

ALAMO HEIGHTS V. CLARK: LET’S TALK ABOUT
SEXUAL ORIENTATION AND ITS ROLE IN
ESTABLISHING SAME-SEX HARASSMENT

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I.	INTRODUCTION.....	1
II.	BACKGROUND OF PRIOR LAW	2
III.	FACTS & PROCEDURAL POSTURE OF <i>ALAMO HEIGHTS V. CLARK</i>	4
IV.	ANALYSIS OF THE <i>CLARK</i> DECISION.....	5
	A. <i>The Role of “Causation” in Employment Discrimination Law</i>	5
	B. <i>Oncale’s Win Means Clark Loses</i>	6
V.	THE SUPREME COURT’S POTENTIAL DISPOSITION REGARDING <i>CLARK</i>	8
VI.	CONCLUSION	8

I. INTRODUCTION

The law’s objective is never to restrain, but rather it is meant to expand freedom.¹ Likewise, “where there is no law, there is no freedom.”² For centuries the law has fallen silent on many issues regarding sexuality and gender. Title VII of the Civil Rights Act of 1964 (“Title VII”) was an attempt to remedy this lack of law. Title VII has prohibited discrimination in employment “because of race, sex, color, religion, and national origin.”³ Still, courts remain hesitantly silent where sexuality, discrimination, and harassment intersect.

Initially, courts followed the plain language of the statute when interpreting the scope and meaning of the term “sex” in the “because of sex”

1. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 42 (C.B. MacPherson ed., Hackett Publishing Co. 1980) (1764).

2. *Id.*

3. 42 U.S.C. § 2000e-2 (1991).

provision.⁴ The minimal legislative history available clearly indicates that the provision is meant to protect women from discrimination in employment because they were female.⁵ However, the term later expanded to include males.⁶ Finally, in 1986, the Supreme Court ruled that sexual harassment was actionable under Title VII as discrimination that is “because of sex.”⁷ Plaintiffs with diverse cases began inundating courts, alleging new theories under Title VII sex discrimination.⁸ Yet, because the Supreme Court has not defined the causation element of sex discrimination with certainty, errors and divisiveness among courts have created a vacuum of freedom.

This Note will first address the development and function of the “causation” element in bringing sexual harassment claims in the workplace under Title VII sex discrimination. Second, this Note will discuss how the plaintiff’s “win” in *Oncale* has placed future sexually harassed plaintiffs in a losing position, as demonstrated by *Clark*.

II. BACKGROUND OF PRIOR LAW

Modern sexual harassment and discrimination case law began taking form in 1991 with *Robinson v. Jacksonville Shipyards*.⁹ Female welder, Lois Robison worked in a shipyard mainly surrounded by male coworkers.¹⁰ During her employment, Robison was bombarded by pornographic pictures of women posted throughout the workplace coupled with sexually explicit commentary.¹¹ Although Robison did not specifically allege that the harassment she experienced was because of the harassers’ sexual interest in her, the court still logically held that the harassment was aimed at Robison on the basis of her sex.¹² The court had no qualms concluding that “sexual

4. Eric S. Dreiband & Brett Swearingen, The Evolution of Title VII—Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964, Address Before the American Bar Association Section of Labor and Employment Law (April 16, 2015).

5. *Id.* at n. 16.

6. *See* *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir. 1971) (refusing to hire male flight attendants solely based on the defense that the public preferred female stewardesses is sex discrimination under Title VII); *see also* *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (concluding that the Title VII extends to any policy of an employer which denies an individual acquisition, retention, or promotion of a job because the individual is either male or female).

7. *See* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (affirming that sexual harassment constituted sex discrimination under Title VII.).

8. DREIBAND, *supra* note 4.

9. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1491 (M.D. Fla. 1991).

10. *Id.* at 1495.

11. *Id.* at 1495-98.

12. *Id.* at 1522.

behavior directed at women will raise the inference that the harassment is based on their sex.”¹³

In the same momentum, an appellate court reviewed *Doe v. City of Belleville* in 1997.¹⁴ The court decided in favor of twin sixteen-year-old brothers who were subjected to sexual epithets, inappropriate grabbing, and threats of rape by male colleagues.¹⁵ Despite both the victims and harassers being male, the court nonetheless held that the victims had sufficiently proved sex discrimination.¹⁶ Given the totality and severity of evidence, it was unnecessary for the victims to prove that the harassers’ were gay or had sexual interest in them to make out a claim for same-sex discrimination under Title VII.¹⁷ The court paralleled the facts contending that had the Does’ been women, the circumstances still clearly indicate sexual harassment.¹⁸

While appearing to be on the same wave, *Oncale v. Sundowner Offshore Services, Inc.* changed the tide. In *Oncale*, a male employee working on an oil rig with an all-male crew had been forcibly subjected to threats of rape and sexually humiliating actions by male colleagues.¹⁹ The U.S. Supreme Court held in favor of the victim.²⁰ However, the Court created a “sexual desire theory” of causation.²¹ *Oncale*’s new theory drifted from *Robinson* and *Doe*’s logic that sexually harassing conduct could be motivated by factors other than sexual attraction to the victim.²² In other words, *Robinson* and *Doe* had recognized that sexual harassment, just like other forms of discrimination, could be perpetrated by other facts such as “personal vendetta, misguided humor, or boredom.”²³ Ultimately, *Oncale*’s sexual desire requirement to prove causation “narrowed the avenues by which female plaintiffs in the most common sexual harassment cases could prove causation.”²⁴

13. *Id.*

14. *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated on other grounds by City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998).

15. *Id.* at 567.

16. *Id.* at 595.

17. *Id.* at 590.

18. *Id.* at 595.

19. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998).

20. *Id.* at 79.

21. *Id.*

22. David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

23. *Doe*, 119 F.3d 563 at 578.

24. Schwartz, *supra* note 22, at 1702.

III. FACTS & PROCEDURAL POSTURE OF *ALAMO HEIGHTS V. CLARK*

The Texas Supreme Court recently addressed the burden of causation in *Alamo Heights Indep. Sch. Dist. v. Clark*. Clark was a physical-education teacher at a junior-high school outside of San Antonio.²⁵ While employed there, Clark met fellow female coach, Monterrubio.²⁶

Monterrubio's developed a fascination of Clark's body.²⁷ Monterrubio would remark daily about Clark's breasts, buttocks, and clothing.²⁸ Monterrubio also sent profane-ridden emails incorporating photos of male genitalia.²⁹ Monterrubio's sexual deviance began manifesting in physical form at the school's Christmas party.³⁰ Clark gave Monterrubio a candle during a gift exchange.³¹ Monterrubio told Clark that she would "f—k next to it and think about you."³² Monterrubio later grabbed Clark's buttocks during a Christmas picture.³³

Tension, and awkwardness, continued to reach a maximum for Clark. Monterrubio asked the other coaches if, "Coach [Clark] swallows."³⁴ And on another day, told Clark to "close her legs" when a student exclaimed 'I smell shrimp!' during lunch.³⁵ Clark complained to the athletic department's supervisor but to no avail.³⁶ Clark then complained to the principal who asked for a written account of her concerns.³⁷ Clark submitted a thirteen-page document detailing the misconduct.³⁸ The principal conducted an informal investigation and later dismissed it.³⁹ Monterrubio became more aggressive bumping, blocking, and following Clark.⁴⁰

Clark became so ill from the stress of her work environment that her doctor recommended she take several weeks of medical leave.⁴¹ After returning to work and filing a formal grievance, Monterrubio was transferred

25. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 764 (Tex. 2018).

26. *Id.*

27. *Id.* at 801.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 809.

34. *Id.* at 768.

35. *Id.* at 802.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 768.

41. *Id.* at 803.

to another school.⁴² Soon after, the school district opened an investigation into Clark and terminated her employment based on various findings.⁴³

The trial court and Fourth Court of Appeals recognized evidence of same sex harassment under Title VII and found in favor of Clark.⁴⁴ Particularly, the appeals court held that there could be harassment based on other factors, like gender stereotypes, without involving the desire theory.⁴⁵ The school district appealed and the Texas Supreme Court reversed.⁴⁶ The Court held that because of *Oncale*, to prevail on a sexual harassment claim, there must be “credible” evidence that the harasser was motivated from sexual desire based on their specific sexual orientation.⁴⁷ The Court did not find any allegation by Clark that Monterrubio was motivated by sexual desire and there was no evidence that Monterrubio’s conduct was linked to Clark’s gender.⁴⁸

IV. ANALYSIS OF THE *CLARK* DECISION

A. *The Role of “Causation” in Employment Discrimination Law*

The phrase “because of” implies that the plaintiff must show a causal link between an adverse employment action and the employee’s sex.⁴⁹ While reasonable in theory, in practice, demonstrating causation can be confusing. Perhaps contributing to the misunderstanding is the lack of specification in the statute itself. Title VII does not specify whether this causal connection should be implicitly or explicitly sexist, or even unintentionally sexist.⁵⁰ Nonetheless, the element of causation is still essential. Without causation nearly, any conduct the employee finds harmful could be brought as a Title VII action. Instead, causation acts as a gate, allowing courts to decide which harmful actions are prohibited by Title VII and can be let in, or kept out.⁵¹

Yet, the causation gate interacts differently with harassment claims as opposed to other discrimination actions. In other forms of employment discrimination such as race or national origin, the claim centers around if the employer had discriminatory motive in making personnel decisions.⁵² This

42. *Id.*

43. *Id.*

44. *Id.*

45. *Alamo Heights Indep. Sch. Dist. v. Clark*, No. 04-14-00746-CV, 2015 WL 6163252, at *5 (Tex. App.-San Antonio Oct. 21, 2015).

46. *Id.*

47. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 773

48. *Id.* at 775.

49. Schwartz, *supra* note 22, at 1709.

50. *Id.*

51. *Id.*

52. *Id.* at 1710.

type of claim forces courts to evaluate if such personnel decisions that are presumed to be economically productive are in fact, unproductive. Whereas, in a sexual harassment claim, the alleged harmful misconduct could never be framed as economically productive or beneficial to the company.⁵³ As a result, courts have not focused on refining a causation analysis for sex discrimination as it has for other forms of discrimination.

Nonetheless, the Supreme Court has attempted to precisely formulate a causation framework. Sometimes the Court uses an objective “but for” test, meaning an employer would not have treated the plaintiff in such a discriminatory manner but for their sex.⁵⁴ Other times the Court requires the plaintiff to prove subjectively that the true reason for the employer’s adverse employment decision against the plaintiff was discriminatorily pretexted on sex.⁵⁵ Such wavering standards have caused sexual harassment case law in lower courts to ambiguously decide just how much of the employment decision was shown to be sex-based to prove discrimination.⁵⁶ Same-sex harassment only added to court’s indecisiveness. The general trend in opposite-sex harassment was to put the intent of the harasser in the background, placing less importance on the “because of sex” connection.⁵⁷ However, with the emergence of same-sex harassment, *Oncale* played a pivotal role in utilizing the “sexual desire theory” to prove the victim was targeted because of their sex.

Clark is the first warning sign down a dangerous path if courts continue to rigorously apply the sexual desire theory of causation. *Clark* was the subject of severe, harassing conduct that impaired her employment relationship, caused her to become ill, and played a role in her termination. If the same line of reasoning applied in *Clark* is applied to other Title VII sexual harassment cases, then victims may be excluded from statutory protections, exposing them to harassing conduct that limit employment opportunities.

B. *Oncale’s Win Means Clark Loses*

The Texas Supreme Court in *Clark* properly asserted that the courts which do follow *Oncale’s* framework, are divided over whether proof of the

53. See e.g., *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994) (applying a mixed-motives analysis evaluating the legitimate and illegitimate reasons behind the adverse employment decision is inapplicable because “an employer could never have a legitimate reason for creating a hostile work environment.”)

54. *City of L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

55. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

56. Schwartz, *supra* note 22, at 1710.

57. Schwartz, *supra* note 22, at 1718.

harasser's sexual orientation is required.⁵⁸ The Court only furthered this divisiveness by creating a rigid rule from two possible examples listed in *Oncale*.⁵⁹ Yet, the *Oncale* examples were only intended to postulate how a plaintiff could show credibility of same sex harassment under Title VII.

The first example of "credible evidence" listed in *Oncale* is that the harasser intended to have sexual contact with the plaintiff.⁶⁰ The second example of credible evidence listed is proof that the alleged harasser made same-sex advances to other employees.⁶¹ Although the Texas Supreme Court created rules from examples, the Court still failed to follow its own new rules. Hypocritically, the Court did not bother to determine which of the two approaches to take because it found that credible evidence was lacking in both directions.⁶²

However, even if the Court decided to take either approach, Monterrubio's ample commentary on Clark's physique and discussion of sexual intercourse is sufficient evidence. Additionally, Monterrubio's conduct clearly pointed to same-sex attraction as demonstrated when she grabbed Clark's buttocks at the Christmas party.⁶³ Despite Monterrubio's apparent proclivity towards members of the same gender, the Court dismissed such conduct as "horseplay."⁶⁴ For the Court to claim that this evidence is somehow not linked to Clark's sex, borderlines willful blindness.

It is evident that in *Clark*, the Texas Supreme Court diverges from binding precedent and reality. The *Oncale* court still found in favor of the plaintiff despite not providing evidence that the harassers were gay.⁶⁵ Furthermore, *Oncale* states the opposite as *Clark*: "Harassing conduct need not be motivated by sexual desire to support inference of discrimination on basis of sex."⁶⁶ If the U.S. Supreme Court did not require this element in their binding decision, it is not only erroneous but unlawful for the Texas Supreme Court to require it. The notion that the *Oncale* court did not require a showing of the harasser's sexual orientation indicates that a same-sex harassment claim could be viable without demonstrating sexual desire.

Ultimately, when a court like *Clark* imposes stringent causation standards on plaintiffs, it marginalizes legitimate claims and leaves victims outside the coverage of Title VII. Furthermore, it raises the evidentiary

58. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 807 (Tex. 2018).

59. *Id.* at 806–807.

60. *Id.* at 773.

61. *Id.*

62. *Id.*

63. *Id.* at 774.

64. *Id.* at 797–798.

65. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

66. *Id.* at 80.

burden for plaintiffs by having to prove the harasser's motivation and sexual preference. In many situations a person may not be openly gay, may not know that they identify as gay, or may not even self-identify. Further, inquiring into a person's sexual preference creates an uncomfortable workplace. Allowing a plaintiff to prove causation using various "because of sex" factors protects broader categories of sexual harassment claimants.

V. THE SUPREME COURT'S POTENTIAL DISPOSITION REGARDING
CLARK

Without doubt, the decade's worth of inconsistent holdings and rogue causation analyses is a clear indication that the Supreme Court must act. If not addressed, the cacophony amongst the courts will create an unequal application of the law and impinge on freedom.

The most viable approach to providing clarification is to generalize and lower the "because of sex" threshold. In keeping within Title VII, this redefinition of sorts may require plaintiffs to show that their protected status "made a difference" or "played a role in a challenged employment decision."⁶⁷ This flexible and simplified standard would allow courts to evaluate all relevant facts to a sex discrimination claim avoiding the rigidity and ambiguity that plagued prior case law. Furthermore, as society moves toward discussing sexuality more openly, this new standard allows the public to have a greater and swifter influence on sex discrimination law, adapting and mirroring future generation's perceptions. The Supreme Court may be particularly inclined to this position as supported by the plurality opinion in *Price Waterhouse v. Hopkins*. In *Hopkins*, the Supreme Court hinted that "because of sex" means "gender must be irrelevant to employment decisions."⁶⁸ Likewise, sex must be a relevant factor to the harassing conduct to establish causation. This clarification would allow plaintiffs to plead their cases, and jurors' greater flexibility when applying causation.

VI. CONCLUSION

The Texas Supreme Court recognizes same-sex harassment under Title VII. However, the Court ignores the advancement in case law recognizing that sexual misconduct may be caused by something other than attraction. Yet, because the causation element has not been refined by courts it has left a void in the law in which the rigid "sexual desire theory" of causation has filled. Although *Clark* attempted to follow precedent laid out in *Oncale*, it

67. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1166–86 (1995).

68. *Price Waterhouse v. Hopkins*, 490 U.S. 288, 244–47 (1989).

2019] *SEXUAL ORIENTATION AND SAME-SEX HARASSMENT* 9

wholly misinterprets the *Oncale* decision and instead supports the sexual desire theory of causation. Such discrepancies among the law suggests that the Supreme Court must redefine the “because of sex” causation standard.