

**HORSEPLAY OR HARASSMENT:  
A CONTINUING PROBLEM IN SAME-SEX DISCRIMINATION**

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**I. INTRODUCTION**

In the last decade, elimination of sexual harassment in the workplace has become a major challenge for employers. Not only do they have powerful moral and financial incentives, but there are also expanding legal prohibitions against certain offensive sex-based behaviors. The courts are frequently called upon to define which behaviors constitute sex discrimination, under Title VII of the 1964 Civil Rights Act that bans employment “discrimination against an individual with respect to ... compensation, terms, conditions or privileges of employment because of such individual’s ... sex.”<sup>1</sup>

On March 4, 1998, the Supreme Court unanimously agreed to extend federal civil rights protection to claims of same-sex harassment, thereby harmonizing a long-running legal controversy of great complexity. The case before the Court, *Joseph Oncale v. Sundowner Offshore Services, Et al*<sup>1</sup> presented the complaints of an off-shore oil rig worker that he was restrained, battered and sexually abused by his male supervisor and two co-workers to the point of being threatened with rape. Forced to quit the job, he tried his case unsuccessfully before a federal district court and the Court of Appeals for the Fifth Circuit in New Orleans, where the Circuit Court held that same-sex claims are not viable under Title VII<sup>3</sup>. But other federal circuits had ruled otherwise, finding that discriminatory behaviors in the workplace “because of sex” were actionable, even if they were intra-gender. The Supreme Court decision in *Oncale* has now resolved this split among the Circuits, but it has not relieved them of the difficult task of distinguishing between actionable discrimination and horseplay or abusive hazing.

This paper first reviews the *Oncale* decision and its three-pronged evidentiary test for the “because of... sex” requirement in Title VII. Next it examines two recent EEOC same-sex settlements with employers on behalf of aggrieved employees, pointing out the employer defense of “horseplay.” Then, it discusses recent case decisions that illustrate the nature of proof that separates actionable discrimination from horseplay. In this regard, it notes the theory of sexual stereotyping which offers a new avenue for proof in same-sex complaints. After giving examples of the expanded duty of employers to take prompt remedial action to prevent or stop offensive behavior in the workplace under the *Faragher v. City of Boca Raton*<sup>4</sup>, and

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<sup>1</sup>42 U.S.C. § 2000e -2 (a)(1) (1988 & Supp. V 1993).

<sup>2</sup>523 U.S. 75 (1998).

<sup>3</sup>83 F.3d 118 (5th Cir. 1999).

<sup>4</sup>524 U.S. 775 (1998).

*Burlington Industries, Inc. v. Ellerth*<sup>5</sup> decisions, the paper concludes with a review of the current state of same-sex cases in the lower courts.

## II. THE DEVELOPMENT OF GENDER NEUTRALITY

Sex under Title VII is gender neutral. Since passage of the Civil Rights Act in 1964, numerous cases have fleshed out the parameters of claims where the victim was of one sex, and the harasser of the opposite sex. The courts first protected women from retaliatory harassment for refusing a supervisor's demands for sex and from "hostile" work environments. Then, protection was extended to male employees from similar harassment by female supervisors<sup>6</sup>. Discerning the nature of sexual harassment became easier after the Supreme Court defined "hostile work environment" in *Meritor Savings Bank, FSB v. Vinson*<sup>7</sup>, as covering not only terms of employment, but also the conditions in which the employee worked. In the following year, the EEOC promulgated guidelines<sup>8</sup> making same sex harassment actionable. Still, the Supreme Court made no definitive ruling on whether or not the ban on discrimination because of sex applied to intra-gender sexual abuse.

However, the lower federal courts continued to struggle with same-gender harassment. In some situations, a male complains that another male has demanded sexual favors from him in return for job benefits, or under threat of adverse job actions, or has subjected him to a hostile work environment. In other situations, the same claim can be made by a woman against another woman. In the absence of any guidance from the Supreme Court, the Circuits were divided as to whether claims of same-sex harassment may state a claim on which relief may be granted. Employers and human resource professionals, particularly in multi-state companies, were subjected to divergent standards of care and varying degrees of liability exposure as they confronted charges of same-sex harassment of their personnel.<sup>9</sup> How were they to deal with what traditionally may have been considered "horseplay," and how could they discern illegal discrimination from gross or morally reprehensible behaviors? The decision in *Oncale* resolved the issue, holding that, *prima facie*, claims of same-sex harassment were actionable. The commitment to gender neutrality in the *Oncale* decision has led to other difficulties, however.

The Justices' comments during the oral arguments indicated that they, too, were troubled by the need for further definition to show the distinction between horseplay and actionable harassment. Justice Antonin Scalia, writing for the Court, proposed a three-prong test for stating a viable claim of harassment because of sex: first, sexual desire on the part of the harasser; second, motivation by general hostility to members of the victim's gender; and third, comparative behavior toward the victim's gender "so objectively offensive as to alter the conditions of the victim's employment."<sup>10</sup> He cautioned that not all behaviors are actionable but depend on the

<sup>5</sup>524 U.S. 742 (1998).

<sup>6</sup>Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669,682 (1983).

<sup>7</sup>477 U.S. 57(1986).

<sup>8</sup>2 EEOC Comp. Man. (BNA) §615.2b3 (June 1987).

<sup>9</sup><[http:Wwww.WSJ.COM](http://www.WSJ.COM)>; U.S. Sup.Ct., 98-568, March 4, 1998.

<sup>10</sup>*Oncale* at 81.

perspective of a reasonable person in the plaintiffs position, considering “a constellation of surrounding circumstances, expectations, and relationships.”<sup>11</sup> Courts must consider “the social context in which particular behavior occurs.”<sup>12</sup> In other words, said the Justice, the courts will be called upon to use common sense and an appropriate sensitivity to social context to distinguish between simple teasing, flirtation, horseplay, or roughhousing among members of the same sex, and conduct which is hostile or abusive under a reasonable person standard. Thus, while the Court clarified the threshold rule, it applied a “common sense” standard to the problem of discernment which promises much future argument. Therefore, in attempting to understand the application of the *Oncale* decision, it may be useful to apply these tests to earlier cases. Lessons learned there may shed light on claims that lie ahead.

In a *prima facie* case of sexual discrimination, the plaintiff has to establish four elements. First, he or she belonged to a protected class under Title VII. Second, that the plaintiff was subject to unwelcome sexual harassment. Third, that the harassment was based on sex; and fourth, that the harassment was sufficiently severe to alter some term, condition, or privilege of employment. The statute is not limited to situations where the target suffers tangible economic losses, known as *quid pro quo* harassment, but can reach conduct that includes unwelcome sexual advances, verbal or physical conduct that is sex charged, or that creates a hostile working environment as a result of such conduct, now known as hostile environment sexual harassment.<sup>13</sup> In same-sex harassment cases, the turning point has been on the various courts’ interpretation of the third requirement: was the harassment by a perpetrator against a target of the same-gender harassment based on sex?

The language of Title VII is gender neutral and makes no requirement, or even suggestion, that the sex of either gender is a prerequisite trigger to Title VII. At oral arguments in *Oncale*, Justice Stephen G. Breyer pointed out that Title VII, which also protects against bias based on race and religion, allows blacks to sue for discrimination caused by other blacks and Jews to sue for actions by other Jews.<sup>14</sup> In the opinion of the Court, Justice Scalia observed that same-sex made no difference in *Johnston v. Transportation Agency, Santa Clara County*,<sup>15</sup> where a male employee claimed reverse discrimination in that a female employee was chosen over him for promotion. This was discrimination against the male because of his sex, he claimed, and done by a male supervisor against a male employee. So it was both a claim of discrimination because of sex, and also same-sex discrimination. Likewise, intra-racial discrimination was found actionable where a supervisor was charged with discrimination against members of his own race<sup>16</sup>. Therefore, the Supreme Court had recognized the gender-neutral language of Title VII in earlier claims of discrimination because of sex and because of race, where job actions were at issue.

Indeed, in the *Meritor* decision the Supreme Court spoke in gender-neutral language in its decision, stating that the intent of Congress was to strike at the entire

<sup>11</sup>*Oncale* at 82.

<sup>12</sup>*Oncale* at 81.

<sup>13</sup>*Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

<sup>14</sup>*Biskupic, Joan, Justices Hear Harassment Case*, Dec. 4, 1997, p. A25.

<sup>15</sup>480 U.S. 616 (1987).

<sup>16</sup>*Castaneda v. Partida*, 430 U.S. 482 (1977).

spectrum of disparate treatment of men and women in employment.”<sup>17</sup> The now famous *Meritor* statement that where “a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘[discriminates]’ on the basis of sex,” by use of its gender-neutral language, makes no requirement that the target be of the opposite sex of the harasser. While the typical case of sexual harassment usually involves a male harasser targeting a female, sexual harassment is not limited to that scenario. Females may be harassers as well as males, and targets can be either male or female.<sup>18</sup> The purpose of Title VII is to prohibit gender-based discrimination, and both men and women are considered belonging to a protected class.<sup>19</sup>

Consistent with the gender-neutral language of *Meritor*, the Supreme Court reiterated in *Harris v. Forklift Sys, Inc.*, that the intent of the statute was to protect both genders against either gender, where discrimination was sex-based.<sup>2</sup> The critical issue, according to the Court’s expert on discrimination issues, Justice Ruth Bader Ginsburg, was “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>21</sup> She raised this issue again at oral argument, noting that it might be hard to know whether a man was singled out for harassment because of his sex when the workplace is composed entirely of men, as was the situation on *Oncale*’s oilrig in the Gulf of Mexico. “There was no other sex involved in this case,” she said. “...[H]ow can we know how these gross people would have treated women?”<sup>22</sup>

Appreciating the Court’s concern, Justice Scalia noted that *Sundowner, Inc.* had used Ginsburg’s test from *Harris* as the point of departure for its defense: “[t]he critical 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.”<sup>23</sup> However, he wrote, “...harassing conduct need not be motivated by sexual desire...” so long as the harasser is motivated by general hostility and the conduct constituted discrimination because of sex. This harassment need not be either asexual or androgynous, as long as it is “... conduct so objectively offensive as to alter the conditions of... employment.”<sup>24</sup> The Justice left the problem to the lower courts of sorting out objectively offensive behavior from gross horseplay.

### III. EEOC Settlements Following *Oncale*

A decade before the *Oncale* decision, the Equal Employment Opportunity Commission had interpreted Title VII to include protection for employees who are harassed by members of their own sex. The EEOC’s compliance manual recognizes such a scenario of intra-gender harassment:

17. 477 U.S. 57 (1986).

18. *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); 2 EEOC Compl. Man. (BNA) § 615 (June 1987).

19. *Showalter v. Allison Reed Group, Inc.* 767 F. Supp. 1205 (D.R.I.1991).

20. *Harris* at 25.

21. 510 U.S. 17, at 25 (1993).

22. *Biskupic*, *supra* note 11.

23. *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

24. *Oncale*, 523 U.S. at 81.

The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex.

The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.<sup>25</sup>

In the year following *Oncale*, the EEOC settled its first class action on behalf of male employees of Long Prairie Packing Company who alleged that they had been subjected to a pattern and practice of sexual and disability-based harassment by men against men, as well as retaliation against individuals who opposed the alleged harassment.<sup>26</sup> The terms of the voluntary \$1.9 million settlement were in a Consent Decree that was submitted to United States District Judge Ann D. Montgomery in federal court in Minnesota on August 11, 1999. The EEOC reached the settlement with LPP, a meat packing plant in Long Prairie, Minnesota. Allegations of "pattern and practice" and retaliation raised the presumption that the offending behavior was much more than mere horseplay or hazing. According to EEOC Chairwoman Ida L. Castro, the case demonstrated that the EEOC would move quickly and aggressively to respond to problems of workplace harassment, whether brought by men or women. The settlement was significant because of the extraordinary breadth of relief, reached through negotiation rather than extensive litigation. "We are fully committed to providing our employees a workplace that is free of discrimination and harassment," said Tom Rosen, CEO, LPP. "We are pleased that we were able to resolve the matter without resorting to litigation that employs about 235 workers." The cost of settlement plus lawyers fees and the stressful distractions of defending against such charges are strong incentives to prevent "horseplay."<sup>27</sup>

Several months later, a second case was settled with Burt Chevrolet Dealership in Colorado for a half-million dollars, on allegations involving harassment by male managers against ten male used car salesmen. Management had at first dismissed the complaints of its salesmen as merely horseplay. The plaintiffs charged Burt Chevrolet with creating a hostile work environment in which the salesmen were subjected to severe and repeated sexual harassment including "touching and grabbing of genitals, pelvic thrusting on the buttocks of male employees, exposing of a manager's penis in the workplace, crude sexual language, crude sexual jokes, and referring to male employees in sexually obscene and derogatory terms. While the alleged unlawful behavior was primarily carried out by two male used car managers, the suit alleged that numerous other managers contributed to and perpetuated the

25,2 EEOC Comp. Man. (BNA) §615.2b 1 (June 1987).

<sup>26</sup><<http://www.eeoc.gov/press/11-08-99>>.

<sup>27</sup>*Id.*

<sup>28</sup>EEOC website <<http://www.eeoc.gov/press/08-04-00>>.

hostile environment by telling sexual jokes, presenting sexual materials at sales meetings, and tolerating offensive sexual conduct in the workplace.

Burt vigorously maintained that the workplace was not as described by the EEOC. Burt Chevrolet had a written policy in place prohibiting sexual harassment and stating its commitment to promptly investigate such allegations. However, the suit alleged that complaints by the salesmen went unheeded by management for nearly a year. According to the suit, management generally dismissed the offensive conduct as “horseplay” or “locker room antics.”<sup>29</sup> Neither manager involved was terminated or demoted from management for the alleged harassment, although one supervisor was given a written warning. Burt claimed it had not been as inactive as the EEOC claimed but had thoroughly investigated the matter and taken appropriate remedial action as soon as the allegations were brought to the attention of management.<sup>30</sup>

The EEOC, however, insisted that the harassment was so objectively offensive as to arise to the level of discrimination because of the sex of the victims. “The conduct in this case involved verbal ridicule and physical torment which created a hostile work environment designed to undermine the masculinity of male personnel,” said Mitchell. “If such blatant discriminatory action was directed toward female workers, there would be no disagreement over whether it was sexual harassment. But because it happened to men, management was initially indifferent to the situation.” Ultimately, L.G. Chavez, Executive Vice President of Burt Chevrolet, said that the company found it “to be in the best interest of everyone involved to get this matter behind us and not become engaged in a protracted legal battle.”<sup>31</sup>

These two settlements illustrate several issues that plague parties to sexual harassment suits. The plaintiffs must show that the conduct they suffer is because of their gender, and that it is unreasonably offensive rather than mere abusive hazing or horseplay. They must show that the behaviors were not directed to the other sex (in these cases, women employees), but if they had been, the behaviors would arguably have risen to the level of actionable conduct. Third, they must have complained to management, which must have failed to take prompt remedial action. Finally, management must be convinced of the credibility of the claims so that they will find settlement a less costly route of dispute resolution than litigation. Without these elements in place, plaintiffs can expect that management will force litigation as a way of wearing down the financial position and psychological will of the employee.

#### IV. HARASSMENT BECAUSE OF SEX OR GENDER

Although it is now clear that either men or women can be harassers, and either men or women can be targets and seek Title VII protections, the Supreme Court had not, before *Oncale*, considered appeals from either a *quid pro quo* harassment or hostile environment harassment case where both the target and the harasser

<sup>29</sup>“EEOC Settles Same-Sex Harassment Suit for a Half Million Dollars Against Major Colorado Auto Dealership,” August 4, 2000, <<http://www.eeoc.gov/press/8-4-00.html>>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

are of the same gender, i.e., both female or both male.<sup>32</sup> In the absence of authority on same-sex harassment, the lower federal courts had divided in their interpretation of what theories of sex discrimination gave protections for intra-gender harassment. Despite the gender-neutral language of the statute, the EEOC's regulations and the *Meritor* case, the circuits also diverged in their recognition of remedies to victims of intra-gender harassment. Some, of course, were unwilling to recognize any remedy for the victim of harassment by a member of their own sex.<sup>33</sup> Others would recognize only *quid pro quo* harassment by the same sex but deny recovery for hostile environment claims.<sup>34</sup> Still other circuits recognized intra-gender claims sounding in either theory of sexual harassment.<sup>35</sup> Though the same-sex claim is now cognizable

<sup>32</sup>See *McWilliams V. Fairfax County Board of Supervisors*, 72 F. 3d 1191 (4th Cir.1996); *Hopkins v. Baltimore Gas and Electric Co.*, 871 F. Supp. 822 (D. Md. 1994).

<sup>33</sup>Following the much-criticized *Goluszek v. Smith*, 697 F. Supp. 1452 (N. D. Ill 1988), these include *Hopkins v. Baltimore Gas and Electric Co.*, 871 F. Supp. 822 (M. D. Md 1994), *aff'd.*, 77 F.3d 745 (4th Cir. 1996); *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994); *Oncala v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996); *Quick v. Donaldson Co., Inc.*, 895 F. Supp. 1288 (S.D. Iowa 1995); *Ashworth v. Roundup Co.*, 897 F. Supp. 489 (W.D. Wash. 1995); *Childress v. City of Richmond, Virginia*, 907 F. Supp. 934 (E.D. Va. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521 (D.S.C. 1995); *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995); *Fleenor v. Hewitt Soap Co.*, 1995 WL 386793 (S.D. Ohio), 67 Fair Empl. Prac. Cas. (BNA) 1625; *Vandever v. Wabash Nat'l Corp.*, 867 F. Supp. 790 (N.D. Ind. 1994), on reconsideration 887 F. Supp. 1178 (N.D. Ind. 1995); *Mayo v. Kiwest Corp.*, 898 F. Supp. 335 (E.D. Va. 1995); *Fredette v. BVP Management Associates*, 905 F. Supp. 1034 (M.D. Fla. 1995); *Carreno v. Local Union No. 226, International Brotherhood of Electrical Workers*, 1990 U.S. Dist. LEXIS 13817, 1990 WL 159199 (M. D. Kan.); *Wrightson v. Pizza Hut of America, Inc.*, 909 F. Supp. 367 (W.D.N.C. 1995); and *Plakio v. The Congregational Home, Inc.*, 1995 U.S. Dist. LEXIS 7088, 1995 WL 317120 (M. D. Kan.).

<sup>34</sup>These include *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186 (1st Cir. 1989); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993), 114 S. Ct.1 189 (1994); *Baskerville v. Culligan Int'l. Co.*, 50 F.3d 428 (7th Cir. 1995); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994).

<sup>35</sup>These include *Easton v. Crossland Mortgage Corp.*, 905 F.Supp. 1368 (C.D. Cal. 1995); *Ecklund v. Fuisz Technology, Ltd.*, 905 F.Supp. 335 (E.D. Va. 1995); *Blozis v. Mike Raisor Ford*, 896 F.Supp 805 (N.D. Ind. 1995); *Raney v. District of Columbia*, 892 F.Supp. 283 (D.D.C. 1995); *Nogueras v. University of Puerto Rico*, 890 F.Supp. 60 (D.P.R. 1995); *Griffith v. Keystone Steel & Wire*, 887 F.Supp. 1133 (M.D. Tenn. 1995); *EEOC v. Walden Book Co.*, 885 F.Supp. 1100 (M.D. Tenn. 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F.Supp. 1545; *McCoy v. Johnson Controls Servs., Inc.*, 878 F.Supp. 229 (S.D.Ga. 1995); *Wenner v. C.G. Bretting Mfg. Co., Inc.*, 917 F.Supp. 640 (W.D. Wis. 1995); *Ladd v. Sertoma Handicapped Opportunity Program, Inc.*, 917 F.Supp. 766 (N.D. Okla. 1995); *Rushing v. United Airlines*, 919 F.Supp. 1101 (N.D. 111. 1996); *Wright v. Methodist Youth Servs., Inc.*, 511 F.Supp. 307 (N.D. 111. 1981); *Polly v. Houston Lighting and Power Co.*, 825 F.Supp. 135 (S.D. Tex. 1993); *Marrero-Rivera v. Department of Justice*, 800 F.Supp. 1024 (D.P.R. 1992, *aff'd.*, 36 F.3d 1089 (1st Cir. 1994); *Joiner v. AAA Cooper Transmission*, 597 F.Supp. 537 (M.D. Ala. 1983), *aff'd.*, 749 F.2d 732 (11th Cir. 1984); *Sardinia v. Dellwood Foods, Inc.*, 69 Fair Empl. Prac. Cas. (BNA) 705; 1995 WL 640502 (S.D.N.Y., 1995); *Dixon v. State Farm Fire and Casualty Ins. Co.*, 1995 WL 810016 (E.D. Va.); *Roe v. Kmart Corp.*, 1995 U.S. Dist. LEXIS 18211, 1995 WL 316783 (D.S.C.); *Ton v. Information Resources*, 905 F.Supp. 335, 1996 WL 5322 (N.D. 111.), 70 Fair Empl. Prac. Cas. (BNA) 355; *Taner v. Prima Donna Resorts, Inc.*, 919 F.Supp. 1 (D.D.C. 1996); *Boyd v. Vonnahmen*, 1995 WL 420040 (S.D. 111.), 67 Fair Empl. Prac. Cas. (BNA) 1769; *Pritchett v. Sizeler Real Estate Mgt. Co.*, 1995 WL 241855 (E.D. La. 1995), 67 Fair Empl. Prac. Cas. 1377; *Llampalas v. Mini-Circuits Lab, Inc.*, 1995 WL 693213 (S.D. Fla.); *Tietgen v. Brown's Westminster Moos, Inc.*, 921 F.Supp. 1495, 1996 WL 189287 (E.D. Va.); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 1996 WL 179860 (D. Minn.); *Johnson v. Community Nursing Services*, 1996 U.S. Dist. LEXIS 9452 (D. Utah).

in *quid pro quo* and hostile work environment theories of action, federal courts still struggle with the thorny evidentiary problem that they must continue to resolve: what facts are necessary to meet the “but for ... sex” test and to prove that terms and conditions of employment have been unreasonably altered in same sex cases?

A. *Because of Sex; but for Gender*

In one of the earliest cases finding gender harassment was a form of sex discrimination, the D.C. Circuit Court of Appeals, in *Barnes v. Costle*,<sup>36</sup> reviewed the allegations of a female employee who was fired because she refused to have sexual relations with her male supervisor. The trial court rejected a claim of sex discrimination finding that she was not discriminated against based upon her gender, but rather the actions taken against her arose from her refusal to engage in sexual intercourse.<sup>37</sup> Rejecting the lower court’s logic, the Court of Appeals found that the conduct of the male supervisor violated Title VII because the supervisor would not have targeted her for sexual favors had she not been female. The *Barnes* court concluded that discrimination under Title VII did not have to rest solely on gender, but that gender only had to be a motivating or contributing factor. “It is clear that the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee’s gender. On the contrary, it is enough that gender is a factor contributing to the discrimination in a substantial way.”<sup>38</sup> The *Barnes* decision made clear that an action could lie for sex discrimination even though the harasser was motivated by sexual desires and not exclusively by the target’s gender.

By recognizing that discrimination based on gender could be predicated upon the sexual desires, that is, predilections or preferences of the harasser as an integral motivating fact of the harassment, the *Barnes* court provided the foundation for proof of same-sex harassment under current legal authority. Even though *Barnes* dealt with opposite sex harassment, if a supervisor wants to target someone of the same sex because of a sexual desire, attraction or preference for sex with one of his or her gender, it would appear logically consistent with *Barnes* that the supervisor was motivated by these desires and not exclusively on the issue of gender.

In fact, the *Barnes* court’s adoption broad views of sexual harassment was motivated by the Congressional desire to condemn all forms of sexual sex-based discrimination. Adopting a liberal view of the expanding possibilities that sexual harassment could take, the court sounds almost prophetic when it states that “Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly unreasonable practices of the present can easily become injustices of the morrow.”<sup>39</sup>

<sup>36</sup>*Barnes v. Costle*, 561 F.2d 983 (D.C. Cir.1977).

<sup>37</sup>*Id.* at 990.

<sup>38</sup>*W.*

<sup>39</sup>*Barnes* at 994, quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), 406 U.S. 957 (1972). See also *Tompkins V. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), rev’d, 568 F.2D 1044 (3d Cir. 1977). For other cases holding that orientation not protected see *Williamson v. A.G.*



As early as 1981 the federal courts began to hear cases specifically alleging intra-gender *quid pro quo* harassment. In *Wright v. Methodist Youth Services, Inc.*, the plaintiff alleged that his supervisor made overt homosexual advances toward him, and that when he resisted those advances, his employment was terminated. Wright's complaint appears to be the first same-sex *quid pro quo* harassment allegation facing the federal bench. The court noted that several cases had upheld female employee's sexual harassment claim based on male supervisor's demands for sex. As a demand by a male for sex with a female employee was conduct that would not be demanded of other male employees, the court noted that in this case, the demand made by a supervisor for homosexual sex would not be directed to a female. The *Wright* court quoted *dicta* in *Bundy vs. Jackson* as dispositive of the issue on intragender harassment:

It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced.<sup>41</sup>

The court, therefore, permitted Wright to state a claim that his resistance to his male supervisor's overt homosexual advances resulted in his termination.<sup>42</sup> Having proved that there was a demand for sex in exchange for a tangible job benefit, the denial of that benefit when the employee resisted, and evidence that the discrimination was because of the employee's sex arising from proof of the perpetrator's homosexuality, the court allowed Wright's allegations of Title VII protection to survive the defendant's motion for dismissal for failure to state a cause of action. Retaliation is actionable in these circumstances.

Two years later a different Circuit again found justification for protecting same-sex *quid pro quo* harassment. In *Joyner v. AAA Cooper*<sup>43</sup> the plaintiff alleged that he was approached by a terminal manager off premises where the manager physically touched his private parts and requested that they have sex. After refusing the advances of the manager, the plaintiff complained to the company, and the manager was confronted with the allegations and issued a warning. Upon meeting the plaintiff again, the manager insinuated that he would find a reason to discharge the plaintiff for having complained about his advances. To avoid a transfer that would have placed the plaintiff under the direct supervision of the manager, he

Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989), 493 U.S. 1089 (1990) and *DesSantis v. Pacific Tel & Tel Co.*, 608 F.2d 327 (9th Cir. 1979). Several cases have held that discrimination on the basis of sexual identity are not covered. See *Ulane v. Eastern Airlines*, 742 F.2d. 1081 at 1084-85 (7th Cir. 1984) and *Powell v. Read's, Inc.*, 436 F.Supp. 369, 371 (D.Md. 1977) (transsexual employee fired for having sex change operation not protected under Title VII).

<sup>40</sup>511 F. Supp. 307 (N.D. 111.1981).

<sup>41</sup> *Id.* at 310, quoting *Barnes*, 561 F.2d 990 n. 55.

<sup>42</sup>*Id.* at 310.

<sup>43</sup>597 F. Supp. 537 (1983).

relinquished his seniority, transferred to a different job within the company, was eventually laid off. He alleged that the manager refused to recall him, even though others with even less seniority were returned to work. The court held “that unwelcomed homosexual harassment ... states a violation of Title VII<sup>44</sup>,” even though removed in time from the adverse job action. Finding that the plaintiffs rejection of his supervisor’s homosexual advances ultimately caused a tangible job detriment, the court granted damages for the homosexual *quid pro quo* harassment. The length of time between the sexual offense and the job retaliation is a factor in causation.

More recently, in *Prescott v. Independent Life and Accident Insurance Co.*,<sup>45</sup> the plaintiff alleged that a supervisor subjected him to unwelcome homosexual advances and touchings, and that he was encouraged to engage in homosexual acts through both implicit threats of retaliation and implied promises of advancement in the company. Relying on both *Wright* and *Joyner*, the court stated that “the gender of the person who requests such favors is not relevant.”<sup>46</sup> In bolstering its position that Congress intended to use the word sex in a gender-neutral manner, the court struck an interesting analogy to the unmodified word “race” used in Title VII:

The language of Title VII is clear. Congress chose to use the unmodified word “sex” when referring to the discrimination that is forbidden. This is a choice of an obviously gender neutral term, just as Congress chose to prohibit discrimination based on “race,” rather than discrimination against African-Americans or other specific minorities. It seems clear to the court that had Congress intended to prevent only heterosexual sexual harassment, it could have used the term “member of the opposite sex.” This way Congress would have accounted for both male-female harassment and the much less frequent female-male harassment.<sup>47</sup>

Upon finding that the plaintiff had established a *prima facie* case of *quid pro quo* harassment, the *Prescott* court denied the defendant’s motion for summary judgment on that issue. Threats of retaliation can be proof enough.<sup>48</sup>

Evidence of sexual desire can arise in workplace contexts other than that of supervisor and employee. The *Oncala* case itself turned on the offending behavior by the victim’s co-workers. Another recent decision involved the sexual desires of co-workers, causing the court to wrestle with the distinction between their harassment, because of the sex of the victim, versus their defense of mere hazing, because of sexual orientation. In *Fry v. Holmes Freight Lines*,<sup>49</sup> the plaintiff dockworker was a janitor with Holmes Freight Lines, and a member of Local 41 and Local 552 of the Teamsters Union. The employer had a policy prohibiting sexual harassment and subjecting to discipline supervisors who did not take prompt corrective action upon notification. In spite of the policy, Fry’s supervisor refused to take any action other

<sup>44</sup>*Id.* at 541.

<sup>45</sup>878 F. Supp. at 1550.

<sup>46</sup>*Id.*

<sup>47</sup>697 F. Supp. 1452 (1988).

<sup>48</sup>*Id.*

<sup>49</sup>72 F. Supp. 2d 1074; 1999 U.S. Dist LEXIS 19309 (W. D. MO, Nov. 1999).

than to give him dirty looks when Fry complained of sexual harassment by coworkers. The conduct included kissing him, throwing him to the ground and simulating sexual intercourse, exposing themselves to him, and propositioning him for sex. Later management defended on the grounds that the conduct was only “school yard taunts” and juvenile provocation.<sup>50</sup>

Fry, who was marginally intelligent, was devastated at being taunted as a homosexual, and suffered severe mental and physical distress. The question appeared to be whether or not he was hazed because of his perceived sexual orientation, or harassed because of his sex. The Court, unconvinced by the horseplay defense, held that the plaintiff had put forth credible evidence of the homosexuality of the defendant harassers, raising the issue of their sexual desire for him because he was a man rather than mere prejudice against one who they perceived as gay. Thus the retarded janitor was allowed to present evidence to a jury that the Teamster dockworkers were motivated by lust for sexual intercourse with him. Their behavior led to the inference that they themselves were gay, which was met with a chorus of their indignant denials.

#### B. *Sexual Orientation versus “But For” Gender Tests*

The legislative history surrounding the Civil Rights Act is virtually silent on Congressional intent concerning any claim of sex-based discrimination. The original draft of the legislation clearly shows a primary concern with discrimination based on race. The word “sex” was added as an amendment in the House of Representatives bill by a southern Congressman who was hoping to make the legislation more vulnerable to defeat if it protected women.<sup>51</sup> With no clear legislative record on the intent of Congress regarding the protections against discrimination based on sex, it was left to the courts to flesh out the boundaries of protections against sexual discrimination.

The stage for the analysis concerning intra-gender harassment was set as early as 1977, when the 9th Circuit, in *Holloway v. Arthur Anderson & Co.*<sup>52</sup> foreclosed any notion that Congress intended to protect persons from discrimination based on their sexual orientation.<sup>53</sup> Noting that later attempts to amend Title VII to specifically include orientation had failed, the court concluded that the statutory language “because of... sex” refers to gender protection.<sup>54</sup> Other federal courts have followed the logic of *Holloway*, refraining from judicial expansion of the meaning of

<sup>50</sup>*Id.* at 1078.

<sup>51</sup>110 Cong. Rec. 2577-84. See generally, 110 Cong. Rec. 2577-84 and *Meritor*, 477 U.S. at 64 which noted the absence of Congressional debate on the meaning of the word sex.

<sup>52</sup>566 F.2d 659 (9th Cir. 1977).

<sup>53</sup>It should be noted that even though Title VII has not been extended to protect gay and lesbian workers based on their sexual orientation, the number of state and local protections has increased. In the light of the Supreme Court’s rejection of Colorado’s now infamous constitutional amendment in *Romer v. Evans* (517 U.S. 620 (1996).) it appears that the trend to extend protection to include sexual orientation at the state and local level will continue.

<sup>54</sup>*Holloway*, 566 F.2d at 662-3.

“sex” to include sexual orientation.<sup>55</sup> It seemed clear that short of additional Congressional action to amend Title VII, the harassment of employees because they are gay or lesbian would, unfortunately, remain legal under judicial construction of the Civil Rights Act.

Emulating the logic of *Holloway*, some lower courts began to adopt a causation test in sexual harassment cases, reasoning that in order to prove Title VII discrimination in a harassment case, the plaintiff would have to demonstrate that the harassing conduct would not have been exhibited but for the gender of the target. Under this theory, these courts could presume that intra-gender targets were harassed because of their orientation, and not because of their gender. The following cases are illustrative.

In *Dillon v. Frank*,<sup>56</sup> a male was harassed because his co-workers simply believed that he was gay. Even though the harassment was sexual in nature, the harassment was based on the presumption of the target’s homosexuality, and therefore, the court found that it was not actionable under Title VII. It is interesting to note that if the plaintiff could have alleged facts that would show he was treated differently than lesbian employees, he might have been able to demonstrate an actionable Title VII claim by showing that he was singled out not for being gay, but because he was a gay man, thus perhaps overcoming the threshold requirement that he was harassed because of his sex.

In *Fox v. Sierra Development Co.*,<sup>57</sup> where heterosexual males seemed obsessed with saturating the work environment with homosexual references, the court held that the hostility, although sexual, was not against men as a gender. Rather the hostility was based on a person’s notions of sexuality and its proper role or place within society, and therefore, it did not rise to protection by being directed against one gender. The same logic was adopted in *Vandeventer v. Wabash Nat’l Corp.*<sup>58</sup>, where the target was a young, easily embarrassed male who was subjected to name calling, verbal slurs, suggestions that he perform oral sex on co-workers and that he needed to experience intercourse with a woman. The *Vandeventer* court reasoned that there was no evidence that the harassment was directed at the plaintiff because he was a male, and that the facts of the case did not support a finding that the workplace was anti-male. If anything, the harassment occurred because of the perception that he was gay-not because of his gender.

#### V. SEXUAL ORIENTATION

This logic continues to prevail. Three of the post *Oncale* decisions involve plaintiffs who were either gay men or perceived to be gay. Inexplicably, in *Simonton*

<sup>55</sup>See generally, *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Dillon v. Frank*, 1992 U.S. App. LEXIS 766, 58 Emp. Prac. Dec. (CCH) 41332 (6th Cir. 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69,70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *Blum v. Guld Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) and *Kelly v. Vaughan*, 760 F.Supp. 161, 163 (W.D. Mo. 1991).

<sup>56</sup>*Id.*, *Dillon* at 27 N.5.  
57,876 F. Supp. 1169 (D. Nev. 1995).

<sup>58</sup>*Vandeventer*, 867 F. Supp. 790 (N.D. Ind. 1994).

*v. U. S. Postal Service*,<sup>59</sup> the plaintiff claimed that he suffered sexual harassment under Title VII, in a hostile work environment, based upon the fact that he is a homosexual. Recalling the Fourth Circuit Court's opinion in *Hopkins v. Baltimore Gas and Electric Co.*,<sup>60</sup> the court held that Title VII does not extend to discrimination because of sexual orientation, but only to discrimination because of sex in the sense of gender. The court reached this conclusion despite the fact that it had described the conduct as intolerable, obscene, and cruel.<sup>61</sup> In the absence of evidence that advanced Simonton's complaint that offensive behavior directed to him because of his sex, the court dismissed the case. On appeal to the Second Circuit, a three-judge panel affirmed the judgment against Simonton, reiterating that neither Congress nor the courts have allowed sexual orientation to be a legal ground for a Title VII discrimination action.<sup>62</sup>

#### A. *Sexual Orientation versus Sexual Stereotyping*

But perhaps something other than sexual orientation was involved. The Circuit Court, citing that the "appalling persecution that Simonton allegedly endured ... is morally reprehensible whenever and in what ever context it occurs, particularly in the modern workplace," went on to consider Simonton's arguments in the alternative that he suffered discrimination based on sexual stereotyping, as Ann Hopkins had successfully alleged in *Price Waterhouse v. Hopkins*.<sup>63</sup> The Court found the argument persuasive, if insufficiently pled, as a theory of discrimination based on the victim's failure to conform to gender norms and stereotyped expectations of masculinity and femininity.<sup>64</sup> This analogy was hailed in the press as a possible alternate route to extend job-bias laws to homosexuals: "Is it sex discrimination to fire a man because he acts like a woman?"<sup>65</sup>

On the other hand, it is not always enough to argue that the harassment was based on the defendant's perception that the victim was gay. In *Dandan v. Radisson*

<sup>59</sup> 225 F. 3d 122 (2d Cir. 2000).

<sup>60</sup> 77 F.3d 745, 751-752 (4th Cir. 1996), *Supra* at note 33.

<sup>61</sup> *Simonton*, 225 F. 3d at 123.

<sup>62</sup> *Id.* The court said, "we are informed by Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences. See, e.g., Employment Nondiscrimination Act of 1996, §2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); see also *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085-86 (7th Cir. 1984) (noting that Congress has rejected a number of proposed amendments to Title VII to prohibit discrimination based on sexual orientation). Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret "sex" to include sexual orientation. See, e.g., *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation"); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979).

<sup>63</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), cited at *Simonton*, *Supra* at note 59.

<sup>64</sup> *Simonton*, *Supra* at note 59.

<sup>65</sup> Jess Bravin, "Courts open alternate route to extend job-bias laws to homosexuals," *Walt Street J.*, Sept. 22, 2000 at B1.

*Hotels Lisle*<sup>66</sup>, the plaintiff alleged discrimination because of sex based on the theory that he, although not a gay man, was perceived to be gay. Proof that he was subjected to cruel taunts, derogatory and bigoted comments directed against his perceived homosexual orientation was insufficient evidence to establish discrimination because of his gender under Title VII. In *Mims v. Carrier Corporation*,<sup>67</sup> the plaintiff alleged a hostile work environment theory of sexual discrimination based on perceived sexual orientation. Though Mims was not a homosexual, he was harassed and treated as a homosexual. While the Court agreed that the conduct was offensive and unwelcome, the plaintiff did not offer evidence of sexual interest in him on the part of the defendants, general hostility toward men, or that the conduct was any different when directed to women. Nor was it so severe as to alter a term or condition of employment. Thus, the defendant prevailed on the motion for summary judgment by arguing that the discrimination was not based on the sex of the victim. In both cases, grossly offensive horseplay and hazing based on the perception that the victims were homosexuals, whether or not they were, did not give rise to proof of actionable discrimination because of sexual stereotyping.

#### B. *Sexual Orientation in Non-Title VII Cases*

In sharp contrast to these cases, protection from same-sex discrimination based on sexual orientation is available to plaintiffs who suffer harassment while working for a public sector employer. In *Quinn v. Nassau County Police Dept.*,<sup>68</sup> a homosexual police officer was victimized by fellow officers over a nine year period, tormented by anti-gay photographs, cartoons and remarks, and made the butt of barbaric pranks. The Court held that the Equal Protection Clause of the Fourteenth Amendment dictated that individuals in public employment have a constitutional right to be free from sexual discrimination that creates a hostile work environment.<sup>69</sup> When harassing conduct in the workplace transcends "hostile and boorish behavior," a hostile work environment exists indicating animosity toward the class of persons affected.

This irrational status-based behavior, consisting of fear and prejudice toward homosexuals, is specifically prohibited in *Romer v. Evans*.<sup>70</sup> In this case, the Supreme Court struck down the Colorado constitutional amendment that barred state legislation designed specifically to protect the status of a person based on sexual orientation. The Court distinguished its decision from that in the *Simonton* case, noting that while Simonton was a public sector employee, his case was pled under Title VII, which requires that discrimination be because of the plaintiffs sex, and not under Sec. 1983/Equal Protection, which prohibits status-based conduct not rationally related to any state interest.<sup>71</sup> One is left to wonder why the Simonton case was

<sup>66</sup>2000 U.S. Dist. LEXIS 5876 (N. D. ILL., Mar. 2000).

<sup>67</sup>88 F. Supp. 2d 706 (E. D. TX 2000).

<sup>68</sup>53 F. Supp. 2d 347; 1999 U.S. Dist. LEXIS 9902 (E. D. N. Y. 1999).

<sup>69</sup>42 U.S.C. §1983; *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617(1979); *Davis v. Passman*, 442 U.S. 228,234-34 (1979).

<sup>70</sup>517 U.S. 620(1996).

<sup>71</sup>*Quinn, Supra*, 53 F. Supp. 2d at 358.

not pled in the alternative as a Section 1983 action, as any public sector case might be.

As for sexual assaults on prisoners, the Ninth Circuit denied an appeal of summary judgment to a Washington state prison guard who allegedly attempted to rape a male-to-female transsexual prisoner.<sup>72</sup> The Court recognized the prisoner's claim that his Eighth Amendment rights against cruel and unusual punishment had been violated. It cited the Supreme Court's holding that "when prison officials maliciously and sadistically use force to cause harm contemporary standards of decency are always violated."<sup>73</sup> No lasting physical injury was necessary where the officer's actions lacked any penological justification, and were offensive to human dignity. Furthermore, the judge held the gender of the rapist or the victim made the assault no more acceptable under the Eighth Amendment. Thus, the defense that the victim was male, as in a same sex-claim, was of no avail to a sexually predatory guard.<sup>74</sup>

#### VI. A HOSTILE WORK ENVIRONMENT

In order for a same-sex discrimination case to rest on a theory of a hostile work environment, it must be shown that the harassment was "so severe and pervasive that it altered the terms and conditions of employment and constituted an abusive working environment." The plaintiff carries the evidentiary burden to show five elements: (1) that he belongs to a protected class; (2) that he was subjected to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe to alter the terms and conditions of employment; and (5) that the employer either knew or should have known of the harassment and failed to take prompt remedial action.<sup>76</sup> The severity of the conduct should be measured by the reasonable person standard, taking into consideration the context, frequency, physical threats or humiliation, and unreasonable interference with work performance.<sup>7</sup>

##### A. *A Hostile Work Environment or Mere Horseplay?*

In *Merritt and Merritt v. Delaware River Port Authority*<sup>78</sup>, the plaintiff brought an action against the Port Authority, including charges of sexual harassment, intentional infliction of emotional distress, and loss of consortium. John Merritt, a controls technician at the Walt Whitman Bridge, claimed that he was sexually harassed by a mentally challenged homosexual co-worker over a nine-month period. He also claimed that when he reported the harassment on numerous occasions to his supervisors, they ignored his complaints, laughed at him, and told him to keep quiet

<sup>72</sup>Schwenk v. Hartford, March 11,1999, 204 F. 3d 1187 (9th Cir. 2000).

<sup>73</sup>*Id.*, citing *Hudson v. McMillian*, 503 U.S. 1, 8, 117 L.Ed. 2d 156 (1992).

<sup>74</sup>*Id.*, citing *Farmer v. Brennan*, 511 U.S. 825, 834,128 L. Ed. Ed 811 (1994).

<sup>75</sup>*Meritor*, 477 U.S. at 67.

<sup>76</sup>*Harris*, 510 U.S. at 21 -22.

<sup>77</sup>*Oncale*, 523 U.S. at 78-79.

<sup>78</sup> 1999 U.S. Dist. LEXIS 5896 (E. D. Pa. 1999.)

or they could all be fired. Merritt claimed that the harassment was so pervasive and violent that it created an intimidating, hostile and offensive environment. The harasser continually grabbed Merritt's genitals, exposed himself and propositioned him. In reciting one incident in which the co-worker bit his fly, Merritt said that it scared the hell out of him. Faced with these allegations, the Port Authority did not deny that the offensive conduct occurred, nor did it raise the defense of horseplay. Rather it claimed that the defendant treated both sexes equally offensively. The Court found that the Port Authority's defense of "equal opportunity harasser" failed to eliminate questions of fact that a jury should decide about the specific treatment of Merritt because he was a man.

In another action for hostile work environment harassment, *Pfullman v. Texas Department of Transportation*,<sup>79</sup> the plaintiff complained that, on one occasion, his supervisor sat in his lap, rocked around, and commented that it sure felt good right there. Another similar incident occurred somewhat later. The Court found that this conduct, though deplorable, was insufficient to establish actionable discrimination. It held that the fact that "an employee feels victimized by his supervisors ... does not, without more, show a violation of Title VII."<sup>80</sup> When the offensive conduct occurs in isolated instances and is not extremely serious, it does not sufficiently alter the terms and conditions of employment to be actionable.

In light of the *Harris* definition of hostile environment, and the *Oncale* requirement of objective and subjective reasonableness that the victim find the terms and conditions of the workplace altered by the conduct, it seems that conduct which to women might be abusive might not be actionable as to men. Furthermore, horseplay directed to women by women might not be as offensive as the same conduct directed to women by men, and vice versa. If it is assumed that men have a higher threshold of offense than women, it logically follows that male complaints of male harassment must meet higher objective and subjective standards than female towards female harassment. Hostile work environment claims may continue to defy easy resolution.

#### B. Prompt Remedial Action in a Hostile Work Environment

Two Supreme Court decisions, within months of *Oncale*, outlined the standard of employer liability for hostile environment sexual harassment. In *Faragher v. City of Boca Raton*<sup>81</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>82</sup> the Court held that where the harasser is a supervisor and the victim suffers no tangible employment action, the employer may be held strictly liable<sup>83</sup> unless (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of

<sup>79</sup>24 F. Supp. 2d 707 (N.D. Tx. 1998).

<sup>80</sup>*Id.*, at 710.

<sup>81</sup>524 U.S. 775 (1998).

<sup>82</sup>524 U.S. 742 (1998).

<sup>83</sup>*Faragher*, 118 S. Ct. at 2293.



corrective opportunities provided by the employer.<sup>84</sup> This would be the result if the employer knew or should have known about the conduct and failed to stop it.<sup>85</sup>

These principles were tested in an action under a hostile environment theory in *Robinson v. Roney Oatman, Inc.*<sup>86</sup> Robinson complained that his supervisor sexually assaulted, battered, and emotionally abused him; that he complained to management; and that within two weeks, Roney fired Robinson's wife and demoted Robinson to menial tasks in a different department. These actions, as opposed to reprimands, dirty looks and the silent treatment, raised questions of fact of tangible effects on the job.<sup>87</sup> Nor were they inconsistent with Robinson's claim of constructive discharge. Once Robinson gave notice, Roney had a duty to take prompt remedial action to stop any sexually harassing conduct. Whether Roney did so also became a question for the jury.

In *Pfullman*, the Texas court faced a similar claim of adverse job action. It noted that under *Faragher*, simple teasing, offhand comments and isolated incidents would not amount to discriminatory changes in the work place; nor would the sporadic use of abusive language, gender-related jokes, or bothersome sexual remarks create a hostile work environment under *Ellerth*. Only an ultimate employment action, including hiring, discharging, promoting, compensating or granting leave, would trigger the employer's strict liability.<sup>85</sup> In the absence of evidence of an ultimate employment action Pfullman could not survive the employer's motion for summary judgment.

An employer, faced with a claim of same-sex discrimination, has a wider scope of risk than existed before the 1998 Supreme Court Term brought *Oncale*, *Faragher* and *Ellerth*. It is in an employer's best interests to take appropriate steps to prevent sexual harassment, and undertake prompt investigative and remedial action should charges be made. If the company has a policy in place, it should reiterate that horseplay, hazing and abusive roughhousing will not be considered as acceptable forms of teasing in the workplace. To demonstrate that the policy is taken seriously, the company should investigate each and every complaint, or indication of, an unwelcome work environment, even if the company has a culture of rough teasing or horseplay.<sup>89</sup>

## VII. CONCLUSION

A policy of prevention is more than worth a protracted litigation. In the current climate of judicial protection for victims of intra-gender sexual harassment, a

<sup>84</sup> *Faragher* at 2292.

<sup>85</sup> *Ellerth*, 524 U.S. 742 (1998).

<sup>86</sup> 1999 U. S. Dist. LEXIS 1866 (N. D. ILL, Feb. 1999).

<sup>87</sup> *Id.*

<sup>88</sup> *Pfullman* at 709.

<sup>89</sup> See, for example, *HR Magazine*, June 1998, Kenneth M. Jarin and Ellen K. Poirer, "New rules for same sex harassment" p. 115-123, v.43,n.7; Steptoe & Johnson, "Former Wal-Mart employee receives \$ 80,000 jury award in same-sex harassment suit," West Virginia Employment Law Letter, May 1999, Vol. 4, Issue 5; CPA Journal, Jun 1998, Vol. 68 Issue 6, Roy Whitehead Jr. and Kenneth Griffin, "Preparing for same-sex sexual harassment claims," p54; Advocate, 04/14/98, Issue 757, Dan Woog, "A new page in the employee handbook?", p53.

company should take all necessary measures to prevent offenses being given, complaints turning into lawsuits, and lawsuits, won or lost, draining valuable resources from the company administration and the bottom line. Case law warns that evidence of harassment because of sex can lie when acts of desire, hostility, or objectively offensive behavior adversely and unreasonably alter the terms and conditions of the work place. Defenses of horseplay are unlikely to succeed when the offenses are repeated over a period of time, ignored when reported to management, and cause economic harm to the victim. The hazing of a homosexual employee or co-worker can no longer be assumed to be automatically protected on the grounds that the harassment was because of sexual orientation. Where alert plaintiffs' lawyers can show sufficient facts that the defendant(s) abused the victim because of perceived femininity, an argument may be made for discrimination by sexual stereotyping. Where it can be shown that the horseplay involved overbearing defendants simulating sexual acts with weaker victims, an inference of sexual desire may arise. Plaintiffs/employees may plead under laws other than Title VII. Congress may continue to refuse protection to homosexuals from discrimination because of their sexual orientation, but the courts have elevated the bar of defenses that must be crossed for companies to escape liability in same-sex harassment/discrimination for "mere horseplay."