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COMMENT: *ONCALE V. SUNDOWNER OFFSHORE SERVICES;* THE POSSIBILITY, AND EFFECT, OF SAME-SEX DISCRIMINATION UNDER TITLE VII

BRIAN D. BOREMAN
Widener University School of Law, Harrisburg, Pennsylvania

ABSTRACT

Same-sex sexual harassment claims have increased dramatically in recent years. Until 1998, the issue of whether such claims were actionable under Title VII of the Civil Rights Act divided federal circuit courts. In 1998, however, the Supreme Court, in *Oncale v. Sundowner Offshore Services,* ruled Title VII vests cognizable interests in such claims. This comment recites the legislative and judicial history of sex discrimination before focusing on same-sex sexual harassment and the practical implications of *Oncale.*

Title VII of the Civil Rights Act of 1964 protects both male and female employees from sexual harassment in the workplace by providing the harassed employee with a cause of action against the harasser. To establish a valid claim of sexual harassment under Title VII, the harassed employee must prove the existence of the following four elements: 1) the employee belongs to a protected group; 2) the employee was subject to unwelcome sexual advances; 3) the harassment occurred because of the employee's sex; and 4) the harassment was sufficiently severe to create a hostile work environment that altered the conditions of employment [1].

However, what if the harassed is of the same sex as the harasser? Does Title VII extend to protect such employees? Can a claim of same-sex sexual harassment by a heterosexual employee against a heterosexual employer satisfy the third element of a harassment claim, which states that the harassment must occur because of the employee's sex? Litigation over these questions has increased significantly over the past ten years, and until 1998 courts had remained divided

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on the issue of whether such harassment violates Title VII [2]. Some courts had maintained same-sex sexual harassment is never actionable as sex discrimination under Title VII [3]. Other courts had concluded the harassed may bring a cause of action only if the harasser was motivated by sexual desire when engaging in the particular conduct [4]. Still, other courts had decided that Title VII forbids sexual harassment regardless of the sex of the individuals involved [5]. In *Oncale v. Sundowner Offshore Services,* the United States Supreme Court finally reconciled this division within the circuits by ruling that Title VII prohibits discrimination in the form of same-sex sexual harassment [6]. But before discussing the reasoning of the *Oncale* Court and the affects of its decision, a review of the prior judicial decisions interpreting Title VII is necessary.

TITLE VII AND THE EEOC GUIDELINES

Congress promulgated Title VII of the Civil Rights Act of 1964 in an attempt to reduce discrimination in the workplace. In pertinent part, Title VII states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to 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].

Unfortunately, the legislature added the prohibition against sexual discrimination to Title VII at the last minute on the floor of the House of Representatives [8]. Opponents to the inclusion of "sex" in Title VII espoused that discrimination based on sex is different from the other types of discrimination already mentioned in the proposed statute and, thus, separate legislation was required. The opposition was defeated, and the inclusion of "sex" as a basis for discrimination passed quickly via amendment. As a result, little history exists regarding the legislative intent for promulgating the statute with sex discrimination. Nonetheless, a broad interpretation of Title VII seems to indicate that Congress intended to create a "harmonious workplace which would improve production and the quality of the employees' lives" [9].

To help determine the type of sexual discrimination prohibited by Title VII, courts often refer to the 1980 guidelines published by the Equal Employment Opportunity Commission (EEOC). Although they are not a binding authority on the courts, these guidelines act as a helpful resource because of the substantial body of knowledge from which the EEOC draws its information [10]. The EEOC guidelines confirm that "[h]arassment on the basis of sex is a violation of section 703 of Title VII." Furthermore,

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment [11].

Subsections (1) and (2) of § 1604.11(a) encompass *quid pro quo* sexual harassment, which is evinced when an employer conditions employment benefits on sexual favors. Subsection (3), however, focuses on the workplace environment, instead of employment benefits. Courts have termed this type of sexual harassment "hostile environment" harassment. Thus, the EEOC guidelines assert that both *quid pro quo* sexual harassment and sexual harassment that creates a "hostile environment" violate Title VII.

THE DEVELOPMENT OF SEXUAL HARASSMENT FROM *MERITOR* TO *ONCALE*

Meritor Savings Bank v. Vinson

The United States Supreme Court first decided a Title VII, sexual harassment inquiry in *Meritor Savings Bank v. Vinson* [12]. In this case, Mechelle Vinson, a teller at the Meritor Savings Bank, alleged that Sidney Taylor, her supervisor, sexually harassed her over a period of three years. Vinson asserted she refused Taylor's sexual advances at first, but eventually engaged in sexual relations with him approximately forty to fifty times because she feared losing her job. Additionally, Vinson claimed Taylor "fondled her in front of other employees, . . . exposed himself to her, and even forcibly raped her on several occasions." Vinson stated she subsequently quit her job as a result of Taylor's conduct. Taylor denied all of Vinson's accusations and stated that the two never engaged in any sexual relations. The trial court, unfortunately, did not resolve the conflicting testimony regarding the presence of a sexual relationship and concluded Vinson had no cause of action under Title VII. The Court of Appeals reversed the decision and ruled Taylor's actions constituted "hostile environment" harassment protected by Title VII. Subsequently, the Supreme Court granted *certiorari* to decide, among other issues, whether Title VII protects against "hostile environment" sexual harassment [12, at 59-63].

Then-Justice Rehnquist, writing for a unanimous Court, stated Title VII protects employees from both *quid pro quo* and "hostile environment" harassment [12, at 64-65]. *Quid pro quo* harassment involves "acquiescence to sexual demands [as] a condition of employment or advancement," which must be

identified by a tangible or economic loss [13, p. 586]. Comparatively, "hostile environment" harassment is actionable if it is sufficiently severe or pervasive "to alter the [terms], conditions, [or privileges] of [the victim's] employment and create an abusive working environment" [12, at 67]. The Court ruled the phrase "terms, conditions, or privileges of employment" used in Title VII includes not only economic interests, but entails the "entire spectrum of disparate treatment of men and women" in employment [12, at 64]. Therefore, a plaintiff does not need to show a direct economic loss resulting from "hostile environment" harassment to have an actionable claim under Title VII; however, a mere showing of offensive conduct that does not effect terms, conditions, or privileges of employment does not invoke the protection of Title VII.

Lastly, the Court rejected the argument that sexual harassment is not actionable if the harassed "voluntarily" engages in the conduct. The "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome' " [12, at 68]. Thus, the fact that Vinson may have "voluntarily" engaged in sexual relations with Taylor (i.e., Taylor did not physically force Vinson to participate in sex against her will) does not preclude a sexual harassment action under Title VII [14]. The Court reversed the decision of the appellate court on other grounds and remanded the case to the trial court for a determination of whether Vinson had a valid claim of "hostile environment" sexual harassment [12, at 73].

Harris v. Forklift Systems

In *Harris v. Forklift Systems, Inc.*, the Supreme Court revisited the definition of "hostile environment" harassment (termed "abusive work environment" in this decision) it had created in *Meritor* [15]. In *Harris,* Charles Hardy, the president of a forklift company, insulted Teresa Harris, a manager at the company, by making her the target of unwanted derogatory, sexual remarks for three years. Harris eventually quit her job and instituted an action against the company, claiming Hardy's comments violated Title VII by creating a hostile work environment. The trial court dismissed the action even though it concluded the comments offended Harris and would offend a reasonable person [16]. The court, however, opined the comments did not rise to the level of creating an abusive work environment because such comments were not "so severe as to be expected to seriously affect [Harris'] psychological well-being" [15, at 19-20].

The Supreme Court, in another unanimous opinion, reaffirmed its previous decision in *Meritor* by concluding conduct must affect the terms, conditions, or privileges of employment to be actionable under Title VII; conduct that is merely offensive is not actionable. The Court, however, stated the particular conduct does not need to cause a tangible physical or psychological injury. Title VII offers protection before "harassing conduct leads to a nervous breakdown." The Court reasoned that a hostile work environment, even if it "does not seriously affect employees' psychological well-being, can and often will detract from employees'

job performance, discourage employees from remaining on the job, or keep them from advancing in their careers" [15, at 22].

To determine whether particular conduct rises to a level of harassment protected by Title VII, the Court used a reasonable-person standard. In addition to the reasonable-person standard, the harassed employee must also "subjectively perceive the environment to be abusive." Thus, to have a cause of action under Title VII, a plaintiff must show the conduct was subjectively perceived to create a hostile work environment *and* that a reasonable person, standing in the shoes of the harassed, would perceive the same result [15, at 21-22].

Lastly, the Court opined a trier-of-fact must examine all available facts regarding the situation before determining the reasonableness of the perceived hostile environment. Moreover, the Court listed the following factors to consider when making a determination: "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" [15, at 23]. This analysis is consistent with the EEOC guidelines on sexual harassment. The guidelines state that when "determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances" [11, § 1604.11(b)].

As such, the Court determined Hardy's comments gave Harris a potential claim of sex discrimination under Title VII. Therefore, the Court remanded the case to the trial court for a determination on the facts.

A Split in the Circuits

Through *Meritor* and *Harris* the Supreme Court established case law for the lower courts to follow when deciding Title VII, sexual harassment issues. The Court, however, never mentioned whether, and to what extent, Title VII protects an employee from same-sex sexual harassment. Therefore, the absence of any binding precedent on same-sex sexual harassment, coupled with the lack of information regarding the legislative intent for promulgating Title VII, created inconsistent court decisions on the issue until 1998.

The Fifth Circuit: Prohibiting Same-Sex Discrimination Under Title VII

The Fifth Circuit had categorically denied that same-sex sexual harassment claims are actionable under Title VII. In *Garcia v. Elf Atochem North America,* Freddy Garcia, a male plant engineer, filed a sexual harassment claim against his male supervisor after the supervisor repeatedly "grabbed [Garcia's] crotch" while making sexually explicit gestures [3, at 448, Garcia]. With minimal explanation for its decision, the Fifth Circuit Court of Appeals ruled harassment, even if immersed in sexual overtones, is not actionable under Title VII if made by a male employer against a male employee [17]. In the opinion, the court cited an

unpublished decision, decided by the same court one year earlier, that held " '[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones' " [3, at 451-452, Garcia].

Proponents of the Fifth Circuit's rejection of same-sex sexual harassment claims under Title VII assert that Congress never contemplated prohibiting such conduct when enacting the statute; instead, Congress intended only to prevent inequality between the sexes in the workplace. Furthermore, permitting same-sex harassment claims under Title VII "would render the statute's casual language—*because of sex*—superfluous." Therefore, allowing a same-sex cause of action would impermissibly broaden the scope of Title VII [1, p. 947].

More recently, in *Oncale v. Sundowner Offshore Services, Inc.* (1996), the Fifth Circuit Court of Appeals granted summary judgment in favor of the defendant employer because it held same-sex sexual harassment is not a cognizable under Title VII. The court did not review the merits of the case and relied on *Garcia* to refute the employee's claim of sexual harassment [6]. As discussed later in this comment, the Supreme Court granted *certiorari* and ultimately concluded the Fifth Circuit's categorical denial of Title VII causes of action for same-sex sexual harassment suits was improper.

The Fourth Circuit: Was the Conduct Motivated by Sexual Desire?

In contrast to the Fifth Circuit's absolute refusal to afford Title VII protection to same-sex sexual harassment claims, the Fourth Circuit had allowed such claims only if the harasser's conduct was motivated by sexual desire. In *McWilliams v. Fairfax County Board of Supervisors,* the plaintiff, a male employee at a transportation agency, brought suit against his fellow male employees and the transportation agency for sex discrimination prohibited by Title VII [4, at 1193, McWilliams]. The plaintiff alleged the other employees physically and verbally sexually harassed him. The Fourth Circuit Court of Appeals ruled the plaintiff did not have a cause of action under Title VII because both the plaintiff and his coworkers were heterosexual; therefore, the conduct of the coworkers, albeit lewd and perverse, was not based on sex. Thus, the court reasoned the prohibition against sex discrimination under Title VII does not include harassment involving heterosexuals of the same gender because the conduct would not be motivated by sexual desire [4, at 1195-1196, McWilliams].

In contrast, in *Wrightson v. Pizza Hut of America,* the Fourth Circuit permitted a heterosexual male employee's claim of sex discrimination against his homosexual male employer and coemployees [4, Wrightson]. In *Wrightson,* the plaintiff alleged on numerous occasions the homosexual employer and coemployees would sexually harass him and the other heterosexual male employees with sexual propositions [4, at 140, Wrightson]. Furthermore, the record indicated the harassers propositioned only the male employees and not any of the female

employees. Therefore, the court concluded harassment was gender-related, and as such, draws the protection of Title VII. Thus, the court's opinion allowed a Title VII cause of action for same-sex sexual harassment only because the particular conduct seemed to be motivated by sexual desire [4, at 142-143, Wrightson].

The Seventh Circuit: Recognizing Same-Sex Discrimination Under Title VII

Directly contrary to the conclusions of the Fifth and Fourth Circuits, the Court of Appeals for the Seventh Circuit, in *Doe v. Belleville,* determined same-sex sexual harassment is actionable under Title VII regardless of the individuals' sex and sexual dispositions. Thus, the Seventh Circuit created a more expansive view for Title VII claims than any other federal circuit had done. In *Belleville,* two heterosexual male employees alleged their heterosexual male employer repeatedly harassed them by taunting them with sexual insults and sexually assaulting them [5, at 566-567]. However, rather than "grappling with the question of whether harassment is 'because of sex' in same-sex actions," the court compared same-sex harassment claims to other types of discrimination claims [18]. The court noted that no inquiry into whether harassment occurred "because of sex" ever happens when a female employee accuses a male employer of harassment [5, at 574].

Additionally, the court concluded whenever a person sexually harasses an individual of the same sex, a presumption arises that the conduct occurred "because of the sex" of the harassed victim. Therefore, because same-sex sexual harassment claims are presumed to have occurred "because of sex," the court did not engage in a lengthy analysis of the harasser's motives. Instead, the court concluded a plaintiff has a cause of action for sex discrimination under Title VII resulting from same-sex sexual harassment [5, at 566, 577-578].

As illustrated in the previous sections, no consensus among the federal circuits existed regarding whether a claim of same-sex sexual harassment is actionable under Title VII. The Supreme Court, however, reconciled the split between the circuits when it decided *Oncale* [19].

ANALYSIS: *ONCALE v. SUNDOWNER OFFSHORE SERVICES*

In *Oncale v. Sundowner Offshore Services, Inc.,* the United States Supreme Court ruled same-sex sexual harassment in the workplace is actionable as sex discrimination under Title VII of the Civil Rights Act of 1964 [19]. The Court, in a unanimous decision authored by Justice Scalia, determined that Title VII does not preclude a claim of sexual harassment even if the harasser is the same sex as the harassed and does not actually wish to engage in sexual relations with the harassed, thus refuting the analyses of the Fourth and Fifth Circuits. Additionally,

the Court reiterated three points from prior Court precedent to consider when deciding same-sex harassment cases.

In this case, the petitioner, Joseph Oncale, worked as a roustabout on an eight-man crew for the respondent, Sundowner Offshore Services, on an oil platform. Oncale claimed that on several occasions John Lyons and Danny Pippen, two of the supervisors on the oil platform, sexually harassed him. More specifically, he alleged that Lyons and Pippen "forcibly subjected him to sex-related, humiliating actions," physically assaulted him in a sexual manner, and threatened to rape him. Oncale subsequently complained about these actions to other supervisors; however, they took no remedial steps to alleviate the problem [19, at *3-4]. When the harassment did not subside, Oncale resigned, stating the resignation was due to the sexual harassment [20].

After resigning, Oncale filed a claim against the respondent in the United States District Court for the Eastern District of Louisiana for same-sex sexual harassment. The court granted summary judgment in favor of the defendants (respondents) and dismissed the case after finding same-sex harassment was not actionable under Title VII. Oncale appealed the decision to the Fifth Circuit Court of Appeals. The Court determined that *Garcia v. Elf Atochem North America,* which did not recognize same-sex sexual harassment as an actionable claim under Title VII [3, at 451-452, Garcia], was binding precedent and affirmed the decision of the trial court [6]. Subsequently, the United States Supreme Court granted *certiorari.*

The Supreme Court recognized the circuit courts had not been able to reach a consensus on whether same-sex sexual harassment is actionable under Title VII. The Court explained that the Fifth, Fourth, and Seventh Circuits have held that same-sex sexual harassment claims are 1) never cognizable under Title VII, 2) actionable under Title VII only if the plaintiff can prove the harasser is motivated by sexual desire, and 3) actionable regardless of the harasser's sex or sexual desire [3-5]. The Court endorsed the view adopted by the Seventh Circuit, concluding no justification in statutory language or precedent exists for the outright denial of same-sex harassment claims under Title VII [19, at *8]. The Court opined: " '[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group' " [21].

In reaching this decision, the Court first looked to the language of Title VII, which in pertinent part states it is unlawful "to discriminate against any individual [22] with respect to his compensation, terms, [and] conditions . . . because of such individual's . . . sex" [7]. Next, the Court evaluated prior precedent to define words such as "terms" and "conditions" of employment. The Court, on previous issues, had defined these words broadly, thus covering "the entire spectrum of disparate treatment of men and women in employment" [19, at *5]. As such, whenever intimidation, ridicule, and insult is sufficiently severe to " 'alter the

conditions of the victim's employment and create an abusive working environment, Title VII is violated' " [23].

To help lower courts evaluate same-sex sexual harassment inquiries, the Court reaffirmed three points mentioned previously in other cases decided by the Court. The first point states that the conduct must actually constitute discrimination "because of sex." Conduct "merely tinged with offensive sexual connotations" does not create a cause of action for sex discrimination under Title VII [19, at *10]. Thus, as enunciated in prior precedent, the critical issue remains " 'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed' " [24]. The prohibition of same-sex sexual harassment, however, does not require "asexuality [or] androgyny in the workplace" [19]. Instead, Title VII forbids only conduct that would alter the terms or conditions of a person's employment. An example of same-sex harassment that receives the protection of Title VII would include a situation where a female employer verbally harasses a female employee with sexually explicit insults to humiliate or frustrate the employee [19, at *10-11].

The second point refutes the proposition that sexual desire by the harasser is a required element of sexual harassment. Although this proposition is often apparent in sexual harassment cases where a member of one sex harasses a member of the opposite sex, the "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." Thus, a person claiming same-sex sexual harassment does not need to prove the harasser is a homosexual to support an actionable claim under Title VII [19, at *9-10].

With the third point, the Court directed trial courts to give "careful consideration [to] the social context in which [the] particular behavior occurs and is experienced by its target" [19, at 1002]. Thus, the "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position" [19, at 1002]. Furthermore, the factfinder must look to the totality of the circumstances to determine the context of the particular behavior. The Court then created a hypothetical instance where a football coach slaps a football player on the buttocks before heading onto the field to illustrate an example where sexual harassment is absent due to the social context of the coach's behavior. If the coach, however, often enters his office and slaps his male secretary on the buttocks, the secretary may likely have an actionable claim for sex discrimination under Title VII because of same-sex sexual harassment [19, at *11-12].

After determining same-sex sexual harassment is actionable under Title VII, the Court reversed the judgment of the Fifth Circuit Court of Appeals. Furthermore, because the Court concluded a reasonable factfinder could determine sexual harassment was present from the facts presented, it remanded the case for further proceedings [19, at *12].

THE PRACTICAL IMPLICATIONS OF *ONCALE*

To what extent does *Oncale* actually affect the life of someone who has been the target of sexual harassment at work by an employer, or even a coemployee, of the same sex? Some may view the decision as unnecessarily superfluous in providing a harassed employee with yet another cause of action against an employer [25]. Without the assistance of Title VII, a harassed victim would have an actionable claim against the harasser vis-à-vis the tort theories of assault, battery, and intentional infliction of emotional distress. Furthermore, the victim could possibly have a cause of action against an employer for breach of an express or implied employment contract. Thus, the harassed employee has other avenues for legal redress against a harasser.

It seems, however, that the Supreme Court's decision to allow Title VII protection for same-sex sexual harassment claims is both equitable and conscionable for the injured party. By promulgating Title VII, the legislature sought to create equity in the workplace. But if courts limit the legal redress Title VII permits, they will be frustrating the main purpose of the statute—to create equality. Thus, excluding same-sex sexual harassment claims from Title VII coverage would subvert efforts to improve the workplace and, additionally, obviate Congress' intentions in enacting the statute.

Another benefit of the *Oncale* decision is that courts will not have differing levels of liability for employers based on the employers' sexual orientations. The following hypothetical scenario will best prove this point. A homosexual male employer constantly makes unwanted sexual innuendoes and propositions to a heterosexual male employee working in the same office. The employee informs the employer he does not appreciate the remarks and asks the employer to stop. Initially the employer agrees; however, within a few weeks the employer reinitiates his harangue of verbal harassment. In addition to the verbal harassment, however, the employer commences to physically touch the employee in sexually explicit ways. As a result, the employee's concentration and desire to work at the company fades and eventually he resigns. Under pre-1998 Fifth Circuit jurisprudence, the employee would have no cause of action available to him under Title VII. If, however, all the facts remained the same, with the exception of substituting a male heterosexual employer and a female heterosexual employee into the hypothetical scenario, the results would change drastically. No court or legal scholar would doubt the female employee would have an actionable claim for sex discrimination under Title VII resulting from harassment caused by a "hostile work environment." Therefore, although both situations create an abusive environment for the employee, a cause of action under Title VII would arise only for the female employee. As a result, the homosexual employer would be in a "better position" than the heterosexual employer because of his sexual orientation. Arguably, the homosexual employer may openly disregard the laws

prohibiting sexual harassment in the workplace without fear of an employee's retaliation through Title VII.

The *Oncale* decision also prevented similar outcomes in the Fourth Circuit. The Fourth Circuit asserted that a harasser, in a same-sex harassment claim, must be motivated by sexual desires. As illustrated in the previous hypothetical scenario, the possibilities for the disparate treatment of individuals based on their sexual orientation are enormous. Under pre-1998 Fourth Circuit jurisprudence, a homosexual employer would face liability for harassment perpetrated on an employee of the same sex because the court would presume the particular conduct was motivated by sexual desire. A heterosexual employer, however, would not incur liability under Title VII for sexual harassment inflicted upon an employee of the same sex because such actions would not be motivated by any type of sexual desire. Regardless of the sexual orientation of the harasser, the victim will undoubtedly incur the same harm. Thus, any holding contrary to *Oncale* regarding Title VII protection afforded to same-sex sexual harassment would lead to the disparate treatment of employers based on their sexual preferences.

A final argument against the inclusion of "motivated by sexual desire" as an element for same-sex sexual harassment asserts that most harassing conduct is not committed for sexual gains, but instead, is committed to gain power over a subordinate [26]. Thus, because the harasser is motivated by power, any type of sexual harassment would rarely meet the prerequisite that the harasser be motivated by sexual desire.

Based on the foregoing reasons, the Supreme Court's decision in *Oncale* was correct. The decision allowed the harassed to seek protection and obtain legal redress against his/her harassers through Title VII, helped establish a basis for creating equality in the workplace, and decreased the potential for disparate treatment of employers with different sexual orientations.

THE FUTURE OF SAME-SEX SEXUAL HARASSMENT

The effect of *Oncale* on the judicial system and public as a whole will remain unknown until courts begin to face similar issues through litigation. As of August 1998, the Supreme Court has had two opportunities to review same-sex sexual harassment cases. The Court vacated and remanded a Seventh Circuit case with instructions to reconsider it in light of *Oncale*. In another instance, the Court declined to hear a same-sex sexual harassment case from the Eleventh Circuit, thus implicitly allowing the case to proceed to trial at the district court level [27]. Regardless of the outcome of these cases at the lower judicial levels, the Supreme Court, through its unanimous decision, appears determined to continue to recognize same-sex harassment claims as actionable under Title VII.

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Brian D. Boreman is a third year law student at Widener University School of Law and is an editor of the *Law Review.*

ENDNOTES

1. Deb Lussier, Oncale v. Sundowner Offshore Services, Inc., and the Future of Title VII Sexual Harassment Jurisprudence, *Boston College Law Review, 39,* pp. 937, 943-944, 1998.
2. Melisa C. George, Note, Because of Sex: Same-Sex Sexual Harassment Claims Under Title VII of the Civil Rights Act of 1964, *Law & Psychology Review, 22,* pp. 251-252, 1998.
3. See, e.g., *Garcia v. Elf Atochem N. Am.,* 28 F.3d 446 (5th Cir. 1994) (holding that Title VII does not provide a cause of action for a male employee who was sexually harassed by a male employer); *Goluszek v. H. P. Smith,* 697 F.Supp. 1452 (N.D. Ill. 1988) (concluding that Title VII does not extend to sexual harassment by male coworkers against one male employee because the employees did not create an "anti-male" environment, and thus, did not impermissibly oppress a protected group).
4. See, e.g., *McWilliams v. Fairfax County Bd. of Supervisors,* 72 F.3d 1191 (4th Cir. 1996) (ruling that same-sex harassment is actionable under Title VII only if the plaintiff can prove that the harasser is homosexual); *Wrightson v. Pizza Hut of Am., Inc.,* 99 F.3d 138 (4th Cir. 1996) (concluding that a plaintiff has an incontestable cause of action for same-sex discrimination under Title VII if the harasser is motivated by sexual desires).
5. See, e.g., *Doe v. Belleville,* 119 F.3d 563 (7th Cir. 1997) (holding that Title VII includes same-sex sexual harassment as a form of prohibited sex discrimination).
6. *Oncale v. Sundowner Offshore Serv., Inc.,* 83 F.3d 118, 118-19 (5th Cir. 1996).
7. 42 U.S.C. § 2000e-2(a)(1) (1994) (emphasis added).
8. 110 Cong. Rec. 2577-2584 (1964).
9. See *Ellison v. Brady,* 924 F.2d 872, 880-81 (9th Cir. 1991) (interpreting Congress' intent for promulgating Title VII, in part, to prohibit "hostile environment" discrimination).
10. See, generally, 45 Fed. Reg. 74676 (1980).
11. 29 C.F.R. § 1604.11(a) (1998).
12. *Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986).
13. Mark A. Rothstein and Lance Liebman, Employment Law (4th ed., 1998), Foundation Press, New York.
14. But cf. *Herman v. Western Fin. Corp.,* 869 P.2d 696 (Kan. 1994) (ruling that no cause of action under Title VII exists if the relationship between the individuals is truly consensual).
15. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17 (1993).
16. The trial court even recognized that this was "a close case" regarding whether Harris had an actionable claim under Title VII against the company [15, at 22].
17. But see *Pritchett v. Sizeler Real Estate Management Co.,* No. CIV.A. 93-2351, 1995 WL 241855, at *2 (E.D. La. April 25, 1995) (ruling that the Fifth Circuit's rejection of same-sex harassment claims in *Garcia* was mere *dicta;* therefore, the court denied the

defendant's motion for summary judgment because the plaintiff did state a claim for which relief could be granted).

18. M. Clayborn Williams, Note, Title VII and Same-Sex Sexual Harassment: What is the Proper Theoretical Basis for a Sexual Harassment Claim?, *American Journal of Trial Advocacy, 21,* pp. 651-663, 1998.
19. *Oncale v. Sundowner Offshore Serv., Inc.,* No. 96-568, 1998 U.S. LEXIS 1599, at *12 (U.S. 1998).
20. Upon leaving, Oncale requested his pink slip "reflect that he 'voluntarily left due to sexual harassment and verbal abuse' " [19, at *4 (citation omitted)].
21. [19, at *6 (quoting *Castaneda v. Partida,* 430 U.S. 482, 499 (1977))].
22. The Title VII prescription against discrimination "because of sex" protects both men and women [19, at *6 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 682 (1983))].
23. [19, at *5-6 (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993))].
24. [19, at *10 (quoting *Harris,* 510 U.S. at 25 (Ginsburg, J., concurring))].
25. Shortly after the *Oncale* decision, the Court decided a pair of cases on the issue of employer liability for sexual harassment committed by a supervisor against an employee. A discussion regarding the Court's rationale is outside the scope of this comment. To summarize, however, the Court ruled an employer may be held vicariously liable for sexual harassment perpetrated by a supervisor, even if the employee cannot establish that the employer acted negligently. See *Burlington Indus., Inc. v. Ellerth,* 118 S. Ct. 2257 (1998); *Faragher v. Boca Raton,* 118 S. Ct. 2275 (1998).
26. Daniel Goleman, Sexual Harassment: About Power, Not Lust, *New York Times,* Oct. 21, 1991, p. C1.
27. Robert Fitzpatrick, Review of Supreme Court's Employment and Other Significant Cases and Emerging Employment Issues, *American Law Institute, 6,* p. 11, 1998.

Direct reprint requests to:

Brian D. Boreman
4312 Main Street
Apt. 201
Philadelphia, PA 19127