

No More Haven For Horseplay?

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Date : August 17, 2021

Kimberly D. Bailey, [*Male Same-Sex "Horseplay": The Epicenter of Sexual Harassment?*](#), 73 **Fla. L. Rev.** 95 (2021).

In *Male Same-Sex "Horseplay": The Epicenter of Sexual Harassment?*, Professor Kimberly D. Bailey explores the depth and limits of one of the carveouts given sanction from sexual harassment liability by the Supreme Court in its 1998 decision, *Oncale v. Sundowner Offshore Services*¹: male horseplay. In *Oncale*, the Supreme Court acknowledged that same-sex sexual harassment is actionable under Title VII, but also stated that horseplay among male employees was not sexual harassment. Using a "masculinities-modified" lens, Professor Bailey delves into the notion that even gender-conforming men have gendered relationships and interpersonal interactions in order to properly classify a lot of what has been presently dismissed as "horseplay" as sex discrimination in the workplace.

Masculinities theory approaches structural and other sex discrimination against women by focusing on men: how they are socialized, and how they perform masculinity. Using this lens, Professor Bailey elaborates upon the often-levied critique that *Oncale* would, as she put it, "reinforce[] the sexual desire paradigm." (P. 95.) Bailey explains that horseplay is often "masculinity competition that leads to harassment among gender-conforming men." Therefore, she concludes that gender-conforming men are deprived of a good deal of legal protection to which they should be entitled under Title VII, advocating for the abolition of the male-horseplay carveout in order to eradicate sexual harassment more broadly in the workplace. (P. 95.)

One of the many aspects of this article that scholars will "like lots" is how it provides an exposition of, and then builds upon, past scholarly critiques of *Oncale*. This, in and of itself is valuable, and the article reads like a treatise on how *Oncale* centers desire-based harassment through its analysis and carveouts. To the extent that Professor Bailey elaborates on scholarly views on the impact of *Oncale* and its progeny on the regulation of discrimination against the LGBTQ community, this post-*Bostock* analysis is most thought-provoking and useful.

Possibly the piece's most valuable contribution is its laser focus on the interpersonal workplace dynamics between gender-conforming men. As Professor Bailey recites, the "gendered hierarchy" created when men perform masculinity to show one another and women that they are more masculine than other men, renders sexual harassment "not just a product of men's relationships with women, it is also a product of their gendered relationships with one another." (P. 99.) With this nuanced understanding, Professor Bailey demonstrates how much of what courts relegate to the realm of horseplay is actually the harassment of men, absent desire.

This piece will also be of interest to those who teach Employment Discrimination. I plan to discuss Bailey's insights regarding Title VII's true purpose and function in my Employment Discrimination classes. This piece also beautifully summarizes some of the foundational scholarship that established bedrock principles related to sexual harassment, including that sexual harassment is discrimination because of sex, as well as critiques of centering sexual desire when identifying sexual harassment.

When I teach my Employment Discrimination class, I encourage students to contrast lenses through

which to view and regulate harassment. Is sexual harassment fundamentally about sexual exploitation and subordination, power and sabotage, or gender regulation and punishment? Just how much room is there in a discrimination-free workplace for sexual expression or conduct? Thanks to Professor Bailey, my students and I not only have a primer to guide us through these and other important discussions, we have a new topic for discussion: What is “horseplay,” actually? Why was it protected? Did this carveout age well? And are same-sex male horseplay and what drives it at the heart of all that Title VII should be seeking to regulate?

1. 523 U.S. 75 (1998).

Cite as: Kerri Lynn Stone, *No More Haven For Horseplay?*, JOTWELL (August 17, 2021) (reviewing Kimberly D. Bailey, *Male Same-Sex "Horseplay": The Epicenter of Sexual Harassment?*, 73 **Fla. L. Rev.** 95 (2021)), https://worklaw.jotwell.com/__trashed/.