

SAME-SEX HARASSMENT: DO EITHER  
*PRICE WATERHOUSE*  
OR *ONCALE* SUPPORT THE NINTH CIRCUIT'S  
HOLDING IN *NICHOLS V. AZTECA RESTAURANT*  
*ENTERPRISES, INC.*  
THAT SAME-SEX HARASSMENT BASED ON  
FAILURE TO CONFORM TO GENDER  
STEREOTYPES IS ACTIONABLE?

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INTRODUCTION

In 2001, the Ninth Circuit of the U.S. Court of Appeals held that same-sex harassment based on gender stereotypes is actionable under Title VII. In *Nichols v. Azteca Restaurant Enterprises, Inc.*,<sup>1</sup> a male restaurant worker who was effeminate was continually harassed at work by other male workers.<sup>2</sup> When he sued under Title VII for hostile environment sexual harassment, the trial court ruled for the employer, finding that the harassment was not “because of sex” and therefore, not actionable under Title VII.<sup>3</sup> In reversing the trial court, the Ninth Circuit found that if a man is harassed for failure to conform to norms of masculinity, that harassment is “because of sex” and actionable under Title VII.<sup>4</sup> In making its holding, the Ninth Circuit also reversed part of its holding in a twenty-two year old case,<sup>5</sup> and dealt with an issue that the

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1. 256 F.3d 864 (9th Cir. 2001).
2. *Id.* at 869.
3. *Id.* at 871.
4. *Id.* at 874.
5. *Id.* at 875, *overruling in part* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

Supreme Court chose to ignore in its only opinion on same-sex harassment, *Oncale v. Sundowner Services, Inc.*<sup>6</sup>

This article argues that *Nichols*' holding, that harassment based on gender stereotyping is actionable under Title VII, although a reasonable reading of the statute, takes a major step beyond the decision reached in *Price Waterhouse v. Hopkins*<sup>7</sup> and is not, as the *Nichols*' court maintains, required by *Price Waterhouse*'s holding.<sup>8</sup> As shown below, Justice Brennan's plurality opinion in *Price Waterhouse* has no precedential authority beyond its holding and the narrowest legal grounds that support it. The principal holding of his plurality opinion has to do with the burden of proof in a mixed-motive case alleging discrimination.<sup>9</sup> In addition to the principal holding, there is a holding that the trial court was not clearly erroneous in admitting and evaluating evidence of sex stereotyping.<sup>10</sup> But the holding does not go beyond that; nothing in the opinion holds that stereotyping by itself is proof of discrimination.<sup>11</sup> Whether same-sex harassment based on gender stereotypes is actionable is also an issue that the Supreme Court calculatedly chose not to consider in its only opinion to date on same-sex harassment.<sup>12</sup> This article is divided into three parts: the first looks at the Ninth Circuit's opinion in *Nichols v. Azteca Restaurant Enterprises, Inc.*; the second reviews the U.S. Supreme Court's divided opinion in *Price Waterhouse* with respect to what kind of holding it makes, and does not make, on gender stereotypes; and the third looks at Justice Scalia's opinion for a unanimous

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6. 523 U.S. 75, 79-80 (1998).

7. 490 U.S. 228 (1989).

8. *Nichols*, 256 F.3d at 874-75. A number of law review articles have discussed the *Nichols* case: see, e.g., Matthew Fedor, Comment, *Can Price Waterhouse and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of Oncale Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455, 474-75 (2002); Jonathan A. Hardage, Commentary, *Nichols v. Azteca Restaurant Enterprises, Inc. and the Legacy of Price Waterhouse v. Hopkins: Does Title VII Prohibit "Effeminacy" Discrimination?*, 54 ALA. L. REV. 193, 214 (2002); Jaimie Leaser, Note, *The Causal Role of Sex in Sexual Harassment*, 88 CORNELL L. REV. 1750, 1751, 1761 (2003); Recent Case, *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001), 115 HARV. L. REV. 2074, 2074 (2002); Geoffrey S. Trotier, *Dude Looks Like a Lady: Protection Based on Gender Stereotyping Discrimination as Developed in Nichols v. Azteca Restaurant Enterprises*, 20 LAW & INEQ. 237, 238-41, 256-67 (2002). None of these articles seriously questions the cornerstone of the opinion, that *Price Waterhouse* overruled *DeSantis*, or even recognizes that Justice Brennan wrote a plurality opinion, which has no precedential value beyond its holding and the narrowest grounds to support it.

9. *Price Waterhouse*, 490 U.S. at 258.

10. *Id.* at 255.

11. *Id.* at 251.

12. See generally *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (holding that same-sex harassment can be actionable under Title VII, but not expressly addressing whether harassment based on gender stereotypes is "because of sex" and is actionable).

Court in *Oncale*, pointing out how he deliberately ignored the issue of same-sex harassment based on gender stereotypes, leaving it to the lower courts to deal with the issue of whether such harassment would satisfy the “because of sex” requirement of Title VII.

### I. THE NINTH CIRCUIT’S

#### *NICHOLS V. AZTECA RESTAURANT ENTERPRISES, INC.*

Title VII prohibits discrimination in the terms or conditions of employment because of race, color, religion, national origin, or sex.<sup>13</sup> While sex can have a broad range of meaning, early opinions from the Court of Appeals interpreting Title VII held that “sex” was meant by Congress to be synonymous with “gender,” and did not extend to sexual activity, gender characteristics, sexuality, transsexualism, or sexual orientation.<sup>14</sup> As the court wrote in *Ulane v. Eastern Airlines*: “The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.”<sup>15</sup>

The Ninth Circuit in *DeSantis Pacific Telephone and Telegraph Co.* actually held that discrimination against a man based on an effeminate appearance is not actionable under Title VII.<sup>16</sup> *DeSantis* is known for its principal holding, that “because of sex” in Title VII refers to gender and does not include sexual orientation.<sup>17</sup> However, *Desantis* was actually a consolidation of three cases from the district court.<sup>18</sup> In one of these cases, the plaintiff, a male nursery school teacher, alleged he was fired from his job because he had worn a small gold ear-loop to school.<sup>19</sup> He specifically contended that he was fired because of his employer’s “reliance on a stereotype — that a male should have a virile rather than an effeminate appearance” and that this reliance was a violation of Title

13. 42 U.S.C. § 2000e-2(a)(1) (2000 & West Supp. 2003).

14. See *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), *overruled in part by Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977). For examples of how Congress has repeatedly rejected legislation that would have extended Title VII to cover discrimination based on sexual orientation, see the Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994).

15. *Ulane*, 742 F.2d at 1085.

16. *DeSantis*, 608 F.2d at 332.

17. *Id.* at 329-30.

18. *Id.* at 328-29.

19. *Id.* at 328.

VII.<sup>20</sup> The majority wrote: “We . . . hold that discrimination because of effeminacy . . . does not fall within the purview of Title VII.”<sup>21</sup> The court saw this as discrimination because of the kind of man he was, not discrimination because he was a man.<sup>22</sup>

*Nichols* reversed that part of the *DeSantis* holding. In *Nichols*, the plaintiff, Antonio Sanchez, worked for almost four years, first as host and then as a food server, for Azteca, a restaurant group in the Northwest.<sup>23</sup> The Court of Appeals summarized his allegations as follows:

. . . Sanchez was subjected to a relentless campaign of insults, name-calling, and vulgarities. Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as “she” and “her.” Male co-workers mocked Sanchez for walking and carrying his serving tray “like a woman,” and taunted him in Spanish and English as, among other things, a “faggot” and a “fucking female whore.” The remarks were not stray or isolated. Rather, the abuse occurred at least once a week and often several time a day.<sup>24</sup>

Eventually, Sanchez sued Azteca, alleging that he was harassed because he was effeminate and failed to conform to a male stereotype, and that such harassment was actionable under Title VII.<sup>25</sup> The trial court ruled as a matter of law that such harassment was not “because of sex” and therefore, not actionable.<sup>26</sup> In reversing the trial court’s ruling, the Ninth Circuit expressly overruled part of its earlier holding in *DeSantis*, by stating that “to the extent [*DeSantis*] conflicts with [the Supreme Court’s decision in] *Price Waterhouse*, as we hold it does, *DeSantis* is no longer good law.”<sup>27</sup>

*Nichols* thus bases its holding — that same-sex harassment based on gender stereotypes may be a legitimate cause of action — directly on *Price Waterhouse*.<sup>28</sup> Furthermore, the cornerstone of the *Nichols*’ hold-

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20. *Id.* at 331.

21. *Id.* at 332.

22. *See id.* at 331-32 (explaining that “Congress intended Title VII’s ban on sex discrimination in employment to prevent discrimination because of gender, not because of sexual orientation or preference”).

23. *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 870 (9th Cir. 2001). Sanchez was one of three plaintiffs in the case and the only one whose case was considered in the published opinion of the court of appeals. *See id.* at 869 n.1.

24. *Id.* at 870.

25. *Id.* at 869.

26. *Id.* at 869, 871.

27. *Id.* at 875.

28. *Id.*; *see Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002).

ing is its finding that *Price Waterhouse* overrules part of *DeSantis*.<sup>29</sup> In the twelve years between *Price Waterhouse* and *Nichols*, no other court had made a holding based on this finding.

In *Price Waterhouse*, decided by the United States Supreme Court in 1989, Ann Hopkins was able to use evidence of gender stereotyping to prove that a large public accounting firm had a partnership selection process that treated women differently than men.<sup>30</sup> *Nichols* cites Justice Brennan's often quoted statement: "[I]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>31</sup> It then concludes, somewhat summarily that, "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes."<sup>32</sup> Two other circuits of the Court of Appeals have expressly recognized in dicta that same-sex harassment based on gender stereotypes is actionable under Title VII: the First Circuit in *Higgins v. New Balance Athletic Shoe*<sup>33</sup> and the Third Circuit in *Bibby v. Phila. Coca Cola Bottling Co.*<sup>34</sup> Furthermore, the Second Circuit, in *Simonton v. Runyon*,<sup>35</sup> suggested that such harassment might be actionable.<sup>36</sup> All three cases involved male plaintiffs who were harassed by other male workers because of effeminacy and homosexuality. And in all three cases, the trial court found that the discrimination alleged by the plaintiffs was not because of sex and therefore, not actionable.<sup>37</sup> In both *Higgins* and *Simonton*, the courts of appeals refused to consider whether the plaintiffs might have been able to prove harassment based on failure to conform to gen-

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29. *Nichols*, 256 F.3d at 875.

30. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232, 250 (1999); *Nichols*, 256 F.3d at 874.

31. *Nichols*, 256 F.3d at 874 (citing *Price Waterhouse*, 490 U.S. at 250).

32. *Id.*

33. 194 F.3d 252, 261 n.4 (1st Cir. 1999) (finding that "[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity") (internal citations omitted).

34. 260 F.3d 257, 264 (3d Cir. 2001) (outlining the different ways to make out a claim for same-sex sexual harassment).

35. 232 F.3d 33 (2d Cir. 2000).

36. *Id.* at 37 (arguing that the chain of inference applied in male-female sexual harassment cases "would be available to a plaintiff alleging same sex harassment").

37. See *Higgins*, 194 F.3d at 257, 258 (affirming the district court's rejection of Higgins' claim because he failed to show harassment was because of sex); *Simonton*, 232 F.3d at 34 (agreeing with the lower court's ruling that "Title VII does not prohibit discrimination based on sexual orientation."); *Bibby*, 260 F.3d at 261 (noting that Congress explicitly refused to extend Title VII to encompass discrimination on the basis of sexual orientation and therefore, "Bibby can see relief under Title VII only for discrimination because of sex").

der stereotypes because the issue had not been raised at the trial court level, but discussed whether such a claim would, as a general matter, be actionable.<sup>38</sup> In *Bibby*, the court found that although such a claim would be actionable, the plaintiff had not provided evidence to support it.<sup>39</sup> All three cite the Supreme Court's 1989 opinion in *Price Waterhouse* as authority for the proposition that such a claim is (or could be) actionable.<sup>40</sup> But, as will be argued below, the only holding in *Price Waterhouse* on gender stereotypes is that the trial court was not clearly erroneous in admitting evidence of stereotyping as part of the evidence to prove discrimination.<sup>41</sup>

## II. *PRICE WATERHOUSE*: WHAT IS ITS HOLDING ON GENDER STEREOTYPING?

*Price Waterhouse* provides limited guidance on whether same-sex harassment based on failure to conform to gender stereotypes is actionable. First, the issue in the case was whether there was in fact discrimination, not whether there was discrimination "because of sex."<sup>42</sup> Evidence of sex stereotyping in *Price Waterhouse* was used to show both general hostility to women as partners in the firm and a partnership selection process that treated female senior managers less favorably than men.<sup>43</sup> What Hopkins alleged — general hostility to one gender over the other, and differential, less favorable treatment of one gender — are the essence of discrimination because of sex.<sup>44</sup> Second, *Price Waterhouse* is

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38. See *Higgins*, 194 F.3d at 259-61 (explaining that *Oncale* establishes that "the standards of liability under Title VII . . . apply to same-sex plaintiffs just as they do to opposite-sex plaintiffs"). *Id.* at 261 n.4; *Simonton*, 232 F.3d at 38 (explicitly stating that, "[w]e do not reach the merits of the issue"). In *Simonton*, the court later revised its original published version of the opinion, which stated that "[t]he same theory of sexual stereotyping [applied in *Price Waterhouse*] could apply here [to the same-sex context]," to remove any implication that it approved this theory. *Simonton v. Runyon*, 225 F.3d 122, 127 (2d Cir. 2000). The revised version states that "Simonton argues that the same theory of sexual stereotyping [that applied in *Price Waterhouse*] could apply here." *Simonton*, 232 F.3d at 37.

39. 260 F.3d at 264.

40. See *Higgins*, 194 F.3d at 259, 261 n.4; *Simonton*, 232 F.3d at 38; *Bibby*, 260 F.3d at 263.

41. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1988).

42. See *id.* at 232. References to *Price Waterhouse* are to the U.S. Supreme Court opinion. References to the opinion of the U.S. Court of Appeals (*Price Waterhouse v. Hopkins*, 825 F.2d 458 (D.C. Cir. 1987)) or the opinion of the district court (*Price Waterhouse v. Hopkins*, 618 F. Supp. 1109 (D.C.D.C. 1985)) will so specify.

43. *Price Waterhouse*, 490 U.S. at 236-37.

44. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (noting that the text of Title VII dictates that, "the critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not ex-

the opinion of a divided court.<sup>45</sup> Only four justices joined in the plurality opinion, which has no precedential value beyond its holding and the narrowest legal grounds to support that holding.<sup>46</sup> If there is any holding on sex stereotyping in an opinion principally concerned with the burden of proof in a mixed-motive case alleging discrimination, it is about the admissibility of evidence of sex stereotyping to prove discrimination, not about sex stereotyping as a form of discrimination.<sup>47</sup>

*Ann Hopkins' Case Against Price Waterhouse: Evidence Of  
Sex Stereotyping And The Findings Of The Trial Court*

In 1984, alleging sex discrimination in violation of Title VII, Ann Hopkins sued her employer, Price Waterhouse, a national accounting and consulting firm, when it refused to accept her into the partnership.<sup>48</sup> She presented her case at a four and half day bench trial before the U.S. District Court for the District of Columbia, offering three kinds of evidence with respect to sex stereotyping. First, she had evidence that she herself had been a victim of sex stereotyping. Partners had described her as “macho,” “a lady using foul language,” “a tough-talking somewhat masculine hard-nosed manager,” and in need of “a course in charm school.”<sup>49</sup> The partner sponsoring Hopkins as a candidate for partner, informed her, after her candidacy was initially postponed, that she would fare better in the process if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>50</sup> Secondly, Hopkins presented evidence that partners in the firm routinely judged women unfavorably because of sex

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posed”) (internal citations omitted).

45. *Price Waterhouse*, 490 U.S. at 231.

46. See discussion *infra* Section III.

47. *Contra* Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 874 (9th Cir. 2001) (“*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes.”); Stephen J. Nathans, Comment, *Twelve Years after Price Waterhouse and Still No Success for “Hopkins in Drag”: The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 VILL. L. REV. 713, 713 (2001) (“In 1989, the United States Supreme Court held that Price Waterhouse’s refusal to promote Ann Hopkins to partnership status because she did not conform to its stereotypical notions of how a woman should look or act, was a violation of Title VII’s ban on sex discrimination in employment.”). These are both examples of a widespread misperception of the *Price Waterhouse* case. The only holding in *Price Waterhouse* on sex stereotyping is that the trial court was not clearly erroneous in admitting evidence of sex stereotypes in an attempt to prove discrimination and in its finding that there was discrimination. See *Price Waterhouse*, 490 U.S. at 251.

48. *Price Waterhouse*, 490 U.S. at 231-36 (summarizing the facts of the case).

49. *Id.* at 235.

50. *Id.*

stereotyping. She was able to show that in the past some partners actually commented that women should not be made partners. One partner “repeatedly commented that he could not consider any women seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers.”<sup>51</sup> And finally, she had an expert witness, Dr. Susan Fiske, who was a professor of social psychology from Carnegie Mellon, testify that in her opinion “the partnership selection process . . . was likely influenced by sex stereotyping.”<sup>52</sup> According to her findings, gender-neutral remarks, as well as sex-based comments, constituted sex-stereotyping. As she explained: “One partner, for example, baldly stated that Hopkins was ‘universally disliked’ by staff . . . and another described her as consistently annoying and irritating’; yet these were people that had little contact with Hopkins.”<sup>53</sup> Dr. Fiske believed that such strong opinions by those who had little contact with Hopkins were based on stereotypical ideas about what women should be like.<sup>54</sup>

According to the district court judge, Hopkins made three separate interrelated arguments in support of her claim that Price Waterhouse’s decision not to make her partner was discriminatory.<sup>55</sup> First she argued that Price Waterhouse’s claim, that Hopkins was not made partner because of deficiencies in interpersonal skills, was a pretext and that the company had in fact fabricated those criticisms.<sup>56</sup> Second, she argued that even if she had been deficient in certain areas of interpersonal relations, Price Waterhouse would have made a man partner even with these deficiencies, had he been strong in other key areas like she was.<sup>57</sup> Lastly, Hopkins argued that the criticism of her interpersonal skills was the result of the male partners’ sexual stereotypes of women, and that the partnership selection process used by Price Waterhouse improperly gave weight to comments based on sexual stereotypes.<sup>58</sup> The district court judge only agreed with the third of these arguments — that the partnership selection process was discriminatory because of the way that sex stereotyping influenced how female candidates were judged.<sup>59</sup>

The district court found that it was clear Ann Hopkins had problems getting along with staff, and that she had been unable to prove that

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51. *Id.* at 236.

52. *Id.* at 235.

53. *Id.* (internal citations omitted).

54. *See id.* at 235-36.

55. *Price Waterhouse v. Hopkins*, 618 F. Supp. 1109, 1113 (D.C. 1985).

56. *Id.*

57. *Id.*

58. *Id.* at 1113-14.

59. *See id.* at 1114-1119.

Price Waterhouse had discriminated against her as an individual.<sup>60</sup> But the judge agreed that even if Hopkins had not proved that she was denied partnership status for discriminatory reasons, she had proved the partnership selection process at Price Waterhouse was tainted by gender stereotyping, and, as a result, Hopkins had been evaluated differently than male candidates.<sup>61</sup> Hopkins argued that the partners who criticized her interpersonal skills were heavily influenced by sexual stereotyping,<sup>62</sup> and that the selection process itself was discriminatory because any partner could make comments, and all comments, regardless of whether or not they were based on stereotypes or were discriminatory, were considered by the committees making the decisions.<sup>63</sup>

Thus, the trial court's judgment in the case was complex. On the one hand, it found that Hopkins had not been able to prove that she personally had been discriminated against: "The contemporaneous records generated by the partnership selection procedure demonstrate that Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself."<sup>64</sup> But on the other hand, it did find that Hopkins succeeded in proving that the process Price Waterhouse used to evaluate her as a candidate for partnership was tainted by sex stereotyping and that it treated women differently than men.<sup>65</sup>

The judgment thus makes a subtle distinction, by holding that even though Hopkins was unable to prove that she suffered from discrimination directed at her, she was able to prove that the review process used by the firm was in itself discriminatory, that Price Waterhouse knew that it was, and that they were legally obligated to do something about it. The court of appeals accurately summarized the trial court's findings that:

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60. *Id.* at 1114-16.

61. *Id.* at 1120.

62. *Id.* at 1118.

63. *Id.*

64. *Id.* at 1115.

65. *Id.* at 1120. The court wrote:

Discriminatory stereotyping of females was permitted to play a part [in the partnership selection process]. Comments influenced by sex stereotypes were made by partners; the firm's evaluation process gave substantial weight to these comments; and the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations.

While these three factors might have been innocent alone, they combined to produce discrimination in the case of the plaintiff.

*Id.* Because of this, the court determined that the Board's conduct violated Title VII. *Id.*

Price Waterhouse had discriminated against Hopkins by filtering her partnership candidacy through a system that gave great weight to negative comments and recommendations, despite evidence that these comments reflected unconscious sexual stereotyping by male evaluators based on outmoded attitudes toward women . . . Price Waterhouse took no steps to discourage sexism, to heighten the sensitivity of partners to sexist attitudes, or to investigate negative comments to ascertain whether they were the product of such attitudes.<sup>66</sup>

*The Limited Precedential Value of the U.S Supreme Court's  
Plurality Opinion*

Hopkins' case ultimately went up to the Supreme Court,<sup>67</sup> whose principal concern was whether, and how, an employer could avoid liability in a so-called mixed motive case under Title VII, where a plaintiff has proven that an illegitimate factor such as sex entered into an employment decision, but the employer was also able to show legitimate reasons for the decision.<sup>68</sup> The Court held that the employer could avoid liability if it could prove, by a preponderance of the evidence, that the same decision about the plaintiff's employment would have been made absent the impermissible motive.<sup>69</sup> But there was serious disagreement within the Court: six of the justices concurred in the judgment, but only three other justices joined with Justice Brennan in his plurality opinion,<sup>70</sup> and three justices dissented.<sup>71</sup> Justices White and O'Connor each wrote separate opinions, concurring only in the judgment of the plurality opinion.<sup>72</sup> Interestingly, the principal issue in the case later became moot when Congress, dissatisfied with the Court's holding, passed the Civil Rights Act of 1991, which makes a defendant with a discriminatory motive liable even with proof that absent that motive, the same action would have been taken.<sup>73</sup>

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66. Price Waterhouse v. Hopkins, 825 F.2d 458, 464 (D.C. Cir. 1987).

67. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

68. *Id.* at 232.

69. *Id.* at 258.

70. Justices Marshall, Blackmun and Stevens joined in Justice Brennan's plurality opinion. *Id.* at 231.

71. Justice Kennedy wrote the dissent, joined by Chief Justice Rehnquist and Justice Scalia. *Id.* at 279.

72. *Id.* at 258, 261.

73. 42 U.S.C. §§ 2000e-2(m), 5(g)(2)(B) (2000 & West Supp. 2003).

It is important at the outset to recognize the limited precedential value of a plurality opinion. Ken Kimura defines a plurality opinion as follows:

A minimum of three opinions, none with the support of more than four Justices, combine to form a plurality decision. The lead opinion . . . announces the outcome that a numerical majority of Justices supported, and articulates one of several competing legal rules. Concurring opinions . . . articulate alternative legal rules that independently justify the outcome announced by the lead opinion. Often, a dissenting opinion . . . exists, which rejects the outcome that both the lead and concurring opinion adopted, and articulates yet another alternative legal rule.<sup>74</sup>

Igor Kirman articulates that there are two types of concurring opinions, “those in which the author joins the majority opinion, and those in which the author does not,” but rather, simply joins the judgment articulated in the opinion of the Court.<sup>75</sup>

In *Price Waterhouse*, Justices White and O’Connor joined only in the judgment of the plurality opinion.<sup>76</sup> As Kirman notes, “[a] concurrence in judgment [alone] . . . represents a dissent from the opinion’s legal rationale and is not considered a part of the majority opinion.”<sup>77</sup> Kimura also states that, “[a]ny legal rule articulated in a plurality decision that is not a majority rule has been implicitly or explicitly rejected by a majority of the court.”<sup>78</sup>

Of plurality opinions, one commentator, quoted with approval by the Third Circuit of the Court of Appeals, has observed:

Traditionally, of course, the Court’s primary function has been that of a tribunal whose institutional pronouncements guide and bind the process of adjudication both in the state courts and in the lower federal courts. In that context a plurality opinion is not, strictly speaking, an opinion of the Court as an institution; it represents nothing more than the views of the individual justices who join in the opinion. A plurality opinion does not, therefore, essentially differ in character from either a concurring opinion or a dissenting opinion. Those joining in a plural-

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74. Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1595 (1992).

75. Igor Kirman, Note, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2088-89 (1995).

76. *Price Waterhouse*, 490 U.S. at 258, 261.

77. Kirman, *supra* note 75, at 2089.

78. Kimura, *supra* note 74, at 1596-97.

ity opinion may speak with authority accorded wise men, but their voices do not carry the authority of the Supreme Court as an institution.<sup>79</sup>

This argument follows the Supreme Court's assessment, as expressed in *Marks v. United States*<sup>80</sup> that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concur in the judgment on the narrowest grounds.'"<sup>81</sup>

The principal holding in Justice Brennan's plurality opinion concerns the burden of proof for an employer in a mixed motive case. Again, the holding of the Court — that in a mixed motive case an employer could avoid liability if it could prove by a preponderance of the evidence that the same decision would have been reached absent the impermissible motive — has been nullified by statute.<sup>82</sup> Implicit in the judgment on the burden of proof in a mixed motive case was a finding that the court of appeals was correct in its determination that the district court had evidence to make a finding of discrimination and that it had not erred in allowing Ann Hopkins to introduce evidence of sex stereotyping. Justice Brennan wrote:

The District Court found that sex stereotyping "was permitted to play a part" in the evaluation of Hopkins as a candidate for partnership [citation omitted]. Price Waterhouse disputes both that stereotyping occurred and that it played any part in the decision to place Hopkins' candidacy on hold. In the firm's view, in other words, the District Court's factual conclusions are clearly erroneous. We do not agree.<sup>83</sup>

It is hard to see how *Price Waterhouse*'s precedential authority on sex stereotyping goes beyond that. The five Justices in the plurality, only four of whom concurred in Justice Brennan's opinion, agreed to nothing beyond that statement that the trial court was not clearly erroneous in admitting the evidence of sex stereotyping and in finding Price Waterhouse's partnership selection process discriminatory.

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79. *Rappa v. New Castle County*, 18 F.3d 1043, 1058 n.21 (3d Cir. 1994) (quoting John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 61 (1974)).

80. 430 U.S. 188 (1977).

81. *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ)).

82. *See supra* note 73 and accompanying text.

83. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255 (1988).

*Justice Brennan's Comments On Sex Stereotyping, Which Have  
No Precedential Value, Are Commonly Misrepresented*

Not only does Justice Brennan's plurality opinion have no precedential value beyond its holding and the narrowest legal grounds which support that holding, but his comments themselves are commonly misrepresented. All of Justice Brennan's remarks on sex stereotyping are in the context of a woman being treated less favorably than similarly situated men. Most of the misrepresentation of *Price Waterhouse* is based on one section of Justice Brennan's plurality opinion, which has been quoted out of context:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>84</sup>

Additionally, he states that, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>85</sup> While Justice Brennan makes a strong statement about stereotyping, the operative words are "evaluate," "disparate treatment," and "acts." The stereotypes go to prove an act, that a woman was evaluated and treated differently than a man. But Brennan immediately clarifies his point that even this particular stereotype is merely evidence of discrimination, not discriminatory in itself:

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on . . . gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.<sup>86</sup>

In addition to Justice Brennan's plurality opinion, sex stereotyping is addressed in two other places in *Price Waterhouse*: in Justice O'Connor's concurring opinion and in Justice Kennedy's dissenting

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84. *Id.* at 251 (citations omitted).

85. *Id.* at 250.

86. *Id.* at 251 (emphasis in original).

opinion. Justice O'Connor is concerned with the way evidence of sex stereotyping bears on proof of discrimination:

At this point Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision. It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership *bid*.<sup>87</sup>

Justice Kennedy's concern, as with much of his dissent, is in spelling out just what the majority of the Court agreed to. The district court based its finding of liability for Price Waterhouse on the firm's use of a partner selection process that it knew was tainted by sex stereotyping, without making any effort to discount the stereotypes or to educate partners on the dangers of unconscious sex stereotyping.<sup>88</sup> Kennedy reminds us that the majority is not making sex stereotypes themselves actionable, nor are they establishing a general affirmative duty for employers:

I think it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decision-makers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm. Our cases do not support the suggestion that failure to "disclaim reliance" on stereotypical comments itself violates Title VII. Neither do they support creation of a "duty to sensitize."<sup>89</sup>

It is worth noting again that in Hopkins' case against Price Waterhouse, even with all the evidence of gender stereotyping she was able to marshal, the trial court found that Hopkins had failed to prove that she personally had been treated differently in the partnership selection process because of her gender.<sup>90</sup> Price Waterhouse's liability was based on the partnership selection process itself — the court found that Price

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87. *Id.* at 272-73 (emphasis in original).

88. *Id.* at 293-94.

89. *Id.* at 294.

90. *See* Price Waterhouse v. Hopkins, 618 F. Supp 1109, 1115 (D.C. 1985).

Waterhouse knew its partnership selection process was tainted with gender stereotyping, and yet had done nothing to eliminate or to discount the gender stereotyping.<sup>91</sup>

### III. *ONCALE* AND GENDER STEREOTYPING

Although the U.S. Supreme Court has addressed same-sex harassment in *Oncale v. Sundowner Offshore Services*, *Nichols* makes no reference to *Oncale*'s analysis of Title VII's "because of sex" requirement in same-sex harassment, and the omission is understandable. *Oncale* made two contributions to the jurisprudence interpreting Title VII. First and foremost, it resolved a conflict in the circuits over whether same-sex harassment could ever be actionable under Title VII, by establishing that Title VII does provide a cause of action for same-sex hostile environment sexual harassment.<sup>92</sup> Secondly, Justice Scalia, having established that same-sex harassment may be actionable, proceeds to consider when it would be actionable; that is, when same-sex harassment would be "because of sex."<sup>93</sup> His discussion is noteworthy because its succinct analysis raises more questions than it answers. *Oncale* tells us surprisingly little about same-sex harassment. As one commentator notes:

*Oncale* is in many respects an enigma. In an effort to give a conclusive answer to a case that, by all appearances, he would have preferred not to have had to consider, Justice Scalia skirted the "what," the "how" and the "why" of sexual harassment. He declined to discuss all but the most basic outline of the facts, offered no theory of the wrong that purports to explain why same-sex cases should be included in Title VII's ambit, and provided only a few hints as to how decision making in these cases should occur.<sup>94</sup>

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91. See *supra* note 66 and accompanying text.

92. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).

93. *Id.* at 80-81. The elements of a complaint under Title VII for hostile environment sexual harassment are: (1) words, actions, or conduct, sexual or not (2) that are severe or pervasive (3) and that are discriminatory because of sex (4) and that alter the work environment, subjectively and objectively. See *id.* at 81. This statutory requirement of "because of sex" has concerned all the courts that have considered same-sex harassment. For Joseph Oncale, once it is accepted that same-sex harassment can be actionable, "because of sex" becomes the key issue in determining whether his complaint is actionable. See *id.* at 80.

94. Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1258 (1998).

*The Resolved Issue: Same-Sex Harassment is Actionable under Title VII*

When the U.S. Supreme Court agreed to review *Oncale*, the circuits were divided on whether same-sex harassment could ever be actionable under Title VII. The Fifth Circuit held that such harassment could never be actionable, and denied Joseph Oncale's claim against his employer on that basis.<sup>95</sup> Other circuits, according to Justice Scalia, held such claims actionable only if the petitioner could prove the harasser is homosexual.<sup>96</sup> And Scalia, in his *Oncale* opinion, cites *Doe v. Belleville*<sup>97</sup> for the proposition that harassment that is sexual is "always actionable, regardless of the harasser's sex, sexual orientation, or motivations."<sup>98</sup> Whatever else might be said about the *Oncale* opinion, it does resolve this issue: *Oncale* makes clear that same-sex harassment can be actionable under Title VII.<sup>99</sup>

If hostile environment sexual harassment is a form of discrimination because of sex under Title VII — and the two earlier Supreme Court opinions *Meritor Savings Bank v. Vinson*<sup>100</sup> and *Harris v. Forklift Systems*<sup>101</sup> hold it is — Justice Scalia's recognition of same-sex harassment

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95. *Oncale*, 523 U.S. at 77.

96. *Id.* at 79 (comparing *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that plaintiff cannot make out a claim for hostile work environment where "both the alleged harassers and the victim are heterosexuals of the same sex") with *Wrightson v. Pizza Hut of America*, 99 F.3d 138, 143 (4th Cir. 1997) (holding that "a same-sex 'hostile work environment' claim may lie under Title VII where a homosexual male (or female) employer discriminates against an employee of the same sex"))).

97. 119 F.3d 563 (7th Cir. 1997).

98. *Oncale*, 523 U.S. at 79.

99. *See id.* at 80.

100. 477 U.S. 57 (1986). In *Meritor Savings Bank*, the Supreme Court, in an opinion written by Justice Rehnquist, held that hostile environment sexual harassment was actionable under Title VII. The Court found that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* at 64 (citations omitted). The holding is based on the Court's sense of Congress' sweeping intent under Title VII, the 1980 guidelines of the EEOC, and the harassment cases that began with a 1971 decision by the Fifth Circuit. *See id.* at 65-66 (citing and discussing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)). The only real guidelines on actionable sexual harassment given in the opinion are that the harassment must be unwelcome and "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (citation omitted).

101. 510 U.S. 17 (1993). Justice O'Connor discussed whether harassment, in order to be actionable, "must 'seriously affect [an employee's] psychological well being' or lead the plaintiff to 'suffer injury.'" *Id.* at 20. The standard, as spelled out in her opinion, "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* at 21. She then goes on to cite the decision in *Meritor*, to support her conclusion that:

follows simply from these earlier cases. There is nothing in the language of Title VII that limits its application to a harasser of a different sex than the harassed. The statute simply reads “because of . . . sex.” Scalia writes:

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. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. 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.<sup>102</sup>

*Oncale*, then, resolved a major issue dividing the circuits: same-sex harassment can be actionable under Title VII. But the next issue is deciding when such harassment is actionable, and specifically whether Joseph Oncale had alleged facts to support a claim. Whether he did or not depends, of course, on how Scalia interprets the “because of sex” requirement of Title VII. Here, the *Oncale* opinion is far from satisfactory. Scalia seems to be attempting to have it both ways. He gives an abbreviated, one-paragraph analysis of the “because of sex” requirement, one that all members of the Court could join in.<sup>103</sup> At the same time, he vacates the judgment in Joseph Oncale’s case, remanding it to the Fifth Circuit, even though under Scalia’s analysis, there seems to be no way for Joseph Oncale to prevail. Four days after *Oncale*, the Supreme Court remanded another same-sex harassment case, *Belleville v. Doe*<sup>104</sup> from the Seventh Circuit, ordering reconsideration in light of *Oncale*.<sup>105</sup>

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[a] “mere utterance of an . . . epithet which engenders offensive feelings in an employee,” does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview.

*Id.* (citation omitted).

102. *Oncale*, 523 U.S. at 79-80.

103. *See id.* at 80.

104. 523 U.S. 1001 (1998).

105. *Id.*

While both cases settled before reconsideration,<sup>106</sup> it is hard to see how *Oncale* would have provided very clear guidance to the lower courts.

*The Difficult Issue: When is Same-Sex Harassment “Because of Sex” and Therefore Actionable?*

The problem with *Oncale* is Justice Scalia’s analysis of when in fact same-sex harassment would be “because of sex” and therefore, actionable. Although this issue divided the circuits, Scalia’s treatment suggests an attempt to avoid any direct confrontation with, or resolution of, the controversy. Presumably he did so to achieve unanimity of the Court.

What is the evidence that Justice Scalia was trying to have it both ways? First, there is an unusual, somewhat cryptic, one-sentence concurrence by Justice Thomas, appended to the otherwise unanimous opinion. Justice Thomas writes: “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.’<sup>107</sup> The sentence suggests that Thomas concurred reluctantly, and that the Court, while unanimous that actionable same-sex harassment had to be “because of sex,” was not in complete agreement on the exact meaning of this phrase. In addition to Thomas’ concurrence, several aspects of *Oncale* strongly suggest that Scalia, wanting the eight other justices to join in his opinion, deliberately avoided speaking out on the issues that divided the circuits. These aspects are: (1) Scalia’s widely noted disinterest in the facts of Joseph Oncale’s case; (2) his actual analysis, one paragraph on an issue that had divided the circuits and continues to divide them; (3) his misrepresentation of the Seventh Circuit’s holding in *City of Belleville v. Doe*; and finally, perhaps most significant, (4) the fact that in the context of the court of appeals’ opinions surrounding *Oncale*, there seems to be no basis for the remand of *Oncale* and *Belleville*. The following addresses each of these aspects of the opinion.

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106. See *Bibby v. Phila. Coca Cola Bottling Co*, 260 F.3d 257, 263 n.5 (3d Cir. 2001), cert. denied, 534 U.S. 1155 (2002); 6 CONN. EMP. L. LETTER, Dec. 1998, at 6.

107. *Oncale*, 523 U.S. at 82.

### 1. Scalia's Lack Of Interest In The Facts Of The Case

First of all, there is Scalia's surprising, and noteworthy, disinterest in the facts of the case. He writes of the facts: "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."<sup>108</sup> The facts, however, would seem essential to an understanding of how the law is applied here, particularly under such novel circumstances. The author of a note in the Harvard Law Review, gathering the facts from a number of sources, summarizes them as follows:

Joseph Oncale, a married father of two, began working for Sundowner as a roustabout on an oil rig in the Gulf of Louisiana in August 1991. Oncale alleges that John Lyons, a crane operator and direct supervisor of the crew's roustabouts, began a pattern of verbal assault early in Oncale's employment; typically, these assaults consisted of threats of forcible sex. On October 25, 1991, driller Danny Phippen allegedly forced Oncale to his knees while Lyons placed his penis on the back of Oncale's head, in full view of many of the crewmen, and threatened to have sex with him. The next morning, floor hand Brandon Johnson restrained Oncale while Lyons placed his penis on Oncale's arm and again threatened to rape him. That night, as Oncale was showering, Phippen allegedly held Oncale while Lyons forced a bar of soap into his anus. Oncale's complaints to supervisors did not improve working conditions; in fact, they seem to have provoked more threats from Lyons. On November 10, 1991, Oncale quit, claiming "sexual harassment and verbal abuse."<sup>109</sup>

Scalia confines himself to this brief summary of the facts:

On several occasions, Oncale was forcibly subjected to sex-related humiliating actions against him by Lyons, Phippen and Johnson in the presence of the rest of the crew. Phippen and Lyons also physically assaulted Oncale in a sexual manner, and Lyons threatened him with rape. . . . When asked at his deposition why he left Sundowner, Oncale

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108. *Id.* at 76-77.

109. *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 325, 327 (1998) (citing *Morning Edition* (NPR radio broadcast, Mar. 5, 1998); *Oncale v. Sundowner Offshore Services*, 83 F.3d 118 (5th Cir. 1996); Brief for Petitioner at 4 n.2, *Oncale v. Sundowner Offshore Services*, 118 S.Ct. 998 (1998) (No. 96-568); Respondents' Brief at 2-3, *Oncale* (No. 96-568); and Brief of National Organization on Male Sexual Victimization, Inc. et al. at 2, *Oncale* (No. 96-568)).

stated “I felt that if I didn’t leave my job, I would be raped or forced to have sex.”<sup>110</sup>

## 2. The Analysis Itself

*Oncale* can be seen as belonging to a trio of cases, *Belleville* and *McWilliams v. Fairfax County Board of Supervisors* being the other two. In all three cases, there was egregious harassment of men by other men in an all male working environment. In all three cases, the harassers allegedly performed criminal sexual acts on the harassees. But in each of these cases, the different circuits reached different results. With *Oncale*, the Fifth Circuit held that same-sex harassment could never be actionable.<sup>111</sup> In *McWilliams*, the Fourth Circuit held that same-sex harassment of the type suffered by the plaintiff would only be actionable if the plaintiff could prove, beyond the sexual nature of the harassment itself, that the harassers were homosexual.<sup>112</sup> And the Seventh Circuit in *Belleville*, while arguing that the explicitly sexual nature of the harassment probably made it actionable, relied instead on the fact that the harassment was based on gender stereotypes and therefore, discriminated “because of sex.”<sup>113</sup>

Where does Scalia stand in this controversy? Well, he expressly overrules the Fifth Circuit, holding same-sex harassment can be actionable under Title VII.<sup>114</sup> But he actually misrepresents the holding in *Belleville*, writing that *Belleville* suggests that any explicitly sexual harassment would be because of sex,<sup>115</sup> which is true, but is not on what the court based its holding. *Belleville*, as discussed below, based its holding on gender stereotyping.<sup>116</sup> And Scalia seems to agree with the holding in *McWilliams*,<sup>117</sup> even though if it is accepted, there seems no basis for the remand of *Oncale*. His approach is minimalist. He summarizes his position succinctly and tightly, making almost no direct reference to how he does or does not align himself with the various positions of the different

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110. *Oncale*, 523 U.S. at 77 (internal citations omitted).

111. *See id.*

112. *See McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996).

113. *See Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997).

114. *Oncale*, 523 U.S. at 82.

115. *Id.* at 79.

116. *Belleville*, 119 F.3d at 581.

117. *Oncale*, 523 U.S. at 79-81.

circuits.<sup>118</sup> The result is a lack of consensus on what exactly *Oncale* stands for.

In *Belleville*, the Seventh Circuit of the U.S. Court of Appeals devoted over twenty pages to an analysis of the issue of when same-sex harassment would be “because of sex” and therefore, actionable.<sup>119</sup> Justice Scalia devotes one paragraph to the issue.<sup>120</sup> He begins with a general principle taken from Justice Ginsberg’s concurrence in *Harris* that, “[t]he 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.”<sup>121</sup> He then explains three ways of meeting the “because of sex” requirement, although he also notes there could possibly be other ways:

1) The “sexual desire” route: “Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.”<sup>122</sup>

2) Hostility to the gender: “But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”<sup>123</sup>

3) Different treatment: “A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”<sup>124</sup>

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118. *Id.* at 79-82.

119. *See Belleville*, 119 F.3d at 574-95.

120. *Oncale*, 523 U.S. at 80.

121. *Id.* (citations omitted).

122. *Id.*

123. *Id.*

124. *Id.* at 80-81 (emphasis added).

This analysis, which was meant to guide all lower courts, and specifically the Fifth and Seventh Circuits that will reconsider *Oncale* and *Belleville*, is problematic because it focuses on a class of people, not individuals. If there are thirty female employees in an office, and a male harasses one of the women, courts have never had any trouble finding an actionable complaint, although in fact the harassment is personal to only one employee. The members of one sex are not being exposed to disadvantage; one member of that sex is. As one commentator noted: “Nothing in the statute’s wording indicates whether ‘discriminate’ refers only to the disparate treatment of men and women, or whether it also applies to one particular person singled out for unequal treatment.”<sup>125</sup> But even more problematic than Scalia’s general approach is his skeletal analysis.

Without more, none of these three evidential routes have any bearing on stereotypes in themselves. Ann Hopkins, of course, used evidence of sex stereotyping to show general hostility to women as managers or partners — Scalia’s second route<sup>126</sup> — and to argue that she was treated differently coming up for partnership evaluation than she would have been, had she been a man — Scalia’s third route.<sup>127</sup> However, it was not the stereotypes, but rather the discrimination they evidenced — general hostility to women managers, women being treated differently than men in the partnership evaluation process — that was actionable under Title VII.

Furthermore, Justice Scalia’s analysis seems to provide no basis for the remand of *Oncale* and *Belleville*. An opinion from the Ninth Circuit of the U.S. Court of Appeals, *Rene v. MGM Grand Hotel, Inc.*,<sup>128</sup> describes *Oncale* as essentially an advisory opinion on the issue of whether same-sex harassment could ever be actionable: “Thus, the Supreme Court in *Oncale* did not hold that the harassment alleged by the plaintiff in that case was actionable under Title VII. The Court, rather, simply rejected the Fifth Circuit’s holding that same-sex harassment could never be actionable under Title VII.”<sup>129</sup> But the dissenting justice in the case noted that the Court cannot simply ignore the actual facts of a case: “Although the majority contends that the facts of *Oncale* are essentially irrelevant to the narrow question presented on certiorari, the Supreme Court was not making an advisory decision. If the facts of *Oncale* did not potentially support a case of sex discrimination, there would have

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125. *Leading Cases*, *supra* note 109, at 329.

126. *See supra* note 123 and accompanying text.

127. *See supra* note 124 and accompanying text.

128. 243 F.3d 1206 (9th Cir. 2001), *different result on reh’g*, 305 F.3d 1061 (9th Cir. 2002).

129. *Rene*, 243 F.3d at 1208 (emphasis in original).

been no basis for a remand to the lower courts.”<sup>130</sup> Both the majority and dissent in *Rene* are correct: as the dissent points out, our jurisprudence does not provide for the remand of a case when the original judgment is correct;<sup>131</sup> but as the majority implies, in *Oncale*, Justice Scalia in effect did just that.<sup>132</sup>

Joseph Oncale settled his suit with Sundowner Services on October 21, 1998, seventh months after the Supreme Court’s decision, and five days before his jury trial was to begin. The City of Belleville also settled with the Does before there was a decision on remand.<sup>133</sup>

### 3. Calculated Omission: Justice Scalia and *Doe v. Belleville*

Justice Scalia’s failure to discuss same-sex harassment based on gender stereotyping in the *Oncale* opinion was calculated. This is clear from his handling of *Doe v. Belleville*.<sup>134</sup> *Belleville* is one of the few cases he refers to in his analysis in *Oncale*. In addition, four days after the Court issued *Oncale*, it vacated the judgment in *Belleville*, remanding the case to the Seventh Circuit for reconsideration in light of *Oncale*.<sup>135</sup> Given their proximity in time and subject matter, *Belleville* had to have been part of the Court’s internal discussion.

Because Scalia’s handling of *Belleville* is so odd, the case requires some discussion. The plaintiffs were two brothers egregiously harassed by sexual comments and remarks; one brother was actually sexually assaulted and threatened with rape. The Seventh Circuit reversed the trial court’s holding that, as a matter of law, the harassment was not “because of sex” and therefore, not actionable.<sup>136</sup> The appellate court pointed out that harassment based on such sexual acts would probably satisfy the “because of sex” requirement of Title VII, but declined to base its holding on that theory, noting that:

Again we have difficulty imagining when harassment of this kind would *not* be, in some measure, “because of” the harassee’s sex – when one’s genitals are grabbed, when one is denigrated in gender-specific language, and when one is threatened with sexual assault, it would seem

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130. *Id.* at 1210-11.

131. *See id.*

132. *See id.* at 1208. Although the Ninth Circuit came to a different decision on remand, the Court’s opinion in this section reflects how the Supreme Court decision in *Oncale* provided little guidance to lower courts.

133. *See supra* note 104 and accompanying text.

134. 119 F.3d 563 (7th Cir. 1997).

135. *Belleville v. Doe*, 523 U.S. 1001 (1998).

136. *Belleville*, 119 F.3d at 566.

to us impossible to de-link the harassment from the gender of the individual harassed. *We need not so decide, however, because there is more linking the harassment to the plaintiff's gender here.*<sup>137</sup>

The court, relying on *Price Waterhouse v. Hopkins*,<sup>138</sup> instead found that harassment based on gender stereotyping satisfies the “because of sex” requirement of Title VII:

Assuming *arguendo* that proof other than the explicit sexual character of the harassment is indeed necessary to establish that same-sex harassment qualifies as sex discrimination, the fact that H. Doe apparently was singled out for this abuse because the way in which he projected the sexual aspect of his personality (and by that we mean his gender) did not conform to his coworkers' view of appropriate masculine behavior supplies that proof here.<sup>139</sup>

Of this kind of harassment, the court wrote:

The contexts of the two cases [*Belleville* and *Price Waterhouse*] are admittedly different, but the differences are immaterial. The question in both cases is whether a particular action (in *Price Waterhouse*, the exclusion from partnership, here, the harassment by co-workers) can be attributed to sex; reliance upon stereotypical notions about how men and women should appear and behave (in *Price Waterhouse* by the partners, here by H. Doe's tormentors) reasonably suggests that the answer to the question is yes.<sup>140</sup>

Thus, the issue in *Doe v. Belleville* was whether a claim of same-sex harassment *based on gender stereotypes* is actionable. Like *Nichols* after it, *Belleville* oversimplifies the holding of *Price Waterhouse*. But in *Oncale*, Justice Scalia ignores the actual holding of *Belleville*, that the harassment is actionable because it is based on gender stereotypes, and instead cites *Bellville* for the dicta that precedes the holding: the proposition that harassment that is sexual is “always actionable, regardless of the harasser's sex, sexual orientation, or motivations.”<sup>141</sup> That is all Justice Scalia says about the case. He never addresses whether harassment that is sexual is actionable — although the fact that he mentions such harassment but does not include it among the three kinds of same-sex harassment that would be actionable — arguably at least, creates an in-

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137. *Id.* at 580 (emphasis added to the last sentence).

138. 490 U.S. 228 (1989).

139. *Belleville*, 119 F.3d at 580.

140. *Id.* at 581.

141. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998).

ference that he does not consider it actionable.<sup>142</sup> And he never addresses the basis of the Seventh Circuit's holding in *Belleville*, that harassment based on a failure to conform to gender stereotypes is actionable. Yet, as mentioned earlier, four days after *Oncale*, the Court vacated the judgment in *Belleville*, remanding the case for reconsideration in light of the *Oncale* decision.<sup>143</sup>

#### 4. "Credible evidence that the harasser was homosexual"

The biggest difficulty with *Oncale* is Scalia's seeming acceptance of the "sexual desire" approach of the Fourth Circuit. *Oncale* and *Belleville* both involve male victims working in an all male environment. Two of the three routes offered by Scalia for meeting the "because of sex" requirement of actionable same-sex harassment are not available to them; neither can argue that their harassers were hostile to men but not women in the workplace, and neither can argue they were treated differently than women — there were none. Therefore, the only one of Scalia's three routes conceivably open to the plaintiffs is the sexual desire route, and for Scalia the key is "credible evidence that the harasser was homosexual."<sup>144</sup> The phrase would seem to refer back to *McWilliams*, an opinion from the Fourth Circuit of the U.S. Court of Appeals cited by Scalia when he wrote of the division in the circuits on the issue of whether same-sex harassment can ever be actionable: "Other decisions say that such claims [of same-sex harassment] are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire)."<sup>145</sup>

In *McWilliams*, the Fourth Circuit held that same-sex harassment of the type suffered by the plaintiff was not actionable, and reserved decision on whether the harassment would be actionable if the plaintiff could prove, beyond the sexual nature of the harassment itself, that the harassers were homosexual.<sup>146</sup> The approach first articulated in *McWilliams* was reiterated by the Fourth Circuit in *Hopkins v. Baltimore Gas and Electric Co.*<sup>147</sup>

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142. *Id.* at 80-81. *But see* *Rene v. MGM Grand Hotel* 305 F.3d 1061, 1067-68 (9th Cir. 2002) (*en banc*) (holding that harassment involving physical conduct of a sexual nature is "because of sex" and so is always actionable).

143. *Belleville v. Doe*, 523 U.S. 1001 (1998).

144. *Oncale*, 523 U.S. at 80.

145. *Id.* at 79.

146. *See* *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996).

147. 77 F.3d 748 (4th Cir. 1996).

Thus, when a male employee seeks to prove that he has been sexually harassed by a person of the same sex, he carries the burden of proving that the harassment was directed against him “because of” his sex. The principal way in which this burden may be met is with proof that the harasser acted out of sexual attraction to the employee. In *McWilliams* [citation omitted], we noted that a male employee who undertakes to prove sexual harassment directed at him by another male may use evidence of the harasser’s homosexuality to demonstrate that the action was directed at him because he is a man. But we cautioned that proof of such homosexuality must include more than “merely suggestive” conduct.<sup>148</sup>

This analysis focuses not on the acts — the nature of the harassment — but on the actor — the character of the harasser. In this context then, Scalia’s phrase “credible evidence that the harassers were homosexual” seems to be accepting the majority’s argument in *Williams*. And the thrust of that argument is that the plaintiff’s evidence must go to the life style of the harasser and not to the sexual act of the harassment. It is not a very strong argument and it is lacerated in the Seventh Circuit’s *Belleville* opinion:

We doubt that it would have mattered for H. Doe [the plaintiff] to know, when his testicles were in Dawe’s [the defendant’s] grasp, that Dawe was heterosexual or (as his deposition reveals) that he lived with a woman (Dawe Dep. 51-52), and thus that he may not have been sexually interested in H. The experience was still humiliating in a deeply personal way, as only sexual acts can be.<sup>149</sup>

The Ninth Circuit adopts a simpler approach, noting that a sexual act by a member of one sex directed at a member of either sex is a sexual act and therefore “because of sex” whatever the motivation, disposition, psychological make-up, self-identity or history of the harasser.<sup>150</sup> In addition, this approach is more faithful to Scalia’s own theory of statutory interpretation. As the dissent in *McWilliams* put it:

I would not require *McWilliams* to allege on top of these facts that his harassers were homosexual. The acts of assault and harassment are

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148. *Id.* at 752.

149. *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997).

150. *See Oncale*, 523 U.S. at 79.

sufficiently direct and suggestive by themselves to raise the question whether they were done “because of [McWilliams’]. . . sex.”<sup>151</sup>

Scalia seems to be following the holding of *McWilliams*, but he notes this by one phrase, “credible evidence that the harasser was homosexual.”<sup>152</sup> Yet the issue is crucial to a reconsideration of *Oncale* and *Belleville* on remand.<sup>153</sup> In both cases, there was no evidence of homosexuality beyond the egregiously sexual acts directed at a person of the same sex. If Scalia is following in the footsteps of the majority of *McWilliams*, there is no basis for *Oncale*’s or *Belleville*’s remand. Scalia’s language strongly suggests that he is following the *McWilliams* position, yet he remands *Oncale* back to the Fifth Circuit. It would seem that guiding the circuits on this particular issue was not a high priority for Scalia or the Court.

First we have Justice Scalia, it seems deliberately, misrepresenting the holding of a published opinion. Then, the Court remands *Belleville* for reconsideration in light of the decision in *Oncale*, even though there is no mention of harassment based on gender stereotyping in *Oncale*, and that was the basis upon which *Belleville* was decided. The Seventh Circuit never had to confront the conundrum that the Court gave it because, as mentioned earlier, *Belleville*, like *Oncale*, settled before reconsideration.<sup>154</sup>

The most likely explanation for Justice Scalia’s odd treatment of the “because of sex” requirement in same-sex harassment is that the Supreme Court was divided on the issue and the only way Scalia could get unanimous support for his opinion was by not raising the difficult issues. His own analysis suggests a narrow, almost rigid, approach to “because of sex” in same-sex harassment.<sup>155</sup> At any rate, *Oncale* is a long way from approving the actionability of same-sex harassment based on stereotypes.

#### CONCLUSION

The readings of *Price Waterhouse* and *Oncale* put forward in this paper are implicitly recognized in the Seventh Circuit’s *Spearman v.*

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151. *McWilliams*, 72 F.3d at 1199.

152. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

153. See *supra* notes 144-45 and accompanying text (where I argue that the other two routes to actionable same-sex harassment offered by Justice Scalia were not available to the plaintiffs in *Oncale* and *Belleville* because they worked in an all male environment).

154. See *supra* note 104 and accompanying text.

155. *Oncale*, 523 U.S. at 80.

*Ford Motor Co.*,<sup>156</sup> where the plaintiff sued Ford for subjecting him to a hostile environment of sexual harassment. The trial court gave summary judgment to Ford and the Seventh Circuit upheld the summary judgment.<sup>157</sup> The plaintiff had argued that his harassment was based on sex stereotypes and was therefore, actionable. The Seventh Circuit, following the District Court, rejected the argument:

[W]hile sex stereotyping may constitute evidence of sex discrimination, “[r]emarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the plaintiff’s] gender in making its decision.”<sup>158</sup>

The opinion continues:

Therefore, according to *Oncale* and *Price Waterhouse*, we must consider any sexually explicit language or stereotypical statements within the context of all of the evidence of harassment in the case, and then determine whether the evidence as a whole creates a reasonable inference that the plaintiff was discriminated against because of his sex.<sup>159</sup>

It is implicit in the *Spearman* analysis that gender stereotyping by itself is not a violation of Title VII, but may be used as evidence to prove that an employment decision was discriminatory — for example, that a woman was treated differently because she was a woman. With respect to hostile environment workplace harassment, stereotyping could be used as evidence to prove that the harassment was “because of sex.” But it is not clear from either *Price Waterhouse* or *Oncale* that, without more, such harassment is discrimination because of sex.<sup>160</sup>

Would harassment because of failure to conform to gender stereotypes be “because of sex?” Finding no guidelines in *Oncale*, the circuits are looking to *Price Waterhouse*,<sup>161</sup> a case with a very limited holding

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156. 231 F.3d 1080, 1085 (7th Cir. 2000).

157. *Id.* at 1087.

158. *Id.* at 1085 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

159. *Id.*

160. See *Oncale*, 523 U.S. at 80-81 (arguing that a trier of fact may find same-sex discrimination if there is evidence that harassment is motivated by a general hostility to working women, or that the harasser treated the opposite sex comparatively better); *Price Waterhouse*, 490 U.S. at 251 (1989) (requiring the plaintiff to show that the employer relied on gender to show employment based sex-discrimination).

161. See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (stating that an employer has committed gender discrimination when he acts based on how he perceives women should or should not behave or appear); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001)

with respect to gender stereotypes. But given Justice Scalia's minimalist analysis in *Oncale*, this is not surprising. In *A Matter of Interpretation: Federal Courts and the Law*, Justice Scalia wrote about the judicial interpretation of statutes: "[W]hen the text of the statute is clear, that is the end of the matter."<sup>162</sup> He noted further: "[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."<sup>163</sup> But Scalia's limited and restrictive interpretation of "because of sex" in the context of same-sex harassment is supported by neither logic, language, nor congressional intent. Justice Stevens, in a recent case where he dissents from the majority's interpretation of another statute, comments on this minimalist approach to the interpretation of law:

[T]he "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" has more discretion than the judge "who will seek guidance from every reliable source." [citation omitted]. A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.<sup>164</sup>

In *Oncale*, it is not so much the purpose of the provision that is being defeated, but common sense. The *Oncale* opinion has already produced some absurd results. An opinion from the Seventh Circuit, *Holman v. Indiana*<sup>165</sup> holds, based on *Oncale*, that when a man and woman are each solicited sexually and harassed by the same harasser, neither can sue because the harasser has treated both sexes the same and therefore, has not discriminated on the basis of sex.<sup>166</sup> The Circuits of the Court of Appeals will continue to wrestle with what constitutes "because of sex" in same-sex harassment unless the Supreme Court some day chooses to answer the questions left unresolved by *Oncale*.

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(extending Title VII gender discrimination to apply to men as well as women).

162. 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, 16 (Amy Guttmann ed., 1997).

163. *Id.* at 17.

164. *Circuit City Stores v. Adams*, 532 U.S. 105, 133 (2001) (Stevens, J., dissenting).

165. 211 F.3d 399 (7th Cir. 2000).

166. *Id.* at 405.