Don’t Ask, Don’t Tell... at Work or in Court—The Conflict between the Supreme Court’s Decisions in Oncale and Price Waterhouse

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It has long been recognized by the federal courts that Title VII of the Civil Rights Act of 1964 does not prohibit workplace discrimination on the basis of sexual orientation. However, in 1998, the U.S. Supreme Court rendered a decision that over the course of the following four years has indirectly further complicated the workplace dilemma for gay, lesbian and bisexual employees, namely, whether to “come out of the closet” and disclose their sexual orientation.

In Oncale v. Sundowner Offshore Services, Inc., the Supreme Court was for the first time presented with the question of whether same-sex harassment was actionable under Title VII. Prior to Oncale, the circuit courts of appeals had struggled with the question and reached incon-

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1. See, e.g., Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001), reh’g granted 255 F.3d 1069 (9th Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979). While the courts have consistently concluded that sexual orientation is not a protected class within Title VII, such conclusions do not rest in the legislative history of Title VII. When Title VII was enacted in 1964, the primary concern of Congress was to prohibit race discrimination. Civil Rights Act of 1964, 1964 U.S.C.C.A.N. 2355–2519. Sex as a basis of discrimination was added to the language of Title VII the day before it was finally enacted and without public debate or discussion. Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1090 (5th Cir. 1975); United States Commission on Civil Rights, Developments in the Law Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1167 (1971). At other times, courts have relied on the later failed attempts to amend Title VII to include sexual orientation as a protected class as evidence that Congress never originally intended to include such protections with the statute. See, e.g., DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327, 329 (9th Cir. 1979) (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977)).

sistent results. The claimant in *Oncale* was employed as a roustabout on an offshore oil platform and was one member of an all-male eight-person crew. He filed suit against his employer alleging that he was the subject of extensive sexual harassment by his male co-workers. In his deposition, the claimant testified that he left his employer because “I felt that if I didn’t leave my job, that I would be raped or forced to have sex.”

In the context of the facts alleged in *Oncale*, the Supreme Court concluded that same-sex harassment was actionable under Title VII because the statutory proscription simply prohibited discrimination “because of sex.” The Court then explained that discrimination may not be automatically inferred from the sexual nature or content of the words or conduct at issue, since “[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the opposite sex are not exposed.” By way of further explanation, the Court then attempted to describe examples of how a claim of same-sex discrimination “because of sex” might be asserted. Claims of “explicit or implicit proposals of sexual activity . . . would be available to a plaintiff alleging same-sex harassment, if there was credible evidence that the harasser was homosexual and of the same sex as the employee.”

3. Compare, e.g., Johnson v. Hondo, Inc., 125 F.3d 408, 411 (7th Cir. 1997) (holding that same-sex harassment is actionable under Title VII), and Kimman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468–69 (8th Cir. 1996) appeal filed 171 F.3d 607 (8th Cir. 1999) (same holding), and Fredette v. BVP Mgmt. Assoc., 112 F.3d 1503, 1510 (11th Cir. 1997) (same holding), with Oncale v. Sundowner Offshore Services, Inc., 83 F.3d 118, 120 (5th Cir. 1996), rev’d 523 U.S. 75 (1998) (holding that same-sex harassment is not actionable under Title VII). The Fourth Circuit’s decisions on the subject varied widely depending on the sexual orientation of the individuals involved. See McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195–96 (4th Cir. 1996) cert. denied 519 U.S. 819 (1996) (holding that plaintiffs do not have a claim where harasser and victim are both heterosexual males); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996) (holding that same-sex harassment may be actionable if the harassment of the male employee was because he was a man); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 141 (4th Cir. 1996) (holding that same-sex harassment is actionable where the harasser is homosexual and of the same sex as the employee).


5. *Id.* The Fifth Circuit described the nature of the sexual harassment to which the claimant was allegedly subjected: “Oncale alleges that the harassment included [two co-workers] restraining him while [another co-worker] placed his penis on Oncale’s neck, on one occasion, and on Oncale’s arm, on another occasion; threats of homosexual rape . . .; and the use of force by [one co-worker] to push a bar of soap into Oncale’s anus while [another] restrained Oncale as he was showering.” *Oncale* v. Sundowner Offshore Services, Inc., 83 F.3d 118, 118–19 (5th Cir. 1996). While neither the Supreme Court’s nor the Fifth Circuit’s decision makes a specific notation of the claimant’s sexual orientation, the Eighth Circuit in *Schmedding v. Tnemec Co.*, concluded that *Oncale* “dealt with claims of same-sex harassment by heterosexual males against a heterosexual male plaintiff.” 187 F.3d 862, 865 (8th Cir. 1999). It is possible the Eighth Circuit may have loosely inferred the orientation from the claimant’s statement that he resigned to avoid being “forced to have sex,” perhaps believing that *only* a heterosexual male would resign to avoid being forced to have sex with his male co-workers.


7. *Id.* at 80 (quoting *Harris v. Forklift Sys.*, Inc., 510 U.S. 17, 25 (1993)).
ual. An "8 However, the Court cautioned that harassing conduct "need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."9 A claim of same-sex harassment could also be stated if the harasser "is motivated by general hostility to the presence" of members of the same sex in the workplace or if the claimant can present comparative evidence as to how the alleged harasser treated members of both sexes.10

Notwithstanding the various explanations it proffered, the Court made no effort to explain how the facts alleged by the claimant in Oncale could ever fall within one of the articulated harassment paradigms.11 Instead the Court remanded the case for further proceedings consistent with the now established principle that same-sex harassment could, under appropriate circumstances, be actionable under Title VII.12 The Fifth Circuit, in turn, remanded the case to the district court for further proceedings, even though summary judgments are routinely affirmed in federal court if the plaintiff fails to come forward with evidence that would support his claim under the established burden of proof.13

The Supreme Court's analysis in Oncale did not address the implications of the Court's prior ruling in Price Waterhouse v. Hopkins.14 While Price Waterhouse had been overruled in part by Congress' passage of the Civil Rights Act of 1991,15 one crucial ruling in that case remained persuasive, if not binding, precedent at the time the Court

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8. Id.
9. Id.
10. Id. at 80–81.
11. In fact, if the Eighth Circuit's conclusion in Schmedding is correct that both the harassers and the victim in Oncale were professed heterosexuals, then there was no evidence in the record before the Supreme Court to warrant the possible conclusion that a same-sex harassment claim could be stated under any of the articulated paradigms.
12. 523 U.S. at 82.
15. The Civil Rights Act of 1991 (1991 Act) effectively overruled the Court's ruling in Price Waterhouse that an employer could avoid liability entirely under Title VII if it could prove that it would have taken the same adverse employment action against the employee notwithstanding any alleged discriminatory animus. The 1991 Act amended Title VII to provide for employer liability if discriminatory animus simply was a motivating factor in the employer's decision, regardless of the existence of other nondiscriminatory motivating factors. See, e.g., Lewis v. Young Men's Christian Assoc., 208 F.3d 1303, 1305 (11th Cir. 2000) (finding the 1991 Act overruled Price Waterhouse as to mixed motive discrimination claims under Title VII); Rubinstein v. Administrators of Tulane Educ. Fund, 218 F.3d 392, 403 (5th Cir. 2000) (describing how Price Waterhouse has been superseded by adoption of 1991 Act in terms of mixed motive cases).
rendered its decision in *Oncale*. In *Price Waterhouse*, the Court concluded that a Title VII claim for discrimination “because of sex” could be maintained based upon sexual stereotypes.\(^{16}\) Specifically, the claimant in *Price Waterhouse* asserted that she had been discriminated against and denied promotional opportunities by her employer because her employer thought she was too aggressive and needed “to attend charm school” so she could “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry.”\(^{17}\) The Court concluded that the employer’s decision making was tainted by the unlawful consideration of stereotypes as to how a woman *should* behave.\(^{18}\) Between the time the Court issued its ruling in *Price Waterhouse* regarding sexual stereotypes and the time *Oncale* was decided, the federal circuit courts of appeal had repeatedly cited *Price Waterhouse* as supporting Title VII discrimination claims that were based on sexual stereotypes and thus were “because of sex.”\(^{19}\)

After *Oncale*, claimants emboldened by the Supreme Court’s observation that the egregious sexual conduct in that case could support a same-sex harassment claim “because of sex” came forward asserting claims of Title VII discrimination. As the federal courts struggled to reconcile the possible interpretations of *Oncale* in the face of the earlier ruling in *Price Waterhouse* regarding sexual stereotypes, decisions with disturbing implications for gay, lesbian and bisexual employees began to issue.\(^{20}\) Nowhere is this more apparent than in a pair of decisions rendered by the Ninth Circuit within four months of each other in 2001.

In *Rene v. MGM Grand Hotel, Inc.* (*Rene I*), the Ninth Circuit considered the claims of a male employee who asserted a Title VII claim of sexual harassment based on the conduct of his male co-workers.\(^{21}\) The employee in *Rene I* worked as a butler for the MGM Grand Hotel on a floor reserved for high profile and wealthy guests. All the other employees who worked on the floor were also male.\(^{22}\) The claimant al-

\(^{16}\) *Price Waterhouse*, 409 U.S. at 251–52.
\(^{17}\) *Id.* at 235.
\(^{18}\) *Id.* at 234–35, 258.
\(^{19}\) See, e.g., Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 289–90 (2d Cir. 1998); Hook v. Ernst & Young, 28 F.3d 366, 376 (3d Cir. 1994); Lindahl v. Air France, 930 F.2d 1434, 1439 (9th Cir. 1991).
\(^{20}\) Ironically, there is reason to believe that issues of transsexuality—that is, issues related to the gender identity of the individual—might receive different treatment than issues relating to the sexual orientation of an individual. In *Schwenk v. Hartford*, a pre-operative male-to-female transsexual prisoner asserted a claim under the federal Gender Motivated Violence Act accusing a prison guard of having attacked her. 204 F.3d 1187, 1192 (9th Cir. 2000). The defendants responded that a cause of action could not be stated because the attacks were not motivated because of gender. *Id.* at 1195. Citing to both *Oncale* and *Price Waterhouse*, the Ninth Circuit concluded in *dicta* that gender and sex were synonymous under Title VII and upheld the prisoner’s right to assert a claim based on her gender. *Id.* at 1200–02.
\(^{21}\) 243 F.3d 1206, 1207 (9th Cir. 2001), reh'g granted 255 F.3d 1069 (9th Cir. 2001).
\(^{22}\) *Id.*
leged that “practically every day” he was subjected to sexual harassment, which consisted of “being grabbed in the crotch and poked in the anus on numerous occasions, being forced to look at pictures of naked men having sex while his co-workers looked on and laughed, being caressed, hugged, whistled and blown kisses at, and being called ‘sweetheart’ and ‘Muneca.’”23 The parties in Rene I did not dispute that the conduct complained of created a hostile work environment. Notwithstanding this stipulation, the Ninth Circuit considered and applied the three paradigms of same-sex harassment set forth by the U.S. Supreme Court in Oncale and initially concluded that the claimant in Rene I could not state a cause of action for same-sex harassment under Title VII.24

Four months later, the Ninth Circuit decided the case of Nichols v. Azteca Restaurant Enterprises, Inc.25 In Nichols, the court considered the claim of a male restaurant employee who had asserted a same-sex harassment claim under Title VII based on the conduct of his male co-workers. The claimant in Nichols alleged that his co-workers verbally harassed him “because he was effeminate and did not meet their views of a male stereotype.”26 The factual allegations in Nichols were remarkably similar to those in Rene I:

> Throughout his tenure at Azteca, Sanchez27 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 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 times a day.28

There were two somewhat striking factual differences between the harassment that took place in Rene I and that which took place in Nichols. First, the employee in Rene I alleged that he was physically assaulted in a sexual manner, whereas the employee in Nichols limited his allegations to instances of verbal abuse. Second, the employee in Rene I never alleged verbal taunts relating to his orientation, whereas the

23. Id. “Muneca” is the Spanish word for “female doll.”
24. Id. at 1208-10. If either the Supreme Court or the Fifth Circuit on remand in Oncale had applied the three paradigms as strictly as the Ninth Circuit did in Rene, it is difficult to imagine how the claimant in Oncale could have ever stated a cause of action for same-sex harassment. The harassment in Oncale presumably was not (1) motivated by sexual desire (the participants were allegedly all heterosexual), (2) motivated by hostility to the presence of men in the workplace (all the workers were male), or (3) motivated by a desire to treat men differently than similarly situated women (there were no women to serve as comparators).
25. 256 F.3d 864 (9th Cir. 2001).
26. Id. at 869.
27. Antonio Sanchez was one of three plaintiffs in Nichols and the only male one.
28. Id. at 870.
employee in Nichols specifically alleged that his co-workers called him a “faggot.” Notwithstanding that the abuse visited upon the employee in Rene I was arguably more severe than the abuse in Nichols, the Ninth Circuit—which four months earlier had denied the claim for same-sex harassment—concluded that the employee in Nichols was able to assert a cause of action for same-sex harassment under Title VII. In reaching this conclusion, the Ninth Circuit ignored the fact that the employee had been called a “faggot” by his co-workers.29 The Ninth Circuit made no effort to fit the claim in Nichols within one of the paradigms set forth in Oncale. Instead, the court proceeded exclusively under the ruling in Price Waterhouse.30

One explanation that presents itself fairly easily for the apparently contradictory rulings from the Ninth Circuit in Rene I and Nichols is that the claimant who was initially denied a cause of action in Rene I was an openly gay man, whereas the claimant in Nichols was either heterosexual or did not disclose his sexual orientation.31 More significantly, perhaps, the employee in Rene I made the apparent mistake of alleging in his pleadings and expressing his view during litigation that the harassment was directed against him because he was gay. The Ninth Circuit quoted at length from the employee’s deposition in which he expressed his opinion that the harassment was directed at him because of his sexual orientation.32 Underlying the Ninth Circuit’s reliance on the claimant’s deposition testimony is the potentially erroneous assumption that it is the claimant’s perception regarding the motivations of his harassers—rather than their actual motivations—that determines whether a cause of action is stated. The factual evidence in Rene I supports the exact same cause of action that the Ninth Circuit indicated in Nichols could be stated under Title VII, but the “label” attached to the claim was apparently the incorrect one.

The almost inescapable conclusion one draws from the Ninth Circuit’s initial decision in Rene I and its later decision in Nichols is that if the claimant in Rene I had hidden his sexual orientation from the court and couched his lawsuit in terms of sexual stereotypes, the rea-

29. Id. at 874 (couching the abuse as an issue of sexual stereotyping and overlooking the pejorative reference to the claimant’s sexual orientation). The Eighth Circuit in Schmedding apparently had little problem ignoring the repeated homophobic taunts made against the employee, provided the employee disavowed actually being gay: “Although Schmedding concedes that [his] use of the phrase ‘perceived sexual preference’ may have been confusing, he asserts that the phrase indicates or shows that the harassment included rumors that falsely labeled him as homosexual in an effort to debase his masculinity.” Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999).
30. Nichols, 256 F.3d at 874–75.
31. Rene, 243 F.3d at 1207. There is no reference in the court’s opinion in Nichols as to the actual sexual orientation of the claimant. All that may be reasonably inferred from the record is that his male co-workers accused him of being gay. Nichols, 256 F.3d at 870.
32. Rene, 243 at 1210.
soning in Nichols would have mandated that he be permitted to pursue his Title VII claim for same-sex harassment. In simpler terms, if the employee in Rene had simply elected to deny or hide his sexual orientation, and thus remained in the proverbial closet, the court might have been more inclined to uphold his right to be free from intolerable harassment.

Perhaps sensing the inequity inherently created by its decisions in Rene I and Nichols, the Ninth Circuit granted rehearing en banc in Rene I. More than a year after granting the rehearing, the Ninth Circuit reversed its ruling in Rene I and found that the openly gay claimant was entitled to state a cause of action for same-sex harassment under Title VII. In reaching this conclusion, though, the Ninth Circuit struggled to reach a consensus as to the legal theory which would allow the claimant to state a cause of action. No majority opinion was issued that agreed upon a single legal theory of recovery. Instead, a plurality opinion was joined as to the result by three concurring judges, thus creating a cause of action for the claimant in Rene II, but leaving in doubt the appropriate argument to be made on remand.

The Ninth Circuit in Rene II produced five separate opinions spanning the entire analytical spectrum. Five of the circuit judges, citing Oncale among other cases, endorsed the notion that

an employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action. It is enough that the harasser engaged in severe or pervasive unwelcome physical conduct of a sexual nature.

This sweeping endorsement of the “irrelevancy” of sexual orientation in Title VII harassment cases was promptly attacked by a four-judge dissent. The dissent noted that the plurality opinion in Rene II “mischaracterized” the pertinent statutory language in Title VII and the Supreme Court’s interpretation of it. The dissent instead applied the three Oncale tests for determining whether same-sex harassment has occurred and concluded, as did the panel in Rene I, that the claimant could not fall within one of these three tests.

Three concurring judges carried the day for the claimant in Rene II by concurring in the result and basing their decision on the gender stereotyping analysis of Price Waterhouse. These three judges cited spe-
cifically to the Ninth Circuit’s decision in Nicholson and concluded there was no factual basis for distinguishing the application of Price Waterhouse to the facts in Rene II.39 This approach was attacked by the dissent on the basis that the claimant in Rene II never asserted a claim of sexual stereotyping and that the three-judge concurrence was “manufacturing a claim for Rene on appeal that was never advanced by him or supported by evidence in the district court.”40 Ironically, the dissent’s disapproval of the sexual stereotyping argument was echoed by one of the judges in the plurality decision who specially concurred, in part to express his view on the sexual stereotyping argument.41

Given the analytical free-for-all that occurred in Rene II, it is not surprising that other circuit courts have struggled with the same issue confronted by the Ninth Circuit and reached at times more opprobrious results. The Seventh Circuit, for example, apparently felt that the mere specter of sexual orientation was sufficient to defeat a claim of same-sex harassment. In Spearman v. Ford Motor Company, the claimant was an employee whom the court identified as homosexual.42 The court reached this conclusion from the employee’s deposition in which he truthfully acknowledged his sexual orientation, but indicated that he had never disclosed the information to anyone at Ford.43 The employee’s lawsuit did not assert discrimination on the basis of sexual orientation, but rather on the basis of sexual stereotype. He premised his claim on allegations that his male co-workers would repeatedly refer to him as, among other things, a “selfish bitch,” “cheap ass bitch,” “little bitch” and “—ing jack-off, pussy-ass.”44 Ignoring the manner in which the employee had couched his lawsuit and the fact that the employee had allegedly never disclosed his sexual orientation at work, the Seventh Circuit affirmed summary judgment in favor of the employer by focusing instead on the actual motivation of his harassers.45

The Seventh Circuit noted that the employee’s male co-workers “had suspected that [the employee] was a homosexual” and taunted him about being gay.46 Even though the case was before the court on a de

39. Id. at 1068–69 (Pregerson, J., concurring).
40. Id. at 1070–71. Apparently, insofar as the dissent appears to be concerned, a claim of same-sex harassment based on sexual stereotyping is a completely separate cause of action from one based on Oncale criteria. The dissent continued to distinguish Rene II from Nichols observing that the claimant in Nichols was properly entitled to invoke the sexual stereotyping argument because he never conceded the belief that the harassment was occurring because of his sexual orientation. Id. at 1077–78.
41. Id. at 1069–70 (Graber, J., concurring). Judge Fisher, who also joined in the plurality decision, also concurred specially and expressed the view that there was “ample evidence from which a jury could conclude that the harassment . . . was based on gender stereotyping.” Id. at 1070 (Fisher, J., concurring).
42. 231 F.3d 1080, 1082 (7th Cir. 2000).
43. Id. at 1082 n.1.
44. Id. at 1082, 1083.
45. Id. at 1085–86.
46. Id. at 1082.
novo review of a summary judgment and the court should have been
drawing all inferences in favor of the employee,47 and even though the
employee had never disclosed his sexual orientation and been repeat-
edly referred to as a “bitch,” the Seventh Circuit glossed over the arg-
ument regarding stereotypes and concluded:

Here, the record clearly demonstrates that [the employee’s] problems
resulted from his altercations with co-workers over work issues, and
because of his apparent homosexuality. . . . Moreover, [the employee’s]
co-workers directed stereotypical statements at him to express their
hostility to his perceived homosexuality, and not to harass him be-
cause he is a man.48

In marked contrast, the Eighth Circuit’s decision in Schmedding seem-
ingly strains to uphold the right of a self-declared heterosexual man to
assert a claim of same-sex harassment, even though he initially couched his claim as one based on “perceived sexual preference.”49 Com-
paring the conduct suffered by the employee to that described in On-
cale, the Eighth Circuit reversed summary judgment and concluded
that the co-workers’ repeated taunts of being homosexual did not bar
the employee’s cause of action. The court cautioned the claimant, how-
ever, that it would be better practice on remand to amend the complaint
to delete any references to “perceived sexual preference.”50 Of course,
it is unclear whether the Eighth Circuit would have reached the same
results had the employee in Schmedding, like the employee in Spear-
man, acknowledged in deposition that he was gay.

Regardless of whether these seemingly aberrant decisions are the
result of well-intentioned judges who are trying to carve out an excep-
tion under Title VII for the harassment claims of gay, lesbian and bi-
sexual employees or whether they manifest anti-gay bias in the judi-
ciary, the results are arguably equally disastrous. From a civil rights
perspective, what would it have meant for African American or Hispanic
employees, for example, to garner protection under the law by denying
their race or ethnicity? Moreover, it appears that the distinction be-
tween a claim based on sexual stereotypes and one based on sexual
orientation discrimination is one without a difference, ultimately des-
tined to create additional confusion in the workplace and in the court-
room. It is not so unreasonable to suggest that, if one sets aside the
various labels used to categorize individuals, claims based on sexual
stereotypes and those based on sexual orientation discrimination are
both fundamentally claims based on the animus of those who object to

48. Id. at 1085 (emphasis added). The Seventh Circuit apparently did not dispute
that the comments made by the claimant’s co-workers were stereotypes based on sex, but
attributed them to the co-workers’ general hostility towards perceived homosexuality.
49. Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999).
50. Id.
the behavior of a particular employee and how such behavior does not conform to society’s “norms” for that gender. Ultimately, what does it mean to be heterosexual or homosexual? For that matter, what does it mean to be neither or in-between? Is it nothing more than a question of self-identification without regard to objective standards? Do the labels serve any purpose in forming the legal construct which the courts must apply to determine whether a same-sex harassment claim can be permitted to stand?

A simple example demonstrates the potential for analytical disaster in the Title VII context. A somewhat effeminate married man with children admits during a drunken outing with his male co-workers to a female strip club that he would like to have sex with other men. He says he has never had sex with a man and doubts he would ever have the courage to do so, but he thinks about it often. From that night on, his male co-workers harass him endlessly about his effeminate behavior (which they previously never did) and make homophobic remarks about him and in his presence. Can the employee assert a cause of action for same-sex harassment under Title VII? Arguably, neither his statement regarding his suppressed sexual desires nor his mannerisms are stereotypically male. Is his Title VII claim supported by Price Waterhouse, or is it a claim based on “perceived homosexuality” barred by the Seventh Circuit’s decision in Spearman? Should the analysis turn on whether this employee has admitted an actual or latent sexual orientation at work or in a deposition? Does anyone other than the employee, in fact, know what the employee’s actual sexual orientation is?

Neither the Supreme Court in Oncale nor any circuit court in a subsequent decision has attempted to analyze the issue of sexual harassment in terms of the exercise of power of one individual over another rather than in terms of sexuality or gender. The anecdotal evidence and psychological analysis are extensive and reflect that sexual oppression, whether it manifests in acts as extreme as rape or as minor as sexist remarks, are exercises in power and control and not merely sexuality. Ultimately, if the fundamental purpose of Title VII can be

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51. In contrast, the federal courts have not hesitated in construing state common law to analyze the enforceability of agreements in the employment context by examining the balance of power between the contracting parties as part of a determination whether such agreements are unconscionable. See, e.g., Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002); Beaver v. Grand Prix Karting Ass’n, Inc., 246 F.3d 905, 910 (7th Cir. 2001); Carter v. Exxon Co. USA, 177 F.3d 197, 207 (3d Cir. 1999). Even the U.S. Supreme Court has cautioned against the effects of overwhelming economic power that would invalidate any contract in the employment context. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

reasonably restated as ensuring fairness in the workplace and minimizing the abuse of power by those who have it over those who do not, then the practical dichotomy created by the Supreme Court's decisions in *Price Waterhouse* and *Oncale* must be abandoned as dysfunctional. Certainly, the current construct encourages gay, lesbian and bisexual employees to lie about their orientation not only in the workplace, but also in court proceedings. Moreover, it entrenches as law the ironic premise that the federal courts do not mind if an employee “acts gay,” as long as he or she is not actually so.

Laurence M. Tribe, *Don’t Ask, Don’t Tell . . . at Work or in Court* (2002), 347

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Rape: Reform and a Statutory Consent Defense, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1528–29 (1983). In the same-sex context, one obvious example of this principle is found in the prison environment. The issue of male-on-male rape is well documented in the prison population of this country. It cannot reasonably be concluded that all these male prisoners were either homosexual prior to incarceration or became so immediately thereafter. The more reasonable conclusion is that these traditional sexual acts are often acts of control and oppression rather than simply sexual desire. WILBERT RIDEAU & BILLY SINCLAIR, *Prison the Sexual Jungle, in MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSIONS* 19 (Anthony M. Scacco ed., 1982); Donald J. Cotton & Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47, 50–51 (1982); Phil Gunby, *Sexual Behavior in an Abnormal Situation*, 245 JAMA 215, 215 (1981); Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons*, 48 FED. PROBATION 46, 47 (1984); Edward Sagarin, *Prison Homosexuality and Its Effect on Post-Prison Sexual Behavior*, 39 PSYCHIATRY 245, 255 (1976).