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**RENE V. MGM GRAND HOTEL, INC.,
305 F.3d 1061 (9th Cir. 2002)**

FACTS

The MGM Grand Hotel in Las Vegas, Nevada employed Medina Rene, an openly gay man, as a butler on an exclusive floor of the hotel.¹ The floor on which he worked hosted an all-male staff.² During his two-year tenure at the hotel, plaintiff's co-workers and supervisor subjected him to daily harassment.³ The harassment included telling jokes, calling the plaintiff names like "muñeca" ("doll"), and subjecting him to pictures of two men having sex.⁴ Rene testified that his harassers would caress his bottom and shoulders, hug him from behind, "like a man holds a woman," and grab his crotch and push their fingers against his anus through his clothing.⁵ Rene believed that his sexual orientation motivated the harassment.⁶

In June 1996, the plaintiff filed a charge with the Nevada Equal Rights Commission alleging discrimination based on his male sex.⁷ Ten months later, he filed a Title VII claim in federal district court alleging sexual harassment.⁸

MGM filed a motion for summary judgment arguing that sexual orientation does not serve as a basis on which a plaintiff may seek relief under Title VII.⁹ The district court concluded that the plaintiff failed to state a valid claim and granted the hotel's motion.¹⁰

HOLDING

The Ninth Circuit, in a 7-4 decision,¹¹ held that an openly gay employee subjected to severe physical harassment of a sexual nature in the workplace may have a valid sex discrimination claim under Title VII.¹² Whether sexual orientation fueled the harassment remains irrelevant to the claim.¹³

¹ Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1063.

¹² *Id.* at 1063-64.

¹³ *Id.* at 1064.

ANALYSIS

Citing *Meritor Savings Bank, FSB v. Vinson*,¹⁴ Judge Fletcher established that Title VII protects individuals from sexual harassment created by a hostile work environment.¹⁵ In *Meritor*, the Court identified three elements that a plaintiff must prove to establish a hostile work environment claim: 1) that the plaintiff was “subjected to “physical conduct of a sexual nature,” 2) that this conduct was unwelcome, and 3) that the conduct was sufficiently severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment.”¹⁶ Judge Fletcher applied this rubric to Rene’s facts and concluded that MGM fostered a hostile work environment for the plaintiff.¹⁷ The court pointed out that the objectively offensive nature of Rene’s claims allowed him to survive summary judgment despite his sexual orientation, which bears no weight in a hostile work environment claim under the statute.¹⁸

To reiterate its assertion, the court reasoned that the alleged harassers did not touch Rene’s elbow or eye but rather grabbed his bottom and crotch.¹⁹ The court noted that other courts have reviewed many cases determining whether certain behavior amounts to harassment.²⁰ It found that several courts consistently forbade physical sexual assault as Title VII sexual harassment.²¹ Judge Fletcher referred to several cases that illustrate prohibited behavior.²² Based on those selected cases, prohibited behavior may include grabbing testicles and flicking groin, patting buttocks, and groping and shoving a broom handle in the crotch.²³ Judge Fletcher adopted the reasoning of these cases by concluding that when a harasser touches a harassee’s genitals, the court must recognize the link such behavior has to the harassee’s gender.²⁴

The district court had held that Rene’s claim did not succeed because he argued that his co-workers targeted him because of his sexual orientation, although the merits of his case were otherwise sound.²⁵ Judge Fletcher pointed out that this is not law; the sexual orientation of the victim remains

¹⁴ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

¹⁵ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065 (9th Cir. 2002).

¹⁶ *Id.* (citing *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991)).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1065-66

²³ *Id.*

²⁴ *Id.* at 1066.

²⁵ *Id.*

irrelevant in determining that such offensive behavior violates Title VII.²⁶ Judge Fletcher contended that the plaintiff's sexual orientation remains irrelevant for both male and female victims.²⁷ The offensive touching functions as the condition within the work environment that constitutes hostility "because of sex."²⁸ The targeting of body parts linked to plaintiff's sexuality serves as the connection between the offensive touching and the "because of sex" provision of Title VII.²⁹ *Why* the harassers behave the way they do toward the victim remains irrelevant.³⁰

The court relied on *Oncale v. Sundowner Offshore Services, Inc.*³¹ as the basis for its conclusion.³² The plurality primarily focused on two propositions from *Oncale* to guide its conclusion in *Rene* that severe or pervasive same-sex physical touching falls under Title VII's protection and that even within a same-sex work environment, offensive sexual touching is discrimination.³³ In addressing the first principle, Judge Fletcher explained that Title VII "forbids severe or pervasive same-sex offensive sexual touching."³⁴ In *Oncale*, the Supreme Court reasoned that although Congress, in enacting Title VII, did not specifically target male-on-male sexual harassment, statutes often go beyond the specific evil for which they were enacted to cover comparable evils.³⁵ Simply because a person belongs to one group does not mean that they will not target other members of their same class for harassment.³⁶

Judge Fletcher then pointed out that pursuant to *Oncale*, same-sex touching provides a viable discrimination claim under Title VII.³⁷ However, in an all-male workplace, *discrimination* must be *because of* an individual's sex.³⁸ When a victim, such as Rene, finds himself subjected to offensive touching in the workplace to which others are not, such behavior by the harassers constitutes discrimination.³⁹ In such a situation, the plaintiff need

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (citing *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991)).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

³² *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066 (9th Cir. 2002).

³³ *Id.* at 1067.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

only show that he faced discrimination “in comparison to the other men” with whom he worked.⁴⁰

The plurality opinion concluded that the plaintiff presented a valid clear-cut sexual harassment claim.⁴¹ The court stated that because Title VII prohibits severe or pervasive physical conduct of a sexual nature, the sexual nature of the act subjects the act to Title VII analysis.⁴² Title VII does not preclude a claim where the conduct is carried out by harassers of the same gender of the harassee, and “it prohibits such conduct without regard to the sexual orientation—real or perceived—of the victim.”⁴³

CONCURRING OPINIONS

Judge Pregerson’s concurring opinion reached the same result as the plurality opinion; however, Pregerson relied primarily on *Nichols v. Azteca Restaurant Enterprises, Inc.*,⁴⁴ a harassment action based on gender stereotyping. The concurrence also relied on *Oncale* for the premise that same-sex sexual harassment is actionable under Title VII.⁴⁵ The factual similarity of *Nichols* to *Rene* allowed the concurrence to conclude that for the same reasons that Title VII bars sex stereotyping in *Nichols*, Title VII bars sex stereotyping in the plaintiff’s claim.⁴⁶

Judge Graber, concurred with the court’s result but wrote separately.⁴⁷ Judge Graber agreed with the plurality opinion’s reliance on *Oncale* and its conclusion that Title VII precluded summary judgment in both *Oncale* and *Rene*.⁴⁸ Graber agreed with the dissent on two issues that the plurality did not reach: first, that discrimination on based sexual orientation does not constitute a valid Title VII claim, and second, *Rene* failed to argue the sexual stereotyping theory.⁴⁹

In the final concurrence, Judge Fisher agreed with Judge Fletcher and Judge Pregerson and argued that both *Oncale* and *Nichols* applied to the plaintiff’s claim.⁵⁰ By looking at the nature of the physical attacks, *Rene*’s

⁴⁰ *Id.*

⁴¹ *Id.* at 1068

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001) (concluding that verbal abuse based on same-sex gender stereotyping by gay plaintiff’s co-workers entitled plaintiff to Title VII protection based on sex stereotyping, because taunting was directed at plaintiff because of his sex).

⁴⁵ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002).

⁴⁶ *Id.* at 1068-69.

⁴⁷ *Id.* at 1069.

⁴⁸ *Id.* at 1070.

⁴⁹ *Id.*

⁵⁰ *Id.*

claim that he suffered discrimination because of his sex remained sound under Judge Fletcher's approach.⁵¹ The instances when plaintiff's co-workers accused him of feminine behavior constituted harassment based on sexual stereotyping under Judge Pregerson's approach.⁵²

DISSENTING OPINIONS

In his dissent, Judge Hug argued that Judge Fletcher incorrectly interpreted *Oncale* by asserting that a plaintiff subjected to pervasive, severe unwelcome physical harassment of a sexual nature maintains a valid claim under Title VII.⁵³ The dissent argued that a plaintiff in a valid Title VII discrimination claim has to assert that the discrimination occurred *because of* the plaintiff's gender.⁵⁴ Claims based on physical touching generally are not actionable under Title VII, unless such action is because of a person's race, color, sex, religion, or national origin.⁵⁵ Harassment based on characteristics other than those enumerated in the statute, such as sexual orientation, are not protected under Title VII.⁵⁶ Sexual stereotyping in the workplace is actionable under Title VII.⁵⁷ However, one's activity outside the job does not serve as a basis for gender stereotyping under Title VII according to Judge Hug's interpretation of the statute.⁵⁸

Although MGM created a hostile work environment, the plaintiff's coworkers did not harass him because of his sex, rather the harassment stemmed from his sexual orientation.⁵⁹ Yet, the plaintiff incorrectly interpreted *Oncale* to stand for the proposition that Title VII's bar on same-sex harassment impliedly protects against discrimination based on sexual orientation.⁶⁰ The plaintiff must prove that the harassment was discriminatory because of the harasser's sex.⁶¹ Judge Hug argued that the *Oncale* court held that same-sex harassment, not offensive physical touching of a sexual nature, constitutes a Title VII claim.⁶² Evidence of that interpretation lies in the fact that the Supreme Court remanded the case to the lower court to determine if the harassment was based on the plaintiff's

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1071-72

⁵⁷ *Id.* at 1072.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1073.

gender.⁶³ Judge Hug concluded that Rene received different treatment because of his *sexual orientation*, not because of his *sex*.⁶⁴

Judge Hug stated that the *Oncale* court described three ways that same sex harassment because of gender is actionable under Title VII: 1) the harassment is based on sexual desire and evidence shows that the harasser is gay, 2) the harasser possesses a general hostility against the presence of men in the workplace, or 3) in a mixed-sex workplace, the plaintiff may offer evidence of how the harasser treated members of both sexes.⁶⁵ Judge Hug argued that Rene failed to present any evidence supporting any of these three approaches.⁶⁶

The dissent also relied on recent cases that hold that Title VII does not protect discrimination based on sexual orientation.⁶⁷ If sexual orientation had meant to be classified under the Title VII, Congress would have taken measures to ensure the inclusion of this class, but it has not.⁶⁸

Judge Hug then turned to the concurrence's argument that the co-workers subjected plaintiff sexual stereotyping, a claim that receives Title VII protection.⁶⁹ Looking to *Price Waterhouse v. Hopkins*⁷⁰ and *Nichols* to support that assertion, Judge Hug stated that the plaintiff had a valid sex stereotyping claim but had failed to raise that argument in district court.⁷¹ The plaintiff failed to say that his effeminate behavior or other non-traditional male characteristics served as the reason for the discrimination.⁷² The plaintiff did not make a sexual stereotyping claim; rather he relied consistently on sexual orientation as the reason for the harassment, which does not serve as an actionable claim under Title VII.⁷³

CONCLUSION

Rene v. MGM Grand Hotel, Inc. confirms two propositions. First, based on the *Oncale* "because of sex" standard, an openly gay plaintiff subjected to pervasive, unwanted, same-sex, physical touching of a sexual nature may have a valid claim under Title VII.⁷⁴ Second, an openly gay

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1074-75

⁶⁶ *Id.* at 1075.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1076.

⁶⁹ *Id.*

⁷⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁷¹ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1077 (9th Cir. 2002).

⁷² *Id.*

⁷³ *Id.* at 1078.

⁷⁴ *Id.*

plaintiff may have a valid cause of action under Title VII by relying on gender conformity as the basis for the contested discrimination.⁷⁵ These arguments provide solid ammunition for gay and lesbian individuals subjected to sexual harassment who otherwise have no class protection under Title VII. Although the decision creates much needed precedent in the struggle for protection of gays, lesbians, and gender non-conformists, *Rene* does not provide a sweeping change in Title VII's protections for these groups.

The Ninth Circuit's interpretation of *Oncale v. Sundowner Offshore Services* artfully stretches the intent behind the Supreme Court's ruling in that case. In *Oncale*, Justice Scalia held that an employee sexually harassed by someone of his same-sex may bring a valid claim of "discriminat[ion] . . . because of . . . sex" under Title VII.⁷⁶ He suggested that the presence of pervasive harassment may create a hostile work environment, but discrimination "because of sex" must also accompany the harassment.⁷⁷ The Ninth Circuit took his analysis a step further. It created a much needed nexus between certain physical harassment and the protected Title VII classification when a gay or lesbian individual faces harassment. Although the plaintiff in *Rene* claimed that his sexual orientation provided the reason for the discrimination and harassment he suffered, the Ninth Circuit stressed that the *manner* in which his co-workers harassed him actually spoke to his sex. The Supreme Court, however, may see this decision as an attempt to fashion Title VII protection based on sexual orientation.

In *Oncale*, Justice Scalia stressed several times that "sex" does not encompass any other classification beyond gender, i.e., does not include sexual orientation.⁷⁸ He instructed courts to interpret his *Oncale* opinion through the lens of common sense and sensitivity to social context.⁷⁹ Based on the unfavorable legislative and judicial history of sexual orientation protection, one cannot anticipate with confidence that the Supreme Court would uphold the Ninth Circuit's interpretation "because of sex" if accepted for review. If *Rene* stands, courts applying this analysis will likely stress that sexual orientation remains irrelevant to a title VII claim. Overall, this perspective provides a useful roadmap when bringing similar claims against employers.

The argument that the plaintiff's co-workers subjected him to harassment based on sexual stereotyping serves as a solid means by which to

⁷⁵ *Id.*

⁷⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998).

⁷⁷ *See id.* at 80-81.

⁷⁸ *See id.*

⁷⁹ *See id.* at 82.

bring a sexual harassment claim for some gay and lesbian individuals. Although harassment based on sexual stereotyping may provide a proxy for sexual orientation, if the court can palate a discrimination claim based on stereotyping more than it can palate a direct claim based on sexual orientation, plaintiffs should embrace it. Unfortunately, gays and lesbians who do not project stereotypical traits of the opposite gender will find themselves without further protection from the Ninth Circuit ruling. People targeted simply for their sexual orientation by a harasser who omits reference to “atypical” gender behavior may also find little assistance from *Rene*.

Summary and Analysis Prepared By:
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