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INTRODUCTION

ONCALE: EXPOSING “MANHOOD”

Marc S. Spindelman* and John Stoltenberg**

In *Oncale v. Sundowner Offshore Services, Inc.*,¹ a legal action brought under Title VII of the 1964 Civil Rights Act,² Joseph Oncale complains of the workplace sexual harassment he suffered at the hands of other men. It is a testament to the force of feminist insight and theory, and their impact on the law, that Oncale’s lawyers could conceive of what happened to him as harassment that happened because of his sex within the meaning of Title VII.³ The question is, will the courts agree? Whatever the ultimate outcome of *Oncale*, it will have cast a stark light on the landscape of sex inequality, illuminating the modern topography of male supremacy.

Joseph Oncale is not alone in declaring that he is a male victim of same-sex sexual harassment. He joins a growing number of men — straight (as the Court of Appeals assumes he is)⁴ and gay — who have raised their voices against similar

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1. 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S.Ct. 2430, 138 L.Ed.2d 192, 65 U.S.L.W. 3809, 65 U.S.L.W. 3814 (U.S. June 9, 1997) (No. 96-568).

2. 42 U.S.C. § 2000e-2(a)(1).

3. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

4. See Brief for The Equal Employment Advisory Council at 6, *Oncale* (96-568) (identifying perpetrators and victim in *Oncale* as heterosexual men).

abuse.⁵ A few of Oncale's confreres have had more success in the federal courts than he has had thus far.⁶ But all have contended with a federal judiciary that has shown some reticence to accept the notion that men, in particular heterosexual men, can sexually harass — or be sexually harassed by — other men because they are men.⁷

Male victims of same-sex sexual harassment labor directly against the cultural norms of male supremacy.⁸ These norms have long presumed the impossibility and impermissibility of a sexual component to social intercourse among men,⁹ or have recognized its existence only when one of the men is gay.¹⁰ To be sure, gay men can and do sexually harass other men, both straight and gay.¹¹ In part because of gay men's gender noncon-

5. See, e.g., *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997) (and authorities collected therein), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 15, 1997) (97-669); *Fredette v. BVP Management Assocs.*, 112 F.3d 1503 (11th Cir. 1997); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 170 (1996); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 72 (1996); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996); *Quick v. Donaldson Co. Inc.*, 90 F.3d 1372 (8th Cir. 1996); *Purrington v. Univ. of Utah*, 996 F.2d 1025 (10th Cir. 1993); *Morgan v. Mass. Gen. Hosp.*, 901 F.2d 186 (1st Cir. 1990); *Carreno v. Local Union No. 226, No. 89-4083-S*, 1990 U.S. Dist. LEXIS 13817 (D. Kan. Sept. 27, 1990).

6. See, e.g., *Doe*, 119 F.3d at 573-74 (collecting authorities); *Fredette*, 112 F.3d at 1506; *Yeary*, 107 F.3d at 447-48; *Wrightson*, 99 F.3d at 141-43; *Quick*, 90 F.3d at 1376-80.

7. See, e.g., *Johnson v. Hondo*, 112 F.3d 408, 412 (7th Cir. 1997); *Hopkins*, 77 F.3d at 754; *McWilliams*, 72 F.3d at 1195-96; *Goluszek v. Smith*, 697 F.Supp. 1452, 1456 (N.D. Ill. 1988), *but see* by *Doe*, 119 F.3d at 574 (expressly rejecting *Goluszek's* construction of Title VII).

8. See, e.g., MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* (1997); JOHN STOLTENBERG, *THE END OF MANHOOD: A BOOK FOR MEN OF CONSCIENCE* (1993); JOHN STOLTENBERG, *REFUSING TO BE A MAN: ESSAYS ON SEX AND JUSTICE* (1989); Marc Spindelman, *Case Threatens Male Supremacy*, *LEGAL TIMES*, Oct. 6, 1997, at S38; Kaethe Hoffer, *The Politics of Masculinity: Sexual Subordination and Social Superiority* (1997) (unpublished manuscript, on file with authors).

9. See Catharine A. MacKinnon, *Oncale v. Sundowner Offshore Services, Inc.*, 96-568, *Amici Curiae Brief in Support of Petitioner*, 8 UCLA WOMEN'S L.J. 1, 9, 21-22 (1997).

10. See *id.* at 9, 30-32; Spindelman, *supra* note 8, at S41.

11. See MacKinnon, *supra* note 9 at 30-32; see also, e.g., *Wrightson*, 99 F.3d at 139 (gay supervisor, among others, harassed straight male plaintiff and other straight male subordinates). Reported federal cases of gay male sexual harassment of other gay men are far from numerous, although they do exist. See, e.g., *Roe v. K-Mart Corp.*, No. 2:93-2372-18AJ, 1995 U.S. Dist. LEXIS 18211 (D.S.C. Mar. 28, 1995) (gay-on-gay case of male same-sex harassment actionable under Title VII). It would seem premature, however, to conclude from the dearth of reported federal cases of

formity, they are frequently the targets of sexual harassment.¹² But as *Oncale* amply demonstrates, it is fantasy to cling to the idea that harassment between or among men can be neither sexual nor sex discriminatory except when it is committed by someone with a homosexual sexual orientation.¹³

The facts of *Oncale* graphically epitomize the abusive patterns by which men dominate other men sexually in order to experience themselves socially and subjectively as possessors of manhood. Joseph Oncale's ordeal reveals that men can and do abuse other men sexually, both when they want to have sex with the men they are abusing and when they do not. Whether, in a male-on-male sexual assault, desire for sex is really not there or is instead sublimated (in deference to the precepts of male supremacy) is beside the point. Either way, men like Oncale's harassers, who self-identify as heterosexual,¹⁴ can and do interact with other men sexually when they abuse and violate those men by means that are clearly sexual. Such interactions help maintain, often in flesh against flesh, the mythic but also socially very real boundaries of "manhood."

A remarkable coalition of organizations doing grassroots work against sexual violence came together to file the *amicus* brief by Catharine A. MacKinnon that follows. The groups include: several organizations that advocate on behalf of male survivors of sexual abuse by other men, many of whose members have themselves been victims of same-sex sexual assault; nine profeminist men's organizations confronting a broad range of issues of men's violence against women (rape, battery, pornography, and prostitution); two gay and lesbian antiviolence projects, one on each coast; and two umbrella groups, the National Organization on Male Sexual Victimization and the National Coalition Against Sexual Assault.

Writing as counsel for the *amici*, MacKinnon marshalls the knowledge and experiences of the coalition members to provide a ringing affirmation of sex equality and gender justice — values

gay male-on-gay male sexual harassment that the incidence of such harassment does not present a (perhaps significant) problem.

12. See MacKinnon, *supra* note 9 at 9-19; see also, e.g., *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (gay plaintiff unmercifully harassed because of his gender nonconformity). Cf. ANDREA DWORKIN, *PORNOGRAPHY* 48-69 (1989) (arguing that "boys and men are targeted [for sexual abuse] according to their devalued position in an exclusively male hierarchy").

13. See MacKinnon, *supra* note 9 at 11, 20-21, 30-32.

14. See *supra* note 4.

that animate the *amici*'s activism and underpin their optimism about the possibilities of social change. From the coalition members' point of view, her text does several crucial things. First, it argues on behalf of male survivors of sexual abuse that "[m]en raping men is a serious and neglected social problem with deep roots in gender inequality."¹⁵ Second, it informs the Supreme Court about the deep connection between men's violence against men and men's violence against women. Third, it boldly articulates a sex-equality approach to lesbian and gay rights by affirming that being discriminated against because one is lesbian or gay is being discriminated against because of sex. And fourth, it presents a simpler, workable test for courts in this area: "if acts are sexual and hurt one sex, they are sex-based, regardless of the gender and sexual orientation of the parties."¹⁶

Oncale is a landmark in the understanding of sexual harassment as a form of sex discrimination, a feminist legal theory pioneered by MacKinnon.¹⁷ The legal premise of the case, that Joseph Oncale's treatment is sex-based, presents a significant challenge to social structures of gender hierarchy. And the facts of *Oncale* demonstrate that sexual subordination between purported social equals — gender-equals — is not harmless or nongendered simply because it happens between those of the same sex.

Organizations doing front-lines work against sexual violence understand why, apart from being legally misguided, it would be socially damaging for the Supreme Court to immunize men's sexually subordinating behavior when it is done to other men. Such a move would tacitly condone men's assaultive and sexualized humiliations of other men — often concealed within all-male preserves (such as boarding schools, street gangs, fraternities, and locker rooms) that serve as training camps for men's sexual assaults on women. Men's sexual subordination of women occurs within a culture rife with male-on-male aggression, which normalizes dominance as a touchstone of "manhood." Simultaneously, men's sexual subordination of other men derives its viscerally gendered and gendering meaning from the violence that men do to women. Allowing plaintiffs to sue under Title VII for same-sex harassment in the workplace would help expose this interactive dynamic so that it might be eliminated.

15. See MacKinnon, *supra* note 9 at 14.

16. See *id.* at 15.

17. See MacKinnon, *supra* note 3.

A number of other civil rights organizations have taken notice of *Oncale* and have told the Supreme Court what they see as the meaning of this case to the cause of civil justice.¹⁸ In addition to sharpening focus on the fight against the ideology and practice of male supremacy, *Oncale* may also open a wide lens on the struggle against social subordination generally. At this point in our nation's history, when the interconnections among hierarchies of social power — along vectors of sex (including sexual orientation), race, and class — are being explored and exposed as never before, the transformative potential of *Oncale* may prove to be profound.

18. See Brief for Lambda Legal Defense and Education Fund, *Oncale* (No. 96-568) (joined by the American Civil Liberties Union; People for the American Way; NOW Legal Defense and Education Fund; Women's Legal Defense Fund; Gay & Lesbian Advocates & Defenders; National Center for Lesbian Rights; National Women's Law Center; Connecticut Women's Education and Legal Fund, Inc.; Northwest Women's Law Center; and Bay Area Lawyers for Individual Freedom).

