

THE DETAILS OF DISCRIMINATION

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COMMENTARY

In the introduction to his classic book *Working*, Studs Terkel, the celebrated oral historian, writes that work is, “by its very nature, about violence—to the spirit as well as to the body.”¹ Of particular importance for Terkel are the “daily humiliations” that occur on the job,² the emotional (and, at times, physical) scars that transform work into a “Monday through Friday sort of dying.”³ Terkel’s is a disquieting, though entirely familiar, account of work. After all, a paycheck is not the only thing we take from work. Work stays with us, often times doing much to define who we are and how we relate to others in society. For those employees who experience physical and emotional scarring in the workplace (the “walking wounded,” as Terkel calls them),⁴ the arm of the workplace is long, capable of reaching deep into their private lives and wreaking havoc.⁵ And there is the cumulative effect to worry about, too. As Terkel describes it, “The scars, psychic as well as physical, brought home to the supper table and the TV set, may have touched, malignantly, the soul of our society.”⁶

Workplace discrimination is but one source of such scars. More often than not, discrimination leaves its victims with emotional scars. At times, however, discrimination also leaves physical scars. Consider a well-known example.⁷ Joseph Oncale worked as a roustabout on an eight-man offshore oil rig.⁸ Two members of the crew were especially aggressive and violent in their treatment of Oncale. Specifically, the men raped Oncale with a bar of soap while he was showering in the rig’s bathroom.⁹ On other occasions, the men pinned Oncale to the ground and put their penises on different parts of his body (neck and arm).¹⁰ Oncale complained to the company’s safety compliance clerk to no avail.¹¹ The clerk, himself a victim of the abusive men in the past,¹² offered Oncale nothing by way of eliminating the ongoing threat posed by the men. Feeling like he had no other option, Oncale quit his job, citing the physical abuse and the company’s failure to stop the abuse as his reasons for leaving.¹³

Oncale brought a sexual harassment claim against his former employer, and the case eventually made it up to the Supreme Court. Lower courts had split over a key issue raised by the

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¹ STUDS TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* xi (1972).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See Zachary A. Kramer, *After Work*, 95 CAL. L. REV. 627 (2007) (arguing that employees “export” their work, including the bad parts of their work, to their families).

⁶ TERKEL, *supra* note 1, at xi.

⁷ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

⁸ *Id.* at 77.

⁹ *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996).

¹⁰ *Id.* at 118.

¹¹ *Oncale*, 523 U.S. at 77.

¹² *Id.*

¹³ *Id.*

case—whether a claimant can recover for same-sex sexual harassment—and the Court set out to resolve the jurisdictional split.¹⁴ The Court concluded that discrimination claimants can raise such claims,¹⁵ though the analysis that led to this holding is not my concern here. Rather, I am interested in the way the Court described the facts of Oncale’s case.

Justice Scalia wrote the unanimous opinion for the Court.¹⁶ As is customary in judicial opinions, Justice Scalia starts with the facts of the case. He writes, “The precise details are irrelevant to the legal point we must decide, and in the interest of both brevity and dignity we shall describe them only generally.”¹⁷ Justice Scalia then goes on to say, vaguely, that the men subjected Oncale to “sex-related, humiliating actions” and that the men “physically assaulted Oncale in a sexual manner.”¹⁸ That is the extent of the Court’s description of what happened to Oncale.

This was a missed opportunity of the highest order. Reading the Court’s opinion, there is no way to glean the severity of the harassment Oncale suffered at the hands of his coworkers. The men could have called Oncale names and grabbed his butt, or done countless other things that would amount to a “physical assault in a sexual manner” but not rise to level of what actually took place on that rig—an act of severe sexual violence. And I am particularly troubled by the Court’s suggestion that it would be undignified to recount the facts in detail. Prudishness has no place in judicial opinions. When a court sugarcoats sex, the court further entrenches the taboo against talking openly about sex and sexuality.

Which brings me back to Studs Terkel. Despite what seems like an overly negative portrayal of work, Terkel still believes in the nobility of a hard day’s work. Sure, work is something we *must* do.¹⁹ But it is also so much more than that. Work can instill a distinctive kind of pride, a sense of purpose or what some might call their calling or their life’s work.²⁰ Because there is so much at stake in work, it is all the more imperative that we take seriously the task of eliminating workplace discrimination. And we cannot expect employment discrimination law to do this all by itself. Although they have done much to protect outsider employees, employment discrimination statutes are ill-equipped to achieve full equality in the workplace. We also need to cultivate a robust antidiscrimination norm. People—especially employers—have to want to end workplace discrimination and adjust their behavior accordingly.

Here’s a small step toward creating such a norm. Let’s make a concerted effort to document

¹⁴ Courts had responded to same-sex sexual harassment cases in three distinct ways. First, some courts—including the lower court in Oncale’s case—held that an employee cannot raise a same-sex sexual harassment claim under Title VII. *See Garcia v. Elf Atochem North America*, 28 F.3d 446,451–52 (5th Cir. 1994); *see also Oncale*, 83 F.3d at 118. Second, some courts concluded that such claims are actionable only when there is evidence—that is, when the plaintiff can prove—that the harasser was motivated by sexual desire. *See McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Wrightson v. Pizza Hut of America*, 99 F. 3d 138 (4th Cir. 1996). Finally, other courts concluded that harassment that is sexual is always actionable, regardless of the harasser’s sex or sexual orientation. *See Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997).

¹⁵ *Oncale*, 523 U.S. 79–80.

¹⁶ Justice Thomas joined Justice Scalia’s opinion, though he also wrote a concurring opinion, which consisted of one sentence: “I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII’s statutory requirement that there be discrimination ‘because of . . . sex.’” *Id.* at 82 (Thomas, J. concurring).

¹⁷ *Id.* at 76–77.

¹⁸ *Id.* at 77.

¹⁹ TERKEL, *supra* note 1, at *xii*.

²⁰ Professor Vicki Schultz’s thoughtful writing on the subject is a case in point. *See Vicki Schultz, Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

what happens to employees in the workplace. The American antidiscrimination tradition tends to prioritize righting wrongs over all other functions. As a result, courts do not place a premium on publicizing discriminatory wrongs in a given case. This is why the Supreme Court felt comfortable glossing over the *real* facts in Joseph Oncale's case. At this point, the skeptical reader responds: *The Supreme Court is not a fact-finding body. The lower court built a record in the case. The Court's job was to resolve the issue of law, not publicize the details of what happened to Oncale.*

Perhaps. But why can't the Court do both things? The Court could have easily just reported what really happened, and doing so would have served the normative purpose of publicizing discriminatory wrongs. Professor Marcia McCormick has written about incorporating a truth and reconciliation model into employment discrimination law.²¹ She argues, convincingly, that our existing employment discrimination model does not provide an adequate mechanism for holding employers accountable for unlawful employment decisions.²² Her proposal is to design a new federal agency—a truth commission—to investigate and report on incidents of discrimination.²³ This is a good idea, although it goes well beyond my point in this space. Simply put, if we have to change people's behavior and convince them not to discriminate, then we should document what discrimination looks like. Courts can do their part by not passing on opportunities to document discriminatory behavior.

²¹ Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193 (2009).

²² *Id.* at 207–22.

²³ *Id.* at 222–31.