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Bibby v. Philadelphia Coca-Cola Bottling Co. and Same-Sex Sexual Harassment In the Workplace: The Third Circuit Forecloses the Possibility of Equal Treatment for Homosexuals Under Title VII

*C. Lee Winkelman**

In the 1998 case of *Oncale v. Sundowner Offshore Services, Inc.*,[1] the Supreme Court reversed the Fifth Circuit Court of Appeals[2] and held that "same sex" sexual harassment was actionable under Title VII of the 1964 Civil Rights Act.[3] Last summer, in *Bibby v. Philadelphia Coca-Cola Bottling Co.*,[4] the Third Circuit had the opportunity to expand this holding by concluding that general anti-gay harassment is actionable under Title VII as discrimination on the basis of sex and not sexual orientation. It declined to do so and, instead, narrowed the Third Circuit's sexual harassment jurisprudence by holding that, as a matter of law, general anti-gay harassment *is not* actionable under Title VII, as it constitutes discrimination on the basis of sexual orientation, not on sex.[5] This holding is not only inconsistent with Title VII "sexual stereotypes" jurisprudence,[6] but also places an unfair burden on gay and lesbian plaintiffs bringing action for same-sex sexual harassment by essentially requiring

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1. 523 U.S. 75 (1998).

2. Prior to *Oncale*, there was a wholesale refusal to countenance Title VII same-sex sexual harassment suits in the Fifth Circuit. *See, e.g.*, Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones.). However, even before the Supreme Court's ruling in Oncale, some federal courts had allowed claims for same-sex sexual harassment under particular circumstances. *See, e.g.*, Wright v. Methodist Youth Servs., 511 F. Supp. 307 (N.D. Ill. 1981) (holding that male plaintiff stated a claim under Title VII where plaintiff had been discharged by the defendant because he refused the sexual advances of his male homosexual supervisor).

3. 42 U.S.C. §§ 2000e-2(a)(1) (2001); *Oncale*, 523 U.S. at 79-80.

4. 260 F.3d 257 (3d Cir. 2001).

5. *See id.* at 264-65.

6. *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (holding that discrimination on the basis of gender stereotypes constitutes discrimination on the basis of sex).

them to demonstrate that their harassers were not motivated by anti-gay animus.

John Bibby, a male homosexual, had been an employee of the Philadelphia Coca-Cola Bottling Co. since 1978. On August 12, 1993, he left work for a few months citing medical reasons.[7] He returned to work on December 23, 1993. On that same day he was violently assaulted by a coworker named Frank Berthcsi. In addition, while at the top of a set of steps working at a machine that put cases of soda on wooden or plastic pallets, Berthcsi, who was driving a forklift, slammed into the load of applets under the stairs effectively blocking Bibby's exit from the platform on which he was standing.[8] Moreover, Berthcsi repeatedly yelled at Bibby that "everybody knows your gay as a three dollar bill," "everybody knows you're a faggot," and "everybody knows you take it up the ass." In addition, Berthcsi would call Bibby a "sissy."[9]

Bibby also claimed that supervisors harassed him by yelling at him, ignoring his reports of problems with machinery, and arbitrarily enforcing rules against him in situations where infractions by other employees were generally ignored.[10] Finally, Bibby claimed that sexual graffiti bearing his name was written in the bathrooms and allowed to remain on the walls longer than other graffiti.[11]

In early 1998, Bibby filed a pro se complaint against Coca-Cola in the Eastern District of Pennsylvania.[12] After subsequently retaining counsel, he amended his complaint. In the amended complaint, he alleged that he had been sexually harassed in violation of Title VII. In addition, the amended complaint included two state-law claims, one for intentional infliction of emotional distress, and one for assault and battery.[13]

The district court granted, in part, Coke's motion to dismiss, dismissing Bibby's assault and battery claim.[14] After a short discovery period, Coca-Cola filed a motion for summary judgment on the sexual harassment claim. The district court granted the motion, holding that the evidence indicated that Bibby was harassed not because of his sex but because of his sexual orientation.[15]

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7. "Bibby was having pains in his stomach and chest when he was found by his supervisor with his eyes closed. . . . He was accused of sleeping on the job. Bibby asked for permission to go to the hospital and was told by the supervisor 'just go.' As he was leaving, the supervisor told him he was terminated, although in fact he was suspended with the intent to terminate. Bibby was hospitalized for several weeks for treatment of depression and anxiety. During his suspension and after receiving clearance from his treating physician, he met with his supervisors to arrange his return to work. At this meeting, he was told that he would be paid $5,000 and would be given benefits. . .if he resigned . . . . Bibby refused the offer and was terminated but, following arbitration of a grievance he filed, he was reinstated and awarded back pay." *Bibby*, 260 F.3d at 259.

8. *Id.*

9. *Id.* at 260.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

Bibby appealed, claiming that the district court erred in its finding.[16] In addition, Bibby further argued that, if upheld, the district court's ruling would place a special burden on gay and lesbian plaintiffs alleging same-sex sexual harassment to prove that the harassment *was not* motivated by their sexual orientation.[17]

Writing for the Third Circuit, Judge Barry stated unequivocally that same-sex sexual harassment based on sexual orientation was not actionable under Title VII.[18] Thus, on appeal, the Third Circuit had to determine whether the anti-gay harassment inflicted on Bibby was motivated by his gender or by his sexual orientation.[19]

According to the Third Circuit, the evidence did not support the conclusion that Bibby was being harassed because he was a man.[20] Indeed, the court found that Bibby did not even argue that he was being harassed because of his sex.[21] According to the court, "his claim was, pure and simple, that he was discriminated against because of his sexual orientation," and "no reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man."[22] The court gave little weight to Bibby's argument that this ruling placed a special burden on gay and lesbian plaintiffs to effectively prove that harassment directed towards them was not based on anti-gay or anti-lesbian animus.[23] The court held that once a showing had been made that the harassment was directed at the plaintiff because of his or her sex, it would be no defense that the harassment may have also been partially motivated by the plaintiff's sexual orientation.[24]

The effect of the Third Circuit's decision was to foreclose any opportunity for a gay or lesbian plaintiff to prevail under Title VII for anti-homosexual harassment or discrimination. That is, the Third Circuit held that, as a matter of law, anti-homosexual harassment is not discrimination *because of sex*, and is thus not actionable under Title VII. The Third Circuit went too far; its opinion is indefensible in the face of *Oncale* and cases like *Price Waterhouse v. Hopkins*,[25] which have held that "sex-stereotyping" is harassment because of sex.

In *Oncale*, the Supreme Court held that there were three distinct situations in which same sex harassment may be considered harassment because of sex.[26] The first is where there is evidence that the harasser

16. *Id.* at 261.
17. *Bibby*, 260 F.3d at 261.
18. *Id.* (citing Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989)).
19. *See Bibby*, 260 F.3d at 261.
20. *Id.* at 264.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. 490 U.S. 228 (1989).
26. *See Oncale*, 523 U.S. at 80-81.

sexually desires the victim.[27] The second is found where there is no sexual attraction, but where the harasser displays hostility to the presence of a particular sex in the workplace.[28] Third, the plaintiff may present evidence that the harasser's conduct was motivated by a belief that the plaintiff did not conform to the stereotypes of his or her gender.[29]

This "gender stereotypes" method is based on *Price Waterhouse.* In *Price Waterhouse*, the Supreme Court held that where the plaintiff had been denied partnership at her accounting firm partly because the other partners felt she was "macho," "masculine," and "needed a course in charm school," the employer had engaged in illegal discrimination *because of sex.*[30] Explaining its ruling the court stated that "[i]n the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[31]

The Bibby court should have followed the lead of *Price Waterhouse. Price Waterhouse* and its progeny provide strong support for the homosexual plaintiff who is harassed because he is a "sissy," or she is "too masculine."[32] Under the "gender stereotypes" jurisprudence a defendant who exhibits anti-gay animus would violate Title VII to the extent that the animus is based on a belief that the plaintiffs personal characteristics or lifestyle do not fit with the defendant's stereotypical view of maleness and femaleness.[33] Indeed, Bibby even produced evidence that his harasser called him a "sissy." Comments like these are part and parcel of anti-gay harassment. The Third Circuit erred in failing to make that con-

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27. *Id.* at 80. For example, when a gay or lesbian supervisor treats an employee in a way that is sexually charged, it is reasonable to infer that the harasser acts as he or she does *because of the victim's sex. Bibby*, 260 F.3d at 262.

28. *Oncale*, 523 U.S. at 80 (stating that same-sex sexual harassment could be found "if a female victim is harassed in such sex specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace"). "For example, a woman chief executive officer of an airline might believe that women should not be pilots and might treat women pilots with hostility amounting to harassment. Similarly, a male doctor might believe that men should not be employed as nurses, leading him to make harassing statements to a male nurse with whom he works." *Bibby*, 260 F.3d at 262.

29. *See Oncale*, 523 U.S. at 80-81.

30. *See id.* at 250.

31. *Id.*

32. *See* Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir.1997) (holding that where co-workers verbally and physically harassed a young man because he wore an earring, repeatedly asked him whether he was a girl or a boy, and threatened to assault him sexually, he presented sufficient evidence to support a conclusion that the harassment amounted to discrimination because of sex).

33. Unfortunately, courts have been very reluctant to rule either way on whether a homosexual may prevail under Title VII for harassment caused by anti-gay animus. *See Simonton*, 232 F.3d at 37 (discussion of the theory, but declining to rule on it because the plaintiff had not raised it before the district court); Shermer v. Ill. Dep't of Trans., 171 F.3d 475, 478 (7th Cir. 1999) (discussion of the theory, but declining to rule on it because the plaintiff did not raise the sexual stereotyping argument at the district court level or in his pleadings.); *Higgins*, 194 F.3d at 259-60 (declining to rule on the theory because it had been waived by the plaintiff.).

nection, and seriously treating Bibby's case as a "sexual stereotypes" case.

In sum, though it gave cursory treatment to *Price Waterhouse*,[34] the *Bibby* court summarily ignored it, and incorrectly held that anti-gay harassment, as a matter of law, is not harassment because of sex. Certainly, such a holding clearly, and incorrectly, rejects the Title VII "gender stereotypes" jurisprudence.

The Third Circuit was also incorrect when it surmised that its ruling would not place an extra burden on gay and lesbian plaintiffs bringing an action for same-sex sexual harassment. Because the court has foreclosed any opportunity for the plaintiff to bring an action for anti-gay harassment under the "gender stereotypes" jurisprudence, a homosexual plaintiff must prove harassment because of sex, via one of the other two routes outlined in *Oncale*. Indeed, under this standard the feminine heterosexual male or masculine heterosexual woman fares a much better chance of prevailing under Title VII, than does a homosexual.[35]

Finally, consider the dissent in *Rene v. MGM Grand Hotel*.[36] In *Rene*, the Ninth Circuit held that a homosexual male employee had not presented a case of sexual harassment under Title VII where his only evidence included harassment based on anti-gay animus.[37] Dissenting, Judge Nelson felt that while "gay-baiting insults and teasing are not actionable under Title VII, a line is crossed when the abuse is physical and sexual."[38] Thus, Judge Nelson would find discrimination because of sex where the abuse is physical with sexual overtones.[39]

The abuse doled out in *Rene* was similar to that in *Bibby*.[40] The *Bibby* court wholly failed to analyze Bibby's case under the first prong of *Oncale*—the sexual desire test. This failure was in error. Bibby's abuse could very well have been motivated by the homosexual desires of a heterosexual man. Bibby's attacker "may have targeted him for sexual pleasure, as an outlet for rage, as a means of affirming [his] own heterosexuality, or any combination of a myriad of factors."[41] In sum, the effect was to humiliate Bibby as a man,[42] not a homosexual. This type of abuse is certainly actionable under Title VII.

The Third Circuit is, unfortunately, representative of the general sentiment in this area of Title VII jurisprudence. While many courts express

34. The court simply outlined the law in that area, but gave no real consideration to applying it to Bibby's case.

35. *See, e.g.*, *Doe*, 119 F.3d at 581 ("[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed because of his sex.").

36. 243 F.3d 1206 (9th Cir. 2001).

37. *See id.* at 1209-10.

38. *Id.* at 1211 (Nelson, J., dissenting).

39. *See id.*

40. Both men were pushed up and pinned against walls.

41. *Rene*, 243 F.3d at 1211 (Nelson, J., dissenting).

42. *See id.*

sympathy for homosexual plaintiffs who have been harassed because of anti-gay sentiment, they have been reluctant find for them.[43] This is unnecessary. Though it might take another decision of the Supreme Court to clarify the point, *Price Waterhouse*, through its endorsement of "sex stereotype" jurisprudence, allows a cause of action for anti-gay harassment under Title VII.

43. *Rene*, 243 F.3d at 1209 ("The degrading and humiliating treatment Rene contends he received from his fellow workers is appalling, and is conduct that is most disturbing to this court. However, this type of discrimination, based on sexual orientation, does not fall within the prohibitions of Title VII.").

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