At the Heart Of Harassment

Same-Sex Exposes Title VII Weakness

BY MARK M. HAGER

In *Oncale v. Sundowner Offshore Services Inc.*, No. 96-568, the Supreme Court has the opportunity to decide whether same-sex sexual harassment is actionable as employment discrimination under Title VII of the Civil Rights Act of 1964. This itself makes *Oncale* amply interesting. But there is a deeper dimension to the drama, which the justices may need to visit although they may dearly wish to steer clear: Why is "sexual harassment" ever conceptualized as "employment discrimination" at all?

On the question of the actionability of same-sex harassment under Title VII, there are intuitively powerful arguments both ways. The federal courts have split dramatically on the issue.

The U.S. Court of Appeals for the 5th Circuit in *Oncale* found for the employer. The plaintiff, a male worker on an offshore oil rig, had been subjected to degrading abuse by one male supervisor and two male co-workers. Specifically, he was on two separate occasions touched by another's penis while being forcibly held; he received threats of rape; and a soap bar was forcibly inserted into his anus. Nonetheless, the 5th Circuit held that because this harassment was at the hands of other males, it could not count as sex discrimination under Title VII.

Thus, on the surface, the Supreme Court in *Oncale* faces the question of whether same-sex harassment ever constitutes discrimination based on sex, and if it does, under what circumstances. In addressing the same-sex issue, however, the Court ought to look at the underlying Title VII question, which has never been satisfactorily answered. The notion of sexual harassment as employment discrimination has always been more ambiguous than most cases and commentators have acknowledged. The same-sex issue represents a point where the ambiguities of the discrimination paradigm as a way of dealing with harassment become potentially overwhelming.

Technical jurisprudence aside, the intuitive arguments over same-sex actionability are easy to grasp. On the one hand, no one should be subjected to abusive sexual advances or other degrading sexual treatment. Whether abuser and victim are of the same sex has no bearing on that point. If victims of opposite-sex harassment get Title VII relief, simple justice requires the same for same-sex victims.

On the other hand, Title VII's original purpose was to outlaw discrimination against the opposite gender. Same-sex harassment, by definition, does not involve an opposite gender. Therefore, it is not discrimination in the Title VII sense.

If same-sex harassment is actionable, Title VII has unmistakably become a weapon to be wielded against evils far beyond straightforward discrimination. It is because same-sex harassment so resembles opposite-sex harassment that it helps spotlight how opposite-sex harassment itself is an evil beyond discrimination.

NO OVERTURES HERE

Oncale is an intriguing choice for Supreme Court review because it is not the normal same-sex case. The number of same-sex claims has jumped sharply since the 1991 amendments to Title VII authorized compensatory and punitive damages for workplace harassment. Most such cases decided by the federal courts involve erotic overtures—seeking sex or romance—toward straight (at least presumably) employees by gay or lesbian employees, usually supervisors. This erotic-overture posture makes such cases analogous to classic opposite-sex cases deemed actionable under Title VII.

But *Oncale* represents a same-sex scenario far rarer in the federal courts: forcible sexual abuse and threats. Still other cases present other same-sex scenarios: vulgarity and sexual horseplay directed at some (presumably) straight workers by other (presumably) straight workers; hostile abuse of gay workers by (presumably) straight workers—that is, gay-bashing, physically nonthreatening erotic overtures by gays toward other gays; and physically nonthreatening erotic overtures by gays toward straights.

The Court may wish not to decide the actionability of all these differing scenarios in one case. Instead, cautious justices may try to distinguish various scenarios and to compare them in different ways to forms of opposite-sex harassment already actionable under Title VII or to different ways of conceptualizing discrimination. If they do, however, they risk becoming lost in a tangle of crisscrossing legal analogies and ambiguous factual characterizations.

The justices must also be mindful that anti-gay discrimination is not currently prohibited under Title VII. Gay-bashing seems closest to a core meaning of "discrimination"—except for the fact that the contempt is directed not at the target's gender or race, but at his sexual orientation. Thus, actionability for gay-bashing seems to run afoul of rulings, undoubtedly faithful to congressional intent, that Title VII does not outlaw discrimination based on sexual orientation. (Whether discrimination based on sexual orientation *should* be banned is another question, of course.)

By contrast, sexual vulgarity between straights seems furthest from any common sense meaning of discrimination or recognized Title VII actionability. It entails no easily discernible group-based contempt and no gender selectivity based on sexual attraction. If mere sexual vulgarity qualifies as discrimination, it is hard to see why *any* mistreatment or abuse of another on the job should not be actionable as discrimination. Why single out mistreatment utilizing sexual words and actions?

Gay-on-gay erotic overtures entail discrimination in the form of gender-selective sexual attraction and thereby seem close to the standard Title VII theory of sexual advances as discrimination. But insofar as the perpetrator knows the orientation of her target, the advances may involve selectivity on the basis of orientation as much as on

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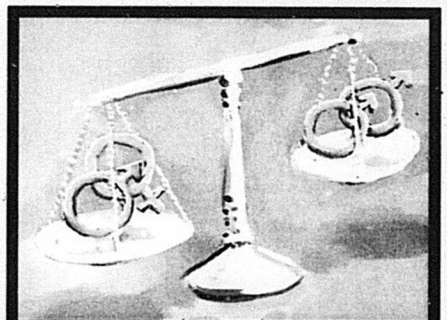

ONCALE v. SUNDOWNER OFFSHORE SERVICES INC.

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Case Threatens Male Supremacy

BY MARC SPINDELMAN

When the Supreme Court turns this term to *Oncale v. Sundowner Offshore Services Inc.*, No. 96-568, it will consider whether the U.S. Court of Appeals for the 5th Circuit erred in concluding that Title VII does not permit a cause of action for same-sex sexual harassment. Trivializing what happened to the plaintiff in this case, commentators have variously characterized the sort of sexual abuse perpetuated upon Joseph Oncale as "just horseplay," "crude horseplay," "locker-room behavior," or "crude locker-room humor." They have called it many things—all to keep others from calling it anything as accurate as "sexual harassment." One hopes the Supreme Court will not be taken in.

In its present procedural posture, the facts of the case are not in dispute: Joseph Oncale started working for Sundowner Offshore Services as part of an all-male crew on an offshore oil rig in August 1991. Within weeks, his supervisor, John Lyons, complimented him, saying, "You know you got a cute little ass, boy." Lyons told him, Oncale says, that he was going to "fuck me in my behind." And Lyons didn't stop there. Oncale reports that Lyons again threatened him with rape: "If I don't get you now, I'll get you later. I'm going to get you. You're going to give it to me."

Some time later, Lyons and a co-worker, Danny Pippen, physically and sexually

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Uncovering Male Taboos

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attacked Oncale. In the sight of other Sundowner employees, Pippen held Oncale down while Lyons unzipped the fly of his trousers, pulled out his penis, and stuck it against the back of Oncale's head. When Oncale asked his two assailants to stop, they laughed. Lyons and another of Oncale's co-workers did it again the next day.

That night, when Oncale was showering in a one-man shower stall, Lyons and Pippen seized him. According to Oncale's testimony, while Pippen lifted him off the ground, Lyons took a "bar of soap and rubbed it between the cheeks of my ass and tells me, you know, they're fixing to fuck me." Oncale contends that several co-workers witnessed this event.

Do we need to know that anything more was done to Oncale—and there is more—to understand that his ordeal cannot be written off as "crude horseplay" or any of the other things it's been called? Does it stretch the legal imagination to the breaking point to appreciate that there really may be a difference between athletes' tush-patting and attempted rape, even when it's all between men? What else is needed to make it sex discrimination?

'SACRED PRECINCTS'

Anyone who takes sex equality seriously must carefully consider any attempt to disparage the legitimacy of a cause of action for male-on-male sexual harassment. Many (perhaps too many) will fervently defend the sanctity of all-male enclaves and patterns of "male bonding." But if there's any merit to the notion that righting Oncale's wrong will threaten the sacred precincts of manhood, it's not because doing so will be tantamount to issuing a roving civil arrest warrant for men who are just acting as men often will, or as men always have. Rather, if righting Oncale's wrong will threaten those sacred precincts, it's because men have and do exercise their power over other men in sexually abusive ways.

It is a social fact, if not yet a universally recognized legal one, that men sexually harass other men. All too often, this harassment is regarded as lacking the power to harm because both perpetrator and victim are men. As Professor Catharine MacKinnon recently observed in her amicus brief in *Oncale*: "The denial that interactions among men can have a sexual component, and that sexual abuse of men is gendered, are twin features of the social ideology of male dominance. . . . In this ideology, men are seen as sexually invulnerable."

The culturally presumed invulnerability of men has its limits, of course. Some regard some men—which is to say, gay men—as unquestionably having the power to sexually harass other men in ways that may truly be actionable under Title VII. The hysteria produced by male anxiety over the existence of and potential sexual violation by the "homosexual" is understandable within our system of male dominance. In this system, "real" men respect some outer limit on the sexual abuse they inflict on other men—meaning they won't have sex with them. Thus, gay men—who will have sex with other men, it is believed, if only they have the chance—do not measure up as real men. It's the very (but not only) thing that makes them fair game for sexual abuse by other men.

THE PREVAILING IDEOLOGY

The prevailing distrust of gay men by straight ones arises partly from the nervousness the straight man feels in his sexual vulnerability to the gay man. The reason for this felt vulnerability (often expressed and acted out through visceral hatred for the homosexual) is that the straight man understands what he, as a man, is supposed to do to women. As Andrea Dworkin has incisively remarked: "As long as male sexuality is expressed as force or violence, men as a class will continue to enforce the taboo against male homosexuality to protect themselves from having that force or violence directed against them." When, despite that taboo, a man aims his (male) sexuality, however potentially, at a straight man, it strikes even a number of those who generally oppose recognizing a cause of action under Title VII for male-on-male sexual harassment that *some* same-sex harassment cases may involve sex discrimination after all. Does it come as any surprise, for example, that one commentator, who denigrated Oncale's legal position, supported his conclusion by noting that Oncale had presented no evidence (other than his own testimony) to establish that any of his assailants were gay or actually intended to rape him?

If one were asked to legislate the prevailing ideology of male supremacy, the law one wrote would surely perpetuate the presumption of male sexual invulnerability. It would also protect straight men from gays. When Congress passed Title VII as part of the Civil Rights Act of 1964, whatever else it did, it most assuredly did not enact male supremacy. But in the *name* of Title VII's sex equality principles, and without any obvious appreciation for irony, the 4th Circuit has done just that.

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In two cases decided around the same time the 5th Circuit was grappling with *Oncale*, the 4th Circuit made its bold move. In *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996), the 4th Circuit took the first step, announcing that a claim of hostile work environment "does not lie where both the alleged harasser and the victim are heterosexuals of the same sex." The court reasoned that to consider such claims of sexual harassment to be "because of sex" would extend Title VII's "protections beyond intentional discrimination 'because of' the offended worker's 'sex' to unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.'"

With *Wrightson v. Pizza Hut of America Inc.*, 99 F.3d 138 (4th Cir. 1996), the 4th Circuit took the next step, resolving a question expressly reserved by *McWilliams*.

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Wrightson held that "a claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual."

The ideology of male supremacy (and thus the *McWilliams-Wrightson* rule) depends upon assuming or enforcing a high degree of stability in the organization of sexual desire—and the related social categories of sex and sexual orientation. How valid are these assumptions? Consider the implications of *McWilliams-Wrightson.*

Begin, as the 4th Circuit evidently did, with the premise that because straight men do not sexually desire other men, they cannot sexually harass other men, but because gay men do, they can. How does this definition of "desire" differentiate what is sexual harassment from what isn't? Imagine that an openly gay man is alleged to have sexually harassed a woman. Is sexual harassment under these circumstances an impossibility because the man is gay? Would it matter if the woman didn't know that her harasser is gay? That he's a closeted (maybe even married) gay man?

Or imagine this: A straight man who sexually desires only blondes or redheads. Can this man sexually harass a woman with brown or black hair in ways that Title VII prohibits?

In practice, sexual desire does not neatly correspond to sex or sexual orientation. Not all straight men are exclusively straight, and not all gay men are exclusively gay. Moreover, not all straight men seek to gain sexual access to all women, and not all gay men find themselves desiring or wanting to have sex with all other men. What do we say of the sexual desire, in terms of orientation, of the self-proclaimed heterosexual man who rapes other men?

THE DESIRE DILEMMA

The mutability of most actual forms of sexual desire, quite apart from the way that socially constructed desire is "supposed" to work, is but one reason courts should avoid adjudicating sexual orientation as the necessary precondition for maintaining a same-sex harassment action under Title VII. And it is but one reason that the 4th Circuit erred in adopting an approach that assumed the fixed nature, "knowability," and relevance of sexual orientation or desire as the evidentiary threshold requirements for same-sex harassment cases.

One way around the desire dilemma would be for courts to enforce, by judicial fiat, their own understanding of how desire, sex, and sexuality intertwine. What looks like an emerging trend in the courts of the 4th Circuit in the wake of *McWilliams* comes closest to taking this tack—that is, imputing "homosexuality-in-fact" to a male sexual harasser if a plaintiff, by pleading and proof, establishes that such an harasser's conduct toward another male is sufficiently sexual in nature. But the line separating heterosexual from homosexual sexual conduct—particularly in same-sex harassment cases—has proved itself unpersuasively thin.

Admittedly, a court's imputation of homosexuality to an harasser preserves the illusion that straight men can't sexually harass other men. Indeed, it even protects straight men from the gender anxiety occasioned by an implicit homosexual menace. Not coincidentally, however, making the homosexual *be* the sole purveyor of same-sex sexual abuse further vilifies him in the cultural imagination. Undoubtedly, there must be better ways to achieve meaningful workplace sex equality than using homophobia as a weapon of social engineering. Recognizing male supremacy for what it is and observing that it's embodied in the *McWilliams-Wrightson* rule seems a good place to start.

While the *McWilliams-Wrightson* rule tracks the dominant cultural myth of men's general sexual invulnerability, the ruling in *Oncale* raises both the standards of masculinity and the stakes of gender difference to new levels. The law announced by the 5th Circuit in *Oncale*—that same-sex harassment is not actionable under Title VII—precludes the possibility that there are *any* circumstances in which a man can be sexually harassed by another man. Does the court mean by this that men cannot sexually harm other men? That those who are sexually harmed are not men?

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We should all be troubled by the implications of the 5th Circuit's blanket refusal to recognize the harm of same-sex sexual abuse in the workplace, and we should be especially troubled by the implications for women. It has required considerable time and effort to persuade the law to take what modest steps it has to listen and respond to women's violation by men.

The bitter struggle for sex equality has proceeded so slowly in part because of the gender tax that men must pay in order to become men. When men regard the abuse they endure in order to be considered real men as lessons in "character-building," how much does (can) (should) one expect these men to regard the abuse they dole out—either to other men or, more often, to women—as abuse?

What is likely to follow from the law in the 5th Circuit, which refused to act when a man raised his voice against the sexual violence he had suffered as a man? One needn't know the whole answer to know with certainty that should the Supreme Court not reverse the *Oncale* decision and hold that Joseph Oncale was sexually harassed within the meaning of Title VII, what is likely to follow doesn't bode well for women. Or men. ■