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EMERGING TRENDS IN EMPLOYMENT LAW: HOW COURTS ARE INTERPRETING HARASSMENT "BECAUSE OF SEX" SINCE *ONCALE*

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ABSTRACT

Under Title VII of the Civil Rights Act of 1964, the courts have had the most difficulty determining discrimination based on sex. Consequently, the federal circuit courts of appeal developed inconsistent results regarding whether same-sex harassment was covered prior to the U.S. Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.* [1]. This article examines case law on sexual harassment prior to 1998 and the Court's decision in *Oncale:* that same-sex harassment is actionable under Title VII. The article also describes how the courts are using *Oncale's* "because of sex" requirement to shape current sexual harassment case law.

BACKGROUND OF SEXUAL HARASSMENT LAW

Meritor Savings Bank v. Vinson

It took some time before the courts clearly addressed sexual harassment under Title VII. Part of the difficulty arose because there was little legislative history on the topic because sex was added to the initial legislative proposal as an amendment in an attempt to defeat the legislation. The key decision on sexual harassment was made by the U.S. Supreme Court in 1973 in *Meritor Savings Bank v. Vinson* [2]. The situation was unusual in that Vinson dressed provocatively, discussed her sexual fantasies at work, and had sexual intercourse with her supervisor, Taylor, forty to fifty times. However, she also testified that Taylor fondled her at work, followed her into the restroom, and on several occasions had raped her.

The lower court correctly determined that Vinson did not lose any tangible job benefits because of the harassment, as she was hired and promoted based on merit. This finding led the court to conclude that she was not a victim of sexual harassment. The trial court also found that the bank was not liable because the plaintiff had failed to follow the reporting procedures outlined in the bank's sexual harassment guidelines. The court reasoned that the bank had had no notice and therefore could not be held responsible. On appeal, the U.S. Supreme Court did not find Vinson's failure to follow procedure dispositive of the issue but stated that courts should look to agency principles in deciding sexual harassment cases, leaving open the possibility of employer liability. The Court found that cases of sexual harassment generally fall into two categories: *quid pro quo,* where an employee experiences some sort of detrimental employment action as retaliation for refusing to submit to sexual demands; or hostile environment, where the general work atmosphere is hostile or abusive because of the harassment but the employee does not necessarily experience any detrimental employment action [2, at 65-67]. Although the Court found Vinson did not experience *quid pro quo* sex discrimination, the Court remanded the case back to the trial court to decide whether a hostile work environment had been created.

Harris v. Forklift Systems, Inc.

However, one clear division in the circuit courts after *Meritor* was whether the standard of determining a hostile work environment should be based on the victim's perception or the perception of a reasonable person [3]. A further division was whether psychological harm had to be proven in order for the plaintiff to win in court [4]. These issues were resolved in 1993 in the second U.S. Supreme Court opinion to address hostile work environment sexual harassment: *Harris v. Forklift Systems, Inc.* [5]. Harris had been subjected to inappropriate comments at work and had to travel more than her male colleagues. She did not say that the harassment prevented her from doing her job, but indicated that it made her job more difficult. The Court made it clear that "this is not, and by its nature cannot be, a mathematically precise test" [5, at 22]. The Court specified that "no single factor is required," but determining whether a work environment may properly be called "abusive" or "hostile" requires a court to consider all of the circumstances of the environment. . . . "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance [5, at 23]. The Court found that psychological harm was not necessary for a plaintiff to win, but could be one factor to consider in deciding whether an environment was objectively hostile. In terms of the appropriate standard, the Court created a two-pronged test: whether the victim herself considered her environment hostile and whether a reasonable person would have perceived the work environment as hostile.

Sexual Orientation Claims

While the courts were trying to apply the decisions of the U.S. Supreme Court in *Meritor* and *Harris* to hostile work environment claims, numerous cases were brought by men who claimed they had been discriminated against on the basis of sexual orientation. The courts consistently held that discrimination based on sexual orientation was not within the scope of Title VII, since the plain language of the statute was to provide coverage based on race, sex, religion, color, and national origin. The courts did not consider sexual orientation discrimination to be the same as discrimination based on sex.

A Split in the U.S. Circuit Courts on Same-Sex Harassment Prior to *Oncale*

Although most of the case law dealt with women who had been harassed by men, cases also arose in which men had been harassed by other men, and the Circuit Courts of Appeal were divided as to the appropriate way to handle such cases because the courts were uncertain whether Title VII applied.

Prior to *Oncale,* the circuits split three ways on same-sex harassment. The Fifth Circuit consistently held same-sex harassment claims were not actionable under Title VII [6]. Other courts recognized such a cause of action under Title VII, but they limited relief to cases where male-on-male harassment was explicitly proven, particularly if the harasser was homosexual and the victim heterosexual [7]. The justification for these decisions was that the harassers' actions were presumably motivated by sexual desire and therefore the harassment was "based on sex." For example, the Sixth Circuit stated, "[W]hen 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'" [8]. Finally, the Seventh and Eighth Circuits permitted Title VII same-sex sexual harassment claims where the plaintiffs could show harassment "because of sex," regardless of the motivation of the harasser [9].

ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.

The long-awaited opinion by the U.S. Supreme Court in *Oncale* was expected to end the three-way split in the federal circuit courts regarding the treatment of same-sex harassment cases [1]. The facts established that Oncale, a heterosexual, married male with two children, worked as a roustabout in an oil rig in the Gulf of Mexico in an all-male environment. He was subjected to sex-related humiliating actions, physically assaulted, and threatened with rape. He complained to supervisory personnel without result and quit, fearing he would be raped on the job. The district court followed established precedent for the circuit and found the plaintiff had no cause of action under Title VII [10]. The appellate court affirmed [11]. Justice Scalia delivered the U.S. Supreme Court's opinion in *Oncale,* addressing

the issue of "whether workplace harassment can violate Title VII's prohibition against 'discriminat[ion] . . . because of . . . sex,' 42 U.S.C. § 2000e-2(a)(1), when the harasser and the harassed employee are of the same sex" [1, at 76].

The Court found that "Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirement" [1, at 79-80]. In defining the "because of . . . sex" requirement, the Court added, "The critical issue, Title VII's text indicates, is whether members are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed" [1, at 80, citing 5, at 25]. The Court's opinion in *Oncale* went on to indicate that different evidentiary routes could be used to show that discrimination occurred because of sex [1, at 80-81]. In addition, the Court found Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victims employment" [1, at 81], and argued that recognition of same-sex harassment would not turn Title VII "into a general civility code for the American workplace" [1, at 80]. Also, citing *Harris,* the Court ruled the "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances'" [1, at 81, citing 5, at 23].

MALE ON MALE HARASSMENT CASES SINCE *ONCALE*

Since the *Oncale* decision in 1998, several cases have been decided that involve one or more males acting in an offensive manner against another male. The difficulty for the courts has been to determine whether or not such conduct violates Title VII of the Civil Rights Act of 1964. The most intelligible of the decisions interpreting *Oncale* looks specifically at the conduct involved and the factors delineated in *Harris* to see whether the plaintiff could prevail by any evidentiary route. One such early decision involving male on male harassment that has been cited favorably by other courts is *Bacon v. Art Institute of Chicago* [12].

In *Bacon,* the plaintiff was a man who worked as a part-time housekeeper following his survival of a car crash that had left him with brain damage and limitations to his physical abilities. Polczynski was employed as the building manager where Bacon worked, and a series of incidents between the two men began in January 1992. Polczynski took a picture of Bacon's backside and displayed it on his desk. In addition, he began to bump into Bacon to initiate physical contact, to run his fingers through Bacon's hair, to grab Bacon's buttocks, and to grab Bacon from behind and simulate intercourse with him. The plaintiff continually told Polczynski to stop touching him [12].

Bacon's complaints eventually culminated in an investigation of Polczynski's behavior in May 1992, during which two other men testified they had also either been touched by Polczynski or comments had been made about their buttocks. As

a result of the repetitive, unwanted behavior of a sexual nature, Polczynski was fired on May 21, 1992. After Polczynski was terminated, Bacon began receiving warning notices at work for unauthorized breaks, unprofessional horseplay, and excessive absenteeism. He left work December 3, 1993, and initiated a lawsuit for sexual harassment and for retaliation [12].

In evaluating Bacon's sexual harassment claim, the court cited the *Oncale* decision stating: "The Supreme Court recently held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII" [12, at 766]. Relying on *Meritor,* the court found the deciding factor in a hostile work environment case to be "whether an employee, because of his gender, is exposed to treatment that alters the conditions of employment in a significant way" [12, at 766]. Then, looking to *Harris,* the court stated:

> To determine whether a work environment may properly be called "abusive" or "hostile" requires a court to consider all of the circumstances of the environment . . . "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performances" [12, at 767].

The employer failed to get the lawsuit dismissed.

After the Illinois district court's decision in *Bacon,* the Court of Appeals in Kentucky issued a similar verdict in *Brewer v. Hillard* [13]. The plaintiff, Hillard, worked for Consolidated Freight ways Corporation of Delaware as a delivery man, while Brewer worked as a dispatcher/supervisor on the evening shift. Hillard complained that Brewer had started calling him sexually explicit names and had grabbed his buttocks, saying, "Why don't you give me some of that ass" [13, at 4]. There were numerous requests for oral and anal sex, and Brewer often rubbed his crotch while making lewd comments. Hillard thoroughly outlined this pattern of behavior to another supervisor in December 1992, who told him she had reported it to the terminal manager.

At trial, the supervisor denied Hillard had reported the harassment, denied giving Hillard a copy of the company harassment policy, and denied going to the terminal manager. Hillard finally reported Brewer's behavior to the terminal manager after he had been hospitalized for stress in March, had to take three weeks off in May for stress, and had been treated with Xanax and Zoloft for anxiety and depression. The appellate court upheld Hillard's award against Brewer based on intentional infliction of emotional distress. The court found the applicable standard to apply was whether the employer "knew or should have known" of the sexual harassment [13, at 10]. Although the question of actual notice was disputed at the trial, the jury clearly believed Hillard. In addition, the court found the employer could have learned about the harassment from other sources, such as Hillard's co-workers on the dock.

Although Hillard proceeded under the Kentucky Civil Rights statute rather than under Title VII, the court looked to federal law for guidance. Citing *Oncale,* the court reiterated the "because of . . . sex" language and held "that a claim for same-sex harassment is cognizable under the Kentucky Civil Rights Act" [13, at 11]. The court quoted the *Oncale* opinion extensively, stating:

> After reviewing the videotape of the trial, we find that there was sufficient evidence to uphold the jury's finding that Hillard was harassed because of his sex. There was no evidence which indicated that Brewer treated women in the workplace the same way he treated Hillard. Brewer's conduct went far past "simple teasing or roughhousing among members of the same sex" and that it clearly constituted behavior which a reasonable person in Hillard's surroundings would find to be severely hostile and abusive . . . While we recognize that the atmosphere of the night shift on an all-male loading dock is far removed from the niceties of a typical office, we believe that Brewer's behavior was extremely offensive even in those surroundings [13, at 12].

DETERMINING THE MEANING OF "BECAUSE OF SEX"

Same-Sex Harassment Victims Must Still Prove the Harassment Is *Because of Sex*

Despite its definitive decision acknowledging that same-sex harassment is actionable under Title VII, *Oncale* has in no way guaranteed that same-sex harassment will result in a victory for the victim of the harassment. *Llampallas v. Mini-Circuits, Lab. Inc.* demonstrates this conclusion [14]. The case involves two women, Blanch and Llampallas, who had engaged in a long-term sexual relationship spanning 13 or 14 years. They worked for the same employer, Mini-Circuits, owned a home together, and paid their bills from a joint banking account. The president of the company, Kaylie, enjoyed a relationship with the two women that was social as well as professional. He had lent both women money on very favorable terms, hired Llampallas's two sons, and transferred the title of a company car to Llampallas. He had visited their home on many occasions and dined with the two women [14].

The harassment involved in this case intensified as soon as Llampallas moved out of the house and Blanch, her longtime lover and supervisor, began to threaten her with being fired if she did not resume their sexual relationship. The threats were repetitive and witnessed by several employees of the company. Llampallas also proved at trial that similar threats were made by Blanch before the sexual relationship had ended. Blanch called President Kaylie and said she was quitting because she could no longer work with Llampallas. Kaylie told her not to quit and summoned Llampallas to come to New York to meet with him. After this two-hour meeting, Kaylie first put Llampallas on suspension with full pay and later fired her

with no indication that a true investigation had taken place. The other employees were not interviewed when Kaylie suspended Llampallas nor at the time that he fired her. The district court held that the company was liable for unlawful *quid pro quo* sexual harassment. But the Eleventh Circuit Court of Appeals determined that the two-hour meeting broke a necessary causal connection between the harassment and the firing. The court stated:

> Here, Llampallas and Blanch are both women; thus, the fact that Kaylie chose Blanch over Llampallas cannot give rise to an ultimate inference that Kaylie choose [sic] "because of" Llampallas' sex. The district court's findings, therefore, do not support its conclusion that because Blanch "got Llampallas fired," Mini-Circuits can be held liable for Llampallas' discharge under Title VII [14, at 1248].

Also, despite the fact that various employees testified at the trial that they had been aware of the harassment of Llampallas by her former lover, the court found that constructive knowledge of the harassment could not be imputed to the employer for liability purposes [14].

Oncale requires that harassment be "because of sex" [1, at 81]. Consequently, in *Llampallas,* the victim—although harassed by her supervisor because she broke off their romantic attachment—lost on appeal to the Eleventh Circuit. The court stated conclusively, "[W]e conclude that Llampallas cannot succeed on the merits of any Title VII claim because she failed to prove that she suffered discrimination 'because of' her sex" [14, at 1242]. The court found that "even in this day and age, an employer is not expected to assume that two of his female employees have engaged in a sexual relationship" [14, at 1250-1251, n. 24]. This result was a departure from traditional liability standards in hostile environment cases based on sexual harassment. The typical language used by the court is whether or not in the exercise of reasonable care, the employer knew or should have known of the harassment. The court's decision seems illogical in light of *Oncale* because even a cursory investigation would have revealed the threats to which Llampallas was subjected.

The court cited *Willis v. Marion County Auditor's Office* as a case in which the subordinate employee's motives were not attributable to the employer because the employer met with the plaintiff before the employee was fired [15]. However, as the court pointed out, in *Willis,* the decision maker "investigated a subordinate's motives . . . before acting on the subordinate's adverse recommendations" [14, at 1249]. However, *Willis* did not involve allegations of sexual harassment, but complaints that the firing might have been racially motivated on the part of one supervisor. In *Willis,* the decision maker who fired the employee who complained of racial prejudice was aware of the alleged racial animosity. There was no doubt that the motives of the subordinate had been brought to light and taken into consideration by the decision maker. Even more significantly, in *Willis,* more than one supervisor had brought evidence that the employee had violated the workplace

rules concerning timely handling of vendor vouchers. The firing was not based on evidence by one supervisor acting alone. Furthermore, the personnel rules were followed in terminating the employee, after three written reprimands had been received in a one-year period [15].

The facts in Llampallas were very different. Kaylie did not do an investigation of the problems that led Blanch to say she was resigning because she could not work with Llampallas. There was no evidence of any violation of workplace rules or misconduct on Llampallas' part. Kaylie indicated at trial that he did not ask Llampallas what the problem was because "he did not want to pry" [14, at 1250, n. 24]. Theoretically, Kaylie had fired her without knowing of the employee's long-standing sexual relationship, despite his close social relationship with them. Additionally, the court would have us believe that he had fired Llampallas without any knowledge that Llampallas was being harassed, notwithstanding the abundant company witnesses. The court further would have us believe he had fired Llampallas without knowing Blanch had animosity against Llampallas, despite Blanch's statement that she could not work with her. Therefore, despite Llampallas' being a victim of same-sex harassment by her immediate supervisor, she could not win her Title VII claim, since the court determined it was not "because of . . . sex." The court's decision seems illogical in light of *Oncale* because the employer knew both women well and had a social as well as professional relationship with the two that involved several visits to their home and employment of other family members. Any questioning by Kaylie would have revealed the threats to which Llampallas was subjected.

Discrimination Based on Sexual Orientation is Not *Because of Sex*

A long line of cases has held that discrimination on the basis of sexual orientation is not covered under Title VII [16]. *Oncale* does not change the view of the Court in this regard because the Court was not addressing a claim based on sexual orientation. Claimants have argued since the *Oncale* decision that their harassment at work is due to their homosexuality or the perception of homosexuality, and that this should be covered under hostile work environment standards. The courts uniformly have denied this reading of *Oncale* [17].

One case example involved John Bibby, who began working for Coca Cola Bottling Co. shortly before his high school graduation [18]. Fifteen years later, plaintiff disclosed his alternative lifestyle to Coca Cola after experiencing some physical problems. He experienced difficulties at work after this time, beginning with an improper discharge. He won an arbitration decision regarding the discharge and was reinstated with back pay and full benefits. However, less than a week after his reinstatement, a co-worker grabbed him, threw him against lockers, and threatened to beat him in the presence of the supervisor who had improperly fired him [18].

Bibby reported the incident to company officials but no action was taken. Bibby was threatened by his co-worker again, was scheduled for transfer to an undesirable night shift, was yelled at, and derogatory slurs for homosexuals were used toward him, sexual graffiti were drawn in the bathroom, and he was singled out and written up for infractions that were not applied to anyone else. Bibby brought suit alleging he was discriminated against because of sex, but the defendant argued any discrimination was based on sexual orientation, an unprotected class not included in Title VII. The court found:

> In order to demonstrate employer liability for a hostile environment based on sex created by a co-worker, plaintiff must demonstrate that: (1) the employee belongs to a protected class; (2) the employee was subject to harassment, that is, unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment was based on sex; (4) the harassment affected a term, condition or privilege of employment, becoming so severe and pervasive as to create a hostile work environment; and (5) the employer knew or should have known of the charged sexual harassment and failed unreasonably to take appropriate corrective action . . . Here, the plaintiff fails this test, because he cannot show that the harassment complained of was based on sex, as is required under Title VII [18, at 514-515].

The court cited the facts in *Oncale* requiring that discrimination be "because of . . . sex."

> One issue that the court in Oncale did not address is whether discrimination on the basis of sexual orientation could constitute discrimination on the basis of sex for purposes of Title VII. However, lower courts that have addressed this issue have consistently held that discrimination on the basis of sexual orientation is not discrimination on the basis of sex under Title VII [18, at 515]. This issue is discussed in depth in *Higgins v. New Balance Athletic Shoe, Inc.,* [19].

Discrimination Based on Gender Is Not *Because of Sex*

In *Higgins,* the plaintiff, whose performance evaluation concluded that he was a "very good" employee overall, was subjected to verbal and physical harassment on a regular basis. "Co-workers would constantly holler, swear, and otherwise verbally demean him" [19, at 69]. Higgins was physically assaulted by a co-worker in the restroom who shook him violently and threatened to kill him. "Employees intentionally threw hot cement at Plaintiff, snapped rubber bands on Plaintiff s body, and stomped on strategically placed mustard and ketchup packets causing the substances to spray onto Plaintiff when he walked by" [19, at 69].

The court found that neither the Maine Human Rights Act (MHRA) nor Title VII recognizes a cause of action based on sexual orientation. However, the

plaintiff also argued an alternative theory for recovery: that a hostile work environment had been created based on sex, instead of sexual orientation. The court found that the plaintiff "invited the Court to interpret the 'because of . . . sex' requirement, as, in effect, a 'because of gender' requirement" [19, at 75]. The court found that the two terms mean very different things and must not be used interchangeably. The court defined sex as an immutable characteristic that is physical in nature, while gender "is a broader concept which encompasses personality features and socio-sexual roles typically associated with 'masculinity' or 'femininity'" [19, at 75].

In a footnote [19, n. 9], the *Higgins* court justified this approach by noting that the U.S. Supreme Court had vacated, without opinion, a Seventh Circuit decision, *Doe v. City of Belleville* [20] in light of *Oncale.* The facts in *Belleville* indicated that the plaintiff, an adolescent male, had been verbally harassed and physically assaulted by co-workers who incorrectly assumed he was gay since he wore an earring [20]. The Seventh Circuit had ruled for the plaintiff and had used the terms "gender" and "sex" interchangeably throughout its opinion. One of the Seventh Circuit judges, Manion, had dissented, writing that the behavior of the co-workers could not be remedied through Title VII [20].

According to the U.S. District Court in Maine, which heard Higgins' case, Judge Manion had chosen a much more limited reading of the "because of . . . sex" requirement. The *Higgins* court said that the Supreme Court seemed to agree with Manion's narrower reading of the term "sex" because the Court had vacated *Belleville* "in light of Oncale" [19, at 75, n. 9].

This argument has been picked up and embraced by other claimants in U.S. district courts. In *Klein v. McGowan,* the plaintiff worked in an environment that was almost exclusively male [21]. The plaintiff did not argue that he had been harassed because of his sexual orientation, but argued instead that the harassment was due to "the sexual aspect of his personality" [21, at 889]. The court found a difference between harassment because of sex and harassment due to the "sexual aspect of Plaintiff's personality" [21, at 889-890]. The victim did not show any other men were harassed, so the court found that he did not show he was treated differently because of his sex. The court referred the opinion in *Higgins* as "instructive" and also referred to the note in *Higgins* regarding the U.S. Supreme Court's vacating of the Seventh Circuit decision in *City of Belleville v. Doe* [21, at 890]. Needless to say, the plaintiff in *Klein* lost his case. The court stated, "Title VII, in its current form, does not prohibit all offensive conduct, nor does it prohibit all forms of workplace harassment" [21, at 890]. The Eighth Circuit Court of Appeals affirmed the district court's decision [22].

Harassment Against Both Men and Women By the Same Harasser Is Not *Because of Sex*

The best example of a horrendous result of this principle is seen in *Holman v. State of Indiana* [23]. The case involves a man and his wife who were both

harassed in a sexual manner by the same supervisor. The court decision raises the question whether the opinion would have differed if the husband had not complained but instead, had encouraged his wife to initiate the discrimination claim solely on her own behalf.

The U.S. district court in this decision reviewed case history regarding harassment by a supervisor against both males and females. The court noted that prior to *Oncale* a number of courts had found harassment against more than one gender could be actionable under Title VII: ". . . the Seventh Circuit determined that the sexual nature of the harassment itself meets the 'because of sex' requirement" [23, at 914, citing 20]. The court found that district courts had "determined that disparate treatment of the genders is evidence of harassment but is not a requirement . . . [23, at 914].

The *Holman* court highlighted the facts of *Steiner v. Showboat Operating Co.*[24]. In that case, "the Ninth Circuit held that the fact that a supervisor harasses males and females alike is not a valid defense to sexual harassment and would not preclude a showing that the harassment was based on gender" [23, at 914, citing 24]. In *Steiner,* the harasser abused both men and women, but harassed the two sexes differently. The harasser picked out gender-sensitive vulnerabilities and attacked each gender separately, using varying tactics designed to offend, humiliate, and degrade the individuals under his supervision. Unfortunately, after reviewing the cases decided before the U.S. Supreme Court's decision in *Oncale,* the court determined that the reasoning used in previous cases was no longer available [23].

"Prior to the *Oncale* decision, these cases created the impression that it was possible for both males and females to be sexually harassed by an 'equal opportunity harasser'" [23, at 915]. Since *Oncale,* the court found it had to rule against the husband and wife. "A brief perusal of cases decided since *Oncale* led the court to conclude that the equal opportunity harasser escapes the purview of Title VII liability" [23, at 915]. *Oncale* indicated that "proof that discrimination is 'because of sex' requires a showing that 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed . . .'" [23, at 915]. Since both the husband and wife in this case were subjected to requests for sexual favors, the court found "neither was subjected to disadvantageous terms or conditions of employment to which members of the other sex were not exposed" [23, at 915]. The Seventh Circuit Court of Appeals affirmed the lower court decision, stating: "We do not think, however, that it is anomalous for a Title VII remedy to be precluded when *both* sexes are treated badly. Title VII is predicated on discrimination. Given this premise, requiring disparate treatment is consistent with the statute's purpose of preventing *such* treatment" [25, at 404].

Not all courts agree that such behavior doled out to both men and women creates a liability loophole for the employer. In *Shepherd v. Slater Steels Corporation,* the plaintiff testified that the man who harassed him had also exposed himself to a

female employee [26]. In addition, he testified that he believed the harasser liked both men and women and would have harassed him regardless of his gender. The court determined, however, that "[w]hatever *beliefs* Shepherd may have as to Jemison's sexual orientation and his propensity to harass women as well as men are to a large extent irrelevant; what matters is whether Jemison in fact did sexually harass members of both genders" [26, at 1011]. The court felt the idea that Jemison harassed women at the plant in the same way and to the same degree that he harassed Shepherd was "simply unfounded" [26, at 1011]. The court was able to conclude "that Jemison harassed Shepherd sexually because he is male" [26, at 1012].

In a similar case, *Merritt v. Delaware Port Authority,* the defense specifically attempted "to avail itself of the so-called 'equal opportunity harasser' defense" [27, at *4]. The court cited the opinion in *Holman* as standing for the position that there can be no discrimination against members of one sex as compared to the other sex when both men and women are equally harassed [27]. However, the court agreed that a question existed about whether Pilla, the harasser, treated men and women differently in the workplace. Although the record indicated that Pilla engaged in sexual conduct of an inappropriate nature in the workplace toward the plaintiffs, other males, and other women, the court cited *Shepherd* as the pertinent precedent [27]. It is clear that the *Oncale* decision confused the issue of whether a plaintiff can maintain a Title VII case based on sex discrimination when both men and women are harassed by the same individual.

CONCLUSION

A perusal of the cases decided since *Oncale* could lead an observer to wonder whether the courts were trying to expand, clarify, or limit the coverage of Title VII. In their interpretations of the U.S. Supreme Court opinion in *Oncale,* some courts are using it primarily as a stick to beat down potential claimants rather than as a carrot to encourage workers to sue. As a result of the interpretation of the "because of sex" requirement since *Oncale,* cases that once would have been compensable under Title VII are no longer covered. Since *Oncale* makes it clear that not all offensive behavior is actionable, glaring inconsistencies exist, such as the loophole currently available to the bisexual harasser. Similarly, egregious verbal and physical harassment is still permissible under Title VII if the victim is harassed due to his/her sexual orientation or sexuality. Also, despite the expansion of coverage to same-sex harassment, it is not clear whether the courts are applying similar treatment to victims of same-sex harassment as to victims of more traditional harassment.

To deal with discrimination based on sexual orientation, Congress must amend Title VII or pass new legislation to cover these claims. Discrimination based on sexual orientation is prohibited in the European Union. However, even if legislation was passed to cover such claims, it still would not remedy all the

inconsistencies in the treatment of discrimination because courts tend to read the wording of such legislation very narrowly. For example, the courts have been reluctant to expand coverage of Title VII despite the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins,* where a claimant who suffered adverse employment consequences for not meeting social stereotypes was found to have a claim under Title VII [28]. Many claimants today are arguing a similar "sex-plus" theory without relief. However, legislation to bring the United States in line with other countries that prohibit the type of invidious discrimination Bibby and Higgins suffered at work would be a good start.

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ENDNOTES

1. *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75 (1998).
2. *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1973).
3. *Ellison v. Brady,* 924 F. 2d 872 (9th Cir. 1991) (using the standard of a reasonable woman).
4. Compare, *Rabidue v. Osceola Refining Co.,* 805 F. 2d 611 (6th Cir. 1986) (requiring serious effect on psychological well-being), with *Ellison v. Brady* [3] (which rejected such a requirement).
5. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993).
6. See, *Oncale v. Sundowner Offshore Services, Inc.,* 83 F. 3d 118 (5th Cir. 1996); *Garcia v. Elf Atochem North America,* 28 F. 3d 446 (5th Cir. 1994).
7. See, *Wrightson v. Pizza Hut of America, Inc.,* 99 F. 3d 138 (4th Cir. 1996); *Fredette v. BVP Management Associates,* 112 F. 3d 1503 (11th Cir. 1997).
8. *Yeary v. Goodwill Indus.-Knoxville, Inc.,* 107 F. 3d 443 (6th Cir. 1997).
9. See, *Doe v. City of Belleville,* 119 F. 3d 563 (7th Cir. 1997), *cert. granted; judgment vacated,* 523 U.S. 1001 (1998); *Quick v. Donaldson Co. Inc.,* 90 F. 3d 1372 (8th Cir. 1996).
10. *Oncale v. Sundowner Services, Inc.,* 1995 WL 133349, 67 Fair. Empl. Prac. Cas. 769 (D. La. 1995).
11. *Oncale v. Sundowner Services, Inc.,* 83 F. 3d 118 (5th Cir. 1996).
12. *Bacon v. Art Institute of Chicago,* 6 F. Supp. 2d 762 (D.Ill. 1998).
13. *Brewer v. Hillard,* 15 S.W. 3d (Ky.App. 2000).
14. *Llampallas v. Mini-Circuits, Lab. Inc.,* 163 F. 3d 1239 (1998), *rehearing & rehearing en banc denied,* 178 F. 3d 1305 (11th Cir. 1999), *cert. denied,* 528 U.S. 930, 120 S.Ct. 327, 145 L.Ed. 2d 255 (1999).
15. *Willis v. Marion County Auditor's Office,* 118 F. 3d 542 (7th Cir. 1997).
16. See, e.g., *Hopkins v. Baltimore Gas & Ele. Co.,* 77 F. 3d 745 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons,* 876 F. 2d 69 (8th Cir. 1989).
17. *Simonton v. Runyon,* 50 F.Supp. 2d 159 (D.N.Y. 1999).
18. *Bibby v. Philadelphia Coca Cola Bottling Co.,* 85 F. Supp. 2d 509 (D.Pa. 2000).

19. *Higgins v. New Balance Athletic Shoe, Inc.,* 21 F. Supp. 2d 66 (D.Me. 1998).
20. See, *Doe v. City of Belleville,* 119 F. 3d 563 (7th Cir. 1997), *cert. granted; judgment vacated,* 523 U.S. 1001 (1998).
21. *Klein v. McGowan,* 36 F. Supp. 2d 885 (1999).
22. *Klein v. McGowan,* 198 F. 3d 705 (8th Cir. 1999).
23. *Holman v. State of Indiana,* 24 F. Supp. 2d 909 (D.Ind. 1998).
24. *Steiner v. Showboat Operating Co.,* 25 F. 3d 1459 (9th Cir. 1994).
25. *Holman v. State of Indiana,* 211 F. 3d 399, 404 (7th Cir. 2000).
26. *Shepherd v. Slater Steels Corp.,* 168 F. 3d 998 (7th Cir. 1999).
27. *Merritt v. Delaware River Port Authority,* 1999 WL 285900 (D.Pa.).
28. *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).

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