Holding the Same-Sex Sexual Harassment Claim at Arm's Length: The Supreme Court's Strict [And Correct] Interpretation of Title VII In Oncale v. Sundowner Offshore Services, Inc.

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HOLDING THE SAME-SEX SEXUAL HARASSMENT CLAIM AT ARM'S LENGTH: THE SUPREME COURT'S STRICT [AND CORRECT] INTERPRETATION OF TITLE VII IN ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 forbids an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." In addition to prohibiting discriminatory hiring practices based on the potential employee's sex, the Supreme Court has extended the language of Title VII to afford employees a remedy for sexual harassment in the workplace.

Opponents of Title VII added the proscription against sex discrimination while the bill was on the floor of the House of Representatives as a last minute attempt to prevent Title VII from passing. The measure proved unsuccessful, and the bill quickly passed as amended, resulting in "little legislative history to guide [courts] . . . in interpreting the Act's prohibition against discrimination based on sex." In recent years, this lack of legislative history has proved extremely frustrating to courts

   
   It shall be unlawful employment practice for an employer-(1) 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 . . . .

   Id.


3. See Meritor, 477 U.S. at 63-64.


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attempting to discern whether Title VII provides a remedy for victims of same-sex sexual harassment.\footnote{See generally Dale Carpenter, \textit{Same-Sex Sexual Harassment Under Title VII}, 37 S. Tex. L. Rev. 699 (1996).}

In \textit{Oncale v. Sundowner Offshore Services, Inc.,}\footnote{118 S. Ct. 998 (1998).} the Supreme Court reversed the Fifth Circuit, holding that Title VII does not categorically bar sexual harassment claims in which the claimant and the harasser are of the same sex.\footnote{See id. at 1001-02.} While conceding that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” the Court, nevertheless, found “no justification in the statutory language [of Title VII] or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”\footnote{Id. at 1002.} Critics cautioned that the expansion of Title VII into the realm of same-sex sexual harassment would essentially turn the statute into a “general civility code for the American workplace.”\footnote{Id. at 1002-03.} In response, the Court declared that “common sense” and “careful attention to the requirements of the statute” will prevent such a transformation.\footnote{See Richard F. Storrow, \textit{Same-Sex Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct}, 47 Am. U. L. Rev. 677, 678 (1998) (stating that the struggle to define what constitutes actionable same-sex sexual harassment “continues in light of Oncale’s cryptic message”).}

While \textit{Oncale} resolves a split of authority among the federal circuits over whether same-sex sexual harassment claims are ever cognizable under Title VII, the Court’s “cryptic” opinion\footnote{See, e.g., Kathryn Abrams, \textit{Postscript, Spring of 1998: A Response to Professors Bernstein and Franke}, 83 Cornell L. Rev. 1257, 1258 (1998) (criticizing the \textit{Oncale} decision for “offering[ing] no theory of the wrong that purports to explain why same-sex cases should be included in Title VII’s ambit”).} does not discuss the inherent policy decisions surrounding the recognition of such a claim.\footnote{See infra notes 188-200 and accompanying text.} As
one commentator observed, "if [Oncale] has opened the gates to same-sex sexual harassment actions, it has made little effort to define the terrain that lies inside."14

This casenote examines the Court's decision in Oncale while considering the impact of the case on both opposite-sex and same-sex sexual harassment actions. Part II discusses the historical background of sexual harassment claims under Title VII. Part III reviews, in detail, the diverse treatment given to same-sex sexual harassment claims among the federal circuits that ultimately led to the Supreme Court's decision to hear Oncale. Such detail is necessary both to chronicle the various theories surrounding a same-sex sexual harassment claim and, in light of the Supreme Court's non-elaborate opinion in Oncale, to forecast the various circuits' treatment of the Oncale decision in future Title VII actions. Part IV introduces the facts and procedural history of the Oncale case. Part V reports and explains the Supreme Court's unanimous decision in Oncale. Part VI analyzes the Court's decision, focusing on the strict construction given to Title VII by the Oncale Court and the effect of the opinion on future claims of both opposite-sex and same-sex sexual harassment. Part VII offers a brief conclusion that anticipates the impact of Oncale on Title VII jurisprudence.

II. THE HISTORICAL BACKGROUND OF ONCALE

A. Title VII: The Fundamental Text and Cause of Action

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "sex."15 In a traditional Title VII claim, an employee recovers if he or she can prove that he or she was denied a promotion, job placement, or equal pay on the basis of his or her gender.16 In addition to helping

14. Abrams, supra note 12, at 1260. According to Professor Abrams, "this is what is ultimately unsatisfying about Justice Scalia's intermittently promising opinion in Oncale: he recognizes the individual injury (and, by implication, some others sufficiently like it), but leaves the collective, integrative account of the wrong to another day." Id. at 1263.


create workplace equality for women, Title VII also prohibits discriminatory employment practices against males because of sex and provides a cause of action for victims of such discrimination to obtain equitable relief, compensatory damages, or punitive damages.

B. Title VII Extended to Prohibit Workplace Sexual Harassment: The Meritor Bank Decision

In the 1986 landmark decision, Meritor Savings Bank, F.S.B v. Vinson, the Supreme Court extended the “no sex discrimination” command of Title VII to forbid sexual harassment in the workplace. The Meritor Court reasoned that Title VII’s prohibition against discrimination because of sex covers not only the “terms” and “conditions” of employment in the narrow, contractual sense, but “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women [in the workplace].” Sexual harassment actions are subdivided into two distinct classes: quid pro quo claims and hostile work environment claims.

A quid pro quo claim for sexual harassment exists when “sexual consideration is demanded in exchange for job benefits.” Alternatively, a “hostile work environment” sexual harassment claim is not predicated on direct economic gain or loss. As the Court stated in Meritor:

Sexual harassment which creates a hostile or abusive work environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial

18. See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 683-84 (1983) (holding that the company’s hospitalization policy, which provided female employees with more pregnancy-related benefits than those afforded spouses of male employees, discriminates against male employees in violation of Title VII).
21. Id. at 64.
22. See id. at 65.
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 of racial epithets.\textsuperscript{25}

The elements of proof necessary to establish a prima facie case of hostile work environment sexual harassment differ from the causal elements of a quid pro quo claim in one respect. Under both theories, the plaintiff or employee must show the following: (1) the employee is a member of a protected class; (2) the employee was the object of sexually oriented conduct; (3) the harassment occurred because of the employee's sex; and (4) the existence of employer liability.\textsuperscript{26}

The fifth element differs only with respect to how the harassment occurred. Under the quid pro quo theory, submission to the sexual demands of the employer must have been a precondition to attaining job-related benefits or avoiding job-related detriments.\textsuperscript{27} Under the hostile environment theory of sexual harassment, the defendant's conduct must have had the effect of unreasonably interfering with the plaintiff's working environment, causing it to be intolerably abusive.\textsuperscript{28} In either case, the victim's employer is liable for damages if knowledge of the harassment can be imputed to the employer and the employer fails to take corrective action.\textsuperscript{29}

Seven years later, in \textit{Harris v. Forklift Systems, Inc.},\textsuperscript{30} the Supreme Court refined the proper test for establishing a hostile work environment sexual harassment claim, stating "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

\textsuperscript{25} Id. at 67 (internal quotation omitted).
\textsuperscript{26} See Lisa Fair McEvers, Comment, \textit{Sexual Harassment by a Supervisor of the Same-Sex, Is It Actionable?}, 72 N.D. L. REV. 397, 400 (1996).
\textsuperscript{27} See id. at 399.
\textsuperscript{28} See \textit{Meritor}, 477 U.S. at 65, 67; see also McEvers, supra note 26, at 402.
\textsuperscript{29} See \textit{Meritor}, 477 U.S. at 72 (declining to establish a bright-line rule, but concluding that agency principles apply and that such liability does not attach automatically).
\textsuperscript{30} 510 U.S. 17 (1993).
working environment, Title VII is violated.\textsuperscript{31} The \textit{Harris} decision inserted a “reasonable person standard” for judging whether the conduct at issue, considering all the circumstances, was severe or pervasive enough to create an objectively hostile or abusive environment.\textsuperscript{32}

III. SAME-SEX SEXUAL HARASSMENT CLAIMS UNDER TITLE VII, PRE-\textit{ONCALE}

A. Introduction

While the guidelines published by the Equal Employment Opportunity Commission have for some time recognized the viability of a Title VII same-sex sexual harassment claim,\textsuperscript{33} prior to \textit{Oncale} the law among the circuit courts of appeals remained sharply divided. Ultimately, \textit{Oncale} answers the cognizability question of same-sex sexual harassment actions under Title VII,\textsuperscript{34} while creating an unclear standard on causation.\textsuperscript{35} Thus, it is necessary to examine the “bewildering variety of stances”\textsuperscript{36} assumed by the federal courts in order to understand the importance of the \textit{Oncale} decision and forecast the direction of Title VII sexual harassment jurisprudence on the issue of same-sex sexual harassment.\textsuperscript{37}

B. Title VII as an Absolute Bar to Same-Sex Sexual Harassment Claims: The Fifth Circuit and the Garcia Decision

With its 1994 decision in \textit{Garcia v. Elf Atochem North America},\textsuperscript{38} the Court of Appeals for the Fifth Circuit became the first federal appellate court to directly address the issue of

\textsuperscript{31} Id. at 21 (emphasis added).
\textsuperscript{32} See id. at 23.
\textsuperscript{33} See Fredette v. BVP Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997) (citing EEOC Compl. Man. (CCH) ¶ 3101 (1987)).
\textsuperscript{34} See supra note 14 and accompanying text.
\textsuperscript{35} See infra notes 188-200 and accompanying text.
\textsuperscript{36} \textit{Oncale v. Sundowner Offshore Servs., Inc.}, 188 S. Ct. 998, 1002 (1998) (stating that “federal courts have taken a bewildering variety of stances” when addressing same-sex, hostile work environment Title VII actions).
\textsuperscript{37} See infra Parts VI, VII.
\textsuperscript{38} 28 F.3d 446 (5th Cir. 1994).
same-sex sexual harassment under Title VII. Garcia involved a male claimant who alleged he was sexually accosted on numerous occasions by another male employee. The plaintiff, a heterosexual male, specifically claimed that a heterosexual male supervisor continually harassed him by approaching him from behind, reaching around the plaintiff's body, grabbing the plaintiff's crotch, and moving in a sexually suggestive manner. Other employees had also complained of similar conduct by the supervisor. The company, however, interpreted the behavior as mere "horseplay."

In affirming the grant of the defendant's motion for summary judgment, the court concluded that the behavior to which the plaintiff was subjected "could not . . . constitute sexual harassment within the purview of Title VII." Although the Fifth Circuit seemingly resolved the case on other grounds, the court offered as an alternative holding that "[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; Title VII addresses gender discrimination.

According to the Fifth Circuit, Title VII categorically barred as a matter of law both quid pro quo and hostile environment sexual harassment claims when the claimant and the alleged harasser were of the same sex. In support of the "gender discrimination" theory of Title VII, the Garcia court cited an unpublished Fifth Circuit opinion, Giddens v. Shell Oil Co., and the controversial 1988 United States District Court for the Northern District of Illinois case, Goluszek v. H.P. Smith.

39. See id. at 448.
40. See id.
41. See id.
42. See id.
43. Id. at 452.
44. The defendants were granted summary judgment because none fell within Title VII's definition of employer; however, "summary judgment in favor of all defendants was proper [because Title VII does not address same-sex sexual harassment] on this basis also." Id.
45. Id. at 451-52 (emphasis added) (quoting Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993) (unpublished table decision)).
46. See id. at 451 (quoting Giddens, 12 F.3d 208).
47. See id. at 452 (citing Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988)).
In *Goluszek*, the federal district court denied relief to a same-sex sexual harassment claimant. Like *Garcia*, *Goluszek* also involved alleged incidents of same-sex sexual harassment between heterosexual males. The plaintiff in *Goluszek* lived at home with his mother and was described by the court as someone who “blushes easily.” At work, the plaintiff was repeatedly subjected to the ridicule of his male colleagues who teased him about his femininity and made provocative sexual remarks in his presence. Complaints to his male supervisor proved futile and ultimately subjected the plaintiff to more ridicule.

The district court in *Goluszek* denied the plaintiff's sexual harassment claim on the belief that, despite the plain language of the statute, Title VII attempted to alleviate only gender discrimination in the work place and should not be interpreted to apply in same-sex sexual harassment claims. The court reasoned:

The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group. Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable. The “sexual harassment” that is actionable under Title VII “is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.” Actionable sexual harassment fosters a sense of degradation in the victim by attacking their sexuality. In effect, the offender is saying by words or actions that the victim is inferior because of the victim’s sex.

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48. See *Goluszek*, 697 F. Supp. at 1456.
49. See id. at 1453.
50. See id.
51. See id. at 1454. The plaintiff's coworkers repeatedly accused him of being gay or bisexual, poked him in the buttocks with a stick, and showed him pictures of nude women. See id.
52. See id. at 1453. The plaintiff's supervisor advised him to “get married and get some of that soft pink smelly stuff that's between the legs of a woman.” *Id.*
53. See id. at 1456.
54. *Id.* (internal citations omitted).
The Goluszek court offered no legislative history to support this holding, but relied solely on a 1984 student written note in a law journal. Thus, precedent was created that allowed other courts, most prominently the Fifth Circuit in Garcia, to deny relief to same-sex sexual harassment claimants through reliance on Goluszek and the "dominant gender" theory of Title VII.

C. The Murky Middle: The Fourth Circuit and the Homosexual Harasser

While some courts followed the Fifth Circuit in holding claimants never have a Title VII cause of action for same-sex sexual harassment, other courts, most notably the Fourth Circuit, allowed same-sex sexual harassment actions provided the claimant could prove that the harasser was homosexual. Courts permitted such claims on the logic that "but for" the claimant's sex, he or she would not have been sexually harassed, thus creating a proper claim within Title VII's prohibition against "discrimination... because of... sex." Because the statutory requirements are satisfied, the fact that both the claimant and the harasser are of the same sex becomes non-determinative.

In McWilliams v. Fairfax County Bd. of Supervisors, a cognitively disabled male named Mark McWilliams was repeatedly subjected by his coworkers to sexually charged teasing and

55. Indeed, little exists. See supra notes 1-4 and accompanying text.
57. See generally Carpenter, supra note 5, at 708 ("The dominant gender theory of Goluszek—that same-sex sexual harassment does not violate Title VII because it cannot create a climate hostile to the victim's sex or abuse the imbalance of power between the sexes—has been followed by most of the courts rejecting same-sex harassment claims.").
58. See, e.g., Wrightson v. Pizza Hut of America, 99 F.3d 138 (4th Cir. 1996); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996).
60. See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998) (holding that an "inference of discrimination" is available to satisfy Title VII's statutory requirements where "credible evidence [exists] that the harasser [is] homosexual"); see also infra note 157 and accompanying text.
61. 72 F.3d 1191 (4th Cir. 1996).
roughhousing. Forced to his knees on one occasion, McWilliams was blindfolded and forced to “fellate” a harasser’s finger. While the Fourth Circuit found the conduct to be highly offensive, the complaint did not state an actionable claim of sexual harassment. To the McWilliams panel, Title VII’s “because of sex” trigger was not met because none of the harassers were homosexual. The court held that sexual behavior between heterosexuals of the same sex is never actionable under Title VII. If McWilliams or any other same-sex sexual harassment plaintiff could prove that the harasser was either homosexual or sexually attracted toward the plaintiff, then the plaintiff could prevail. Only then would such harassment be considered to have occurred “because of . . . sex.”

The Fourth Circuit’s hypothetical became verifiable several months later. In Wrightson v. Pizza Hut of America, Inc., the heterosexual plaintiff’s gay supervisor and gay coworkers attempted, over a period of seven months, to entice him and three other heterosexual male employees into performing homosexual acts. The plaintiff was able to prove the homosexuality of his harassers, and the court held that “a claim under Title VII for same-sex ‘hostile work environment’ harassment may lie where the perpetrator of the sexual harassment is homosexual.” The court based its holding on the “simple logic” that “an employer of either sex can discriminate against his or her employees of the same sex because of their sex.”

62. See id. at 1193. Specifically, McWilliams’s coworkers asked questions about his sexual activities, made requests to masturbate him, assaulted him by placing a broomstick to his anus and fondling him to the point of erection. See id. at 1193, 1199.
63. See id. at 1193.
64. See id. at 1196.
65. See id. at 1195.
66. See id.
68. See id. at 139. In addition, the plaintiff was forced to listen to verbal descriptions of homosexual sex and was touched in a “sexual nature” by his harassers. See id.
69. Id. at 141.
70. Id. at 142.
D. The Sexual Orientation of the Harasser is Unimportant: The Eighth Circuit

In the 1996 *Quick v. Donaldson Co.* decision, the Court of Appeals for the Eighth Circuit became the first federal appellate court to extend Title VII protection to all victims of workplace sexual harassment, regardless of the sex or sexual orientation of the claimant and the harasser.\(^7\)

*Quick* involved a heterosexual male plaintiff who was repeatedly subjected to “bagging” incidents, whereby other heterosexual male coworkers would “bag” or grab the plaintiff’s testicles against his will.\(^7\) The plaintiff’s coworkers also called him “queer” and “pocket lizard licker” and repeatedly made homosexual references in his presence.\(^7\) The plaintiff ultimately required psychological treatment and sued his employer for sexual harassment.\(^7\)

The district court, relying largely on a *Goluszek*-type analysis, held that the plaintiff’s same-sex harassment claim did not fall within the parameters of Title VII.\(^7\) The Eighth Circuit reversed, holding that as long as “members of one sex are exposed to disadvantageous . . . conditions of employment to which members of the other sex are not exposed,” then Title VII’s causal element is satisfied.\(^7\)

To the appellate court, Title VII’s protections extend “to all employees and . . . [prohibit] disparate treatment of an individual, man or woman, based on that person’s sex.”\(^7\) In rejecting the *Goluszek*-style dominant gender theory of Title VII adopted by the district court, the *Quick* panel held that “[p]rotection

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71. 90 F.3d 1372 (8th Cir. 1996).
72. See id. at 1379.
73. See id. at 1374.
74. See id. at 1375, 1379.
75. See id. at 1375.
76. See *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1296 (S.D. Iowa 1995); see also supra notes 47-57 and accompanying text.
77. *Quick*, 90 F.3d at 1378 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsberg, J., concurring)).
78. Id.
under Title VII is not limited to only disadvantaged or vulnerable groups. It extends to all employees.  

This holding placed the Eighth Circuit in direct conflict with the Fifth Circuit, while also rejecting the Fourth Circuit’s proposition that only when the harasser is homosexual does a claim of same-sex sexual harassment fall within Title VII’s purview. In Quick, the Eighth Circuit held that “[a] worker need not be propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually harassed.” To the Eighth Circuit panel, “[i]ntimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. Moreover, physical aggression, violence, or verbal abuse may amount to sexual harassment.”

E. The Seventh Circuit in Doe v. City of Belleville: Workplace Harassment That is Sexual in Content Is Always Actionable

In Doe v. City of Belleville, the Seventh Circuit developed perhaps the most liberal analysis of Title VII’s “because of... sex” language. After a thorough analysis of Title VII’s sexual harassment jurisprudence, the Doe court concluded that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or, most importantly, motivations. Doe, aside from Oncale, is the only other same-sex sexual harassment case to which the Supreme Court has thus far granted certiorari. In vacating the decision and remanding the case to the Seventh Circuit for

79. Id.
80. See supra notes 58-70 and accompanying text.
81. 90 F.3d at 1379 (quoting Burns v. McGregor Elec. Indus., 939 F.2d 959, 964 (8th Cir. 1993)).
82. Id. (citing Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988)).
83. 119 F.3d 563 (7th Cir. 1997), cert. granted and judgment vacated, 118 S. Ct. 1183 (1998).
84. See generally Richard F. Storrow, Same-Sex Harassment Claims After Oncale: Defining The Boundaries of Actionable Conduct, 47 AM. U. L. REV. 677, 714 (1998). Storrow states that “Doe ventured further than any other decision in analyzing fully the various concerns raised by same-sex cases, and it offered the most controversial analytical paradigm for these cases to appear to date.” Id.
85. See 119 F.3d at 566.
reconsideration in light of their opinion in Oncale, the Supreme Court has sent the message that perhaps Doe went too far and Title VII should be more strictly construed. The case is, thus, helpful in defining the outer limits of an actionable same-sex sexual harassment claim.

The facts in Doe illustrate the inherent difficulty in differentiating conduct which is merely offensive and insensitive from that which rises to the level of actionable sexual harassment. Two minor brothers, J. Doe and H. Doe, were hired by the defendant in 1992 to cut weeds and grass in the municipal cemetery. The teenage boys received daily abuse from their coworkers and their supervisor. J. Doe was nicknamed “fat boy” and H. Doe, who wore an earring, was referred to as the “fag” or “queer.” The primary harasser referred to H. Doe as his “bitch” and regularly commented that he was going to take him “out to the woods” and “get [him] up the ass.” The same coworker, in one instance, cornered H. Doe and grabbed his testicles, commenting “[w]ell, I guess he’s a guy.”

After enduring two months of continual harassment by their coworkers and supervisor, the brothers quit their summer jobs. Through their parents, they subsequently filed an action against the City of Belleville, alleging claims of sexual harassment and retaliation in violation of Title VII. The district court granted summary judgment in favor of the defendant on all of the plaintiffs claims, primarily because both of the Does and their harassers were heterosexual males and, therefore, plaintiffs could not establish that they were harassed “because of [their] sex.”

Justice Rovner, writing for the majority, reversed the trial court, holding that the plaintiffs were entitled to a trial on

87. See id.
88. See infra notes 194-200 and accompanying text.
89. See 119 F.3d at 566.
90. See id.
91. See id.
92. Id. at 567. This coworker, described as a “former Marine of imposing stature,” also urged H. Doe to “go back to San Francisco with the rest of the queers.” Id.
93. Id.
94. See id.
95. See id.
96. See id. at 567-68.
their claims of sexual harassment. In answering the threshold question of whether same-sex sexual harassment claims are ever cognizable under Title VII, the Doe panel concluded that "[u]nless 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."

Having concluded that same-sex sexual harassment claims were actionable, the Seventh Circuit then addressed the quantum of proof necessary to establish that the harassment occurred "because of sex." The court noted that sexual harassment is assumed to be "because of sex" when a female employee is harassed by a male coworker. Conversely, the court also noted that by and large, most courts have refused to make the same assumption "when a man harasses another man in the workplace, however rife the harassment may be with sexual innuendo, sexual contact, and other conduct of an explicitly sexual nature."

In a resounding departure from the foregoing, the Seventh Circuit held:

One may reasonably infer from the evidence before us that H. Doe was harassed "because of" his gender. If that cannot be inferred from the sexual character of the harassment itself, it can be inferred from the harassers' evident belief that in wearing an earring, H. Doe did not conform to male standards . . . . The fact that none of the harassers are gay does not defeat the claim of sexual harassment, as the district court believed . . . . [W]e do not agree that same sex, sexual harassment is actionable under Title VII only when the harasser is sexually oriented toward members of his or her own gender. We have never made the viability of sexual harassment claims dependant upon the sexual orientation of the harasser, and we are convinced

97. See id. at 568.
98. Id. at 574.
99. See id.
100. See id. (citing Horn v. Duke Homes, 755 F.2d 599, 604 (7th Cir. 1985)).
101. Id. at 574-75 (citing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195-96 n.5 (4th Cir. 1996); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996)).
that it would be 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, we believe, unfounded.102

While the Seventh Circuit conceded that proving the harasser was motivated to target one gender and not the other may be required where the harassment is not sexual on its face, it rejected the notion that such proof is necessary when the harassment itself is "imbued with sexual overtones."103

The court identified and rejected the disparate nature of requiring proof of sexual orientation in the case of same-sex harassment, stating:

Men sexually harass women in the workplace for reasons other than sexual desire; but that does not detract either from the sexual content of the harassment or from the uniquely intrusive and denigrating impact sexual harassment has upon the women who experience it. So too, as this case demonstrates, can men be sexually harassed without the harassers (so far as we know it) acting out of sexual desire. . . . We therefore reject the notion that same-sex harassment amounts to sex discrimination under Title VII only when the harasser is proven to be gay or lesbian.104

The court continued:

[W]hen someone's gender is questioned on a daily basis, when his co-worker regularly threatens to sexually assault him in the woods, and when his genitals are grabbed for the ostensible purpose of determining his gender, we must question whether it makes a whit of difference why he was singled out for abuse; whether his harassers were motivated by his sex, by his purported sexual orientation, or by some other factor, it would seem he has been harassed sexually and his gender necessarily implicated.105

102. Id. at 575.
103. Id. at 575, 577-78.
104. Id. at 590-91. The court noted, "[h]ere, for example, the evidence suggests not that H. Doe's co-workers were biased against men per se, but against men who did not conform to their notions of masculinity." Id. at 592.
105. Id. at 593.
F. Pre-Oncale Caselaw: Conclusion

With the Fifth Circuit in *Garcia* and the Seventh Circuit in *Doe* representing the polar extremes regarding whether a same-sex sexual harassment claim is ever cognizable under Title VII, the federal courts remained "hopelessly divided." Some, like the Fifth Circuit in *Garcia*, held that same-sex sexual harassment claims are never cognizable under Title VII. Other courts, most notably the Fourth Circuit, stated that such claims are only actionable if the plaintiff can prove that the harasser is homosexual and, presumably, motivated by sexual desire. Still others, most notably the Seventh Circuit in *Doe*, suggested that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations. By granting certiorari in *Oncale*, the Supreme Court would ostensibly attempt to provide some guidance.

106. See McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 n.4 (4th Cir. 1996) ("[T]he lower federal courts which have [addressed this issue] are hopelessly divided.").

107. See supra notes 38-57 and accompanying text.

108. See supra notes 58-70 and accompanying text.

109. See supra notes 83-105 and accompanying text.
IV. Oncale: The Facts and Procedural History

A. The Facts

In October of 1991, Joseph Oncale was employed as a roustabout on an oil platform in the Gulf of Mexico. Oncale worked as part of an eight-man crew which included the respondents in his eventual sexual harassment action: John Lyons, Danny Pippen, and Brandon Johnson. No women were employed on the offshore platform.

On several occasions, Oncale claims to have been subjected to "sex-related, humiliating actions against him by Lyons, Pippen, and Johnson in the presence of the rest of the crew." On one occasion, with Pippen and Johnson restraining Oncale, Lyons placed his penis on Oncale’s neck. In a separate, similar incident, Lyons placed his penis on Oncale’s arm. The most graphic display of sexual assault occurred when, after repeated threats of homosexual rape by Lyons and Pippen, Pippen held Oncale against a wall in a shower on Sundowner’s premises while Lyons forced a bar of soap into Oncale’s anus.

110. These facts are pulled largely from the district and appellate court opinions in Oncale. Justice Scalia’s opinion presents only a short summary of Mr. Oncale’s allegations, stating that “[t]he precise details are irrelevant to the legal point we must decide and in the interest of both brevity and dignity we shall describe them only generally.” Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1000 (1998). But see Abrams, supra note 12, at 1258 n.9. Professor Abrams suggests that perhaps Justice Scalia is uncomfortable reciting the actual facts of the case, stating:

Presumably, the Court is referring to the dignity of Joseph Oncale, although the conclusion that reciting the facts of an actionable legal wrong somehow disgraces its victim seems both anachronistic (a throwback to a time when sexualized injury was thought to reflect badly on the victim) and surprisingly gender-specific (this reluctance is rarely manifest in cases involving the sexualized injury of a woman). Perhaps Justice Scalia means to suggest that in the interests of preserving the dignity of the Court, he will not recite these distasteful facts.

111. See Oncale, 118 S. Ct. at 1000-01.
112. See id. at 1001.
113. Id.
115. See id.
116. See id. at 118-19.
Oncale complained to supervisory personnel, but the company took no remedial action and Oncale's concerns went unadressed. Indeed, Sundowner's Safety Compliance Clerk "told Oncale that Lyons and Pippen 'picked [on] him all the time too,' and called him a name suggesting homosexuality." Oncale eventually quit, asking that his dismissal papers reflect that he "voluntarily left due to sexual harassment and verbal abuse." When deposed, Oncale stated that he left Sundowner because "I felt that if I didn't leave my job, that I would be raped or forced to have sex."

B. The Procedural History

In May of 1994, Oncale filed suit against his former employer, Sundowner Offshore Services, Inc., and three coworkers (Lyons, Pippen, and Johnson) in the United States District Court for the Eastern District of Louisiana. Oncale's complaint alleged both quid pro quo and hostile work environment sexual harassment in violation of Title VII's prohibition against "discrimination because of . . . sex." In March of 1995, Judge Porteus granted the defendants' motion for summary judgment. While noting that Oncale's allegations, if proven, would constitute "outrageous conduct by the defendants which would be actionable under Louisiana law," Judge Porteus wrote that Oncale's complaint "only alleges violations of Title VII." Relying on the Fifth Circuit's "clear-
ly articulated... position that same sex harassment does not state a claim under Title VII,"\(^{125}\) Judge Porteus held that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers."\(^{126}\)

Oncale appealed the defendant's summary judgment verdict to the Court of Appeals for the Fifth Circuit. In May of 1996, the Fifth Circuit affirmed the district court's summary judgment determination.\(^{127}\) Finding the Garcia decision to be "binding precedent,"\(^{128}\) the Fifth Circuit held that "same-sex harassment claims are not viable under Title VII."\(^{129}\) Oncale's request for an en banc rehearing was denied, and the Supreme Court granted Oncale's writ of certiorari in June of 1997.\(^{130}\)

V. **ONCALE: THE SUPREME COURT'S DECISION**

Justice Antonin Scalia wrote the "unusually brief,"\(^{131}\) seven page opinion for the unanimous Court.\(^{132}\) The issue presented to the Court by *Oncale* was "whether workplace harassment can violate Title VII's prohibition against 'discrimination... because of... sex' when the harasser and the harassed employee are of the same sex."\(^{133}\)

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126. Id. at *2; see also supra notes 38-57 and accompanying text.
127. See *Oncale Offshore Servs., Inc. v. Sundowner*, 83 F.3d 118 (5th Cir. 1996).
128. See id. at 120. The Fifth Circuit panel held that *Garcia* could only be reversed by an en banc hearing or by the Supreme Court. See id. at 119.
129. Id. at 120. This is a categorical rejection of both quid pro quo and hostile work environment same-sex sexual harassment actions as a matter of law.
130. Before deciding whether to grant certiorari in *Oncale*, the Supreme Court first asked the U.S. Department of Justice to submit briefs on the subject of same-sex sexual harassment. The Solicitor General ultimately appeared as amicus curiae in *Oncale* to support the views of the petitioner, Joel Oncale. See Theresa Schulz, *U.S. Supreme Court Seeks Advice From Justice Department On Same-Sex Harassment Appeal*, *West's Legal News*, Dec. 18, 1996, at 13,521.
132. Justice Clarence Thomas also filed a one paragraph concurrence stating, "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.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998) (Thomas, J., concurring).
133. *Oncale*, 118 S. Ct. at 1000 (citation omitted).
A. The Holding in Oncale: A Simple Reading of Title VII’s Text and the Court’s Precedents Supplies the Backdrop

Because Oncale ultimately presents an issue of statutory interpretation, the Court’s opinion appropriately begins with a recitation of the gender-neutral language of Title VII’s text and discusses the evolution of Title VII jurisprudence.134 Particular attention is given to Meritor’s expansion of Title VII into the realm of workplace sexual harassment as clarified by Harris.135

In a foreshadowing of events to come, the Court reminds the reader that Title VII’s “prohibition of discrimination ‘because of . . . sex’ protects men as well as women,”136 and that “in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race.”137

Although the exact precedential value of Johnson v. Transportation Agency, Santa Clara County,138 a Title VII case ultimately decided on other grounds,139 is unclear, the Court seemingly cites to the decision in support of its holding in Oncale. The Johnson Court, in dicta, “did not consider it significant that the supervisor who [promoted a female over the male claimant] was also a man.”140

Then, as “[i]f our precedents leave any doubt on the question”,141 the Court holds that “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely be-

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134. See id. at 1001.
135. See id; see also supra notes 20-32 and accompanying text.
137. Oncale, 118 S. Ct. at 1001 (citing Castaneda v. Partida, 430 U.S. 482, 499 (1977) (“Because 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.”)). The Court is alluding to the fact that reverse-discrimination “because of . . . sex” is entirely plausible.
139. See Oncale, 118 S. Ct. at 1001.
140. Id. (citing Johnson, 480 U.S. at 624-25).
141. Id.
cause the plaintiff and the defendant (or the person charged with acting for the defendant) are of the same sex."142

After delivering the holding of the Court, the remainder of Justice Scalia's opinion responds to the two main arguments advanced by the respondents and their amici143 in Oncale.

B. Did Congress Intend for Title VII To Prohibit Same-Sex Sexual Harassment?

The Fifth Circuit and other courts that categorically excluded same-sex harassment claims from Title VII coverage did so primarily on the rationale that providing a remedy for this type of claim was not the intent of Congress and, thus, outside the scope of the statute.144 Justice Scalia concedes that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII."145 Justice Scalia concludes, however, that "statutory prohibitions 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."146

Finding "no justification in the statutory language [of Title VII] . . . for a categorical rule excluding same-sex harassment claims,"147 the Court is seemingly relying on the plain, unambiguous language of the statute. The Court states that "Title VII prohibits 'discrimination . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding [in Meritor] that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."148
C. What Will Prevent Title VII From Being Transformed Into a General Civility Code?

In *Oncale*, respondents and their amici further contended that “recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace.” The Court does not find this argument particularly persuasive and assures that “careful attention to the requirements of the statute” will prevent such a transformation.

1. The First Requirement: The Court’s Refusal To Delete “Discrimination” From the Statute

Under the first requirement of the Court’s two-part test, plaintiffs in same-sex sexual harassment claims must always prove that they were actually victims of “discriminat[ion] . . . because of . . . sex.” Workplace harassment, even between men and women, does not automatically amount to “discrimination” merely because “the words used have sexual content or connotations.”

Justice Scalia then provides four hypothetical fact patterns, each of which, if proved, would support an “inference of discrimination”, thus satisfying Title VII’s causal requirement. In the first hypothetical, an inference of discrimination is “easy to draw” in most male-female sexual harassment situations, because the “challenged conduct typically involves explicit or implicit proposals of sexual activity” and it is “reasonable to assume those proposals would not have been made to someone of

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149. Id.
150. See id. “That risk [of Title VII becoming a general civility code] is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute.” Id.
151. Id.
152. Id.
153. 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., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).
154. Id. at 1002.
the same sex." In the second hypothetical, the "same chain of inference [of discrimination]" from the first hypothetical is also available in a same-sex sexual harassment case if the harasser is homosexual. In the third hypothetical, Justice Scalia presents a same-sex sexual harassment situation where the female harasser is not motivated by sexual desire, but instead is motivated by a general hostility towards women in the workplace. In the final hypothetical, a same-sex harassment plaintiff could "offer direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace" in order to support an inference of discrimination. Ultimately, "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 'discriminat...ion] ... because of ... sex." 

2. The Second Requirement: Title VII Only Prohibits Severe or Pervasive Conduct Which Creates an Objectively Hostile Work Environment Considering All the Circumstances Including the Social Context of the Alleged Harassment 

Citing the Meritor and Harris decisions, the Court makes clear that Title VII does not reach "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and opposite sex." Title VII only forbids discriminatory behavior "so objectively offensive as to alter the 'conditions' of the victim's employment." "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a

155. Id. 
156. Id. The logic behind this inference of discrimination mirrors the position of the Fourth Circuit prior to the Supreme Court's decision in Oncale. See supra notes 58-70 and accompanying text. 
157. See id. 
158. Id. 
159. Id. 
160. Id. at 1003. Presumably, "genuine but innocuous differences" include "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation." Id. 
161. Id.
reasonable person would find hostile or abusive—is beyond Title VII's purview.'\textsuperscript{162}

In determining the "objective severity of [the] harassment," courts and juries must give "careful consideration [to the] social context in which [the] particular behavior occurs and is experienced by its target."\textsuperscript{163} By using "[c]ommon sense and an appropriate sensitivity to social context," courts and juries will be able "to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive," thus preventing the transformation of Title VII into a general workplace civility code.\textsuperscript{164}

VI. ANALYSIS

A. The Court's Decision in Oncale: A Strict and Correct Application of Title VII

Respondents in the \textit{Oncale} case argued that expanding Title VII to cover same-sex harassment claims would ignore the historical context within which the statute was enacted.\textsuperscript{165} However, by failing to define the unambiguous word "sex," Congress effectively "relinquished the duty to delineate proscribed behavior in the workplace relating to 'sex' in the judiciary."\textsuperscript{166}

As Judge Luttig of the Fourth Circuit Court of Appeals wrote in \textit{Wrightson v. Pizza Hut of America, Inc.},\textsuperscript{167} "[w]here Congress has unmistakably provided a cause of action, as it has through the plain language of Title VII, [the courts] are without

\textsuperscript{162} Id. (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).
\textsuperscript{163} Id. For example, "[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 be experienced as abusive by the coach's secretary (male or female) back at the office." \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{167} 99 F.3d 138 (4th Cir. 1996); \textit{see also supra} notes 67-70 and accompanying text.
authority in the guise of interpretation to deny such exists, whatever the practical consequences.\textsuperscript{168}

Indeed, any excursion into an extra-textual interpretation of Title VII by the \textit{Oncale} Court would have broken the first canon of statutory interpretation: read the plain language of the statute.\textsuperscript{169} The text of Title VII is gender-neutral and does not suggest that the particular gender of the harasser or victim should be a dispositive consideration in a Title VII case. Addressing this issue, the Seventh Circuit stated that "[u]nless 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."\textsuperscript{170}

The statute's text simply does not support the Fifth Circuit's categorical exclusion of same-sex sexual harassment claims:

The 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 . . . . It is, ultimately, the plain, unambiguous language of the statute upon which we must focus . . . . There is no ambiguity here . . . . [T]he words of Title VII suggest that anyone discriminated against "because of" such individual's sex may bring suit, regardless of his gender or that of his harasser.\textsuperscript{171}

The Court's holding in \textit{Oncale} is the only proper one under the Constitution's structure of the three branches of the federal system. Congress, not the Court, created Title VII. Congress chose to use the unmodified word "sex" when referring to dis-

\textsuperscript{168} Id. at 144. The "practical consequences" alluded to by Judge Luttig include a significant increase in Title VII litigation. See \textit{id}.

\textsuperscript{169} See, e.g., Bailey v. United States, 116 S. Ct. 501, 506 (1995) (explaining that the first step in statutory construction is reading the language of the statute); INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) (stating that when a statute's text is clear on its face, the Court should not look to the legislative history); see also Kelly v. Robinson, 479 U.S. 36, 43 (1986) ("[T]he starting point in every case involving construction of a statute is the language itself." (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975))).

\textsuperscript{170} Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1998), cert. granted and judgment vacated, 118 S. Ct. 1183 (1998).

\textsuperscript{171} Id. at 572-73 (internal citations omitted).
crimination that is forbidden. This is a choice of an obviously gender-neutral term, just as Congress chose to prohibit discrim-
ination based on “race” rather than discrimination against par-
ticular racial groups. The Court would be overstepping its con-
stitutional bounds if it were to deny relief to a claimant who satisfied Title VII’s statutory requirements in a same-sex sexual harassment case where Congress has not provided that such an action is outside the scope of Title VII.172

B. Oncale Eliminates the Absurdity of the Bisexual Harasser

The Fifth Circuit’s categorical rejection of both quid pro quo and hostile work environment same-sex sexual harassment actions gave both bisexual and homosexual harassers “free rein to victimize same-sex employees without the threat of liability.”173 The Court’s opinion in Oncale provides redressability under Title VII to all victims of discriminatory sexual harass-
ment, and does not allow harassment that satisfies the statu-
tory requirements to fortuitously proceed unchecked simply because the harasser and his or her victim are of the same sex.174

The absurd circumstances that would be created through an acceptance of the Garcia rule are underscored by the United States District Court for the Eastern District of Louisiana in the matter of Pritchett v. Sizeler Real Estate Management Co.175 In Pritchett, the plaintiff filed an action against her former employer alleging that she was sexually harassed by her female supervisor in violation of Title VII.176 Refusing to fol-
low seemingly binding Fifth Circuit precedent,177 the judge dismissed the defendant’s motion for summary judgment178 and acknowledged the logical absurdity that the Fifth Circuit’s rule in Garcia created. In Pritchett, the court held that it natu-

172. See Wrightson, 99 F.3d at 144 (“[O]ur role as courts is limited to faithfully interpreting the statutes enacted by the Congress and signed into law by the President.”).
173. Shahan, supra note 166, at 526.
176. See id. at *1.
177. See id. at *2.
178. See id. at *1.
rally would be a discriminatory practice to exempt a supervisor from a Title VII sexual harassment claim solely because of that supervisor's sexual orientation or the gender of his victim.\(^7\) As stated in *Pritchett*, “to conclude that same-gender harassment is not actionable under Title VII, is to exempt homosexuals from the very laws governing the workplace conduct of heterosexuals.”\(^8\) Certainly, the broad reach of Title VII, as defined by the Court in *Meritor* and refined in *Oncale*, to “strike at the entire spectrum of disparate treatment of men and women in employment,”\(^9\) did not support such an exemption.

C. An Unclear Standard: The Court’s Command That Judges and Juries Use “Common Sense and an Appropriate Sensitivity To Social Context” To Distinguish Between Ordinary Socializing and Actionable Sexual Harassment

Critics have cautioned that an expansion of Title VII liability into the realm of same-sex sexual harassment would open a floodgate of litigation, transforming Title VII into a “general civility code for the American workplace.”\(^1\) In response, *Oncale* commands that “[c]ommon sense, and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.”\(^2\)

As one commentator has observed, “[t]he elegance and unusual brevity of Justice Scalia's opinion leaves it to the lower courts to thrash out the distinction between common sense and nonsense.”\(^3\) Another has written that the “*Oncale* opinion

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179. See id. at *2.
180. Id.
182. See, e.g., 118 S. Ct. at 1002 (“Respondents and their amici contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace.”).
183. Id. at 1003.
contains a remarkable call for contextualization in the assessment of sexual harassment, tempered only by Scalia's confident and perhaps solipsistic suggestion that one can resolve these cases with a healthy dose of common sense.\textsuperscript{185}

The one example of contextualization that the Court provides (of a football coach smacking his players on the buttocks)\textsuperscript{186} is illustrative of the inherent ambiguity of the Court's rationale. For example, what would be the outcome if the place kicker on Justice Scalia's hypothetical football team were a female? If a male coach's "smack" on the female kicker's buttocks was indeed "experienced"\textsuperscript{187} by the female as offensive, then the coach's conduct may very well be classified as abusive. Either way, the existence of valid arguments on both sides illustrates the difficulty lower courts and juries will have applying the Court's standard. Clarification will require that the high court review a case more fully developed at trial rather than one disposed on summary judgment.

D. How Do Future Same-Sex Sexual Harassment Plaintiffs Satisfy Title VII's "Because of . . . Sex" Causation Element?

As one commentator noted:

\textit{Oncale} is in many respects an enigma. In an effort to give a conclusive answer to a case that, by all appearances, he would have preferred not to consider, Justice Scalia skirted the "what," the "how" and the "why" of sexual harassment . . . and provided only a few hints as to how decisionmaking in these cases should occur.\textsuperscript{188}

\begin{itemize}
  \item 185. Abrams, supra note 12, at 1258-59.
  \item 186. See \textit{Oncale}, 118 S. Ct. at 1003; see also supra note 164 and accompanying text.
  \item 187. See id. at 1003 ("In same sex (as in all) harassment cases, [determining whether alleged conduct constitutes actionable sexual harassment] requires careful consideration of the \textit{social context} in which particular behavior \textit{occurs} and \textit{is experienced} by its target.") (emphasis added). It is also doubtful that a male coach's slapping of a female player's buttocks is considered a social norm.
  \item 188. Abrams, supra note 12, at 1258. To Professor Abrams, "Justice Scalia's opinion strikes me as holding the sexual harassment claim somewhat at arm's length. My perception may be colored in part by the lack of solicitude Justice Scalia has manifested toward constitutional discrimination claims raised by women, gays, and lesbi-
In the words of Judge Brody of the United States District Court for Maine, "[c]ourts are only beginning to decipher the 'because of . . . sex' requirement emphasized in Oncale."\(^{189}\) A plaintiff must ultimately prove the causation element of Title VII as part of his or her prima facie case of sexual harassment. As the Supreme Court stressed in Oncale, if the plaintiff cannot offer evidence to prove that he or she was harassed "because of . . . [his or her] sex," a Title VII claim will not lie.\(^{190}\)

The easiest way for a same-sex sexual harassment plaintiff to satisfy Title VII's causal element is to prove that his or her harasser is either homosexual or bisexual. The Oncale decision clearly establishes an "inference of discrimination [because of . . . sex]" under such facts.\(^{191}\) While a lack of such evidence does not render a plaintiff unable to establish a prima facie claim of same-sex sexual harassment, it certainly makes the case more difficult to prove. Presumably, the plaintiff must offer proof that the harasser only harassed employees of his or her own sex in such a manner that the harasser's conduct demonstrates a "general hostility to the presence of [members of his or her sex] in the workplace."\(^{192}\)

What is far less clear is whether a same-sex sexual harassment plaintiff can ever satisfy Title VII's "because of . . . sex" causation element where an alleged heterosexual harasser verbally assaults the plaintiff in an extremely sexual manner by referring to lewd sexual conduct. The Oncale decision does not conclusively shut the door on such a claim; it simply states that


\(^{190}\) See Oncale, 118 S. Ct. at 1002.

\(^{191}\) Id.

\(^{192}\) Id.
a same-sex sexual harassment plaintiff must do more than prove that the “conduct at issue . . . [is] merely tinged with offensive sexual connotations.”

The Supreme Court’s decision to vacate, without opinion, the judgment of the Seventh Circuit in *Doe v. City of Belleville*, in light of *Oncale*, seems to limit the viability of a gender-based, as opposed to sex-based, approach to proving causation under Title VII. For example, in *Doe*, the Seventh Circuit stated:

[A] man who is harassed because his voice is soft, his physique slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his co-workers’ ideas of how men are to appear and behave, is harassed “because of” his sex.

The *Doe* Court concluded that “gender stereotyping establishes the link to the plaintiff’s sex that Title VII requires.”

In his concurring and dissenting opinion in *Doe*, Judge Manion disagreed with the majority’s conclusion that the particular behavior alleged constituted actionable harassment under Title VII and suggested a much narrower reading of Title VII’s “because of . . . sex” requirement. Judge Manion instead concluded that the harassment occurred because “H. Doe wore an earring, not because H. Doe was a male.” Judge Manion criticized the majority for “shift[ing] the focus from the individual’s sex (male or female) to sexuality,” given that “Title VII does not prohibit discrimination on the basis of ‘sexuality,’ ‘sexual orientation,’ ‘something linked to sex,’ or anything else—only discrimination . . . because the victim is a man, or because the victim is a woman.”

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193. *Id.*
195. *Id.* at 581.
196. *Id.*
197. *See id.* at 599-601 (Manion, J., concurring and dissenting).
198. *Id.* at 601.
199. *Id.* at 603.
200. *Id.* at 604.
To at least one federal jurist, "[t]he Supreme Court's vacation of the decision in [Doe] 'in light of Oncale' suggests that the Court may favor Judge Manion's stricter reading of the term 'sex' over the majority's broader use of the term 'gender.'"201

VII. POST-ONCALE: NOT EVERYONE WILL WIN

In the days following the Oncale decision, it was hard not to find a particular interest group which did not appear satisfied. Gay rights activists "praised" the decision,202 the Equal Employment Opportunity Commission was "pleased" with the decision,203 and Sundowner Attorney Harry Reasoner stated that Oncale was "easily defensible on remand."204

On remand, however, Mr. Oncale will likely try to assert or seek discovery into the sexual orientation of his harassers, in hopes of receiving the ever-difficult "inference of discrimination" that the Court held is available when a same-sex harassment plaintiff is the victim of a homosexual harasser. Increased inquiry into sexual orientation does not seem like the sort of "victory" advocates of gay rights should celebrate; indeed, such inquiry could lead to the reduced hiring of homosexual employees by employers looking to escape liability from same-sex sexual harassment suits.205

The Oncale decision requires further refinement in the federal system before predictable patterns in same-sex harassment cases begin to emerge. In the meantime, employers are best advised to follow Justice Scalia's directive and treat all claims

204. Id.
205. One commentator has even suggested that juries will issue disproportionately higher damages in same-sex cases than in opposite-sex cases and that these higher damage awards will in turn inspire employers to discriminate against gays and lesbians. See E. Gary Spitko, He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard, 18 BERKELEY J. EMP. & LAB. L. 56, 84 (1997). But see Storrow, supra note 11, at 729 (arguing against Spitko's theory). Federal courts have thus far refused to extend Title VII protection to people on the basis of their sexual orientation.
of sexual harassment with "common sense" and appropriate responsiveness.

Thomas I. Queen, Jr.