1997 WL 471805 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Joseph ONCALE, Petitioner,
v.
SUNDOWNER OFFSHORE SERVICES, INCORPORATED; John Lyons; Danny Pippen; and Brandon Johnson, Respondents.

No. 96-568.
October Term, 1997.
Aug. 11, 1997.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND; AMERICAN CIVIL LIBERTIES UNION; PEOPLE FOR THE AMERICAN WAY; NOW LEGAL DEFENSE AND EDUCATION FUND; WOMEN'S LEGAL DEFENSE FUND; GAY & LESBIAN ADVOCATES & DEFENDERS; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL WOMEN'S LAW CENTER; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.; NORTHWEST WOMEN'S LAW CENTER; AND BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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***i** TABLE OF CONTENTS

***iv** TABLE OF AUTHORITIES

CASES

1 INTEREST OF *AMICI CURIAE [1]

Amici include national and regional organizations dedicated to achieving equality under the law for lesbians and gay men: Lambda Legal Defense and Education Fund, The National Center for Lesbian Rights, Gay & Lesbian Advocates & Defenders, and Bay Area Lawyers for Individual Freedom.

Amici include organizations dedicated to supporting women's efforts to eliminate sex discrimination: NOW Legal Defense and Education Fund, The National Women's Law Center, The Women's Legal Defense Fund, Northwest Women's Law Center and Connecticut Women's Education and Legal Fund.

Amici include nonpartisan organizations dedicated to the protection of civil and constitutional rights: The American Civil Liberties Union and People for the American Way.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* and their statements of interest are set forth in Appendix A.

***2** SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals affirmed summary judgment for Sundowner in this case, holding that there can never be a cause of action under Title VII for sexual harassment where the harasser and the harassed employee are of the same sex. This interpretation would have Title VII apply differently to exactly the same facts, conditioning liability on the sex of the harassed employee. *Amici* urge that this is a remarkable reading of a statute intended to *stop* practices that take sex into account, a reading that should be rejected here.

The statute's language and purpose would similarly be disserved by holding sexually harassing behavior actionable if consistent with a harasser's sexual orientation, yet finding exactly the same conduct exempt from coverage if the harasser's sexual orientation were different. Given that such a requirement has never been articulated in different-sex cases, this Court should reject Sundowner's argument.

Two concepts already embodied in the Court's prior rulings help alleviate the confusion that has surfaced in this case and others, over Title VII's application to same-sex sexual harassment. The first is that unwelcome sexual conduct imposed on employees is, *per se,* because of sex. No separate showing is required to establish that sexual harassment occurred because of sex; sexual

harassment, by its very nature, takes sex into account and disadvantages its victims on that basis. The second critical concept is that the statute covers all adverse employment actions, in this case a hostile environment, that take gender into account (and that meet the other applicable requirements, such as severity or pervasiveness and employer liability). Such actions based on sex "discriminate" within the meaning of the statute, without the need for any further group-based or comparative showing, ***3** because they rely on a factor that Title VII aims to banish from the workplace.

Sexual harassment jurisprudence rests on the recognition that a gender-based condition of employment is created when physical or verbal conduct of a sexual nature is so severe or pervasive as to create a hostile or offensive work environment, or as to interfere with an individual's performance. Sexual harassment can spring from myriad sources within the harasser-some ascertainable and some not. In different-sex cases, the courts have correctly deemed irrelevant the complex personal well-spring for a particular harasser's behavior. Same-sex sexual harassment does not require the courts to delve into those factors any more than different-sex cases did. It is the inherently gender-based nature of sexual harassment that brings the conduct under the purview of Title VII, no matter the respective sexes or sexual orientations of the harasser or the harassed employee, and no matter whether the harasser's intentions are amorous or hostile. The language and the spirit of Title VII would be contravened by holding otherwise.

ARGUMENT

I. A PLAINTIFF ESTABLISHES THE ELEMENTS OF HOSTILE ENVIRONMENT SEXUAL HARASSMENT BY PROVING THAT HE OR SHE WAS SUBJECTED TO UNWELCOME VERBAL OR PHYSICAL CONDUCT OF A SEXUAL NATURE THAT WAS SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER NEGATIVELY THE CONDITIONS OF HIS OR HER EMPLOYMENT.

This Court recognized a decade ago that the injection of unwelcome sexual conduct into the workplace-whether ***4** by demanding a *quid pro quo* or by creating a hostile environment-is prohibited by Title VII in that it creates an adverse condition of employment because of sex. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 64-66 (1986). Whatever the sex of the harasser and the harassed employee, the principle that sexual conduct is *per se* related to the sex of the person or persons subjected to it is the gravamen of the sex discrimination inherent in sexual harassment.

To prove a hostile environment sexual harassment claim, a plaintiff must show that in the context of employment he or she suffered (1) verbal or physical conduct of a sexual nature [2] (2) that was unwelcome and (3) that was sufficiently severe or pervasive to affect the conditions of his or her employment negatively. [3] *Fuller v. City of Oakland,* 47 F.3d 1522 (9th Cir.1995); *EEOC v. Hacienda Hotel,* 881 F.2d 1504 (9th Cir.1989); *see also Andrews v. City of Philadelphia,* 895 F.2d 1469 (3rd Cir.1990). By proving those three elements, a plaintiff necessarily shows that an impermissible factor-sex-has been used to impose disadvantageous terms of employment, thereby subjecting that individual to unlawful discrimination prohibited by Title VII.

***5** The determination that the discrimination occurs "because of sex" in sexual-harassment cases is based on the nature of the sexual conduct itself. Where sexual references or behavior are the basis of a harassment claim, no further evidence should be required to establish the link between the harasser's use of sex to create an abusive work environment and the harassed employee's gender. Some courts have purported to require a separate duplicative showing that the sexual harassment is imposed based on sex, but they err by doing so. Even these courts, however, correctly have readily found this separate because-of-sex "element" to be established (although usually without discussion) where men harass women sexually (or vice versa); it is only in cases involving harassers and harassed employees of the same sex that they erroneously have required additional proof. *Fredette v. BVP Management Associates,* 112 F.3d 1503 (11th Cir.1997); *Hopkins v. Baltimore Gas and Electric Co.,* 77 F.3d 745, 752 (4th Cir.), *cert. denied,* 117 S.Ct. 70 (1996); *McWilliams v. Fairfax County Board of Supervisors,* 72 F.3d 1191 (4th Cir.) *cert. denied,* 117 S. Ct. 72 (1996); *Wrightson v. Pizza Hut,* 99 F.3d 138 (4th Cir.1996); *Quick v. Donaldson Co.,* 90 F.3d 1372 (8th Cir.1996).

An understanding of how a plaintiff shows "discrimination" and "because of sex" in a sexual-harassment case is critical to the issues that have confused the circuit courts in same-sex sexual harassment cases. *Amici* therefore first address the meaning of the concepts "because of sex" and "to discriminate" in Title VII.

A. Conduct Of A Sexual Nature Is Inherently "Because Of Sex."

Gender is powerfully rooted in all sexual behavior, in the workplace as elsewhere. To the recipient, unwelcome sexual overtures or sexual abuse can never be divorced from ***6** gender. "In each case, the victim's gender not only supplies the lexicon of the harassment, it affects how he or she will experience that harassment ..." *Doe v. City of Belleville*, No. 94-3699, 1997 U.S. App. LEXIS 17940, at *45 (7th Cir. July 17, 1997).

Environmental sexual harassment makes a condition of employment the endurance of severe or pervasive gender-based intimidation and humiliation. [4] By barraging an employee with "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature," 29 C.F.R. § 1064.11(a), a harasser exposes the victim's gender in sharp relief, degrading the employee based on his or her particular gender. Overtly sexual conduct inevitably plays off of the victim's sex and thus establishes sex as a substantial factor in the creation of such adverse working conditions. [5]

***7** When sexual propositions, innuendo, or derogatory sexual language is used, the intent to discriminate is implicit. *Andrews v. City of Philadelphia*, 895 F.2d at 1482 n. 3. The interchangeable uses of the term "sex" to refer to the panoply of intimate acts and to refer to a person's gender is not coincidental in the sexual-harassment context, nor is it beside the point. It is indicative of the deep connection between the two. Sexual words or conduct can be conveyed, as well as received, only in the context of a person's particular sex (gender). Thus, sexual conduct has its meaning and effect "because of sex." [6] *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir.1994) ("[S]exual harassment is *ordinarily* based on sex. What else could it be based on?") (emphasis in original).

In its first direct ruling on same-sex sexual harassment, the Seventh Circuit recently adopted this very principle in a comprehensive and thoughtful opinion. *Doe v. City of Belleville*, No. 94-3699, 1997 U.S. App. LEXIS 17940, at *45 (7th Cir. July 17, 1997). The court reasoned:

> [W]e 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 impossible to de-link the harassment from the gender of the individual harassed.

Id. at *51. The court found that the sexual nature of the harassment imposed by men on two teenage boys constituted ***8** sex discrimination, and commented at length on the gender basis inherent in any harassing sexual acts. *Id.*

Whether unwelcome physical or verbal conduct of a sexual nature is imposed upon an employee to exact a *quid pro quo*, or to create a hostile work environment, it imposes a gender-based employment condition. In each instance, the sexual conduct itself establishes the connection to gender.

B. "Discriminate," In Title VII, Means To Use Any Of The Enumerated Characteristics As A Factor In Making Employment Decisions Or Establishing The Conditions Of Employment.

A finding of discrimination under Title VII requires nothing more than the use of an impermissible factor in an employment action. "Congress' intent" in enacting Title VII was "to forbid employers to take gender into account in making employment decisions[.]" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989). Sections 2000e-2(a)(1) and (2) "mean that gender must

be irrelevant to employment decisions." *Price Waterhouse* at 240. Thus, once a plaintiff has proven that an employer acted "because of such individual's ... sex," 42 U.S.C. § 2000e-2(a)(1), that plaintiff also has established discrimination with respect to Title VII's use of the term "to ... discriminate." The notion of discrimination in this statute does not introduce some additional element above and beyond proof that gender *was* impermissibly taken into account in refusing to hire, in firing, or in creating hostile working conditions (as in the present case). As the Court emphasized in *Meritor,* "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." ***9** *Meritor,* 477 U.S. at 64. [7]

Sundowner mistakenly assumes that Title VII's reference to discrimination, in defining unlawful employment practices, requires that an individual being sexually harassed show that he or she is being subjected to unwanted sexual conduct that inherently uses his or her gender as a factor to set up hostile work conditions *and* additionally show that those of a different sex are not also being subjected to parallel conduct. However, the concept of "discrimination" embodied in Title VII does not require the second, additional showing.

Title VII's prohibition of certain employment practices clearly includes a number of situations that are not dependent upon a showing that one group was disadvantaged and others not. The use of gender stereotypes is a violation of Title VII (*Price Waterhouse, supra*), for example, and this ***10** would be true even if both men and women were subjected to stereotypes about their sex. Having sex-segregated want ads likewise constitutes sex discrimination even though *both* men and women are thereby discouraged from applying for certain jobs. *Ruhe v. Philadelphia Enquirer,* 14 Fair Empl. Prac. Cas. (BNA) 1304, 1305 (D.C.Pa.1975). Taking an adverse job action against an employee because of the employee's association with someone of a different race similarly violates Title VII, even if the employer penalizes *both* white and nonwhite employees who are in interracial relationships. *See Watson v. Nationwide Insurance Co.,* 823 F.2d 360, 361-2 (9th Cir.1987); *Parr v. Woodmen of the Word Life Ins.,* 791 F.2d 888, 892 (11th Cir.1986); *Reiter v. Central Consol. Sch. Dist.,* 618 F. Supp. 1458, 1460 (D.Colo.1985); *Gresham v. Waffle House, Inc.,* 586 F. Supp. 1442, 1445 (N.D.Ga.1984). Workplace segregation may present the starkest example of prohibited "discrimination" that occurs (*see Firefighters Institute for Racial Equality v. City of St. Louis,* 549 F.2d 506, 514 (8th Cir.), *cert. denied,* 434 U.S. 819 (1977); *Rogers v. EEOC,* 454 F.2d 234, 238-39 (5th Cir.1971), *cert. denied,* 406 U.S. 957 (1972)), even though *all* employees are subjected to the segregation.

In the same way, an employer who repeatedly fondles a female employee's breasts and often grabs a male employee's testicles, or a supervisor who rapes or exacts a sexual *quid pro quo* both from a male employee and a female employee, has sexually harassed and thereby engaged in discrimination based on sex as to two employees, not none. Even the very same conduct, such as rape, uses and plays on an employee's male or female sex differently, and relies upon each specific victim's gender to demean and disadvantage him or her, individually, in the workplace. *See also infra,* section II(D).

***11 II. ALL OF THE LIMITATIONS ON TITLE VII'S COVERAGE THAT SUNDOWNER SEEKS TO IMPOSE ARE PRECLUDED BY THE LANGUAGE AND LOGIC OF THE STATUTE.**

A. The Statute Applies Regardless Of The Respective Sexes Of The Harasser And The Harassed Employee.

Title VII protects male as well as female employees, *Newport News Shipbuilding & Dry Dock Co. v. EEOC.,* 462 U.S. 669, 681-82 (1983), and it does so without regard to the race, color, religion, sex, or national origin of the person who takes the adverse action against the employee. *Belleville,* 1997 U.S. App. LEXIS 17940 at *26. It is not surprising that the statute does not distinguish among employees' claims based on their sex, or other characteristics, given that the statute reflects "the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins,* 490 U.S. at 237 (1989).

Throughout the history of Title VII, this Court has applied the plain meaning of the statute to countenance no distinctions in the application of its standards based on race, sex, religion or national origin. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.,*

427 U.S. 273, 280 (1976) ("Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable as were they Negroes....").

This remains true in the many instances in which employers of one race, religion, sex or national origin are charged with discriminating in violation of Title VII against another of the same race, religion, sex, or national origin. *See* ***12** *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 624-26 (1987) (in sex-discrimination case brought by male plaintiff attacking decision to promote female applicant instead of him, this Court attached no significance to the fact that the promotion decision was made by another male); *Wilson v. Bailey,* 934 F.2d 301 (11th Cir.1991) (considering male plaintiffs' sex discrimination claims without objection that relevant employment decisions were made by other men); *Veatch v. Northwestern Memorial Hospital,* 730 F. Supp. 809 (N.D.Ill.1990) (assertion that plaintiff has no claim of sex discrimination because the firing decision was made by another woman reflects a misunderstanding of the laws against discrimination and the evils they were enacted to combat); *Blalock v. Metals Trades, Inc.,* 775 F.2d 703, 708 (6th Cir.1985) (Christian allowed to sue Christian employer for religious discrimination); *Hansborough v. City of Elkhart Parks and Recreation Dep 't,* 802 F. Supp. 199, 201, 206 (N.D.Ind.1992) ("intraracial discrimination," such as "discrimination by a black individual against another black individual because of the fact that he is a black person," is actionable under Title VII). Given the unfortunate fact that human beings may discriminate against their own kind, *Castaneda v. Partida,* 430 U.S. 482 (1977), the goal of eliminating consideration of the impermissible factors from the workplace would be subverted, and the statute's own terms contradicted, if the viability of a claim turned upon the sex (*i.e.*, gender) of the parties.

***13 B. The Statute Applies Regardless Of The Sexual Orientation Of The Harasser.**

1. Potential Sexual Attraction Is Not Required To Connect Sexual Behavior And Gender.

Like the overwhelming number of lower courts that have considered different-sex sexual harassment cases, this Court has seen no need for evidence that the harassers whose conduct resulted in lawsuits acted consistent with their sexual orientation as a necessary precursor to Title VII liability. *Meritor Savings Bank; FSB v. Vinson,* 477 U.S. 57, 65-66 (1986); *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993). Nor have different-sex sexual harassment cases involved any showing that the men who harassed actually considered themselves to be heterosexual. Clearly, the language of Title VII, as correctly applied in the different-sex scenarios, does not hinge liability on proven sexual attraction or on the perpetrator having a particular sexual orientation, and no such limitations should be applied here.[8] *Burns v. McGregor* ***14** *Electronic Industries,* 955 F.2d 559 (11th Cir.1992); *Henson v. City of Dundee,* 682 F.2d 897 (11th Cir.1982).

Sundowner's reliance on Oncale's purported failure to rebut Lyons', Pippin's and Johnson's heterosexuality, Opp'n Cert. at P. 15, demonstrates how a focus on sexual orientation undermines the statute's aim of ending employment practices that are, in whole or in part, based on the employee's sex. Requiring sexual harassment to be consistent with the harasser's sexual orientation would shift the focus of the inquiry from the one mandated by Title VII, namely the harasser's use of the sex of the employee, to the sexual desires and identity of the harasser, a factor irrelevant to its mandate.

Indeed, Sundowner's discussion of heterosexuality and its supposed function as a defense illustrates that explicitly sexual words or behavior cannot be divorced from gender. In relying on the harassers' sense of themselves as heterosexual men to assert that their behavior was not sexual harassment, *Sundowner places critical reliance on Oncale's gender.* Confusing sexual desire with "because of sex," it argues that the harassers' grossly sexual behavior, like exposing themselves and putting their penises on Oncale's body, would be sexual harassment only if they were gay because, Sundowner assumes, in that case the men's behavior would have been undertaken to gratify sexual desire. Opp'n Cert. at P.10. Thus, Sundowner claims that the harassers' heterosexuality-and *Oncale's status as a man*-means that ***15** the behavior was not "because of sex."[9] Sundowner's argument concedes that sexual behavior is so inextricably related to gender that the two cannot be divorced, for Sundowner's own gloss on the harassers' behavior-that it is not covered by Title VII because as heterosexual men their conduct must not have been motivated by desire-turns on Oncale's sex.

2. The Harasser's Reason For Engaging In Sexual Conduct Is Irrelevant.

This Court has not inquired into harassers' or harassees' sexual orientations, or the thoughts or feelings that a harasser might have had in using sexual conduct. This lack of inquiry establishes the irrelevance under Title VII of the personal psychosocial make-up of individuals who sexually harass. A person who, for whatever complex internal reason, decides to interfere with an employee's performance, or creates a hostile environment by imposing unwelcome sexual conduct is a person who has taken action and disadvantaged another because of sex. *Belleville,* 1997 U.S. App. LEXIS 17940.

A harasser's personal impetus for his conduct is totally irrelevant to liability for sexual harassment. *See* ***16** *International Union, UAW v. Johnson Controls,* 499 U.S. 187, 200 (1991) ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination ..."); *Harris v. International Paper Co.,* 765 F. Supp. 1509, 1515 (D.Me.1991) ("laws prohibiting racial and sexual harassment are wholly uninterested in the perpetrator's intent. Victims need establish neither the fault or the discriminatory intent of their employers and co-workers to succeed under Title VII....").

Sexually harassing conduct equally violates the statute if the harasser acts out of disgust and animus just as if he acts out of misplaced desire. [10] Individuals who engage in sexual harassment may have different purposes; one may wish to "gratify his sexual desires" while another may seek "to subordinate women, to remind them of their lower status in the workplace, and to demean them." *EEOC v. Farmer Bros. Co.,* 31 F.3d 891, 897-98 (9th Cir.1994). "Men sexually harass women in the workplace for reasons other than sexual desire; but that does not detract either from the sexual content of the harassment or from the uniquely intrusive and denigrating impact sexual harassment has upon the women who experience it." *Belleville,* 1997 U.S. App. LEXIS 17940 at *86.

This Court's two sexual harassment cases illustrate the ***17** point. In *Meritor,* which involved ongoing sexual relations between the parties, the harasser might have said he was motivated by admiration or desire, while in *Harris,* which involved derogatory sexual comments, the harasser claimed only to be joking. Yet no relevance was attached to these varying personal interests, because the conduct of the harassers demonstrated the only fact necessary: it was based on the sex of its victims.

3. A Sexual Orientation-Based Test For Liability Is Not Only Completely Without Foundation In The Statute, It Would Wreak Havoc As An Evidentiary Matter.

Amici urge adoption of the analysis set forth above because it is consistent with the statute, with this Court's decisions interpreting Title VII, and with the pertinent constitutional limitations. Another factor further compels a finding against hinging liability on the harasser's sexual orientation: the horrendous quagmire of evidentiary and definitional problems that would be raised by a test specific to the internal sexual and sexual orientation-related perspective of the harasser.

For example, in the instant case, if Sundowner's submission of evidence that Lyons is married to a woman is relevant to its culpability because it is sought to be offered as circumstantial evidence that he did not act against Oncale out of sexual desire, then would evidence that he was sexually aroused when he assaulted Oncale affect a finding of liability? Should it? Is a person's self-definition as to sexual orientation rebuttable? In different-sex cases, would men or women accused of harassment be absolved if they (or their employers) are willing to say they are gay, lesbian or bisexual? Would same-sex experience need to be ***18** substantiated? Would attraction suffice? A sexual orientation-based test would make relevant the most elusive, private aspects of alleged harassers' (and sometimes harassees') lives, histories, and thoughts.

As argued above, the assumption that sexual attraction, or potential sexual attraction, determines whether the same acts are or are not "because of sex" is a fallacy. However, a further fallacious assumption follows from adopting that approach: that only people who call themselves "gay" or "lesbian" experience attraction to those of the same sex, and that only those who consider themselves "heterosexual" experience attraction to those of a different sex. [11] Sexual attraction, and the designation of sexual ***19** orientation, are far more complex and variable than allowed for by such an assumption. Conditioning Title VII

liability on a finding concerning a harasser's potential for sexual attraction to a person of a particular gender would legitimize extraordinarily broad, unsavory inquiries and result in many employers escaping liability.

C. Employers In Single-Sex Environments Are Not Immunized From Liability.

Sundowner also advances the implausible suggestion that because there were no women at Oncale's job site, Oncale cannot make out the elements of a sex-discrimination claim. Opp'n Cert. at 13. This argument rests on the flawed premise that Oncale needs to show that women were in fact, or would have been, treated differently by the employer to prove that he suffered discrimination because of sex. As explained above at I(B), this reflects a misunderstanding of the statute's use of the term "discriminate."

Comparative evidence is an evidentiary tool that individual plaintiffs may use in some Title VII cases to show that the adverse action suffered was because of the employee's sex. [12] As this Court has indicated, however, it is ***20** not the only way to do so. [13] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Racial slurs, for example-or even racial symbols, references, cartoons or jokes that allude to race-demonstrate *by themselves* that a hostile environment occurred "because of race" or national origin. [14] Indeed, in *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1258 (6th Cir.1985), *cert. denied*, 475 U.S. 1015 (1986), the Sixth Circuit squarely rejected an argument that a racial ***21** harassment plaintiff (under section 1981) needed to demonstrate differential treatment relative to whites. There, the defendant presented evidence that the plaintiff, a Mexican-American, had himself engaged in racial harassment of his white supervisees (777 F.2d at 1252) but the court nevertheless found for the plaintiff. The court noted: "[R]equiring in all cases a demonstration that an employer treated harassment claims of minority employees differently from those of white employees would erode severely the important protections courts have recognized under section 1981." *Id.* at 1258.

Finally, to argue that "discrimination" requires a group-based showing of comparative mistreatment in addition to a demonstration that an individual suffered an adverse job consequence because of his or her sex contravenes the terms and policy of the statute. 42 U.S.C. 2000e-2(a)(1), the basis for a sexual harassment claim, prohibits certain actions taken against individuals. As this Court has noted, "the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 709 (1978).

D. The "Equal Opportunity Harasser" Is A Red Herring, And The "Problem" It Presents Is Not Particular To Same-Sex Cases.

As discussed above, from the earliest days of the statute's enforcement, courts easily determined that, even if different groups receive identical treatment, Title VII is violated where employers openly act on the basis of race or sex (except in the rare instance that there is a *bona fide* occupational qualification). Nevertheless, in sexual harassment cases some courts have stumbled on the notion ***22** that an "equal opportunity harasser" (sometimes, even more absurdly, called a "bisexual harasser") does not subject his or her victims to harassment because of each one's sex.

Once it is understood that "discrimination" against *both* men and women is not impossible, and that harassing sexual conduct always implicates the gender of the harassed employee, it becomes clear why "equal opportunity" harassment can provide no safe harbor from liability. Even where a harasser affects members of both genders with equal use of sexual epithets, innuendo, touching, unwanted advances, and sexually degrading behavior, the status of the harassee as a man or a woman is "inextricably intertwined" in the sexual form the harassment takes, as well as its impact on the harassee. *Belleville*, 1997 U.S. App. LEXIS 17940 at *45. Each instance of sexual harassment must be judged individually from the victim's perspective; if a supervisor sexually harasses a male and a female worker, the result is not that he is liable to neither, but that he is liable to both. [15] *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D.Wy.1993).

A person who sexually harasses both a man and a woman discriminates against each, in the same way that a erson can, for example, limit the employment opportunities ***23** of both men and women by applying sex-based stereotypes to each. [16] Unfortunately, it is all too possible to discriminate against different individuals based on each person's particular sex, race, national origin, or religion. By illustration, evidence that an employer targeted members of many different groups for race-based harassment-calling Hispanic employees "spics," whites "crackers," and Asians "chinks," for example-would not render an employer immune from liability. [17] An individual employee's gender is no less demeaned by sexual harassment if an employer subjects members of both sexes to pervasive sexually-based ridicule, innuendo, and uninvited attentions.

***24 E. The Employer Is Not Immunized From Liability For Sexual Harassment If The Harassed Employee Is, Or Is Perceived To Be, Gay Or Lesbian.**

The sexual orientation of a harassed employee is also irrelevant to determining whether sexual harassment is actionable. Perception of lesbian or gay sexual orientation may contribute to same-sex harassment in some cases, (*see, e.g., McWilliams v. Fairfax County Board of Supervisors,* 72 F.3d 1191 (4th Cir.1996); *Quick v. Donaldson Co.,* 90 F.3d 1372 (8th Cir.1996); *Belleville,* 1997 U.S. App. LEXIS 17940 at *95-96 (collecting cases)), but that is not a defense because gender need only be a factor in the adverse treatment for it to be actionable as discrimination, and gender and sexual orientation, particularly in the context of sexual harassment, are inextricably linked. *See, e.g., supra,* at section II(B)(1). The *Belleville* court pointed out that "it is not always possible to rigidly compartmentalize the types of bias that [sexist and homophobic] epithets represent," *Belleville* at *96. Further, it should not make "a whit of difference why [the plaintiff in *Belleville*] was singled out for abuse; whether his harassers were motivated by his sex, by his purported sexual orientation, or by some other factor, it would seem that he has been harassed sexually and his gender necessarily implicated." *Belleville,* 1997 U.S. App. LEXIS 17940 at *94-95.

Sexually harassing conduct is not stripped of its connection to sex when the harasser alleges or proves that he acted as he did because of homophobia. [18] Some harassers may ***25** claim that they harassed a person sexually because of the color of her eyes, or hair, or her figure, example. Obviously this would not by itself render the harasser's sexual conduct lawful. The fact that a sexual harasser might have been "inspired" by a different factor does not alter that the harassment violates Title VII if it invokes sex to create a sexually abusive environment. [19]

Of course, sex (both meanings) and sexual orientation are closely related. "Homosexuality," like "heterosexuality," cannot even be defined without reference to both sex (gender) ***26** and sexuality; it is the gender of one's preferred sexual partner that denotes sexual orientation. Further, gender stereotyping is often associated with homosexuality. These connections make particularly broad and untenable Sundowner's proposal to exempt from coverage of any sexual harassment that a harasser suggests is tainted by a connection to the victim's or the harasser's sexual orientation. [20] For instance, it is clear that an employer violates Title VII if it denies advancement to a woman because she is insufficiently feminine. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 255-56 (1989). An employer should not be able to immunize itself from liability for sexual harassment by calling her a lesbian. Nor should a male employee's unwelcome sexual advances be rendered beyond Title VII's reach if he claims to have been provoked by his belief that his victim is a lesbian.

III. EXEMPTING SAME-SEX SEXUAL HARASSMENT FROM TITLE VII'S COVERAGE WOULD BE INCONSISTENT WITH THIS COURT'S EQUAL PROTECTION JURISPRUDENCE.

Official classifications based on sex are subject to heightened scrutiny under the Court's equal protection analysis. "The burden of justification is demanding and it rests entirely on the State. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *U.S. v. Virginia,* 116 S.Ct. 2264, 2275 (1996) (internal ***27** citations and quotations marks omitted).

It is also well settled that this heightened standard of equal protection review applies not only to classifications that disadvantage women, but also to classifications that appear to advantage women or disadvantage men. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding unconstitutional, under heightened scrutiny, peremptory challenges exercised to exclude male jurors); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (finding, under heightened scrutiny, that nursing school's exclusion of men violates the Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (striking state law that imposed disparate drinking ages for men and women); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (striking federal statute that provided disparate social security benefits to widows and widowers).

To dismiss Oncale's claim because he is a man rather than a woman, as the Fifth Circuit did, is to hold that Title VII claimants should be treated differently, based solely on their sex, without any support for such a result in the statutory language. It is no answer to maintain that the excluded "same-sex harassment" would not create a sex-based classification because it exempts members of each sex, equally, from establishing liability for sexual harassment by a perpetrator of the same sex. This Court rejected that analytic canard in *Loving v. Virginia*, 388 U.S. 1 (1967).

It presents the same problem to add a spurious sexual-orientation element, such as Sundowner advocates, only to same-sex sexual harassment cases. For example, under such a test, a female employee who is harassed by another woman would have a different and more onerous evidentiary burden than a similarly situated male victim, solely because of her sex: she would have to further prove the sexual orientation of her harasser, whereas for the male victim harassed by a ***28** female such proof would be unnecessary. Conversely, a male employee who is harassed by another man cannot properly be required to satisfy a different and more stringent standard than a similarly situated woman just because he is male.

Moreover, even if the sexual-orientation requirement were now to be added to all claims, including those of different-sex sexual harassment, the problem would resurface in another way. Were such a new element of proof introduced, a female employee who was harassed by a lesbian would be protected under Title VII, but a male employee subject to the same conduct by the same harasser would be excluded from protection based on his male sex. Likewise, a male employee harassed by a gay man would be protected, but a female employee subject to the same conduct by the same harasser would not. This is all contrary to the spirit of Title VII *and* equal protection principles.

***29 CONCLUSION**

This Court should reverse because the Fifth Circuit's determination that no Title VII cause of action is stated where a man alleges sexual harassment by male harassers is contrary to this Court's sexual harassment and Equal Protection jurisprudence, and to Title VII's terms, its purpose, and its spirit.

***1A APPENDIX A**

Lambda Legal Defense and Education Fund ("Lambda") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work. In addition to litigating sexual orientation and HIV/AIDS issues, including *Romer v. Evans*, 116 S.Ct. 1620 (1996), Lambda frequently appears as *amicus curiae* in state and federal courts across the country. Lambda is deeply concerned by the issues raised in this case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. It has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The ACLU has been deeply involved in the interpretation and implementation of Title VII since its enactment, primarily through the work of the ACLU's Women's Rights Project. Through the work of its Lesbian and Gay Rights Project, the ACLU has fought for equal rights on behalf of gays and lesbians. This case thus raises issues of longstanding interest to the ACLU and its members.

Bay Area Lawyers for Individual Freedom (BALIF) is a minority bar association comprised of over 500 lesbian, gay and bisexual members of the Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian and bisexual community at large. As part of that mission, BALIF actively participates in public policy debates concerning the ights of lesbians, gay men and bisexuals. BALIF frequently ***2a** appears as *amicus curiae* in cases where it can provide perspective and argument that will inform a court's decision on a matter of broad public importance. BALIF believes that it is the nature of the harassing behavior, not the gender of the harassed or of the harasser, that should determine the applicability of Title VII. BALIF therefore opposes the Fifth Circuit's decision in *Oncale v. Sundowner Offshore Services.*

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF) is a non-profit women's rights organization. Incorporated in 1973, CWEALF has over 1,400 members. The mission of the organization is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. CWEALF has a long history of working on both the issue of sexual harassment and the issue of gay and lesbian civil rights. We believe that sexual harassment is gender neutral and sexual-orientation neutral and that therefore same-sex sexual harassment should be actionable under Title VII.

Gay & Lesbian Advocates & Defenders (GLAD), New England's leading legal rights organization for lesbians, gay men, bisexuals and people with HIV, works in the courts and through public education to secure equal justice under law. Since its founding in 1978, GLAD has counseled people subjected to workplace discrimination, and has also appeared as counsel and *amicus curiae* in a wide variety of cases involving the scope of anti-discrimination protections and same-sex sexual harassment in the workplace. GLAD is interested in this case to demonstrate that existing sex discrimination prohibitions properly focus on the nature of the conduct involved, and must be interpreted to include a prohibition on same-sex sexual harassment, regardless of the sex or sexual orientation of the harasser or victim. ***3a** The National Center for Lesbian Rights (NCLR) is a national nonprofit civil rights organization founded in 1977 and headquartered in San Francisco. NCLR's principle objective is to secure and protect the civil rights of lesbian, gay, and bisexual people through litigation and public education. NCLR has a vital interest in securing fair and equal treatment in the workplace for all people, without regard to sexual orientation.

NOW Legal Defense and Education Fund (“NOW LDEF”) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D.Fla.1991), *cross appeals dismissed per stipulation* (Mar. 14, 1995), and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir.1993). NOW LDEF also has filed *amicus* briefs in sexual harassment cases such as *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993).

The National Women's Law Center (“Center”) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The Center has played a major role in shaping sexual harassment law, participating ***4a** as *amicus* in sexual harassment cases before the Supreme Court, including *Meritor Savings Bank v. Vinson, Harris v. Forklift Systems, Inc.,* and *Franklin v. Gwinnett County Pub. Sch.,* and as counsel and *amicus* in numerous sexual harassment cases in the lower courts. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in ensuring that Title VII adequately protects all workers from sexual harassment in employment.

The Northwest Women's Law Center (NWLC) is a Seattle-based public interest organization that works to advance the legal rights of women in the Northwest through litigation, education, legislation and the provision of legal information and referral

services. Founded in 1978, the NWLC works to challenge all forms of sex discrimination including that faced by lesbians and gay men. It has long been the position of NWLC that sexual harassment and sex discrimination laws apply equally and without regard to an individual's sexual orientation. In that regard the NWLC has participated in a wide range of litigation and legislative advocacy challenging efforts to deny gay and lesbian employees the full protection of state and federal civil rights laws.

People for the American Way ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women and of gay men and lesbians, ***5a** through such activities as supporting the enactment of civil rights legislation, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias, injustice, and discrimination. People For seeks to participate in this case in order to help vindicate the important interests at stake, including the interest in the uniform application of Title VII to all employees, regardless of gender, and the interest of every employee in a workplace that is free from the type of egregious conduct that admittedly occurred in this case.

The Women's Legal Defense Fund (WLDF) is a nonprofit national advocacy organization founded in 1971 to advance the rights of women in the areas of work and family. WLDF advocates for equal employment opportunity through litigation of sex discrimination cases, public education, and advocacy for improved enforcement of EEO laws.

Footnotes

FN

* Counsel of Record

1 Counsel for the parties authored no part of this brief, and the expenses of its preparation and submission have been borne exclusively by Lambda Legal Defense and Education Fund.

2 Obviously, sexual conduct need not be shown where it is alleged that gender-based harassment, which need not be sexual to be actionable, violated Title VII.

3 Of course, in all Title VII cases, some basis for employer liability, such as *respondeat superior* must also exist. Because that is an element common to all Title VII actions, it requires no separate consideration in this brief, nor need it be included in any test particular to sexual harassment claims. In addition, some courts impose a completely illusory requirement that the plaintiff show membership in a protected class, an element rendered meaningless by the fact that both men and women are protected by the statute. *Nichols v. Frank,* 42 F.3d 503 (9th Cir.1994) (criticizing the typical five-part test).

4 The Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment, 29 C.F.R. § 1604.11 (1997), describe the range of behavior addressed by the statute as follows: "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." The guidelines go on to explain that such conduct will rise to the level of actionable sexual harassment if submission to it is a condition of employment, if submission to or rejection of such conduct is the basis for employment decisions, or if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.*

5 This stands in marked contrast to instances of "bad behavior" that do not directly invoke the invidious bases enumerated in Title VII (such as when an employer, with no reference or allusion to an employee's race, religion, sex, or national origin, is gruff, unpleasant, harsh, quick tempered, a strict disciplinarian, or the like). In such a case, if a plaintiff alleges that the employer has created an environment violative of Title VII by that behavior, other evidence proving a connection to at least one prohibited basis will be required.

6 Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII,* 97 Harv. L. Rev. 1449, 1456 (1984) ("[B]y definition, sexual harassment occurs because of the harassed employee's sex ...").

7 That comparative evidence is not a necessary element of all Title VII claims is shown by the very structure of § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire, or to discharge, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis supplied). If there were some separate proof requirement invested in the word "discriminate," surely Congress would have drafted the provision so that this word was directly tied to claims arising out of hiring and firing

decisions as well. The statute unambiguously states that a decision to fire or not to hire an individual because of any one of the impermissible factors establishes an unlawful employment practice; the word "discriminate" and phrase "otherwise to discriminate" are only included as a catch-all phrase for other uses of those invidious factors "with respect to ... compensation, terms, conditions, or privileges of employment."

8 Moreover, even if sexual harassment did require libidinous intent, some men who consider themselves gay nonetheless are sexually attracted to some women and may act upon that attraction, without this changing their self-definition. *See* Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men & Women* 54-55 (1978) (reporting study results showing that almost two-thirds of men who considered themselves gay had engaged in heterosexual coitus at least once in their lives and that 14 to 22 percent of self-defined gay men had engaged in heterosexual coitus in the year prior to interview).

Likewise, "[m]any people who have had same-sex sexual experiences do not label themselves gay or lesbian...." *Developments in the Law-Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, n. 1 (1989); Edward O. Laumann, et al., *Homosexuality* in *The Societal Organization of Sexuality* 283, 287-301 (1994) (reporting survey findings of "sizable groups who do not consider themselves to be either homosexual or bisexual but [who] have had adult homosexual experiences or express some degree of [same sex] desire").

9 Of course, neither the harassers' marital status, nor their asserted heterosexuality alters the highly sexual nature of conduct like Lyons' placing his penis on Oncale's neck and arm, or the men forcing a bar of soap into his buttocks, or anus, while threatening that they were preparing to rape him. Nor does any of the men's status change that they each engaged in sexual conduct with and in the company of men, at the expense of Oncale's employment.

10 Indeed, many male harassers of women no doubt believe their sexual attentions to be complimentary and would claim to hold their victims in high esteem. *Pease v. Alford Photo Indus.*, 667 F.Supp. 1188, 1190 (W.D.Tenn.1987) (finding liability for harassment where the perpetrator thought his acts were merely "the friendly acts of an employer"); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 Am. Psychol. 497, 499 (1991) (noting that conduct that women generally perceive as sexual harassment will not necessarily be perceived as such by men, who may consider it ordinary social interaction); Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 Sex Roles 9 (1986).

11 Having courts or juries attempt to make a definitive factual determination regarding a person's sexual orientation, much less his or her capacity for sexual attraction in a specific instance, would be a highly problematic exercise. Sexual orientation is a complex construct, involving elements of desire, behavior, community and identity. *See* Edward O. Laumann, *et al.*, "Homosexuality," in *The Social Organization of Sexuality*, 283, 287-301 (1994) ("homosexuality is fundamentally a multidimensional phenomenon"); Gregory M. Herek, *Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sexuality 133, 134-35 (1991) (discussing different aspects of human sexuality that are contained within the rubric of sexual orientation); John P. DeCecco, *Definition and Meaning of Sexual Orientation, in Philosophy and Homosexuality* 51, 64 (Noretta Koretge, ed. 1985) (reviewing studies and concluding that "sexual orientation ... is a tapestry far richer and more intricate than we have imagined"); *see also* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 U.C.L.A. L. Rev. 263 (1995) (comparing difficulties in fact-finding regarding a litigant's race and a litigant's sexual orientation).

If a defendant's liability hinged on the harasser's sexual orientation or on the even more difficult-to-prove presence of sexual attraction in a given instance, obviously the harasser's own statements on those issues could not be seen as definitive proof. This is in marked contrast to the situation faced by gay or lesbian plaintiffs, or those perceived to be gay, in cases completely distinct from the one at hand. There, self-identification or the perception of others is sufficient proof as to the sexual-orientation component of the case. (More facts would be necessary, of course, in any such case to prove a plaintiff's claim, but here a complete defense to liability is contemplated.)

12 The *McDonnell-Douglas* burden-shifting paradigm, which frequently leads plaintiffs to employ comparative evidence, was crafted to permit an inference of an impermissible motive in the very different situation where there is no direct evidence that the adverse action was really taken based on race, color, religion, national origin, or sex. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Perry v. Kunz*, 878 F.2d 1056, 1059 (8th Cir.1989) ("the McDonnell Douglas test was designed merely to aid in discovering discrimination where only circumstantial evidence is available"). However, this paradigm does not apply in sexual harassment cases, where the reliance on an impermissable factor, sex, is directly and conclusively established by the conduct itself. *See Cline v. General Electric Credit Auto Lease*, 748 F. Supp. 650 (N.D.Ill.1990).

13 Where, as here, no inferential proof is necessary because the plaintiff presents direct proof that an impermissible factor was present in her treatment, circumstantial evidence merely supplements the initial showing. Its absence cannot defeat plaintiff's claim. *See, e.g.*, *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir.1994) ("If there is direct evidence that an employer placed substantial negative reliance on an illegitimate criterion in reaching an employment decision, however, resort to inferential methods of proof is unnecessary."); *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir.1989) (direct evidence of discrimination makes resort to circumstantial evidence unnecessary); *Perry v. Kurz*, 878 F.2d 1056, 1059 (8th Cir.1989) (same).

14 *See, e.g.*, *Boutros v. Canton Regional Transit Authority*, 997 F.2d 198, 205 (6th Cir.1993) (references to Arab plaintiff as a "camel jockey," a "rich Arab," and as unable to drive because he had no motor vehicles where he came from were indisputably national origin based, and not based on personal characteristics); *Ways v. City of Lincoln*, 871 F.2d 750 (8th Cir.1989) (racially offensive jokes, comments and actions directed at plaintiff's Black and Native American heritage stated claim of hostile work environment); *Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir.1986) (racial harassment and ethnic slurs demonstrated a racially hostile environment against both Blacks and Hispanics).

15 *Cf. Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir.1994) ("That conduct is egregious enough to offend the sensibilities of men as well as women cannot serve to immunize it for Title VII purposes."); *Woods v. Graphic Communications*, 925 F.2d 1195, 1198, 1202 (9th Cir.1991) (finding violation as to African-American employee where workplace polluted with "forms of hostility directed at almost every conceivable racial and ethnic group"), *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir.1989) (holding that it is no defense to assert that workplace conditions were equally offensive to men and women).

16 *See, e.g.*, *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir.1996) (pointing out that an employer's sexual harassment of men and of women in the workplace would be actionable by each, because each would experience harassment that was based in their status as a man or a woman) (Posner, J.) *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D.Wy.1993) ("[E]qual harassment of both genders does not escape the purview of Title VII in the instant case. Where a harasser violates both men and women 'it is not unthinkable to argue that each individual who is being harassed is being treated badly because of gender' ").

17 *See, e.g.*, *Steiner v. Showboat Operating Company*, 25 F.3d 1459, 1464 (9th Cir.1994), *cert. denied*, 513 U.S. 1082 (1995) (where defendant defended with the assertion that the harasser abused everyone in the workplace, "we do not rule out the possibility that both men and women working at Showboat have viable claims against Trenkle for sexual harassment").

18 In the present case, as in any sexual harassment case, the presence of indisputably sexual behavior establishes the requisite connection to sex (gender). In other cases, gender-based conduct that is demeaning or abusive can invoke gender albeit not in sexual terms. *See e.g.*, *King v. Hillen*, 21 F.3d 1572, 1583 (Fed.Cir.1994); *Kopp v. Samaritan Health Systems, Inc.*, 13 F.3d 264, 269 (8th Cir.1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482, n. 3 (3rd Cir.1990).

19 Just as there is non-sexual gender-based conduct, there is also sexual-orientation discrimination that is not sexual harassment. *Amici* 's position in this case that sexual harassment is *per se* because of sex, and that Title VII liability for otherwise actionable sexual harassment is not defeated whenever sexual orientation is introduced as a factor, does not touch on the question of whether or under what circumstances nonsexually harassing discrimination based on sexual orientation might so profoundly turn on sex as to violate Title VII. This Court has never addressed that question, and it should not do so in this context. Some lower courts have held that Title VII does not address sexual orientation discrimination, *see, e.g.*, *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir.1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir.1978) (holding discrimination against "effeminate" males not sex discrimination; arguably overruled by *Price Waterhouse*). But *see Macauley v. Massachusetts Comm'n Against Discrimination*, 397 N.E.2d 670, 671 (Mass.1979) ("As a matter of literal meaning, discrimination against homosexuals could be treated as a species of discrimination because of sex.... [H]omosexuality is ... sex-linked."). The present case does not present these questions, arising as they do outside the sexual harassment context, and this Court should not attempt to answer them here.

20 *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of sex Discrimination Under Title VII*, 81 Geo. L.J. 1, 32 (1992) ("By its nature, sexual harassment is an attack that involves the sexuality of the victim.")

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