Case Brief: *Chazz Roberts v. Glenn Industrial Group, Inc.*[*]

INTRODUCTION

Slowly but surely, some U.S. courts are increasing protections for LGBTQ+ individuals[1] and eliminating stereotypes in laws based on sex and gender.[2] A recent Fourth Circuit decision further expanded these civil rights protections in the context of employment. In May of 2021, the Fourth Circuit broadened the evidentiary routes available to plaintiffs establishing same-sex sexual harassment in the workplace in *Roberts v. Glenn Industrial Group, Inc*.[3]

In *Roberts*, the Fourth Circuit analyzed whether the three *Oncale v. Sundowner Offshore Services, Inc.*[4] evidentiary routes for proving same-sex sexual harassment were exhaustive as the district court previously held.[5] Before *Roberts*, the Fourth Circuit had not published an opinion addressing the ways a plaintiff may prove a same-sex sexual harassment claim since the Supreme Court's *Oncale* decision.[6] Upon review, the Fourth Circuit vacated the lower court's ruling of summary judgment in favor of the employer in Roberts's same-sex sexual harassment claim and remanded for further proceedings.[7] It held that plaintiffs "may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes."[8] For support, the court relied upon the *Oncale* case as well as other circuit courts' handling of same-sex sexual harassment cases.[9]

CASE BACKGROUND

From July 2015 to April 2016, Chazz Roberts worked as a diver's assistant at Glenn Industrial Group, Inc., a corporation that provides underwater inspection and repair services to utility companies.[10] Roberts was supervised by

1. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 679–81 (2015); Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020); M.E. v. T.J., 380 N.C. 539, 2022-NCSC-23, ¶ 4.

2. *See, e.g.*, *Bostock*, 140 S. Ct. at 1753–54 (2020); Peltier v. Charter Day Sch., Inc., 8 F.4th 251, 272 (4th Cir. 2021); Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

3. 998 F.3d 111, 121 (4th Cir. 2021).

4. 523 U.S. 75, 80–81 (1998).

5. *Roberts*, 998 F.3d at 119.

6. *Id. Oncale* confirmed that same-sex sexual harassment in the workplace violates Title VII's prohibition on discrimination based on sex. *Id.* at 118.

7. *Id.* at 115.

8. *Id.* at 121.

9. *Id.* at 120–22.

10. *Id.* at 115–16.

Andrew Rhyner during his employment with the corporation and claimed Rhyner harassed him from the beginning of his employment.[11] For example, Rhyner "repeatedly called Roberts 'gay' and made sexually explicit and derogatory remarks toward him," and Roberts alleged that he was harassed almost every time he was around Rhyner.[12] Roberts was also physically assaulted by Rhyner when "Rhyner slapped [his] safety glasses off his face, pushed him, and put him in a chokehold" and when Rhyner slapped him, knocking his helmet off his head.[13] On numerous occasions, Roberts voiced complaints about Rhyner's behavior to Rhyner's supervisors.[14] While Roberts never complained directly to the company's CEO, as company policy requires, he complained to the CEO's wife who served as the vice president and human resources manager.[15] After two safety incidents, the CEO—Richard Glenn—fired Roberts.[16] Shortly thereafter, Roberts filed an Equal Employment Opportunity Commission ("EEOC") Charge of Discrimination alleging sex discrimination and retaliation and, after investigation, the EEOC dismissed the charge and issued Roberts a "Notice of Right to Sue."[17] An EEOC Notice of Right to Sue "gives [a party] permission to file a lawsuit in federal or state court," and it is provided when the EEOC closes its investigation or when a party requests the notice during investigation.[18]

In February 2018, Roberts filed suit against Glenn Industrial for multiple claims, including Title VII violations of same-sex sexual harassment and retaliation.[19] Under Title VII, an employer cannot "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."[20] A plaintiff can establish a prima facie case of sexual harassment based on a hostile work environment by proving: "(1) unwelcome conduct; (2) based on the plaintiff's sex; (3) sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) that is imputable to the employer."[21] The district court addressed only the second of the four requirements and granted summary judgment to Glenn Industrial after concluding that the harassment was not "based on sex."[22]

11. *Id.*
12. *Id.* (citation omitted).
13. *Id.* (citation omitted).
14. *Id.*
15. *Id.*
16. *Id.* at 116.
17. *Id.*
18. *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit [https://perma.cc/CA7K-4EW3].
19. *Roberts*, 998 F.3d at 116.
20. *Id.* at 117 (citing 42 U.S.C. § 2000e-2(a)(1)).
21. *Id.* (citing Okoli v. City of Baltimore, 648 F.3d 216, 220 (4th Cir. 2011)).
22. *Id.* at 118.

The district court relied on the Supreme Court's 1998 decision in *Oncale v. Sundowner Offshore Services*, a same-sex sexual harassment case presenting three evidentiary routes through which a plaintiff may prove that they were a victim of same-sex sexual harassment based on their sex:

> (1) [W]hen there is "credible evidence that the harasser [is] homosexual" and the harassing conduct involves "explicitly or implicit proposals of sexual activity"; (2) when the "sex-specific and derogatory terms" of the harassment indicate "general hostility to the presence of [the victim's sex] in the workplace"; and (3) when comparative evidence shows that the harasser treated members of one sex worse that members of the other sex in a "mixed-sex workplace."[23]

The second and third situations did not apply to Roberts's case because Rhyner was not hostile toward all men at Glenn Industrial and all of Glenn Industrial's nonoffice employees were male.[24] The district court found the first situation did not apply either because the record's only evidence stated that Rhyner was "straight" and the court did not find that Rhyner made "explicit or implicit proposals of sexual activity."[25]

The district court treated the *Oncale* examples as the exclusive evidentiary routes available to prove a same-sex sexual harassment claim, and when it found none of the three situations applied, it granted summary judgment to Glenn Industrial.[26] It determined that the physical assaults by Rhyner were "not of a sexual nature."[27] The district court also held that Roberts failed to establish a Title VII claim of retaliation because there was no evidence Glenn knew about Roberts's sexual harassment complaints before firing him.[28] Glenn claimed to have fired Roberts because of safety policy violations, so the protected conduct was not the but-for cause of the firing.[29]

In Roberts's appeal to the Fourth Circuit, he argued that the district court erred in granting summary judgment to Glenn Industrial. Specifically, he argued that the trial court erred in concluding that Roberts must prove that (1) his harasser identifies as gay in order to establish a same-sex sexual harassment claim and that (2) Glenn knew of Roberts's protected activity before firing him to establish a retaliation claim.[30]

23. *Id.* (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998)).

24. *Id.* at 118–19 (defining nonoffice employees as employees working in the field providing underwater inspections and repair services to utility companies).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 116.

29. *Id.* at 117.

30. *Id.*

LEGAL ISSUES AND OUTCOMES

The Fourth Circuit reviewed the order of summary judgment *de novo* analyzing both of Roberts's two claims: same-sex sexual harassment and retaliation.[31] First, looking at the claim of same-sex sexual harassment, the Fourth Circuit agreed with Roberts that the district court "misconstrued and misapplied the Supreme Court's decision in *Oncale*" by rejecting his claim of Title VII same-sex sexual harassment.[32] While the *Oncale* case identified three evidentiary routes for proving same-sex sexual harassment, the Fourth Circuit determined they "are not exclusive."[33] The Fourth Circuit reasoned that the Supreme Court did not indicate in *Oncale*'s language that the three routes were exclusive.[34] Additionally, it noted that the facts underlying the *Oncale* plaintiff's claim specifically showed that there was no evidence the harassers identified as gay or were hostile towards men at the workplace and the workplace was all male.[35] Therefore, none of the evidence applied to the three evidentiary routes the Supreme Court cited in the case, but the Supreme Court still reversed the lower court's summary judgment determination, which showed that it believed there are alternative routes to proving Title VII sex-based harassment.[36] The district court also relied on unpublished opinions using the *Oncale* routes and, specifically, an unpublished South Carolina district court case that seemingly treated the *Oncale* examples as the only way to establish same-sex sexual harassment.[37] The Fourth Circuit in *Roberts* explicitly rejected that position.[38]

The Fourth Circuit relied on Supreme Court same-sex harassment cases and other courts' interpretations of such cases. It noted that other circuit courts have decided the examples in *Oncale* "were not intended to serve as an exhaustive list."[39] The other courts' opinions highlighted *Oncale*'s use of the phrases "for example" and "[w]hatever evidentiary route the plaintiff chooses to follow" to support the existence of a nonexhaustive list of ways to prove same-sex sexual harassment.[40] They also confirm that *Price Waterhouse v. Hopkins*,[41] which held that plaintiffs can establish a sexual harassment claim with

31. *Id.*

32. *Id.* at 118.

33. *Id.* at 119.

34. *Id.* at 119–20 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998)) (emphasizing the facts of *Oncale* and the Supreme Court's use of "for example" and "[w]hatever evidentiary route the plaintiff chooses to follow").

35. *Id.* at 119.

36. *Id.*

37. *Id.* at 120; McDowell v. Nucor Bldg. Sys., No. 3:10-172, 2012 WL 714632, at *6 (D.S.C. Feb. 29, 2012), *aff'd*, 475 F. App'x 462 (4th Cir. 2012).

38. *Roberts*, 998 F.3d. at 111.

39. *Id.* at 120 n.4 (discussing the Third, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals' decisions).

40. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)).

41. 490 U.S. 228 (1989).

sex stereotyping,[42] was not overturned by *Oncale*.[43] These decisions by a majority of the circuit courts provided strong support for the outcome in *Roberts*. The Fourth Circuit found additional guidance in *Bostock v. Clayton County*,[44] which held that an employer violates Title VII if the employer discriminates based on sexual orientation or transgender status.[45] *Bostock* represented an expansion of LGBTQ+ rights in the workplace, specifically in discrimination based on sex-based stereotypes.[46] Additionally, the EEOC showed support for Roberts's claim by filing an amicus brief in the case urging the Fourth Circuit to reverse the district court's decision and remand the case for further proceedings.[47]

The Fourth Circuit vacated the lower ruling of summary judgment in favor of the employer on Roberts's same-sex sexual harassment claim and remanded for further proceedings.[48] It held that plaintiffs "may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes."[49] The court emphasized that actions do not need to be "overtly sexual" in order to be considered as evidence in a hostile work environment claim based on sex.[50] Therefore, the district court erred by not examining further whether the physical assaults by Rhyner were "part of a pattern of objectionable, sex-based discriminatory behavior."[51]

In regard to Roberts's retaliation claim, the court affirmed the district court's grant of summary judgment for the defendant because the evidence did not establish a sufficient causal relationship between Roberts's EEOC claim of harassment and his firing.[52] Roberts failed to show Glenn knew about the sexual harassment complaints before firing him, and Glenn cited safety concerns as the reason for the firing.[53]

42. *Id.* at 258.

43. *Roberts*, 998 F.3d at 120 (citing EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 456 (5th Cir. 2013)).

44. Bostock v. Clayton County, 140 S. Ct. 1731, 1744 (2020).

45. *Roberts*, 998 F.3d at 121.

46. *Id.*

47. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant at 24, Roberts v. Glenn Indus. Grp., Inc., 998 F.3d 111 (4th Cir. 2021) (No. 19-1215). The EEOC argued that the district court in the case "misunderstood the governing legal principles" in analyzing Roberts's sexual harassment claim. *Id.* at 4. The brief emphasizes that the *Oncal*e evidentiary routes are not exclusive and references other circuit courts' decisions in support. *Id.* at 9–10. Many of the Fourth Circuit's reasons for reversal and remand are found in the brief including *Oncale*'s facts, other circuit opinions, and the nonbinding nature of unpublished decisions. *See id.* at 6, 9–11.

48. *Roberts*, 998 F.3d at 115.

49. *Id.* at 121.

50. *Id.*

51. *Id.*

52. *Id.* at 122.

53. *Id.* at 116–17. The two safety concerns Glenn highlighted were (1) a work-related accident where Roberts suffered burns and Glenn alleged Roberts was not wearing the required safety gloves

POTENTIAL IMPACT

The *Roberts* decision may be used to continue the expansion of gender rights in the courts. *Roberts* clarified that the evidentiary routes for proving same-sex sexual harassment are not limited to the three *Oncale* examples.[54] The opinion reinforced the standard of proof a plaintiff must meet for a prima facie case of sexual harassment by providing the correct interpretation of "based on sex."[55] The guidance provides district courts with a more thorough understanding of the potential evidentiary routes that plaintiffs can use. Hopefully, with the clarification, the lower courts will apply the correct standard, leading to fewer remands and saving both the court and the parties time and money.

This case also puts employers on notice that same-sex sexual harassment under Title VII may encompass more situations than previously believed.[56] Employers can be liable for a greater scope of workplace harassment "based on sex," including when a plaintiff is perceived as failing to conform to a particular sex stereotype.[57] This expansion provides more protections to employees and may make same-sex sexual harassment victims feel more comfortable reporting discrimination to supervisors and the EEOC.

Additionally, *Roberts* can now be cited as a published Fourth Circuit case expanding LGBTQ+ rights in the workplace. As a published opinion, plaintiffs in other circuits can use the case as persuasive precedent. As the nonbinding circuit court decisions from other circuits aided in the *Roberts* outcome,[58] the minority of circuit courts that have not yet interpreted *Oncale*'s evidentiary routes as nonexhaustive may be more likely to do so. Even more broadly, this decision can be used to support further expansions of workplace equality for gender nonconforming and LGTBQ+ people on a national scale.

MARGARET HAY**

and (2) a day when Roberts was removed from a job site for erratic behavior, including slurred speech and glossed over eyes. *Id.* at 115–16.

54. *Id.* at 121.

55. *Id.*

56. *See id.*

57. *Id.*

58. *Id.* at 120.

** J.D. Candidate, Class of 2023.