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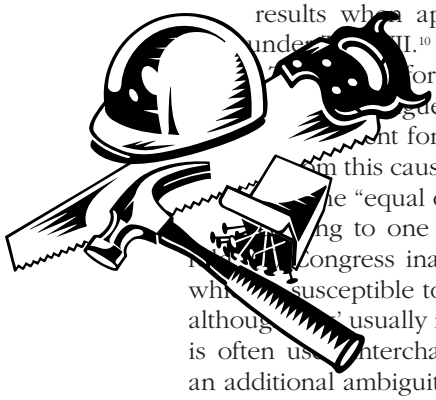
Title VII's "Equal Opportunity Harasser" Defense Produces Differing Outcomes Among the Federal Courts

Title VII of the Civil Rights Act of 1964[1] provides that it is an unlawful employment practice to discriminate "because of" an individual's sex.[2] Courts have interpreted sex discrimination to include sexual harassment[3] by requiring that sexual harassment claims satisfy the elements of a sex discrimination claim.[4] The "equal opportunity harasser" defense emerged from the "because of sex" causation requirement in a sex discrimination claim.[5] This defense allows a perpetrator who harasses both men and women to escape liability, because the victim of harassment cannot prove that the perpetrator discriminated "because of" the individual's sex.[6]

Sexual harassment is a pervasive problem that creates barriers to sexual equality in the workplace and supports a sexual hierarchy by punishing individuals who do not conform to sexual stereotypes.[7] In 2006, the Equal Employment Opportunity Commission received 12,025 sexual harassment charges, 15.4 percent of which were filed by males.[8] Because approximately 50 percent to 85 percent of females will experience some form of sexual harassment during their academic or working lives,[9] Title VII is designed to remove these barriers to sexual equality in the workplace. Even with this purpose, the courts have produced various results when applying sexual harassment law under Title VII.[10]



[illegible] for the myriad outcomes from the [illegible]gate "because of sex" causation requirement for sexual harassment cases.[11] It is from this causation requirement that the issue of the "equal opportunity harasser" arose. According to one scholar, "[t]he problem is two-fold: Congress inadequately defined 'because of' which is susceptible to a variety of meanings, and (2) although 'sex' usually means 'biological sex,' the word is often used interchangeably with 'gender' creating an additional ambiguity in the standard."[12]

In *Oncale v. Sundowner Offshore Services Inc.*, the U.S. Supreme Court modified the evidentiary standard for the "because of sex" causation element in sexual harassment cases.[13] In establishing that there is a cause of action under Title VII for same-sex harassment, the Court ascertained three types of evidence that might satisfy the "because of sex" element: (1) comparative evidence, (2) gender-specific actions or conduct, or (3) explicit or implicit proposals of sexual pursuit.[14] Even with the greater flexibility *Oncale* allows in proving the "because of sex" requirement, the federal courts are split in their analysis when faced with an "equal opportunity harasser."[15]

The U.S. Court of Appeals for the D.C. Circuit was the first court to raise the issue of the "equal opportunity harasser" in *Barnes v. Costle*.[16] In the famous footnote 55 of the decision, the court stated that demanding sexual favors from both men and women would not constitute sexual harassment because the conduct would not discriminate on the basis of sex. After the *Barnes* decision, the U.S. Court of Appeals for the Eleventh Circuit also suggested, in *Henson v. City of Dundee*, that sexual implications directed toward both men and women would equally offend both sexes and would fail under Title VII.[17]

Much later, in *Holman v. Indiana*, the U.S. Court of Appeals for the Seventh Circuit solidified the "equal opportunity harasser" defense.[18] That case involved a married couple who alleged sexual harassment by their male supervisor. Karen Holman claimed that the supervisor had stood too closely to her, asked her to sleep with him, touched her, and made sexist comments to her. Steven Holman also asserted that the same supervisor grabbed his head while asking for sexual favors, then retaliated against Holman for refusing to consent to the supervisor's demands. Affirming the district court's dismissal of the suit, the Seventh Circuit relied on *Oncale* and decided that discrimination "is to be determined on a gender-comparative basis: 'The critical issue, Title VII's text indicates, 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*."[19]

The court further held that—

> Both before and after *Oncale*, we have noted that because Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the "equal opportunity" or "bisexual" harasser, then, because such a person is not *dis-*

criminating on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).[20]

The Seventh Circuit emphasized that requiring disparate treatment for sexual harassment is consistent with Title VII's purpose of preventing discrimination.[21] The court concluded that it is Congress' duty to determine whether Title VII prohibits equal opportunity or bisexual harassment. Several courts have agreed with the conclusion in *Holman* and found that the "equal opportunity harasser" defense defeats sexual harassment claims when the perpetrator harasses both sexes.[22]

Some federal courts have allowed claims against equal opportunity harassers while still satisfying the "because of sex" causation requirement. In *Kopp v. Samaritan Health System*, the U.S. Court of Appeals for the Eighth Circuit assessed the "because of sex" element of a sexual harassment claim, even though the perpetrator had harassed both sexes.[23] The plaintiff alleged that her supervisor had harassed approximately 10 female employees; however, the employer presented evidence that the supervisor had also harassed four men and asserted that, because the supervisor assaulted everyone, he did not discriminate against women. The court found that, even though the supervisor had treated both sexes harshly, his language toward women was more serious, frequent, and sometimes resulted in physical contact. The court ruled that a factfinder could conclude that the defendant's conduct toward women was worse than his treatment of men; therefore, there was disparate treatment of the sexes.[24]

Other courts have rejected the "equal opportunity harasser" defense.[25] In *Steiner v. Showboat Operating Co.*, the U.S. Court of Appeals for the Ninth Circuit stated that evidence of a perpetrator harassing both men and women would not bar sexual harassment claims.[26] In this case, Barbara Steiner alleged that her supervisor had spoken to her in a harassing manner, using sexually offensive terms. The employer argued that Steiner's supervisor had harassed everyone and, therefore, Steiner could not prove that he had discriminated against her because of her sex. The court acknowledged that Steiner's supervisor had harassed both men and women; however, the court found that the supervisor's behavior toward women was distinguishable, because the supervisor's abuse of women was related to their gender, but his abuse toward men was not.[27]

Whether the federal courts have ruled against the "equal opportunity harasser" defense, upheld it, or acknowledged it while still allowing a factual inquiry into the specific harassment, the results of these cases are inconsistent. In *Oncale*,[28] the U.S. Supreme Court clarified the standard to prove the "because of sex" requirement, and this standard is likely to continue to develop in sexual harassment law under Title VII. **TFL**

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Endnotes

[1]42 U.S.C. §§ 2000e–2000e-17 (2000).

[2]*Id.* § 2000e-2(a)(1).

[3]*Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (finding that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex").

[4]*See generally* Elen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 352 (1990).

[5]*See* Shylah Miles, *Two Wrongs Do Not Make A Defense: Eliminating The Equal Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 606 (2001).

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