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Oncale v. Sundowner Offshore Services, Inc.: Perverted Behavior Leads to a Perverse Ruling

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ESSAYS

ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.: PERVERTED BEHAVIOR LEADS TO A PERVERSE RULING

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I. INTRODUCTION

A recent decision by the United States Supreme Court concerning same-gender harassment in the workplace has left employers scratching their heads and plaintiffs' lawyers licking their chops. *Oncale v.*

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Sundowner Offshore Services, Inc.[1] also represents the Court's near-complete break with the language and original intent of Title VII of the Civil Rights Act of 1964.[2] Despite Justice Scalia's plea that the case does not establish a "general civility code,"[3] the opinion is nothing less than notice to employers that if employees behave badly enough, the federal judiciary will take on the role of manners police.

Oncale is a virtual invitation to anyone who has been offended at the office or job site by the bad behavior of a member of the same gender to file a complaint in federal court despite alternative and more appropriate legal remedies. Though an employee must still clear several legal hurdles to get to a jury, *Oncale* lowers those hurdles to levels never imagined by Title VII's framers and proponents. The old saw is that bad facts make bad law. A review of *Oncale's* bad facts, in light of Title VII's legislative and interpretive decisional underpinnings, demonstrates *Oncale* is a perversion of that portion of the Civil Rights Act.

II. HISTORY OF TITLE VII

Congress added the prohibition of discrimination based on gender to the civil rights legislation at the last moment.[4] Given its current impact, one might expect that the addition was meant to strengthen the rights of women. In fact, almost the opposite is true. The treatment of gender discrimination was seen as so divisive that the language was added for the purpose of preventing its passage.[5] That effort failed, and the bill that passed included language prohibiting discrimination based on gender.[6]

Other than the plain language of the statute, little is known of the intent of the drafters.[7] Unlike other portions of the statute, there is no legislative

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

2. 42 U.S.C. §§ 2000a-e (1994).

3. *Oncale*, 118 S. Ct. at 1002.

4. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986) (citing 110 CONG. REC. 2577-2584 (1964)).

5. *See* Brief for Petitioner at 11 n.8, *Oncale* (No. 96-568).

6. *See Meritor*, 477 U.S. at 64.

7. *See id.* While politically incorrect today, there is little doubt Title VII was enacted to protect women and minorities from subjugation to men. *See* Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375, 379-80 (1995). Laws passed by Congress around the same time as Title VII are instructive. For example, the Equal Pay Act of 1963, 29 U.S.C. § 206 (1994), the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000 (1994), and the Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994), cover women and religious minorities. The Glass Ceiling Commission of 1991 was created to analyze opportunities of women and minorities' executive positions. *See* Glass Ceiling Act of 1991, Pub. L. 102-166, § 202(b), 203(a) 105 Stat. 1081. The language in *Meritor* is a natural outgrowth of the stated purpose of Title VII in that male-on-female sexual harassment comports with the legislators' intent to protect women in the workplace. The same is not true of male-on-male situations.

history to provide any interpretative guidance in the area of sexual or gender-based discrimination.[8] As a result, the EEOC had a virtually free hand in crafting guidelines as to what constitutes discrimination based on sex.[9]

The plain language of Title VII states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[10]

The statute does not define the term "discriminate."[11]

A reading of the statute does not make it clear that discrimination based on sex may take the form of *harassment.*[12] The prohibition of sexual harassment stems from judicial interpretation of Title VII and has its roots in the EEOC guidelines concerning gender discrimination.[13] The now familiar definition in 29 C.F.R. § 1604.11 states:

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating intimidating, hostile, or offensive working environment.[14]

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8. *See Meritor*, 477 U.S. at 64.

9. Prior to the instant case, the United States Supreme Court had decided only three sexual harassment cases. *See* Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993) (finding employment setting "permeated with 'discriminatory intimidation, ridicule and insult'" violates Title VII even if the victim has suffered no psychological damage) (quoting *Meritor*, 477 U.S. at 65); Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) (extending *Meritor* to public schools); *Meritor*, 477 U.S. 57 (finding on-the-job sexual harassment as a form of sex discrimination).

10. 42 U.S.C. § 2000e-2(a) (1994).

11. *See id.*

12. *See* Grose, *supra* note 7, at 377. It is a large leap in logic to conclude that Title VII's enactors envisioned the statute as protecting against same-gender *harassment*, particularly when the statute as enacted did not mention harassment. *See* § 2000e-2.

13. *See* 29 C.F.R. § 1604.11 (1997).

14. § 1604.11(a) (footnote omitted). A footnote indicates that these principles also apply to race, color, religion, or national origin. *See* § 1604.11 n.1. 29 C.F.R. § 1606.8(b) states that:

This regulation describes three scenarios under which sexual harassment would be actionable based on Title VII. The first two possibilities are related. Title VII prohibits sexual harassment when submission is a condition of employment or when the submission to or rejection of such behavior is a factor in an employment decision.[15] The very nature of the descriptions used—submission to or rejection of sexual advances or requests for sexual favors—clearly assumes an interaction based on sexual attraction or desire.[16] Harassment falling into these two categories is commonly referred to as "*quid pro quo*."[17]

It is critical to note that these EEOC definitions do not rely on the plain language of Title VII, which itself refers only to discrimination. Black's Law Dictionary defines discrimination (referencing constitutional law) as "the effect of a statute or established practice which confers particular privileges on a class."[18] Discrimination, in its most universal meaning, means to distinguish or to differentiate. Recently, discrimination has become short-hand for illegal discrimination. We all, however, discriminate constantly and from an early age. We choose between things we like and dislike; we discriminate by choosing a favorite movie, rock star, or food. Discrimination is not necessarily a bad thing. It was not so long ago that describing a person as discriminating meant he had good judgment or superior taste. In the case of employment, the law only prohibits certain types of discrimination. Distinguishing between individuals based on sex, race, color, age, national origin, or religion is

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> Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct:
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> (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment;
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> (2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
>
> (3) Otherwise adversely affects an individual's employment opportunities.

§ 1606.8(b).

15. *See* § 1604.11(a).

16. When a man touches a women in a sexually-suggestive way, it can be presumed he is doing it "because of her gender." *See* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998). This presumption is not necessarily valid in same-gender actions, particularly when there are no members of the opposite gender against which the allegedly offensive behavior can be measured. *See* Grose, *supra* note 7, at 382. Without this frame of reference, and with an acknowledgment of more traditional notions of heterosexuality, a plaintiff cannot prove the conduct is "because of gender." *See id.* at 393.

17. *See Meritor*, 477 U.S. at 65.

18. BLACK'S LAW DICTIONARY 467 (6th ed. 1990).

prohibited.[19] Distinguishing between individuals based on other characteristics, for example, attendance records, seniority, or performance, is permitted.

The third possibility described in the EEOC regulation refers to what is commonly known as "hostile work environment."[20] The Supreme Court first recognized hostile work environment as a violation of Title VII in *Meritor Savings Bank v. Vinson*.[21] In *Meritor*, Vinson claimed that during her employment, her supervisor requested sexual favors, fondled her, and even raped her.[22] Her supervisor categorically denied these allegations.[23] The district court did not determine whether there was a sexual relationship, but denied relief finding that if a sexual relationship did exist, it was voluntary.[24] The Court of Appeals for the District of Columbia reversed and remanded.[25]

As the language quoted below indicates, the *Meritor* Court presumed discrimination was present. The *Meritor* Court quoted with approval language from the Eleventh Circuit Court of Appeals:

> Sexual harassment which creates a hostile or offensive [work] environment for members of one sex is every bit the arbitrary 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 of racial epithets.[26]

Critically, the Court's language in *Meritor* refers to discrimination even though the word "discrimination" (or its derivatives) is not found in the EEOC guidelines.[27]

In deciding *Meritor*, the Supreme Court reviewed the history and

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19. *See* 42 U.S.C. § 2000(e)-2(a)(1) (1994). State or local laws may protect additional characteristics.

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

21. 477 U.S. 57 (1986).

22. *See id.* at 60.

23. *See id.* at 61.

24. *See id. Meritor* is also the first Supreme Court case to recognize the distinction between voluntary and welcome behavior. *See id.* at 68 (stating that although the relationship was voluntary, the advances could have been unwelcome).

25. *See id.* at 63.

26. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

27. Even *Meritor* requires proof that the harassment is "because of gender" for it to be actionable. *See id.* Without that requirement, Title VII would be transformed into a tort statute aimed at eradicating unwelcome sexuality or sexually based comments in the work place.

development of hostile work environment claims.[28] The Court characterized the EEOC precedent as concluding that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[29] After discussing lower court decisions which relied on the EEOC principles, the Court concluded, "Nothing in Title VII suggests that a hostile work environment based on discriminatory *sexual* harassment should not be likewise prohibited."[30]

Following *Meritor*, the Court recognized a hostile work environment claim in *Harris v. Forklift Systems, Inc.*[31] In that case, Teresa Harris was a manager for Forklift Systems and complained about discriminatory treatment from the company's President, Charles Hardy.[32] This treatment included derogatory remarks about women[33] and behavior directed at Harris and other female employees.[34] Specifically, the magistrate judge found that "Hardy often insulted [Harris] because of her gender" but then concluded the conduct did not rise "to the level of interfering with [Harris's] work performance."[35]

In concluding that Harris's claim was actionable, the Supreme Court relied on *Meritor* and again used language which included discrimination.[36] "A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[37] In a concurring opinion, Justice Ginsburg stated, "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."[38]

III. *ONCALE*: THE FACTUAL AND PROCEDURAL HISTORY

It is precisely this reliance on the presence of *discrimination* that is lacking from the Court's opinion in *Oncale*.[39] At oral argument both sides

28. *See id.* at 65-67.
29. *Id.* at 65 (citations omitted).
30. *Id.* at 66.
31. 510 U.S. 17 (1993).
32. *See id.* at 19.
33. These included "You're a woman, what do you know?" and "We need a man as the rental manager." *Id.*
34. *See id.*
35. *Id.* at 19-20.
36. *See id.* at 21-23.
37. *Id.* at 22.
38. *Id.* at 25 (Ginsburg, J., concurring).
39. *See Oncale*, 118 S. Ct. at 998.

were repeatedly asked how the facts in this case showed discrimination.[40] Despite this questioning, Justice Scalia tried to evade the issue by saying that sexual harassment discrimination is not dependent on the presence of sexual attraction.[41] While this statement is correct, it is woefully inadequate to address how the facts in *Oncale* meet the plain language requirements of Title VII.

A. *The Facts*

Joseph Oncale was working as a roustabout for Sundowner on an oil platform off the coast of Louisiana in October of 1991.[42] He was one of eight men in that location.[43] There were no women on the platform.[44] It was Oncale's bad luck to be in a crew which included John Lyons (a crane operator), Danny Pippen (a driller) and Brandon Johnson (a crew member).[45] Lyons and Pippen were supervisors.[46] Under any standards of decent society, these supervisors behaved abysmally by subjecting the plaintiff to degrading and humiliating threats and behavior of a sexual nature.[47] As the case was decided on the Defendant's Motion for Summary Judgment at the trial level, Oncale's allegations must be accepted as genuine.[48]

Specifically, Oncale alleged that on October 25, 1991, Pippen grabbed and held him as Lyons removed his (Lyons') penis from his pants and placed it on the back of Oncale's head.[49] Though Oncale struggled against the attack, Lyons indicated he was going to "fuck [Oncale] in the behind."[50] The entire crew witnessed the incident.[51] And that was just the beginning.

The next morning, as the crew was being lifted from a boat onto the work platform, Johnson restrained Oncale as Lyons again exposed himself, placed his penis on Oncale's arm and assured the Plaintiff he had more

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40. *See* Transcript of Oral Arguments at 9, 12, 18, *Oncale* (No. 96-568).
41. *See Oncale*, 118 S. Ct. at 1002.
42. *See id.* at 1000.
43. *See id.* at 1000-01.
44. *See id.*
45. *See id.* at 1001.
46. *See id.*
47. *See id.*
48. *See id.*
49. *See* Brief for Petitioner at 4 n.2, *Oncale* (No. 96-568).
50. *Id.*
51. *See id.*

intimate acts in mind.[52] Later that day, as Oncale was showering, Lyons and Pippen got in the shower stall with him, and Pippen again restrained Oncale as Lyons placed a bar of soap between "the cheeks of his (Oncale's) behind" and informed Oncale yet again that the two were going to "fuck (Oncale) in the behind."[53] It was uncontroverted that Pippen and Lyons had the authority to direct and control Oncale's employment.[54]

In response, Oncale reported the horrendous conduct to, among others, Sundowner's Safety Compliance Clerk.[55] Incredibly, the Compliance Clerk indicated Pippen and Lyons "'picked [on] him' [also] and called him a name suggesting homosexuality."[56] No remedial action was taken, and Oncale eventually resigned his position in November of 1991, indicating he was forced to quit out of fear he would be "raped or forced to have sex."[57] Oncale's termination paperwork indicated he voluntarily left "due to sexual harassment and verbal abuse."[58]

Oncale brought suit in the Federal District Court in the Eastern District of Louisiana on May 4, 1994, against Sundowner, Lyons, and Pippen, alleging violation of Title VII of the Civil Rights Act of 1964.[59] He claimed he was discriminated against in his employment because of his gender.[60] The Defendant filed a motion for summary judgment based on the Fifth Circuit's prior prohibition of same-sex harassment claims in *Garcia v. Elf Atochem North America*.[61] The district court granted defendant's motion.[62] On appeal, the Fifth Circuit affirmed and the United States Supreme Court granted certiorari.[63]

B. *The Respective Theories*

Throughout the appellate process, Oncale argued *Garcia* was simply wrong and that the language and interpretation of Title VII did not exclude

52. *See id.*
53. *Id.*
54. *See Oncale*, 118 S. Ct. at 1000-01.
55. *See id.* at 1001.
56. *Id.*
57. *Id.*
58. Brief for Petitioner at 6, *Oncale* (No. 96-568).
59. *See Oncale*, 118 S. Ct. at 1001.
60. *See id.*
61. 28 F.3d 446 (5th Cir. 1994); *see* Brief for Petitioner at 2, *Oncale* (No. 96-568) (discussing the *Garcia* decision, which failed to recognize a claim under Title VII for same-sex sexual harassment).
62. *See Oncale*, 118 S. Ct. at 1001.
63. *See id.*

same-gender harassment claims.[64] Oncale relied on precedent from other circuits allowing such claims.[65] He also cited decisions in which the Supreme Court rejected a conclusive presumption that employers would not discriminate against other members of the same group.[66] Additionally, Oncale argued that the applicable portion of Title VII placed no prohibitions on same-gender claims.[67]

Because Congress used the term "sex" instead of "member of the opposite sex," and "race" as opposed to a separate race, Oncale argued *Garcia* was unsupportable and that the prohibition against same-sex Title VII claims should be lifted in the Fifth Circuit.[68] In view of the relatively scant legislative history, Oncale further argued the Fifth Circuit's affirmance was neither compelled nor supported by the plain language, legislative history, or jurisprudential interpretation of Title VII.[69] Citing *Meritor*, Oncale argued the gravamen of sexual harassment claims was that the conduct was "unwelcome."[70] He cited the EEOC guidelines defining "sexual harassment" as additional support.[71] Since submission to the ongoing barbarous acts of Lyons, Pippen, and Johnson became a condition of his continued employment, Oncale argued those actions altered the conditions of his job so as to create a "sexually intimidating and offensive work environment" in violation of Title VII.[72] Because Oncale was a married, heterosexual father of two, his lawyers argued Oncale's harassers' actions were particularly reprehensible.[73] More specifically, they were harassing *because* Oncale was a man, thus satisfying the gender causation component of Title VII.[74] Oncale's lawyers also emphasized the evolution of the standard for measuring offensiveness, eventually arriving at the gender-neutral test of the "reasonable person" which would obviously include males.[75]

Not surprisingly, Sundowner took a diametrically opposed approach throughout the appeal. Put simply, Sundowner contended there was never

64. *See* Brief for Petitioner *passim*, *Oncale* (No. 96-568).
65. *See id.* at 10 n.7 (citing cases).
66. *See id.* at 24 n.24.
67. *See id.* at 25-26.
68. *Id.* at 10.
69. *See id.* at 11-14.
70. *See id.* at 27-30.
71. *See id.* at 16.
72. *Id.* at 17.
73. *See id.* at 19.
74. *See id.*
75. *See id.* at 19-22.

an occasion on which it would be proper for a court to find a cause of action under Title VII in same-gender situations.[76] Sundowner traced the evolution of that statute from its intended purpose to protect women and minorities, through an impermissible judicial expansion to include "harassment" as a form of "discrimination," and finally to a situation in which the requirement that gender be a motivating factor in finding liability is ignored and replaced by a standard where any offensive language could be used as a basis for a Title VII claim.[77] Sundowner also distinguished other circuit decisions which, unlike the Fifth Circuit, have allowed same-gender suits.[78]

As an alternative to Title VII liability, Sundowner discussed same-gender hazing and the need for Congress to address such situations with legislation aimed at bringing a same-sex workplace misconduct matter within the legislative ambit of Title VII.[79] From a practical/analytical standpoint, Sundowner also argued that the facts in *Oncale* would not allow a reasonable fact finder to conclude the bad behavior was motivated by gender since there were no women on the platform and other males also had been treated badly by Lyons, Pippen, and Johnson.[80] Essentially, because there was no sexual frame of reference (i.e., women subjected to different treatment), there was no way to conclude Oncale was targeted for his gender as opposed to some other reason. Sundowner concluded that allowing Oncale to proceed would eliminate the gender-causation requirement of the statute, thereby unmooring it from its plain language and transforming it into a general "workplace tort statute."[81]

C. *The Analytical Framework*

At this point, it is particularly important to recall the procedural history of *Oncale*. The case came before the Supreme Court because the employer's motion for summary judgment had been granted.[82] Unlike a review based on a motion to dismiss, in order to withstand a motion for

76. *See* Brief for Respondent at 6, *Oncale* (No. 96-568). Sundowner's lawyers in *Oncale* simply argued that members of the same gender cannot sexually harass each other in such a manner as to constitute "discrimination" because of gender as intended by Title VII's enactors. *See id.* at 8-10.

77. *See id.* at 16-22.

78. *See id.* at 15.

79. *See id.* at 16-22.

80. *See id.* at 37-38.

81. *Id.* at 44.

82. *See Oncale*, 118 S. Ct. at 1000.

summary judgment, the non-moving party must show that sufficient issues of material fact exist.[83] In contrast, a court granting a motion to dismiss must find that there are no facts which could be proven to support a finding of liability.[84] The distinction here is critical. It is the difference between deciding whether there can ever be a claim for same-sex harassment (the question posed by a motion to dismiss) or whether the facts in this case support a claim for same-sex harassment (the question posed by a motion for summary judgment).

IV. THE SUPREME COURT DECISION

A. *Justice Scalia's Overreaching Language*

Justice Scalia, writing for a unanimous Court,[85] tried to have it both ways. That is, while the Court attempted to avoid implying that simple bad manners around the office could give rise to federal liability, it also missed the opportunity to realign the current law with the original intent of Title VII.

Although the *Oncale* case will be widely cited for the proposition that Title VII prohibits same-sex discrimination, its most important value comes from what it fails to do. To prove a violation of Title VII, a plaintiff must show discrimination based on gender.[86] The opinion fails to address how Oncale can possibly show discrimination in an all-male environment. To survive a motion for summary judgment there must be material facts in dispute.[87] Without females in the work environment, how could Oncale prove different treatment based on gender? Significantly, the briefs do not argue whether there is a factual dispute about discrimination.

Citing *Meritor*, the *Oncale* court noted that Title VII "evinc[ed] a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."[88] The Court noted that when a

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83. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

84. *See* Conley v. Gibson, 355 U.S. 41 (1957). In arguing to the Supreme Court, Oncale characterized the procedural posture as follows: "The court below found that no facts were material. The court below did not review the facts and determine which facts of the alleged harassing situation were material. They didn't decide this case as a matter of fact. They decided this case as a matter of law." Transcript of Oral Arguments at 6, *Oncale* (No. 96-568).

85. *See Oncale*, 118 S. Ct. at 1000.

86. *See id.* at 1001-02.

87. *See Celotex*, 477 U.S. at 322-23.

88. *Oncale*, 118 S. Ct. at 1001 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

"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 working environment, Title VII is violated."[89] The Court also noted that the discrimination had to be "because of" gender.[90]

Noting that "hostile environment" claims are necessarily "bewildering," Justice Scalia referenced the hodgepodge of lower court opinions concerning same sex harassment.[91] The *Oncale* court specifically rejected the notion that same-gender actions must be motivated by sexual desire or orientation.[92] Because Title VII prohibits discrimination because of sex, the *Oncale* court found the proscribed harassment must extend to interactions between members of the same sex regardless of the gender and/or sexual orientation of the participants.[93] That noted, Justice Scalia then attempted to explain the holding in response to anticipated criticism from employers that *Oncale* would transform Title VII into a "general civility code" for the American workplace.[94] He pointed out in very general terms that Title VII does not prohibit all verbal or physical harassment in the workplace, only discrimination based on sex.[95] Justice Scalia noted that in opposite-gender cases, courts and juries have found the "inference of discrimination easy to draw" because the conduct typically involved explicit or implicit requests for sexual activity.[96] But not everything is harassment under the *Oncale* Court's reasoning.

In what is quickly becoming one of the more famous examples in Supreme Court history, Justice Scalia wrote that a professional football coach who "smacks [his player] on the buttocks as he heads onto the field" would not be deemed a sexual harasser due to the workplace environment; however, this would not be the case for a boss who does the same thing in an office environment.[97] The reasoning is that the "constellation of surrounding circumstances" necessarily affects what is acceptable or unacceptable workplace behavior.[98] "Common sense" and a sensitivity to the "social context" will enable courts, according to Justice Scalia, to

89. *Id.* at 1001 (quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993)).
90. *Id.*
91. *Id.* at 1002.
92. *See id.*
93. *See id.*
94. *Id.*
95. *See id.*
96. *Id.*
97. *Id.* at 1003.
98. *Id.*

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."[99]

In further rebuttal to anticipated commentators who would say *Oncale* represents a general civility code, Justice Scalia reasoned that Title VII was not designed to eliminate "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[100] Since avoiding sexual harassment does not require either "asexuality nor androgyny," Justice Scalia wrote that Title VII prohibited only behavior that was so "*objectively offensive*" as to alter the conditions of the victim's employment.[101]

In what is offered as an aside to the opinion, Justice Scalia brushes right by *Oncale*'s fatal flaw. The *Oncale* court correctly pointed out that members of one definable group are not above discriminating against other members of the same group.[102] For example, a female victim may be harassed in gender-specific and derogatory ways by another woman in her workplace who is motivated by general dislike of other women on the job.[103] By way of proof, Justice Scalia pointed out that the same-sex harassment plaintiff could prove such improper activity by offering "direct comparative evidence" about how the alleged harasser treated members of both sexes in order to prove the inference that the derogatory language was based on gender.[104] While that reasoning is sound, it is that specific lack of factual underpinnings in *Oncale* which is the opinion's Achilles' heel. Additionally, Justice Scalia's multiple efforts to portray *Oncale* as something other than a general civility code are completely gutted by his own use of an objective standard not dependent on different behavior toward the sexes. It is this evidentiary and logistical flaw which renders this latest decision the unrecognizable progeny of Title VII.

B. *The Evidentiary Flaw*

Nowhere in *Oncale* is there an argument that females were treated differently. In fact, this is clearly an impossible argument to make. The oil

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99. *Id.*
100. *Id.* at 1002-03.
101. *Id.* at 1003.
102. *See id.* at 1001-02. In *Castaneda v. Partida*, 430 U.S. 482, 499 (1987), the Supreme Court found that members of a class can discriminate against each other.
103. *See Oncale*, 118 S. Ct. at 1002.
104. *Id.*

rig had an unusual work environment—it was all male.[105] By definition, this all-male environment poses an analytical problem for Oncale. How can he show discrimination because of gender in an environment with only one gender?

Implicitly, *Oncale* argued that showing different treatment towards males and females was not required.[106] Oncale's brief states, "When an individual of either gender reasonably perceives that he must abandon his employment to escape unwelcome sexual harassment and verbal and physical sexual assault, he is the victim of employment discrimination based on sex as proscribed by Title VII."[107] Notice the leap. No longer is proof of discrimination required. Rather, when an employee is subjected to offensive behavior of a sexual nature, discrimination is presumed. Despite its protests, this is exactly the conclusion of the Supreme Court. In quoting *Meritor*, Oncale excluded language which relies on the presence of discrimination. Consider this statement, where Oncale cited to *Meritor* for authority: "The sexual harassment proscribed includes both hostile or abusive environment claims as well as sexual conduct or activity which is directly linked to the grant or denial of an economic *quid pro quo*."[108]

By determining that Title VII did allow claims of same-gender harassment (even if not sexually motivated) the Court ignored the underlying facts—Oncale worked in a single-gender environment.[109] The Court repeatedly pays homage to the fact that the statutory language actually requires discrimination; that is, some evidence the complained of action was because of gender.[110] What the Court does not do is explain how discrimination because of gender can be proven in an all-male environment.[111]

Justice Scalia opens the opinion by stating, "This case presents the

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105. *See id.* at 1001-02.

106. *See generally* Brief for Petitioner, *Oncale* (No. 96-568) (explaining Oncale's harassment in the context of both genders).

107. *Id.* at 6-7.

108. *Id.* at 8-9.

109. *See Oncale*, 118 S. Ct. at 1001-02.

110. *See id.* Removing the "because of gender" requirement from the Title VII analysis transforms the statute into a general work place rule prohibiting any sexually-suggestive language or behavior.

111. Male-on-male sexual harassment with sexual overtones is not sex discrimination "absent a showing that the employer treated the plaintiff differently because of his gender." *See* Giddens v. Shell Oil, 12 F.3d 208 (5th Cir. 1993). It is this lack of the plaintiff's ability in *Oncale* to show he was treated differently than other employees which is fatal to his claim. This is compounded by the fact that other members of the offshore crew were subjected to similar degrading behavior which, while socially reprehensible, does not violate Title VII. *See Oncale*, 118 S. Ct. at 1001.

question whether workplace harassment can violate Title VII's prohibition against 'discriminat[ion] . . . because of . . . sex' . . . when the harasser and the harassed employee are of the same sex."[112] The Court answered the question resoundingly—there can be same-sex harassment—but failed to discuss evidence in this case that could be used to show discrimination.[113] There is only one problem. There is no proof of discrimination because of gender in a single-gender environment.[114]

The *Oncale* Court stated that the prohibition against discrimination protects both men and women.[115] The Court could have stopped there—recognizing the possibility or validity of same-sex discrimination, but finding no violation in this case because of a lack of evidence showing discrimination. The *Oncale* Court also could have recognized that same-sex harassment was valid while limiting its holding to the facts (or similar cases), stating that in a single-gender work environment, objectively offensive behavior of a sexual nature can serve as proof of discrimination if it sufficiently exceeds accepted behavior in the societal context.

Instead, the *Oncale* Court stated that there are several ways the plaintiff can prove a violation occurred.[116] Justice Scalia wrote that 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; it is reasonable to assume those proposals would not have been made to someone of the same sex."[117] Another avenue of proof available to the plaintiff which follows the same analytical path is to show the harasser was a homosexual.[118] In both instances the violation is based on a presumption of sexual desire. Neither of these avenues were open to Oncale as both Oncale and his harassers

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112. *Oncale*, 118 S. Ct. at 1000 (quoting 42 U.S.C. § 2000e-(a)(1) (1994)).

113. *See id.* at 1003.

114. When courts rely on the sexual orientation of the harasser in same-gender cases, they disregard the language of the statute which deals only with "sex" as opposed to sexual orientation. *See* Yeary v. Goodwill Indus., 107 F.3d 443, 448 (6th Cir. 1997). The United States Congress has had ample opportunity to legislate against discrimination or harassment based on sexual orientation, but it has refused to do so. *See* Romer v. Evans, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (noting that Congress has not enacted legislation despite "repeated attempts" to extend federal civil rights laws to gays and lesbians). Additionally, the Senate rejected the Employment Non-Discrimination Act of 1994, Senate Bill 2238, 103d Cong. (1994). Therefore, no matter how socially reprehensible or politically incorrect, without state or local legislative prescriptions, discrimination against an individual because of his or her homosexuality does not violate Title VII.

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

116. *See id.* at 1002.

117. *Id.*

118. *See id.*

were heterosexual.[119]

The Court continued to provide other options for proving a violation that did not rest on sexual attraction. For example, the Court hypothesized about a woman who did not like to work with other women in the workplace and "is motivated by general hostility to the presence of women in the workplace."[120] This, however, is a difference in motivation, not in the proof required. Relying on this as a separate avenue, distinct from sexual attraction, the opinion goes on to say: "A same-sex harassment plaintiff may also, of course, offer direct *comparative evidence* about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[121] Again, this was not an option available to Oncale. What's left? A violation of Title VII based on sexual conduct in a same-sex environment that is discriminatory solely because it is so far outside the bounds of accepted societal conduct. In other words, the dreaded conclusion—a civility code![122]

C. Oncale *Is a Civility Code*

Previously, many courts have held that the purpose of Title VII is not to eliminate all offensive behavior from the workplace.[123] Rather, Title VII has the limited purpose of eliminating discrimination based on race, national origin, color, gender, or religion.[124] In *Oncale*, the Court has equated discrimination with behavior that exceeds the bounds of social

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119. *See* Brief for Petitioner at 19, *Oncale* (No. 96-568).

120. *Oncale*, 118 S. Ct. at 1002.

121. *Id.* (emphasis added).

122. According to the Petitioner's brief, the claim was actionable because the "conduct was sexual in nature, offensive, [and] unwelcome." Brief for Petitioner at 7, *Oncale* (No. 96-568). Discrimination is not mentioned. Petitioner argued that the alleged conduct was repulsive and offensive because Oncale was a man. *Id.* at 18-19. Yet, the Petitioner gracefully glossed over the fact that having a male co-worker place his penis on a woman's head, would clearly be repulsive and offensive.

123. No employer can purge the workplace of all comments that are offensive—or even of all comments that imply substantive violations of Title VII. *See* Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir. 1986). Justice Scalia noted that men and women often deal with each other in different ways. *See Oncale*, 118 S. Ct. at 1003. Without citation to statutory or decisional authority, but with a nod towards common sense, it seems obvious that outlawing all rough language, horseplay, and other socially questionable interaction between men would swamp genuine Title VII claims in a sea of cases about bad manners. This is not to say that "boys will be boys," but it is an acknowledgment that not all men are gentlemen, particularly to each other.

124. In cases involving same-gender harassment by heterosexuals, courts and commentators often confuse "sex" with "sexual orientation," the latter of which is not prescribed by Title VII as a basis for discrimination. Again, this may be socially unpalatable, but it is not against the law under this statute.

context and is offensive.[125] Arguably, Title VII has been expanded to punish the equal opportunity harasser.

Despite the authors' interpretation that *Oncale* does promote a civility code in the workplace, there is good news for employers. First of all, the Court's language emphasizes that not all sexual conduct is actionable under Title VII. In order to create a hostile working environment the Court quoted language stating that the conduct must be severe and pervasive as judged by a "reasonable person."[126] While this merely reemphasized the old standard, the Court raised the bar by clearly stating that "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation" does not amount to a discriminatory condition of employment.[127] The Court elevated the standard another notch by drawing attention to the social context—distinguishing between a pristine office work environment and a rougher, more playful sports setting.[128] The ability to focus on the expectations of those in the environment should be a boon for employers.

This appears to be holding true. Shortly after *Oncale* was decided, the majority of courts citing to it rendered decisions favorable to employers.[129] Lower courts continue to require proof of discrimination and have cited *Oncale* for the standard of a hostile work environment.[130] In *Brennan v.*

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125. *See Oncale*, 118 S. Ct. at 1002-03. Men harass other men for many reasons, almost all of which have nothing to do with gender. For example, if the same louts involved in *Oncale* ridiculed the plaintiff because he supported one football team or another or because he voted for one political party versus another, there would surely not have been any violations of Title VII. Therefore, this leaves only the sexual content of the behavior to differentiate it from the sexually-neutral examples above. With that said, the *Oncale* Court necessarily turned Title VII into a work place behavior code, particularly in instances in which either words or conduct concern sex acts. It is that emasculation of Title VII's "because of gender" requirement that turns *Oncale* into the standard bearer for Title VII as a work place conduct code. Additionally, because Justice Scalia did not limit the subject holding to sexually-charged language and behavior, Title VII can now be interpreted even more broadly to include males razzing other males because of their choice of football team or political party if the same language is not directed to women in the work place.

126. *Id.* at 1001 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

127. *Id.* at 1003.

128. *See id.*

129. As of April 27, 1998, 18 federal court cases have cited to the *Oncale* decision. Four of these gave *Oncale* cursory treatment, citing it for its most basic proposition—that Title VII permits a same-gender harassment suit. One case concerned removal, not employment discrimination. Ten of the remaining thirteen cases resulted in a decision at least partially favorable to employers. Seven of those were complete victories for employers. One case was remanded to the trial court, citing *Oncale* for the societal context language.

130. *See, e.g.*, Brennan v. Metropolitan Opera Ass'n, No. 95 CIV. 2926(MBM), 1998 WL 193204, at *8 (S.D.N.Y. Apr. 22, 1998) (stating that the main issue in sexual harassment cases is whether plaintiff is a member of a protected class).

Metropolitan Opera Ass'n, the trial court granted summary judgment for the defendant, citing *Oncale* to support its statement that "the plaintiff must show that she experienced the hostility because of her membership in a protected class and not because the environment was generally hostile to everyone, including people outside the protected class."[131]

In *Reyes v. McDonald Pontiac-GMC Truck, Inc.*,[132] the trial court granted summary judgment for the defendant even though a coworker had called the plaintiff a "bitch."[133] The district court cited *Oncale* to support the proposition that words with several connotations do not automatically constitute discrimination.[134] The court went further stating, "Sometimes words of frustration and anger are only meant in that spirit."[135]

In *Gallant v. Board of Trustees*,[136] the trial court granted summary judgment for the defendant despite the fact that plaintiff was subject to "objectionable and unprofessional" conduct.[137] The court cited *Oncale* to support the proposition that the conduct must be because of gender.[138] "Plaintiff has produced no evidence . . . that [the alleged harasser] would not have acted in exactly the same way to a student or prospective student who happened to be male."[139] These decisions are at least initial evidence that Justice Scalia has not opened the doors to a flood of new pro-employee litigation. However, they do not, retroactively, cure the opinion's flawed reasoning. They also are not sufficiently similar to another line of cases in which intra-group claims are proper under the law.

V. SAME-RACE CASES

In *Oncale*, Justice Scalia alluded to earlier decisions in which the Court rejected defense contentions that members of the same protected class would not discriminate against each other.[140] While such decisions do exist and are supportable under Title VII, they do not lead to the conclusions that *same-gender* harassment is actionable. Initially, racial claims were intended by Title VII's framers to be covered along with the protection of

131. *Id.* at *13.
132. 997 F. Supp. 614 (D.N.J. 1998).
133. *Id.* at 617.
134. *See id.*
135. *Id.*
136. 997 F. Supp. 1231 (N.D. Cal. 1998).
137. *Id.* at 1235.
138. *See id.* at 1234.
139. *Id.* at 1235.
140. *See Oncale*, 118 S. Ct. at 1001-03.

women.[141] Accordingly, there is no bootstrapping of adjunct claims like sexual harassment to sexual discrimination as was done in *Meritor*. Put simply, discrimination based on race was a direct target of Title VII from its inception.

Also, and just as importantly, reported decisions dealing with same-race discrimination are decided in the context of mixed-race employment environments. That is, unlike *Oncale*, in which there were no women on the oil rig,[142] a typical same-race discrimination case is situated so the factfinder can compare how, for example, an African-American supervisor treats an African-American subordinate in comparison to how she treats a white subordinate. Without that context, there is no logical, rational, or legal way to conclude whether the discrimination was based on an illegal factor (race) or a legal factor (personality, dress, attitude, etc.).

Similar reasoning (or lack thereof), is found in cases involving male-on-male hazing.[143] Quite often such practices border on barbarism and involve behavior of an arguably sexual nature. Greasing, shaving or otherwise calling attention to male genitalia is standard fare in fraternity houses and some employment settings around the country.[144] Like the Sundowner platform, the behavior is not predicated on gender in the way Title VII's drafters envisioned.[145] Such actions may be illegal, but the proper means of redress is not Title VII.

VI. MORE APPROPRIATE THEORIES OF RECOVERY

Louisiana, like all states, has both criminal and tort statutes and theories which would have been more appropriate to address the reprehensible Sundowner supervisors and their employer.[146] In all likelihood, Oncale was the victim of a criminal offense. On the civil side, he could have sought recompense for battery or intentional infliction of emotional distress against the individual defendants. Similarly, a negligent hiring and retention claim could have been brought against Sundowner for what the plaintiff experienced. Punitive damages may have been a real possibility

141. *See id.* at 1001.

142. *See id.*

143. *See, e.g.*, Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996), *abrogated* by *Oncale*, 118 S. Ct. at 998; Skinner v. City of Miami, 62 F.3d 344 (11th Cir. 1995); Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982).

144. *See* cases cited, *supra* note 143.

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

146. *See* LA. REV. STAT. ANN. ch.1 (West 1998); LA. CIV. CODE ANN. art. 2315 (West 1998).

against the employer, particularly after Oncale complained and was not given any help while on the rig.[147] So Oncale, a man who experienced hideous treatment at the hands of deranged supervisors and with the (at least) casual approval of an indifferent employer, would not have been left without a means of redress if the *Oncale* Court had properly ruled Title VII did not apply. The result of that error will plague employment law for years to come.

VII. CONCLUSION

We live in an age in which all but the most proper behavior between individuals is viewed, at least in some circles, as legally actionable. Particularly in the work setting, members of different groups often interact in a stilted way for fear they may be disciplined, discharged, or even sued for the most innocuous remark to a co-worker or subordinate. Simply repeating the punch line from a sit-com, asking for a date, or even going so far as making a proposition for sex is, without more, not the type of activity which should subject people and corporations to civil liability. Rather, such actions are the natural and expected (though not always "G-rated") interaction between human beings working together. Nevertheless, the objects of such attention quite often resort to the civil justice system rather than a simple request that the offender stop his or her conduct. This is good for the lawyers, but bad for America. It is with that background that *Oncale* was decided.

Far from experiencing just bawdy office humor or a legitimate request for after-work social interaction, Mr. Oncale was the subject of a blatant sexual battery. Out of propriety, the facts will not be recited again here, but it is no exaggeration to say this gentleman would have been well within his right to have called the police as opposed to simply reporting the situation to a company representative on the oil rig. A call to law enforcement would have been most appropriate; as would have been a call to a lawyer relying on a theory other than Title VII. This is simply because Title VII was not intended to redress wrongs perpetrated between male co-workers, particularly in the factual setting of *Oncale*. Justice Scalia, with the unanimous backing of the Supreme Court, however, missed an opportunity to differentiate between wildly inappropriate behavior of a criminal nature and those actions properly cognizable under Title VII. While there is no way to say with any certainty, it seems likely the United States Supreme

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

Court was caught up in the wave of political correctness and social probity which have swamped the original intent of Title VII.

Did the individual defendants in Oncale engage in completely reprehensible behavior? Yes. Should the Plaintiff recover monetarily for those deeds? Yes, against both the individuals and the employer. Should the gravamen of that claim be Title VII? Absolutely not! The *Oncale* decision represents our highest Court trying to have it both ways. On the one hand, Justice Scalia writes about the context in which human beings interact, noting the differences between men and women and pleading heartily that this latest decision does not represent a workplace code of conduct. However, as Shakespeare would have said, "The [justice] protests too much, me thinks."[148] As in *Hamlet*, Justice Scalia's own protestations about what the opinion is *not* reveal what it truly *is*.

Rather than representing an explanation and necessary restriction on Title VII, *Oncale* stands for the proposition that objectively reprehensible talk and actions between members of the same gender, even in a single-gender setting, can lead to Title VII liability. Though there is no way to tell if the *Oncale* bad guys would have behaved differently towards women (because there were no women around to bear the brunt of their sophomoric, at best, behavior), there is factually and logistically no way to say these men behaved as they did toward Oncale because of his gender. Without that critical component, this new decision is little more than the Supreme Court giving the federal judiciary the right to clean out this defendant's wallet where it would be more appropriate to wash out its employees' mouths with soap.

148. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 3, sc.2.