual, and not because of his sex.[36]

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29 *Id.* at 447-48.
30 *Id.* at 448.
31 *Id.*
32 99 F.3d 138 (4th Cir. 1996).
33 *Id.* at 139-40.
34 *Id.* at 141.
35 *Id.* at 140.
36 *Id.* at 143.

That is, the defendant sought to establish that the dispositive factor was the defendant's sexual orientation as a heterosexual, which is not protected under Title VII, and not his sex as a male, which would be protected. However, the Court held that the appropriate standard for finding discrimination under Title VII is that it occurred "because of" and not "solely because of" the victim's sex.[37] The Court, therefore, applied a mixed motives analysis in its desire to find for the plaintiff.

C. HETEROSEXUAL HARASSER, HOMOSEXUAL VICTIM

In cases in which a heterosexual harasser targets a homosexual victim, the courts have predominantly found no cause of action under Title VII.[38] This is because they have generally found that the harassment occurs because of the victim's sexual orientation and not because of the victim's sex.

In *Shermer v. Illinois Department of Transportation*,[39] the plaintiff

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37 *Id.* at 143-44.

38 *See* Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wash. 1995) (finding same-sex harassment not actionable at all, even though heterosexual perpetrator's "behavior consisted of calling the plaintiff a 'homo' or 'faggot,' 'shaky' or 'shaky fuck' due to the plaintiff's nervous disposition, stating 'let's butt fuck' and on frequent occasions stating 'Glenn, how come whenever I get around you, I quiver." *Id.* at 490.); Jasmer v. Mico, Inc., No. CV3-95-363 (D. Minn. 1995)(no protection based on sexual orientation under Title VII); Williamson v. A.G. Edwards and Sons, Inc., 876 F.2d 69 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals." *Id.* at 70.); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) ("Congress manifested an intent to exclude homosexuals from Title VII coverage . . . ." *Id.* at 1084.); Dillion v. Frank, 1990 WL 358586 (E.D. Mich. Oct. 19, 1990) ("Title VII's comparative analysis must focus on examining job disparities based on gender, not sexual preference or orientation." *Id.* at 6). *See also* Carreno v. Local Union No. 226, 1990 WL 159199 (D. Kan. Sept. 27, 1990).

The Supreme Court addresses the issue of Congressional intent in *Oncale*, admonishing those courts, such as the one in *Ulane*, *infra*, that have asserted that Congress never intended to protect homosexuals. The Supreme Court applies a texualist approach to Title VII. The Court specifically states:

> As some courts have observed, male-on-male sexual harassment in the workplace was surely not the principal evil Congress was concerned with when it enacted Title VII. But statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncale, 1998 Westlaw 88039, at *3.

39 937 F. Supp. 781 (C.D. Ill. 1996).

was harassed by his heterosexual supervisor who *perceived* the plaintiff to be a homosexual. The principal acts of harassment were comments directed to the plaintiff about him "engaging in sexual acts with members of his own sex."[40] Although the Court applied several analytical tests to determine whether or not the harassment was based on "sex," including (1) whether or not there was a sexual attraction on the part of the harasser (2) whether the harasser treated the opposite sex differently and (3) a vague "type of work environment" test, the Court ultimately held for the defendant because the plaintiff did not prove that he would have been discriminated against if he had been perceived as heterosexual.[41] In doing so, the Court appears to have imposed an additional burden of proof on plaintiffs. The plaintiffs must prove a hostile environment, and in addition, must prove that the sexual harassment would have occurred even if they not been perceived as gay or lesbian. This seems to be an unfair allocation of the burden of proof. If the Court used perceived sexual orientation as a means of denying recovery, the Court should at least have shifted the burden of proof to the defendants, forcing them to prove that the discriminatory conduct occurred because they perceived the plaintiffs to be homosexual. [42]

In *Vandeventer v. Wabash National Corporation*,[43] an alleged homosexual was harassed by his heterosexual co-worker. Such harassment included calling the plaintiff a "dick sucker" and other degrading epithets.[44] The Court held that those "who are harassed because they are homosexual (or are perceived as homosexual) are not protected by Title VII any more than people who are harassed for having brown eyes."[45] At the same time, the Court also stated that "being homosexual does not deprive someone from protection from sexual harassment under Title VII, it is merely irrelevant to it. The issue is and remains whether one is discriminated against because of one's gender."[46]

This analysis seems to virtually negate the protection of homosexual victims of sexual harassment by heterosexuals. At the same

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40 *Id.* at 782.

41 *Id.* at 785.

42 Although there is no provision in Title VII protecting homosexuals from harassment on the basis of sexual orientation, should a mere perception that a victim is homosexual be enough to deny him or her protection? The court's analysis seems to lead to this absurd and patently homophobic conclusion.

43 887 F. Supp. 1178 (N.D. Ind. 1995).

44 *Id.* at 1181.

45 *Id.* at 1180.

46 *Id.*

time, however, it protects heterosexual and probably homosexual victims of a homosexual harasser. What is ironic about the Court's analysis is that although it provides that sexual orientation is irrelevant in sexual harassment cases, surely the orientations of both the harasser and the victim will be relevant in determining whether or not the harassment is actionable, since either the victim's orientation as a homosexual, or the harasser's orientation as a heterosexal may be used to negate the idea that the harassment was "sex-based."

D. HETEROSEXUAL HARASSER, HETEROSEXUAL VICTIM

In cases in which both the harasser and the victim are heterosexual, courts have overwhelmingly found for the employer.[47] This is because the courts have found that a certain sexual tension between the parties is not present. In *Goluszek v. Smith*,[48] the victim, a shy, "unsophisticated"[49] machine operator was harassed by several coworkers. The harassers told the victim he needed to "get married and get some of that soft pink smelly stuff that's between the legs of a woman,"[50] questioned whether "he had gotten any 'pussy' or had oral sex, showed him pictures of nude women, told him they would get him 'fucked,' accused him of being gay or bisexual and made other sex-related comments. The operators also poked him in the buttocks with a stick."[51]

The court, in a rather unreasoned opinion, in which it principally relies on a student note,[52] held that such harassment is not actionable under Title VII. Citing the note, the court stated:

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47 *See, e.g.*, Hopkins v. Baltimore Gas and Electric Co., 77 F.3d 745 (4th Cir. 1996)(in opposite-sex sexual harassment cases there is a presumption that the harassment is caused by the victim's gender, but in same-sex sexual harassment cases, there is no such presumption. It must be prove nthat the harasser acted out of sexual attraction to the victim. *Id.* at 752). *See also* Ward v. Ridley School District, 940 F. Supp. 810, *aff'd* 124 F.3d 189 (1997). In contrast, *see* Quick v. Donaldson Co., 90 F.3d 1372 (1996)(sole fact that harassment was heterosexual on heterosexual did not mandate summary judgment for defendant).

48 697 F. Supp. 1452 (N.D. Ill. 1988).

49 *Id.* at 1453.

50 *Id.*

51 *Id.* at 1454.

52 Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L.REV. 1449, at 1451 (1984).

> Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable. The "sexual harassment" that is actionable under Title VII "is the exploitation of a powerful person to impose sexual demands or pressures on an unwilling but less powerful person."[53]

Accepting this note as an encapsulation of Congressional intent, the court denied the plaintiff's claim, stating that it chooses "to adopt a reading of Title VII consistent with the underlying concerns of Congress."[54] Ironically, although this case only stands for the proposition that heterosexual same-sex harassment is not actionable, many courts have applied it to deny relief in cases in which the victim or harasser was homosexual. Many courts have declined to follow *Goluszek*, describing it as "a favored target of jurisprudential criticism, most of which makes sense."[55]

In *McWilliams v. Fairfax County Board of Supervisors*,[56] a heterosexual mechanic was harassed by his heterosexual co-workers.

> [C]oworkers tied McWilliams' hands together, blindfolded him, and forced him to his knees. On one of these occasions, a coworker placed his finger in McWilliams' mouth to stimulate an oral sexual act. During another of these incidents, a coworker, Doug Witsman, and another placed a broomstick to McWilliams' anus while a third exposed his genitals to McWilliams.[57]

Despite the pervasive and brutal nature of this conduct, the Court held that heterosexual on heterosexual same-sex sexual harassment is not actionable, and denied the plaintiff relief. This is because the Court felt that such harassment, although "puerile and repulsive," is not "because of" the victim's sex.[58] In order for the claim to be actionable, a certain sexual element needs to be present.

Martin v. Norfolk Southern Railway Co.,[59] is another

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53 *Goluszek*, 697 F. Supp. at 1456.

54 *Id.*

55 *See, e.g.* Ton v. Information Resources, Inc., 1996 WL 5322, at *7 (N.D. Ill. Jan. 3, 1996); Sardinia v. Dellwood Foods, Inc., 1995 WL 640502, at *4-5 (S.D.N.Y. Nov. 1, 1995).

56 72 F.3d 1191 (4th. Cir. 1996), *cert. denied,* 117 S.Ct. 72 (1996).

57 *Id.* at 1193.

58 *Id.* at 1196.

heterosexual-heterosexual harassment case in which the court adopts this logic. Martin, a mechanical supervisor, was harassed by his foreman and by two of his co-workers. The coworkers exposed their penises to him, grabbed and pinched him, told him that he (his supervisor) would like to bend him over a chair and have sex with him and told him that he looked like he had AIDS.[60] However, the Court held that plaintiff lacked an actionable claim. As in *McWilliams*, this Court found that the harassment was not predicated on the victim's sex because of the lack of sexual desire. The Court states:

> In a situation where a male sexually harasses a female, there is the presumption that he does so because she is a female and that he would not do the same to a male. The same is true when a homosexual or bisexual male harasses another male, there is the presumption that the harasser does so because he is sexually attracted to the male victim and would not treat a female in the same manner. The presumption arises from the sexually oriented harassing conduct and is predicated upon the perceived need for sexual gratification. Because of the demand by the harasser for sexual gratification, the victim is singled out because of his or her gender. Thus, there is discrimination based upon the victim's sex in violation of Title VII.[61]

Therefore, in heterosexual same-sex sexual harassment cases, the Court feels that this presumption ceases to exist.[62]

III. Sexual Identity as an Indicator of Outcome

In analyzing these four distinct situations, it becomes apparent that each has been treated differently. It is immediately evident that the sexual identities of both the harasser and the victim have determined the outcome of these cases. In the cases in which the harasser is homosexual and the victim is heterosexual, courts seem to have predominantly found the sexual harassment actionable. In cases in which both the harasser and victim are homosexual, there has been slightly more reluctance to find such harassment actionable. However, it is fair to say that the standard of proof has been more stringent because some courts have required the

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59 926 F. Supp. 1044 (N.D. Ala. 1996).

60 *Id.* at 1046-47.

61 *Id.* at 1049.

62 *Id.*

plaintiff to prove that the harassment was not based on sexual orientation. In cases in which the harasser is heterosexual and the victim is homosexual, courts have overwhelmingly declined to find an actionable claim and have held that the harassment was based on sexual orientation and not on sex. Finally, where both the harasser and victim are heterosexual, courts have generally not found such harassment actionable because of the lack of "sexual attraction."

As a general rule,therefore, heterosexual, same-sex harassers have been generally insulated from suit, whereas homosexual harassers have been held liable. Moreover, heterosexual victims of "homosexual harassment" have been most likely to have actionable claims. But do such discrepancies in recovery make sense? It seems absurd that recovery should be based on the sexual identities of the victim and harasser, especially considering the similarity of the harassment in all four situations. In fact, when comparing the conduct in these cases, it is apparent that much of the behavior of the non-liable heterosexual harassers is far more brutal and of a more sexual nature than that of the liable homosexual harassers. Such distinctions make less sense when one considers the fluidity of sexuality and the subjective nature of sexual identity.

Therefore, it seems that any test involving the identity of the participants is only arbitrary, misleading. Instead, a test based solely on the conduct of the alleged harassment, without regard to sexual identity, is both accurate and fair, as it comports with the EEOC's guidelines and with *Meritor*[63] and *Harris*,[64] the two landmark Supreme Court cases dealing with sexual harassment.

However, the Supreme Court in *Oncale* declines to adopt a formulaic, conduct-based approach for determining actionability. Although *Oncale* gave the Supreme Court a remarkable opportunity to clarify the general requirements, not only for instances of same-sex sexual harassment, but also for all other forms of hostile environment sexual harassment, the Court, by predominantly using analogy as a substantive tool to arrive at its holding, fails to further develop the holdings of *Meritor* and *Harris*. Rather, the Court's opinion merely enlarges the class of beneficiaries of these two cases. The following section analyzes the various imperatives for finding same-sex sexual harassment actionable, concluding that a conduct-based analysis would have yielded a more protective result than that of the analysis applied by the Supreme Court.

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63 *Meritor*, 477 U.S. 57 (1986).

64 *Harris*, 510 U. S. 17 (1993).

IV. EXTENDING TITLE VII PROTECTION TO ALL FORMS OF SAME-SEX SEXUAL HARASSMENT

There are many arguments for finding all same-sex sexual harassment actionable regardless of the sexual identities of the harasser and victim. The first is contained in the EEOC guidelines.[65] The EEOC guidelines state that "the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat the employees of the opposite sex the same way."[66] Non-recognition of same-sex sexual discrimination is a blatantly contradicts these guidelines, since the critical inquiry is not how the *opposite* sex of the harasser is treated but rather how any *one* sex is treated. Moreover, there need not be disparate treatment of an entire sex, but rather only an individual. There are many cases in which a victims were tormented solely because they were "different," regardless of their sexual orientation. In *Goluszek v. Smith*, *infra*, the plaintiff was harassed because he was shy and awkward. However, the harassing conduct was sexually violative conduct, including constant "pok[ing] in the buttocks with a stick."[67] Moreover, there was no evidence that female employees were treated disparately. It would seem, therefore, under the EEOC guidelines, that Goluszek stated an actionable claim. Yet, his claim is denied and these guidelines are ignored. Likewise, the Supreme Court neglects to properly address these guidlines in *Oncale*. In fact, it fails to even mention them as factors in its decision. This is rather surprising considering their direct applicability to *Oncale*'s facts.

The second argument for all finding same-sex sexual harassment actionable is that the sexual identity of the harasser and victim does nothing to diminish the degree and pervasiveness of the harassment under *Harris's* "totality of the circumstances" test. The Supreme Court states in *Harris*: "[w]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it interferes with an employee's work performance."[68]

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65 *See infra* notes 9-10, and accompanying text.

66 2 EEOC Compliance Manual, § 615.2 (b)(3)(1974 & Supp. 1996).

67 *See supra* note 51 and accompanying text.

68 *Harris*, 114 S.Ct. at 371.

This test says nothing about the sexual identities of the harasser and victim. The *Harris* test primarily focuses on the conduct of the harassment. Moreover, the *Harris* test does not impose an additional burden of proof whereby a plaintiff must prove how sexual identities are germane to the harassment. The main factor to be analyzed is the conduct itself and how it affects the employee. Yet the Supreme Court in *Oncale* does not truly discuss this aspect of *Harris*. Rather, it cites Justice Ginsburg's concurrence, which states that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadventageous terms or conditions of employment to which members of the opposite sex are not exposed." In effect, it shies away from applying a pure conduct-based approach. This is unfortunate because the Court's analysis does not contemplate the situation in which a harasser treats members of both sexes equally crudely. Moreover, the Court's analysis fails to recognize the abusive conduct experienced by individual victims, perhaps even allowing harassers to exculpate themselves by proving that they treated employees of both sexes with equal malice.

Many courts have unfortunately allowed the subjective perception of the harasser to determine whether the harassment was based on sex or sexual orientation. This has occurred mostly in cases in which a heterosexuals harass their victims because they are perceived to be homosexual. For example, in *Shermer v. Illinois Department of Transportation*, discussed *infra*, the plaintiff was denied recovery because the harasser perceived him as homosexual. The court imposed on the plaintiff the additional, weighty burden of proving that the same harassment would have occurred if the defendant had perceived him to be a heterosexual. Unable to do so, the plaintiff lost.

To deny a plaintiff recovery solely because of the subjective perception of the harasser is unfair, since it places a much larger burden on a plaintiff to prove how the harasser perceived his identity, which is really irrelevant to the fact of the harassment. Moreover, it enforces gender stereotypes of masculinity and femininity, something that Title VII was surely meant to abrogate.

In *Oncale*, the Supreme Court, unfortunately, does not deal with the tension between discrimination based on sexual orientation and that which is based on "sex." In fact, by not explicitly recognizing a pure conduct-based approach, the Court, in effect, leaves open the possibility of impunity for those harassers who abuse their employees because they perceive them to be gay or lesbian. As a result, a critical issue sure to arise in future litigation is a determinination of the borderline between conduct that appears to be based solely on sexual orientation and conduct that would sustain a finding that the harassment was based on "sex."

Third, not recognizing all same-sex sexual harassment claims by concentrating on sexual identity ignores the holding in *Meritor*, which, like *Harris*, focuses on the conduct of the harassment and not identity. *Meritor* condemns "unwelcome sexual advances that create a hostile working environment"[69] in violation of Title VII. Most of the cases cited in this article were brought because of unwelcome sexual advances, some of which were committed by people who identify as heterosexual. In *McWilliams v. Fairfax County Board of Supervisors*, *infra*, recovery was denied to a heterosexual victim of heterosexual harassers even though the victim's coworkers' actions barely fell short of rape. Similarly, in *Martin v. Norfolk Southern Railway Co.*, *infra*, in which the victim's coworkers constantly exposed themselves and fondled him, recovery was denied because the harassers considered themselves heterosexual and, as a result, the court found a sexual element missing, despite the overwhelmingly sexual nature of the conduct. These holdings overlook the basic assertion of *Meritor*, that the conduct merely need be "unwelcome."

In *Oncale*, the Supreme Court does not focus on whether or not the conduct was "unwelcome" in order to determine liability. Rather, it skirts this requirement of *Meritor*, choosing to allow recovery through the use of analogy. The Court likens the situation in which the harasser and victim are of the same sex to cases in which the discriminator and victim are of the same race.[70] The Court, citing *Castaneda v. Partida*, states that "we have rejected any conclusive presumption that an employer will not discriminate against members of his own race."[71] The Court similarly rejects the idea that any presumption should govern the issue of same-sex sexual harassment, and therefore determines that there can be sex discrimination involving members of the same sex.

The fourth reason for finding all same-sex sexual harassment actionable is the plain language of Title VII. There is nothing in the language or legislative history of Title VII that (1) supports a finding that same-sex harassment is not prohibited and (2) requires the harassment to be based on attraction or the product of a sexual tension. The latter is a court-fashioned rule that has been used to deny the most terrorized victims recovery.[72] Moreover, a finding of whether or not there was, in fact, an attraction has generally been predicated on the sexual identity of the harasser, which cannot, as noted, be so easily ascertained.

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69 *Meritor*, 477 U.S. at 64.

70 *See* Castaneda v. Partida, 430 U.S. 482, 499 (1977).

71 *Oncale*, 1998 WL 808838, at *2.

72 *See supra* note 59 and accompanying text.

Furthermore, whether there is attraction or not does not change the pervasiveness or the brutality of the conduct.

Fortunately, the Supreme Court directly addresses the issue of sexual attraction in *Oncale*, stating that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[73] Moreover, the Court states that harassing conduct can be found, for example, in the situation in which "a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[74] Therefore, the Court eviserates the requirement, previously used by some courts, that the plaintiff prove that the harasser seeks sexual gratification from the harassing conduct. By doing so, the Supreme Court eliminates the often insurmountable burden of proving the subjective mental state of a harasser.

In conclusion, although there has not been uniformity as to whether same-sex sexual harassment is actionable prior to the Supreme Court's decision in *Oncale*, this newly decided case provides, as a general rule, that such harassment is actionable. However, by failing to apply a pure conduct-based analysis, the Court allows sexual identity to continue to govern the application of Title VII to same-sex sexual harassment cases. Most importantly, it does not prohibit harassing conduct based on the victim's sexual orientation, regardless of the conduct. Therefore, until the Supreme Court explicates the core holdings of *Meritor* and *Harris*, thereby allowing the nature of the harassing conduct itself to determine actionability, some instances of harassment will, sadly, continue to be insulated from suit because of categorizations of gender and identity, as well as stereotypical notions of masculinity and femininity.

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73 *Oncale*, 1998 WL 808838, at *4.

74 *Id.*