



**Art Gutman**  
**Florida Institute of Technology**

*Author's Note: In the October 2004 column, I promised to write on sexual harassment in the United States as compared to other parts of the planet. Unfortunately, most of my time between mid-August and late October was spent preparing for and recovering from hurricanes. I was going to write the comparative article in this issue followed by an article on same-sex harassment in the next issue.<sup>1</sup> Because I had already completed my research on same-sex harassment, I decided to reverse the order and write on same-sex harassment below and on the comparative issues in the April 2005 issue.*

## **Unresolved Issues in Same-Sex Harassment<sup>2</sup>**

In a unanimous ruling, the Supreme Court outlawed same-sex harassment in *Oncale v. Sundowner* (1998). Justice Scalia wrote the ruling and emphasized that harassment must be “because of sex.” Clearly, that means harassment based on sexual orientation is **not** covered in Title VII—pure and simple. However, there are unresolved issues based on examples Scalia used to illustrate the meaning of “because of sex.” This column focuses primarily on two such issues: (a) the so-called “horseplay” defense and (b) the “equal opportunity harasser.”<sup>3</sup>

### **Background Issues**

There were three major views on same-sex harassment prior to *Oncale*. One view, expressed by the 5th Circuit in *Garcia v. Elf Atochem* (1994), is 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.” Thus, the 5th Circuit, which later ruled in *Oncale*, held that no form of same-sex harassment is covered in Title VII. A second view was expressed by the 4th Circuit Court in *Wrightson v. Pizza Hut* (1996) and *McWilliams v.*

<sup>1</sup> A major reason for including same-sex harassment in such a column is that in other parts of the world, particularly Europe, discrimination based on sexual orientation is included in the proscriptions against discrimination based on sex.

<sup>2</sup> The research on same-sex harassment cases was funded by the Office Of Naval Research and conducted for the DEOMI (Department of Defense Equal Opportunity Management Institute) at Patrick Air Force Base in Cocoa Beach, Florida during summer 2004.

<sup>3</sup> In my April 2004 column on sexual harassment, I implied that equal opportunity harassment was a resolved issue. Obviously, it is not.

*Fairfax County* (1996) requiring same-sex harassers to be homosexuals for their actions to be “because of sex.” A third view was expressed by the 7th Circuit in *Doe v. Belleville* (1997) that some behaviors are unacceptable in and of themselves and constitute same-sex harassment regardless of the sexual orientation of the harassers. Ultimately, the 5th Circuit was overturned by Scalia’s ruling in *Oncale*, but Scalia’s ruling did little to distinguish between the views of the 4th and 7th Circuits.

To illustrate, in *Wrightson v. Pizza Hut*, Arthur Wrightson, a heterosexual male, was harassed by a homosexual supervisor and five homosexual co-workers. The abuses Wrightson suffered included both taunts and sexual advances. The 4th Circuit ruled for Wrightson because of the sexual orientation of the harassers. In *McWilliams v. Fairfax County*, Mark McWilliams was blindfolded, tied up, and had a finger placed in his mouth to simulate oral sex. The harassers also exposed their genitals, fondled him, and placed a broomstick in his anus. The harassers claimed McWilliams was abused because of his cognitive deficits (he had a learning disability), not their own sexual desire. The 4th Circuit accepted that reasoning and ruled that McWilliams was targeted because of his “known or believed prudery,” or the “perpetrators’ own sexual perversion, or obsession, or insecurity,” but “not specifically ‘because of’ the victim’s sex.”

*Doe v. Belleville* had facts similar to the *McWilliams* case. Two brothers were treated much like Mark McWilliams by a group of heterosexual males. However, in contrast to the 4th Circuit view, the 7th Circuit ruled for the brothers, stating:

[W]e have difficulty imagining when harassment of this kind would not be, in some measure, because of the harassee’s sex—when one’s genitals are grabbed, when one is denigrated in gender-specific language, and when one is threatened with sexual specific assault, it would seem impossible to de-link the harassment from the gender of the individual harassed.

### ***Oncale v. Sundowner* (1998)**

Joseph Oncale was a roustabout on an eight-man crew. Three other crewmembers subjected him to humiliating sex-related actions in front of the other four crewmembers, including a physical assault. Oncale complained to management but obtained no relief. He quit after he was threatened with rape. The defense argued there can be no sex discrimination when all employees are male, and there can be no “sexual desire” when harassers are heterosexual. The 5th Circuit accepted these arguments, but the Supreme Court did not.

Justice Scalia ruled there is no basis “for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.” He noted that same-sex harassment was not “the principal evil Congress was concerned with when it enacted Title VII” but noted further that “statutory provisions often go beyond

the principal evil to cover reasonably comparable evils.” He thus extended Title VII to cover same-sex harassment, but with the following caveat:

The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. **Common sense**, and an appropriate sensitivity to social conduct, will enable courts and juries to distinguish between simple **teasing or roughhousing** among members of the same sex and conduct which a reasonable person....would find hostile or abusive. [*Emphasis added by author*]

Unfortunately, the phrase “common sense” has subsequently meant different things to different courts.

Scalia provided three examples to illustrate when same-sex hostile harassment may be inferred. Accordingly:

[1] [There is] credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if ... [2] [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.... [3] 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. [*Numbers added by author*]

Example [1] affirms that homosexual same-sex harassers act “because of sex.” Example [2] shows there can be same-sex harassment in the absence of sexual desire. For example, a woman who is hostile to other women because she wants to be the only or the highest-ranking woman in the workplace is a same-sex harasser. Example [3] implies that what may ordinarily constitute sexual harassment when directed at one gender and not the other does **not** constitute sexual discrimination when directed at both genders simultaneously. A frequently used example by the courts is a bisexual harasser who makes sexual advances to both males and females alike, a concept termed “equal opportunity harassment.”

### Sexual Desire Versus Horseplay

In general, plaintiffs in same-sex harassment claims have fared best when the harasser is gay and have fared worst when the harasser is not gay **and** there are no physically abusive actions. The best-case scenario (for victims) is illustrated in *Kelly v. City of Oakland* (2000) and the worst-case scenario is illustrated in *Spearman v. Ford* (2000) and *Bibby v. Coca Cola* (2001).

In *Kelly*, a park ranger (Stephen Kelly) was harassed daily by a supervisor (Kent McNab), who routinely watched Kelly dress and undress in the locker room. McNab also made sexual propositions, offering better performance evaluations if Kelly complied. Coworkers testified to seeing these acts and to their belief that McNab was gay. A jury awarded Kelly \$415,000 in damages, and this award was upheld by the 9th Circuit.

In both the *Spearman* and *Bibby* cases, the plaintiffs were barraged on a daily basis with insults (a variety of epithets from “fag” to “sissy” and more) and there was insulting graffiti in the bathrooms. However, neither plaintiff was physically touched and both admitted they were harassed because of their sexual orientation. Both courts ruled that harassment based on sexual orientation is **not** harassment based on sex. In *Bibby*, the 3rd Circuit ruled there was no claim that the “harassers were motivated by ‘sexual desire,’ or that they possessed any hostility to the presence of men in the workplace.” Similarly, in *Spearman*, the 7th Circuit ruled:

Here, the record clearly demonstrates that Spearman’s problems resulted from his altercations with coworkers over work issues, and because of his apparent homosexuality. But he was not harassed because of his sex (i.e. not because he is a man). His harassers used sexually explicit, vulgar insults to express their anger at him over work-related conflicts.

The prototypical examples of the “horseplay” defense are found in *McCown v. St. John’s Health System* (2003), *Davis v. Coastal* (2002), and *Rene v. MGM Grand Hotel* (2001). All three cases featured heterosexual harassers. However, *McCown* and *Davis* featured heterosexual victims, whereas *Rene* featured a homosexual victim. All three cases involved physical acts that easily satisfy the criteria for hostile harassment in cross-sex cases.

In *McCown*, the plaintiff (James McCown) was clearly harassed by his supervisor (Lloyd Soller). As noted by the 8th Circuit Court:

Soller subjected McCown to inappropriate conduct on multiple occasions including: grabbing McCown by the waist, chest and buttocks; grinding his genitals against McCown’s buttocks in simulated intercourse; telling McCown to “squeal like a pig, or a woman,” and making other lewd comments; attempting to stick the handle of a shovel and a tape measure in McCown’s anus; and kicking McCown in the buttocks. Initially, McCown thought that Soller was kidding. Although McCown did not understand what motivated Soller’s behavior, he speculated that Soller was trying to “irritate” him because “that’s just how Lloyd was.” McCown repeatedly asked Soller to stop, but Soller continued to engage in this offensive behavior.

Despite Soller’s lewdness, McCown lost because (a) he acknowledged that Soller’s behavior was “just how Lloyd is” (i.e., horseplay) and (b) the court found no evidence that “Soller was homosexual and motivated by sexual desire toward McCown.”

In *Davis*, the plaintiff (Wallace Davis), a security guard and supervisor, disciplined two supervisees (Smith and Allen) for on-the-job infractions. Initially, there was milder nonsexual retaliation by Smith and Allen. However, the retaliation then escalated dramatically. In the words of the DC Circuit Court:

Smith and Allen expanded their repertoire. Smith approached Davis at his work station and grabbed his (Smith's) crotch, made kissing gestures, and used a phrase describing oral sex. (Readers interested in additional description of this behavior may consult the briefs and record, which spare no detail, however vulgar.)

Davis lost for the same two reasons articulated in *McCown*. There was no evidence that either Smith or Allen was gay, and Davis himself acknowledged that "Smith and Allen were motivated by a workplace grudge, not sexual attraction."

In *Rene*, the plaintiff (Medina Rene), an openly gay male, was a butler in the Grand Hotel. Two of the three judges on the 9th Circuit Court panel ruled against him and the third judge dissented. It was acknowledged in the majority ruling that:

The sexual harassment consisted of, among other things, being grabbed in the crotch and poked in the anus on numerous occasions, being forced to look at pictures of naked men having sex while coworkers looked on and laughed, being caressed, hugged, whistled and blown kisses at, and being called "sweetheart" and "Muneca."

However, the majority ruled that the harassers were not motivated by sexual desire. In addition, while testifying at trial, Rene himself stated he believed he was being abused because he is gay. In the words of the majority ruling:

[Rene] presented no evidence that any of his harassers were homosexual, not that they were in any way motivated by sexual desire. On the contrary, evidence presented suggests not that they desired him sexually, but rather that they sought to **humiliate** him because of his sexual orientation. ... The plaintiff, in fact, had testified that he thought he was being harassed "because he is gay." [*Emphasis by author*]

It should be noted, however, that the "humiliation" defense did not work in *La Day v. Catalyst Technology* (2002), where the 5th Circuit favored a heterosexual victim (La Day), because the harasser (Craft) was gay.

Returning to *Rene*, the dissenting judge in this case agreed that harassment based on sexual orientation **alone** is not protected in the *Oncale* ruling. However, focusing on the physical attacks cited by the majority, he stated:

While gay-baiting insults and teasing are not actionable under Title VII, a line is crossed when the abuse is physical and sexual. None of the cases cited by the majority to show that sexual orientation falls outside Title VII involves sexual assault. Rather, they involve verbal abuse... reprimands

for wearing makeup at work as well as allegedly false accusations that an employee was disrupting the workflow by discussing his sex life...and dismissal from work for wearing an earring and verbal harassment.

Thus, the dissenting judge agreed with the 7th Circuit ruling in *Doe v. Belleville* (1997) in which the court's viewpoint was that physically abusive behavior of a sexual nature constitutes same-sex harassment regardless of the sexual orientation of the harasser.

Consistent with the dissenting opinion in *Rene*, the horseplay defense did not work in *Martin v. Schwan's Sales* (1999), even though the harasser (Tim Patrick) was heterosexual. In *Martin*, the 6th Circuit focused on the actions of Patrick, which included "repeated touching of private parts, explicit verbal solicitations for oral sex, and other offensive comments and actions of a sexual nature."

Similarly, in *Schmedding v. Thnemec* (1999), there was evidence that Nicholas Schmedding suffered the same types of abuses as Medina Rene. In the words of the 8th Circuit Court, Schmedding was:

[P]atted on the buttocks; asked to perform sexual acts; given derogatory notes referring to his anatomy; called names such as "homo" or "jerk off"; and was subject to the exhibition of sexually inappropriate behavior by others including unbuttoning of clothing, scratching of the buttocks, and humping the door frame to Schmedding's office.

The critical feature in this case was that Schmedding was not gay, but was perceived to be gay. In contrast to the 8th Circuit's later ruling in *McCown* (where James McCown admitted that Lloyd Soller was known for horseplay), Schmedding countered the horseplay defense by arguing that false perceptions of his sexual orientation served to "debase his masculinity."

A final case to note is *Shepherd v. Slater Steels* (1999), where the plaintiff (Lincoln Shepherd) and the harasser (Edward Jemison) were coworkers (fellow stockbrokers). Jemison routinely propositioned Shepherd for sex and made repeated sex-based gestures such as masturbating in front of him. The defense argued that Jemison was not gay, he was horsing around, and he had a propensity for equally mistreating men and women. The district court ruled for the defense in a summary judgment. However, the 7th Circuit ruled it was up to jury to decide, stating:

A jury might decide, for example, that Jemison was not at all interested in Shepherd sexually, but made these types of remarks and engaged in this type of behavior simply because he was exceedingly crude and/or because he knew that this type of sexually-charged conduct would make Shepherd uncomfortable. What to make of Jemison's behavior (assuming that it occurred as Shepherd described it) is a task that requires one to weigh the tone and nuances of his words and deeds and a host of other intangibles that the page of a deposition or an affidavit simply do not reveal.

In summary, Justice Scalia's decision to leave the distinction between sex-based harassment and horseplay to the "common sense" judgment of judges and jurors has resulted in contradictory rulings. Most notably, there is disagreement among the lower courts on (a) whether there are physical acts that cross the line regardless of the sexual orientation of the harassers and (b) if it is necessary to prove the harasser is gay in the absence of physical abuse.

### A Brief Note on Example [2]

Scalia's second example in *Oncale* implies there can be same-sex harassment absent sexual desire if hostility is directed at others because of gender (e.g., the "top dog" male or female in the office). The author knows of no direct test of this example, but the issue of **sexual favoritism**, which preceded *Oncale*, is potentially applicable. Sexual favoritism clearly implies sexual desire from a cross-sex perspective. However, there is also a same-gender concern. For example, in *King v. Palmer* (1985), a female plaintiff prevailed when another female was promoted after that female had sexual relations with a male supervisor. Clearly, there is potential asexual same-gender animosity between those who agree to and those who refuse to grant sexual favors to supervisors.

### Equal Opportunity Harassment

Scalia's third example in *Oncale* was likely intended for actions **not** involving sexual propositions. For example, in a mixed-sex environment, one who engages in gender-irrelevant horseplay should be an equal opportunity horseplayer. To illustrate, in *Lack v. Wal-Mart* (2001), one of two plaintiffs (Christopher Lack) complained about vulgar insults by his male supervisor (James Bragg). The district court awarded Lack a sizeable monetary remedy, but the 4th Circuit overturned this award because there was also a female plaintiff (Susan Willis) whose complaints were similar to Lack's. Accordingly, the 4th Circuit ruled that Bragg's vulgar statements (e.g., "penis butter") amounted to "juvenile wordplay," and ruled:

Lack fails to come to grips with the fact that female employees (including his original co-plaintiff Susan Willis) also lodged similar complaints regarding Bragg's behavior. This fact undercuts Lack's claim to a substantial extent. In its totality, the evidence compels the conclusion that Bragg was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike.

Whether by intent or not, Scalia's third example also bolsters the belief that a **bisexual** harasser who propositions both males and females alike is not guilty of sexual discrimination. This is not a new issue. In the mid-1990s, courts generally frowned on such "equal opportunity harassment" expressing the general belief that even a bisexual harasser is acting because of sex at the particular time he is propositioning either of the two genders (see for example *Steiner v.*

*Showboat*, 1994). Thus, it seemed like a settled issue. However, in *Pasqua v. Metropolitan Life* (1996), a pre-*Oncale* case, the 7th Circuit endorsed the notion that equal opportunity harassment is not sexual discrimination, stating:

Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex.

Ironically, in rendering this decision, the 7th Circuit relied on Justice Ginsburg's concurrence *Harris v. Forklift* (1993), where she stated that the "critical issue" in a Title VII sex discrimination case is that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Subsequently, after the *Oncale* ruling, the 7th Circuit used Scalia's third example to bolster its prior argument in *Holman v. Indiana* (2000). Steven and Karen Holman worked for the same supervisor (Gale Ulrich), and each was propositioned routinely for sex. Consistent with its prior ruling in *Pasqua*, The 7th Circuit ruled:

Both before and after *Oncale*, we have noted that because Title VII is premised on eliminating discrimination, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the "equal opportunity" or "bisexual" harasser, then, because such a person is not discriminating on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).

The EEOC wrote an amicus brief in this case arguing that the equal opportunity harasser was an anomalous result of bad policy, noting several reasons why it would create "public policy" concerns to protect an "authentic" bisexual harasser. The EEOC also argued that the Holmans were harassed in ways unique to their sex.

Subsequently, in a case in its own domain (Federal Civil Service), the EEOC rejected the concept of equal opportunity harassment in *Wild v. Cohen*, (2000).

## Conclusions

Although a seemingly short and crisp ruling enjoying unanimous agreement among nine justices, the *Oncale* ruling leaves much to be resolved. The only clear rulings in *Oncale* are that (a) homosexuality indicates sexual desire in same-sex harassers and (b) harassment based on sexual orientation alone is not covered in Title VII. In general, heterosexual employees are free to taunt and debase homosexual colleagues as long as the focus is on sexual orientation and the victims are not touched. Even when victims are touched in ways that would clearly constitute cross-sex harassment, some courts accept the defense that the offensive actions are because of reasons other than sex. Some courts also believe a bisexual harasser is free to proposition and harass as long as that person is careful enough to harass males and females equally.

In the author's opinion, two of the aforementioned issues will have to be reviewed by the Supreme Court because of disagreements in the lower courts. The first issue is whether physical abuses of a sexual nature imply same-sex harassment when the harasser is heterosexual. The second issue involves the boundary conditions for equal opportunity harassment. There are also other issues where courts have yet to rule. For example, can the homosexual who harasses (but does not touch) claim that same-sex harassment had nothing to do with the harasser's sexual orientation? In addition, can the male who freely teases and taunts females (or vice versa) without touching claim that these actions had nothing to do with sex?

This is not a column on social policy or civility. My focus has always been on consistencies and inconsistencies in legal rulings as they interface with running businesses. That said, there are individual differences among us beyond classes of people covered in Title VII and related laws (i.e., beyond race, religion, national origin, sex, age, and disability). Federal laws cannot feasibly cover the variety of other reasons some people have for harassing others. The run of cases on racial and sexual harassment illustrate to me that no form of harassment is good for business, even when it is legal. Harassment for any reason should be outlawed internally if only because in the best-case scenario, nothing good can come of it. In the worst-case scenarios, the business may suffer lost productivity and/or legal consequences. It is also possible for victims of harassment to do the sorts of things that make national headlines.

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