REDEFINING THE PARAMETERS OF TITLE VII IN ACCORDANCE WITH EQUAL PROTECTION STANDARDS: THE UNITED STATES SUPREME COURT'S RECOGNITION OF SAME-SEX SEXUAL HARASSMENT AS A FORM OF DISCRIMINATION

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[I]f a Jew could discriminate against a Jew, an African American against an African American, an Italian against an Italian . . . why isn't it possible that a homosexual man or nonhomosexual man, irrespective, could discriminate against another man on the basis of sex, and so could a woman?[1]

I. INTRODUCTION

Imagine that you are a heterosexual male, working as a roustabout[2] on an isolated oil rig as part of a small, eight-man crew. You are stationed off the Louisiana coast, miles away from shore in the Gulf of Mexico.[3] Your co-workers are constantly harassing you, both verbally *and* physically. For example, on several occasions, a co-worker places his penis on you, and two of your co-workers, including your supervisor, threaten to rape you. Perhaps most frightening of all, your co-workers attack you in the shower and try to shove a bar of soap into your anus. In a desperate effort to stop this abuse, you report these incidents to the highest ranking representative on the rig, but your complaints are ignored, and the harassment continues.

Assuming that you place a high value on your life and well-being as most

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[1] Transcript of oral argument at *33-34, Oncale v. Sundowner Offshore Services, Inc., No. 96-568, 1997 WL 751912 (U.S. Oral Arg. Dec. 3, 1997).

[2] A roustabout is "a deckhand or water-front laborer" or "an unskilled or transient laborer, as on a ranch or in an oil field." WEBSTER'S NEW WORLD DICTIONARY 1170 (3d ed. 1994).

[3] The following hypothetical scenario is based upon the facts presented to the United States Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998).

people do, you consider the few options available to you: staying on the job, but constantly fearing for your life, or leaving your job and losing your livelihood. Like many self-respecting individuals faced with such a difficult decision, you choose the latter option and bring suit against your employer for constructive discharge.[4] To your dismay, however, your case is dismissed because sexual harassment between members of the same gender is not a form of discrimination prohibited by Title VII.[5]

Had the foregoing harassment been suffered by a woman at the hands of a man, her right to sue under Title VII would have been unquestionable.[6] This double standard should not be surprising because until the United States Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.*,[7] plaintiffs who sought to bring same-sex sexual harassment claims frequently faced dismissal. The United States Supreme Court decision in *Oncale* marked a significant moment for American workers.[8] The Court satisfied many legal commentators[9] by reversing a ruling of the Fifth Circuit Court of Appeals that re-

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[4] Constructive discharge has been said to occur "when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job." Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981) (quoting Slotkin v. Human Dev. Corp. of Metropolitan St. Louis, 454 F. Supp. 250, 255 (E.D. Mo. 1978)).

[5] *See* 42 U.S.C. § 2000e (1994); *see also* discussion of Title VII *infra* Part II.

[6] *See* John Stoltenberg, *Male-on Male Sexual Harassment*, FEMINISTA! (visited Oct. 23, 1998) <http:// www. feminista.com/v1n7/stoltenberg.html>. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court recognized that sexual harassment of a woman by a man, and vice versa, was a form of discrimination prohibited by Title VII.

[7] 118 S. Ct. 998 (1998).

[8] The United States Supreme Court's unanimous opinion was anxiously awaited and is important because it gives many people the right to seek legal redress in the federal courts when they have been harassed because of their sex. *See* Jan Crawford Greenburg, *Harassment Ban Expanded: High Court Gives Same-Sex Cases Equal Protection*, CHI. TRIB., Mar. 5, 1998, Zone N, at 1. One commentator stated that "[t]his is a victory for all American workers. We're pleased that the Court understands that sexual harassment is about power and that sexual orientations of the people involved are irrelevant." *High Court: Same-Sex Harassment is Illegal* (Mar. 4, 1998) <http://www.channel6000.com/news/stories/news-980304-144505.html> (quoting Kim Mills of the Human Rights Campaign). Another commentator explained the effect of the Court's decision by noting that "victims of sexual harassment in all U.S. workplaces have the right to sue under federal law even if their harassers are of the same sex." Michael Kirkland, *Court: Same-Sex Harassment Violates Law* (Mar. 4, 1998) <http://www.chron.com/content/wire/upi/wed9/ea8890292572142.upi.-html>.

[9] *See* Mark A. Hofmann, *High Court to Rule on Harassment*, BUS. INS., Feb. 16, 1998, at 2 (quoting Clifford M. Sloan, a partner in the Washington-based law firm Wiley,

jected same-sex sexual harassment as a viable cause of action under Title VII.[10] The Court held that same-sex sexual harassment is actionable under Title VII and that such harassment need not be motivated by sexual desire.[11] As a result of the *Oncale* decision, any person subjected to sexual harassment in the workplace may bring a Title VII claim regardless of the harasser's gender.[12]

The United States Supreme Court first recognized Title VII's prohibition against sexual harassment in 1986.[13] Same-sex sexual harassment claims, however, recently surfaced in the lower courts.[14] The ultimate resolution of such claims, including the application of Title VII to those claims, varied dramatically from court to court.[15] The Supreme Court's landmark decision in *Meritor*

Rein & Fielding) ("'I think it's unlikely the Supreme Court will adopt' the appeals court's position that same-sex sexual harassment is totally outside the protection of Title VII."); Ann G. Sjoerdsma, *High Court Tackles Same-Sex Question: Case Centers on Issue of Heterosexual Men Bothering Other Men*, THE ARIZ. REPUBL., Dec. 9, 1997, at B5 ("The Supreme Court agreed to hear *Oncale vs. Sundowner* because the Fifth U.S. Court of Appeals . . . is the only appellate circuit to hold that Title VII doesn't cover same-sex sexual harassment. The Court will overrule the Fifth Circuit on this point—Title VII is gender-neutral . . . ."); Interview with Professor David Cole, Georgetown University, CBS Evening News (Oct. 5, 1997), *available in* 1997 WL 5615510 ("I'm inclined to believe that [the Court] will find that same-sex sexual harassment will be covered by Title VII."). *But see* Regina L. Stone-Harris, Comment, *Same-Sex Harassment—The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 ST. MARY'S L.J. 269, 315-316 (1996) ("[T]he Court would most likely deny same-sex plaintiffs a cause of action because the Supreme Court has historically refused to expand the definition of sex discrimination in its interpretation of Title VII without some form of instruction from Congress.").

[10] *See Oncale*, 118 S. Ct. at 1003; *see also* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 120 (5th Cir. 1996) (finding that same-sex sexual harassment claims are not actionable under Title VII).

[11] *See Oncale*, 118 S. Ct. at 1002.

[12] *See id.*; *see also* Greenburg, *supra* note 8, at 1.

[13] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64-67 (1986); *see also* Doe v. City of Belleville, 119 F.3d 563, 569 (7th Cir. 1997) (quoting *Vinson*, 477 U.S. at 66) ("In 1986, the Supreme Court held for the first time that 'a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.'").

[14] *See infra* notes 108-12.

[15] *See, e.g., City of Belleville*, 119 F.3d at 574 (recognizing a cause of action under Title VII for a claim of same-sex sexual harassment where twin brothers were verbally and physically abused by their male co-workers); *Oncale*, 83 F.3d at 120 (refusing to recognize a same-sex sexual harassment claim where a male employee was sexually harassed by his heterosexual male co-workers and supervisor); Wrightson v. Pizza Hut of Am., Inc., 99

Savings Bank, FSB v. Vinson[16] recognized sexual harassment as a form of discrimination prohibited by Title VII, but it was limited to the paradigmatic situation of male-on-female or female-on-male sexual harassment.[17] This paradigm, however, has progressively shifted.[18] While the typical sexual harassment scenario involves a man and a woman, it is no longer limited to members of the opposite sex, and it is just as likely to occur between members of the same sex.[19] The Supreme Court's decision in *Oncale* represents a proper re-

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F.3d 138, 143 (4th Cir. 1996) (finding that same-sex sexual harassment claims brought under the hostile environment theory are actionable only when the perpetrator and the victim are of the same sex).

[16] 477 U.S. 57, 66 (1986) (finding that Title VII prohibits hostile environment sexual harassment as a form of sex discrimination).

[17] *See* Fredette v. BVP Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997) ("In the paradigm harassment case, where a heterosexual male makes unwelcome advances toward a female, we have readily concluded that harassment occurred 'because of sex.'").

[18] Traditionally, sexual harassment suits have involved persons of the opposite sex. *See* Corey Taylor, Comment, *Same-Sex Sexual Harassment in the Workplace Under Title VII: The Legal Dilemma and the Tenth Circuit Solution*, 46 U. KAN. L. REV. 305, 305 (1998). Recently, however, sexual harassment claims involving members of the same sex have emerged. *See id.* As a matter of fact,

> [o]ver the past few decades, the issue of workplace sexual harassment has finally entered into mainstream discourse and is no longer limited to male-female relations. As sexual minorities are becoming more vocal in demanding equal rights, people are beginning to recognize that the same type of sexual harassment in the workplace that has been perpetrated against women is being perpetrated against gay men and lesbians.

Deborah Zalesne, *When Men Harass Men: Is it Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 395 (1998). Accordingly, some employers anticipated same-sex sexual harassment claims, and integrated the prohibition against same-sex sexual harassment into their existing sexual harassment policies. *See* Paula Murphy, *UCSF Ahead of Curve on Same-Gender Harassment*, UCSF's Electronic Daily—daybreak news, (Mar. 19, 1998) <http://www.ucsf.edu/daybreak/1998/03/319_sam.htm>. For example, the University of California in San Francisco expanded its sexual harassment policy to include language directed at same-sex sexual harassment. *See id.*

[19] In the majority of sexual harassment situations, the man is the harasser and the woman is the harassee. *See* Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1353 (7th Cir. 1995). Assuming that sexual harassment between members of the opposite sex results from sexual attraction or the conditioning of employment benefits on sexual favors, then it is not difficult to foresee that sexual harassment is just as likely to occur between members of the same sex because a homosexual harasser's harassment can result from

definition of sexual harassment and ensures that no person will be denied legal redress simply because the harasser was a person of the same gender.

Although Title VII now includes a prohibition against same-sex sexual harassment as a result of *Oncale*, the serious equal protection implications that would have arisen if same-sex sexual harassment claims had not been recognized by the Court in *Oncale* were not addressed by the Court nor by many scholars.[20] The Court's decision in *Oncale* is in accord with equal protection jurisprudence, however, because a failure to recognize same-sex sexual harassment claims, or to do so only when the harasser is homosexual, would have created a constitutional double standard by conditioning the application of Title VII on the gender or sexual orientation of the harasser.[21]

This Comment chronicles the Supreme Court's interpretation of Title VII with respect to sexual harassment claims, and more specifically, the Court's recent recognition of same-sex sexual harassment. Part II of this Comment includes an analysis of Title VII, and an overview of the incremental recognition of sexual harassment as a form of discrimination prohibited by Title VII, progressively setting the stage for the Court recognizing that same-sex sexual harassment is a form of discrimination prohibited by Title VII in *Oncale*. Further, Part III analyzes the treatment of same-sex sexual harassment claims by state courts, federal district courts, circuits courts, and ultimately, the United States Supreme Court in *Oncale*. This analysis evidences the wide range of views adopted by the many courts, and the Supreme Court's ultimate decision on the issue of same-sex sexual harassment. Additionally, Part III focuses on the equal protection implications surrounding the same-sex sexual harassment issue, an area of law explored by few commentators. Part IV provides the

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his or her sexual attraction to a member of the same sex or from conditioning employment benefits on sexual favors. The author acknowledges that this theory is especially true in this day and age when more and more people are "coming out of the closet" and acknowledging their sexual identities.

[20] The equal protection argument was not raised by any party in *Oncale* nor was it the basis for any of Mr. Oncale's claims. The argument was addressed, however, by Professor Catharine A. MacKinnon in her *amici curiae* brief in support of Mr. Oncale. *See Amici Curiae* Brief for Petitioner at 34-36, Oncale v. Sundowner Offshore Servs., Inc., (No. 96-568), *reprinted in* 8 UCLA WOMEN'S L.J. 9 (1997) (Catharine A. MacKinnon, Counsel for *Amici Curiae*) [hereinafter MacKinnon, *Amici Curiae* Brief]. The equal protection argument was also addressed by other *amici* on behalf of Mr. Oncale. *See Amici Curiae* Brief for Petitioner at 26-28, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (No. 96-568), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.). This brief was presented by the Lambda Legal Defense and Education Fund, the American Civil Liberties Union, and People for the American Way, among others.

[21] *See* discussion *infra* Part III.B.1.

author's analysis of the implications of the Supreme Court's decision by addressing unresolved issues that remain after *Oncale*. The author concludes, however, that the Court's decision was the only justifiable solution under well-settled constitutional principles.

II. TITLE VII AND SEXUAL HARASSMENT: SEXUAL HARASSMENT IS RECOGNIZED BY THE COURT AS A FORM OF DISCRIMINATION PROHIBITED BY TITLE VII

The Civil Rights Act of 1964[22] was an effort by Congress to end discrimination.[23] Title VII of the Act specifically addresses discrimination in the employment setting, and states in pertinent part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[24] While the statute explicitly addresses sex,[25] Title VII does not ex-

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[22] *See generally* 42 U.S.C. § 2000e (1994).

[23] *See* Taylor, *supra* note 18, at 306.

[24] 42 U.S.C. § 2000e-2(a)(1). While Title VII specifically addresses discrimination on the basis of "sex," there is little legislative history regarding that provision because it has been noted that:

> discrimination based on an individual's "sex" was not included in the preliminary draft of Title VII. In an effort to thwart the passage of Title VII, "sex" was added to the Act at the last minute by a floor amendment. However, the effort failed, the bill passed, and "sex" was included in the language of Title VII without any debate regarding what would constitute sexual discrimination.

Taylor, *supra* note 18, at 306-07. Title VII's lack of legislative history has made the development of sexual harassment difficult. *See* M. Clayborn Williams, Note, *Title VII and Same-Sex Sexual Harassment: What is the Proper Theoretical Basis for a Sexual Harassment Claim?*, 21 AM. J. TRIAL ADVOC. 651, 652 (1998). As a result, "the legislative history offers little insight into the definition of 'sex' and how it should be interpreted." Joanna P. L. Mangum, Comment, Wrightson v. Pizza Hut of America, Inc.: *The Fourth Circuit's "Simple Logic" of Same-Sex Sexual Harassment Under Title VII*, 76 N.C. L. REV. 306, 316 (1997).

[25] As previously stated, Title VII states in pertinent part that: "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . *sex* . . . ." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). When referring to "sex" as used in the text of Title VII, the author refers to gender. The interpretation of "sex" as used in the language of Title VII, has generally been interpreted narrowly by

pressly prohibit sexual harassment.[26] With little in the way of legislative history to aid in the interpretation of Title VII,[27] courts initially failed to recognize a cause of action for sexual harassment.[28] In 1979, however, Professor Catharine A. MacKinnon defined sexual harassment as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."[29] Moreover, Professor MacKinnon argued that sexual harassment

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equating it with gender. *See* Mangum, *supra* note 24, at 317. This narrow interpretation of "sex" as adopted by the Court has prevented courts from recognizing a cause of action for harassment on the basis of sexual orientation. *See id.* at 318. In fact, "courts unanimously agree that 'sex' refers to one's gender and not one's sexual preference or sexual orientation." Taylor, *supra* note 18, at 307. *But see* Zalesne, *supra* note 18, at 397 ("[C]ourts should interpret 'because of sex' in its broadest sense to mean not only biological sex, but also anything relating to sexual issues, behavior, anatomy, or identity, as long as the harassment implicates and exploits power imbalances between the sexes.").

[26] As provided in the language of Title VII, discrimination "because of . . . sex" is prohibited by Title VII. *See* 42 U.S.C. § 2000e-2(a)(1). Sexual harassment, however, is a form of discrimination "because of . . . sex" that has been recognized by the Court subsequent to the passage of Title VII. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[27] *See supra* note 24 (discussing the lack of legislative history regarding "sex" in Title VII).

[28] *See, e.g.*, Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977); Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974). In *Vinson v. Taylor*, the court of appeals recognized that a plaintiff is not confined to proving sexual harassment merely by showing that job benefits were conditioned on sexual favors. 753 F.2d 141, 144-45 (D.C. Cir. 1985). Subsequently, in *Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir.), the court of appeals denied an application for rehearing, and the case was ultimately brought before the Supreme Court as *Meritor Sav. Bank, FSB v. Vinson* in which the Court recognized the hostile environment theory of sexual harassment as a form of discrimination prohibited by Title VII. *See Vinson*, 477 U.S. at 66. In *Taylor*, Judge Bork dissented from the court of appeal's denial of an application for rehearing, and questioned the viability of sexual harassment as a claim under Title VII. 760 F.2d at 1331 (Bork, J., dissenting). Judge Bork argued that Congress was not "thinking of sexual harassment at all but of discrimination in employment because of gender." *Id.* at 1333 n.7 (Bork, J., dissenting). *But see* Katherine H. Flynn, Comment, *Same-Sex Sexual Harassment: Sex, Gender and the Definition of Sexual Harassment Under Title VII*, 13 GA. ST. U. L. REV. 1099, 1104 (1997) ("The refusal to recognize sexual harassment as actionable under Title VII was short-lived.").

[29] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1 (1979).

should be considered a form of discrimination prohibited by Title VII.[30] In 1980, the Equal Employment Opportunity Commission ("EEOC") issued guidelines indicating that sexual harassment was a valid form of discrimination prohibited by Title VII.[31]

It was not until 1986, however, that the United States Supreme Court recognized, in *Meritor Savings Bank, FSB v. Vinson*, that Title VII prohibited sexual harassment as a form of sex discrimination, and concluded that "a claim of 'hostile environment' sex discrimination is actionable under Title VII."[32] The Court defined sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[33] The Court in *Vinson* strongly relied on the EEOC Guidelines on sexual harassment and recognized that when sexual discrimination creates a hostile or abusive work environment, such conduct constitutes a violation of Title VII.[34] The Court further held that the phrase "terms, conditions, or privileges of employment" does not only apply to tangible or economic benefits; rather, it "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[35] Thus, *Vinson* exemplifies the

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[30] *See id.* at 208-213 (advocating that sexual harassment should be recognized as a form of employment discrimination); *see also* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 103-116 (1987) (discussing the Supreme Court's recent recognition of sexual harassment as a form of discrimination prohibited by Title VII in *Meritor Sav. Bank, FSB v. Vinson*).

[31] *See* 29 C.F.R. § 1604.11 (1991). For a discussion of the persuasive authority of EEOC interpretations, see *infra* note 152.

[32] *Vinson*, 477 U.S. at 73 (recognizing a claim of sexual harassment by a bank employee against a supervisor and the bank where the plaintiff alleged the supervisor requested sex from her, touched and fondled her in front of other employees, and forcibly raped her several times); *see also* Doe v. City of Belleville, 119 F.3d 563, 569 (7th Cir. 1997) (quoting *Vinson*, 477 U.S. at 66) ("In 1986, the Supreme Court held for the first time that 'a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.'").

[33] *Vinson*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).

[34] *See id.* at 66.

[35] *Id.* at 64 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)); *see also* 42 U.S.C. § 2000e-2 (1994); 29 C.F.R. § 1604.11(c) (1995); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (finding that the Congressional intent under Title VII was to protect both men and women); Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669, 676 (1983) (finding a violation of Title VII where an insurance plan provided less benefits to married male employees than to married female employees).

Court's initial willingness to recognize that sexual harassment was a pervasive problem.

Seven years later, in *Harris v. Forklift Systems, Inc.*,[36] the United States Supreme Court moved beyond *Vinson*, and defined a hostile or abusive work environment.[37] Specifically, the Court opined that such an environment is created by conduct so severe or pervasive that a reasonable person would find it to be hostile.[38] In addition, a sexual harassment victim must subjectively perceive the environment to be hostile or abusive.[39] The Supreme Court rejected the lower courts' focus on the psychological well-being of the victim,[40] and instead adopted the "totality of the circumstances" test to determine whether a work environment is "hostile" or "abusive."[41]

Sexual harassment continues to be a pervasive problem in the American workplace.[42] Sexual harassment comes in both physical and verbal forms.[43] It can include such things as placing inappropriate pictures around the work area,[44] initiating unwanted physical contact,[45] using sexually abusive lan-

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[36] 510 U.S. 17 (1993).

[37] *See id.* at 21-22 (finding that a hostile work environment was created when the defendant, a president of a rental company, made comments to plaintiff, a manager of the rental company, insinuating that she had sex with potential clients).

[38] *See id.* at 21.

[39] *See id.* at 21-22.

[40] *See id.* at 22.

[41] *Id.* Some of the factors to determine whether a work environment is hostile or abusive listed by the Court were "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

[42] *See Men v. Men in U.S. Courts: Satvinder Juss Looks at a Supreme Court Ruling Which Provides a Precedent for Same-Sex Harassment Actions*, THE LAWYER, July 28, 1998, at 24, *available in* LEXIS, News Library, The Lawyer File [hereinafter *Men v. Men*] (finding that since 1991, sexual harassment claims have doubled to 16,000 per year, 12 percent being from men); *see also* Cara Tanamachi, *Bastrop Same-Sex Harassment Suit Goes to Court*, AUSTIN AM.-STATESMAN, Aug. 24, 1998, Metro/State, at B1 (finding that all types of sexual harassment claims have increased 131 percent since 1991).

[43] *See* MACKINNON, *supra* note 29, at 29.

[44] *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (finding that there is no First Amendment right to post pornographic pictures throughout the workplace). It has been noted that "[p]ornography is sometimes used" as a form of sexual

guage,[46] or exhibiting outright hostility toward one gender in the workplace.[47] A sexual harassment claim may be brought under one of two legal theories, either the quid pro quo theory or the hostile work environment theory.[48] On one hand, a claim brought under the quid pro quo theory typically involves a defendant who requests sexual favors from the plaintiff in exchange for security or economic benefits.[49] On the other hand, the hostile work environment theory involves conduct by a defendant that creates an unbearable work environment for the plaintiff.[50]

To establish a sexual harassment claim under either theory, a plaintiff must establish five elements.[51] First, in both types of claims, the plaintiff must prove that he or she is a member of a protected class.[52] Second, the plaintiff

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harassment. MACKINNON, *supra* note 29, at 29.

[45] Professor Catharine A. MacKinnon has stated that "[p]hysical forms range from repeated collisions that leave the impression of 'accident' to outright rape." MACKINNON, *supra* note 29, at 29.

[46] *See Harris*, 510 U.S. at 19 (noting that the president of the company called the plaintiff "a dumb ass woman" and suggested that they "go to the Holiday Inn to negotiate [the plaintiff's] raise" in front of others).

[47] *See* WILLIAM PETROCELLI & BARBARA KATE REPA 2/4, 2/11 (1994) ("In most of these situations, however, the hostility stems from men's opposition to women in previously all-male jobs—and it manifests itself against any woman worker who happens to come upon the scene.").

[48] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

[49] *See* Williams, *supra* note 24, at 655; *see also* Jones v. Commander, Kansas Army Ammunitions Plant, Dep't of the Army, 147 F.R.D. 248, 250 (D. Kan. 1993) (finding that sexual harassment under the quid pro quo theory occurs when "submission to sexual conduct is made a condition of concrete employment benefits"); MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 627 (1997) (defining quid pro quo sexual harassment as harassment that "occurs when sexual conduct is a condition of tangible employment benefits, including salary, promotion, and continued employment").

[50] This theory was first recognized by the Supreme Court in *Vinson*. *See Vinson*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)) (finding that sexual harassment occurs when "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment").

[51] *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

[52] *See id.*

must prove that he or she was the object of unwelcomed sexual conduct.[53] Third, the harassment must have occurred because of the plaintiff's sex.[54] Fourth, the plaintiff must establish *respondeat superior*[55] liability.[56]

Finally, the fifth element of a sexual harassment claim is different under each theory, but "differs only with respect to how the harassment occurred."[57] In cases brought under the quid pro quo theory of liability, a plaintiff must establish that attaining job-related benefits was conditioned upon submission to sexual conduct.[58] Conversely, in an action brought under the hostile environment theory, a plaintiff must show that the defendant's conduct unreasonably interfered with his or her work environment rendering it intolerably abusive.[59] Additionally, in a hostile environment case, a plaintiff must prove that he or she has been subjected to sexual comments, advances, or physical contact, irrevocably altering the terms or conditions of employment.[60]

While same-sex sexual harassment claims have been brought by plaintiffs under both theories,[61] the real controversy concerning same-sex sexual harass-

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[53] *See id.*; *see also Vinson*, 477 U.S. at 68 (stating that essential to a claim of sexual harassment is that the sexual advances were "unwelcome").

[54] *See Henson*, 682 F.2d at 909.

[55] Black's Law Dictionary defines *respondeat superior* as a doctrine which holds that "a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990).

[56] *See Henson*, 682 F.2d at 909.

[57] Williams, *supra* note 24, at 655.

[58] *See Henson*, 682 F.2d at 909.

[59] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); *see also* Lisa Fair McEvers, Case Comment, *Civil Rights—Work Environment; Sexual Harassment: "Sexual Harassment by a Supervisor of the Same Sex, Is It Actionable?"* Equal Employment Opportunity Comm'n v. Walden Books Co., 885 F. Supp. 1100 (M.D. Tenn. 1995), 72 N.D. L. REV. 397, 402 (1996).

[60] *See Vinson*, 477 U.S. at 65. Opposite sex sexual harassment often includes displaying pornography, telling vulgar jokes, or using sexual innuendo that creates a hostile work environment that makes it difficult for a worker to perform a job. *See* Stuart Silverstein, *Same-Sex Harassment Cases Might Increase*, PORTLAND OREGONIAN, Mar. 8, 1998, *available in* 1998 WL 4188564.

[61] *Compare* Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997) (a same-sex sexual harassment case involving a hostile environment claim) *with* Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997) (a same-sex sexual harassment

ment claims has occurred in cases brought under the hostile environment theory.[62] For a plaintiff in a typical sexual harassment situation to initiate a hostile environment sexual harassment claim, he or she must first show that the situation is objectively hostile.[63] Next, the plaintiff must show that the situation is subjectively hostile insofar as he or she personally perceived that the terms or conditions of employment were materially altered as a result of the perceived hostile work environment.[64] Therefore, the plaintiff must show that "the environment would reasonably be perceived, and is perceived [by the plaintiff], as hostile or abusive."[65] Additionally, the plaintiff must show that

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case involving a hostile work environment claim as well as a quid pro quo claim).

[62] *See* Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1549-50 (M.D. Ala. 1995) (finding quid pro quo harassment actionable under Title VII where the harasser was homosexual); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541-42 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984) (holding that plaintiff properly established a claim under Title VII for quid pro quo same-sex sexual harassment); *see also* Zalesne, *supra* note 18, at 402 ("Most courts have found a cause of action in [quid pro quo] cases based on the apparent fact that the harassment is targeted at employees of only one sex."); McEvers, *supra* note 59, at 408 (finding that with respect to same-sex sexual harassment claims, "[t]he trend emerging appears to be that many courts are recognizing quid pro quo claims, but failing to recognize hostile environment claims"); Taylor, *supra* note 18, at 309-310 ("Courts generally recognize same-sex quid pro quo sexual harassment complaints," but "[c]ourts are divided about whether Title VII should cover same-sex hostile environment claims."). Same-sex sexual harassment claims brought under the hostile environment theory are not as widely accepted as those brought under the quid pro quo theory because "[i]n same-sex harassment cases of the quid pro quo variety in which the superior requests sexual favors from the same-sex subordinate, the harasser is presumed to be sexually attracted to the employee—that is, the employer is presumed to be gay." Zalesne, *supra* note 18, at 402 (citing *Vinson*, 477 U.S. at 65). Therefore, it is apparent in this type of situation that the harasser is only targeting employees of one sex. *See id.* (citations omitted). In a hostile environment same-sex sexual harassment case, however, it is more difficult to determine whether the harasser is targeting the victim because of his or her sex. *See id.* This is so because hostile environments are typically created by "crude sexual jokes, persistent taunting and sexual touching." *Id.*

[63] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). An objective hostile work environment is one that a reasonable person would find to be hostile or abusive. *See id.* The Court interpreted the standard for establishing a hostile or abusive work environment as set forth in *Vinson*, and stated that conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." *Id.*

[64] *See id.* at 21-22. The Court specifically stated that "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Id.*

[65] *Id.* at 22. While the Court has held that requiring a plaintiff to endure the situation

the harassment altered the terms or conditions of employment.[66] The work environment does not have to be altered in a pecuniary manner; rather, a plaintiff must show that the work environment was altered in such a way that the employee no longer felt comfortable.[67] Therefore, courts must look to the totality of the circumstances in order to determine whether the environment is hostile or abusive.[68]

Finally, unlike quid pro quo sexual harassment cases, in hostile work environment cases, employers are not held strictly liable because a hostile environment can be created by *any employee*, not just by those persons in supervisory positions.[69] Therefore, a plaintiff must show that the employer knew or should have known that a hostile work environment existed and that the employer, nonetheless, failed to take any remedial action.[70]

It took the Court twenty-two years from the time Title VII of the Civil Rights Act of 1964 was enacted to recognize sexual harassment as a form of

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to the point of a nervous breakdown is not necessary for Title VII to apply, one isolated incident would not render a work environment sufficiently pervasive and severe. *See id.*; *see also* Taylor, *supra* note 18, at 310-11.

[66] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). Title VII of the Civil Rights Act of 1964 specifically states that:

> [it is] an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994) (emphasis added). The phrase "terms, conditions, or privileges of employment," however, does not apply solely to tangible or economic benefits; rather, it "'strike[s] at the entire spectrum of disparate treatment of men and women' in employment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

[67] A tangible or economic injury is not necessary to state a claim because sexual advances can violate Title VII if they create an offensive or hostile work environment. *See* Helen L. McDonald, *Is Same-Sex Harassment Actionable Under Title VII As Sexual Harassment?*, 32 WILLAMETTE L. REV. 821, 822 (1996); *see also Vinson*, 477 U.S. at 64, 66.

[68] *See Harris*, 510 U.S. at 23.

[69] *See* Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982).

[70] *See id.* at 905.

discrimination prohibited by Title VII in *Vinson*.[71] It would take the Court another twelve years to recognize that sexual discrimination can occur even between persons of the same sex.[72] Nonetheless, the Court did so, and expanded Title VII's protection to all American workers.

III. SAME-SEX SEXUAL HARASSMENT CLAIMS: A NEW FORM OF DISCRIMINATION

Same-sex sexual harassment differs from the typical sexual harassment situation recognized by the Court in *Vinson* because the harasser and the victim are of the same gender. In this new breed of sexual harassment cases, the focus has sometimes been inappropriately placed on the sexual orientation of the victim or the harasser.[73] The focus, however, should be on the gender of the victim and not their sexual orientation.[74]

The controversy over the recognition of same-sex sexual harassment claims has occurred in cases brought under the hostile environment theory of liability under Title VII.[75] The plaintiff in a hostile environment claim must establish that the harassment occurred because of the plaintiff's sex.[76] In effect, the plaintiff must show that, but for his or her sex, he or she would not have been discriminated against.[77] A problem encountered by many courts faced with same-sex sexual harassment claims under Title VII is the difficulty in determining whether the discrimination occurred because of the victim's sex as required by the statute.[78] Due to the special problem of same-sex sexual harass-

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[71] *See Vinson*, 477 U.S. at 66.

[72] *See* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998).

[73] *See infra* notes 109-10.

[74] *See* Michael Delikat & Rene Kathawala, *Same-Sex Harassment and Title VII*, NEW YORK LAW JOURNAL, Sept. 8, 1997, at 1, *available in* LEXIS, News Library, New York Law Journal File (when a woman sexually harasses another woman, or a man is sexually harassed by another man, same-sex sexual harassment is said to occur because the focus is on the gender of the victim, not their sexual orientation).

[75] *See supra* note 62 and accompanying text.

[76] *See* Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

[77] *See id.* at 904.

[78] *See* Taylor, *supra* note 18, at 319. Same-sex sexual harassment claims focus on the interplay between gender and sexual orientation. *See* Delikat & Kathawala, *supra* note 74,

ment, the lower courts struggled enormously to decide how these claims should be treated under Title VII. This resulted in vastly different holdings in the dis-

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at 1. Legal experts say that it is difficult to identify where horseplay crosses the line to illegal conduct because there is no public consensus on what is improper behavior. *See* Silverstein, *supra* note 60. It is more difficult to see that harassment is "because of sex" when a man sexually harasses another man or when a woman sexually harasses another woman. *See* Taylor, *supra* note 18, at 319. As a matter of fact,

> [c]ourts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.

Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998).

The difficulty in accepting same-sex sexual harassment claims lies in the "because of . . . sex" requirement. *See* Taylor, *supra* note 18, at 319. For example, if a male heterosexual harasses another male, the question arises whether that harasser would subject a female to the same harassing conduct. If he would, it becomes difficult to see that he harassed the male "because of . . . sex." *See id.* (finding that "[t]hose courts that do not recognize a Title VII cause of action for same-sex sexual harassment seem to do so because proving that a victim was harassed because of his or her sex is difficult when the harasser and victim are the same gender"). The Court in *Oncale* noted that:

> [t]he same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.

Oncale, 118 S. Ct. at 1002.

Moreover, recognizing same-sex sexual harassment claims is also difficult because:

> [c]ausation is less evident in same-sex sexual harassment cases than in those involving individuals of opposite gender because, simply stated, society as a whole has more experience with heterosexual relationships and heterosexual interaction . . . . This is so because the allegedly harassing conduct is often capable of being construed not only as actionable harassment, but also, and perhaps more familiarly, as mere locker room antics, joking, or horseplay.

Willis v. Wal-Mart Stores, Inc., No. 24152, 1998 WL 331510, at *4-5 (W. Va. June 24, 1998) (quoting Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1501 (E.D. Va. 1996)).

trict courts and the circuit courts,[79] and ultimately led to the United States Supreme Court's decision in *Oncale*. Not surprisingly, some state courts tackled the issue as well.

A. THE STATES' APPROACH TO SAME-SEX SEXUAL HARASSMENT CLAIMS: RELIANCE ON FEDERAL LAW

The federal courts have not been the only fora in which same-sex sexual harassment claims have been brought. Several state cases have been brought under state anti-discrimination statutes, and those state courts have addressed the same-sex sexual harassment issue.[80] Some of these courts have looked to federal case law on the subject for guidance, and therefore, it is helpful to examine the treatment afforded by some states to same-sex sexual harassment claims. This section will analyze and discuss a New Jersey case decided two years before *Oncale* and a West Virginia case decided shortly after *Oncale*.

First, in *Zalewski v. Overlook Hospital*,[81] the Superior Court of New Jersey, Law Division, found that the New Jersey Law Against Discrimination ("NJLAD")[82] applied to sexual harassment between heterosexuals in the workplace when the harassment is based on gender stereotyping.[83] The court com-

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[79] *See* discussion *infra* Parts III.B.1.a, III.B.2.

[80] *See* H.M. v. Jefferson County Bd. of Ed., No. 1961607, slip op., *available in* 1998 WL 397430 (Ala. July 17, 1998) (finding that "discrimination on the basis of sex" as defined by the United States Supreme Court in *Oncale* renders same-sex sexual harassment actionable under Title IX of the Education Amendments of 1972); Tarver v. Calex Corp., 76 Fair Empl. Prac. Cas. (BNA) 323 (Ohio Ct. App. 1998) (relying on federal case law interpreting Title VII to find that same-sex sexual harassment claims are viable under the state's anti-discrimination statute); *Willis*, 1998 WL 331510 (relying on the Supreme Court's decision in *Oncale* to recognize a same-sex sexual harassment claim). *But see* Melnychenko v. 84 Lumber Co., 676 N.E.2d 45 (Mass. 1997) (concluding that same-sex sexual harassment is actionable under Massachusetts' anti-discrimination statute, however, not relying on Title VII or Title VII case law because the state statute does not parallel Title VII); Cummings v. Koehnen, 556 N.W.2d 586 (Minn. App. 1996), *aff'd*, 568 N.W.2d 418 (Minn. 1997) (finding same-sex sexual harassment actionable under the Minnesota Human Rights Act irrespective of any parties' gender or sexual orientation); Zalewski v. Overlook Hospital, 300 N.J. Super. 202 (Law Div. 1996) (concluding that a claim for same-sex sexual harassment is actionable under the New Jersey Law Against Discrimination by relying on federal case law interpreting Title VII despite the fact that the language of the New Jersey statute is much broader than the language of Title VII).

[81] 300 N.J. Super. 202 (Law Div. 1996).

[82] *See* N.J. STAT. ANN. §§ 10:5-1 to -42 (West 1993).

[83] *See Zalewski*, 300 N.J. Super. at 203. The sexual harassment alleged by the plaintiff

menced its analysis by reviewing the New Jersey Supreme Court's decision in *Lehmann v. Toys 'R' Us, Inc.*,[84] which set forth the standard for hostile environment sexual harassment claims in New Jersey.[85] *Lehmann* effectively extended the NJLAD's protection to same-sex sexual harassment, but the remaining issue in *Zalewski* was whether the NJLAD's protection extended only to harassment by a homosexual of a heterosexual, and vice versa, or whether the NJLAD extended to harassment between heterosexuals.[86] Finding no New Jersey case law on point, the *Zalewski* court looked to the federal courts' interpretations of Title VII.[87]

The *Zalewski* court discussed the seminal case of *Goluszek v. H.P. Smith*,[88]

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consisted mainly of constant ridicule and harassment from co-workers who perceived that the plaintiff was a virgin. *See id.* Specifically, the plaintiff was called a "whack'o," a "jerk-off," and "3-5, 3-5" to insinuate that the plaintiff masturbated because he did not have sex with women. *Id.* Also, pictures were placed by plaintiff's co-workers on his desk and locker which were meant to insinuate that the plaintiff did not have sex with women. *See id.* at 203-04. For example, a picture of a kitten was placed in the plaintiff's work area with a caption on it stating, "the only pussy Bill has ever gotten." *Id.* at 204. Despite plaintiff's complaints to his supervisors, the harassment continued and caused plaintiff to bring a lawsuit under the NJLAD. *See id.*

[84] 132 N.J. 587 (1993).

[85] *See id.* at 603-604. Specifically, the Court in *Lehmann* stated:

> [t]o state a claim for hostile work environment sexual harassment, a female plaintiff must allege conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. For the purposes of establishing and examining a cause of action, the test can be broken down into four prongs: the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.

Zalewski, 300 N.J. Super. at 205 (quoting *Lehmann*, 132 N.J. at 603-04).

[86] *See id.* at 205-06.

[87] *See id.* at 206-210.

[88] 697 F. Supp. 1452, 1456-57 (N.D. Ill. 1988) (finding that the plaintiff may have been harassed by his male co-workers because he was a male, but refusing to recognize a claim under Title VII because an anti-male environment did not exist in the workplace). *Goluszek*, a district court case, was the first case within the Fifth Circuit to address the issue of same-sex sexual harassment, and it laid the foundation for the Fifth Circuit's decision in *Oncale*. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996).

as well as *Hopkins v. Baltimore Gas & Electric Co.*,[89] both of which limited Title VII to male-female sexual harassment.[90] The *Zalewski* court noted, however, that most federal courts had refused to limit Title VII in such a fashion and had extended Title VII to apply to same-sex sexual harassment claims.[91] The *Zalewski* court referred to *Wright v. The Methodist Youth Services, Inc.*,[92] which recognized a same-sex sexual harassment claim brought under the quid pro quo theory by a male employee who was discharged for rejecting his male supervisor's advances.[93] The *Zalewski* court surveyed and discussed the reasoning of other district courts that had found same-sex sexual harassment claims to be actionable under Title VII.[94] Ultimately, the *Zalewski* court found that the facts in the case did not mirror those in any federal or state cases addressing the issue.[95] Instead, the *Zalewski* court relied on the United States Supreme Court's decision in *Price Waterhouse v. Hopkins*[96] that squarely dealt with the issue of gender stereotyping.[97] The *Zalewski* court, nonetheless, ex-

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[89] 871 F. Supp. 822 (D. Md. 1994) (refusing to find that the plaintiff had a cause of action under Title VII where plaintiff was harassed by co-workers of the same gender), *aff'd*, 77 F.3d 795 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

[90] *See Zalewski*, 300 N.J. Super. at 206-07.

[91] *See id.* at 207. After reviewing *Goluszek* and *Hopkins*, the *Zalewski* court noted that other courts had rejected same-sex sexual harassment claims as well. *See id.* (citing Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995); Myers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995); Quick v. Donaldson Co. Inc., 895 F. Supp. 1288 (S.D. Iowa 1995); Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994)). The *Zalewski* court further found that, "[t]he majority of the federal courts addressing the scope of Title VII, however, have refused to limit its application to male-female harassment and have held that discrimination based on sexual harassment includes not only male-female harassment but also same-sex harassment." *Id.*

[92] 511 F. Supp. 307 (N.D. Ill. 1981) (finding that the discharge of the male plaintiff because he rejected his male supervisor's sexual advances was a violation of Title VII).

[93] *See Zalewski*, 300 N.J. Super. at 207-08.

[94] *See id.* at 208-209 (citing Blozis v. Mike Raisor Ford, Inc., 896 F. Supp. 805 (N.D. Ind. 1995); Polly v. Houston Lighting and Power Co., 825 F. Supp. 135 (S.D. Tex. 1993)).

[95] *See id.* at 209.

[96] 490 U.S. 228 (1989).

[97] *See Zalewski*, 300 N.J. Super. at 209-10. The *Zalewski* court recognized that the facts in *Zalewski* involved gender stereotyping, and as such, it looked to *Price Waterhouse* where "the court found that an employer's failure to promote an employee because she was perceived as less than feminine was gender stereotyping and, a form of discrimination under

emplifies one state's struggle with the issue of same-sex sexual harassment and its reliance on diverse federal law regarding same-sex sexual harassment.

Further, the Supreme Court of Appeals of West Virginia in *Willis v. Wal-Mart Stores, Inc.*,[98] a case decided shortly after the Supreme Court's decision in *Oncale*, interpreted West Virginia's anti-discrimination statute, the West Virginia Human Rights Act, and recognized a claim of same-sex sexual harassment.[99] The *Willis* court noted West Virginia courts' consistent reliance on Title VII case law when interpreting the state's human rights statutes.[100] Thus, the *Willis* Court analyzed the Supreme Court's recent decision in *Oncale* which was grounded in Title VII, and interpreted the West Virginia Human Rights Act to include same-sex sexual harassment as a form of prohibited sexual discrimination.[101] In so holding, the *Willis* court specifically reiterated the Supreme Court's justification for recognizing same-sex sexual harassment under Title VII,[102] and noted that the Supreme Court's decision was not limited to

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Title VII." *Id.* at 209. The *Zalewski* court further noted that "plaintiff's co-workers discriminated against him because they believed him to be a virgin and effeminate." *Id.* at 210. The *Zalewski* court then found that, "[a] jury could therefore conclude that plaintiff's co-workers discriminated against him because he was a male who did not behave as they perceived a male should behave, i.e., that they discriminated against him based on gender stereotyping." *Id.* at 210-11.

[98] No. 24152, 1998 WL 331510 (W. Va. June 24, 1998).

[99] *See* 1998 WL 331510, at *1. The plaintiffs, Susan Willis and Christopher Lack, were employed by Wal-Mart Stores, Inc. *See id.* They brought suit against Wal-Mart and their supervisor, James Bragg, alleging sexual harassment. *See id.* Mr. Lack alleged that Mr. Bragg "made offensive jokes, remarks, and gestures to him or in his presence." *Id.* Mr. Bragg was ultimately terminated, not for his action against Mr. Lack, but because it was determined that Mr. Bragg had engaged in conduct that offended some *female* employees. *See id.*

[100] *See* 1998 WL 331510, at *3 (quoting West Virginia Human Rights Comm'n v. Wilson Estates, No. 24142, 1998 WL 248638, at *4 (W. Va. May 18, 1998)).

[101] *See* 1998 WL 331510, at *1-5.

[102] *See* 1998 WL 331510, at *1-3. Specifically, the *Willis* court noted that the Supreme Court in *Oncale* relied on the language of Title VII and the Court's precedent to find that same-sex sexual harassment was actionable under Title VII. *See* 1998 WL 331510, at *1-2. Further, the court reiterated Justice Scalia's rejection of the argument that recognizing same-sex sexual harassment claims would turn Title VII into a general civility code for the workplace. *See* 1998 WL 331510, at *2. The *Willis* court also noted that *Oncale* "was not aimed at eradicating the routine office banter that occurs among members of either the opposite sex or the same sex." *Id.*

same-sex sexual harassment situations where the harasser is homosexual.[103] Instead, the *Willis* court concluded that evidence of the harasser's homosexuality can be relevant to establish a same-sex sexual harassment claim, but the lack of such evidence would not bar such a claim.[104]

The states that have addressed same-sex sexual harassment by relying on federal courts' interpretation of Title VII have agreed that same-sex sexual harassment is a viable theory of discrimination.[105] These decisions further support the Supreme Court's decision in *Oncale* that same-sex sexual harassment should be a recognized form of discrimination. While some states have participated in the judicial debate over the same-sex sexual harassment issue, the extensive controversy over the issue exists in the federal courts. Therefore, the following section will analyze, in more depth, the federal case law that has emerged on this issue.

B. THE FEDERAL COURTS' TREATMENT OF SAME-SEX SEXUAL HARASSMENT CLAIMS: A LACK OF UNIFORMITY

Prior to the Supreme Court's decision in *Oncale*, circuit courts and district courts were sharply divided over the limits of Title VII and its application to same-sex sexual harassment.[106] While the federal courts were willing to take the challenge head-on, this resulted in confusion because the courts could not agree on how to handle the issue.[107] The decisions by the federal courts can be

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[103] *See* 1998 WL 331510, at *4. Specifically, the court noted that *Oncale* put to rest the issue of "whether a same-sex sexual harassment claim requires evidence of the perpetrator's homosexuality" by finding that the issue in sexual harassment cases is whether members of one sex are treated differently from members of the other sex. *Id.*

[104] *See id.*

[105] *See* Cummings v. Koehnen, 556 N.W.2d 586, 589 (Minn. App. 1996), *aff'd*, 568 N.W.2d 418 (Minn. 1997); Zalewski v. Overlook Hospital, 300 N.J. Super. 202, 212 (Law Div. 1996); Tarver v. Calex Corp., 76 Fair Empl. Prac. Cas. (BNA) 323, 327 (Ohio Ct. App. 1998); *Willis*, 1998 WL 331510, at *1.

[106] One commentator stated that, "[a]s recently as 1994, a deep split began to develop within the federal courts concerning whether Title VII proscribes sexual harassment when the putative victim and the alleged harasser are both of the same sex." E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 58 (1997).

[107] *See* Mangum, *supra* note 24, at 306. One commentator has noted that "[w]hile the courts have considered a number of issues in determining whether a same-sex sexual harassment claim will lie under Title VII, the confusion apparently centers around the meaning of 'because of sex' in Title VII." *Id.* at 335.

classified into one of three distinct categories. First, there are those courts that recognized same-sex sexual harassment claims regardless of the harasser's sexual orientation.[108] Second, other courts recognized same-sex sexual harassment claims only when the harasser was homosexual,[109] while some courts merely declared so in dicta.[110] Finally, other courts categorically rejected same-sex sexual harassment claims.[111] Among the circuit courts, however, the Fifth Cir-

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[108] *See* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997); Quick v. Donaldson Co., Inc., 90 F.3d 1372 (8th Cir. 1996).

[109] *See* Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996) (holding that same-sex sexual harassment claims, under the hostile environment theory, may *only* lie where the perpetrator and the victim are of the same sex); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996) (finding, without deciding the issue of whether same-sex sexual harassment claims should be recognized under Title VII, that sexual harassment between members of the same gender may state a claim under Title VII if the harassment is because of sex). *But see* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996) (concluding that same-sex sexual harassment is not actionable between heterosexual males where the plaintiff, a mechanic, was frequently subjected to sexual comments and even where a co-worker placed a condom in his food).

[110] *See* Fredette v. BVP Management Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998) (finding that a same-sex sexual harassment claim was actionable under Title VII where a homosexual restaurant manager requested sexual favors from the plaintiff in exchange for employment benefits and stating that the Fourth Circuit's focus on the sexual orientation of the perpetrator was easily perceived); Yeary v. Goodwill Indus.-Knoxville, 107 F.3d 443, 444 (6th Cir. 1997) (concluding that the male plaintiff had a valid same-sex sexual harassment claim where a homosexual male co-worker repeatedly propositioned the plaintiff for a date and touched him in a harassing manner and finding that the harassment was "because of sex"); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) ("[W]e do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases."); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) (indicating in dicta that it would "not rule out the possibility that both men and women working at Showboat have viable claims against (a male) for sexual harassment"); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring), *cert. denied*, 510 U.S. 1164 (1994) (concluding that the court may consider a same-sex sexual harassment claim under Title VII); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192 (1st Cir. 1990) (finding that a cause of action for sexual harassment existed under Title VII where a heterosexual male alleged that a homosexual male co-worker made sexual advances toward him); Barnes v. Costle, 561 F.2d 983, 990 n.5 (D.C. Cir. 1977) (indicating that a claim may be brought under Title VII "upon a subordinate of either gender by a homosexual superior of the same gender").

[111] *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998); Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994); Dillon v. Frank, 58 Fair Empl. Prac. Cas. (BNA) 144 (6th Cir. 1992); Ashworth v. Roundup Co.,

cuit Court of Appeals, which addressed the issue in *Oncale*, stood virtually alone in rejecting same-sex sexual harassment claims.[112]

1. A BROAD INTERPRETATION OF TITLE VII: SAME-SEX SEXUAL HARASSMENT FOUND ACTIONABLE UNDER TITLE VII REGARDLESS OF THE HARASSER'S SEXUAL ORIENTATION

At one end of the same-sex sexual harassment spectrum are those circuit courts that have concluded that same-sex sexual harassment is always actionable under Title VII, regardless of the harasser's sex, sexual orientation, or motivation.[113] For example, in *Quick v. Donaldson Co., Inc.*,[114] the Eighth Circuit Court of Appeals broadly interpreted Title VII, and concluded that plaintiff's same-sex sexual harassment claim should be cognizable under Title

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897 F. Supp. 489 (W.D. Wash. 1995); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995); Myers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995); Quick v. Donaldson Co., Inc., 895 F. Supp. 1288 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 795 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); Fleenor v. Hewitt Soap Co., 67 Fair Empl. Prac. Cas. (BNA) 1625 (S.D. Ohio 1994), *aff'd*, 70 Fair Empl. Prac. Cas. (BNA) 737 (6th Cir.), *cert. denied*, 117 S. Ct. 170, *reh'g denied*, 117 S. Ct. 598 (1996); Vanderenter v. Wabash Nat'l Corp., 867 F. Supp. 790, 796 (N.D. Ind. 1994); Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).

[112] *See Oncale*, 83 F.3d at 118; *Garcia*, 28 F.3d at 446; *Dillon*, 58 Fair Empl. Prac. Cas. (BNA) at 144. Many district courts, however, rejected, disagreed with, or at least refused to extend the Fifth Circuit's holdings with respect to same-sex sexual harassment. *See* McCoy v. Macon Water Auth., 966 F. Supp. 1209, 1217 (M.D. Ga. 1997); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 354 (D. Nev. 1996); Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393, 400 (D. Minn. 1996); Ecklund v. Fuisz Tech., Ltd., 905 F. Supp. 335, 338 (E.D. Va. 1995); Equal Employment Opportunity Comm'n v. Walden Book Co., Inc., 885 F. Supp. 1100, 1101 (M.D. Tenn. 1995); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); King v. M.R. Brown, Inc., 911 F. Supp. 161, 167 (E.D. Pa. 1995); McCoy v. Johnson Controls World Services, Inc., 878 F. Supp. 229, 231 (S.D. Ga. 1995); Noguera v. University of Puerto Rico, 890 F. Supp. 60, 63 (D.P.R. 1995); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550 (M.D. Ala. 1995); Raney v. District of Columbia, 892 F. Supp. 283, 286 (D.D.C. 1995); Roe v. K-Mart Corp., No. CIV.A.2:93-2372-18AJ, 1995 WL 316783, at *1 (D.S.C. Mar. 28, 1995); Sardinia v. Dellwood Foods, Inc., 69 Fair Empl. Prac. Cas. (BNA) 705 (S.D.N.Y. 1995).

[113] *See, e.g., Fredette*, 112 F.3d at 1509; *Yeary*, 107 F.3d at 448; *Quick*, 90 F.3d at 1378; *City of Belleville*, 119 F.3d at 574; *Saulpaugh*, 4 F.3d at 148 (Van Graafeiland, J., concurring); *Morgan*, 901 F.2d at 192.

[114] 90 F.3d 1372 (8th Cir. 1996).

VII.[115] The concurrence in *Quick* stated that "the key inquiry is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"[116] Thus, the Eighth Circuit reversed the district court's grant of summary judgment in favor of the defendant, and found that the record from the lower court failed to contain any evidence of similar conduct toward females in the workplace.[117]

In *Doe v. City of Belleville*,[118] the Seventh Circuit Court of Appeals addressed the same-sex sexual harassment issue in a case involving two sixteen year-old twin brothers who were subjected to verbal and physical abuse.[119] In *City of Belleville*, the court held that the harassment of a man by another man is actionable under Title VII, even when both parties are heterosexuals.[120] The Seventh Circuit held that the harasser's sexual orientation or preference is immaterial in same-sex sexual harassment.[121] The court reasoned that harassment

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[115] *See id.* at 1376. Plaintiff's sexual harassment claim was based on the actions of his co-workers which included verbal and physical harassment. *See id.* at 1374. In particular, plaintiff's co-workers engaged in a practice called "bagging" defined as the "intentional grabbing and squeezing of another person's testicles." *Id.* On one occasion, plaintiff's testicles were squeezed so hard that it caused him pain and swelling. *See id.* at 1375. In addition, plaintiff was verbally harassed because his co-workers believed he was homosexual. *See id.*

[116] *Id.* at 1378 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

[117] *See id.* at 1379.

[118] 119 F.3d 563 (7th Cir. 1997).

[119] *See id.* at 566-67.

[120] *See id.* at 574. J. Doe's and H. Doe's parents brought a sexual harassment claim on behalf of their sons against their sons' co-workers. *See id.* at 566. J. Doe was nicknamed "fat boy" by his co-workers while H. Doe was called "fag" and "queer" because he wore an earring. *Id.* at 566. Furthermore, one co-worker called H. Doe his "bitch" threatening to take him "out to the woods" and "get him up the ass." *Id.* at 567. H. Doe was also physically abused when the same co-worker stated, "I'm going to finally find out if you are a girl or a guy," while he cornered H. Doe and grabbed his testicles. *Id.*

[121] *See id.* at 580. In explaining its decision to recognize claims of same-sex sexual harassment regardless of the harasser's sexual orientation, the court noted:

> [w]e doubt that it would have mattered for H. Doe to know, when his testicles were in [the harasser's] grasp, that [the harasser] was heterosexual or (as his deposition reveals) that he lived with a woman, and thus that he may not have been sexually interested in H.

could still violate Title VII, even if it is not sexually explicit, because it could be gender-based if "visited upon workers of one gender but not the other."[122]

Courts that have recognized same-sex sexual harassment claims have advanced several reasons for doing so,[123] unlike those courts that have rejected same-sex sexual harassment claims under all circumstances providing little or no support for their arguments.[124] First, at least one court has argued that the validity of Title VII itself may be attacked on equal protection grounds unless the statute is interpreted to include claims of same-sex sexual harassment.[125] In *Roe v. K'Mart Corp.*, the United States District Court for the District of South Carolina addressed a same-sex sexual harassment claim brought by an employee under Title VII.[126] The court denied the employer's motion for summary judgment, and found that "plaintiff's claims [were] actionable under Title VII's prohibition against unwanted sexual advances that create an offensive or hostile working environment or which form the basis for quid pro quo sexual harassment and the plaintiff should be allowed [to] pursue his claim."[127] In so holding, the court commented that "[a]ny other conclusion conceivably subjects

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Id.

[122] *Id.*

[123] *See* McDonald, *supra* note 67, at 837. It has been noted that "[t]he arguments supporting the conclusion that same sex harassment is actionable under Title VII are better reasoned and more logical than those promulgated by courts reaching the opposite conclusion." *Id.* The courts recognizing same-sex sexual harassment claims under Title VII "have focused on the language of Title VII and the legislative history of the statute . . . [as well as] upon the EEOC's interpretative guidelines on sexual harassment, which focus on whether the harasser treats a member of one sex differently from members of the other sex." James H. Stock, Jr., *Same-Sex Sexual Harassment: Does it Violate Title VII?*, (visited Sept. 18, 1998) <http://www.weintraubstock.com/weinarticle3.htm>.

[124] *See* Dale Carpenter, *Same-Sex Sexual Harassment Under Title VII*, 37 S. TEX. L. REV. 699, 714 (1996) (summarizing the several arguments advanced by courts recognizing same-sex sexual harassment claims).

[125] *See* Roe v. K-Mart Corp., No. CIV.A.2:93-2372-18AJ, 1995 WL 316783, at *2 n.2 (D.S.C. Mar. 28, 1995) (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).

[126] *See* 1995 WL 316783, at *1. The plaintiff, a male homosexual, alleged that he was discharged for refusing to succumb to his male homosexual supervisor's sexual advances. *See id.*

[127] 1995 WL 316783, at *2.

Title VII to an attack on equal protection grounds."[128] While the equal protection issue surrounding the recognition of same-sex sexual harassment claims has not been fully addressed by any court, the equal protection issue "urges a reading of Title VII that would avoid unconstitutionality, a common cannon of statutory construction."[129]

The Equal Protection Clause of the United States Constitution states, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[130] Under this constitutional guarantee, a state must treat those persons who are similarly situated in a similar manner.[131] Building on this bedrock principal and the holding in *Roe*, Professor Catharine A. MacKinnon asserted in an *amici* brief filed on behalf of the petitioner in *Oncale* that the failure to recognize same-sex sexual harassment claims under Title VII would violate the Equal Protection Clause.[132] Professor MacKinnon argued that the reasoning of the Fifth Circuit Court of Appeals "creates a blatant double standard in sexual harassment cases based on gender, and potentially on sexual orientation as well, that denies survivors equal protection of the laws."[133] This argument exemplifies the constitutional conundrum surrounding the recognition of same-sex sexual harassment claims under Title VII that was not addressed by almost any court that addressed the issue.

It has been noted that "[o]fficial classifications based on sex are subject to

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[128] 1995 WL 316783, at *2 n.2 (citing *Hogan*, 458 U.S. at 718).

[129] Carpenter, *supra* note 124, at 720.

[130] U.S. CONST. amend. XIV, § 1. Section one of the Fourteenth Amendment states:

> [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.

Id. (emphasis added).

[131] *See* Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[132] *See* MacKinnon, *Amici Curiae* Brief, *supra* note 20, at 34-36.

[133] *Id.* at 34.

heightened scrutiny under the Court's equal protection analysis."[134] Under this heightened scrutiny, a classification must serve important governmental objectives and "the discriminatory means employed [must be] substantially related to the achievement of those objectives."[135] Furthermore, this heightened level of scrutiny applies to classifications that disadvantage men was well as women.[136]

Courts that rejected same-sex sexual harassment claims under all circumstances crossed an impermissible constitutional line.[137] These courts failed to protect men and women who were harassed by a person of their same gender. Professor MacKinnon argued in her *amici* brief that the dichotomy between conventional sexual harassment and same-sex sexual harassment perpetuates "[a] dual system of rights on an arbitrary ground [which] violates every equal protection standard known."[138] Professor MacKinnon also noted that it has been held that "ignoring men's complaints of sexual harassment while taking women's seriously violates the sex equality component of the Equal Protection Clause . . . and of Title VII."[139] It logically follows from Professor MacKinnon's reasoning that interpreting Title VII to ignore complaints by men regarding sexual advances by other men, while recognizing women's claims of sexual harassment by men, would violate equal protection.[140]

The Fourth Circuit, which only accepted same-sex sexual harassment claims

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[134] *Amici Curiae* Brief for Petitioner at 26, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (No. 96-568), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.) (Brief of Lambda Legal Defense and Education Fund, et al.) (citing United States v. Virginia, 116 S. Ct. 2264, 2275 (1996)).

[135] *Id.* (quoting United States v. Virginia, 116 S. Ct. 2264, 2275 (1996)).

[136] *See id.* at 27 (citing J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Weisenfeld, 420 U.S. 636 (1975)).

[137] *See* MacKinnon, *Amici Curiae* Brief, *supra* note 20, at 34-35; *see also Amici Curiae* Brief for Petitioner at 27, *Oncale* (No. 96-568) (Brief of Lambda Legal Defense and Education Fund, et al.) (stating that by dismissing a man's claim "because he is a man rather than a woman, as the Fifth Circuit [has done], is to hold that Title VII claimants should be treated differently, based solely on their sex, without any support for such a result in the statutory language"). For a discussion of the cases that rejected same-sex sexual harassment, see *infra* Part III.B.2.

[138] MacKinnon, *Amici Curiae* Brief, *supra* note 20, at 35.

[139] *Id.* (citing Nabozny v. Podlesny, 92 F.3d 446, 456 (7th Cir. 1996); Madon v. Laconia Sch. Dist., 952 F. Supp. 44, 47-48 (D.N.H. 1996)).

[140] *See id.* at 34-35.

where the harasser was homosexual, created an additional unacceptable and unconstitutional double standard.[141] For example, the Fourth Circuit would allow a claimant to bring a same-sex sexual harassment claim where the perpetrator was homosexual, but would bar the same claim if the harasser was heterosexual.[142] Therefore, individuals would be denied legal redress based on the sexual orientation of their harasser.[143] Again, this creates a situation where two individuals who are similarly situated in that they have been sexually harassed, are given different degrees of protection depending on the harasser's sexual orientation. The Fourth Circuit approach creates another troublesome equal protection issue. While homosexual harassers are held accountable for harassment under the Fourth Circuit's interpretation of Title VII, heterosexual harassers are able to escape liability.[144] This situation, once again, creates an im-

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[141] *See id.*; *see also Amici Curiae* Brief for Petitioner at 27-28, *Oncale* (No. 96-568) (Brief of Lambda Legal Defense and Education Fund, et al.); discussion *infra* Part III.B.1.a.

[142] *See* MacKinnon, *Amici Curiae* Brief, *supra* note 20, at 34-35.

[143] *See id.* It was argued by *amici* that by conditioning the application of Title VII to same-sex sexual harassment cases where the harasser is homosexual:

> a female employee who is harassed by another woman would have a different and more onerous evidentiary burden than a similarly situated male victim, solely because of her sex: she would have to further prove the sexual orientation of the harasser, whereas for the male victim harassed by a female such proof would be unnecessary. Conversely, a male employee who is harassed by another man cannot properly be required to satisfy a different and more stringent standard than a similarly situated woman just because he is male.

See Amici Curiae Brief for Petitioner at 27-28, *Oncale* (No. 96-568) (Brief of Lambda Legal Defense and Education Fund).

Furthermore, *amici* also argued that:

> [w]ere [a plaintiff required to prove that the harasser was homosexual], a female employee who was harassed by a lesbian would be protected under Title VII, but a male employee subject to the same conduct by the same harasser would be excluded from protection based on his male sex. Likewise, a male employee harassed by a gay man would be protected, but a female employee subject to the same conduct by the same harasser would not. This is all contrary to the spirit of Title VII and equal protection principles.

Id. at 28.

[144] *See* MacKinnon, *Amici Curiae* Brief, *supra* note 20, at 34-35.

permissible, unconstitutional double standard.[145]

A second reason advanced by some courts that embraced same-sex sexual harassment claims is that same-sex sexual harassment constitutes "but for" discrimination.[146] A plaintiff in any sexual discrimination case must show that he or she would not have been discriminated against "but for" his or her sex.[147] While "[s]ome courts have had conceptual difficulties with the hypothetical case of the 'bisexual harasser,' one who harasses both men and women,"[148] discrimination on the basis of sex can be established "[w]hen a preference for targeting one sex over the other is evident, as demonstrated by more frequent or more intensive harassment of one sex."[149] It is entirely possible, for example, that a male harasser, who is either homosexual or heterosexual, will tend to target men more so than women.[150] Further, these courts have argued that it is the victim's gender that Title VII is concerned with, not the harasser's.[151]

Third, some courts that have addressed same-sex sexual harassment have relied upon interpretations of Title VII by the EEOC.[152] Courts rely upon the

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[145] *See id.*

[146] *See* Carpenter, *supra* note 124, at 715.

[147] *See* Polly v. Houston Lighting & Power Co., 825 F. Supp. 135, 138 (S.D. Tex. 1993).

[148] Carpenter, *supra* note 124, at 715.

[149] *Id.* at 716.

[150] *See id.*

[151] *See* McDonald, *supra* note 67, at 839-40. It has been noted that:

> [t]he argument that same-sex harassment is discrimination because of gender implies that the harasser's gender is irrelevant; the focus is instead on the victim. The harasser "could be 'either male or female with homosexual, heterosexual, or bisexual tendencies' because the class for purposes of Title VII was defined by reference to those subjected to harassment . . . ." What is important is the harasser's motivation. The crucial issue is whether the harasser chose to harass the victim because of the victim's gender.

Id. at 839.

[152] *See, e.g.*, Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 446 (6th Cir. 1997); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996). Scholars have considered the EEOC Compliance Manual as an authoritative source for courts. For example, one scholar has stated that:

EEOC Compliance Manual when dealing with issues of sexual discrimination in the workplace.[153] The manual specifically addresses same-sex sexual harassment under Title VII, recognizes it, and squarely supports the position that the harasser and the victim need not be members of the opposite sex.[154] The

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> [w]hile EEOC interpretations of Title VII are not binding, reliance on them is proper and persuasive for several reasons. Supreme Court Title VII cases have cited the EEOC interpretations as informed and persuasive authority within the context of sexual harassment, as well as in other Title VII contexts. Further, it is a common principle of administrative law that, if an agency has the authority to enforce a statute, that agency's interpretation of the statute will be entitled to much deference if it is rational and consistent with the intent of Congress.

McDonald, *supra* note 67, at 844. Further, the Supreme Court has stated that courts should, at least under some circumstances, defer to the EEOC's interpretation of Title VII. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). Specifically, the Court stated that:

> [w]e consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 141-42 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[153] *See* McDonald, *supra* note 67, at 843-44; *see also* Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeling the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817, 820 (1994) (citing Horn v. Duke Homes, Inc., 755 F.2d 599 (7th Cir. 1985); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)) ("The EEOC guidelines have been utilized in the judiciary's analysis of sexual harassment claims and employer liability for such conduct.").

[154] *See* EEOC Comp. Man. (CCH), ¶ 3101, § 615.2(b)(3) (1998). The Equal Employment Opportunity Commission Compliance Manual states, in pertinent part, that:

> [t]he victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex . . . and the harasser does not treat employees of the opposite sex the same way.

Id.

crucial inquiry under the EEOC Compliance Manual "is whether the harasser treats a member or members of one sex differently from members of the other sex."[155] Thus, many federal courts faced with same-sex sexual harassment claims relied upon the EEOC Compliance Manual to support the recognition of such claims.[156]

Fourth, courts have relied on the plain language of Title VII to justify the statute's expansion to include same-sex sexual harassment claims.[157] In fact, courts have acknowledged that there is nothing in the actual text of the statute that can be seen as a limitation of Title VII's protection to persons discriminated against by the opposite sex.[158] Furthermore, the language of the statute indicates that Congress intended to prohibit discrimination based on the gender

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[155] *Id.* The EEOC Compliance Manual sets forth examples where members of one sex are treated differently from members of the other sex. Specifically, the manual states:

> Example 1—If a male supervisor of male and female employees makes unwelcome sexual advances toward a male employee because the employee is male but does not make similar advances toward female employees, then the male supervisor's conduct may constitute sexual harassment since the disparate treatment is based on the male employee's sex.
>
> Example 2—If a male supervisor harasses a male employee because of the employee's homosexuality, then the supervisor's conduct would *not* be sexual harassment since it is based on the employee's sexual preference, not on his gender. Title VII covers charges based on gender but not those based on sexual preference.

Id.

[156] *See* McDonald, *supra* note 67, at 844 (stating that "[c]ourts holding same-sex harassment actionable cite these EEOC statements as valid authority in support of their position").

[157] *See* Carpenter, *supra* note 124, at 714. Many courts cited the plain language of Title VII to support their argument that same-sex sexual harassment is actionable since the wording of Title VII makes it clear that it is unlawful to discriminate against men because they are men and against women because they are women. *See* McDonald, *supra* note 67, at 837. Cases which held that same-sex sexual harassment is not actionable, however, failed to address the plain language argument, and therefore, there is a major weakness in those cases. *See id.* at 841. In fact, "[t]he most compelling argument for allowing same-sex sexual harassment claims is that Title VII's plain language does not differentiate between the sexes." Taylor, *supra* note 18, at 329. Furthermore, "[c]ircuit courts that have allowed claims to be brought for same-sex sexual harassment adopted a plain language view of Title VII in their analysis." Williams, *supra* note 24, at 661.

[158] *See* McDonald, *supra* note 68, at 837; *see also* 42 U.S.C. § 2000e (1994).

of the victim, while making no reference to the gender of the harasser.[159] Therefore, cases that have broadly interpreted Title VII to encompass same-sex sexual harassment claims have found strong support in the plain language of Title VII.

Finally, while Congress provided little legislative history regarding its intent as to sex discrimination,[160] this should not provide a basis for rejecting same-sex sexual harassment claims. Courts that rejected same-sex sexual harassment claims have argued that Congress did not intend to include such claims in the purview of Title VII because it did not foresee those types of claims.[161] The stark reality, however, is that sexual harassers no longer limit themselves to members of the opposite sex.[162] To accept that same-sex sexual harassment claims should not be recognized merely because of Title VII's lack of legislative history would be to presume that the Court's holding in *Vinson* was wrong because, although Congress could not foresee Title VII's application to any type of sexual harassment, the Court recognized opposite-sex sexual harassment claims in *Vinson*.[163]

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[159] *See* Carpenter, *supra* note 124, at 714.

[160] *See id.*; *see also supra* note 24 and accompanying text.

[161] *See, e.g.*, Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (finding that same-sex sexual harassment was not actionable under Title VII where a male was in a male-dominated environment because "defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII," but rather "[t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group"). For other cases finding that same-sex sexual harassment claims are not actionable under Title VII because Congress did not intend to include such claims with the statute's purview, see Ashworth v. Roundup Co., 897 F. Supp. 489, 493 (W.D. Wash. 1995) (quoting *Goluszek*, 697 F. Supp. at 1456); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822, 834 (D. Md. 1994) (quoting *Goluszek*, 697 F. Supp. at 1456), *aff'd*, 77 F.3d 795 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); Fleenor v. Hewitt Soap Co., 67 Fair Empl. Prac. Cas. (BNA) 1625, 1627-28 (S.D. Ohio 1994) (quoting *Goluszek*, 697 F. Supp. at 1456), *aff'd*, 70 Fair Empl. Prac. Cas. (BNA) 737 (6th Cir.), *cert. denied*, 117 S. Ct. 170, *reh'g denied*, 117 S. Ct. 598 (1996).

[162] This is evident from the vast amount of same-sex sexual harassment claims that have inundated the courts.

[163] *See* Carpenter, *supra* note 124, at 715; *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (recognizing for the first time that Title VII prohibits sexual harassment as a form of discrimination on the basis of sex).

a. A More Limited View of Title VII: Same-Sex Sexual Harassment Found to be Actionable Under Title VII Only When the Harasser is Homosexual

In the same-sex sexual harassment spectrum, cases that accepted the validity of same-sex sexual harassment claims only when the harasser was homosexual lie somewhere in between those cases that completely embraced same-sex sexual harassment claims under Title VII and those cases that wholeheartedly rejected such claims.[164] These courts were unwilling to extend Title VII to cover same-sex sexual harassment claims unless the harasser was homosexual. Thus, these courts chose to focus on the sexual orientation of the harasser as the determinative factor for recognizing same-sex sexual harassment claims.

In *McWilliams v. Fairfax County Board of Supervisors*,[165] the plaintiff brought a hostile environment same-sex sexual harassment claim under Title VII.[166] The Fourth Circuit rejected the plaintiff's claim based on a determination that a hostile work environment claim for sexual harassment could not lie when the harasser and the victim are both heterosexual of the same sex.[167] The court reasoned that the claim was inappropriately raised under Title VII since the harassment was not "because of" the plaintiff's sex.[168] The court narrowly

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[164] *See* Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996) (holding that same-sex sexual harassment claims, under the hostile environment theory, may *only* lie where the perpetrator and the victim are of the same sex); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996) (finding, without deciding the issue of whether same-sex sexual harassment claims should be recognized under Title VII, that sexual harassment between members of the same gender may state a claim under Title VII if the harassment is because of sex). *But see* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996) (concluding that same-sex sexual harassment is not actionable between heterosexual males where the plaintiff, a mechanic, was frequently subjected to sexual comments and even where a co-worker placed a condom in his food).

[165] 72 F.3d 1191 (4th Cir. 1996).

[166] *See id.* at 1193. The plaintiff was a male automotive mechanic who had cognitive and emotional disabilities. *See id.* Plaintiff's co-workers, heterosexual males, "teas[ed] the plaintiff about sexual matters, expos[ed] themselves to the plaintiff, and physical[ly] assault[ed] the plaintiff [by] blindfolding [him], forcing him to his knees, and simulating oral sex with a finger in his mouth." Zalesne, *supra* note 18, at 399 (citing *McWilliams*, 72 F.3d at 1193).

[167] *See McWilliams*, 72 F.3d at 1195.

[168] *See id.* The court stated:

construed the language of Title VII because a broader interpretation would have led to "unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.'"[169]

Shortly after *McWilliams*, in *Hopkins v. Baltimore Gas & Electric Co.*,[170] the Fourth Circuit addressed the same-sex sexual harassment issue again.[171] This time, however, the Fourth Circuit acknowledged that same-sex sexual harassment *could be* actionable if the basis for the harassment is the victim's gender, even if the harasser was not homosexual.[172] Judge Nemeyer, specifically stated that "sexual harassment of a male employee, whether by another male or by a female, may be actionable under Title VII if the basis for the harassment is because the employee is a man."[173]

Several months after its decisions in *McWilliams* and *Hopkins*, the Fourth Circuit again addressed the same-sex sexual harassment issue in *Wrightson v.*

> [a]s a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here . . . is considered to be "because of the [victim's] '*sex*.'" Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity . . . . But not specifically "because of" the victim's *sex*.

Id. at 1195-96.

[169] *Id.* at 1196.

[170] 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996). In *Hopkins*, the male plaintiff alleged that his immediate supervisor, also a male, subjected him to at least 13 different instances of sexual harassment over a period of eight years thereby creating a hostile work environment. *See id.* at 747-748. Specifically, the plaintiff claimed that on one occasion, his supervisor entered the bathroom while the plaintiff was at the urinal and "pretended to lock the door and said, '[a]h, alone at last.'" *Id.* at 747. Plaintiff also alleged that his supervisor "pivoted an illuminated magnifying lens over [plaintiff's] crotch, looked through it while pushing the lens down, and asked '[w]here is it?'" *Id.* Upon bringing these incidents to the attention of his other supervisors, an investigation commenced, but it was ultimately determined that plaintiff "was trying to 'hang' [his supervisor]." *Id.* at 748. Higher management subsequently assured plaintiff that he would no longer be subjected to this type of behavior. *See id.* Plaintiff later refused an invitation to transfer and ultimately brought a charge with the EEOC. *See id.*

[171] *See id.*

[172] *See id.* at 752.

[173] *Id.*

Pizza Hut of America.[174] In *Wrightson*, the Fourth Circuit reversed the district court's order of summary judgment granted in favor of the defendant, and allowed the plaintiff's same-sex sexual harassment claim to proceed to trial.[175] The Fourth Circuit's decision was based on the fact that the harasser in *Wrightson* was a homosexual male who repeatedly harassed the plaintiff, a heterosexual male, and other heterosexual male employees.[176] Therefore, while the Fourth Circuit took a step forward in recognizing same-sex sexual harassment claims, the court's reasoning was limited insofar as the harasser was homosexual, and it declined to address the merits of a same-sex sexual harassment claim.[177]

Only in the rare circumstance where the harasser is openly homosexual, or where there is overwhelming proof available to a plaintiff of the harasser's sexual orientation, will a plaintiff benefit by these courts' narrow rulings.[178] Limiting a plaintiff to bringing a same-sex sexual harassment claim only when the perpetrator is homosexual presents an obstacle to those plaintiffs who are unaware of the perpetrator's sexual preference.[179] In those instances where a

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[174] 99 F.3d 138 (4th Cir. 1996).

[175] *See id.* at 144.

[176] *See id.* The plaintiff brought an action under Title VII against his employer, Pizza Hut of America, Inc., based on the actions of his openly homosexual male supervisor. *See id.* at 139. The plaintiff alleged that his supervisor, along with five other openly homosexual male employees, engaged in a pattern of sexual harassment. *See id.* Specifically, plaintiff alleged that his supervisor "graphically described homosexual sex to [him] in an effort to pressure [him] into engaging in homosexual sex." *Id.* Plaintiff further claimed that his supervisor turned the verbal harassment into physical harassment when he, on several occasions, "ran his hands through [plaintiff's] hair, massaged [his] shoulders, purposely rubbed his genital area against [plaintiff's] buttocks while walking past him, squeezed [plaintiff's] buttocks, and pulled out [plaintiff's] pants in order to look down into them." *Id.* at 140.

[177] *See* Mangum, *supra* note 24, at 313 ("[D]espite the potential for an expansive interpretation of Title VII in *Wrightson*, the court expressly limited its holding to very narrow circumstances.").

[178] *See id.* at 351 ("While *Wrightson*'s recognition of this limited subset of same-sex sexual harassment claims can benefit victims by recognizing a cause of action for their harassment, it has troubling implications for homosexuals."). This is true because under this theory, harassers who are homosexual are faced with potential liability, but if they are harassed because they are homosexual, they do not have a cause of action. *See generally* DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979).

[179] The dissent in *McWilliams v. Fairfax County Bd. of Supervisors*, authored by Judge Michael, noted that:

> I recognize that in a same-sex harassment claim, evidence of sexual orientation could be relevant to either side's case. However, it should not be elevated to a required element of the plaintiff's proof. That would burden the statute too much because the focus would shift from an examination of what happened to the plaintiff to a pursuit (surely to be complicated, far-ranging and elusive) of the "true" sexual orientation of the harasser.

McWilliams v. Fairfax County Bd. of Supervisors,72 F.3d 1191, 1198 (4th Cir. 1996) (Michael, J., dissenting) (citing Mogilefsky v. Superior Court, 26 Cal. Rptr. 2d 116 (1993)). Further, hinging the success of a same-sex sexual harassment claim on the sexual orientation of the harasser "creates problems for homosexuals seeking remedies under Title VII. Since the statute does not prohibit harassment because of sexual orientation, people may not sue if they were harassed because of their heterosexuality or homosexuality." Mangum, *supra* note 24, at 342. The distinction made by the Fourth Circuit,

> has placed homosexuals and lesbians in a precarious situation. They have no claim for harassment based on their sexual orientation, but they can be liable for sexually harassing a heterosexual. In contrast, under *Wrightson*, a heterosexual could not be found liable for the same-sex sexual harassment of another heterosexual or homosexual.

Id. In addition, one commentator has advanced three reasons why same-sex sexual harassment claims should not *only* be recognized when the harasser is homosexual:

> First, the harasser's homosexuality may be difficult to prove. Homosexual tendencies are not always easy to identify. Simply because a person makes sexual comments or advances toward a member of the same sex does not mean that the person is homosexual or sexually attracted to the victim. The harasser's comments may instead be made in jest or horseplay, or they may be motivated by the harasser's vulgarity or desire to degrade the victim. Furthermore, privacy issues may arise regarding inquiries into the harasser's sex life, thus making this element even more difficult to prove. A victim of same-sex sexual harassment should not be precluded from maintaining a suit simply because the victim cannot prove that the harasser is homosexual.
>
> Second, requiring the victim to prove the harasser is homosexual shifts the focus of the suit away from the victim and toward the sexual activities of the harasser. The Supreme Court has specified that Title VII sexual harassment suits should focus on the unwelcomeness of the sexual harassment to the victim. If the victim is required to prove the harasser is homosexual, judges and juries may be overburdened with evidence of the harasser's sex life, thus diverting attention away from the critical point of the complaint-what happened to the victim.
>
> Finally, relying on the homosexuality of the harasser as an element of a same-sex

plaintiff may not know that the harasser is homosexual, an insurmountable hurdle is placed upon the plaintiff who must prove that the harassment occurred because of his or her sex.[180] Further, this provides an opportunity for the harasser to escape liability by simply denying his homosexuality. In essence, the Fourth Circuit's distinction creates a double-edged sword for some plaintiffs because it freely opens homosexuals to liability, while simultaneously restricting homosexuals' ability to bring same-sex sexual harassment claims based on their sexual orientation because it has been held that sexual harassment on the basis of sexual orientation is not a recognized form of discrimination under Title VII.[181]

2. INTERPRETING TITLE VII NARROWLY: SAME-SEX SEXUAL HARASSMENT CLAIMS NOT RECOGNIZED UNDER TITLE VII

At the other end of the same-sex sexual harassment spectrum are courts which have categorically disapproved of this cause of action under Title VII.[182] These courts have provided little or no justification for such a narrow reading of Title VII.[183] Their reasoning, however, was ultimately rejected by the Su-

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> hostile environment complaint is inconsistent with the overall protection against discrimination based on one's sex provided by Title VII. A victim who is discriminated against based on his or her sexual orientation is not protected by Title VII. It contradicts common sense to disallow a Title VII claim when the victim is harassed for being homosexual, but then make a claim for same-sex sexual harassment actionable only when the victim can prove the harasser is homosexual.

Taylor, *supra* note 18, at 321-22.

[180] *See* Polly v. Houston Lighting & Power Co., 825 F. Supp. 135, 138 (S.D. Tex. 1993).

[181] *See DeSantis*, 608 F.2d at 329-30.

[182] *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998); Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994); Dillon v. Frank, 58 Fair Empl. Prac. Cas. (BNA) 144 (6th Cir. 1992); Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wash. 1995); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995); Fleenor v. Hewitt Soap Co., 67 Fair Empl. Prac. Cas. (BNA) 1625 (S.D. Ohio 1995), *aff'd*, 70 Fair Empl. Prac. Cas. (BNA) 737 (6th Cir.), *cert. denied*, 117 S. Ct. 170, *reh'g denied*, 117 S. Ct. 598 (1996); Myers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995); Quick v. Donaldson Co., Inc., 895 F. Supp. 1288 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 795 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).

[183] *See* Carpenter, *supra* note 124, at 714.

preme Court in *Oncale*.

Numerous courts, most notably the Fifth Circuit Court of Appeals, have consistently relied upon the seminal case of *Goluszek v. H.P. Smith*[184] to reject same-sex sexual harassment claims.[185] In *Goluszek*, the plaintiff brought a same-sex sexual harassment claim against his employer under Title VII.[186] The court rejected the plaintiff's claim of sexual harassment, and granted summary judgment to the defendant basing its decision on Congress' intent in enacting Title VII.[187] In so doing, the court narrowly construed how Congress intended to end discrimination and achieve equal opportunity.[188] Thus, the court held that same-sex sexual harassment could not be actionable unless the harassment created an "anti-male environment" where males are made to feel inferior because they are males.[189] As a result, the court rejected the plaintiff's claim, and concluded that an anti-male environment did not exist because the plaintiff was a male in a male-dominated environment.[190] The court's only support, however, for its anti-male dominated theory was a student-written Note.[191] Additionally, the court failed to cite Title VII or any of its legislative history when it concluded that the plaintiff's claim was not cognizable under Title VII.[192]

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[184] 697 F. Supp. 1452 (N.D. Ill. 1988).

[185] *See Oncale*, 83 F.3d at 120; *Garcia*, 28 F.3d at 451-52.

[186] *See Goluszek*, 697 F. Supp. at 1453. Specifically, plaintiff's claim was based upon comments made to him by his co-workers. *See id.* at 1453-1454. For example, plaintiff claimed that his night supervisor told him he should "get married and get some of that soft pink smelly stuff that's between the legs of a woman." *Id.* at 1453. In addition, plaintiff claimed that his co-workers occasionally asked him whether "he had gotten any 'pussy' or had oral sex, showed him pictures of nude women, told him they would get him 'fucked,' and accused him of being gay or bisexual, and made other sex-related comments." *Id.* at 1454. Plaintiff also claimed that he was poked with a stick in the buttocks. *See id.*

[187] *See id.* at 1456.

[188] *See id.*; *see also* Flynn, *supra* note 28, at 1113.

[189] *See Goluszek*, 697 F. Supp. at 1456; *see also* Flynn, *supra* note 28, at 1113.

[190] *See Goluszek*, 697 F. Supp. at 1456.

[191] *See id.* (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)); *see also* Flynn, *supra* note 28, at 1113.

[192] *See Goluszek*, 697 F. Supp. at 1456; *see also* Flynn, *supra* note 28, at 1113.

Building upon *Goluszek*, the Fifth Circuit Court of Appeals, in *Garcia v. Elf Atochem North America*,[193] became the first federal circuit court to address the same-sex sexual harassment issue.[194] In *Garcia*, the plaintiff brought a same-sex sexual harassment claim against his employer.[195] In the court's one-paragraph analysis of the issue, the Fifth Circuit affirmed the district court's order of summary judgment for the employer, and rejected the plaintiff's claim.[196] The only authority cited by the *Garcia* court was a Fifth Circuit decision affirming, without an opinion, an unpublished decision of the United States District Court for the Western District of Texas and the opinion of the District Court for the Northern District of Illinois in *Goluszek*.[197]

In *Oncale*, the Fifth Circuit relied upon *Garcia* and *Giddens v. Shell Oil Co.*[198] to reject a cause of action for same-sex sexual harassment under Title VII.[199] This final holding from the Fifth Circuit on the same-sex sexual harassment issue and the division between the circuit courts as to the recognition of same-sex sexual harassment claims led the United States Supreme Court to address the issue.[200]

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[193] 28 F.3d 446 (5th Cir. 1994).

[194] *See* Zalesne, *supra* note 18, at 398.

[195] *See* Garcia v. Elf Atochem N. Am., 28 F.3d 446, 448 (5th Cir. 1994). Plaintiff's sexual harassment claim was based on several instances of conduct by defendant's employees, including the conduct of a plant foreman who grabbed plaintiff's crotch area as well as made sexual motions while standing behind plaintiff. *See id.*

[196] *See id.* at 451-52.

[197] *See id.* The Fifth Circuit decision affirming the unpublished district court opinion was *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993) (affirming without an opinion), *cert. denied*, 513 U.S. 925 (1994).

[198] 12 F.3d 208 (5th Cir. 1993) (affirming without an opinion), *cert. denied*, 513 U.S. 925 (1994).

[199] *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 119-20 (5th Cir. 1996).

[200] *See* Robin Estrin, *Lumber Company Appeals Same-Sex Sexual Harassment Case*, THE DAILY IOWAN, Oct. 11, 1996, at 7A ("Same-sex sexual harassment is an issue courts around the country have been forced to address, and they have reached conflicting conclusions that ultimately may have to be resolved by the U.S. Supreme Court."); *see also* Zalesne, *supra* note 18, at 401 ("Th[e] split in the circuits over whether same-sex sexual harassment is actionable under Title VII led the Supreme Court to grant certiorari on a recent Fifth Circuit case, *Oncale v. Sundowner Offshore Servs., Inc.*").

C. THE SUPREME COURT'S APPROACH TO SAME-SEX SEXUAL HARASSMENT: A PLAIN LANGUAGE INTERPRETATION

The United States Supreme Court's recent decision in *Oncale v. Sundowner Offshore Services, Inc.* satisfied many in the legal community by reversing the line of jurisprudence from the Fifth Circuit Court of Appeals and holding that same-sex sexual harassment is a viable cause of action under Title VII.[201] While the Court recognized the prohibition against sexual harassment in 1986,[202] its recent application of Title VII to same-sex sexual harassment claims has been long-awaited.[203] The Court held that same-sex sexual harassment is a form of discrimination prohibited by Title VII regardless of the harasser's sexual orientation.[204]

From August 1991 to November 1991, Joseph Oncale worked on an all-male offshore rig with an eight-man crew as a roustabout for Sundowner Offshore Services, Inc.[205] Mr. Oncale alleged that throughout his tenure on the rig, he was the target of degrading sexual attacks, both physical and verbal, by his supervisor, John Lyons ("Lyons"), and by two of his co-workers, Danny Pippen ("Pippen") and Brandon Johnson ("Johnson").[206] Specifically, Mr. Oncale asserted that, on one occasion, Pippen and Johnson restrained him while Lyons placed his penis on Mr. Oncale's neck and then on his arm.[207] Moreover, Mr. Oncale alleged that Lyons and Pippen frequently threatened him with homosexual rape, and that on another occasion, while Mr. Oncale was taking a shower on Sundowner premises, Lyons attempted to force a bar of

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[201] *See* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998); *see also supra* note 8 and accompanying text.

[202] The Court first recognized sexual harassment as a form of discrimination prohibited by Title VII in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[203] *See supra* note 9 and accompanying text. Prior to the Court's decision, the circuit courts, as well as the district courts, were divided as to the application of Title VII to same-sex sexual harassment claims thereby causing a lack of uniformity within the courts. *See* discussion *supra* Parts III.A, III.B.1.a, III.B.2.

[204] *See Oncale*, 118 S. Ct. at 1002.

[205] *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118 (5th Cir. 1996); *see also Oncale*, 118 S. Ct. at 1000-01.

[206] *See Oncale*, 118 S. Ct. at 1001.

[207] *See Oncale*, 83 F.3d at 118.

soap into Mr. Oncale's anus while Pippen restrained Mr. Oncale.[208] Mr. Oncale repeatedly reported these incidents to the highest-ranking employee on the rig.[209] Despite reporting these incidents to his employer, no action was taken.[210] Soon thereafter, Mr. Oncale quit, thereby terminating his employment with Sundowner Offshore Services, Inc.[211]

Mr. Oncale subsequently brought suit against Sundowner Offshore Services, Inc., Lyons, Pippen, and Johnson, alleging sexual harassment under both the quid pro quo and the hostile environment theories.[212] In his lawsuit, Mr. Oncale sought reinstatement, or in the alternative, damages.[213]

The United States District Court for the Eastern District of Louisiana, in a cursory two-page opinion, exclusively relied on Fifth Circuit precedent when it dismissed Mr. Oncale's case.[214] Specifically, the district court supported its position by noting the *Garcia* court's reliance upon *Giddens*, *a* Fifth Circuit decision affirming, without an opinion, the unpublished decision of the United States District Court for Western District of Texas which found that a same-sex sexual harassment claim by a male employee against his male supervisor did not fall within Title VII's protection because Title VII addresses sexual harassment by a man of a woman and vice versa.[215]

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[208] *See id.* at 118-19.

[209] *See Oncale*, 118 S. Ct. at 1001; *see also Arguments Before the Court: Employment Discrimination: Same-Sex Harassment; Scope of Title VII of 1964 Civil Rights Act*, 66 USLW 3393 (Dec. 9, 1997), at 1.

[210] *See Oncale*, 118 S. Ct. at 1001.

[211] *See Oncale*, 83 F.3d at 119.

[212] *See id.* at 118-19.

[213] *See* Oncale v. Sundowner Offshore Servs., Inc., 67 Fair Empl. Prac. Cas. (BNA) 769 (E.D. La. 1995).

[214] *See id.* at 769-70 (citing Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994); Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993) (affirming without an opinion), *cert. denied*, 513 U.S. 925 (1994); Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988)). While the district court conceded that the acts and assaults of the defendant would constitute outrageous conduct actionable under Louisiana Law, it noted that "plaintiff's complaint . . . only allege[d] violations of Title VII, and the Fifth Circuit has clearly articulated its position that same sex harassment does not state a claim under Title VII." *Id.*

[215] *See id.* (citing Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993) (affirming without an opinion), *cert. denied*, 513 U.S. 925 (1994)).

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision granting summary judgment for the defendants.[216] After concluding that the decision in *Garcia* was binding precedent, the Fifth Circuit in *Oncale* relied solely upon the principles articulated by the *Garcia* court to justify its conclusion that same-sex sexual harassment is not actionable under Title VII.[217] The court conceded that *Garcia* had been rejected by several district courts, but it refused to overrule a Fifth Circuit decision.[218] Furthermore, the Fifth Circuit in *Oncale* also relied on the decision in *Giddens* which affirmed without an opinion the unpublished decision of the United States District Court for the Western District of Texas, but nonetheless the Fifth Circuit in *Oncale* admitted that the court's holding in *Giddens* was entirely unclear.[219] Without providing independent justification to bar Mr. Oncale's same-sex sexual harassment claims, the court of appeals affirmed the district court's decision to dismiss Mr. Oncale's claims against his employer.[220]

The Supreme Court of the United States granted *certiorari* to resolve the debate engendered by the divergence of opinion throughout the circuits regarding Title VII's application to same-sex sexual harassment claims.[221] Justice Scalia wrote for a unanimous court, and rejected the Fifth Circuit decisions by

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[216] *See Oncale*, 83 F.3d at 121.

[217] *See id.* at 119-20. The court specifically stated that "[t]his panel, however, cannot review the merits of appellant's Title VII argument on a clean slate. We are bound by our decision in *Garcia*, . . . and must therefore affirm the district court." *Id.* at 119 (citation omitted).

[218] *See id.* Specifically, the court stated that:

> [a]lthough our analysis in *Garcia* has been rejected by various district courts, we cannot overrule a prior panel's decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superceding decision by the Court *en banc* or the Supreme Court.

Id. (citing Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991)).

[219] *See id.* at 119-20. The Fifth Circuit admitted that "[a]lthough the holding in [*Giddens*] is not entirely clear, it *appears* that the Court ruled that male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex." *Id.* (emphasis added).

[220] *See id.* at 121.

[221] *See* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998), *cert. granted*, 117 S. Ct. 2430 (1997).

holding that Title VII's protection extends to same-sex sexual harassment claims.[222] The Court strictly relied on the statute's language and the Court's precedents, and found that a categorical rule excluding same-sex sexual harassment claims from Title VII's purview was unwarranted.[223] Unlike the distinctions previously adopted by some circuit courts, the Supreme Court did not limit the protection under Title VII to situations where the harasser is homosexual.[224] Rather, the Court held that a same-sex sexual harassment claim is actionable under Title VII, despite the fact that the harasser is heterosexual.[225] Thus, the Court rejected the Fifth Circuit's interpretation of Title VII and held that Title VII extends to any type of sexual harassment as long as it meets the statutory requirements.[226]

The Supreme Court's opinion focused on the language of Title VII as well on prior Title VII case law.[227] First, the Court quoted the pertinent language of Title VII[228] and noted that the Court in *Vinson* found that the statute's language

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[222] *See id.* at 1003 (concluding that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII").

[223] *See id.* at 1002. The Court specifically stated that it saw "no justification in the statutory language or [its] precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id.*; *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669 (1983); Castaneda v. Partida, 430 U.S. 482 (1977).

[224] *See Oncale*, 118 S. Ct. at 1002 ("But harassing conduct need not to be motivated by sexual desire to support an inference of discrimination on the basis of sex.").

[225] *See id.*

[226] *See id.* The Court specifically stated that "[o]ur holding that [discrimination on the basis of sex in the terms or conditions of employment] includes sexual harassment must be extended to sexual harassment of any kind that meets the statutory requirements." *Id.* For further discussion of the requirements a plaintiff must meet when bringing a sexual harassment claim under the hostile environment and quid pro quo theories, see *supra* Part II.

[227] *See Oncale*, 118 S. Ct. at 1001-03.

[228] *See id.* at 1001. The specific language of Title VII as noted by the Court is:

> [i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

was intended to cover "the entire spectrum of disparate treatment of men and women in employment."[229] The Court also noted that Title VII's prohibition of discrimination "because of sex" extended to men as well as women, and to that end, the Court in *Johnson v. Transportation Agency of Santa Clara County*[230] had not found it significant that the male plaintiff's claim of discrimination was against a male supervisor.[231] The Court in *Oncale* then recognized the pronounced split of authority among the circuits regarding same-sex sexual harassment,[232] but concluded that the language of Title VII and the Court's precedents could not justify "a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[233]

The Court rejected the arguments made by defendants and *amici* on their behalf that recognizing such claims under Title VII would turn the statute into a general civility code.[234] The Court argued that the risk of converting Title VII into a general civility code was not greater in same-sex sexual harassment situations than in opposite-sex harassment situations.[235] The Court found that requiring that the discrimination occur "because of . . . sex" and that the behavior alter the conditions of employment would prevent Title VII from be-

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Id. (quoting 78 Stat. 255, as amended, 42 U.S.C. § 2000e-2(a)(1) (1994)).

[229] *Id.* (quoting Meritor Sav. Bank, FSB, v. Vinson, 477 U.S. 57, 64 (1986)).

[230] 480 U.S. 616 (1987). In *Johnson*, the plaintiff brought a sexual discrimination claim on the basis that his male supervisor promoted a female employee instead of plaintiff. *See id.* at 624-25. In *Oncale*, the Court noted that while the plaintiff's case in *Johnson* was ultimately dismissed on other grounds, the Supreme Court had not found it significant that the supervisor was also a man. *See Oncale*, 118 S. Ct. at 1001.

[231] *See Oncale*, 118 S. Ct. at 1001.

[232] *See id.* at 1002. The Court noted that the Fifth Circuit had consistently held that same-sex sexual harassment claims should never be recognized under Title VII. *See id.* (citing Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988)). The Court also cited some cases holding that same-sex sexual harassment claims are actionable only when the harasser is homosexual. *See id.* (comparing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) with Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996)). Finally, the Court noted that some cases held that same-sex sexual harassment claims were always actionable. *See id.* (citing Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997)).

[233] *Id.*

[234] *See id.*

[235] *See id.*

coming a general civility code.[236] According to the Court, another requirement which would prevent Title VII from becoming a "general civility code" for the workplace is that "the statute does not reach genuine but innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex."[237] Therefore, the Court found that its decision to recognize same-sex sexual harassment claims under Title VII would not have an adverse effect on the purpose of the statute.

The Court, while recognizing same-sex sexual harassment as a form of discrimination prohibited by Title VII, reiterated that a plaintiff must continue to prove that the conduct at issue was a result of "*discriminat[ion]* . . . because of . . . sex."[238] The Court sought to provide some guidance for lower courts as to this requirement in the context of same-sex sexual harassment cases.[239] Specifically, the Court stated that the "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[240] In effect, the Court rejected the distinction that had been created by the Fourth Circuit, which only recognized same-sex sexual harassment claims when the

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[236] *See id.* at 1002-03. The Court stated:

> that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discriminat[ion]* . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Id. at 1002 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

[237] *Id.* at 1002-03. The Court went on to note that "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Id.* at 1003. The Court noted that this requirement prevents juries from mistaking ordinary socializing amongst co-workers for conduct that alters the conditions of employment. *See id.*

[238] *Id.* at 1002.

[239] *See id.*

[240] *Id.*

harasser was homosexual. The Court, instead, found that "[a] trier of fact might reasonably find [] discrimination, . . . if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[241] The Court also suggested that a plaintiff can present "direct comparative evidence" about the harasser's treatment of both sexes if the plaintiff works in a mixed-sex workplace.[242] The Court, ultimately reiterated that whatever evidentiary route a plaintiff may choose, he or she must still prove that the conduct "was not merely tinged with offensive sexual connotations," but was "*discriminat[ion]* . . . because of . . . sex."[243]

To bolster its inclusion of same-sex sexual harassment claims under Title VII, the Court stated the general requirement that all sexual harassment claims must "be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[244] The Court exemplified how a reasonable football player would not consider his work environment to be severely and pervasively abusive if the coach smacked him on the buttocks, but noted that that conduct might be inappropriate in the typical work environment.[245] The Court assured that "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[246] Ultimately, the Court remanded the case for further proceedings consistent with its opinion.[247]

While joining in the majority opinion, Justice Thomas elected to author a

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[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.* at 1003 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

[245] *See id.*

[246] *Id.*

[247] *See id.* Shortly prior to the publication of this Comment, Mr. Oncale settled the case with Sundowner Offshore Services. *See, e.g., Same-Sex Harassment Case Settled*, THE DES MOINES REG., Oct. 25, 1998, at 8, *available in* LEXIS, News Library, The Des Moines Register File. It appears that "[Mr.] Oncale and Sundowner Offshore Services Inc. agreed not to disclose [the] terms of the settlement, which was reached Wednesday [October 21, 1998] before Magistrate Lance Africk after two mediation sessions." *Id.*

separate concurring opinion.[248] Justice Thomas' concurrence amounted to a single precautionary sentence which stressed 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.'"[249]

IV. AUTHOR'S ANALYSIS AND CONCLUSION

The Supreme Court's opinion in *Oncale v. Sundowner Offshore Services, Inc.* has been heralded for recognizing same-sex sexual harassment as a form of discrimination prohibited by Title VII.[250] Subsequent to the Court's decision in *Oncale*, same-sex sexual harassment cases have resurfaced, and they have resulted, in some instances, in million dollar judgments.[251] *Oncale*, however, continues to require that a plaintiff prove that the harassment was discrimination based on gender, not actions "merely tinged with offensive sexual connotations."[252] Therefore, a plaintiff must prove that the conduct in a same-sex sexual harassment claim rose to such a level that a hostile or abusive work environment resulted.[253] While the Court's opinion was widely acclaimed,[254] it

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[248] *See Oncale*, 118 S. Ct. at 1003 (Thomas, J., concurring).

[249] *Id.*

[250] *See supra* note 8 and accompanying text.

[251] *See, e.g.*, Alan Byrd, *Brevard Woman Wins $1M in Same-Sex Harassment Lawsuit*, ORLANDO BUS. J., June 5, 1998, *available in* 1998 WL 7369500 (noting that a Florida woman was awarded one million dollars for the sexual harassment she suffered at the hands of her female boss); Ramon Coronado, *Man Gets $1 Million in Harass Lawsuit: Nurse's Employer to Pay in Same-Sex Settlement*, THE SACRAMENTO BEE, June 19, 1998, Metro, at B1, *available in* LEXIS, News Library, Sacramento Bee File (discussing the settlement of a same-sex sexual harassment case in which a male nurse was awarded one million dollars); Stephanie Ebberg, *Man Wins Same-Sex Lawsuit Judgment*, THE BOSTON GLOBE, June 19, 1998, Metro/Region, *available in* LEXIS, News Library, Bglobe File (noting that a Massachusetts jury awarded a Leicester man close to one million dollars for a same-sex sexual harassment claim); *Same-Sex Harassment Charged: Machine Shop Worker in NJ Says His Male Boss Constantly Taunted Him About His Sex Life*, ROCKY MOUNTAIN NEWS, Mar. 29, 1998, at 3A, *available in* LEXIS, News Library, Rocky Mountain News File (discussing a lawsuit filed by a New Jersey man against his male boss for sexual harassment and noting that the plaintiff was seeking more than one million dollars in addition to punitive damages).

[252] *Oncale*, 118 S. Ct. at 1002.

[253] *See id.* at 1003.

[254] *See* Richard Carelli, *Same-Sex Harassment Can Violate Law*, THE SALT LAKE TRIB., Mar. 5, 1998, at B4 (quoting Ann Reesman, a lawyer for the Equal Employment Advisory

left some questions unanswered that will undoubtedly result in further litigation on the same-sex sexual harassment issue.[255]

First, while the Court's decision articulated that the conduct in a same-sex sexual harassment case must rise to the level of discrimination because of sex, the *Oncale* decision failed to provide guidance to lower courts regarding the kind of evidence necessary to prove such claims. The Court's decision does not answer whether Mr. Oncale must show that his male co-workers would have treated women differently.[256] Since a plaintiff in a same-sex sexual harassment case must bear the same burden as a plaintiff in an opposite sex sexual harassment case, he or she must prove that the harassment occurred "because of [his or her] . . . sex." In other words, a plaintiff must establish that the harassment would not have occurred had the plaintiff been of the opposite sex. The Court resolved that the harassment did not have to be motivated by sexual desire,[257] and stated that "[a] same-sex harassment plaintiff may . . . offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[258] This, however, fails to provide guidance in cases where there is an all-male or all-female workplace. For example, if a male working in an all-male environment is sexually harassed by a co-worker who makes sexual advances toward him, how will the male employee prove that the harassment occurred because of sex? This may prove to be a particularly large obstacle for plaintiffs to overcome. The mere lack of women in a workplace would make it difficult for a male plaintiff who works in a completely male environment, such as Mr. Oncale, to show that the defendant would not have treated women similarly.[259]

Council, an employer's group) ("'We're very pleased with the common sense standard the court adopted.'"). Further, "[g]ay rights advocates also praised the ruling." *Id.*

[255] *See id.* ("[P]lenty of questions remain about the legality of certain conduct in specific employment settings.").

[256] *See* Martha F. Davis, *Court Clarifies Sexual Harassment Tests: Same-Sex Harassment is Deemed Actionable; Employers May Be Vicariously Liable, But Not Schools*, THE NAT'L L.J., Aug. 10, 1998, at B10 ("[I]t remains for the lower courts to work out what proof is required to establish that same-sex harassment is because of sex. Proof of sex stereotyping may be one way—submitting evidence that the victim is being harassed because he or she doesn't fit gender stereotypes of masculinity or femininity.").

[257] *See Oncale*, 118 S. Ct. at 1002.

[258] *Id.*

[259] *See* Jeffrey Rosen, *Men Behaving Badly*, THE NEW REPUBLIC, Dec. 29, 1997, at 18 ("Because there were no women on the oil platform, who can say how [the supervisor] would have treated Oncale if he had been a woman?").

Second, the Court failed to address another aspect of same-sex sexual harassment that will likely cause concern in this area—the equal opportunity harasser.[260] This so-called equal opportunity harasser perpetrates sexual advances on both men and women indiscriminately. For example, if a male, regardless of his sexual orientation, sexually harasses both men and women equally, a male victim will have a cognizable cause of action under Title VII pursuant to the Court's decision in *Oncale*, but he will have a difficult time proving that he was discriminated against because of his gender. Conversely, a woman would have a slam dunk sexual harassment claim under Title VII and experience few evidentiary problems.

Third, while the Court reassured critics that Title VII would not become a general civility code for the workplace, the Court's decision in *Oncale* engenders ambiguity as to where to draw the line between horseplay among members of the same sex and discrimination on the basis of sex.[261] Commentators have urged that "[t]here is a need for clarification."[262] While the facts before the Court reflect that the conduct in *Oncale* crossed the line from horseplay to an unacceptable display of sexual discrimination, not every case will provide such clear-cut factual scenarios, and therefore, "[h]ow, practically speaking, same sex harassment cases will play out is anybody's guess."[263] For example, what

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[260] *See* Kevin Isom, *Harassment Gets a Blow*, EXPOS'E MAGAZINE, (visited Sept. 19, 1998), <http://206.26.99.127/writers/isom/isom6.htm>. Mr. Isom specifically stated that:

> [u]nfortunately, as far as I know, the ruling still gives full freedom to one type of harasser. The person who harasses both men and women more or less equally. [The] harassment has to be on the basis of the harassed person's sex. And if you're harassing members of both sexes equally—pinching both herass and hisass—then you're not harassing on the basis of sex. This is known, in strictly non legal parlance of course, as the "equal opportunity harasser."

Id.

[261] The Court noted that "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998).

[262] *Men v. Men*, *supra* note 42, at 24.

[263] Michel Lee, *Last Term's Employment Decisions Have Shaken Up the Status Quo*, NEW YORK LAW JOURNAL, Sept. 28, 1998, Outside Counsel, at 1, *available in* LEXIS, News Library, New York Law Journal File. Therefore, "[w]ill same sex harassment cases be limited to extreme and idiosyncratic fact patterns? How should they be evaluated when homosexual orientation or antihomosexual animus is thrown into the equation?" *Id.*

if locker-room horseplay becomes crude?[264] What if one male co-worker reads Playboy in front of another?[265] Will these types of behavior be recognized as sexual harassment or will they be dismissed by courts as "simple teasing or roughhousing among members of the same sex?"[266] These questions are yet to be answered by the lower courts who have been left to "sort out the law's finer details as they handle individual cases."[267]

Despite the many unanswered questions that remain after *Oncale*, the Court's decision was necessary in order to shield Title VII from equal protection challenges.[268] If the Court had refused to recognize Mr. Oncale's same-sex sexual harassment claim, or had limited the recognition of such claims to situations where the harasser is homosexual, Title VII could have potentially been exposed to constitutional attack on equal protection grounds.[269]

The unanswered questions that remain, however, may slow the progress of this newly recognized form of discrimination. Courts will be faced with questions regarding the amount of proof required for a plaintiff to sustain the burden that he or she was harassed because of sex. Despite the uphill battles that plaintiffs may face in proving their same-sex sexual harassment suits, the war has been won, and victims will no longer be denied legal redress.

Imagine again that you are a heterosexual male working on the oil rig off the Louisiana coast with an all-male crew. Instead of leaving your job due to the harassment by your co-workers and your supervisor, you continue to work on the rig. Your co-workers and your supervisor continue to physically and verbally harass you. It is the year 1998 and the decision in *Oncale* has just recently been handed down by the Supreme Court. After reporting the incidents to your supervisor, no action is taken. Armed with the Court's decision in *Oncale*, you decide to bring suit against your employer for the sexual harassment you have suffered at the hands of your co-workers and supervisor. While there is no guarantee that you will win the case, as there never is in any case, your case will be welcomed by the court and you will not suffer the harsh repudiation of summary judgment.

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[264] *See Men v. Men*, *supra* note 42, at 24.

[265] *See id.*

[266] *Oncale*, 118 S. Ct. at 1003.

[267] *Men v. Men*, *supra* note 42, at 24.

[268] *See* discussion *supra* Part III.B.1.

[269] *See* discussion *supra* Part III.B.1.