Same-sex Sexual Harassment

How the "Equal Opportunity Harasser" Became a Legitimate Defense

by David S. Sherwyn, Ezekiel A. Kaufman, and Adam A. Klausner

By thus far refusing to acknowledge sexual harassment as *per se* unlawful, the Supreme Court has left open the door for egregious and lewd behavior under the equal-opportunity-harasser defense.

A couple of years ago an article in *Cornell Quarterly* examined three then-recent U.S. Supreme Court cases that established new standards for sexual harassment.[1] In *Burlington Industries v. Ellerth*[2] and *Faragher v. Boca Raton*[3] the Supreme Court clarified standards for determining employer liability in cases where supervisors harassed employees. In *Oncale v. Sundowner Offshore Services*[4] the court addressed the novel issue of whether employees could successfully make out a case for "same sex" sexual harassment.

The Supreme Court's decisions in the three cases immediately created a buzz among scholars and legal commentators, who freely judged the efficacy of the court's decisions and rendered predictions as to how the lower courts would interpret and apply the guidance contained in the Supreme Court's opinions. At the time, of course, commentators could

[1] David Sherwyn and J. Bruce Tracey, "Sexual-harassment Liability in 1998—Good News or Bad News for Employers and Employees?," *Cornell Hotel and Restaurant Administration Quarterly*, Vol. 39, No. 5 (October 1998), pp. 14–21.

[2] 118 S. Crt. 2257 (1998).

[3] 118 S. Crt. 2275 (1998).

[4] 523 U.S. 75; 118 S. Ct. 998 (1998).

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not know if the court had created "good law," because it was simply impossible in 1998 to know exactly how lower courts would interpret the new case law. Now, after two years of lower-court opinions, a clear record has been established and it is therefore possible to ascertain the effect and judge the effectiveness of the 1998 cases.

This article focuses on the court's *Oncale* decision and its progeny after first providing a quick overview of sexual-harassment law and the evolution of the same-sex sexual-harassment cause of action.

A History of Sexual Harassment

There is no legislation that expressly prohibits sexual harassment. Rather, sexual harassment as a cause of action was first identified by a law professor, and then defined by a voluminous body of case law and scholarship on the topic. Professor Catherine MacKinnon created the cause of action when she published the book *Sexual Harassment of Working Women*.[5] MacKinnon defined sexual harassment, in its broadest sense, as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power." Although the Civil Rights Act of 1964 had prohibited discrimination based on sex, it didn't create a cause of action for employees who were subjected to unwanted sexual advances. The influence of MacKinnon's work was swift and profound,[6] and much of the initial debate focused on the meaning and definition of sexual harassment.

In 1980 the Equal Employment Opportunity Commission (EEOC) expanded its guidelines on "Discrimination Because of Sex under Title VII" to include sexual harassment. After the EEOC published its guidelines, courts routinely held that "hostile environment" sexual harassment did, in fact, create a cause of action.

In 1986 the *Meritor Savings Bank v. Vinson* decision put to rest any lingering questions concerning the legal efficacy of MacKinnon's theory by ruling that sexual harassment created a legal cause of action and violated Title VII.[7] Specifically, *Meritor* holds that sexual harassment comes in two forms: *quid pro quo* and hostile environment. *Quid pro quo* harassment exists when wages, hours, or other terms of employment are conditioned on the acquiescence to unwanted sexual favors. In its simplest form, *quid pro quo* harassment occurs when an employer or a supervisor says: "Sleep with me or you're fired."[8]

A hostile environment exists when an employee is exposed to conduct of a sexual nature that is sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."[9] Unfortunately, those terms are far from clear and the lower courts have struggled over determining what constitutes a hostile environment.

The U.S. Supreme Court revisited the issue in *Harris v. Forklift Systems, Inc.*, holding that an employee did not need to prove that the alleged harassment seriously affected the employee's psychological well-being.[10] Instead, the court held that while Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, such conduct does not "mark the boundary of what is actionable."[11] Thus, as long as the environment "would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."[12] In his concurring opinion, Justice Scalia stated that while the holding "does not seem to me a very clear standard... [b]e that as it may, I know of no alternative to the course the court today has taken."[13]

In *Meritor*, and in almost all the other early sexual-harassment cases, the litigants were of opposite sexes, and as such the courts assumed that the motivation behind sexual conduct was the victim's gender. Accordingly, conduct of a sexual nature that was severe or pervasive was automatically regarded as being "because of sex" (and thus in violation of Title VII and *per se* unlawful).[14] In fact, most courts took this assumption to its logical extension and held that in opposite-sex sexual-harassment cases, conduct of a sexual nature is *per se* unlawful. Such is not the case, however, in same-sex sexual-harassment cases.

Same-sex Sexual Harassment

In the mid-1990s courts were faced with an onslaught of so-called "same sex" sexual-harassment cases. Between 1992 and 1997 four different appellate courts faced the question of whether plaintiffs could make out a cause of action in "same sex" cases (i.e., a man harassing a man or a woman harassing a woman). The four different circuits produced four different legal conclusions. Before

[5] Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, Yale University Press, 1979).

[6] See, for example: Kristine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 Stan. Law. Rev. 751 (1989), which reviews all of Professor MacKinnon's work and discusses its profound influence on legal doctrine and practice.

[7] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), affirming *sub nom Vinson v. Taylor*, 243 U.S. App. D.C. 323, 753 F.2d 141 (1985).

[8] In *Ellerth*, the court clarified *quid pro quo* cases by holding that to make the claim, employees had to prove that they had suffered a tangible loss.

[9] *Meritor* at 66 (citing both *Rogers*, 454 F.2d at 238; and *Henson*, 682 F.2d. at 904).

[10] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

[11] *Id.* at 22.

[12] *Id.*

[13] *Id.* at 24 (A. Scalia, concurring).

[14] See: *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Kopp v. Samaritan Health Systems, Inc.*, 13 F.3d 264, 269 (8th Cir. 1993); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987); and *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985).

examining the *Oncale v. Sundowner Offshore Services* holding, in which the U.S. Supreme Court resolved the issue, an analysis of the four circuit-court opinions that led to the decision is warranted.

Fourth Circuit. In the Fourth Circuit's case, *Wrightson v. Pizza Hut of America, Inc.*, the plaintiff alleged that his supervisor graphically described homosexual sex to Wrightson and pressured him to engage in homosexual sex.[15] In addition, the supervisor rubbed his genital area against Wrightson's buttocks and often squeezed them. In finding for Wrightson, the Fourth Circuit Court of Appeals held that same-sex Title VII claims are actionable only when the alleged harasser is homosexual and therefore presumably motivated by sexual desire.

Eighth Circuit. The Eighth Circuit held that plaintiffs might prevail in same-sex cases if they could prove that members of their gender were subjected to treatment that members of the other gender were not. In *Quick v. Donaldson Co., Inc.*,[16] employees engaged in an activity they described as "bagging." Bagging consisted of one employee hitting and grabbing another employee. The plaintiff alleged that at least 12 different male co-workers bagged him. Moreover, there was no evidence that female employees were ever bagged. In finding for the plaintiff, the Eighth Circuit held that employees of either gender could make out a claim for same-sex sexual harassment so long as only one of the genders suffered the conduct alleged. If, however, there was no disparate treatment (i.e., both men and women were treated similarly, if poorly), then there was no cause of action.

Seventh Circuit. The Seventh Circuit implied that while conduct of a sexual nature is *per se* unlawful regardless of the gender of the parties, same-sex sexual harassment is unlawful if it is motivated by the victim's perceived failure to comply with sexual stereotypes. In the Seventh Circuit case of *Doe v. City of Belleville*, two brothers, "J. and H. Doe," alleged that they were physically threatened and verbally harassed at the construction site where they worked.[17] The brother known as "J" was called "fat boy" by his co-workers because he was overweight. The employees, including a supervisor, referred to brother "H" as "fag" or "queer" on a daily basis. One employee, described by the court as a former marine of imposing stature, called H his "bitch" and threatened to take H "out to the woods" and sexually assault him. The threats became physical when the former marine grabbed H by his testicles and announced: "Well, I guess he is a guy." Fearing escalation into outright physical assaults, the brothers quit their jobs. In its opinion, the Seventh Circuit rejected the argument that the sexual orientation of the harasser was relevant, and instead focused on the conduct endured by the plaintiffs. The court argued that conduct with sexual overtures is "because of sex" and thus, if severe and pervasive, is unlawful.[18] That standard is not, however, the holding of the case. Instead, the court backtracked and relied on a clear precedent to justify its finding for the plaintiffs. In *Price Waterhouse v. Hopkins*, plaintiff Hopkins was denied a partnership because, according to the Supreme Court testimony, she was not feminine enough for her male colleagues. In finding for Hopkins, the court held that an employer violates Title VII when an employee is denied a term or condi-

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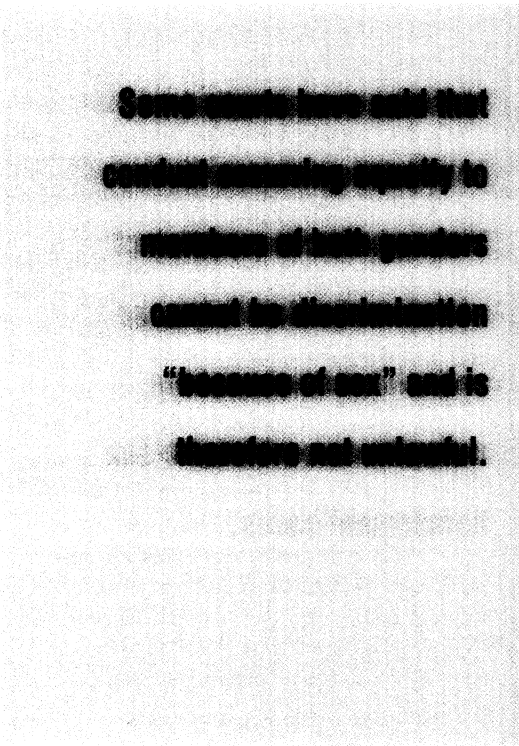
[15] *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996).

[16] *Quick v. Donaldson Co, Inc.*, 90 F.3d 1372, 1377 (8th Cir. 1996).

[17] *Doe v. City of Belleville*, 119 F.3d 563, 570 (7th Cir. 1997).

[18] See *Id.* at 576 and 577. See also: *Andrews v. City of Philadelphia*, 895 F. 2d. 1469 (3d Cir. 1990).



tion of employment because his or her appearance or conduct does not conform to stereotypical gender roles.[19] Similarly, in *Doe v. City of Belleville,* H was harassed because he did not conform to his co-workers' perception of a man. Accordingly, the court found that the conduct H endured was "because of sex" and thus violated Title VII.

Fifth Circuit. Finally, in the clearest but probably most troublesome opinion, the Fifth Circuit held that same-sex claims are never actionable under Title VII. In *Garcia v. Elf Atochem North America,* the male plaintiff alleged that another male employee harassed him.[20] Garcia alleged that on several occasions his supervisor approached him from behind, grabbed him, and made sexual motions. Garcia complained, and his supervisor was reprimanded. CBI (Elf Atochem's parent company) informed the supervisor that any further incidents would result in his termination. After the supervisor was reprimanded, no further incidents occurred between Garcia and his supervisor. Shortly thereafter, Garcia filed a charge of employment discrimination with the EEOC, alleging that he had been sexually harassed in violation of Title VII. The 5th Circuit rejected the complaint for four different reasons. First, the plaintiff failed to prove that the defendant, the parent company of the subsidiary that actually employed the plaintiff, was, in fact, the employer. Second, the conduct was not severe or pervasive. Third, the company stopped the harassment when it learned of the conduct and, thus, could not be held liable. Finally, the court held that even if Garcia could prove the harassment was severe and pervasive, no cause of action existed under Title VII for same-sex sexual harassment.

Oncale

Two years later the Fifth Circuit was once again faced with a same-sex sexual harassment case. This time the plaintiff's case did not feature the defects of Garcia. The plaintiff named the proper employer, the employer did not respond to complaints, and, most importantly, the conduct was both severe and pervasive.[21] Bound by the decision in *Garcia*, the *Oncale* court dismissed the case, but was troubled enough by its precedent to send up a flare. The court stated:

> This panel, however, cannot review the merits of Appellant's Title VII argument on a clean slate. We are bound by our decision in *Garcia v. Elf Atochem* [28 F.3d 446, 451-52 (5th Cir. 1994)] and must therefore affirm the district court. Although our analysis in *Garcia* has been rejected by various district courts, we cannot overrule a prior panel's decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the Court *en banc* or the Supreme Court.

The U.S. Supreme Court agreed to hear the case.

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[19] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). Hopkins was a senior manager at Price Waterhouse, a professional accounting partnership. After she was neither offered nor denied partnership and the partners refused to reconsider her for partnership, she sued Price Waterhouse in Federal District Court under Title VII of the Civil Rights Act of 1964, charging that it had discriminated against her on the basis of sex. The District Court ruled in Hopkins's favor, holding that Price Waterhouse had unlawfully discriminated against her on the basis of sex by consciously giving credence to some partners' comments about her that resulted from sex stereotyping. The Court of Appeals affirmed. Both courts held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. Price Waterhouse could not carry this burden.

[20] *Garcia v. Elf Atochem North America*, 28 F.3d 446 (1994).

[21] According to his lawyer, Nick Canady, Oncale's co-workers, including supervisory personnel, grabbed him, held him, unzipped their trousers and exposed themselves, and threatened to have sex with him. Oncale claimed he was in a shower when these same men got in the shower stall with him, restrained him, and sexually assaulted him using a bar of soap.

Oncale Defines the Law

In *Oncale v. Sundowner Offshore Services*, the U.S. Supreme Court resolved the split among the circuits by deciding that a plaintiff could make out a claim for sexual harassment as long as the harassing conduct was "because of sex."[22] The court did not hold, however, that sexual conduct automatically means that the harassment was because of sex. Instead, the court held that the key issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Thus, according to the court, to prove same-sex sexual harassment, the employee needs to show that only members of one gender are subjected to the alleged conduct.

In *Oncale,* the Supreme Court discussed its reluctance to create a general-civility code for the American workplace. The Supreme Court acknowledged that there are differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. According to the court:

> The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only 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 reasonable person would find hostile or abusive—is beyond Title VII's purview.[23]

The immediate reaction to the ruling was one of celebration by the plaintiffs' bar, who saw the holding as a victory for all workers, but specifically for homosexuals (as reported in the October 1998 *Cornell Quarterly*).[24] That *Cornell Quarterly* piece, however, raised a red flag. The article contends that in creating the new cause of action for same-sex harassment, the court also created a new defense for the employer: the equal-opportunity harasser. The article further argued that under the Supreme Court's same-sex analysis in *Oncale*, if members of both sexes were exposed to harassment of a sexual nature, no cause of action exists because there is no disparate treatment between the genders. Consequently, the article contended that *Oncale* codified the equal-opportunity-harasser defense as a legitimate defense to sexual harassment. Now, two years later, it is possible to examine whether *Oncale* represents a victory for employees or creates a new defense for harassers and employers.

New Cases and the Equal-opportunity-harasser Defense

In *Holman v. Indiana*, a husband and wife alleged that the same supervisor sexually harassed them.[25] The wife alleged that the male supervisor sexually harassed her by touching her body, standing too close to her, asking her to go to bed with him, making sexual comments, and otherwise creating a hostile work environment based on sex. In addition, as a result of her refusal to perform the acts requested, the supervisor negatively altered her job-performance evaluations and otherwise retaliated against her for rejecting his advances. The Holmans' complaint further alleged that the supervisor harassed the husband by "grabbing his head while asking for sexual favors." When the husband refused such requests, the supervisor retaliated by opening the husband's locker and throwing away his belongings.

The court dismissed the case based on the equal-opportunity-harasser defense. To support its decision, the court stated that "the 'equal-opportunity harasser' does not treat plaintiffs differently than members of the opposite sex... [and] under current sex-discrimination theories, there is no discrimination when something happens to both sexes and not simply to one."[26] The court concluded by stating: "Simply put, the court concludes that, under current Title VII jurisprudence, conduct occurring equally to members of both genders cannot be discrimination 'because of sex'"[27] and is therefore not unlawful.

Similarly, in *Romero v. Caribbean Restaurants, Inc.*, the court dismissed the plaintiff's sexual-harassment case because the supervisor exhibited the same harassing conduct to both men and women.[28] Landrau, the plaintiff, alleged his supervisor made an explicitly sexual comment to Landrau. The supervisor then repeated the comment to a female employee shortly thereafter. As in *Holman,* the *Romero* Court dismissed the case pursuant to the equal-opportunity-harasser defense. To support its decision, the court stated: "the record clearly shows that Figueroa [the supervisor] did not reserve his tasteless comportment for male employees, or that he treated male employees differently from female employees. In fact, it appears that Figueroa directed his most outlandish behavior, grabbing his genitals, as an insult to female employees."[29] The court concluded: "While Figueroa's behavior and comments were often sexual in nature, and may have created an undignified or even unpleasant working environment, they were not discriminatory and thus not actionable under Title VII."[30] In fact, according to *Romero,* the equal-

[22] *Oncale v. Sundowner Offshore Services*, 479 U.S. 806, 140 L. Ed. 2d 201 (1998).
[23] *Id.*
[24] Sherwyn and Tracey, p. 18.
[25] *Holman v. Indiana*, 24 F. Supp. 2d 909; (N. D. In. 1998). In late 2000, the Seventh Circuit upheld the lower court's ruling (211 F. 3d 399 [7th Cir. 2000] cert. denied 121 S. Ct. 191).
[26] *Holman v. Indiana, op. cit.*
[27] *Id.*
[28] *Romero v. Caribbean Restaurants, Inc.*, 14 F. Supp. 2d 185 (D. Pr. 1998).
[29] *Id.* at 189.
[30] *Id.* at 190.

opportunity-harasser defense defeats both *quid pro quo* and hostile-environment cases.

The Law Is Problematic

The *Holman* and *Romero* decisions—that the equal-opportunity harasser does not violate Title VII—are logical, yet seemingly inappropriate extensions of the Supreme Court's holding in *Oncale*. If disparate treatment is required to prove same-sex sexual harassment, which is what *Oncale* stands for, then the equal-opportunity-harasser defense should emerge as the law of the land. This may not occur, and we argue that it should not occur.

First, it may not occur because courts could distinguish an equal-opportunity-harasser case from *Oncale*. In *Oncale* there were no women on the oil rig, so the defense was neither raised nor discussed. A lower court could cite that distinction as a basis for refusing to validate the defense. Accordingly, employers should not rely on this defense when deciding whether to litigate or settle a sexual-harassment case. On the other hand, employers are well advised to raise the prospect of such a defense in any litigation and in settlement talks. A defense that could potentially absolve an employer from liability should reduce the value of a case, and thus make it easier and less expensive to settle.

Second, the equal-opportunity-harasser defense should not be validated because it creates strange incentives that are detrimental to employers and employees alike. No employer wants to have sexual harassment in the workplace. Even if the conduct is lawful, it reduces productivity and morale and may impose costs by, for example, increasing turnover. A legal standard that gives managers *carte blanche* to sexually harass employees (so long as they conduct themselves the same way with both sexes) creates a strange and horrible incentive. Consequently, we contend the 1998 *Cornell Quarterly* article set forth a better standard.

That article proposed that unwanted conduct of a sexual nature that is severe or pervasive should be *per se* unlawful.[31] Thus, employees would need to prove conduct—but not motivation—when bringing a claim for sexual harassment. Such a standard, we contend, will not result in a general civility code (which the courts seek to avoid, as explained earlier). Moreover, judges and juries can recognize horseplay for what it is. Courts can also recognize when "sexual" comments are not intended to be interpreted literally. The case of *Johnson v. Hondo, Inc.*, supports this notion. In *Johnson*, two male co-workers hated each other.[32] To show disdain for his co-worker, one employee would repeatedly say to the other, "suck my dick." It was clear from the context of the conversations, however, that the speaker had no desire to engage in oral sex with his co-worker. The Seventh Circuit panel, which heard the case after *Doe*, but before *Oncale*, stated that conduct of a sexual nature violated Title VII if it was severe or pervasive. The court then dismissed the case, holding that the statements were meant as insults and were not sexual. We agree that the *Hondo* court properly applied the law to the facts. Moreover, we believe that this standard should be the law of the land and the policy of employers. At this time, however, the equal-opportunity-harasser defense appears to be a viable way for some employers to avoid or reduce sexual-harassment liability.

How Should Managers Use the Defense?

Even though the equal-opportunity-harasser defense is a viable method to restrict company liability, we are not advising managers to train their supervisors and employees to harass both men and women. There are at least three reasons for our reluctance to make the defense part of a training program. First, the conduct is reprehensible. Second, harassment without accountability will likely create a human-resources nightmare. Employers could expect morale to drop while turnover and employees' interest in unionization rises. Finally, the law may change. The equal-opportunity-harasser defense contradicts the rationale behind the discrimination law and it is possible that either the U.S. Congress or the Supreme Court may correct the problem. That does not mean, however, that the defense is worthless in the meantime. In fact, it should guide managers during harassment investigations.

When investigating "harassment" charges, managers need to ascertain whether the employee is alleging sexual discrimination, gender harassment, or sexual harassment. In addition, because the defense is a viable method for limiting liability, managers investigating harassment charges now need to know if the harasser harasses one sex or both. The best time to discover this information is during the initial investigation. After employees hire legal counsel, management cannot speak to them without the presence of their lawyers. If the employee is represented by counsel, then management will need to have its attorney present as well. At this point, both sides are posturing and preparing their cases. Real information may be hard to extract. Moreover, the expense of attorney involvement cannot be ignored. Alternatively, if the manager asks the employee during the initial investigation who the harasser harassed, the defense may be established. If so, management may have resolved the legal issue and will be left to deal only with the human-resources aspect of the issue. Human-resources issues are easier to address because there is no court, no jury, no lawyers, and no judgments. **CQ**

[31] Sherwyn and Tracey, p. 21.

[32] *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997).