

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOSEPH ONCALE, Petitioner v. SUNDOWNER
OFFSHORE SERVICES, INC., ET AL.
CASE NO: 96-568 C. |
PLACE: Washington, D.C.
DATE: Wednesday, December 3, 1997
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOSEPH ONCALE, :

4 Petitioner :

5 v. : No. 96-568

6 SUNDOWNER OFFSHORE SERVICES, :

7 INC., ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, December 3, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 NICHOLAS CANADAY, III, ESQ., Baton Rouge, Louisiana; on
16 behalf of the Petitioner.

17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting the Petitioner.

21 HARRY M. REASONER, ESQ., Houston, Texas; on behalf of the
22 Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-568, Joseph Oncale v. Sundowner's
5 Offshore Services, Inc.

6 Mr. Canaday.

7 ORAL ARGUMENT OF NICHOLAS CANADAY

8 ON BEHALF OF THE PETITIONER

9 MR. CANADAY: Mr. Chief Justice, and may it
10 please the Court:

11 Rejecting Joseph Oncale's title VII claims, the
12 Fifth Circuit stated, same-sex harassment claims are not
13 cognizable under title VII. The question presented
14 through this appeal is whether the Fifth Circuit's
15 categorical rejection of same-sex claims under title VII
16 is correct.

17 We argue that it is not. The court below should
18 be reversed. Same-sex sexual harassment claims are
19 actionable under title VII. This case is not about the
20 outer limits of parameters of same-sex sexual harassment
21 as an actionable form of discrimination because of sex,
22 nor is this case about the methods of proof of such a
23 claim. This case is about whether a same-sex sexual
24 harassment claim exists as a matter of law.

25 The Fifth Circuit rule that same-sex claims do

1 not exist under title VII is not sex-specific. It is an
2 absolute rule.

3 Both sides to this litigation agree that women
4 are entitled to the protections of title VII, but to
5 accept the Fifth Circuit rule is to accept the proposition
6 that a woman's right to work in an environment free of
7 unwelcome sexual conduct, or sexual solicitation, turns on
8 the sex of her harasser. If the harasser is a female, the
9 woman has no rights or remedies under title VII as
10 interpreted by the Fifth Circuit.

11 QUESTION: I thought this case involved a man.

12 MR. CANADAY: It does, Your Honor. This case
13 does involve a man, but I emphasize that the Fifth
14 Circuit's ruling is not a male-on-male decision, it is a
15 same-sex decision, and I emphasize that to point out the
16 breadth of the Fifth Circuit's categorical and absolute
17 rule that same-gender sexual harassment claims, regardless
18 of the genders, as long as they're identical, and
19 regardless of the underlying facts, would, under the Fifth
20 Circuit's rule, be dismissed as a matter of law, but Your
21 Honor, you're exactly correct, this is a male-on-male
22 situation, but the court did not decide the case on that
23 fact except to recognize that the genders of the two
24 parties, the harasser and the victim, were the same.

25 So to accept the Fifth Circuit's rule, then, is

1 to agree that the sex of the harasser defines the scope of
2 title VII.

3 QUESTION: Not necessarily. I mean, you could
4 say if the harasser, whoever he or she is, treats members
5 of one sex, whether the same sex as the harasser or the
6 opposite sex, differently, you could -- so you -- if you
7 have a difference of -- in treatment by the perpetrator of
8 males and females, that's one thing.

9 So I don't think that the Fifth Circuit has
10 ruled quite as broadly as you suggest. You could have a
11 male perpetrator and a male victim.

12 MR. CANADAY: Your Honor, the Fifth Circuit has
13 ruled categorically that if there is a male victim and a
14 male perpetrator they do not look at the underlying facts
15 or circumstances of the harassment. They decided as a
16 matter of law that same-gender causes of actions do not
17 exist.

18 The Fifth Circuit's rule would be equally
19 applicable were this a woman-on-woman case. The fact that
20 it is male-on-male --

21 QUESTION: But my point is, this was an all-
22 male environment, too, and wasn't that -- don't we have to
23 take the decision in that context?

24 In other words, they didn't say that if you have
25 an employer who treats members of one sex one way and

1 members of another sex another way there would still be no
2 claim under title VII if the victim is a male and the
3 perpetrator is a male. They didn't say that. There was
4 no other sex involved in this case.

5 MR. CANADAY: That is correct, there was no
6 other sex involved, but that factual determination is not
7 the foundation of the Fifth Circuit's rule. The Fifth
8 Circuit's rule is a categorical rule. The Fifth Circuit
9 in fact did not discern or consider the underlying
10 circumstances or the maleness of the workplace. The Fifth
11 Circuit's rule is the broadest of possible brushes. It's
12 an absolute rule.

13 QUESTION: Well, as I understand, Mr. Canaday,
14 you're not asking us to decide whether or not there was
15 discrimination in this case. You're simply asking us to
16 say that the fact that it was male on male does not
17 prevent there from having been discrimination.

18 MR. CANADAY: Your Honor, that's exactly
19 correct, because my case was thrown out as a matter of
20 law. The court below found that no facts were material.
21 The court below did not review the facts and determine
22 which facts of the alleged harassing situation were
23 material. They didn't decide this case as a matter of
24 fact. They decided this case as a matter of law.

25 QUESTION: Well, what are you going to have to

1 show if you prevail? What does a judge tell the jury?
2 Ladies and gentlemen of the jury, you may find for the
3 plaintiff if, what?

4 MR. CANADAY: We would prevail if the jury was
5 instructed that sexual harassment is a cognizable form of
6 discrimination based on sex. The jury could then be
7 instructed on the law as established in the circuits and
8 as articulated by this Court, and then the court, the
9 trier of fact could draw the reasonable inference -- well,
10 first of all, under the facts alleged the trier of fact
11 could determine that Joseph Oncale was quid pro -- the
12 victim of quid pro quo sexual harassment, or the trier of
13 fact, under the facts as they currently stand, could find
14 that Joseph Oncale was victimized of a hostile sexual
15 environment.

16 QUESTION: But title VII doesn't speak of sexual
17 harassment or a hostile sexual environment. That is a
18 part of a -- the basic is discrimination. You would have
19 to show that he was treated differently because he was a
20 man, would you not?

21 MR. CANADAY: Your Honor, we would have to show
22 that discrimination because of sex, as defined by this
23 Court in the Meritor case, did in fact occur, yes, sir.

24 QUESTION: Well, suppose you had a case in which
25 an uncouth supervisor tells very offensive and suggestive

1 jokes to both sexes.

2 MR. CANADAY: Well, on the facts --

3 QUESTION: Or, in your case, if we could change
4 the facts a little bit, if almost the same conduct was
5 perpetrated against both sexes by this supervisor?

6 MR. CANADAY: If it is the off-color, or the
7 poor joke case, Your Honor, I believe the argument then
8 would be, or the issue then would be whether or not the
9 severity or pervasiveness of the conduct raised the
10 level --

11 QUESTION: Well, you know what I'm trying to
12 say.

13 MR. CANADAY: Yes, sir.

14 If the facts were that the -- all employees of
15 both genders are treated equally, the equal opportunity
16 harasser -- first of all, let me emphasize that's not this
17 case.

18 QUESTION: I understand.

19 MR. CANADAY: But assume hypothetically it was,
20 then the question would be whether or not that under the
21 facts you could -- the jury could discern an attempt to
22 discriminate based on sex. So --

23 QUESTION: So you're saying that the other
24 sexual harasser, or the homosexual harasser is liable, but
25 the bisexual harasser is not.

1 MR. CANADAY: No.

2 QUESTION: That there is immunity for the
3 bisexual harasser.

4 MR. CANADAY: No, sir. That is not our position
5 in this case.

6 QUESTION: Oh, I thought -- I thought --

7 MR. CANADAY: No, sir. If I stated that, I
8 misspoke.

9 QUESTION: Well, if not, why is there
10 discrimination? I think that's what we're both asking.

11 MR. CANADAY: In the pure -- in the true
12 bisexual harasser scenario, which again this case is not,
13 the court could then look at the sexual nature of the
14 conduct and could, under existing precedent, argue that
15 each victim was a victim of sexual harassment.

16 QUESTION: No. Each victim would have been a
17 victim of -- would have been discriminated against on the
18 basis of that person's sexuality, but not on the basis of
19 that person's sex, because it was indifferent to the
20 harasser whether the person was male or female.

21 MR. CANADAY: But the individual claimant, Your
22 Honor, who brought the cause of action alleging that he or
23 she was the victim of sexual discrimination could
24 demonstrate that their work environment was a
25 discriminatorily hostile work environment and then,

1 perhaps as a matter of defense --

2 QUESTION: No more so than people of the other
3 sex.

4 MR. CANADAY: Then that would be --

5 QUESTION: That's what the person has to show.

6 MR. CANADAY: But that would be a matter of
7 affirmative defense, would it not, not as matter of an
8 element of cause of action. If that person shows that
9 they are singled out for mistreatment based upon sex --

10 QUESTION: Yes, if they show they're singled
11 out.

12 MR. CANADAY: Yes.

13 QUESTION: But the point is, they haven't been
14 singled out. This person treats males and females alike.

15 MR. CANADAY: Right, and again, if that was --

16 QUESTION: I just wonder -- you know, if you
17 acknowledge that the bisexual harasser does not violate
18 this law, I just wonder how that transfers over to the
19 case that you have.

20 MR. CANADAY: Well, I do not believe it
21 transfers over to the case that I have because the case
22 before you now is the first-step case as to whether the
23 cause of action exists and secondly, in my case, only men
24 were harassed under the situation on the Sundowner rig.
25 Only Joseph Oncale was harassed.

1 QUESTION: No, but you don't concede as a matter
2 of law, do you, that the bisexual harasser cannot harass
3 on the basis of sex?

4 MR. CANADAY: That is exactly correct.

5 QUESTION: I mean, a person may be quite neutral
6 on sexuality and still in fact discriminate on the basis
7 of sex, and you're not conceding that fact.

8 MR. CANADAY: Absolutely not, sir.

9 QUESTION: Okay.

10 MR. CANADAY: Your Honor. I do not concede
11 that.

12 QUESTION: Well, are you taking the position
13 that any harassment, provided that it's grave, fits under
14 title VII, then?

15 MR. CANADAY: No, Your Honor, we're not taking
16 the position that any harassment --

17 QUESTION: So what would you exclude?

18 MR. CANADAY: Well, I believe that the
19 exclusions would be a matter of fact, whether or not it --
20 whether or not the harassment was shown as a matter of
21 fact to raise to the level of severity of the --

22 QUESTION: Oh, let's assume that it's very
23 gross, but -- so -- and it meets all the standards of our
24 case law about it has to be pervasive and grave. Is there
25 any category that you would then omit, or are you saying

1 that all sexual harassment, provided it meets the
2 standards of being severe and pervasive, fits under title
3 VII?

4 MR. CANADAY: If -- assuming the harassment does
5 raise to the level of severity and pervasiveness and would
6 be recognized as sexual harassment, then our position is
7 that the gender of the harasser vis-a-vis the gender of
8 the victim is not a material fact.

9 QUESTION: Well, why is that discrimination,
10 then?

11 QUESTION: You would agree that you also have to
12 show that the harasser is discriminating --

13 QUESTION: Yes

14 QUESTION: -- on the basis of sex, which the
15 statute says, would you not, that he is treating, or she
16 is treating one sex differently from the other?

17 MR. CANADAY: I believe that's an essential
18 element of the cause of action, but the Fifth Circuit in
19 this case said that those circumstances could never be
20 proved in a same-gender sexual harassment claim.

21 These questions that the court have posed are
22 questions of proof, or questions of motive, but not of
23 questions of definition.

24 QUESTION: No, but it's also a question of how
25 we're going to write the opinion.

1 I mean, maybe you would prevail under these
2 facts, but we have to understand the nature of the cause
3 of action, and we're asking you why there is
4 discrimination in some of these hypotheticals that we have
5 posed.

6 MR. CANADAY: Your Honor, there is
7 discrimination because Joseph Oncale in this case, alone
8 among men in a workplace, was selected by his supervisor,
9 a male, to be the victim of that male supervisor's
10 unsolicited, unwanted, and obnoxious sexual advances.
11 That is sexual harassment.

12 QUESTION: I wouldn't really call them sexual
13 advances. It was certainly not -- a lot cruder than that,
14 but suppose -- suppose that Mr. Oncale had been hazed,
15 which is what the other side says. This is just, you
16 know, good frolics, and male hazing.

17 Suppose he had been hazed in some other fashion.
18 I mean, just as obnoxious, but just not -- you know,
19 nothing to do with genitals or anything else. They just
20 said, you know, you're a fat slob. Your eyes are crooked.
21 And, you know, they just made life miserable. The same,
22 but -- just as obnoxious.

23 MR. CANADAY: But removing the element of sex,
24 then --

25 QUESTION: Well, just using something else,

1 other than his manhood, as the basis for the hazing.

2 MR. CANADAY: Then he would not have -- I don't
3 believe, under that fact pattern, he would have a right of
4 action under title VII.

5 QUESTION: You see, I find that difficult to
6 understand. I mean, that -- he's still singling out this
7 person.

8 MR. CANADAY: Well, if --

9 QUESTION: I don't know why singling him out on
10 the basis of his sexuality means that you're singling him
11 out on the basis of his sex.

12 MR. CANADAY: Well, I believe that what we've
13 argued in brief is that it is -- the singling out for sex-
14 specific or sex-driven conduct is one category, this
15 category, but your hypothetical --

16 QUESTION: Why is that? Is this a law -- I
17 mean, is this a dirty-word law, or something? It wasn't
18 meant to produce politeness and --

19 MR. CANADAY: Right.

20 To answer your question, though, you asked
21 earlier, Your Honor, is if the conduct was devoid of
22 sexual connotations, or didn't involve grabbing
23 Mr. Oncale's genitalia, or didn't involve use of a bar of
24 soap in a shower, as this case did, then perhaps there
25 would have to be showing of modus, or motive, or intent,

1 or animus, independent of the facts.

2 But given that this man was singled out for
3 sexual abuse by his supervisors, the component of
4 sexuality as a component of -- because of his sex is
5 inherent in the fact pattern.

6 QUESTION: Well, take Justice Scalia's
7 hypothesis that the hazing here did not involve genitals,
8 *but just very nasty treatment. Now, if you could show
9 the supervisor, or whoever was the hazer, did not treat
10 women the same way given the same circumstances, then I
11 suppose you could make out a claim of discrimination.

12 MR. CANADAY: Yes, sir.

13 QUESTION: But just the hazing by itself, unless
14 you can show that men are treated differently than women,
15 doesn't make out a claim.

16 MR. CANADAY: I believe if the harassing conduct
17 is nonsexual then the plaintiff would have a burden of
18 establishing a *disparity of treatment and show that
19 perhaps that supervisor didn't treat women the same way so
20 as to show the motive to --

21 QUESTION: But supposing it is sexual, you still
22 have to show different treatment of men versus women, do
23 you not?

24 MR. CANADAY: You have to show that this
25 individual was harassed or discriminated against because

1 of his sex.

2 QUESTION: And to be discriminated against, that
3 is, treated differently than someone of the other sex.

4 MR. CANADAY: That is true.

5 QUESTION: Isn't your point here that when the
6 hazing is of the sexual nature here, simply by proving
7 what went on, you make a stronger prima facie case that in
8 fact there was sex discrimination going on than you would
9 be if you were merely to prove hazing of a totally
10 nonsexual nature? Isn't that the real difference?

11 MR. CANADAY: Yes, Your Honor, it is.

12 QUESTION: But theoretically your burden is the
13 same. In this case, your burden is to prove that in fact
14 these -- the individual defendants here would not have
15 treated women the same way they were treating this man.

16 MR. CANADAY: Yes, Your Honor, in --

17 QUESTION: And that the employer would not have
18 reacted or have condoned this sort of treatment in a
19 women -- had women been the object of it, whereas they
20 have condoned it in this case. Those are your two
21 burdens, then.

22 MR. CANADAY: Right, and the manner in which
23 members of the opposite gender are treated and the manner
24 in which the employer may respond to --

25 QUESTION: But how could you show that for an

1 all-male workforce? That's -- you seem to be thinking
2 that it's irrelevant that we don't have any comparison
3 group, and yet you answered Justice Souter, yes, it is
4 relevant.

5 Where you have an all-male workforce, how can we
6 know how the -- this -- these gross people would have
7 treated women, or how the employer would have reacted to
8 it?

9 MR. CANADAY: Your Honor, it may well be
10 relevant, but we do not concede that it's determinative.

11 QUESTION: But how would you prove anything at
12 all about it, because what evidence would you have about
13 how women would have been treated had they been in the
14 workplace?

15 MR. CANADAY: We might be able to show how women
16 were treated in other circumstances, in other work offices
17 of Sundowner, or how they responded to sexual harassments
18 by other individuals.

19 We may be able to demonstrate that Mr. Lyons may
20 confess that had Joseph Oncale not been a man he never
21 would have done that. In the current posture of this case
22 we haven't had an opportunity to take Mr. Lyons'
23 deposition, but those are the types of questions we would
24 certainly explore with him.

25 I'd like to save some time for rebuttal, if I

1 may.

2 QUESTION: Very well, Mr. Canaday.

3 Mr. Kneedler.

4 ORAL ARGUMENT OF EDWIN S. KNEEDLER

5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE PETITIONER

7 MR. KNEEDLER: Mr. Chief Justice, and may it
8 please the Court:

9 QUESTION: Mr. Kneedler, will you please get
10 into this question of what a plaintiff has to show when
11 it's a same-sex situation, in the Government's view?

12 MR. KNEEDLER: Yes. The --

13 QUESTION: Is there an element of
14 discrimination?

15 MR. KNEEDLER: The --

16 QUESTION: And how can that be shown?

17 MR. KNEEDLER: The test under title VII is
18 whether a person was treated in the way he or she was
19 because of that employee's sex.

20 As this Court said in Vinson, to quote, without
21 question, when a supervisor sexually harasses a
22 subordinate because of the subordinate's sex, that
23 supervisor discriminates on the basis of sex, or, put
24 another way, as in Manhart, when the person is treated in
25 a manner different from what he would have been treated if

1 gender had not been taken into account.

2 The question of how someone of the opposite sex
3 is treated is one way of proving that ultimate question,
4 but the Court in Vinson regarded *it as treating someone
5 because of their sex as discrimination.

6 QUESTION: How can that possibly be involved in
7 this case? I mean, there were other men in the workplace
8 who weren't treated this way. They just didn't like this
9 guy.

10 MR. KNEEDLER: Well, that -- there's a
11 difference between motive and treatment.

12 I mean, if we look at Harris, for example, in
13 Harris the harassment was explicitly sexual, sex-based.
14 The employer was saying, you dumb woman, comments like
15 that. It was facially sex-based, just like in Johnson
16 Controls the policy with respect to employment was
17 explicitly sex-based, and the Court said when you have
18 something that's explicitly sex-based the motive behind
19 that does not detract from the fact that it is a violation
20 of title VII.

21 And when you -- in the opposite gender
22 harassment cases the courts, lower courts have been
23 prepared to assume, as I think this Court's descriptions
24 in Vinson and Harris have, that it is because of sex.
25 Now, that may --

1 QUESTION: So it's a presumption? Justice
2 Souter used the kinder, gentler word of prima facie case.

3 MR. KNEEDLER: Yes.

4 QUESTION: But is there a presumption that this
5 kind of conduct is discriminatory? Is that what you're
6 saying?

7 MR. KNEEDLER: Well, I think that the courts
8 have assumed that it's because of sex, that there's
9 something relational about sex.

10 QUESTION: But the statute requires
11 discrimination, and that's what we're puzzled --

12 MR. KNEEDLER: The -- what I was saying, though,
13 is that it prohibits action because of sex. It was
14 intended to remove race, sex, national origin from the
15 decision-making process.

16 QUESTION: Well, because of the sex of the
17 victim.

18 MR. KNEEDLER: Yes, because of the --

19 QUESTION: Isn't that right?

20 MR. KNEEDLER: Because of the sex of the victim.

21 QUESTION: Okay. So suppose you have an
22 employer who has the unfortunate habit of patting every
23 single employee, male or female, on the fanny every day,
24 indiscriminately, both sexes. Now, how do you show sexual
25 harassment under that discrimination requirement of

1 title VII?

2 MR. KNEEDLER: It may well be that in that
3 situation the conduct is not because of the recipient's --
4 of the victim's sex. That is the requirement, and as the
5 Court said in Harris, this is a question of the facts and
6 circumstances and the severity --

7 QUESTION: You're concentrating on because of
8 sex, which is in the statute, I agree, but discriminate --
9 discriminate is also a word in the statute, and you're
10 leaving that out of your analysis, it seems to me.

11 MR. KNEEDLER: Well, it textually -- this is a
12 constructive discharge case, among other things, and the
13 statute says it's an unlawful employment practice to fail
14 or refuse to hire -- excuse me, or to discharge an
15 individual or otherwise discriminate because of the
16 individual's sex.

17 The suggestion textually, discharge because of
18 sex, is taken to be discrimination in that situation, and
19 this is consistent with the purpose of title VII, which is
20 to render irrelevant a person's sex, just as the person's
21 race or national origin is to be irrelevant in the
22 workplace.

23 So if you have -- in the hypothetical equal
24 opportunity harasser, if someone uses explicitly sex-
25 based harassing terms, rising to the level of

1 offensiveness at issue in Harris, against women using sex-
2 specific words and men using derogatory, sex-specific
3 terms, each of those employees experiences the terms and
4 conditions of his or her employment --

5 QUESTION: I don't see how you can get that out
6 of the statute, Mr. Kneedler. It says discriminate.

7 MR. KNEEDLER: Well, each -- going back to
8 Manhart, the question is --

9 QUESTION: Well, but I'm talking about the
10 statute. I'm not --

11 MR. KNEEDLER: But the words used, discriminate
12 means treat differently, or to draw a distinction between,
13 and the words chosen for the harassment of the woman are
14 different from the words chosen for the harassment of the
15 man, and specifically because of the recipient's --

16 QUESTION: Well then, Justice O'Connor's
17 hypothetical, then, would not meet the statute because no
18 words were chosen. Each one is just patted on the fanny.

19 MR. KNEEDLER: And it is not -- it is not --
20 perhaps looked at in other ways, it's not facially sex-
21 based. In the opposite sex sexual harassment cases the
22 courts have been prepared to assume, I think, that it is
23 because of sex.

24 Maybe that's an assumption about human behavior,
25 and probably an accurate one. It is seldom the case that

1 the victim, or the other person's sex is irrelevant in
2 sexual conduct. Sex is relational. It's done with regard
3 to the sex of the other person, whether it's the same sex
4 or opposite sex.

5 QUESTION: I find it difficult to see that there
6 ought to be a distinction, with regard to the application
7 of this law, whether the particular individual who was
8 harassed in this case is made to feel small and
9 insignificant and embarrassed by using dirty sex words or
10 in some other fashion. I can't see how that would have
11 anything to do with whether he's being discriminated
12 against on the basis of his sex.

13 You're telling me if you call him a jerk every
14 day, that's okay, but if you use some sex-related word
15 it's not okay.

16 MR. KNEEDLER: Well, it's not --

17 QUESTION: That doesn't make any sense.

18 MR. KNEEDLER: It wouldn't be okay -- if you
19 have very abusive conduct that is not sex-based on its
20 face, it would still be open to the employee to show that
21 it is because of the employee's sex by showing that women
22 were not treated in the same way.

23 But where it is explicitly sex-based, where it
24 is by use of the sex organs, it would at least be a
25 permissible inference for a finder of fact to conclude

1 that this conduct would not have been engaged in with a
2 woman, that this was done --

3 QUESTION: A mandatory -- would it be a
4 mandatory conclusion? Does it go to the jury?

5 You know, if -- do you tell the jury, if you
6 find that the reason they were giving this man a hard
7 time, including through sexual acts and so forth, is
8 because of his sex, you will find for the plaintiff.
9 However, if you think they were doing this just because
10 for some reason they didn't like this guy --

11 MR. KNEEDLER: Well, I think again --

12 QUESTION: -- you won't find for the plaintiff?

13 MR. KNEEDLER: It would depend on the facts and
14 circumstances. If the --

15 QUESTION: I just want to know what the charge
16 is.

17 MR. KNEEDLER: Well, the charge would be that it
18 has to be because of sex, and I would think ordinarily
19 that would be -- the jury could draw an inference -- I
20 think it should go to the jury, but it's a question --

21 QUESTION: Would the instruction that I just
22 gave -- if you think the reason they did these sex-based
23 acts is because they didn't like his sex, that's one
24 thing, if you think they did it just because they didn't
25 like this jerk, that's something else --

1 MR. KNEEDLER: But if the method that was done
2 was sex-specific -- for example, the grabbing of the
3 genitals --

4 QUESTION: Yes, right. Then what?

5 QUESTION: Even if it's not, wouldn't you also
6 say, even if it's not sex-specific, even if it doesn't get
7 beyond the point of calling the person a jerk, if the
8 employer calls males he doesn't like jerks, and does not
9 do the same thing for females he doesn't like, that would
10 qualify under the statute?

11 MR. KNEEDLER: Right. No, absolutely. No, I
12 didn't mean to suggest otherwise.

13 QUESTION: Sure. Sure. Sure. I -- that's no
14 question. I'm talking about this case, an all-male
15 workforce, and they have picked on this fellow, and
16 they've picked on him in ways that have sexual
17 connotations.

18 What charge do you give to the jury? Is it
19 enough that they've picked on him in ways that have sexual
20 connotations? If you find that they did this, there has
21 been sexual discrimination. Is that the charge?

22 MR. KNEEDLER: Well --

23 QUESTION: Or do you tell the jury, in addition
24 to finding that they did this, you have to find that they
25 did it because they didn't like his maleness, and it --

1 this was not just some other way of hazing him.

2 MR. KNEEDLER: No, I think the question is, was
3 he treated in a manner but for the fact that he was a man
4 he would have been treated differently, and the fact that
5 it was sexual conduct is a permissible basis upon which a
6 trier of fact can conclude that that was so. I mean, this
7 conduct may have been --

8 QUESTION: Well, would it be wrong for the judge
9 to charge, you make a decision. Was it because of his
10 sex? Did they want to demean him because they didn't
11 consider him sufficiently male, or was it just that they
12 didn't like him and they used this disgusting way of
13 showing it? Would that be a proper charge?

14 MR. KNEEDLER: Well, it might be, but I just
15 want to make clear, for example, in --

16 QUESTION: Well, under --

17 MR. KNEEDLER: -- that if something is -- if the
18 method -- it's not just the identity of the person. if
19 the manner of the treatment is selected because of the sex
20 of the person, in this case placing the penis on the
21 person's head because it was -- it would be regarded as
22 especially humiliating for a man to be subjected to that
23 treatment, then the manner of treatment as well as the
24 selection of the individual, if that is because of sex,
25 then there is a violation of --

1 QUESTION: Well, you're leaving out the word
2 discriminate, which is in the statute. You're just
3 looking at the part of the statute that says, because of.

4 Now, don't you have to at least instruct on --
5 that a discrimination because of the individual's sex --

6 MR. KNEEDLER: Justice O'Connor, I think as in
7 Price Waterhouse, the question of how a woman would have
8 been treated, or a man, in that case, may be evidence that
9 goes to whether the person -- whether sex was made
10 relevant in the action, but the ultimate question is
11 whether something that shouldn't have been relevant was
12 made relevant in that --

13 QUESTION: Thank you, Mr. Kneedler.

14 Mr. Reasoner, we'll hear from you.

15 ORAL ARGUMENT OF HARRY M. REASONER

16 ON BEHALF OF THE RESPONDENTS

17 MR. REASONER: Mr. Chief Justice, and may it
18 please the Court:

19 I would like to rest our argument on three
20 points, to the extent that the Court would permit. First,
21 I think the question by Mr. Chief Justice about the
22 relationship of sexual harassment to this discrimination
23 statute is at the heart of the case.

24 This is a discrimination statute. It was passed
25 in 1964, clearly, we submit by its plain language to deal

1 with discrimination between men and women. In our
2 language, words take their meaning from the context, and
3 in the context of this statute it did refer to
4 discrimination between men and women.

5 Sexual harassment, although both the Government
6 and petitioner treat it as if it were an independent,
7 statutory concept not tied to the fundamental finding of
8 discrimination, is not an independent --

9 QUESTION: Mr. Reasoner, can I ask you sort of a
10 basic question? Your opponent relied on the Manhart case.

11 MR. REASONER: Yes, Your Honor.

12 QUESTION: Which I guess the basic test is, if
13 this person would have been treated differently if he had
14 been of the opposite sex, then that's a prima facie proof
15 of discrimination.

16 MR. REASONER: Yes, Your Honor.

17 QUESTION: Would you agree that if the jury
18 could reasonably infer from the set of circumstances that
19 the same thing would not have happened if this person had
20 been a woman, that then that would be the necessary
21 showing of discrimination?

22 MR. REASONER: I would not, Your Honor.

23 QUESTION: You would not.

24 MR. REASONER: And if I might attempt to
25 explain, I think that when you -- that the Court extended

1 the statute to say that sexual harassment can so affect
2 the conditions of employment that it violates the statute,
3 creates discrimination.

4 That is clearly powerfully true with regard to
5 women. Congress was well-informed on that. They had
6 passed in 1963 the Equal Pay Act, and so to extend the
7 statute to say if you are harassing women in the workplace
8 you are creating a discrimination which deprives them of a
9 level playing field. We do not -- and I think that this
10 extension is reasonable.

11 The question that is now being asked, the Court
12 is now being asked to do is say, you have extended sexual
13 harassment into the area of men and women, discrimination
14 against men and women. Now we want you to extend it to
15 regulate the conduct of men. Sexual --

16 QUESTION: The statute doesn't say either women
17 or men. It says sex.

18 MR. REASONER: It says because of sex, Your
19 Honor, correct, and I would interpret that to mean the two
20 sexes, men and women.

21 QUESTION: Yes. There are only two, so far as
22 we know.

23 (Laughter.)

24 QUESTION: But you answered my question by
25 saying, if there was a fair inference for the jury to draw

1 that the man was treated differently because he was not a
2 woman, that a woman would have been treated one way and a
3 man a different way, that's not discrimination.

4 MR. REASONER: What I would --

5 QUESTION: I think that's how you answered me.

6 MR. REASONER: I think I did, too. What I'm
7 trying to say, at least, is this. If we move into Federal
8 regulation the whole spectrum of male relationships which
9 are sexually, which have sexual content and are abusive
10 and in the workplace -- and I submit to you, that is what
11 both the petitioner and the Government are asking for.

12 If you look at page 21 of the Government's
13 paper, in response to Justice O'Connor and Justice
14 Ginsburg's question, they would include it all, all male
15 conduct that has a sexual content that is in the workplace
16 and is abusive.

17 QUESTION: And supposing we disagree with that.
18 We're not bound by what they said. Supposing we say, this
19 is just a discrimination statute. Then why doesn't it
20 apply in the hypo I give you?

21 MR. REASONER: If Mr. Oncale would have been
22 treated differently if he had been a woman?

23 QUESTION: If the evidence were clear that
24 the -- that if a woman had been on the barge, that he
25 would not have done this because he had a special interest

1 in relationships with men, if that was clearly proved --

2 MR. REASONER: Your Honor --

3 QUESTION: -- would that -- why would that not
4 be discrimination within the meaning of the statute?

5 MR. REASONER: Let me suggest to you why I think
6 that the statute should not be applied in that way, and
7 three circuits have followed that notion. The Fourth
8 Circuit, Sixth Circuit, and the Eleventh Circuit have
9 adopted the concept of a homosexual -- if the
10 homosexual -- there's a homosexual harassment, then they
11 can meet the because-of-sex requirement. You would argue
12 that if you can find homosexuality, or raise an issue of
13 homosexuality, then it was because of Mr. Oncale's sex
14 that this occurred. I --

15 QUESTION: But employers can discriminate
16 because of sex without the discriminator having any
17 particular sexual desires for the victim of the
18 discrimination.

19 I mean, under the Fifth Circuit's ruling a man
20 who discriminates against a man or a woman who
21 discriminates against a woman in the workplace is immune,
22 and it seems to me that's very difficult to justify.

23 MR. REASONER: I -- with respect, Mr. Chief
24 Justice, I would say that is an overstatement of the Fifth
25 Circuit's position, as I would understand it.

1 I think you must bear in mind that the Fifth
2 Circuit was speaking only to sexual harassment, and only
3 to the question that when the Court has extended this
4 discrimination statute into the area of sexual harassment
5 to meet its purposes, should it then extend it further to
6 regulate same-sex conduct?

7 QUESTION: I don't know that we regard it as an
8 extension of the statute to say that it covered sexual
9 harassment. I think what we said was that sexual
10 harassment without actual resulting in a discharge or a
11 demotion was nonetheless actionable. I don't think we
12 changed the actors involved.

13 MR. REASONER: I think, Your Honor, what --
14 Mr. Chief Justice, what I understood you to say in Meritor
15 is that sexual harassment can be equivalent to
16 discrimination if it is so severe and pervasive that it
17 changes the conditions of employment, thereby
18 discriminating against the sex being harassed.

19 QUESTION: Well, sexual harassment directed in a
20 discriminatory way against a victim, but certainly we
21 didn't say that sexual harassment that was meted out
22 equally to everybody is discrimination.

23 MR. REASONER: Well, yes, Mr. Chief Justice, I
24 agree with that, and both in Meritor and Harris you were
25 dealing with sexual harassment of women, very clear based

1 on congressional findings -- I mean, that there was a
2 disparity. There's a disparity in power. There was a
3 need to level --

4 QUESTION: But there were no findings at all in
5 connection with the inclusion of sex in the 1964 acts.

6 MR. REASONER: I would submit, Your Honor, that
7 the Court can look to the Equal Pay Act of 1963, that
8 there were extensive findings by Congress that there was a
9 disparate treatment of women in the workplace.

10 My point on federalism is that there are no
11 findings, anywhere, that suggest that Congress needs to
12 pass a statute to regulate discrimination among males, or
13 to regulate male conduct.

14 QUESTION: Mr. --

15 QUESTION: Well --

16 QUESTION: Then you defend the fifth Circuit's
17 rationale based on a nonstatutory analysis. You would
18 have us hold that if a homosexual supervisor trades favors
19 with people of his own sex for advancement, that this is
20 not a violation of the statute.

21 MR. REASONER: I would, Your Honor.

22 QUESTION: Why is that? Because if a Jew could
23 discriminate against a Jew, an African American against an
24 African American, an Italian against an Italian, all those
25 things could happen.

1 MR. REASONER: Certainly, Your Honor.

2 QUESTION: So why isn't it possible that a
3 homosexual or nonhomosexual man, irrespective, could
4 discriminate against another man on the basis of sex, and
5 so could a woman?

6 MR. REASONER: Well, I think -- you're using the
7 word discriminate.

8 QUESTION: Yes. Well, if that's so, if those
9 things are possible --

10 MR. REASONER: There's --

11 QUESTION: -- as *they think they are, how could
12 you have a circuit that has a rule that says they're not
13 possible under the statute?

14 MR. REASONER: I don't think it does, Your
15 Honor. I think what the Fifth --

16 QUESTION: Well, if we think that's what they
17 held, I guess we'd have to say that's wrong.

18 (Laughter.)

19 MR. REASONER: Yes, Your Honor.

20 QUESTION: Yes.

21 QUESTION: Mr. Reasoner --

22 QUESTION: And it sure reads that way, so I
23 think you have to come to grips with that and then help
24 us --

25 MR. REASONER: Well --

1 QUESTION: -- decide what it is this statute
2 really means.

3 MR. REASONER: I --

4 QUESTION: And in that context, do we consider
5 at all the EEOC guideline on this?

6 Now, the guideline says that harassment on the
7 basis of sex is a violation of title VII if it's physical
8 conduct of a sexual nature when such conduct has the
9 purpose or effect of unreasonably interfering with an
10 individual's work performance or creating an intimidating,
11 hostile, or offensive working environment.

12 The guideline does not refer at all to
13 discrimination, I notice.

14 MR. REASONER: No, and the EEOC flatly argues,
15 Your Honor, if you look at their brief they want to
16 include it all. They feel no obligation to prove
17 discrimination.

18 But again, all the Fifth Circuit was addressing
19 was sexual harassment, and I respectfully submit, as the
20 circuits which struggled with this --

21 QUESTION: I just read you the EEOC guideline --

22

23 MR. REASONER: Yes, Your Honor.

24 QUESTION: -- on sexual harassment, or
25 harassment, however you pronounce it.

1 MR. REASONER: Yes.

2 QUESTION: Now, does that -- do we rely on that?
3 Are they entitled to some deference there --

4 MR. REASONER: I --

5 QUESTION: -- in how we interpret this statute?

6 MR. REASONER: I think they're entitled to
7 deference only insofar as the Court finds them consistent,
8 and they're not entitled to a Chevron-type deference, as
9 this Court has made clear, only insofar as you find them
10 consistent and persuasive.

11 But I would respectfully submit, Your Honor, the
12 question here --

13 QUESTION: Excuse me. They get no Chevron
14 deference, you say?

15 MR. REASONER: That is my understanding, Your
16 Honor.

17 QUESTION: Well, what's the basis for that
18 understanding?

19 MR. REASONER: If I might -- I don't recall your
20 case.

21 QUESTION: The General Electric case.

22 MR. REASONER: Thank you, Mr. Justice Stevens.
23 I will rely on Mr. Justice Stevens.

24 (Laughter.)

25 QUESTION: Are you --

1 QUESTION: You could rely on the Chief Justice.
2 He wrote it.

3 (Laughter.)

4 QUESTION: Mr. Reasoner, have you finished your
5 answer to Justice O'Connor? I have a question, but I --
6 if you have more to say --

7 MR. REASONER: If I could say this one word, or
8 sentence, the Fifth Circuit is saying that discrimination
9 because of sex was not intended to comprehend
10 relationships between the same sex. It was not intended
11 to comprehend all the whole spectrum of males' treatment
12 of males. Because of sex meant discrimination between men
13 and women. That's why they would exclude sexual
14 harassment.

15 QUESTION: Then you could -- is it in general?
16 If you have a male boss who takes good care of the women
17 but treats the men miserably, that would not be -- that
18 would not be in title VII?

19 MR. REASONER: Justice Ginsburg, I think there
20 is a clear distinction between policies regarding to pay,
21 promotion, et cetera. That's clear. You can't
22 discriminate. The sex of the superior deciding that is
23 immaterial. It is only the area of sexual harassment,
24 this interpersonal abuse --

25 QUESTION: Well, why would it be different?

1 Let's say you had two rooms in the same *, and in one
2 there were women working, in the other, men, and when the
3 women complain about sexual harassment, the boss attends
4 to it, takes it seriously, and when the men complain about
5 the grossest treatment, the kind we have here, the boss
6 says, boys will be boys. That would be okay? That would
7 not be within title VII?

8 MR. REASONER: No, it would not be okay. The
9 conduct alleged here, for example, would violate five
10 Louisiana criminal statutes, and subject all the
11 participants to damages.

12 QUESTION: But I'm talking only about title VII,
13 so -- but I've given you a situation where the employer
14 responds to women's complaints of sexual harassment, says
15 to the guys, you've got to be made of sterner stuff, so
16 I'm not going to pay any attention. That would not come
17 within title VII?

18 MR. REASONER: No, Your Honor, I think not, in
19 the sense if what is being complained about is male
20 harassment of a male. The -- now, to the extent --

21 QUESTION: The same boss treats women one way,
22 he attends to their complaints, and he treats men a
23 different way, says, I'm not going to listen to you. I've
24 no sympathy with you.

25 MR. REASONER: Let me say, clearly, Justice

1 Ginsburg, I think such a boss would be foolish, and would
2 be inviting action under State * --

3 QUESTION: But you --

4 MR. REASONER: But the question here is, did
5 Congress in 1964, when it said discrimination because of
6 sex intend to encompass not only discrimination between
7 men and women based on sex, but the entire gambit of
8 sexuality -- and that is what the Government would argue
9 for. As Mr. Justice Scalia said, we would now be into
10 sexuality, for example --

11 QUESTION: But our choice is not between nothing
12 and everything, so -- and your argument is for nothing.

13 MR. REASONER: My -- I do not believe, Your
14 Honor, that if you cross this threshold, certainly you
15 have no assistance from the petitioner or the Government
16 in drawing a line, and if you look at how the circuits
17 have tried to struggle with this, in Doe the Seventh
18 Circuit said we will -- in trying to say what because of
19 sex means, they looked at sexual stereotyping, sexual
20 orientation, sexuality in general.

21 They then attempted to retreat from that in
22 Johnson v. Hondo shortly thereafter saying, well, we won't
23 look at sexual content alone, but once you get into
24 regulating male behavior with sexual content --

25 QUESTION: Why isn't the Manhart test the answer

1 to all this? You say there are all sorts of problems, but
2 why don't you just have a very simple rule? If the
3 plaintiff sustains the burden of proving that the victim
4 would have been treated differently if he or she had been
5 of the opposite sex, that proves discrimination. Why
6 isn't that a simple test that works?

7 MR. REASONER: Because it's not simple, Your
8 Honor, because how do you give content to it? The Fourth,
9 Sixth, and Eleventh --

10 QUESTION: Well, you require the proof in the
11 particular case and make the plaintiff prove his case.

12 MR. REASONER: Well, what is --

13 QUESTION: And if the jury finds here, well,
14 we're pretty well convinced that this fellow would have
15 done the same thing to women, the plaintiff loses.

16 MR. REASONER: I would --

17 QUESTION: But if the reasonable inference is he
18 wouldn't have, the plaintiff wins.

19 MR. REASONER: I would submit, Your Honor, that
20 that would be the creation of a statute that was not
21 intended by Congress.

22 QUESTION: We'd just be following what we wrote
23 in Manhart, you know, 15 or 20 years ago.

24 MR. REASONER: I think not, Your Honor. I mean,
25 there in Manhart you're talking about treating men and

1 women differently --

2 QUESTION: Right.

3 MR. REASONER: -- on levels of policy, pension
4 plans, pregnancy leave, et cetera.

5 Now, when we're talking about interpersonal
6 relationships and we're going to attach them to
7 discrimination in some way, what's the content we give to
8 them? What does because of sex mean?

9 The only thing the Fourth, Sixth, and Eleventh
10 Circuit could figure out that because of sex meant was
11 that we inquire into the sexual orientation of the
12 predator.

13 QUESTION: But that must be wrong, isn't it? I
14 mean, isn't it the -- that they're trying to get at the
15 problem of whether the employer has imposed a term or
16 condition, a significant term or condition because of the
17 person's gender, and in those instances where, for
18 example, people create a workplace where there is either
19 quid pro quo or some frightful situation where the women
20 have to suffer because of their gender, they have a term
21 or condition that the others don't, and the same could
22 happen to a man, couldn't it?

23 I grant you it's hard to work out in the -- in
24 some individual cases. In many it's not hard to work out.
25 But how does that differentiate this from any other area

1 of law, antitrust, or, you know, thinking of difficult
2 ones, and how could you escape that in this statute?

3 MR. REASONER: I -- Your Honor, I think that you
4 would go where Congress did not intend. I think when they
5 said discrimination because of sex, it's very clear that
6 they were trying to level the playing field between men
7 and women, and that there's no evidence, not the slightest
8 evidence that they intended to federalize the regulation
9 between men and men.

10 QUESTION: Mr. Reasoner --

11 QUESTION: Well, Mr. Reasoner -- go ahead.

12 QUESTION: Let me see if I understand what your
13 position is.

14 Suppose that there had been hazing of male
15 employees without any sexual allusions or connotations,
16 and you have a workplace in which only male employees are
17 hazed, they are made to feel insignificant, or, you know,
18 horseplay, whatever, but no sexual connotations, and this
19 is never done to women employees, what is your position on
20 whether that would violate the legislation?

21 MR. REASONER: I would say it would not, Your
22 Honor.

23 QUESTION: It would not. Well then, I don't
24 understand your position.

25 (Laughter.)

1 QUESTION: You told me that you thought the
2 male-on-male was no good, only as it relates to sexual
3 harassment, and you said that's what the position of the
4 court of appeals here was.

5 I give you a case that doesn't involve any
6 sexual harassment --

7 MR. REASONER: I apologize, Mr. Scalia. I did
8 not realize you -- that was the case you were giving me.

9 QUESTION: Oh.

10 MR. REASONER: I think --

11 QUESTION: Well, that was the case I gave you.

12 MR. REASONER: Well --

13 QUESTION: So your answer is what I thought it
14 should be, right, that that would be a violation.

15 (Laughter.)

16 MR. REASONER: Yes. I clearly -- if a company
17 set a discriminatory policy, that would be a different --
18 discriminating between men and women, that would clearly
19 be reached by the statute.

20 QUESTION: Okay. So if you haze them with no
21 sexual allusions and you don't haze women, then it is a
22 violation of title VII, right?

23 MR. REASONER: If the company sets a
24 discriminatory policy.

25 QUESTION: Yes. Then -- now suppose you haze

1 them with sexual allusions, but you don't haze women.
2 Suddenly it does not become a violation of title VII?

3 MR. REASONER: I think what a court must then
4 ask itself, Your Honor, is what does because of sex mean,
5 and I submit to you -- Congress has not passed, as you
6 know, the Employment Nondiscrimination Act, which I think
7 tries to deal in a way that would be workable and not
8 intrusive and violative of privacy, with harassment based
9 on sexuality or orientation.

10 QUESTION: But discriminatory hazing is
11 discriminatory hazing, whether the hazing has sexual
12 allusions mixed into it or not.

13 MR. REASONER: But that --

14 QUESTION: I would think your answer would have
15 to be, yes, if it's discriminatory hazing, it's bad.

16 MR. REASONER: If the defendant is going to be
17 allowed to raise the issue as to whether it is because of
18 sex, Mr. Justice Scalia, then I think you are opening it
19 up into inquiry as to the sexual orientation of all of the
20 parties involved.

21 QUESTION: Is that any part of this case? As
22 far as I know, it isn't, and --

23 MR. REASONER: The -- I -- Justice Ginsburg, I
24 would be inclined to say not, but you -- I think I just
25 heard the petitioner say that they would argue that there

1 was quid pro quo possibility involved. They will, and if
2 you're going to argue quid pro quo, of course you have
3 to --

4 QUESTION: But you see, we don't know that at
5 this stage. The case has been thrown out because it says
6 no matter what, if it's male-male, it's not covered.

7 MR. REASONER: You know that the petitioner is
8 trying to assert that over these facts, and, of course,
9 this is a fee-shifting statute. You would make the
10 Federal courts the forum of choice for all litigation
11 involving abusive male-on-male --

12 QUESTION: Mr. --

13 QUESTION: If we were to decide, Mr. Reasoner,
14 that in some cases discrimination by a man against a man
15 violates the statute, it seems to me we would have to
16 reverse the Fifth Circuit here, because they said that
17 just can't be, and very likely we don't have to work out
18 the rules that would apply to whatever factual development
19 comes in this case, but I don't see how we can possibly
20 sustain the ruling of the Fifth Circuit that it never
21 could be.

22 MR. REASONER: Well, Your Honor, I think that
23 when one looks at the struggles of the Seventh Circuit,
24 the Fourth, the Sixth, and the Eleventh, to work out a
25 rationale to make this statute -- and I submit one reason

1 it is so difficult to work out is because this statute was
2 never designed to regulate conduct among the same sex,
3 then I think that the -- that it's fair to say that the
4 courts desperately need guidance.

5 QUESTION: How about a woman supervisor
6 discriminating against a woman? Would that -- is that
7 immune from the statute?

8 MR. REASONER: If she discriminates in an
9 employment decision, a promotion decision, certainly not.
10 You know, discrimination at the level of company policy
11 or supervision is certainly not immune.

12 If she discriminates -- if she propositions her,
13 or makes sexual overtures to her, then yes, we would say
14 that that is not implicated by the statute.

15 QUESTION: Well, and is the reason -- is the
16 reason it is not implicated simply because it was not the
17 intent of Congress to implicate it? Is that your
18 argument?

19 MR. REASONER: Yes, Your Honor.

20 QUESTION: In other words, it's the -- the text
21 covers it.

22 MR. REASONER: I think not, Your Honor.

23 QUESTION: But that was not the problem that
24 Congress was addressing. Is that your argument?

25 MR. REASONER: I think that the text does not

1 cover it. I think that --

2 QUESTION: Then why does the text cover white
3 against white discrimination? The language is equally
4 undifferentiated.

5 MR. REASONER: Well, the statute would cover
6 reverse discrimination. It would -- I mean, in all its
7 aspects, but --

8 QUESTION: Well then, why doesn't the statute
9 cover reverse sexual discrimination when it happens to
10 take a sexually explicit form?

11 MR. REASONER: I --

12 QUESTION: I mean, so far as the text of the
13 statute is concerned, I don't see how you can draw a
14 distinction.

15 MR. REASONER: Well, I would submit that you're
16 having to change the meaning. If you say discrimination
17 because of sex, speaking of gender, you're talking about
18 discrimination because somebody's a male or because
19 somebody's a female. That's exactly what you had in
20 Meritor and Harris. You went no further than that.

21 QUESTION: Sure, but at the time the statute was
22 passed, exactly the same argument could have been made
23 about discrimination because of race. You're talking
24 about somebody of race A who treats race B in a
25 disadvantageous way, and exactly that same argument, if it

1 were sound, would have led to the conclusion that you
2 can't have discrimination by one white against another
3 white.

4 MR. REASONER: No, Your Honor, I would suggest
5 that if you look at because of sex, when you apply it
6 to -- a female to a female, or a male to a male, you have
7 changed the meaning. You are now making it because of
8 this --

9 QUESTION: Why have you changed it when --

10 MR. REASONER: Because --

11 QUESTION: Why have you not changed it when you
12 say because of race?

13 MR. REASONER: I think, Your Honor, that
14 we're -- that sexual harassment is a complex concept that
15 implicates many things that because of race does not.

16 QUESTION: *Because it --

17 QUESTION: Well, are you -- may I -- are you
18 saying that it's simply the nature of the harassment
19 rather than the nature of the discrimination against a
20 member of one sex or the other which is the crucial thing,
21 so that it comes down to a point almost of evidence?

22 MR. REASONER: No.

23 QUESTION: No.

24 MR. REASONER: I would say that on the
25 harassment that male-on-male, it's not because of sex. It

1 may be because of orientation, it may be because of
2 sexuality, it may be because he doesn't like him --

3 QUESTION: Why couldn't it be because you're not
4 the right kind of man, just as with respect to women, and
5 wasn't there, at least in one case, a statement to the
6 effect of what title VII is aimed at is getting rid of
7 stereotypical notions about the way men are or the way
8 women are, so that if you -- we know that an employer
9 can't say, as in Martin Marietta, how could I discriminate
10 against women, most of the people I hire are women, but I
11 won't take the ones who have children.

12 So if that's what title VII is about, you're not
13 the right kind of male, or you're not the right kind of
14 female, why wouldn't it fit?

15 MR. REASONER: Well, I think Your Honor
16 illustrates the difficulty. Martin Marietta is easy. Of
17 course that's discrimination. But are we now going to say
18 that, on male-on-male relationships, that abuse, because
19 we don't like their appearance -- I mean, does it all go
20 back to sex and harassment, and I submit to you that's
21 what the Government would have you do.

22 They say to you flatly it's immaterial what the
23 motives were, and the test is tautological. You say,
24 because of sex. Man harasses a man, of course it's
25 because of sex. What else? He is a sex.

1 QUESTION: But why do we have to go as far as
2 you go? As -- I understand your position. You're not
3 saying that male-on-male is bad. There can be
4 discrimination male-on-male. You're just saying that
5 sexual harassment male-on-male does not automatically
6 constitute discrimination under the act, as male-on-female
7 or female-on-male would. Is that right? Does not
8 automatically.

9 MR. REASONER: I would certainly agree that it
10 does not automatically --

11 QUESTION: Okay.

12 MR. REASONER: -- Your Honor.

13 QUESTION: But just because it does not
14 automatically, I don't know why that leads to the
15 conclusion that it does not ever, and why was a summary
16 judgment proper here?

17 Why shouldn't it have been left to the jury to
18 say, well, regardless of whether there were sexual
19 overtones or not, that doesn't decide the case, but
20 nonetheless, if you think that this individual male was
21 being discriminated against because he was a man and not
22 for some other reason, you can find for the plaintiff?

23 MR. REASONER: It leads to that conclusion, Your
24 Honor, if you conclude that, looking at the language of
25 title VII in context, that Congress intended to limit it

1 to discrimination between men and women, that it did not
2 intend to reach into same-sex harassment, and --

3 QUESTION: Wait, you've acknowledged that it
4 didn't intend to limit it between men and women. You've
5 acknowledged that if you -- that if a woman discriminates
6 against another woman because of her womanness, say, I
7 just want a male workforce, I'm not going to promote any
8 women, you've acknowledged that that's a violation.

9 MR. REASONER: Certainly. Certainly.

10 QUESTION: It's only in the sexual harassment
11 area --

12 MR. REASONER: Exactly.

13 QUESTION: -- you think that it does not
14 automatically constitute a violation, but why do you have
15 to say it does not ever constitute a violation?

16 MR. REASONER: I have to say that, Your Honor,
17 because --

18 QUESTION: To win the case. Okay.

19 MR. REASONER: -- the Fifth Circuit said that.
20 (Laughter.)

21 MR. REASONER: But -- but let me say, I do
22 believe that is correct. I think it implicates serious
23 concerns of federalism to now say that this statute will
24 be expanded to uncover this entire spectrum of
25 relationships, and to do it with no -- you have no

1 standard.

2 Once you've cut loose from the moorings of the
3 two sexes, because of sex, are we then going to get into
4 homosexuality --

5 QUESTION: Of course, there's another way of
6 looking at it. Instead of saying it's expanding the
7 statute, say the statute's always covered discrimination,
8 and you're asking to cut out of the general field of
9 discrimination this one area. One can look at it that
10 way, too.

11 MR. REASONER: One could, Your Honor, but I
12 submit, and even the Government admits this at page 10 of
13 their brief, that sexual harassment was an expansion of
14 the statute based on the intent of the statute, and I
15 think necessary to achieve the statutory purposes, and the
16 question before the Court now is, does sexual harassment
17 need to be applied in the context of single-sex
18 relationships in order to achieve the statutory purposes,
19 and --

20 QUESTION: But it's not necessary to look at it
21 as an expansion of the statute. It seems to me that it's
22 sufficient to look at the sexual harassment law as being
23 in effect a kind of evidentiary gloss on the statute, that
24 when this kind of conduct occurs, as Thoreau put it, you
25 know, there's a trout in the milk. We know what that

1 means, and I don't see why we don't also draw an inference
2 when the harassment is between the same sexes.

3 It may in some instances be more difficult to
4 draw it, but as Justice Scalia says, what is the
5 theoretical basis for saying you can never draw that kind
6 of an inference?

7 MR. REASONER: Well, you know, first I would say
8 that there -- the statute is solid. It does not create
9 such an offense.

10 Second, we have a history in the literature. We
11 know about the disparate treatment of women, et cetera.
12 We know that there was something for Congress to remedy
13 there.

14 QUESTION: That's why we can draw the inference
15 so easily, right.

16 MR. REASONER: With regard to women, correct.

17 QUESTION: As a practical, common sense thing,
18 right.

19 MR. REASONER: But now, on same sex, we have the
20 whole spectrum, from hazing, bullying -- you know, I mean,
21 would we argue that generations of fraternity boys are
22 liable under --

23 QUESTION: Right.

24 MR. REASONER: -- title VI, or --

25 QUESTION: More difficult to draw. I can

1 understand your point there, but how do you take the final
2 leap, you can't draw it?

3 MR. REASONER: But I would say, Your Honor, that
4 because of sex becomes contentless in this statute if
5 you're going to say every time there's sexual content,
6 male-on-male abuse, it's sexual harassment.

7 QUESTION: Thank you, Mr. Reasoner.

8 MR. REASONER: Thank you, Mr. Chief Justice.

9 QUESTION: Mr. Canaday, you have 2 minutes left.

10 REBUTTAL ARGUMENT OF NICHOLAS CANADAY, III

11 ON BEHALF OF THE PETITIONER

12 MR. CANADAY: The Fifth Circuit held that same-
13 sex harassment is not cognizable under title VII. That is
14 the holding of the court below. Again, we re-urge the
15 Court to reverse that holding. The language of title VII
16 is broad enough to -- that a decision of the court below
17 is inconsistent with this Court's interpretations of the
18 statute --

19 QUESTION: The statute doesn't make unlawful
20 same-sex harassment, or any harassment. It makes unlawful
21 discrimination on the basis of sex, right?

22 MR. CANADAY: Yes, Your Honor, and this Court --

23 QUESTION: So you don't want us to say that
24 same-sex harassment is actionable. It isn't necessarily
25 actionable. It's actionable if it constitutes --

1 MR. CANADAY: Sexual discrimination.

2 QUESTION: If and only if it constitutes sexual
3 discrimination.

4 MR. CANADAY: Yes, sir, as set forth in the
5 Meritor case.

6 QUESTION: Which you say it always does.

7 MR. CANADAY: I --

8 QUESTION: And your opponent says it never does.

9 MR. CANADAY: No, sir. I said that the --
10 (Laughter.)

11 MR. CANADAY: Our position is that the sexual
12 nature of the conduct does allow for the inference which
13 has been recognized in the cross-gender cases of the fact
14 that it is because of sex, but our position is that it is
15 inherently a question of fact which needs to move to the
16 trier of fact.

17 It is not a -- we are not asking for a per se
18 rule. We're asking for a rule that recognizes the factual
19 nature of the inquiry, and with that, we thank the Court
20 for its attention in our case.

21 CHIEF JUSTICE REHNQUIST: Thank you,
22 Mr. Canaday.

23 The case is submitted.

24 (Whereupon, at 11:00 a.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

JOSEPH ONCALE, Petitioner v. SUNDOWNER OFFSHORE SERVICES, INC., ET AL.
CASE NO: 96-568

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Fedele-----

(REPORTER)