

William & Mary Bill of Rights Journal

Volume 7 (1998-1999)
Issue 3 Symposium: *Strengthening Title VII:
1997-1998, Sexual Harassment Jurisprudence*

Article 8

April 1999

The Plain Meaning of Oncale

Catherine J. Lanctot

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

Repository Citation

Catherine J. Lanctot, *The Plain Meaning of Oncale*, 7 Wm. & Mary Bill Rts. J. 913 (1999),
<https://scholarship.law.wm.edu/wmborj/vol7/iss3/8>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

THE PLAIN MEANING OF ONCALE

Catherine J. Lanctot*

The unanimous Supreme Court opinion in Oncale v. Sundowner Offshore Services, Inc. caught many observers by surprise. Even more surprising than the Court's unanimity on the divisive issue of same-sex harassment, however, was the author of the opinion—the deeply conservative Justice Antonin Scalia. Many commentators suggest that the opinion's requirement that plaintiffs prove that the harassment was "because of sex" will hamper lawsuits arising from single-sex work environments. Attempts to fit the decision within traditional Title VII jurisprudence inevitably will be clouded by conjecture about Scalia's true intent. Indeed, after one year of experience with Oncale, the judicial record is decidedly mixed. The debate over Oncale's meaning has manifested itself most clearly in an emerging dispute over the role of summary judgment in resolving harassment cases. Nevertheless, in attempting to apply a new Supreme Court opinion, particularly one joined by all nine Justices, it is the holding of the opinion that must guide the lower courts, not the assorted examples, exhortations, and suggestions that accompany it. The way to make sense of Oncale is to take it at face value, as a victory for a plaintiff who alleged particularly egregious harassment.

* * *

*"It is the law that governs, not the intent of the lawgiver."*¹

INTRODUCTION

The unanimous Supreme Court opinion in *Oncale v. Sundowner Offshore Services, Inc.*² caught many observers by surprise.³ The issue of whether same-sex

* Professor of Law, Villanova University Law School. A.B., Brown University, 1978; J.D., Georgetown University Law Center, 1981.

¹ Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997).

² 118 S. Ct. 998 (1998).

³ Post-*Oncale* commentary includes: Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Robert Brookins, *A Rose by Any Other Name: The Gender Basis of Same-Sex Sexual Harassment*, 46 DRAKE L. REV. 441 (1998); Charles R. Calleros, *Same-Sex Harassment, Textualism, Free Speech, and Oncale: Laying the Groundwork for a Coherent and Constitutional Theory of Sexual Harassment Liability*, 7 GEO. MASON L. REV. 1 (1998); Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307 (1998); Richard F. Storrow, *Same-Sex*

sexual harassment was cognizable under Title VII of the Civil Rights Act of 1964 had divided the lower federal courts and spawned much commentary in recent years. In light of this ongoing dispute, it appeared likely that the Supreme Court would split on the issue as well.⁴ Instead, the Supreme Court, in a brief opinion, announced that there was no statutory bar to such lawsuits and provided some guidance as to how lower courts were to address this cause of action.⁵ Even more surprising than the Court's unanimity on this divisive issue, however, was the author of the opinion—the deeply conservative Justice Antonin Scalia, who had expressed in vigorous dissents in recent years his well-known antipathy toward expansion of discrimination principles in general and toward providing protection for homosexuals in particular.⁶

Many commentators pounced on this apparent paradox to speculate that *Oncale* was not the boon for plaintiffs that it seemed to be, but rather a clever way to limit sexual harassment suits generally.⁷ Commentators have characterized *Oncale* as

Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct, 47 AM. U. L. REV. 677 (1998); 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 DE LA UNIVERSIDAD DE PUERTO RICO 163 (1998); S. Ashby Williams, Comment, *Long Overdue: The Actionability of Same-Sex Sexual Harassment Claims Under Title VII*, 35 HOUS. L. REV. 895 (1998).

⁴ See generally Lyle Denniston, *A Curveball on Same-Sex Harassment*, AM. LAW., Mar. 1998, at 90 (describing the oral argument in *Oncale*).

⁵ See *Oncale*, 118 S. Ct. at 1003.

⁶ See, e.g., *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

⁷ See, e.g., *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122, 329 (1998) (stating that the *Oncale* decision was "an initial step toward foreclosing a broader conception of sexual harassment"); Dominic Bencivenga, *Same-Sex Harassment Ruling Puts Work Environment Under Scrutiny*, 219 N.Y. L.J. 5 (1998) ("[M]anagement attorneys predicted that the 'because of sex' standard and the reasonableness test, which are only broadly outlined in the ruling, may make it easier to eliminate cases early."); Deanna Hodgin, *Nino's Gift Horse*, RECORDER, Mar. 6, 1998, at 4

(The result seems to be in harmony with Scalia's conservative vision: If everyone is treated equally poorly, the context and comparability defenses would seem to exempt universally bad actors from prosecution. Imagine that—a veritable get-out-of-jail-free pass for workers whose harassment targets both men and women. It may be that Scalia has authored a guide to PC harassment: Do it to everyone equally and you'll be fine. The mouth of this gift horse bears close examination.);

Michel Lee, *Last Term's Employment Decisions Have Shaken up the Status Quo*, 220 N.Y. L.J. 1 (1998) (stating that *Oncale* will "set up a bulwark that will impede many claims"); Michael Rabinowitch, *'Same Gender' Sexual Harassment After Oncale and City of Belleville*, IND. LAW., Apr. 29, 1998, at 4 (arguing that *Oncale* and the remand of *City of Belleville, Ill. v. Doe*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998), "clearly give[] some indication that the plaintiff's burden in such cases will be extremely difficult and protection made available only in certain very limited

"cryptic"⁸ and "perplexing."⁹ Although some hail it as a victory,¹⁰ others have suggested that the opinion's requirement that plaintiffs prove the harassment was "because of . . . sex"¹¹ would hamper lawsuits arising from single-sex work environments.¹² The fact that the case left open a number of difficult questions about same-sex harassment also sparked criticism.¹³ Others contend that the opinion makes it more difficult for litigants to survive motions for summary judgment.¹⁴ Much of

circumstances"); David G. Savage, *Signs of Disagreement: Scalia May Have Sown Seeds of Dissent in Same-Sex Ruling*, 84 A.B.A. J. 50 (May 1998); Jeffrey M. Schlossberg, *The Pendulum Swings Back in Sexual Harassment Cases*, N.Y. L.J., Mar. 17, 1998, at 1

([T]he Court may be paving the way for stricter scrutiny of sexual harassment claims in general. . . . The Court devoted the balance of its opinion to clarifying the parameters of sexual harassment generally. The fact that it did so is significant for while rendering a decision that on its face opens the door to a greater number of potential plaintiffs, the Court also appears to have sent a message that reveals its dissatisfaction with the plethora of sexual harassment suits today.);

Michael Subit, *Oncale May Narrow Sexual-Harassment Law*, 151 N.J. L.J. 1136, 1136 (1998) (presenting for a "narrower view of sexual harassment"); Sidney R. Steinberg, *U.S. Supreme Court Decision in Oncale Answers Some Questions Raise Others*, LEGAL INTELLIGENCER, Mar. 11, 1998, at 7.

⁸ See Storrow, *supra* note 3, at 677, 678 & n.6 ("The struggle continues in light of *Oncale*'s cryptic message about when same-sex sexual harassment is actionable.").

⁹ Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1261 (1998).

¹⁰ See Thomas M. Sipkins & Joseph G. Schmitt, *Same-Sex Harassers Get Equal Time*, NAT'L L.J., June 8, 1998, at B7 ("The *Oncale* decision has been greeted by a variety of dire predictions that Title VII will become a general civility code for the workplace and result in a flood of lawsuits in federal court.").

¹¹ 42 U.S.C. § 2000e-2(a)(1) (1994).

¹² See, e.g., Christine Cesare & Lisa Lerner, *Same-Sex Harassment Ruling Leaves Employers to Grapple with Distinction*, 5 EMPLOYMENT L. STRATEGIST, Apr. 1998, at 1 ("The Supreme Court's opinion may be viewed, at least in part, as helpful to employers."); Marcia Coyle, *Victor in Court's Same-Sex Ruling Faces Tough Trial*, NAT'L L.J., Mar. 16, 1998, at A10 (arguing that it may be more difficult for *Oncale* to prove his case after the Supreme Court's opinion); Debra S. Katz & Lynne Bernabei, *Sex Harassment Cases Create Uncertainties*, 14 TEX. LAW. 28, 28 (1998) ("It is ironic that the court has effectively created a myriad of new issues since it appears that one of its chief objectives—at least in the Title VII context—was to reduce the number of suits by placing the primary burden on businesses to eliminate sexual harassment.").

¹³ See, e.g., Cesare & Lerner, *supra* note 12, at 12 (noting that issues of single-sex work environment and questions about anti-gay harassment are left open); Katz & Bernabei, *supra* note 12 (identifying difficulties for same-sex harassment based on sexual orientation and lamenting the lack of guidance on harassment in single-sex work environments); Lee, *supra* note 7, at 1 (arguing that implications for suits challenging harassment based on anti-gay animus are unclear).

¹⁴ See, e.g., Bencivenga, *supra* note 7, at 5 (asserting that a "common sense" standard

the analysis has highlighted *Oncale*'s call for "common sense," in evaluating sexual harassment claims "in context," as evidence that Justice Scalia intentionally sowed the seeds of destruction in his opinion;¹⁵ rather than being viewed as a victory for plaintiffs, *Oncale* has been characterized as a "Trojan horse."¹⁶

What did Justice Scalia mean to accomplish in *Oncale*? Attempts to fit the decision within traditional Title VII jurisprudence inevitably will be clouded by conjecture about Scalia's true intent. Regardless of such speculation, however, the fact remains that it is the lower courts, not professors and pundits, who will be the first to decide what message, if any, the Court sought to convey in *Oncale* about sexual harassment litigation. After one year of experience with *Oncale*, the judicial record is decidedly mixed. Some of the open issues identified by early commentators, such as *Oncale*'s applicability to bisexual harassers or to anti-homosexual harassment, already have emerged in reported decisions.¹⁷ Moreover, a number of

may make it difficult to dispose of cases on summary judgment); John W. Hamlin, *Questions on Same-Sex Sexual Harassment Remain After Oncale*, CONN. L. TRIB., Mar. 16, 1998, available in LEXIS, News Library, Cumwts file (arguing that ambiguous standards may make summary judgment less likely); Bertrand C. Sellier, *Summary Judgment in Sexual Harassment Cases*, N.Y. L.J., Apr. 29, 1998, at 1 ("The Supreme Court's reference to 'courts' can fairly be read as an admonition to district judges to use summary judgment in appropriate cases to weed out claims that 'a reasonable person' could not find 'severely hostile or abusive.'"). But see Lee, *supra* note 7, at 1 ("[T]he Court seems to place the harassment determination squarely in the province of the jury.").

¹⁵ See Cesare & Lerner, *supra* note 12, at 12.

It is somewhat unusual to have Justice Scalia as the author of a three-page unanimous opinion that creates a new class of claims, but offers little guidance on where to draw the line between a permissible fraternal atmosphere in the workplace and one that is tinged with unlawful discrimination by members of the same sex.

Id.; see also Hamlin, *supra* note 14 (highlighting one "troubling passage" because it "can hardly be characterized as (and is clearly not intended to be) objective"); Savage, *supra* note 7, at 51 (quoting an expert's comment that "'Oncale may have expanded the coverage but restricted the liability under the law'"); Schlossberg, *supra* note 7, at 1

(The numerous examples of permissible conduct cited by the Court could serve as the basis in subsequent cases for courts to conclude that the Supreme Court is willing to entertain a wider latitude of behavior in the workplace than previously permitted. This conclusion would be based in large part on the fact that the Court seems to have gone to unnecessary lengths to articulate permissible behavior, especially in an opinion that in theory should be limited to the issue of same-sex sexual harassment.);

Jenna Ward, *High Court's 'Oncale' May Cut Both Ways*, RECORDER, Mar. 5, 1998, at 1 ("[*Oncale* is a] decision which appears to give with one hand but take away with the other.").

¹⁶ See Hodgins, *supra* note 7, at 4 ("While he copped some very good press this week for his long-awaited opinion on same-sex employment discrimination, Supreme Court Justice Antonin Scalia succeeded in making a Trojan horse gift to the plaintiffs' employment bar.").

¹⁷ See *Shepherd v. Slater Steels Corp.*, No. 97-3265, 1999 WL 80735, at *14 (7th Cir.

opinions have construed *Oncale*'s language about considering these claims in context as a signal from the Supreme Court to scrutinize sexual harassment cases more closely and to enter judgment for defendants in advance of and, at times in spite of, a jury verdict for plaintiffs.¹⁸ The ensuing debate over the appropriate role of summary judgment in sexual harassment lawsuits already looms as one of the most significant results of *Oncale*.

Unfortunately, the critical fact that the plaintiff below prevailed in *Oncale* and that the Supreme Court recognized, for the first time, the availability of federal relief for same-sex sexual harassment disappears into the fog. Indeed, the efforts to interpret *Oncale* may be based on a false premise—the notion that the intent of the opinion's author, rather than the actual holding of the case, is the key to understanding its meaning. Such a reading of *Oncale* is ironic in light of Justice Scalia's antipathy toward attempts at deducing legislative intent in construing statutes.¹⁹ Indeed, although Scalia is no liberal on civil rights issues, his "intent" with respect to federal antidiscrimination laws is not as easily determined as media commentary might indicate, because *Oncale* is only one in a series of unanimous opinions Scalia has authored in recent employment discrimination cases, and his own approach to the law of sexual harassment has been less dogmatic than some might expect. Thus, although the holding and the language of *Oncale* may be sending mixed signals, courts should resolve ambiguities in favor of plaintiffs unless and until the Supreme Court clearly states otherwise.

In the final analysis, an *Oncale* opinion written by Antonin Scalia ought to mean the same thing as an identical opinion by Ruth Bader Ginsburg. It takes little imagination to speculate that the commentary on *Oncale* would have been far different had Justice Ginsburg issued *Oncale* under her signature. Commentators and scholars would have been convinced that *Oncale*'s language urging careful attention to common sense and context reflected a strong signal from Ginsburg to the lower courts to take sexual harassment claims seriously and to let more cases go to the jury. Giving more weight to the perceived intent of the author of a Supreme Court opinion than to its holding can only lead to disarray, as the brief history of *Oncale* reflects.

Feb. 19, 1999).

¹⁸ See *Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66, 74-75 (D. Me. 1998); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 493 (W.D. Wash. 1995).

¹⁹ Countless articles attempt to describe, define, deconstruct, or defend Scalia's approach to statutory construction. For a recent analysis that includes some discussion of *Oncale*, see Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 22-23 (1998). For other expositions, see William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist But Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998) (examining the textualist approach of Scalia and Thomas); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) (analyzing Scalia's theory of "new textualism").

This Article will review Justice Scalia's opinion in *Oncale* and briefly address the Seventh Circuit's opinion in *Doe v. Belleville, Illinois*,²⁰ which the Supreme Court remanded immediately after it decided *Oncale*. It then will survey relevant lower court decisions decided since *Oncale* to highlight the emerging controversy over the role of summary judgment in sexual harassment cases. Finally, it will show why attempts to discern Justice Scalia's true intent in *Oncale* inevitably must fail, and why the lower courts instead simply ought to apply the plain meaning of *Oncale* for the foreseeable future.

I. SAME-SEX HARASSMENT IN THE SUPREME COURT

A. Justice Scalia's Opinion in *Oncale*

In *Oncale v. Sundowner Offshore Services, Inc.*,²¹ the Supreme Court considered an issue that had closely divided the courts of appeals and had received substantial media attention—whether allegations of same-sex sexual harassment were cognizable under Title VII of the Civil Rights Act of 1964.²² Joseph Oncale, an employee on an eight-man oil platform crew, alleged that he had been harassed sexually by his fellow male employees, by “sex-related, humiliating actions against him,” including physical assault and the threat of rape.²³ Oncale quit his job in fear of further harassment²⁴ and later filed suit, alleging that he had been discriminated against in his employment because of his sex, in violation of Title VII of the Civil Rights Act of 1964.²⁵ The United States District Court for the Eastern District of Louisiana granted summary judgment for the employer, holding that there was no cause of action under Title VII for harassment by male coworkers.²⁶ On appeal, the United States Court of Appeals

²⁰ 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998).

²¹ 118 S. Ct. 998 (1998).

²² 42 U.S.C. § 2000e-2(a)(1) (1994).

²³ *Oncale*, 118 S. Ct. at 1001. The actions he challenged included the forcible insertion of a piece of soap into his anus, and are detailed in Note, *Leading Cases*, 112 HARV. L. REV. 122, 327 (1998). Rather than recite these facts, Justice Scalia asserted: “The precise details are irrelevant to the legal point we must decide, and in the interest of both brevity and dignity we shall describe them only generally.” *Oncale*, 118 S. Ct. at 1000. This delicacy has been criticized as disingenuous. See Abrams, *supra* note 8, at 1258 n.8 (suggesting that Scalia was “holding the sexual harassment claim somewhat uncomfortably at arms’ length”); Ward, *supra* note 15, at 1 (noting that the attorney for amicus curiae Lambda Legal Defense and Education Fund “attributed its PG-rated content to ‘squeamishness’ and ‘homophobia’” and noted that the Court’s omission of description of the egregious conduct would make it more difficult for lower courts to interpret the opinion).

²⁴ Oncale alleged that his complaints to supervisors went unanswered and that at least one supervisor called him a name suggesting homosexuality. See *Oncale*, 118 S. Ct. at 1001.

²⁵ 42 U.S.C. § 2000e-2(a)(1).

²⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 67 Fair Empl. Prac. Cas. (BNA) 769 (E.D.

for the Fifth Circuit affirmed,²⁷ based on its previous decision in *Garcia v. Elf Atochem North America*, in which it held that same-sex harassment suits were not cognizable under Title VII.²⁸ The circuits had become increasingly divided over this issue,²⁹ and the Supreme Court granted certiorari to resolve it.

The Court construed a deceptively simple statutory provision and asked if “discrimination . . . because of . . . sex”³⁰ includes workplace harassment when the harasser and the harassed employees are of the same sex. The Court’s landmark decision in *Meritor Savings Bank, FSB v. Vinson* had extended the phrase “because of sex” to reach sexual harassment generally in the workplace,³¹ and the Court had expanded the reach of that opinion further in its unanimous decision in *Harris v. Forklift Systems, Inc.*³² As Justice Scalia noted, the Court previously had held that Title VII’s prohibition of sex discrimination protects men as well as women in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.³³ Explaining that there is no basis to presume that a male would never discriminate against a male,³⁴ Justice Scalia announced: “If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”³⁵

La. Mar. 24, 1995).

²⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118 (5th Cir. 1996).

²⁸ *See Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994).

²⁹ Some courts had held that same-sex sexual harassment claims never are cognizable under Title VII. *See, e.g., Goluszek v. H. P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Other courts had held that such claims were cognizable only if the plaintiff could prove that the harasser was homosexual. *See McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141 (4th Cir. 1996). Other courts had taken a third approach, suggesting that any harassment that is sexual in content is actionable under Title VII. *See Doe v. City of Belleville, Ill.*, 119 F.3d 563, 566 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998). For a detailed analysis of the state of the law prior to *Oncale*, see Storrow, *supra* note 3, at 689-93.

³⁰ Title VII of the Civil Rights Act of 1964 provides: “It 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).

³¹ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

³² 510 U.S. 17, 21 (1993).

³³ 462 U.S. 669, 682 (1983).

³⁴ *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 499 (1977); *see also Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (holding that a county agency did not violate Title VII when, pursuant to an affirmative action plan, it promoted a female employee over a male employee with higher test scores).

³⁵ *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001-02 (1998).

This holding did not necessarily resolve the broader issue of whether sexual harassment of one male by another is susceptible to redress under Title VII.³⁶ Justice Scalia asserted: "We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."³⁷ Rejecting the assertions of some courts that such harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII,"³⁸ Justice Scalia in typical fashion treated such reliance on legislative intent as misplaced, noting: "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."³⁹ He continued: "Title VII prohibits 'discrimination . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."⁴⁰ To this point, the *Oncale* opinion easily might be explained as a reflection of Scalia's textualism, stressing the plain meaning of statutory language and rejecting resort to legislative history or other expressions of legislative intent.⁴¹

The controversy over *Oncale*, however, emerges from the remainder of the opinion. Acknowledging concerns that permitting same-sex harassment lawsuits could "transform Title VII into a general civility code for the American workplace,"⁴² Scalia noted that this danger is equally present in more traditional harassment cases as well, and can be "adequately met by careful attention to the requirements of the statute."⁴³ He then set forth what those requirements might be. In particular, Scalia emphasized that harassment suits brought under Title VII are discrimination suits and, as such, must establish that the plaintiff suffered disparate treatment at the hands of the employer.⁴⁴ The critical issue, then, will be to establish that "'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"⁴⁵ Thus, not all workplace harassment is actionable under Title VII, even if "the words used have sexual content or

³⁶ See *id.*

³⁷ *Id.* at 1002.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ For a recent discussion of textualism as articulated by Justice Scalia, see Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1836 (1998).

⁴² *Oncale*, 118 S. Ct. at 1002.

⁴³ *Id.*

⁴⁴ See *id.* at 1003.

⁴⁵ *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

connotations.”⁴⁶ Rather, the plaintiff must prove that he or she was treated differently “because of sex.”⁴⁷

How might a plaintiff make this showing in a harassment case? Scalia noted that this inference will be drawn most easily in cases of “explicit or implicit proposals of sexual activity,” and for same-sex harassment this inference would be available “if there were credible evidence that the harasser was homosexual.”⁴⁸ Even in the absence of such a showing, however, a same-sex harassment plaintiff may “offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”⁴⁹ Regardless of the method of proof chosen, the plaintiff “must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination . . . because of . . . sex.’”⁵⁰

Although *Oncale*’s emphasis on the disparate treatment aspect of harassment has proven to be controversial, it is the final substantive paragraph of the opinion that has provided the most fodder for those seeking to limit sexual harassment suits. Scalia noted cryptically 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” and that the statute “requires neither asexuality nor androgyny in the workplace.”⁵¹ Reiterating the teaching of *Harris* that the challenged conduct must be “severe” and “pervasive” enough to create an “objectively hostile or abusive work environment,”⁵² Justice Scalia asserted that this requirement is “crucial” and “sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for

⁴⁶ *Id.* at 1002.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* One might characterize Justice Thomas’s one sentence concurrence as a reflection of this approach. His opinion, in full, reads as follows: “I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII’s statutory requirement that there be discrimination ‘because of . . . sex.’” *Id.* at 1003 (Thomas, J., concurring); see *The Supreme Court, 1997 Term—Leading Cases*, *supra* note 7, at 328 n.38 (describing Thomas’s opinion as “elliptical”). Justice Thomas’s dissent in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2271 (1998), joined by Justice Scalia, also emphasized the disparate treatment nature of harassment lawsuits by noting: “Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination. As such, it should be treated no differently (and certainly no better) than the other forms of harassment that are illegal under Title VII.” *Ellerth*, 118 S. Ct. at 2275.

⁵¹ *Oncale*, 118 S. Ct. at 1002-03.

⁵² *Id.* at 1003 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

discriminatory 'conditions of employment.'"⁵³ As an example of how all the facts and circumstances of such "horseplay" ought to be weighed, Justice Scalia asserted:

A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.⁵⁴

The most-debated portion of *Oncale* is Scalia's urging that the lower courts give "careful consideration of the social context in which particular behavior occurs and is experienced by its target," explaining that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."⁵⁵ He asserted: "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."⁵⁶

Although the Court remanded *Oncale* to much speculation about its possible outcome, it ultimately had little impact on subsequent legal developments. Perhaps in response to widespread publicity, or to the particularly egregious conduct outlined in the complaint, the case settled just before trial in October 1998.⁵⁷

B. *Remand of Doe v. City of Belleville, Illinois*

For those attempting to construe the meaning of *Oncale*, another signal came from the Supreme Court just six days later. Without opinion, the Court vacated the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* At least one commentator has praised this passage as a "model of judicious context-specificity." Abrams, *supra* note 9, at 1257, 1258-59 ("[A] remarkable call for contextualization in the assessment of sexual harassment, tempered only by Scalia's confident and perhaps solipsistic suggestion that one can resolve these cases with a healthy dose of common sense."). Another commentator, however, worried: "Common sense and sensitivity to social context are indeed essential, but absent some conception of what Title VII is about—some conception of 'what's wrong with sexual harassment'—they are hardly sufficient to distinguish between conduct that is and is not proscribed by Title VII." Dorf, *supra* note 19, at 22.

⁵⁷ *Sun Sets on Sundowner*, TEX. LAW., Nov. 2, 1998, at 3 (stating that the parties finalized a settlement October 21, six days before trial was scheduled to begin; terms were confidential).

judgment in *Doe v. City of Belleville, Illinois*,⁵⁸ and remanded it to the Court of Appeals for the Seventh Circuit for further consideration in light of *Oncale*.⁵⁹ Because the lower court's *Doe* opinion had provided an extensive analysis of same-sex sexual harassment, its rejection by the Supreme Court furnished further ammunition for those who read *Oncale* as a pro-employer opinion.⁶⁰ In *Doe*, twin teenage brothers claimed harassment by heterosexual male coworkers at their summer job, including homosexual epithets and sexual threats as well as at least one physical assault. Reversing the entry of summary judgment for the city, the Seventh Circuit held that same-sex harassment was actionable under Title VII under the "plain, unambiguous language of the statute."⁶¹

Although the actual holding in *Doe* is consistent with that in *Oncale*, as is *Doe*'s cautionary discussion of "horseplay,"⁶² other aspects of Judge Rovner's opinion are more problematic. In particular, the court asserted that a plaintiff can prove that same-sex harassment is "because of sex" from either the sexual character of the harassment or from the sexual stereotyping by the harassers that led to the conduct.⁶³ The court suggested that explicitly sexual harassment sufficed to "demonstrate[] the nexus to the plaintiff's gender that Title VII requires."⁶⁴ Indeed, in *Doe*, the court appeared to reject the model of disparate treatment for harassment that subsequently was adopted in *Oncale*, asserting:

Proof that the harasser was motivated to target (or in practice did target) one gender and not the other may be necessary where the harassment is not on its face sexual, as we have discussed, but such proof would seem unnecessary when the harassment itself is imbued with sexual overtones.⁶⁵

⁵⁸ 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998).

⁵⁹ *City of Belleville, Ill. v. Doe*, 118 S. Ct. 1183 (1998).

⁶⁰ The *Oncale* opinion criticized the *Doe* holding. *See Oncale*, 118 S. Ct. at 1002.

⁶¹ *Doe*, 119 F.3d at 573.

⁶² *Id.* at 575.

We have never made the viability of sexual harassment claims dependent upon the sexual orientation of the harasser, and we are convinced that it would be both unwise and improper to begin doing so. Fears that if such a requirement is not imposed, commonplace "horseplay" will give rise to sexual harassment claims are, we believe, unfounded. Sexual harassment law already provides the means for distinguishing between isolated instances of non-severe harassment and the truly hostile working environment.

Id.

⁶³ *Id.* at 575 (citing "the harassers' evident belief that in wearing an earring, H. Doe did not conform to male standards").

⁶⁴ *Id.* at 577 ("In view of the overt references to H.'s gender and the repeated allusions to sexual assault, it would appear unnecessary to require any further proof that H.'s gender had something to do with this harassment; the acts speak for themselves in that regard.").

⁶⁵ *Id.* at 577-78.

. . . Looked at in another light, the explicitly sexual harassment of a female worker amounts to sex discrimination in violation of Title VII not simply because her harasser might be heterosexual, and thus would not be sexually interested in a man, and not simply because a man might not encounter comparable harassment in the workplace, but because her employment is now conditioned upon her willingness to endure harassment that is inseparable from her gender.⁶⁶

In addition, the court noted that same-sex harassment stemming from sexual stereotyping about appropriate male or female behavior also was actionable under the rationale of *Price Waterhouse v. Hopkins*.⁶⁷

Finally, in addressing the concerns that same-sex harassment claims will open the floodgates of litigation, the court responded:

Interestingly, very similar concerns were expressed when courts rejected the first claims of sexual harassment brought by women in the 1970s Here we are, twenty years later, and the sky has not fallen. We are not, it turns out, incapable of distinguishing between the occasional off-color joke, stray remark, or rebuffed proposition, and a work environment that is rendered hostile by severe or pervasive harassment. We are well practiced in examining sexual harassment from the objective viewpoint of the reasonable individual as well as the subjective view of the plaintiff. When a man complains that he has been sexually harassed by another man, then, we know how to distinguish between harassment and "horseplay"; we have been making that very distinction for years in the cases that female plaintiffs have brought.⁶⁸

Thus, so long as the environment itself is hostile to the plaintiff because of her sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point. If H. and J. were twin brother and sister, for example, it would not be permissible for their co-workers to pervasively refer to J. as "the chick," to grab her breasts, and to threaten to undress and assault her ostensibly to tell the two of them apart. Whatever the reason she were [sic] harassed in this way, the work environment would be rendered hostile to J. *as a woman*.

Id.

⁶⁶ *Id.* at 579. The court also noted the difficulties with a traditional disparate treatment model: "How is a plaintiff to show disparate treatment if he is the only individual being harassed, for example? And how could he ever hope to show disparate treatment in a work environment populated entirely by men, as the Does' workplace was?" *Id.* at 583.

⁶⁷ 490 U.S. 228 (1989). See *Doe*, 119 F.3d at 580.

⁶⁸ *Doe*, 119 F.3d at 591.

In a sharp dissent, Judge Manion asserted that motive to discriminate on the basis of sex was essential to a sexual harassment claim.⁶⁹ He stated:

The language of the statute is not meaningless; unless the behavior at issue is motivated (at least in part) by the victim's sex, no cause of action can lie. It will be a truly rare case of same-sex harassment where this burden is satisfied. When a man harasses a man, or a woman harasses a woman, an inference does not arise that the harassment was because of the victim's sex. My colleagues assure us that the sky has not fallen, suggesting I suppose that federal courts will not be swamped by men or women claiming harassment by coworkers of the same sex. Perhaps not, but that never was the concern. The concern always will be the standards by which we define a cause of action not specifically described in a statute, and our proper reluctance to extend such claims further and further away from their statutory moorings.⁷⁰

In light of this sharp division, the Court's remand of *Doe* seemed to emphasize that in *Oncale* the Court had rejected an expansive reading of same-sex harassment and to reiterate the Court's insistence on a disparate treatment framework for all harassment cases.

III. *ONCALE* IN THE LOWER COURTS

The lower courts ultimately determine what a new Supreme Court case means. Despite its pro-plaintiff holding, *Oncale* has been used as support for restricting sexual harassment claims in many reported opinions. In the past year, as federal courts have attempted to parse the language of *Oncale*, there has been much inconsistency in the meaning various courts have given to Scalia's opinion. It may be surprising to some that the case itself seems to have spawned relatively few same-

⁶⁹ *Id.* at 597 (Manion, J., dissenting). Judge Manion also rejected the notion that Title VII addresses so-called "sexuality harassment"—harassment somehow sexual in nature—explaining:

Rather, if raunchy sexual banter is directed at an employee by coworkers of the same sex because they do not like him, do not respect him, want to tease him, want to embarrass him, or simply want to "initiate" him into a rather disgusting workplace, under the court's new standard employees targeted by such mean-spirited teasing could have a claim merely by the sexual nature of the teasing. Perhaps judges think an expansion is necessary because Congress has not sufficiently asserted itself in cleaning up such workplaces. But that is not the court's role.

Id. at 602.

⁷⁰ *Id.* at 607.

sex harassment cases. Instead, *Oncale* has been cited most frequently by lower courts in more traditional sexual harassment cases, usually brought by women against men. The cases have begun to highlight some of the questions left open after *Oncale*, such as its applicability to the so-called "equal opportunity harasser" and to single-sex work environments. More noteworthy, however, is an emerging split over whether the Court's intent in *Oncale* was to encourage more frequent use of summary judgment to resolve harassment claims, or whether, instead, the Court's emphasis on "common sense" and "context" signaled a desire to leave such questions to juries rather than to federal judges.

As of February 1999, only a handful of reported opinions have relied on *Oncale* to resolve claims of same-sex sexual harassment.⁷¹ The most notable pro-plaintiff opinion to date is *Bailey v. Runyon*,⁷² in which the United States Court of Appeals for the Eighth Circuit reversed entry of judgment as a matter of law for the defendant. The court noted that the evidence of same-sex harassment by a coworker should have been weighed by a jury because there is no distinguishable "bright line" between harassment and mere unpleasantness or vulgarity.⁷³ Similarly, in one case resolved in the plaintiff's favor, *Bacon v. Art Institute of Chicago*, a district court denied an employer's motion for summary judgment on a same-sex harassment issue, holding that a genuine issue of material fact existed as to whether the male plaintiff was harassed "because of" his sex when the male harasser photographed plaintiff's buttocks and displayed the photograph, continually touched various parts of plaintiff's body, and simulated sexual acts on plaintiff's body.⁷⁴

In several other cases, however, the plaintiff's claim foundered on the question of whether he had proven disparate treatment under *Oncale*.⁷⁵ In *Landrau Romero v. Caribbean Restaurants, Inc.*,⁷⁶ the district court granted summary judgment to the employer on a claim that a male supervisor winked at a male trainee and teased him, as well as other male and female employees. The court cited the caution from *Oncale* that courts distinguish "simple teasing" from severe and pervasive harassment.⁷⁷

⁷¹ One other same-sex harassment case decided after *Oncale*, *Ford v. Rigidply Rafters, Inc.*, 999 F. Supp. 647 (D. Md. 1998), simply upheld a verdict for the plaintiff entered prior to the Supreme Court case.

⁷² No. 98-1030, 1999 U.S. App. LEXIS 1766 (8th Cir. Feb. 8, 1999).

⁷³ *Id.* at *8-*9.

⁷⁴ See *Bacon v. Art Inst. of Chicago*, 6 F. Supp. 2d 762, 768 (N.D. Ill. 1998).

⁷⁵ One appellate decision conceded that harassment resulting from the breakup of a lesbian relationship would be actionable, but held that the plaintiff had not proven that the harassment by her former lover was the cause of her termination. *LLampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1248 (11th Cir. 1998).

⁷⁶ 14 F. Supp. 2d 185, 192 (D.P.R. 1998).

⁷⁷ The court noted: "Thus, other than winking, there is no evidence in the record of Figueroa making sexual advances on the plaintiff. Winking, in the context of plaintiff's other allegations, at its worst amounts only to teasing." *Id.* at 189.

Similarly, in *Raum v. Laidlaw, Ltd.*,⁷⁸ the district court rejected a sexual harassment claim brought by a man against his male supervisor for a series of vulgar comments when the record showed that the supervisor made similar remarks to everyone, male and female. The court emphasized that "the plaintiff must show that he experienced the hostility because of his membership in a protected class and not because the environment was generally hostile to everyone, including people outside the protected class."⁷⁹

A more comprehensive analysis of the disparate treatment aspect of *Oncale* appeared in *Holman v. Indiana*,⁸⁰ a case which raised the classic law school hypothetical of the harasser who pursues both males and females indiscriminately. In *Holman*, a husband and wife both claimed sexual harassment by a male foreman, described by the district court as an "equal opportunity harasser."⁸¹ The district court had held initially that such plaintiffs could not, as a matter of law, prove that the harassment was "because of sex" if it affected both genders equally.⁸² After *Oncale*, the court reconsidered its holding in *Holman*, but reached the same conclusion. It read *Oncale* as changing the prior law to require a showing of disparate treatment, explaining:

Under the Supreme Court's analysis, presumably, if members of one sex are exposed to identical disadvantageous terms or conditions of employment as the other sex, there is no Title VII discrimination. Such a reading gives legitimacy to the various courts' findings that no liability exists where both males and females in the workplace are accorded like treatment.⁸³

⁷⁸ No. 97-CV-111 (FJS), 1998 U.S. Dist. LEXIS 17969 (N.D.N.Y. July 1, 1998).

⁷⁹ *Id.* at *4 (holding that the alleged harasser merely "engaged in conduct that some people of either gender may consider to be rude or vulgar behavior"). See *Pavao v. Ocean Ships, Inc.*, No. C-97-4059-VRW, 1998 U.S. Dist. LEXIS 20431, at *4-*5 (N.D. Cal. Dec. 30, 1998) (asserting that "vulgar banter" did not cross the line that separates vulgarity from harassment."); *Burgess v. Gateway Communications*, 1998 U.S. Dist. LEXIS 18020 (S.D.W. Va. Nov. 10, 1998) (examining vulgarity directed at both sexes).

⁸⁰ No. 1:97 CV 0178, 1998 U.S. Dist. LEXIS 18760, at *9-*11 (N.D. Ind. Dec. 1, 1998).

⁸¹ *Id.* at *10-*11.

⁸² See *id.* at *7.

⁸³ See *id.* at *12-*13. The court stated further:

Prior to the *Oncale* decision, these cases created the impression that it was possible for both males and females to be sexually harassed by an "equal opportunity harasser." This impression was created by language in these cases which suggested that disparate treatment was not necessarily the gravamen of a sex discrimination claim where the harassing conduct itself demonstrated some gender animus. However, in light of the Supreme Court's reaffirmation that proof that discrimination is "because of sex" requires a showing that "members of one sex are exposed to disadvantageous terms or conditions of employment

It rejected the theory that the sexual nature of the harassment rendered the activity "because of sex."⁸⁴

The anomaly of this rationale was not lost on the court. It noted:

Often the court is placed in the position of being the mediator between the reality of legal doctrine and the dictates of common sense. The court cannot deny that this is such a case. Certainly, the court is cognizant that to decide as it does creates an anomalous result in sexual harassment jurisprudence which leads to the questionable result that a supervisor who harasses either a man or a woman can be liable but a supervisor who harasses both cannot be. While the court finds that the equal opportunity harasser escapes liability in the present case, it is not condoning the existence of such conduct in the workplace. Simply put, the court concludes that, under current Title VII jurisprudence, conduct occurring equally to members of both genders cannot be discrimination "because of sex."⁸⁵

The decision in *Holman* seems to be the result of an unnecessarily rigid reading of *Oncale*, which said nothing directly about the phenomenon of the equal opportunity harasser. First, the likelihood that such a harasser really would treat both sexes "identically" seems fairly remote and, thus, in appropriate situations, there could well be a triable issue of fact over whether men and women actually were subjected to disparate treatment.⁸⁶ Second, it is theoretically possible that such a harasser could exhibit discriminatory animus toward one gender even though he or she also harasses the other. A heterosexual male supervisor who physically assaults a female coworker because he wants to drive women from the workplace, and who

to which members of the other sex are not exposed," the implications in these cases are of questionable significance.

Id. at *20-*21.

⁸⁴ *Id.* at *20-*21 ("While the court acknowledges plaintiffs' arguments that the very sexual nature of the harassment is sufficient to demonstrate that the harassing conduct would not have occurred 'but for' the sex of each plaintiff, *Oncale* clearly indicates that this is not necessarily a foregone conclusion."). This position had been taken prior to *Oncale* by the Court of Appeals for the Seventh Circuit in *Doe v. City of Belleville, Illinois*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998), but the case was vacated and remanded by the Supreme Court, rendering it of questionable vitality. See *Holman*, 1998 U.S. Dist. LEXIS 18760, at *17 n.3.

⁸⁵ *Holman*, 1998 U.S. Dist. LEXIS 18760, at *23-*24 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998)).

⁸⁶ See Calleros, *supra* note 3, at 38-42 ("Even when the harasser's harassment of men is virtually identical in motive and technique to his harassment of women, the harassment potentially can be viewed as discriminatory on a disparate impact analysis if men and women experience the harassment in substantially different ways.").

also physically assaults males in similar fashion out of some misguided notion of "horseplay" would at least have the requisite discriminatory intent with respect to the female plaintiff. Third, if a jury were to find that the allegations of harassment of women were credible, but that the allegations of harassment of men were not, disparate treatment would be proven. Thus, the articulation in *Holman* of a *per se* rule to the contrary was both unnecessary and inconsistent with the plain meaning of *Oncale*. In light of *Oncale*'s emphasis on evidence of disparate treatment, however, cases like *Holman* are likely to continue to grapple with the phenomenon of the equal opportunity harasser.⁸⁷

Another signal of future controversy under *Oncale* is the decision in *Higgins v. New Balance Athletic Shoe, Inc.*,⁸⁸ a case that addressed the question of whether anti-gay harassment is harassment "because of sex" and thereby actionable under Title VII. Unlike *Oncale*, in *Higgins*, the plaintiff was openly gay and the harassment consisted largely of demeaning comments about homosexuals. In considering whether this harassment was "because of sex" under the holding in *Oncale*, the court explained: "Plaintiff cannot merely rely on the sexually explicit nature of his co-workers' conduct to support his claim of sexual harassment. Rather, the key issue is 'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"⁸⁹ In *Higgins*, the plaintiff argued that the discrimination was "because of gender" rather than "because of sex." The district court explained its view that the two terms were distinguishable because "while 'sex' tends to refer to an individual's physical characteristics and is considered immutable, 'gender' is a broader concept which encompasses personality features and socio-sexual roles typically associated with 'masculinity' or 'femininity.'"⁹⁰ Nevertheless, the court rejected the attempt to "equate 'gender' with 'sexual orientation' under Title VII analysis" and granted the employer's motion for summary judgment, holding that "Title VII does not provide a remedy to persons who have experienced harassment motivated solely by animus toward the plaintiff's sexual orientation."⁹¹

⁸⁷ See, e.g., *Butler v. Ysleta Indep. Sch. Dist.*, No. 97-50362, 1998 WL 792557, at *32 (5th Cir. Nov. 16, 1998) ("Irwin's sending of offensive materials to both men and women is evidence that the workplace itself, while perhaps more sexually charged than necessary, was not sexually charged in a way that made it a hostile environment for either men or women.").

⁸⁸ 21 F. Supp. 2d 66 (D. Me. 1998).

⁸⁹ *Id.* at 74 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (Ginsburg, J., concurring)).

⁹⁰ *Id.* at 75.

⁹¹ *Id.* at 76. The court further stated:

In determining along with numerous other jurisdictions that Title VII does not provide a remedy for discrimination based on sexual orientation, the Court does not in any way condone this serious and pervasive activity in the American workplace. The intolerable working conditions set forth in the cases denying

In light of the Court's apparent reluctance to give further guidance on the applicability of *Oncale* to same-sex harassment based on perceptions of homosexuality, the issue addressed in *Higgins* is likely to continue to reappear. The *Oncale* holding did not speak directly to this issue, however, and nothing in the language of the opinion would preclude a potential plaintiff from asserting that he was treated differently "because of sex," because his "effeminate" characteristics would have been tolerated in a female but inspired hostility because he was a male.⁹² Indeed, a male plaintiff who alleges that he had been beaten by coworkers because he likes to make quilts, for example, but shows that a female coworker who joins him in these quilting bees is praised for her womanly skills, would be pleading a quintessential example of disparate treatment "because of sex."

Nevertheless, the conceptual difficulties with disparate treatment as a model for harassment cases make it difficult for lower courts to analyze same-sex claims.⁹³ What may be more striking about the case law to date, however, is that courts have interpreted *Oncale* as a signal from the Supreme Court about the proper way to handle all harassment claims, not just the small subset of claims that are same-sex. Although some courts have resolved cases in favor of plaintiffs,⁹⁴ a number of

relief under Title VII for rampant discrimination based on sexual orientation call for immediate remedial response by Congress.

Id. at 76 n.10.

⁹² Recent commentary has suggested that harassing conduct that reinforces gender stereotypes, such as those at issue in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), could be actionable under *Oncale*. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); *The Supreme Court, 1997 Term—Leading Cases*, *supra* note 7, at 333-35.

⁹³ The issue of proving disparate treatment in single-sex working environments is also likely to spark controversy. See, e.g., *Holman v. Indiana*, No. 1:97 CV 0178, 1998 U.S. Dist. LEXIS 18760, at *11 n.2 (N.D. Ind. Dec. 1, 1998) (stating that an employer has a defense to harassment claims in single-sex work environments because "there is clearly no evidence which could be presented to show that employees of the opposite gender were treated differently"). The particular question of "social context" recently has been addressed by Debra Raskin, a prominent plaintiff's lawyer, in *Employment Discrimination—Sex: Effects of Oncale are Discussed by Panel of Judges and Attorneys*, 66 U.S.L.W. 2567 (Mar. 24, 1998). She warned of the possibility of "'a kind of assumption of the risk' argument when an employee enters a traditionally sex-segregated workplace," using as an example the well-known case of *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (1991). She further noted that the case of *Jenson v. Eveleth Taconite Co.*, No. 97-1147 MNST, 1998 U.S. App. LEXIS 2824 (8th Cir. Feb. 18, 1998), one of the few cases on the issue, rejected such an argument even in light of a "widely-known 'culture' of sexual harassment in the mining industry in Minnesota." *Id.* See also Calleros, *supra* note 3, at 36-38 (arguing that the Supreme Court has placed an excessive burden on the plaintiff to prove disparate treatment).

⁹⁴ See *Mendoza v. Borden, Inc.*, 158 F.3d 1171, 1176 (11th Cir. 1998) (reversing in part a directed verdict for defendant) (noting the Court's concerns in *Oncale* about "context" to reject a claim that challenged conduct could not constitute harassment as a matter of law);

appellate opinions have construed *Oncale* as a warning against expanding the sexual harassment cause of action. Lower courts have given particular emphasis to the Court's suggestions that mere sexual content alone is insufficient to meet the "because of sex" prong,⁹⁵ that not every incident amounts to harassment based on disparate treatment,⁹⁶ even if there is some relationship to the gender or race of the plaintiff,⁹⁷ and that Title VII is not to be transformed into a "civility code."⁹⁸

The debate over *Oncale*'s meaning has manifested itself most clearly in an emerging dispute over the role of summary judgment in resolving harassment cases, a battle foreseen by many commentators in the immediate aftermath of the decision.⁹⁹ The use (or overuse) of summary judgment motions in resolving employment discrimination cases has been a subject of controversy for many years.¹⁰⁰ The Court

Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1109 (9th Cir. 1998) (permitting the plaintiff to proceed on a continuing violation theory).

⁹⁵ See, e.g., *Butler v. Ysleta Indep. Sch. Dist.*, No. 97-50362, 1998 WL 792557 (5th Cir. Nov. 16, 1998); *Richmond-Hopes v. City of Cleveland*, No. 97-3595, 1998 U.S. App. LEXIS 29572 (6th Cir. Nov. 16, 1998) (per curiam) (affirming an entry of summary judgment in favor of an employer when a female employee claimed her supervisor sexually harassed her by simulating masturbation); *Sweeney v. West*, 149 F.3d 550 (7th Cir. 1998).

⁹⁶ See *Lissau v. Southern Food Servs., Inc.*, 159 F.3d 177, 183 (4th Cir. 1998) (affirming in part and reversing in part a grant of summary judgment on the issue of vicarious liability for employers) ("Title VII does not provide a remedy for every instance of verbal or physical harassment in the workplace."); *Bravo v. Veterans Admin.*, No. 97-56646, 1998 U.S. App. LEXIS 27845, at *2 (9th Cir. Oct. 26, 1998) ("Because Bravo failed to establish that statements made by or actions taken by his supervisor were sexual in nature, Bravo failed to establish a prima facie case of sexual harassment."); *Clover v. Total Sys. Servs., Inc.*, 157 F.3d 824, 828 (11th Cir. 1998) (reversing a jury verdict in favor of the plaintiff's retaliatory discharge claim because the conduct described by the plaintiff was not sufficient to support an objectively reasonable belief that it was sexual harassment; in fact, it "misse[d] the mark by a country mile").

⁹⁷ See *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1263 (10th Cir. 1998) (holding that the defendant's conduct with "gender-related implications," such as taking female employees to Hooters Restaurant, was not "permeated with discriminatory intimidation" but was "motivated by poor taste and a lack of professionalism rather than by the plaintiffs' gender"); *Bonner v. Payless Shoe Source*, No. 97-2401, 1998 U.S. App. LEXIS 7438, at *5 (4th Cir. Apr. 14, 1998) (per curiam) (affirming an entry of summary judgment for the defendant because "not all of the purported harassing incidents cited by Bonner were necessarily motivated by Bonner's race").

⁹⁸ See *Webb v. Cardiothoracic Surgery Assoc. of N. Tex.*, 139 F.3d 532, 540 (5th Cir. 1998) (affirming an entry of summary judgment for the defendant and holding that the defendant's treatment of the plaintiff did "not amount to an adverse employment action").

⁹⁹ In *Lissau*, one concurring judge asserted that the Supreme Court's recent sexual harassment claims rendered summary judgment generally inappropriate because the inquiry is "especially fact intensive." *Lissau*, 159 F.3d at 184 (Michael, J., concurring in part and dissenting in part).

¹⁰⁰ See *supra* notes 91-94. Judge Patricia Wald of the United States Court of Appeals for

of Appeals for the Second Circuit addressed this issue at some length in *Gallagher v. Delaney*,¹⁰¹ a sexual harassment case in which the lower court had entered summary judgment for the defendant. The plaintiff, a secretary, had alleged that her boss pestered her incessantly, without explicitly demanding sex or threatening retaliation.¹⁰² The district court found it “‘doubtful that [plaintiff], or a reasonable woman of her generation would find Hansen’s conduct sexually harassing.’”¹⁰³ Sitting by designation, Judge Jack Weinstein of the United States District Court for the Eastern District of New York explained with typical frankness the appellate court’s decision to reverse and remand:

A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. Such an effort, even were it successful, would produce questionable legal definitions for the workplace where recognition of employees’ dignity might require standards higher than those of the street. . . . Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogen[e]ous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation. The factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment. Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.¹⁰⁴

the District of Columbia Circuit recently described the “unseemly rush to summary judgment” as a matter of particular concern in employment discrimination cases. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1938 (1998). Other commentators have argued in favor of using summary judgment motions to weed out unmeritorious discrimination cases before trial. See R. Alexander Acosta & Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: Deepening the Disagreement on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. L. & POL. 207, 209-10 (1998).

¹⁰¹ 139 F.3d 338 (2d Cir. 1998).

¹⁰² See *id.* at 343-45.

¹⁰³ *Id.* at 346 (quoting the lower court’s decision).

¹⁰⁴ *Id.* at 342.

He cautioned that "[t]he dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases."¹⁰⁵ Judge Weinstein concluded: "An Article III judge is not a hierophant of social graces. Evaluation of ambiguous acts such as those revealed by the potential evidence in this case presents an issue for the jury."¹⁰⁶ Other courts also have treated *Oncale* as a signal to treat issues about severity and pervasiveness as fact questions for juries, rather than as questions of law.¹⁰⁷

In contrast, in *Butler v. Ysleta Independent School District*,¹⁰⁸ Judge Patrick Higginbotham, writing for the United States Court of Appeals for the Fifth Circuit, upheld the entry of judgment for the defendant after a jury verdict for plaintiff in a hostile environment claim. Plaintiffs were elementary school teachers who received anonymous mail, with sexual overtones, at their homes.¹⁰⁹ Upon investigation, the anonymous sender was found to be their principal, who also was under investigation for sending lewd facsimiles to male administrators. In upholding the district court's entry of judgment, Judge Higginbotham announced:

To ensure the continued vitality of Title VII as a remedy for the sexual harassment wrong, this court must separate meritorious claims from those that identify offensive conduct but do not state a claim under Title VII. The claims here fall in this latter category. While the letters the plaintiffs received were undoubtedly immature and inappropriate, and while some of the letters had a sexual content, a consideration of all the circumstances does not permit the conclusion that the letters created a hostile or abusive environment at the workplace.¹¹⁰

Judge Higginbotham's opinion reflects a restrictive approach to sexual harassment cases, substituting the court's own view of "reasonableness" for that of

¹⁰⁵ *Id.* at 343.

¹⁰⁶ *Id.* at 347 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998)). A "hierophant" is defined as "[a]n interpreter of sacred mysteries or arcane knowledge." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 851 (3d ed. 1992).

¹⁰⁷ See, e.g., *Breeding v. Arthur J. Gallagher & Co.*, No. 98-1338, 1999 U.S. App. LEXIS 481 (8th Cir. filed Jan. 15, 1999) (exemplifying that summary judgment seldom should be granted in discrimination cases); *Leslie v. United Technologies Corp.*, No. 97-8212-CIV-GOLD, 1998 U.S. Dist. LEXIS 20900, at *8 (S.D. Fla. Dec. 15, 1998) (denying a motion for summary judgment because there was adequate evidence of racial harassment); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870 (N.D. Ind. 1998) (denying a motion for summary judgment on the issue of whether one act of sexual assault sufficed to meet requirements of a hostile work environment).

¹⁰⁸ 161 F.3d 263 (5th Cir. 1998).

¹⁰⁹ See *id.* at 265.

¹¹⁰ *Id.* at 268.

the jury. In *Butler*, the court determined that the alleged harassment was insufficient as a matter of law because the letters were infrequent, were sent privately rather than circulated publicly, were not threatening, and were not received at work.¹¹¹ In addition, Judge Higginbotham asserted that the sexual content was irrelevant because "[t]he letters here commented on the plaintiffs' personal lives and habits, but did not state or suggest that they or women in general were incompetent to be teachers."¹¹² He asserted: "A plaintiff, however, must show that implicit or explicit in the sexual content is the message that the plaintiff is incompetent because of her sex, and the plaintiffs cannot draw such a connection here."¹¹³ Most surprising is that the Fifth Circuit treated *Oncale* as almost an afterthought, asserting with no explanation that it was not a hostile environment case, and, under the circumstances of this case, Irwin's sending of offensive materials to both men and women is evidence that the workplace itself, while perhaps more sexually charged than necessary, was not sexually charged in a way that made it a hostile environment for either men or women.¹¹⁴

The approach of the court in *Butler* to sexual harassment cases is all too typical in that it analyzed the challenged conduct by disaggregating it into a series of unconnected events, minimized the significance of those events, and then concluded that no reasonable jury could perceive the facts otherwise.¹¹⁵ A representative case from the district courts is *Landsee-Huschitt v. City of Crystal Lake*.¹¹⁶ Noting the observation in *Oncale* that "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment,"¹¹⁷ the court granted summary judgment to the defendant in his sexual harassment claim, explaining:

¹¹¹ See *id.* at 269-70.

¹¹² *Id.* at 270.

¹¹³ *Id.*

¹¹⁴ See *id.* Judge Higginbotham's opinion is particularly disturbing because of the disingenuous way it cites to recent feminist scholarship on sexual harassment to support the conclusion that the jury's verdict properly was set aside. For example, it is difficult to accept his conclusion that when feminist scholars stress that the workplace is central to sexual harassment claims, they somehow mean to suggest that a supervisor can harass female workers at home without incurring Title VII liability. See *id.*

¹¹⁵ See *Indest v. Freeman Decorating, Inc.*, No. 96-30212, 1999 U.S. App. LEXIS 710, at *17 (5th Cir. Jan. 19, 1999) (holding that a supervisor's remarks "were no more offensive than sexual jokes regularly told on major network television programs" and, "[s]ignificantly," he never actually touched the plaintiff).

¹¹⁶ No. 97 C 50235, 1998 U.S. Dist. LEXIS 17856 (N.D. Ill. Oct. 29, 1998).

¹¹⁷ *Id.* at *11 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998)).

Moreover, the evidence which could even arguably be considered to support a sexual harassment claim shows that during a seven-month period, plaintiff heard one pregnancy-related joke, saw one pornographic picture, saw Playboy magazines in a drawer whenever she opened it, was unable to use a bathroom on one occasion, was brushed against the shoulder and had her meter book hid[den] once, was prevented from filling her water bottle, and was shoved once. With the exception of the shoving incident, the remaining conduct was innocuous on the sliding scale of egregiousness, and all were isolated. A reasonable person could not objectively find plaintiff was subjected to an atmosphere permeated with discriminatory intimidation, ridicule, and insult, sufficiently severe or pervasive so as to alter the conditions of her employment.¹¹⁸

The court no doubt described the facts this way to minimize their significance, but even through this prism, it is hard to credit the court's conclusion that no reasonable person could find this constellation of facts and circumstances to be sexual harassment. Nevertheless, many courts have taken a similar approach and regularly entered judgment for employers without trial, relying at least in part on the *Oncale* opinion,¹¹⁹ and the debate is likely to continue as more courts grapple with the meaning of *Oncale*.¹²⁰

¹¹⁸ *Id.* at *14-*15.

¹¹⁹ In a recent opinion by Judge Edith Jones, the Court of Appeals for the Fifth Circuit explicitly contended that "the Supreme Court's decisions strongly suggest that [allegations of sexual harassment] are not invariably to be resolved by the jury," and further urged: "Motions for judgment as a matter of law can police the baseline for hostile environment claims." *Indest*, 1999 U.S. App. LEXIS 710, at *16. *See also* *Owens v. Commercial Testing & Eng'g Co.*, No. 1:97-0908-RV-C, 1998 U.S. Dist. LEXIS 18147 (S.D. Ala. Oct. 26, 1998) (holding that innocuous racial comments were insufficient to constitute unlawful racial harassment); *Brennan v. Metropolitan Opera Ass'n, Inc.*, No. 95 Civ. 2926 (MBM), 1998 U.S. Dist. LEXIS 5562 (S.D.N.Y. Apr. 22, 1998); *Crawford v. Bank of Am.*, 181 F.R.D. 363, 365 (N.D. Ill. 1998) (granting summary judgment for a female who claimed harassment by a male gay coworker's lewd stories).

¹²⁰ In a panel discussion immediately after *Oncale* was decided, Judge Joseph Irenas of the United States District Court for the District of New Jersey suggested that *Oncale* would encourage summary judgment for employers, arguing that the Court's emphasis on the context in which the harassment occurred might encourage him "a little more to look at the record and say 'in context, is this really harassment.'" *See Employment Discrimination—Sex: Effects of Oncale are Discussed by Panel of Judges and Attorneys*, *supra* note 93 (Judge Manuel Real of the United States District Court for the Central District of California also stated that *Oncale* gave employer motions for summary judgment "something of a boost" in requiring a showing that the harassment occurred because of sex and that the harassment actually altered the terms of employment. In contrast, Judge Charles Brieant of the United States District Court for the Southern District of New York was more doubtful, noting: "It's very difficult to grant summary judgment in employment cases in general" because of the

III. JUSTICE SCALIA AND THE PLAIN MEANING OF *ONCALE*

What is the plain meaning of *Oncale*? More particularly, is it of any significance that this pro-plaintiff holding comes in an opinion by Justice Scalia? Divining the intent behind a Supreme Court opinion may be a favorite pastime of scholars but, ultimately, it is a futile one. The *Oncale* holding itself suggests several reasons why these efforts would be fruitless.

First, there is no doubt that Scalia vehemently has opposed what he has considered to be unwarranted expansions of discrimination law, as indicated by several fiery dissents¹²¹ and the caustic opinion for the five-to-four majority in *St. Mary's Honor Center v. Hicks*.¹²² Nevertheless, in considering *Oncale* in context, one must recall that it is not the first Scalia opinion to uphold a plaintiff's position in an employment discrimination case. Indeed, a little-noted aspect of recent discrimination jurisprudence is that Scalia has authored several unanimous opinions for the Court resolving circuit splits in favor of plaintiffs. Many of these opinions disposed of artificial rules that had been constructed by the lower courts to limit liability. Those attempting to read *Oncale* as a pro-employer opinion masquerading as a blow for civil rights must consider this backdrop.

In one notable example, Scalia wrote the unanimous opinion in *O'Connor v. Consolidated Coin Caterers Corp.*¹²³ In *O'Connor*, the Court squarely rejected a rule some circuits had developed that precluded a plaintiff from establishing a prima facie case of age discrimination under the Age Discrimination in Employment Act of 1967¹²⁴ ("ADEA") unless he or she could show replacement by a worker who was outside the ADEA's protected class of workers forty years-old and older.¹²⁵ Scalia indicated that the statutory language prohibiting discrimination "because of . . . age" did not foreclose proof of such discrimination even when the plaintiff was replaced by a younger worker who also was in the protected class.¹²⁶

many factual issues they generate.).

¹²¹ See, e.g., *Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 845 (1998) (Scalia, J., dissenting); *Johnson v. Transportation Agency*, 480 U.S. 616, 657-77 (1987) (Scalia, J., dissenting).

¹²² 509 U.S. 502 (1993). Both the majority and the dissenting opinions in *Hicks* were particularly vituperative. Justice Scalia's opinion for the Court reads so much like a dissent that I have long believed that one vote switched at the last minute and that the opinion was simply edited to become a majority opinion.

¹²³ 517 U.S. 308 (1996).

¹²⁴ 29 U.S.C. §§ 621-34 (1994).

¹²⁵ See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

¹²⁶ See *id.* Construing the statutory language, Scalia explained:

As the very name "prima facie case" suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a "legally mandatory, rebuttable

Scalia's opinion for a unanimous Court in *Pennsylvania Department of Corrections v. Yeskey*,¹²⁷ held that a state prison is covered as a "public entity" under Title II of the Americans with Disabilities Act of 1990.¹²⁸ Indeed, Scalia noted, the statute "unmistakeably includes State prisons and prisoners within its coverage"¹²⁹ in its "unambiguous statutory text."¹³⁰ Similarly, in his unanimous opinion for the Court in *Walters v. Metropolitan Educational Enterprises, Inc.*,¹³¹ Scalia resolved a circuit split over how to count employees for purposes of the fifteen-employee threshold of Title VII.¹³² Most recently, in the 1998-1999 Term, Justice Scalia wrote the opinion for a unanimous Court in *Wright v. Universal Maritime Service Corp.*,¹³³ holding that a general arbitration clause in a collective bargaining agreement did not require arbitration of claims under the Americans with Disabilities Act.

Having identified this precedent, it goes without saying that Scalia is no closet liberal. One readily might counter that Scalia's authorship of these opinions reflects little about his real views on employment discrimination, and that the recent spate of unanimous opinions on more technical issues in employment discrimination cases simply papers over the deeper gulf in the Court over the substance of such claims. The assignment of such unanimous opinions to more conservative justices like

presumption." The element of replacement by someone under 40 fails this requirement. . . . Because it lacks probative value, the fact that an ADEA . . . plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.

O'Connor, 517 U.S. at 311-12 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) (citation omitted)).

¹²⁷ 118 S. Ct. 1952 (1998).

¹²⁸ 42 U.S.C. § 12131 (1990). The Act "prohibits a 'public entity' from discriminating against a 'qualified individual with a disability' on account of that individual's disability." *Yeskey*, 118 S. Ct. at 1954.

¹²⁹ *Yeskey*, 118 S. Ct. at 1954.

¹³⁰ *Id.* at 1956.

¹³¹ 519 U.S. 202 (1997).

¹³² 42 U.S.C. § 2000e(b) generally makes the provisions of Title VII applicable to any employer who "has" 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Scalia explained: "We think that the payroll method represents the fair reading of the statutory language, which sets as the criterion the number of employees that the employer 'has' for each working day." *Walters*, 519 U.S. at 207. He further noted: "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning'" and relied on dictionary definitions to further support his interpretation. *Id.* at 207-08.

¹³³ 119 S. Ct. 391 (1998).

Scalia, Thomas,¹³⁴ or even Kennedy,¹³⁵ may reflect more about the internal dynamics of the Rehnquist Court. To the extent that the conservative wing of the Court believes that federal discrimination law ought to be interpreted as written, but no further, it would be logical for Chief Justice Rehnquist to ensure that opinions that speak for the whole Court do not contain any language that would expand the reach of those laws. Nevertheless, the mere fact that the Supreme Court has resolved a number of such circuit splits unanimously suggests that the evolution of discrimination jurisprudence is more complex than a simple reflection of political philosophy. It also should counsel prudence for those who seek to read into *Oncale* a more restrictive meaning, based solely on the perceived intent of its conservative author.

A second little-noted factor is that, for whatever reason, Scalia's own approach to harassment cases has been surprisingly fluid. Before coming to the Court, one easily could have identified Scalia as a foe of sexual harassment claims, based largely on the fact that he joined Judge Bork's dissent in *Vinson v. Taylor*,¹³⁶ a case that a unanimous Supreme Court later affirmed in the landmark decision of *Meritor Savings Bank, FSB v. Vinson*.¹³⁷ His concurrence to the Court's unanimous opinion in *Harris v. Forklift Systems, Inc.*,¹³⁸ however, reflects far more ambivalence than one might expect. In that opinion, Scalia expressed reservations about the ability of the Court to elucidate a standard for evaluating when harassing conduct becomes severe or pervasive enough to be actionable under Title VII.¹³⁹ In a comment that may explain the concerns he later expressed in *Oncale*, Scalia noted: "As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an

¹³⁴ See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (resolving a conflict among circuits as to whether the term "employee" in Title VII covers former employees by construing ambiguous term in light of the "broader context of Title VII and the primary purpose of § 704(a)").

¹³⁵ See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (rejecting the "after-acquired evidence" rule in employment discrimination cases).

¹³⁶ 760 F.2d 1330, 1330-33 (D.C. Cir. 1985), *aff'd*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

¹³⁷ In *Vinson v. Taylor*, then-Judge Scalia joined Judge Robert Bork's strong dissent from the denial of a motion to hear the case en banc.

¹³⁸ 510 U.S. 17 (1993).

¹³⁹ See *id.* at 24-25 (Scalia, J., concurring).

"Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to be a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person's" notion of what the vague word means.

Id. 24 (Scalia, J., concurring).

award of damages.”¹⁴⁰ Nevertheless, in perhaps a prophetic comment, Scalia asserted:

Be that as it may, I know of no alternative to the course the Court today has taken. One of the factors mentioned in the Court’s nonexhaustive list—whether the conduct unreasonably interferes with an employee’s work performance—would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute. Accepting *Meritor*’s interpretation of the term “conditions of employment” as the law, the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered. I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts. For these reasons, I join the opinion of the Court.¹⁴¹

The difficulty of providing guidance to the lower courts on the meaning of an ambiguous federal statute, while at the same time remaining steadfast to textualist principles, seemed particularly troubling to Scalia in sexual harassment cases.¹⁴² This tension may explain his somewhat tepid attempts to instruct the lower courts in *Oncale*. Just a few months later, Scalia joined Justice Thomas’s dissent in *Burlington Industries, Inc. v. Ellerth*,¹⁴³ rejecting the majority’s attempt to resolve the difficult issue of vicarious liability in sexual harassment cases. Thomas’s dissenting opinion sharply criticized the Court’s scheme as “a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based,” asserting that “its holding is a product of willful policymaking, pure and simple.”¹⁴⁴ He attacked *Ellerth* as “based solely on its divination of Title VII’s *gestalt*,” and that “it provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead, it issues only Delphic pronouncements and leaves the dirty work

¹⁴⁰ *Id.* at 24. Scalia continued:

One might say that what constitutes “negligence” (a traditional jury question) is not much more clear and certain than what constitutes “abusiveness.” Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute “abusiveness” is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation.”

Id. at 24.

¹⁴¹ *Id.* at 24-25.

¹⁴² Charles Calleros notes the irony that Scalia’s textual approach produces a broader holding than a more contextual reading might have generated. *See* Calleros, *supra* note 3, at 18-19.

¹⁴³ 118 S. Ct. 2257, 2271-75 (1998).

¹⁴⁴ *Id.* at 2273-74.

to the lower courts.”¹⁴⁵ Of course, it is precisely this type of criticism that has been leveled at Scalia’s equally Delphic analysis in *Oncale*.

Finally, Supreme Court opinions are not simply the product of one person. Even unanimous opinions (or perhaps especially unanimous opinions) are the product of compromise and, as such, the author of the opinion may include language to satisfy some justices that does not necessarily reflect the way the opinion would have been written had it been a solo effort. Thus, even if the justice who writes the opinion may have a particular intent, his message may well be obscured by the necessities of brokering an agreement. Indeed, even when Scalia plainly has sought to resolve a split in the lower courts, often his opinion has produced more conflict than it has resolved. The quintessential example of this phenomenon is Scalia’s opinion for the five-to-four majority in *St. Mary’s Honor Center v. Hicks*.¹⁴⁶ The Court split in a bitter contest over the amount of evidence a plaintiff must produce to prove that the employer’s adverse action was a pretext for discrimination.¹⁴⁷ Scalia’s opinion stressed that the plaintiff must prove not simply pretext, but pretext for discrimination in order to prevail.¹⁴⁸ Indeed, these passages echo the Court’s insistence in *Oncale* on using a disparate treatment model for analyzing sexual harassment claims. Nevertheless, *Hicks* did not resolve the battle over the meaning of “pretext,” because ambiguous language in Scalia’s opinion inevitably left open the very issue he sought to foreclose—the possibility that plaintiffs could continue to prevail by proving pretext alone.¹⁴⁹ The circuit split that preexisted *Hicks* continues, prompted largely by this loophole left open by Scalia’s majority opinion.¹⁵⁰

IV. CONCLUSION

Why does an apparently straightforward case like *Oncale* produce such confusion? The actual holding of *Oncale*, which plainly favored plaintiffs, somehow has become obscured by attempts to construe some supporting passages in the

¹⁴⁵ *Id.* at 2274.

¹⁴⁶ 509 U.S. 502 (1993).

¹⁴⁷ See Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

¹⁴⁸ *Hicks*, 509 U.S. at 515-20.

¹⁴⁹ See *id.* at 511 (“Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, ‘no additional proof of discrimination is required.’” (quoting *Hicks v. St. Mary’s Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992))).

¹⁵⁰ The split in the circuits continues to grow, with the most recent entry being the en banc opinion of the United States Court of Appeals for the District of Columbia Circuit in *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998). See, e.g., Acosta & Von Vorys, *supra* note 101; *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1571 (1996).

opinion in favor of employers. In casting *Oncale* as a pro-employer opinion, it appears that many judges either read *Oncale* in light of their preexisting views of how sexual harassment cases ought to be handled, or they interpret *Oncale* as a reflection of the conservatism of its author. There is an unfortunate but undeniable appeal to the latter approach, if only because it conforms to the reflexive pigeonholing of Supreme Court justices that so many lawyers seem to favor.

In ultimately applying a new Supreme Court opinion, particularly one joined by all nine justices, it is the holding of the opinion that must guide the lower courts, not the assorted examples, exhortations, and suggestions that accompany it. In his opinion in *Hicks*, Justice Scalia himself warned against the tendency to enshrine Supreme Court dicta as law, justifying his rejection of the Supreme Court's long-standing analysis of pretext cases by admonishing his colleagues against "dissect[ing] the sentences of the United States Reports as though they were the United States Code."¹⁵¹ If we are to take Scalia at his word, the attempts to discern some broader intent in *Oncale* as guidance for applying the case to new fact patterns must be as illegitimate in his view as the attempts to construe statutes by resort to legislative history.¹⁵²

The way to make sense of *Oncale* is to take it at face value, as a victory for a plaintiff who alleged particularly egregious harassment. In light of the ambiguities of Title VII's language, a court seeking to apply faithfully the words of the statute had little choice but to reject the restrictive rule against same-sex suits that had been adopted by some lower courts. Thus, whether or not *Oncale* reflects the "limitations of a backward-looking textualism,"¹⁵³ the fact remains that its holding represents a significant step forward in sexual harassment jurisprudence. Nine justices of the Supreme Court, from both ends of the political spectrum, joined an opinion that broadened the scope of liability for sexual harassment. That is the plain meaning of *Oncale*. It is that holding, rather than the ambiguities in the brief opinion that accompanied it, that should guide lower courts as they grapple with the complexities of harassment cases.

¹⁵¹ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993); see *The Supreme Court, 1997 Term—Leading Cases*, *supra* note 7, at 333 n.74.

¹⁵² For an analysis of Scalia's views on illegitimacy of resort to legislative history in statutory construction, see Vermeule, *supra* note 41, at 1833. See also Scalia, *supra* note 1.

¹⁵³ Dorf, *supra* note 19, at 22-23 ("[I]ts determined textualism prevented it from even identifying relevant considerations."). Dorf notes that the Court "refused to articulate a normative vision of the evils the statute addresses." *Id.* at 22. He asserts: "Unable to find an original public meaning that spoke at all to sexual harassment and unwilling to construct an objective purpose for its prohibition, the Court in its textualist mode could only fall back on the vague language of the statute." *Id.* at 23-24.