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**Employment Discrimination Law—Title VII and Same-Sex Sexual Harassment—Closing the Great Divide: What to do in a Same-Sex Sexual Harassment Case. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998).**

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EMPLOYMENT DISCRIMINATION LAW—TITLE VII AND SAME-SEX SEXUAL HARASSMENT—CLOSING THE GREAT DIVIDE: WHAT TO DO IN A SAME-SEX SEXUAL HARASSMENT CASE. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998).

I. INTRODUCTION

In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>1</sup> the United States Supreme Court decided that same-sex sexual harassment is a form of sex discrimination; it then held that sex discrimination comprised of same-sex sexual harassment is actionable under Title VII of the Civil Rights Act of 1964.<sup>2</sup> The decision ended a division among lower courts regarding this issue.<sup>3</sup>

Part II of this note examines the facts related to the *Oncale* decision. Part III reviews the legislative history regarding Title VII's inclusion of discrimination "because of . . . sex," and it analyzes the United States Supreme Court's recognition of sexual harassment as a category of sex discrimination under Title VII, noting that sexual harassment law grew out of racial harassment law. Part III also discusses the two general types of sexual harassment claims under Title VII—hostile environment and quid pro quo—and it examines three different positions circuit and district courts have taken regarding the actionability of same-sex sexual harassment claims in the last few years.<sup>4</sup> After evaluating the Court's reasoning in Part IV, this note considers the significance and future implications of the *Oncale* decision in Part V.

II. FACTS

Congress enacted Title VII of the Civil Rights Act of 1964<sup>5</sup> to eliminate employment discrimination.<sup>6</sup> Title VII prohibits an employer from discriminating against an employee based on the employee's sex, among other statuses.<sup>7</sup>

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1. 118 S. Ct. 998 (1998).

2. *See id.* at 1003.

3. *See* Corey Taylor, Comment, *Same-Sex Sexual Harassment in the Workplace Under Title VII: The Legal Dilemma and the Tenth Circuit Solution*, 46 U. KAN. L. REV. 305, 314-19 (1998).

4. The author acknowledges that in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998), the United States Supreme Court stated that although they are not irrelevant to Title VII litigation, the labels quid pro quo and hostile work environment are not controlling for purposes of establishing employer liability under Title VII. *Ellerth* was decided over three months after *Oncale*, and while it modified *Oncale*, *Ellerth* did not overrule *Oncale* nor diminish the importance of the *Oncale* decision in the area of sexual harassment/sex discrimination law.

5. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-532, § 703(a), 78 Stat. 255 (codified as amended in 42 U.S.C. § 2000e-2(a) (1994)).

6. *See* 42 U.S.C. § 2000e-2(a)(1), (a)(2) (1994).

7. *See id.* "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or

The United States Supreme Court has held that Title VII's protection against employment discrimination based on sex encompasses sexual harassment claims.<sup>8</sup> In 1997, the United States Supreme Court faced a major issue regarding Title VII—whether sex discrimination comprised of same-sex sexual harassment is actionable under the statutory language and provisions of Title VII.<sup>9</sup>

The Court considered the case of Joseph Oncale (Oncale), who, in October of 1991, worked as a roustabout on an oil platform for Sundowner Offshore Services, Inc. (Sundowner).<sup>10</sup> He was a member of an eight-man crew.<sup>11</sup> Three of Oncale's co-workers, including his supervisor, subjected Oncale to a series of sex-related incidents.<sup>12</sup> Although he complained to the oil

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privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* Note that courts construe "sex" in the most narrow form of the word, referring only to discrimination on the basis of gender, not to sexuality or sexual preference such as homosexuality. See generally *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-330 (9th Cir. 1979).

8. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The Equal Employment Opportunity Commission (EEOC) guidelines state that sexual harassment in the workplace is a violation of Title VII. See 29 C.F.R. § 1604.11(a) (1993). Specifically, the guidelines state that "[u]nwelcome 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 . . . ." See *id.* at § 1604.11(a)(1).

9. See *Oncale*, 118 S. Ct. at 1003.

10. See *id.* at 1000. One amicus brief writer described the job on the oil platform as a "dangerous, isolated job in an all-male environment." See Amicus Brief, Brief of National Organization on Male Sexual Victimization, Inc. at 2, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568). A roustabout holds the lowest ranking position on an oil platform. See Brief for Respondent at 1, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568). Oncale got the job through Sundowner's Houma, Louisiana, office. See Brief for Petitioner at 4 n. 1, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568).

11. See *Oncale*, 118 S. Ct. at 1001. The eight-man crew included the platform's crane operator, John Lyons (Lyons), the platform's driller, Danny Pippen (Pippen), and Brandon Johnson (Johnson), a co-worker. See *id.* Lyons and Pippen had supervisory authority. See *id.* The crew worked offshore seven days at a time during which time they lived on one offshore platform and worked on another nearby oil platform. See Brief for Respondent at 1, *Oncale* (No. 96-568).

12. See *Oncale*, 118 S. Ct. at 1001. In the first and second incidents, which occurred on October 25 and 26, 1991, respectively, Lyons placed his penis on Oncale's head and arm. To facilitate Lyons's actions, Pippen restrained Oncale in the first incident, and Johnson restrained him in the second. See Brief for Respondent at 1-2, *Oncale* (No. 96-568). In the third incident, which occurred the night of October 26, 1991, Lyons and Pippen entered the shower with Oncale, and Lyons rubbed a bar of soap between Oncale's buttocks while Pippen again restrained Oncale. See *id.* at 2. During the first and third incidents, Lyons was saying that he was going to "f\*\*\* [Oncale] in [his] behind." See *id.* at 1-2.

platform's supervisory personnel, the company took no remedial action.<sup>13</sup> He eventually quit his job on the oil platform.<sup>14</sup>

Oncale filed a complaint against Sundowner, alleging that the employer discriminated against him in his employment because of his sex in violation of Title VII of the Civil Rights Act of 1964.<sup>15</sup> Sundowner argued that the conduct Oncale experienced constituted sexually charged male-on-male horseplay, not sex-based discrimination, as shown by the fact that Lyons picked on other crew-members.<sup>16</sup> Relying on the decision of the Fifth Circuit Court of Appeals in *Garcia v. Elf Atochem North America*,<sup>17</sup> the District Court for the Eastern District of Louisiana granted summary judgment for Sundowner.<sup>18</sup> On appeal, a panel of the Fifth Circuit Court of Appeals affirmed the district court's decision.<sup>19</sup> The United States Supreme Court granted certiorari and reversed the Fifth Circuit, holding that sex discrimination comprised of same-sex sexual harassment is actionable under Title VII.<sup>20</sup>

### III. BACKGROUND

This section first discusses the legislative history of Title VII's inclusion of discrimination "because of . . . sex." Second, it examines the Court's recognition of sexual harassment as a category of sex discrimination, noting that sexual harassment law grew out of racial harassment law. It also reviews the two general theories of sexual harassment. Third, this section analyzes the

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13. See *Oncale*, 118 S. Ct. at 1001. Oncale reported the harassment to the company's Safety Compliance Clerk, Valent Hohen. See *id.* Hohen told Oncale that Lyons and Phippen continuously picked on him as well, and called him a name suggesting homosexuality. See *id.* Hohen was Sundowner's highest ranking representative on the job site. See Brief for Petitioner at 4-5, *Oncale* (No. 96-568).

14. See *Oncale*, 118 S. Ct. at 1001. Oncale resigned on November 10, 1991, after Lyons reprimanded him for taking a smoking break without Lyons's permission; Lyons told Oncale he was going to "run him off." See Brief for Respondent at 3, *Oncale* (No. 96-568). Oncale's pink slip reflected his reason for leaving as "voluntarily left due to sexual harassment and verbal abuse." See *id.* (citing Brief for Petitioner at 6). At his deposition, Oncale stated that he left because he felt that "if [he] didn't leave [his] job, that [he] would be raped or forced to have sex." See *Oncale*, 118 S. Ct. at 1001.

15. See *Oncale*, 118 S. Ct. at 1001; see also *supra* note 7 for pertinent language of Title VII.

16. See Brief for Respondent at 3, 33, *Oncale* (No. 96-568).

17. 28 F.3d 446 (5th Cir. 1994).

18. See *Oncale v. Sundowner Offshore Servs., Inc.*, No. Civ. A. 94-1483, 1995 WL 133349 (E.D. La. 1995), *aff'd* 83 F.3d 118 (5th Cir. 1996). Relying on *Garcia*, the district court stated it was "compelled to find that Mr. Oncale, a male, ha[d] no cause of action under Title VII for harassment by male co-workers." See *id.* at \*2.

19. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998).

20. See *Oncale*, 118 S. Ct. at 1001-03.

division among the lower courts regarding the actionability of a same-sex sexual harassment claims under Title VII prior to the *Oncale* decision. This analysis begins with the Fourth Circuit Court of Appeals' decision to extend Title VII's protection to same-sex sexual harassment cases only where the harasser is homosexual. It then examines both the Fifth Circuit's categorical rule barring same-sex sexual harassment claims from Title VII's coverage, as set out in *Garcia v. Elf Atochem North America*, and the Seventh Circuit's rejection of that approach.

A. Legislative History Regarding the Inclusion of Discrimination "because of . . . sex"

Congress enacted Title VII of the Civil Rights Act of 1964 as a prohibition against discrimination based on sex and other statuses.<sup>21</sup> By its actual terms, Title VII prohibits only sex discrimination; it does not mention sexual harassment.<sup>22</sup> An opponent of Title VII added "sex" to the bill the day before it was approved, apparently in an attempt to ensure the bill's defeat.<sup>23</sup> Congress included sex as a provision under Title VII with little or no debate, research, or discussion.<sup>24</sup> Courts were therefore left with little to guide them in interpreting Congress' intent in prohibiting discrimination because of sex.<sup>25</sup> But despite the absence of legislative intent and no mention of sexual

21. See *supra* note 6 for pertinent language of Title VII.

22. See Susan Perissinotto Woodhouse, Comment, *Same-Gender Sexual Harassment: Is It Sex Discrimination Under Title VII?*, 36 SANTA CLARA L. REV. 1147, 1152 (1996).

23. See Ellen Frankel Paul, *Overview: Civil Rights in the 1990s—Title VII and Employment Discrimination, Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990); Joanna P. L. Mangum, *Wrightson v. Pizza Hut of America, Inc.: The Fourth Circuit's "Simple Logic" of Same-Sex Sexual Harassment Under Title VII*, 76 N.C. L. REV. 306, 316 (1997); see also WILLIAM F. PEPPER & FLORYNCE R. KENNEDY, *SEX DISCRIMINATION IN EMPLOYMENT* 18 (1981).

24. See PEPPER & KENNEDY, *supra* note 23, at 18.

Why 'sex' was added to the bill at the last minute remains puzzling . . . Regardless of what happened . . . the bill passed with 'sex' included, but without any clear expression of congressional intent; thus, the provision opened the door to massive litigation as the courts attempted to develop a doctrine of sex discrimination on their own.

Mangum, *supra* note 23, at 316-17.

25. See Paul, *supra* note 23, at 346.

In all likelihood, the members of that Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination . . . They were fashioning a civil rights law . . . one addressing impediments to individuals as a result of discriminatory acts — not a law proscribing just any kind of oppressive act that one person might commit against another.

Paul, *supra* note 23, at 346.

harassment in Title VII itself, the United States Supreme Court judicially recognized sexual harassment as a classification of sex discrimination in 1986.<sup>26</sup>

#### B. Recognition of Sexual Harassment Claims under Title VII, and Two General Theories of Sexual Harassment

In *Meritor Savings Bank, FSB v. Vinson*,<sup>27</sup> the Supreme Court held, for the first time, that sexual harassment is a form of sex discrimination that falls under the protection of Title VII.<sup>28</sup> Specifically, the *Meritor* Court approved the hostile environment theory of sexual harassment, which is one form of sexual harassment.<sup>29</sup> It is important to note that sexual harassment law grew out of racial harassment law.<sup>30</sup> As the *Meritor* Court noted, the Fifth Circuit, in *Rogers v. EEOC*,<sup>31</sup> a racial harassment case, was apparently the first court to recognize a cause of action based upon a hostile, abusive working environment.<sup>32</sup>

In *Rogers*, a female Hispanic employee filed suit against her employer pursuant to Title VII, alleging that her employer had discriminated against her because of her national origin by creating an offensive working environment.<sup>33</sup> The Fifth Circuit Court of Appeals ultimately held that the employee could establish a Title VII violation by showing that her employer created a discriminatory and offensive working environment by giving Hispanic clientele discriminatory service.<sup>34</sup> In reaching this decision, the court explained that

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26. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986); see also Woodhouse, *supra* note 22, at 1152 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986)).

27. 477 U.S. 57 (1986).

28. See *id.* at 73; but see Michelle Ridgeway Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1092 (1989) (stating that the judicial expansion of Title VII to sexual harassment is improper. “Based on Title VII’s legislative history, it is clear that Congress gave little or no thought to the inclusion of ‘sex’ in the statute, much less to ‘sexual harassment.’ Congress intended to equalize job opportunities, not regulate sexual activity in the workplace.”); Paul, *supra* note 23, at 364 (stating that a new tort of sexual harassment, as opposed to Title VII, could offer “a more propitious remedy” for unwelcome sexual advances in the workplace, and elsewhere).

29. See *Meritor*, 477 U.S. at 73.

30. See *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971); *Firefighters Inst. for Racial Equal. v. St. Louis*, 549 F.2d 506 (8th Cir. 1977); see also *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977).

31. 454 F.2d 234 (5th Cir. 1971).

32. See *Meritor*, 477 U.S. at 65-66.

33. See *Rogers*, 454 F.2d at 236.

34. See *id.* at 237-41.

Title VII is an expansive concept, reaching beyond mere economic aspects of employment.<sup>35</sup>

In *Meritor*, Mechelle Vinson brought a claim against Meritor Savings Bank and her supervisor claiming that her supervisor subjected her to constant sexual harassment.<sup>36</sup> Vinson specifically claimed that while she initially refused her supervisor's suggestion that she go to a motel with him, she later gave in to the requests for fear of losing her job.<sup>37</sup> Vinson argued that unwelcome sexual advances that create a hostile working environment violate Title VII's prohibition against sex discrimination.<sup>38</sup> The United States Supreme Court agreed with Vinson, thereby aligning itself with the *Rogers* court and aligning sexual harassment law with racial harassment law.<sup>39</sup>

In reaching its decision, the Court noted, as the *Rogers* court had already discussed, the expansive nature of Title VII that allowed the statute to cover hostile environment sexual harassment.<sup>40</sup> The Court then set out the test for determining what constituted actionable hostile environment sexual harassment.<sup>41</sup> The Court also looked to the Eleventh Circuit's decision in *Henson v. City of Dundee*.<sup>42</sup> Focusing on a former police dispatcher's claim that her supervisor created a hostile working environment in violation of Title VII, the

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35. *See id.* at 238. The court stated:

[E]mployees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority workers . . . .

*Id.* But the court recognized that not all workplace conduct constitutes harassment that affects a "term, condition, or privilege of employment" within Title VII's meaning, stating that "it [did] not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in the employee" falls under Title VII's protection. *See id.*

36. *See Meritor*, 477 U.S. at 59.

37. *See id.* at 60.

38. *See id.* at 64.

39. *See id.* at 66. "A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.*

40. *See id.* at 65-66. The Court also noted that the EEOC guidelines issued in 1980 recognized sexual harassment as a form of sex discrimination, and that those guidelines recognized that sexual harassment includes unwelcome sexual advances. *See id.* at 65.

41. *See id.* at 67. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's employment] and create an abusive work environment." *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). Further, the Court stated that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *See id.* at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

42. 682 F.2d 897 (11th Cir. 1982).

*Henson* court stated that sexual harassment composed of an abusive working environment barred sexual equality in the workplace in the same way racial harassment barred racial equality.<sup>43</sup>

In the 1993 case *Harris v. Forklift Systems, Inc.*,<sup>44</sup> the Supreme Court elaborated upon its decision in *Meritor*. In *Harris*, the Court held that determining whether a working environment is hostile or abusive requires consideration of the totality of the circumstances, not just any one factor.<sup>45</sup> The *Harris* Court also recognized that the threshold issue presented by a sexual harassment case is whether the plaintiff was harassed because of his or her sex.<sup>46</sup> The plaintiff need not suffer psychological injury from the harassment; instead, the harassment must be objectively and subjectively abusive or hostile.<sup>47</sup> In this way, the Supreme Court recognized sexual harassment as a category of sex discrimination under Title VII, explicitly recognizing hostile environment harassment as one theory of sexual harassment.

The second generally recognized theory of sexual harassment is the quid pro quo theory.<sup>48</sup> Under this type of sexual harassment, a term of the employment is conditioned upon the employee's submission to unwelcome sexual advances.<sup>49</sup> A plaintiff alleging quid pro quo harassment must prove five things.<sup>50</sup> Most courts have broadened Title VII's coverage beyond sexual harassment claims between females and males and have recognized same-sex sexual harassment under the quid pro quo theory; but courts were split on whether Title VII should encompass same-sex hostile environment sexual

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43. *See id.* at 902.

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest racial epithets.

*Id.*

44. 510 U.S. 17 (1993).

45. *See id.* at 23.

46. *See id.* at 22; *see also* Taylor, *supra* note 3, at 319. "In reviewing same-sex sexual harassment cases, it appears that the main obstacle to establishing a Title VII hostile environment cause of action for same-sex sexual harassment is proving that the victim was harassed because of his or her sex." Taylor, *supra* note 3, at 319.

47. *See Harris*, 510 U.S. at 22.

48. *See generally* *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

49. *See id.* at 910.

50. *See id.* at 909. First, he or she must prove he belongs to a protected class; second, that he or she was subjected to unwelcome sexual advances; third, that the harassment complained of was based on sex; fourth, that his or her reaction to the harassment affected tangible aspects of his employment; and fifth, respondeat superior. *See id.* Recently, however, the Supreme Court held that there is no requirement for a tangible job detriment in order to bring a sexual harassment claim under Title VII. *See infra* note 143 and accompanying text.



harassment claims.<sup>51</sup> District and circuit courts, when confronted with the actionability of same-sex hostile environment sexual harassment claims under Title VII, have taken a variety of positions, leading to much confusion and a great division on the subject.<sup>52</sup>

### C. Division Among the Lower Courts

#### 1. *Recognition of Same-Sex Sexual Harassment Claims, But Only Where the Harasser is Homosexual*

The Fourth Circuit Court of Appeals considered whether Title VII covers situations in which both the victim and the harasser are of the same sex in *McWilliams v. Fairfax County Board of Supervisors*.<sup>53</sup> McWilliams began working for Fairfax County Equipment Management Transportation Agency as an automotive mechanic in 1987.<sup>54</sup> Beginning in 1989, several of McWilliams's co-workers began taunting him, asking him about his sexual activities.<sup>55</sup>

Based on Title VII, McWilliams ultimately brought a hostile environment sexual harassment claim against the county.<sup>56</sup> The Fourth Circuit court held explicitly that Title VII did not apply in heterosexual male-on-male (same-sex) sexual harassment cases.<sup>57</sup> The Fourth Circuit made this decision without extensive discussion or analysis.<sup>58</sup> It simply stated that to extend Title VII to protecting conduct in which only heterosexual males are involved would overextend the statute.<sup>59</sup>

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51. See Woodhouse, *supra* note 22, at 1158; see also Taylor, *supra* note 3, at 310-11. Many same-sex sexual harassment cases dealing only with males have involved the quid pro quo form of sexual harassment and only a "select few" involve the less common hostile environment form. See Woodhouse, *supra* note 22, at 1158.

52. See Amy Shahan, Comment, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Sexual Harassment*, 48 BAYLOR L. REV. 507, 512-23 (1996) (discussing the dilemma in district courts in determining whether same-sex sexual harassment is actionable under Title VII).

53. 72 F.3d 1191 (4th Cir. 1996).

54. See *id.* at 1193.

55. See *id.*

56. See *id.* at 1194.

57. See *id.* at 1195.

58. See *id.* The Fourth Circuit reasoned, summarily, that McWilliams's hostile environment claim failed "for the more fundamental reason that such a claim does not lie where both the alleged harassers and the victim are heterosexuals of the same sex . . . and [there was] no claim made that any [of the parties] was homosexual." See *id.* The court then stated that while perhaps there "ought to be a law against" such puerile and repulsive workplace behavior even when it involves only heterosexual workers of the same sex . . . Title VII is not that law." See *id.* at 1196.

59. See *McWilliams*, 72 F.3d at 1195-96. The Court said that to extend Title VII to

In the same year it decided *McWilliams*, the Fourth Circuit addressed another same-sex sexual harassment case in *Wrightson v. Pizza Hut of America, Inc.*<sup>60</sup> Unlike in *McWilliams*, *Wrightson* dealt with openly homosexual harassers.<sup>61</sup> The District Court for the Western District of North Carolina, Charlotte Division, dismissed *Wrightson*'s complaint.<sup>62</sup> The Fourth Circuit reversed the district court ruling and explicitly held, as it had only suggested in *McWilliams*, that Title VII encompassed a same-sex hostile work environment sexual harassment claim, but only where the harasser was a homosexual.<sup>63</sup>

2. *Categorical Rule Barring Same-Sex Sexual Harassment Claims in the Hostile Environment Sexual Harassment Context—Garcia v. Elf Atochem North America*

The Fifth Circuit established a categorical rule barring a same-sex sexual harassment claim in the hostile environment context in *Garcia v. Elf Atochem North America*.<sup>64</sup> The Fifth Circuit relied on its 1993 decision in *Giddens v. Shell Oil Co.*<sup>65</sup> In that case, the court held that no cause of action existed under Title VII for same-sex sexual harassment.<sup>66</sup>

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heterosexual same-sex sexual harassment would lead to "unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.'" *See id.* The Fourth Circuit's decision in *McWilliams* leads to the problem of a plaintiff attempting to prove that his aggressor is homosexual, which might be impossible to do and might lead to much unnecessary embarrassment. *See* Shahan, *supra* note 52, at 517-18.

60. 99 F.3d 138 (4th Cir. 1996).

61. *See id.* at 139.

62. *See id.* at 141. In dismissing the complaint, the district court relied on the Fifth Circuit's decision in *Garcia v. Elf Atochem North America* (holding that same-sex sexual harassment is not actionable under Title VII). *See infra* note 64, at 451-52.

63. *See Wrightson*, 99 F.3d at 141, 143. "Simple logic" guided the Fourth Circuit in its decision. *See id.* at 142. "As a matter of both textual interpretation and simple logic, an employer of either sex can discriminate against his or her employees of the same sex because of their sex, just as he or she may discriminate against employees of the opposite sex because of their sex." *Id.*; *see also* Susan Silberman Blasi, *The Adjudication of Same-Sex Sexual Harassment Claims Under Title VII*, 12 LABOR LAW 291 (1996). There are two types of same-sex sexual harassment cases: 1) sexual orientation cases wherein the plaintiff tries to bootstrap sexual orientation protection under the sex discrimination of Title VII, and 2) true actions of sexual harassment in which the victim and harasser are of the same sex. *See id.* at 308. Title VII does not cover the first type of harassment case, only the second. *See id.* at 308-09.

64. 28 F.3d 446 (5th Cir. 1994). *See Woodhouse, supra* note 22 (arguing that courts should follow *Garcia* and hold that same-sex sexual harassment is not actionable under Title VII because "[s]uch harassment is not the type of conduct that sexual harassment law meant to deter").

65. No. 92-8533 (5th Cir. 1993) (unpublished).

66. *See id.* Specifically, the *Giddens* court stated that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment

The court also relied on the district court's decision in *Goluszek v. Smith*.<sup>67</sup> The district court in that case held that Title VII did not protect an employee against same-sex sexual harassment where no evidence of an anti-male environment existed.<sup>68</sup> In reaching this decision, the court noted the limited scope of Title VII, asserting that Title VII protected against abuse of power against another less powerful person.<sup>69</sup> But not all commentators agreed with the *Garcia* and *Goluszek* holdings.<sup>70</sup> One scholar enumerated five specific reasons why same-sex sexual harassment claims should be actionable under Title VII.<sup>71</sup>

### 3. *Finding Same-Sex Sexual Harassment Actionable—Doe v. City of Belleville, Illinois*

In *Doe v. City of Belleville, Illinois*,<sup>72</sup> the Seventh Circuit Court of Appeals explicitly rejected the narrow interpretation of Title VII given in the *Garcia* and *Goluszek* decisions.<sup>73</sup> *Doe* involved two sixteen-year-old male twins, H. and J. Doe, who were subjected to a relentless campaign of harassment by their

has sexual overtones. Title VII addresses gender discrimination." *See id.*

67. 697 F. Supp. 1452 (N.D. Ill. 1988).

68. *See id.* at 1456.

69. *See id.* 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 . . . 'is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.'" *See id.* (quoting Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984)); *see also* Shahan, *supra* note 52, at 527 (arguing that in the same-sex sexual harassment context, "the power involved is not exclusively within the realm of gender," and the "only power involved may be that of sheer force of manipulation," which should be enough to support a Title VII claim based on an imbalance of power).

70. *See* Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87 (1995). "When determining whether the conduct involved in a sexual harassment claim is based on gender, courts should not look to the respective gender of the harasser and the victim. The gender of the harasser with respect to the victim is irrelevant . . ." *Id.* at 122-23; *see also* Trish K. Murphy, Note & Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125 (1995).

71. *See* Blasi, *supra* note 63, at 317-18. Same-sex sexual harassment claims should be actionable under Title VII for five reasons: 1) public policy demands it; 2) the rationale for sexual harassment claims under Title VII is to give relief to people who have received demeaning treatment on the job, and this applies to males and females, heterosexuals and homosexuals; 3) same-sex sexual harassment is not discrimination on the basis of sexual orientation and therefore is covered by Title VII; 4) courts that have denied same-sex sexual harassment victims claims under Title VII have done so based on flawed reasoning; and 5) allowing same-sex sexual harassment claims under Title VII will not bring any undesirable effects. *See* Blasi, *supra* note 63, at 317-18.

72. 119 F.3d 563 (7th Cir. 1997).

73. *See id.* at 574.

male coworkers while employed to cut weeds and grass in the municipal cemetery for the City of Belleville, Illinois, in 1992.<sup>74</sup>

The court noted that, although sexual harassment usually involved a male harassing a female, in a previous decision, it had suggested that same-sex sexual harassment could be actionable in appropriate situations.<sup>75</sup> While it agreed with the *Goluszek* court that the historic imbalance of power between men and women in the workplace powerfully illustrated why harassment by a male superior over a female should be regarded as sex discrimination, the Seventh Circuit rejected the *Goluszek* ruling that Title VII excluded from its coverage men who were sexually harassed by other men.<sup>76</sup>

Ultimately, according to the court, the plain, unambiguous language of Title VII suggested that anyone discriminated against because of his or her sex may bring suit, regardless of his gender or the harasser's gender.<sup>77</sup> The *Doe* court stated that the rule that same-sex sexual harassment was actionable only when the harasser was homosexual was wrong.<sup>78</sup>

#### IV. REASONING OF THE COURT

In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>79</sup> a unanimous United States Supreme Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII of the Civil Rights Act of 1964.<sup>80</sup> In addition, the Court determined that recognizing liability for same-gender sexual harassment under Title VII would not convert the statute into a general code of behavior for the American workplace.<sup>81</sup> This section will

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74. *See id.* at 566.

75. *See id.* (quoting, as dicta, its decision in *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995)).

76. *See id.* at 572. In rejecting *Goluszek* on this point, the court stated that "[t]he language of Title VII . . . does not purport to limit who may bring suit based on the sex of either the harasser or the person harassed." *See id.*

77. *See id.* at 573. According to the court, "unless we read into the statute limitations that have no foundation in the broad, gender-neutral language that Congress employed, it is evident that anyone sexually harassed can pursue a claim under Title VII, no matter what her gender or that of her harasser." *See id.* at 574.

78. *See Doe*, 119 F.3d at 574-75. The court stated that it had never made the viability of sexual harassment claims dependent upon the sexual orientation of the harasser, and that it would be "both unwise and improper to begin doing so. Fears that if such a requirement is not imposed, commonplace 'horseplay' will give rise to sexual harassment claims . . . are unfounded." *See id.* "We are not, as it turns out, incapable of distinguishing between the occasional off-color joke, stray remark . . ." *Id.* at 591.

79. 118 S. Ct. 998 (1998).

80. *See id.* at 1003.

81. *See id.* at 1002-03. Sundowner argued that "[t]o hold that cases involving same-gender sexually harassing conduct are actionable under Title VII as discrimination because of gender simply because of the sexual content of the conduct would write the 'because of sex'

analyze the Court's opinion that Title VII does not establish a categorical rule against same-sex sexual harassment claims. It will also outline the Court's reasoning that recognizing liability for same-sex harassment will not transform Title VII into a general civility code. Finally, this section will note the brief concurring opinion in *Oncale*.

#### A. Unanimous Opinion

The Court began its substantive discussion by outlining the Court's precedents regarding Title VII.<sup>82</sup> Quoting the relevant language of Title VII,<sup>83</sup> the Court first noted the prior holding of *Meritor Savings Bank, FSB v. Vinson*<sup>84</sup> that Title VII is a broad prohibition against all disparate treatment of men and women in the workplace.<sup>85</sup> The Court then noted its decision in *Harris v. Forklift Systems, Inc.*<sup>86</sup> that hostile environment discrimination violates Title VII.<sup>87</sup> The Court looked further at its Title VII precedents and asserted its prior holding that Title VII's prohibition of sex discrimination applies to both men and women.<sup>88</sup>

The Court also cited its recognition in *Castaneda v. Partida*<sup>89</sup> that an employer might discriminate against members of his own race.<sup>90</sup> Finally, the Court discussed its decision in *Johnson v. Transportation Agency, Santa Clara County*.<sup>91</sup> In *Johnson*, the Court rejected a male employee's claim that he was discriminated against because of his sex when his supervisor promoted a female employee over him, but the Court did not find it relevant that the supervisor who made the decision was also a male.<sup>92</sup> Based on these precedents, and to clear any confusion they created, the Court held that nothing

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language out of the statute," thereby converting the statute into an artificial "generalized workplace tort statute." See Brief for Respondent at 16, *Oncale* (No. 96-568).

82. See *Oncale*, 118 S. Ct. at 1001.

83. See *supra* note 7 for the pertinent language of Title VII.

84. 477 U.S. 57 (1986).

85. See *Oncale*, 118 S. Ct. at 1001. Title VII's prohibition against sex discrimination "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" See *id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

86. 510 U.S. 17, 21 (1993) (holding that Title VII is violated when the workplace is "permeated" with insult and intimidation that is "sufficiently severe or pervasive" to "alter the conditions of the victim's employment and create an abusive working environment").

87. See *Oncale*, 118 S. Ct. at 1001.

88. See *id.* (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)).

89. 430 U.S. 482 (1977).

90. See *Oncale*, 118 S. Ct. at 1001.

91. 480 U.S. 616 (1987).

92. See *Oncale*, 118 S. Ct. at 1001.

in Title VII conclusively bars a claim of discrimination "because of . . . sex" simply because the harassed and the alleged harasser are both males or both females.<sup>93</sup>

The Court enumerated three different positions state and federal courts have taken regarding the applicability of Title VII to sex discrimination claims in the context of hostile environment sexual harassment.<sup>94</sup> The first stance the Court cited, the Fifth Circuit's position in this case, was that same-sex sexual harassment claims are never actionable under Title VII.<sup>95</sup> The Court explicitly rejected the Fifth Circuit's categorical rule barring a discrimination claim under Title VII where the plaintiff and defendant are of the same sex.<sup>96</sup> In rejecting this position, the Court reasoned that while male-on-male sexual harassment in employment was not the primary evil Congress was concerned with when it enacted Title VII, statutory provisions often cover evils similar to, yet beyond, the primary evil the statute targeted.<sup>97</sup>

The second stance the Court reviewed was that same-sex sexual harassment claims are cognizable under Title VII, but only if the complaining party can prove that the alleged harasser is homosexual and thus presumably motivated by sexual desire.<sup>98</sup> The Court also rejected this position, stating that sexual desire need not motivate the harassing conduct in order to support an inference of discrimination based on sex.<sup>99</sup>

The third stance the Court identified was that sexual harassment in the workplace is always actionable under Title VII regardless of the alleged harasser's gender, sexual orientation, or motivations.<sup>100</sup> The Supreme Court

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93. *See id.* at 1001-02. "If [its] precedents [left] any doubt on the question . . . nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Id.*

94. *See id.* at 1002. The Court stated that while courts have largely accepted the theory of same-sex discrimination where an employee is passed over for a job or promotion, when the issue arises in the "hostile environment" sexual harassment context, courts have split on the issue and taken a "bewildering variety of stances." *See id.*

95. *See id.*

96. *See id.* The Court saw "no justification in the statutory language or [its] precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *See id.* If the plaintiff can prove he was discriminated against because of his sex and that the discrimination has altered the terms or conditions of his employment, that claim is actionable under Title VII. *See id.*

97. *See id.* The Court noted that 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." *See id.*

98. *See Oncale*, 118 S. Ct. at 1002 (citing *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) in comparison with *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138 (4th Cir. 1996)).

99. *See id.*

100. *See id.* (citing *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997) as representative

adopted the third approach here.<sup>101</sup> Ultimately, the Court concluded that Title VII's prohibition against discrimination because of sex must encompass all kinds of sexual harassment that meet the statutory requirements, and this can include same-sex sexual harassment.<sup>102</sup>

In the final part of its opinion, the Court addressed Sundowner's argument<sup>103</sup> that employer liability for same-sex sexual harassment would transform Title VII into a general code of behavior for the American workplace.<sup>104</sup> The Court gave three specific reasons why this alleged transformation would not occur.<sup>105</sup> First, the Court focused on Title VII's requirement that the alleged workplace discrimination was in fact because of the plaintiff's sex.<sup>106</sup> Holding that the critical issue in Title VII cases was whether the discrimination was "because of . . . sex,"<sup>107</sup> the Court held that courts and juries could reasonably infer sex discrimination where the plaintiff and defendant are of the same gender.<sup>108</sup> This inference could occur, the Court held, because under the statute, the sexually-harassing conduct does not have to be driven by the harasser's sexual desire;<sup>109</sup> the conduct must actually constitute discrimination because of sex.<sup>110</sup> The Court stated, then, that one

of this stance).

101. See *supra* note 96 and accompanying text.

102. See *Oncale*, 118 S. Ct. at 1002.

103. See Brief for Respondent at 5, 16-18, *Oncale* (No. 96-568). Sundowner argued that *Oncale* was trying to have the Court expand Title VII to cover same-gender harassment with sexual overtones where no evidence of discrimination because of sex exists. See *id.*

104. See *Oncale*, 118 S. Ct. at 1002-03.

105. See *id.*

106. See *id.* at 1002. The Court reasoned that Title VII prohibits only discrimination "because of . . . sex", not all workplace harassment, and that the Court has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." See *id.*

107. See *id.* "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 372 (1993) (Ginsburg, J. concurring)).

108. See *id.* The Court reasoned that a jury might "reasonably find" sex discrimination if, for example, a female 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." See *id.*

109. See *id.* The Court noted:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations . . . . The same chain of inference would be available to a plaintiff alleging same-sex harassment if there were credible evidence that the harasser was homosexual. But the harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.

*Id.*

110. See *supra* note 7 for pertinent language of Title VII.

requirement that would prevent recognizing liability for same-sex harassment from transforming Title VII into a mere civility code for the workplace is the statute's detailed requirement that the alleged harassment must actually denote discrimination "because of . . . sex."<sup>111</sup>

Second, the Court noted the alleged expansion of Title VII into a general civility code would not occur because the statute is narrow in scope.<sup>112</sup> It covers only objectively offensive behavior.<sup>113</sup> This objectively offensive conduct requirement, the Court held, serves as the third requirement of Title VII that would prevent the alleged transformation.<sup>114</sup> The Court said this third requirement was vital in differentiating simple same-gender horseplay from sexual harassment.<sup>115</sup> The objective gravity of the harassment should be determined from the perspective of a reasonable person in a situation similar to the plaintiff's under the totality of the circumstances.<sup>116</sup>

According to the Court, the proper inquiry in a same-sex sexual harassment case, as in all harassment cases, requires careful reflection on the social context in which the alleged offensive conduct occurred.<sup>117</sup> The Court held that common sense and an appropriate sensitivity to the social context in which the behavior occurred and was experienced by the victim would guide

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111. See *Oncale*, 118 S. Ct. at 1002. "Whatever evidentiary route the plaintiff chooses to follow, he or she *must always prove* that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] . . . because of . . . sex." *Id.* (emphasis added).

112. See *Oncale*, 118 S. Ct. at 1003. Title VII does not cover the "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex . . . . [I]t forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." See *id.*

113. See *id.* "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993)).

114. See *id.*

115. See *id.* Specifically, the Court noted that it has always regarded the objectively offensive requirement of Title VII "as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'" See *id.*

116. See *id.* (citing *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993)).

117. See *Oncale*, 118 S. Ct. at 1003. The Court used the example of a professional football player, noting that:

A professional football player's working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.



courts and juries in this inquiry.<sup>118</sup> These two things would allow courts and juries to differentiate between simple teasing or roughhousing among males or females and conduct that a reasonable person in the plaintiff's place would regard as severely abusive or hostile.<sup>119</sup>

Based on the Court's Title VII precedents and its reasoning that liability for same-sex sexual harassment would not transform or expand Title VII into a general civility code, the Court reversed the Fifth Circuit and held that Title VII covers same-sex sexual harassment claims.<sup>120</sup>

#### B. Justice Thomas's Concurring Opinion

Justice Thomas, writing individually, expressed his support for the Court's opinion for one reason—because the Court emphasized Title VII's requirement that the same-sex sexual harassment plaintiff must prove that the actions against him or her constituted discrimination because of sex.<sup>121</sup>

### V. SIGNIFICANCE

*Oncale* is a milestone decision in the area of sexual harassment sex discrimination law.<sup>122</sup> One of the most obvious effects of this decision will be that male same-sex sexual harassment victims can bring a claim under Title VII. Before the *Oncale* decision, these victims labored against a male-dominated society and received little or no protection under Title VII.<sup>123</sup> Further, the decision ends the confusing split among the lower courts regarding

118. *See id.*

119. *See id.*

120. *See id.*

121. *See Oncale*, 118 S. Ct. at 1003 (Thomas, J., concurring). "I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'" *Id.* Interestingly, in 1991, in "the first [sexual harassment] case to receive widespread public attention," Anita Hill brought charges of sexual harassment against then United States Supreme Court Justice nominee Clarence Thomas; at that time, Hill was a young, novice lawyer, and Thomas was her supervisor at the Department of Education and subsequent Chair of the EEOC. *See Vicki Schultz, Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692 (1998).

122. *See* Marc S. Spindelman & John Stoltenbert, *Amicus Brief, Introduction, Oncale: Exposing "Manhood,"* 8 UCLA WOMEN'S L.J. 3 (1997). As these scholars noted, the *Oncale* case, once decided, would be "landmark" in the "understanding of sexual harassment as a form of sex discrimination." *See id.* at 6. They further stated that if the Supreme Court failed to find same-sex sexual harassment actionable under Title VII, it would "tacitly condone men's assaultive and sexualized humiliations of other men—often concealed within all-male preserves (such as boarding schools, street gangs, fraternities, and locker rooms)." *See id.*

123. *See id.* Spindelman and Stoltenbert noted that in the years before *Oncale*, male victims of same-gender sexual harassment "labor[ed] directly against the cultural norms of male supremacy." *See id.*

the actionability of same-sex sexual harassment claims under Title VII.<sup>124</sup> *Oncale* is also significant because it reiterates the key to any sex discrimination or sexual harassment case—that the alleged harassment occurred because of the plaintiff's sex.<sup>125</sup>

In addition, the Court's decision in *Oncale* settles the debate about whether the alleged harassment must be sexual in nature.<sup>126</sup> Before this decision, courts distinguished between hostile work environment cases involving sexual innuendo and those cases involving gender discrimination.<sup>127</sup> The *Harris* decision left the issue of what constitutes actionable conduct open.<sup>128</sup> Most courts, however, have held that the harassing conduct need not contain sexual innuendo to be actionable.<sup>129</sup> For example, in *McKinney v. Dole*,<sup>130</sup> the Court of Appeals for the District of Columbia Circuit distinguished between harassing conduct involving sexual overtones and other sexually harassing conduct, holding that any kind of harassment that would not have occurred but for the employee's gender, whether comprised of sexual overtones or not, was actionable under the provisions of Title VII.<sup>131</sup> Clearly,

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124. See *supra* Part III.C for the various positions that lower courts took regarding the actionability of same-sex sexual harassment claims under Title VII.

125. See *supra* note 111 and accompanying text.

126. See generally Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions, or Privileges of Employment under Title VII?*, 37 B.C. L. REV. 643, 673-76 (1996). "The classic sexual harassment hostile work environment case involves sexual innuendo or sexually explicit materials." *Id.* at 673.

127. See *id.* Hostile work environment cases involving what has been termed "gender discrimination" denote cases in which an employee "is simply treated poorly because of her sex." See *id.* (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013-14 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.3d 1406, 1415 (10th Cir. 1987), among other cases, as referring to this type of "gender discrimination" sexual harassment hostile work environment situation). "It is not clear, at first, whether hostile environment cases should be extended to the latter variety of cases; those in which the plaintiffs were subjected to mistreatment (though not of a sexually connotative nature) because of their sex." *Id.*

128. See *id.*; see also *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring). Justice Ginsburg stated that the "critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." See *id.*

129. See Beiner, *supra* note 126, at 674. Instead of requiring the harassing conduct to have sexual overtones, one court stated that "conduct of a nonsexual nature that ridicules women or treats them as inferior can constitute prohibited sexual harassment." See Beiner, *supra* note 126, at 674 (quoting *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922, 929 (M.D. Ala. 1992)).

130. 765 F.2d 1129 (D.C. Cir. 1985).

131. See *id.* at 1138. The court made the distinction as such:

We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now. Rather, we

after the Court's decision in *Oncale*, the alleged harassment need not be sexual in nature to be actionable.<sup>132</sup>

Perhaps even more significant is the question *Oncale* leaves unanswered—whether the alleged harassing conduct is judged from the perspective of the reasonable person or the reasonable victim.<sup>133</sup> In *Harris v. Forklift Systems, Inc.*,<sup>134</sup> the Supreme Court discussed the actionability of harassing conduct from the perspective of the reasonable person.<sup>135</sup>

In *Ellison v. Brady*,<sup>136</sup> the Ninth Circuit Court of Appeals adopted the reasonable victim of the same gender standard in determining whether harassment had occurred, thereby replacing the sex-blind standard of the reasonable person.<sup>137</sup> The court believed that the reasonable person standard tended to be male-biased and ignored women's experiences.<sup>138</sup> The Michigan Supreme Court, in *Radtke v. Everett*,<sup>139</sup> rejected the reasonable victim of the same gender standard set out in *Ellison* and thereby created a debate between the *Harris* reasonable person standard and the *Ellison* reasonable victim of the

hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.

*Id.*; see also Beiner, *supra* note 126, at 674-75 (discussing the *McKinney* case in the context of "reindeer games" as a source of unequal treatment of an employee).

132. See *Oncale*, 118 S. Ct. at 1002. The Court explicitly stated that its holding that Title VII's prohibition against "discriminat[ion] . . . because of . . . sex" includes sexual harassment "must extend to sexual harassment of any kind that meets the statutory requirements." See *id.* Even though the harassing conduct directed at Joseph *Oncale* contained sexual innuendos, this language does not require or even suggest that the harassment must be "sexual" in nature to be actionable under Title VII. See *id.*

133. See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Radtke v. Everett*, 501 N.W.2d 155 (Mich. 1993).

134. 510 U.S. 17 (1993).

135. See *id.* at 21. "Conduct that . . . a reasonable person would [not] find hostile or abusive—is beyond Title VII's purview." *Id.*

136. 924 F.2d 872 (9th Cir. 1991).

137. See *id.* at 879. Specifically, the court held that "a female (or male) plaintiff states a prima facie case of hostile environment sexual harassment when she (or he) alleges conduct which a reasonable woman (or man) would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." See *id.* (parentheticals added).

138. See *id.*; see also Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207 (1990) (stating that men tend to view some types of sexual harassment as "harmless social interactions to which only overly-sensitive women would object"); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) (noting that the male view of sexual harassment characteristically depicts it as "comparatively harmless amusement").

139. 501 N.W.2d 155 (Mich. 1993).

same gender standard.<sup>140</sup> The *Oncale* decision, because of the Court's careful skirt around this issue, does little to settle this debate.<sup>141</sup> Therefore, while the Court in *Oncale* resolved some issues relating to sexual harassment sex discrimination, at least one major issue in this area remains unsettled, meaning that confusion surrounding sexual harassment law persists. Whether the Court will finally address this unresolved issue in a later case remains to be determined.

In two decisions subsequent to *Oncale*, *Faragher v. City of Boca Raton*<sup>142</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>143</sup> both decided on June 26, 1998, the Supreme Court settled three important issues in the area of sexual harassment law under Title VII. First, the Court stated that the scope of Title VII extends beyond tangible or economic discrimination; this means that there is no requirement for a tangible job detriment, such as discharge or demotion, in order to establish a sexual harassment claim under Title VII.<sup>144</sup> Second, the Court held that an employer is subject to vicarious liability to a sexually harassed employee victim for actions of a supervisor that create an actionable hostile working environment.<sup>145</sup> Third, the Court held that an employer defending against an actionable sexual harassment claim may raise an affirmative defense to liability or damages when no tangible employment action is taken against the victimized employee.<sup>146</sup> Two necessary elements

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140. See *id.* at 166. In rejecting the reasonable victim standard, the court stated that "the reasonable person standard should be utilized because it is sufficiently flexible to incorporate gender differences . . . . [T]he reasonable person standard has been carefully crafted to formulate one standard of conduct for society." See *id.*

141. See *Oncale*, 118 S. Ct. at 1003. In discussing the careful consideration of the social context in which the particular behavior occurred and was experienced by its target, the Court stated that a coach's pat on the buttocks of a professional football player does not constitute a hostile work environment, "even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office." See *id.* The careful use of the parenthetical "male or female" allows the Court to dodge answering this issue once again, because it leaves open the door for the reasonable person standard and the reasonable victim of the same gender standard.

142. No. 97-282, 1998 WL 336322 (U.S. June 26, 1998).

143. No. 97-569, 1998 WL 336326 (U.S. June 26, 1998).

144. See *Faragher*, 1998 WL 336322 at \*8. Specifically, the Court recognized that "although the statute [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to 'economic' or 'tangible' discrimination.'" See *id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)); see also *Burlington*, 1998 WL 336326 at \*16 (holding that "[a]lthough [the plaintiff] has not alleged she suffered a tangible employment action . . . this is not dispositive").

145. See *Faragher*, 1998 WL 336322 at \*19; *Burlington*, 1998 WL 336326 at \*15. Using the same language in both cases, the Supreme Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." See *id.*

146. See *Faragher*, 1998 WL 336322 at \*19; *Burlington*, 1998 WL 336326 at \*15. The Court, in each case, noted that the affirmative defense is "subject to proof by a preponderance

make up the affirmative defense.<sup>147</sup> The Court further stated, however, that when the supervisor's harassment ends in a tangible job detriment, such as termination or receiving an undesirable reassignment, no affirmative defense is available to the employer.<sup>148</sup> *Oncale*, therefore, is one of several major Supreme Court decisions pertaining to sexual harassment claims under Title VII, and each new decision sheds light on this ever important area of the law.

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of the evidence." *See id.*

147. *See Faragher*, 1998 WL 336322 at \*19; *Burlington*, 1998 WL 336326 at \*15. According to the Supreme Court, the two "necessary elements" comprising the defense are:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

*Id.*

148. *See Faragher*, 1998 WL 336322 at \*19; *see also Burlington*, 1998 WL 336326 at \*15. Specifically, the Court stated that "[n]o affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *See id.*