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Sonya Smallets

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Oncale v. Sundowner Offshore Services: 
A Victory for Gay and Lesbian Rights?

Sonya Smallets†

INTRODUCTION

In its March 1998 decision Oncale v. Sundowner Offshore Services, Inc., the Supreme Court for the first time held that same-sex sexual harassment is actionable under Title VII of the Civil Rights Act of 1964. The Supreme Court has long held that sexual harassment of women by men or of men by women is sex discrimination and, as such, a violation of Title VII. Actionable sexual harassment includes pressuring a subordinate to engage in sexual activity as a condition of employment or subjecting an employee to a hostile and abusive work environment. In Oncale, the Court held that Title VII may also be violated when men sexually harass men or women sexually harass women.

Oncale has been widely described as a victory for lesbian and gay rights, both in the popular press and by gay and lesbian advocacy groups. Popular press articles have generally assumed that the decision would have the greatest positive impact on gay men and lesbians. For example, in

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† J.D. cand., Boalt Hall School of Law, University of California at Berkeley.
3. As amended, Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . 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." 42 U.S.C. § 2000e-2(a)(1) (1994). The Supreme Court has held that this subsection "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment," Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (citations and internal quotation marks omitted), and thus that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." Id. at 66.
4. See Oncale, 118 S. Ct. at 1002.
5. See id.
6. See, e.g., Mary Sanchez & Stacy Downs, Court Says Laws Apply to Same-Sex Harassment, The KANSAS CITY STAR, Mar. 5, 1998, at A1 ("A Supreme Court ruling Wednesday that adds same-sex cases to federal bans against sexual harassment is being lauded as a step toward equal civil rights protections for gays and lesbians."); Sex of Harasser Irrelevant: Justices Say Conduct, Not Gender, Counts in Workplace, ROANOKER TIMES & WORLD NEWS (Roanoke, Va.), Mar. 5, 1998, at A1 ("Attorneys said the ruling gives gays and lesbians the same weapons to fight bullies that others have had.").
one *U.S. News and World Report* article, John Leo wrote, "gays are probably the big winners in this decision[, which] opens the door to a flood of litigation that could convert existing sexual harassment doctrine into the rough equivalent of a gay civil rights law." While more reserved, comments by advocates for lesbian and gay rights also have been optimistic. The National Center for Lesbian Rights stated that "[t]his decision means that workers who are harassed on the basis of their gender because they are (or are perceived to be) lesbian or gay are no longer automatically barred from legal protection under Title VII." Providing lesbians and gay men with legal protection from harassment based on their sex, gender, or sexual orientation would be a desirable result of the *Oncale* decision. However, an examination of the *Oncale* opinion, its legal context, and subsequent same-sex sexual harassment cases indicates that the hope that *Oncale* will extend anything more than minimal legal protection to lesbians or gay men may be overly optimistic.

**THE ONCALE DECISION**

Joseph Oncale sued his employer, Sundowner Offshore Services, alleging that he was sexually harassed by his male supervisor and two male co-workers. According to Oncale's testimony, a co-worker forced him to the ground while his supervisor took out his penis and placed it onto Oncale's head; the next day, a co-worker forced him to the ground while his supervisor took out his penis and placed it onto Oncale's arm. These incidents were accompanied by verbal threats of rape. Later on that same day, a co-worker pinned Oncale in the shower while his supervisor "inserted a bar of soap into 'the cheeks of his [Oncale's] behind,'" during which time both threatened to "'fuck [Oncale] in the behind.'" There

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8. *See*, e.g., Kimberly Blanton & Diane Lewis, *Ruling Significant but No Hill-Thomas Redux; Same-Sex Case Not Expected to Spur Surge in Suits*, The Boston Globe, Mar. 5, 1998, at Cl (quoting Mary Bonauto, civil rights director of Gay and Lesbian Advocates and Defenders in Boston as stating that, after *Oncale*, "an employer who treats a sexual harassment complaint from a gay person differently from that of a heterosexual person will 'have a real problem.'"); Gaylord Shaw, *Harassment Ban Widened; Supreme Court: Workplace Offender, Victim Can Be of Same Sex*, Newsday, Mar. 5, 1998, at A5 (quoting Matt Coles, director of the American Civil Liberties Union's Lesbian and Gay Rights Project in New York, as saying that *Oncale* is a "great decision [that] really says that lesbians and gay men are part of American society and are subjected to the same rules and protections in the workplace as everyone else.").
11. *See* id.
12. *Id.* Compare this detailed description of the facts to the Supreme Court opinion, in which the Court described the facts of the case in very general terms, stating that "Oncale was forcibly subjected to sex-related, humiliating actions[,]... physically assaulted... in a sexual manner[,]... and threatened with rape." *Oncale*, 118 S. Ct. at 1001. The Supreme Court justified this brief description of the facts of this case by stating that the "precise details are irrelevant to the legal
was no allegation that either Oncale or any of his alleged harassers was gay.\textsuperscript{13}

The United States District Court for the Eastern District of Louisiana granted summary judgment to the defendants, holding that the Fifth Circuit precedent, Garcia v. Elf Atochem North America,\textsuperscript{14} clearly stated that same-sex sexual harassment was not actionable under Title VII.\textsuperscript{15} The Fifth Circuit affirmed the trial court’s decision.\textsuperscript{16} The Supreme Court granted certiorari to address the question of “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.”\textsuperscript{17}

The Supreme Court began its analysis in Oncale by reaffirming its holdings in Meritor Savings Bank, FSB v. Vinson\textsuperscript{18} and Harris v. Forklift Systems, Inc.\textsuperscript{19} that sexual harassment is a violation of Title VII’s prohibition against sex discrimination.\textsuperscript{20} The Court then found same-sex sexual harassment to be actionable by stating that Title VII’s prohibition against sex discrimination, including sexual harassment, “must extend to sexual harassment of any kind that meets the statutory requirements.”\textsuperscript{21} According to the Court, the “critical issue” in determining whether verbal or physical harassment in the workplace is a violation of Title VII is “whether members of one sex are exposed to disadvantageous terms or

\textsuperscript{13} Oncale explicitly asserted his heterosexuality in his brief to the Supreme Court:
Can there be any treatment more demeaning and objectively harassing to a married, heterosexual male with two children than to be subjected to sexual taunts, sexual touching and physical, sexual assault by other men with whom he must work in a closely confined work space on the Outer Continental Shelf of the United States? Brief for Petitioner at 27-28, Oncale (No. 96-568). Neither petitioner nor respondents explicitly address the sexual orientation of the alleged harassers, but both implicitly assume that the alleged harassers are heterosexual. Thus, Oncale argued that “there is no sexual gratification element necessary to a Title VII claim.” Id. at 29. Respondents repeatedly described the conduct at issue in the case as hazing, implying that the conduct did not involve sexual desire on the part of the alleged harassers. See Brief for Respondents at 33-35, Oncale (No. 96-568).

\textsuperscript{14} 118 S. Ct. 998, 1000 (1998).

\textsuperscript{15} 118 S. Ct. 998 (1998).

\textsuperscript{16} 510 U.S. 17 (1993).

\textsuperscript{17} 477 U.S. 57 (1986).


\textsuperscript{19} See Oncale, 118 S. Ct. at 1001.

\textsuperscript{20} Id. at 1002.
conditions of employment to which members of the other sex are not exposed."\(^{22}\)

In the traditional case of male-female sexual harassment, the Court found that courts and juries are able to infer that the harassing conduct is based on sex. When the harassing conduct involves explicit or implicit proposals of sexual activity, such harassment is "because of sex" as required by Title VII, since, according to the Court's reasoning, such harassment presumably would not occur if the harasser and victim were of the same sex.\(^{23}\) This inference is based on the assumption that the harasser is heterosexual, as the Court implicitly acknowledged in Oncale when it stated that "[t]he same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual."\(^{24}\)

The inference that sexual harassment is because of the victim's sex in opposite sex cases is also based on an assumption that sexual harassment is motivated by sexual desire; otherwise, the sexual orientation of the harasser would be irrelevant. In Oncale, the Court accepted that harassment can be inferred to be "because of sex" when motivated by sexual desire, but held that harassment "need not be motivated by sexual desire" in order to be "because of sex" and thus sex discrimination.\(^{25}\) According to the Court in Oncale, harassment is also sex discrimination if it is motivated by hostility toward a particular gender's presence in the workplace or if there is evidence that men and women are treated differently.\(^{26}\) Because the Court held that harassment can be sex discrimination even if the harasser is not sexually attracted to members of the victim's gender, the Court did not require that a plaintiff in a same-sex sexual harassment case prove that his or her harasser is homosexual in order to state a cause of action.\(^{27}\)

Throughout the opinion, however, the Court stressed that Title VII should not be understood as "a general civility code."\(^{28}\) The Court emphasized that Title VII "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex,"\(^{29}\) and that Title VII is only implicated when harassing behavior is "so objectively offensive" that it "alter[s] the 'conditions' of the victim's employment."\(^{30}\) The Court explicitly excluded "male-on-male horseplay or intersexual flirtation" from the ambit

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22. *Id.* (citing Harris v. Forklift Systems, Inc., 510 U.S. at 25 (Ginsburg, J., concurring)).
23. See *id.* at 1002.
24. *Id.*
25. See *id.*
26. See *id.*
27. See *id.*
28. *Id.*
29. *Id.* at 1002-03.
30. *Id.* at 1003.
of the statutory prohibition. The Court also emphasized that the harassment must be evaluated from "the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" which include "the social context in which the behavior occurs and is experienced by the target."

Thus, in *Oncale*, the Supreme Court recognized that same-sex sexual harassment could be sex discrimination and thus a violation of Title VII. However, the Court required that plaintiffs in same-sex sexual harassment cases prove that they were harassed because of their sex, either because the harassment is sexually explicit and the harasser is homosexual or because the harassment is the result of hostility toward members of the victimized sex. It is unclear whether Joseph Oncale would be able to meet these requirements and thus recover under this standard.

**THE MODEST VICTORY OF *ONCALE*: SAME-SEX SEXUAL HARASSMENT IS A VIOLATION OF TITLE VII EVEN IF THE ALLEGED HARASSER IS NOT A GAY MAN OR A LESBIAN WOMAN**

*Oncale* is a victory for gay and lesbian rights in one important respect: the Supreme Court did not limit actionable same-sex sexual harassment to situations in which the alleged harassers are gay men or lesbian women. Prior to the *Oncale* decision, the circuit courts were split regarding the appropriate standard upon which to judge same-sex sexual harassment. The Fifth Circuit, which decided *Oncale*, had taken the position that same-sex sexual harassment is never a violation of Title VII, while the Seventh and Eighth Circuits had held that same-sex sexual harassment is a actionable under Title VII. However, the Fourth Circuit ex-

31. *Id.* The Court, however, did not address intrasexual flirtation, most likely reflecting the Court's unwillingness to acknowledge homosexuality.
32. *Id.*
35. See Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994).
36. See Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997).
37. See Quick v. Donaldson Co., 90 F.3d 1372, 1379 (8th Cir. 1996).
38. See McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996) (holding that a hostile environment claim does not lie when both the alleged harassers and the victim are heterosexuals of the same sex); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) (holding that a same-sex sexual harassment claim may lie when the perpetrator is homosexual).
implicitly held that same-sex sexual harassment is actionable only when the harasser is a gay man or a lesbian woman. Additionally, the Sixth and Eleventh Circuits had held that same-sex sexual harassment is actionable when the harasser is a gay man or a lesbian woman, with the proviso that this does not imply that same-sex sexual harassment is always actionable. Thus, given these prior lower court rulings, the modest "victory" of Oncale is that it does not explicitly require that the harasser be gay or lesbian in order for same-sex sexual harassment to be actionable under Title VII.  

However, in practice, it is likely that courts will be more willing to find that same-sex harassment is a violation of Title VII if the alleged harasser is a gay man or lesbian woman or if the harassment can be characterized as a sexual advance, thus leading to the presumption that the harasser is homosexual. While it is too soon to comprehensively evaluate the effects of the Oncale decision, an examination of the cases that cite Oncale may be helpful. Of the 100 cases that cited Oncale as of December 1, 1998, three involve allegations of a woman being harassed because of her sex by another woman; seventeen involve allegations of a man being harassed because of his sex by another man. While only one

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39. See Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997) (holding that same-sex sexual harassment is actionable if the harasser is homosexual, while explicitly not addressing whether the harassment would be actionable if the harasser were heterosexual).

40. See Fredette v. BVP Management Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997) (holding that a homosexual's harassment of someone of the same sex is "because of sex" and thus a violation of Title VII, while refusing to address the question of whether heterosexual's sexual harassment of someone of the same sex would be "because of sex").

41. As Elizabeth Birch, Executive Director of the Human Rights Campaign, described it, Oncale is a victory for gays and lesbians because “[t]he Supreme Court affirmed what we have always maintained: that sexual harassment has to do with power and hostility and has nothing to do with the sexual orientation of the people involved.” Morning Edition: Same-Sex Harassment Case (NPR radio broadcast, Mar. 5, 1998).

42. See Gabriel A. Terrasa, Fitting a Square Peg Into a Round Hole: “Same-Sex” Sexual Harassment and the “Because of... Sex” Requirement in Hostile Environment Claims, 67 REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 163, 183 (1998).

of the three female-female sexual harassment cases involves specific allegations that the harasser is a lesbian, all three cases involve sexual harassment in the form of unwelcome sexual advances. For example, in Foster v. Mac Pizza Management, Inc., Marie Foster alleged that Machelle Mixon bit Foster on the neck, grabbed Foster’s breasts, and asked Foster “to have sex with [her] and another woman.” Similarly, in Brunetti v. Rubin, Denise Brunetti alleged that Noreen Medeiros repeatedly touched or brushed Brunetti’s breasts, lips and knee, sent Brunetti gifts, and told Brunetti that she had “feelings for her that she did not know how to handle.” Both of these claims were of sexual harassment in the form of unwelcome sexual advances and both survived defendants’ motion for summary judgment.

An examination of the cases in which male-male sexual harassment is alleged suggests that whether or not the case survives summary judgment may depend upon whether the court characterizes objectively similar harassing behavior as a sexual advance or as horseplay. In Willis v. Wal-Mart Stores, Inc., Christopher Lack alleged that James Bragg made homosexual advances to him by grabbing his own crotch during a department Christmas party and telling Lack “[t]his is your Christmas present”; grabbing his own crotch and motioning as if he were going to unzip his pants; and saying to Lack “I’m coming. I’m coming, Chrissy. I’m coming for you.” In responding to certified questions from the trial court, the Willis Court suggested that these allegations would be sufficient to state a claim of same-sex sexual harassment. In Van Pfullman v. Texas Department of Transportation, Michael Van Pfullman alleged that a supervisor sat on his lap and rocked around, commenting “that sure feels good”; another supervisor made fellatio insinuations to Pfullman as Pfullman was eating a sausage; and a supervisor told a co-worker to bend over so that he could “fit test” him in Pfullman’s presence. The plaintiff characterized these actions as homosexual advances; the alleged harassers characterized them as mere horseplay, even though they admitted that the incidents would not have been appropriate had they been directed toward a female employee. In apparent acceptance of the alleged harassers’ characterization of the incidents as horseplay, the judge found for the defendants. While

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45. Id. at *1.
47. Id. at 1410.
49. Id. at 650.
50. See id. at 652-54.
52. See id. at 710.
53. See id. at 711.
54. See id. at 713.
RECENT DEVELOPMENTS

it is difficult to compare the outcome of these cases because of the differences in their procedural postures, whether the courts characterized the alleged harassment as a homosexual advance or not seems to have affected their decisions. Therefore, while the Supreme Court explicitly did not require that the harasser be homosexual in order for the victim to state a valid sexual harassment claim, it is possible that many courts will make homosexuality of the harasser a \textit{de facto} requirement.

Another concern is that the presumed homosexuality of the defendant in a same-sex sexual harassment case may cause the courts to judge the behavior of the defendant more harshly, thus finding actionable sexual harassment based on incidents that would not constitute sexual harassment in an opposite sex context.\textsuperscript{55} \textit{Hampel v. Food Ingredients Specialties}\textsuperscript{56} illustrates this potential issue in the context of male-on-male sexual harassment. In \textit{Hampel}, the jury awarded plaintiff Laszlo Hampel over 1.6 million dollars in damages\textsuperscript{57} based on one conversation.\textsuperscript{58} During this conversation, Hampel expressed frustration over the unavailability of supplies he needed to do his job by stating "[o]ne of these days I'm going to blow," to which his supervisor responded, "[h]ey, Laz, you can blow me."\textsuperscript{59} The conversation continued with the supervisor telling Hampel, "[y]ou're the only man in the world that I want to suck my dick" and "I want you to taste my cum and go umm, umm, umm, and I want you to ware [sic] my pearl necklace."\textsuperscript{60} Although the appellate court reversed, finding that this conversation did not constitute a claim of sexual harassment, it is quite unlikely that a similarly inappropriate conversation between a male supervisor and a female subordinate would have resulted in a 1.6 million dollar jury verdict.\textsuperscript{61} Thus, this case raises concerns that significantly less severe behavior will be considered harassment in the same-sex context, to the disadvantage of lesbians and gay men, especially if

\begin{itemize}
\item \textsuperscript{56} No. 73143, 1998 WL 767620 (Ohio App. Oct. 29, 1998).
\item \textsuperscript{57} See id. at *3 (reciting jury award of $368,750 in compensatory damages and $1,280,000 in punitive damages).
\item \textsuperscript{58} See id. at *6 (stating claim is based on a single episode of sexually explicit verbal abuse).
\item \textsuperscript{59} Id. at *3 (quoting from the appellee's contemporaneous notes).
\item \textsuperscript{60} Id. at *3-4 (quoting from the appellee's contemporaneous notes).
\item \textsuperscript{61} See Spitko, \textit{supra} note 55, at 82-90 (arguing that potentially sexually harassing behavior is likely to be judged more harshly in the same-sex context because it is likely to be judged by a heterosexual finder of fact who is uncomfortable with any homosexual expression). Compare \textit{Hampel}, 1998 WL 767620, at *3-4, *6, with Garcia v. Schwab, 967 S.W.2d 883, 885, 887 (Tex. App. 1998) (affirming the trial court's grant of summary judgment for the defendant and holding that the male defendant's staring at and commenting on the female plaintiff's breasts, touching his genitals in her presence, discussing sexual matters with her, remarking on her appearance, commenting on the appearance of other women in her presence, and making repeated sexual references, did not create a sufficiently abusive or hostile environment to constitute actionable sexual harassment).
\end{itemize}
they are disproportionately likely to be accused of same-sex sexual harassment. 62

**ONCALE DOES NOT PROVIDE A BASIS FOR PROTECTING LESBIANS AND GAY MEN FROM HARASSMENT ON THE BASIS OF SEXUAL ORIENTATION**

Despite the optimism with which the *Oncale* opinion has been greeted by lesbian and gay advocacy groups, the ruling does not further the goal of protecting lesbians and gay men from harassment on the basis of sexual orientation. Prior to this decision, courts have consistently held that Title VII's prohibition of sex discrimination and thus sexual harassment does not prohibit discrimination and harassment on the basis of sexual orientation. 63 Although the issue of same-sex sexual harassment presented the Court with the opportunity to address harassment on the basis of sexual orientation, the Court's decision to address same-sex sexual harassment in the context of a case in which all of the parties were apparently heterosexual allowed the Court to avoid addressing harassment on the basis of sexual orientation.

Although the Court did not explicitly address harassment on the basis of sexual orientation in *Oncale*, the decision does have implications for the extent to which lesbians and gay men will be able to invoke the protection of Title VII. In *Oncale*, the Court reiterated that harassment must be "because of sex" in order for it to violate Title VII. 64 Therefore, lesbians and gay men are protected by Title VII if they are harassed because of their sex but not if they are harassed because of their sexual orientation. However, if the "because of sex" requirement is read to encompass gender, Title VII will provide a remedy to women who are harassed because they are not sufficiently feminine and to men who are harassed because they are not sufficiently masculine, groups which often include people who are or are perceived to be lesbian or gay. 65 While ex-

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63. See DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (holding that Title VII's prohibition against sex discrimination applies only to discrimination on the basis of gender and not on the basis of sexual preference); see also Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) (holding that Title VII protections did not extend to a transsexual airline pilot); Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, at 73-74 (D. Me. 1998) (holding hostile work environment sexual harassment claim for treatment related to sexual orientation not actionable).

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

plicitly protecting lesbians and gay men from harassment on the basis of sexual orientation would be preferable to this limited form of protection, an expansive reading of the “because of sex” requirement to include gender roles would at least provide lesbians and gay men with some protection from discrimination.66

The Oncale opinion does not define “because of sex,” and it is not clear from the opinion whether “because of sex” means because of biological sex or because of gender identity. The Supreme Court has previously defined sex to include gender roles.67 For instance, in the context of a claim of sex discrimination in promotion, the Court found that advice that the plaintiff could improve her chances of being promoted to partner status if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”68 was evidence that the plaintiff was the victim of sex discrimination. In so holding, the Court noted that it does not “require expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”69 Such a broad reading of the “because of sex” requirement has positive implications for the protection of lesbians and gay men from sexual harassment.

However, a more narrow reading of the “because of sex” requirement in the future is suggested by the Court’s decision to vacate and remand the Seventh Circuit’s decision in Doe v. City of Belleville.70 In this case, the Seventh Circuit adopted an expansive view of the “because of sex” requirement, finding that the allegations of sixteen-year-old twin brothers that they were sexually harassed by their male co-workers stated a valid same-sex sexual harassment claim.71 The harassers constantly referred to H. Doe as “queer” and a “fag” and asked him, “[a]re you a boy or a girl?”72 One of the harassers referred to him as his “bitch” and threatened to take him out to the woods and “get [him] up the ass.”73 This harasser also grabbed him by the testicles and then declared “[w]ell, I guess he’s a guy.”74 The court concluded that the “fact that H. Doe apparently was singled out for this abuse because the way in which he projected the sexual


68. Id. at 235.

69. Id. at 256.

70. 119 F.3d 563 (7th Cir. 1996), vacated, 118 S. Ct. 1183 (1998).

71. See id. at 566.

72. Id. at 566-67.

73. Id. at 567.

74. Id.
aspect of his personality (and by that we mean his gender) did not conform to his coworkers’ view of appropriate masculine behavior" showed that the same-sex sexual harassment H. Doe experienced was sex discrimination. The court went even further and suggested that harassment is "because of sex" when it has explicit sexual overtones: "[a]rguably, the content of that harassment in and of itself demonstrates the nexus to the plaintiff’s gender that Title VII requires." Since the circuit court based its conclusion alternatively on these two arguments, it is unclear what changes the court will need to make in order to conform its opinion to the Supreme Court’s opinion in Oncale. However, it is likely that the court will need to narrow its understanding of the "because of sex" requirement, resulting in less protection from sexual harassment for lesbians and gay men.

Following the Oncale decision, courts may construe the "because of sex" requirement narrowly, a result that is suggested by several lower court decisions. A narrow construction of the "because of sex" requirement would have the effect of excluding many claims of harassment on the basis of sexual orientation, even when such claims are entwined with claims of harassment on the basis of sex. This can be seen in Higgins v. New Balance Athletic Shoes, Inc., in which the plaintiff alleged that he had been harassed on the basis of his sex as well as his sexual orientation when his co-workers made comments such as "[y]ou eat shit out of men’s assholes," "[y]ou faggot," "you dumb fuck," and "you stupid fuck." In addition to this verbal harassment, on one occasion a co-worker shook Higgins violently and threatened to kill him. In ruling in favor of the employer on the employer’s motion for summary judgment, the court considered whether the "because of sex" encompassed gender. The court concluded that it did not need to address this issue since

75. Id. at 580.
76. Id. at 576.
77. See Romero v. Caribbean Restaurants, Inc., No. Civ. 97-1491 (HL), 1998 WL 459386, *3 (D.P.R. July 31, 1998) (holding that since male defendant’s harassing behavior was directed at both male and female employees, the harassment could not have been "because of sex"); Chrouser v. DePaul Univ., No. 95 C 7363, 1998 WL 299426, *3 (N.D. Ill. May 20, 1998) (holding that the use of the term "breeder" constitutes harassment on the basis of sexual orientation and not sex and thus is not a violation of Title VII).
79. Id. at *1.
80. See id. at *2.
[t]he only facts on the record conceivably relating to Plaintiff's gender are his undisputed allegations that he is a homosexual and that he was perceived as such by his co-workers. Given that these are the only gender-related facts before the Court, Plaintiff effectively asks the court to equate "gender" with "sexual orientation" under Title VII analysis. In light of Title VII's scope of coverage, which does not include sexual orientation discrimination, the Court declines to do so.\textsuperscript{81}

Such an analysis does not bode well for lesbians and gay men who seek to invoke the protections of Title VII.

**CONCLUSION**

The *Oncale* decision reveals the extent to which the Supreme Court is struggling with its understanding of sexual harassment as sex discrimination. In the opposite-sex cases, the Supreme Court has been willing to simply assume that harassment with sexually explicit content is based on sex. However, in the same-sex context, the Supreme Court is less willing to rely on this assumption. As the oral arguments in *Oncale* reveal, the justices are caught between an intuition that same-sex sexual harassment must be a violation of Title VII and an inability to articulate how same-sex sexual harassment can be sex discrimination, given that sexual-orientation discrimination is not considered actionable under federal law. During Oncale’s argument and the United States’ argument as amicus curiae supporting Oncale, the justices repeatedly asked, "Why is this discrimination?"\textsuperscript{82} Yet during Sundowner’s argument, the Court focused on the inconsistency of finding that same-sex sexual harassment is not covered by Title VII, given the broad reach of the statute’s ban on discrimination.\textsuperscript{83}

The Court’s struggle to conceptualize the link between sexual harassment and sex discrimination could potentially be the best cause for optimism regarding the *Oncale* opinion. While the Court’s confusion might lead to a narrowing of the Court’s understanding of sexual harassment, it may present an opportunity for advocates to help the courts reestablish the link between sex discrimination and sexual harassment on even firmer ground, based on the experience of two decades of litigation. Such reconceptualizations are currently underway in the academy, where feminist legal theorists are working to strengthen the theoretical underpinnings of sexual harassment jurisprudence. Recent works have focused on understanding sexual harassment as gender discrimination, in which the wrong

\textsuperscript{81} Id. at *8.


\textsuperscript{83} See id. at 28, 29, 31, 34, 35, 37, 38, 43, 45, 46, 47.
of sexual harassment is that both women and men are forced to conform to gender roles that limit their opportunities. Other works have sought to broaden the types of conduct that are considered actionable harassment based on an understanding that sexual harassment is an attempt by dominant groups to maintain their power and prestige in the workplace. Such reconceptualizations would strengthen the protections against discrimination for lesbian women and gay men as well as for women in general.
