Can *Price Waterhouse* and Gender Stereotyping Save the Day For Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of *Oncale* Compels an Affirmative Answer

Matthew Fedor*

INTRODUCTION

Sexual harassment in the workplace is an insidious problem in our society today. In the last decade, there has been a dramatic increase in the number of sexual harassment claims filed under Title VII of the Civil Rights Act of 1964.¹ Sexual harassment between members of the same gender is becoming more and more prevalent and has been recognized to be "just as frequent, pervasive, severe, threatening, humiliating, and disruptive" to a work environment as opposite-sex sexual harassment.² Prior to the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*,³ courts were divided over whether same-sex sexual harassment claims were actionable under Title VII.⁴ In a brief and cryptic opinion, *Oncale* resolved this confusion, holding that same-sex sexual harassment

---

* J.D., *summa cum laude*, Seton Hall University School of Law, 2002; B.S., Rutgers University, 1997. I dedicate this article to my wife Meghan, whose patience, love, and understanding has enabled me to achieve success not only in law school, but more importantly, in life. I would also like to thank my family and friends for all of their constant and continuing love and support.


⁴ Compare, e.g., Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that same-sex sexual harassment claims under Title VII are never actionable) with Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) (holding that same-sex sexual harassment claims are actionable where a homosexual male harasses an employee of the same sex) and Doe v. City of Belleville, 119 F.3d 563, 577-80 (7th Cir. 1997) (holding that regardless of the harasser's gender, sexual orientation, or motivation, workplace harassment that is sexual in nature is always actionable under Title VII).
claims are actionable under Title VII.  

Although Oncale clarified that same-sex harassment is actionable, the opinion begs an important question: In same-sex sexual harassment cases, what satisfies Title VII's requirement that harassment be "because of sex?" The answer is not clear.

Post-Oncale courts evaluating same-sex sexual harassment claims have disagreed over two closely related issues. First, courts have struggled to determine the meaning of the word "sex," and what an individual's "sex" encompasses. Second, courts have disputed the appropriate evidentiary methods that same-sex plaintiffs may utilize to prove discrimination "because of sex." These interrelated issues in turn raise two significant questions: (1) whether a victim can use evidence that the harassment was motivated by his failure to conform to gender stereotypes; and (2) how a victim's perceived sexual orientation affects the analysis.

The problem of gender stereotyping is not a new one. The Supreme Court first addressed the issue in 1979. In Price Waterhouse v. Hopkins, the Court held that Title VII prohibited disparate treatment based on gender stereotypes. Price Waterhouse, however, was not a same-sex discrimination case. Since Oncale did not mention gender stereotyping or cite Price Waterhouse, it is debatable whether Price Waterhouse applies in the same-sex context. Moreover, further uncertainty resulted when the Supreme Court vacated a case approving of the use of gender stereotypes to prove discrimination "because of sex" in the same-sex context.

The Supreme Court has never addressed whether discrimination based on sexual orientation states a valid cause of action under Title VII. No lower court before or after Oncale has recognized such a claim, however. Irrespective of whether a cause of action lies for

---

5 Oncale, 523 U.S. at 79.
6 490 U.S. 228 (1989).
7 See generally id.
8 See generally Oncale, 523 U.S. 75.
discrimination based on sexual orientation, harassment motivated by a victim's perceived sexual orientation may be relevant when considering gender stereotypes.

This Comment analyzes same-sex sexual harassment claims since Oncale and the viability of the argument that Title VII's "because of sex" requirement is satisfied when the victim is harassed because of gender stereotypes. Part I of this Comment briefly summarizes the development of Title VII sexual harassment jurisprudence. Part II discusses the inclusion of the category of "sex" in the statutory language of Title VII, and identifies two different interpretations of the meaning of "sex." Part III.A reviews the Supreme Court's opinion in Price Waterhouse, which discussed the legal relevance of gender stereotyping in sexual harassment claims under Title VII. Part III.B discusses the Oncale decision, which held that same-sex sexual harassment is actionable under Title VII. Part IV surveys the various ways federal courts have approached same-sex sexual harassment claims since the Oncale decision. Finally, Part V analyzes the methods these courts have employed in evaluating same-sex sexual harassment claims. Part V concludes that an appropriate reading of Price Waterhouse and Oncale compels the conclusion that same-sex plaintiffs can prove discrimination "because of sex" through

by Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001).

Legislation that would prohibit employment discrimination based on sexual orientation was proposed to Congress in 1994, but the bill did not pass. See Toni Lester, Protecting the Gender Nonconformist from the Gender Police: Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court's Decision in Oncale v. Sundowner, 29 N.M. L. REV. 89, 91 (1999).

The cases discussed herein deal with hostile work environment claims involving male-on-male harassment. It is important to point out, however, that my analysis of gender stereotyping and "sex" should apply to all claims of discrimination based on "sex." For example, a male employee's claim that he was subjected to an adverse employment action because he is effeminate would presumably state a cause of action under Title VII. See generally Price Waterhouse, 490 U.S. 228. This factual scenario is what some commentators have come to label "Hopkins in drag." Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law of Feminist Jurisprudence, 105 YALE L.J. 1, 33 (1995) (arguing that there is no basis for limiting Price Waterhouse's application to women).

The focus on male-on-male sexual harassment is not to suggest that female-on-female sexual harassment is less pernicious than its male-on-male counterpart. Rather, it merely reflects the reality that the overwhelming majority of cases addressing same-sex harassment and gender stereotyping involve males harassing males. Furthermore, most female-on-female sexual harassment cases involve unsolicited sexual advances, while most cases of male-on-male sexual harassment involve hostile work environments. Zalesne, supra note 2, at 402-03. Evidence of gender stereotyping is relevant only in the latter.

Price Waterhouse, 490 U.S. at 250-52.

Oncale, 523 U.S. at 79.
evidence of gender stereotyping, that discrimination motivated by a victim’s perceived sexual orientation can be discrimination based on gender stereotypes, and that such claims are consistent with the purposes and goals of Title VII.

I. THE DEVELOPMENT OF TITLE VII SEXUAL HARASSMENT JURISPRUDENCE

Title VII of the Civil Rights Act of 1964 states that “[i]t shall be unlawful employment practice . . . to fail or refuse to hire or to discharge any individual, or otherwise 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.”14 Two causes of action are available to plaintiffs alleging discrimination “because of sex” in violation of Title VII.15 One is the disparate treatment theory.16 A plaintiff in a disparate treatment case must show that he or she was exposed to “disadvantageous terms or conditions of employment that the other sex was not.”17

The other cause of action available to plaintiffs alleging discrimination “because of sex” is the sexual harassment theory.18 Title VII sexual harassment cases were once limited to circumstances where employment-related benefits were conditioned on the harassee’s compliance with sexual demands.19 This type of conduct is commonly referred to as “quid pro quo” harassment.20 A basic example of quid pro quo harassment is a situation where a subordinate employee is either threatened with being fired or demoted, or is offered advancement opportunity, in exchange for engaging in sexual relations with a superior.

In Meritor Savings Bank, FSB v. Vinson,21 the Supreme Court recognized a second type of sexual harassment claim under Title VII:

16 Id. at 72.
17 Id.
18 Id. at 73.
19 Id. at 74.
20 Id. at 74. “Quid pro quo” literally means “what for what,” or “something for something.” BLACK’S LAW DICTIONARY 1248 (6th ed. 1990). In law, the expression is used to refer to “the giving of one valuable thing for another.” Id.
the hostile work environment. In recognizing a cause of action based on a hostile work environment, the Court noted that “[s]exual harassment which creates a hostile or offensive work environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.” The Court observed that the language of Title VII is “not limited to ‘economic’ or ‘tangible’ discrimination.” Rather, the Court explained, the phrase “terms, conditions, or privileges of employment” demonstrates Congress’s intent “to strike at the entire spectrum of disparate treatment of men and women in employment.”

In order to prove a prima facie case of hostile work environment sexual harassment under Meritor, plaintiffs must establish the following elements: (1) the plaintiff is a member of a protected class; (2) the plaintiff was subjected to unwelcome harassment; (3) the harassment occurred “because of sex;” (4) the conduct affected the terms and conditions of employment; and (5) the employer “knew or should have known about the harassment” and failed to take remedial action. In Harris v. Forklift Systems, Inc., the Court clarified the bounds of hostile work environment sexual harassment claims by holding that to state a claim under Title VII, harassing conduct must be both subjectively and objectively hostile or abusive. In other words, the victim must actually perceive the environment to be hostile or abusive and the environment must be one that a reasonable person would find hostile or abusive.

Although these landmark cases establish the methods by which plaintiffs can prove hostile environment sexual harassment, they do not clarify when harassing conduct is “because of sex.”

---

22 Id. at 73.
23 Id. at 66-67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
24 Id. at 64.
25 Id. (quoting Los Angeles Dep’t of Water and Power v. Manhart, 435 U.S. 702, 707 & n.13 (1978)) (internal quotations omitted).
26 Varona & Monks, supra note 15, at 73; see also Meritor, 477 U.S. at 66-73.
28 Id. at 21-22. The Court indicated that whether an environment is hostile or abusive can only be determined by considering all of the circumstances. Id. at 23. These may include “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.
29 Id. at 21-22.
30 Because both Meritor and Harris involved claims by female employees who were harassed by male supervisors, the Court did not analyze the “because of sex” requirement in either case. See generally Meritor, 477 U.S. 57; Harris, 510 U.S. 17.
II. THE DEBATE OVER THE MEANING OF “SEX”

The main impetus behind enacting Title VII was to combat race discrimination in the workplace.\(^{31}\) Nevertheless, Congress drafted a broad statute that protected many classes of individuals.\(^{32}\) As originally drafted, Title VII did not proscribe discrimination on the basis of sex.\(^{33}\) In fact, for nearly all of its life as a bill, Title VII only covered discrimination based on race, color, religion, and national origin.\(^{34}\) Ironically, the category of “sex” was added to Title VII by an amendment proposed by Representative Howard Smith in a last ditch attempt to defeat the bill.\(^{35}\) Representative Smith’s plan failed, however, and the House adopted Title VII with very little debate over the added category of “sex.”\(^{36}\)

After its adoption by the House, the bill was sent to the Senate, where its passage was debated for several months.\(^{37}\) Much like the House, there was very little discussion in the Senate over the inclusion of “sex” in Title VII’s prohibitions.\(^{38}\) As a result, many commentators have recognized that Title VII’s legislative history does not offer any guidance in defining “sex.”\(^{39}\)

The lack of legislative history as to Congress’s intended meaning has led to a substantial debate among both courts and commentators over what the word “sex” actually means. Two competing theories have emerged: the biological view and the gender-based view.

The biological view interprets “sex” very narrowly. This approach only recognizes the biological or anatomical distinctions

\(^{31}\) See Deborah N. McFarland, Note, Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation, 65 FORDHAM L. REV. 493, 497 (1996) (explaining that ending racial discrimination in the workplace was the main goal of Title VII).

\(^{32}\) See id.

\(^{33}\) Varona & Monks, supra note 15, at 70.

\(^{34}\) Id. at 70 & n.17.

\(^{35}\) Id. at 70 (observing that Representative Smith offered the addition of “sex” to act as a “poison pill” to prevent Title VII’s passage in its entirety); Christopher W. Deering, Comment, Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII’s Ban on Discrimination “Because of” Sex, 27 CUMB. L. REV. 231, 236 (1996) (noting that Representative Smith added “sex” to Title VII hoping that the bill would not pass).

\(^{36}\) See 110 Cong. Rec. H2577-84 (daily ed. Feb. 8, 1964); see also Zalesne, supra note 2, at 403 (noting that Title VII passed with very little debate over the inclusion of the prohibition against sex discrimination); Denise Merna, Note, Getting It Straight: The Supreme Court Expands Title VII to Protect Against All Forms of Same-Sex Sexual Harassment, 15 N.Y.L. SCH. J. HUM. RTS. 323, 325-26 (1999) (same).

\(^{37}\) Varona & Monks, supra note 15, at 71.

\(^{38}\) Id.

\(^{39}\) See id.; Zalesne, supra note 2, at 403.
between individuals. In other words, “sex” refers to an individual’s biological sex (male or female), and nothing else. Supporters of this view argue that the biological interpretation of “sex” is logical since other categories contained in Title VII (race, color, and national origin), like a person’s biological sex, are immutable physical characteristics.

The gender-based view of “sex,” by contrast, is much broader in scope. Under the gender-based view, besides biological and anatomical differences, the definition of “sex” also includes personality attributes, socio-sexual roles, character traits, and behavioral expressions such as masculinity and femininity. Advocates of this view argue that solely focusing on biological or anatomical differences effectively ignores “culturally constructed dimensions” and fails to recognize that “[b]iology and culture are all part of one piece” in the way society views men and women.

III. PRICE WATERHOUSE AND ONCALE

As the preceding section indicates, the disparity in opinion over the meaning of “sex” is significant. As a practical matter, the way particular courts define “sex” and “because of sex” is often outcome determinative of whether a plaintiff has stated a claim for sexual harassment under Title VII. This is particularly true in cases of same-sex sexual harassment. Any attempt to determine what type of conduct constitutes discrimination “because of sex” in a same-sex case necessarily requires a discussion of the Supreme Court’s decisions in Price Waterhouse and Oncale.

---

40 Hilary S. Axam & Deborah Zalesne, Simulated Sodomy and Other Forms of Heterosexual “Horseplay:” Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale, 11 YALE J. L. & FEMINISM 155, 236 (1999); Zalesne, supra note 2, at 403-04.
41 Axam & Zalesne, supra note 40, at 236.
42 See, e.g., Dillon v. Frank, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. Jan. 15, 1992). This argument is somewhat undercut by two points. First, the category of religion was included in Title VII’s prohibitions despite the fact that it is not an immutable physical characteristic. Second, race, color, and national origin are distinguishable from a person’s biological sex, since the latter can be altered surgically.
43 Axam & Zalesne, supra note 40, at 236; Varona & Monks, supra note 15, at 94-96; Zalesne, supra note 2, at 403.
A. Price Waterhouse

Ann Hopkins was a Senior Manager at Price Waterhouse who was proposed for partnership in 1982. The firm neither offered nor denied Hopkins partnership, but instead held her over for reconsideration in the following year. Reconsideration of Hopkins’ partnership never occurred, however. Before being reconsidered, several partners in Hopkins’ office withdrew support for her, and the firm told Hopkins that it would not reconsider her partnership candidacy. Hopkins subsequently resigned.

Hopkins sued Price Waterhouse under Title VII, alleging that she was discriminated against because of her sex. Both the district court and the Court of Appeals for the District of Columbia Circuit ruled in Hopkins’ favor on the question of Title VII liability. The Supreme Court granted certiorari.

The evidence in the case dealt with two key areas: (1) Hopkins’ achievements in the workplace; and (2) Hopkins’ personality characteristics and workplace relationships. The evidence showed that partners and clients alike praised Hopkins for her accomplishments. Hopkins was described as “an outstanding professional” who had a ‘deft touch,’ a ‘strong character, independence and integrity.’

The evidence also showed, however, that on many occasions Hopkins was criticized for her abrasiveness. Indeed, virtually all

---

45 Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989). Price Waterhouse is a national professional accounting partnership. Senior Managers were eligible to become candidates for partnership only when other partners in the Senior Managers’ local office submitted their names as candidates. Id. at 232.
46 Id. at 231. At the time Hopkins was proposed for partnership, there were 662 partners at Price Waterhouse, only seven of whom were women. Id. at 233. Along with Hopkins, eighty-seven other Senior Managers were proposed for partnership in 1982; Hopkins was the only woman. Id. Of the eighty-eight persons proposed for partnership in 1982, forty-seven were admitted to partnership, twenty-one were rejected and twenty (including Hopkins) were held over for reconsideration. Id.
47 Id. at 233 n.1.
48 Id.
49 Id.
50 Id. at 232. The Court did not address whether Price Waterhouse’s refusal to reconsider Hopkins for partnership constituted constructive discharge, rather, the Court only addressed the decision to place her candidacy on hold. Id. at 233 n.1.
51 Price Waterhouse, 490 U.S. at 232.
52 Id. at 232.
53 See id. at 233-37.
54 See id. at 233-34.
55 Id. at 234.
56 Id. at 234-35.
negative remarks, including remarks by those who supported Hopkins’s candidacy, related to her interpersonal skills.\footnote{57} For example, one partner indicated that Hopkins was “universally disliked” by staff, while another stated she was “consistently annoying and irritating.”\footnote{58}

There were clear signs that some of the partners’ negative reactions to Hopkins were due to the fact that she was a woman.\footnote{59} One partner described Hopkins as “macho,” another stated that she “overcompensated for being a woman.”\footnote{60} A third partner advised Hopkins to take “a course at charm school.”\footnote{61} Many partners criticized Hopkins for using profanity, although it was speculated that those partners objected because it was a “lady” using bad language.\footnote{62} Finally, in what the Court described as the coup de grace, the partner who was responsible for explaining to Hopkins why her candidacy was placed on hold advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”\footnote{63}

A large portion of the Court’s opinion addressed the issue of causation.\footnote{64} Price Waterhouse essentially argued that even if Hopkins demonstrated that gender played a part in the employment decision, it was still her burden to prove that the outcome would have been different had Price Waterhouse not discriminated against her.\footnote{65} Thus, Price Waterhouse claimed it was not liable under Title VII since it would have made the same employment decision irrespective of Hopkins’ gender.\footnote{66} The Court ultimately rejected this argument and held that once a Title VII plaintiff demonstrates that gender was a motivating factor in an employment decision, the defendant can

\footnote{57} Price Waterhouse, 490 U.S. at 234-35.
\footnote{58} Id. at 235 (quotations in original).
\footnote{59} Id. Even supporters of Hopkins described her in sex-specific terms. For example, one Hopkins supporter described her as someone who “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.” Id.
\footnote{60} Id. (quotations in original).
\footnote{61} Id. (quotations in original).
\footnote{62} Id.
\footnote{63} Price Waterhouse, 490 U.S. at 235 (internal citations omitted).
\footnote{64} Although an important concept in Title VII jurisprudence, I only briefly mention the issue of causation as it is not relevant to the scope of this Comment. For an in-depth discussion, see Robert Brookins, Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric, 59 Ala. L. Rev. 1 (1995); Candace S. Kovacic-Fleischer, Proving Discrimination After Price Waterhouse and Wards Cove: Semantics as Substance, 59 Am. U. L. Rev. 615 (1990).
\footnote{65} Price Waterhouse, 490 U.S. at 237-38.
\footnote{66} See id.
avoid liability only if it proves that the decision would have been the same had gender not played a role.\textsuperscript{67}

The portion of the Court's opinion applicable to this Comment's analysis addressed the legal relevance of gender stereotyping to Title VII's prohibition of discrimination "because of sex." The Court noted, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."\textsuperscript{68} The Court proclaimed that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."\textsuperscript{69}

The Court stated that while stereotypical remarks in the workplace do not necessarily prove that an employment decision was based on gender, such statements are definitely evidence that gender played a role.\textsuperscript{70} The stereotyping by Price Waterhouse in this case, the Court ruled, "did not simply consist of stray remarks," rather it was "discrimination brought to ground and visited upon an employee."\textsuperscript{71} The Court held that when an employer acts on the basis of stereotypical beliefs about a particular gender, that employer has made an employment decision "because of sex."\textsuperscript{72}

B. Oncale

Joseph Oncale worked for Sundowner on an offshore oil platform from August to November 1991.\textsuperscript{73} He worked as a roustabout on a crew that included John Lyons, Danny Pippen, and Brandon Johnson.\textsuperscript{74} On numerous occasions, Lyons, Pippen, and Johnson forcibly subjected Oncale to humiliating, sex-related actions.\textsuperscript{75} The harassment included Pippen and Johnson restraining

\textsuperscript{67} Id. at 244-45.
\textsuperscript{68} Id. at 251.
\textsuperscript{69} Id. (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
\textsuperscript{70} Id.
\textsuperscript{71} Price Waterhouse, 490 U.S. at 251 (internal quotations omitted).
\textsuperscript{72} Id. at 250.
\textsuperscript{73} Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118 (5th Cir. 1996).
\textsuperscript{75} Id. at 77. John Lyons was Oncale's direct supervisor aboard the Sundowner oil rig. Oncale, 83 F.3d at 118. Danny Pippen and Brandon Johnson were Oncale's co-workers. Id. Pippen was Johnson's direct supervisor, however, he had no supervisory authority over Oncale. Oncale v. Sundowner Offshore Servs., Inc., Civ. A. No. 94-1483, 1995 WL 133349, at *2 n.4 (E.D. La. Mar. 24, 1995).
Oncale while Lyons put his penis on Oncale's neck and, in a separate instance, on his arm. On another occasion, Pippen restrained Oncale while he was showering, and Lyons forcefully "push[ed] a bar of soap into Oncale's anus." Additionally, Lyons and Pippen repeatedly verbally abused Oncale, and threatened him with rape and sexual assault.

Oncale complained to Sundowner supervisory personnel about the harassment on several occasions, but no action was taken. Soon after the shower incident, Oncale quit his job. He subsequently filed a Title VII action against Sundowner, Lyons, Pippen, and Johnson, alleging that he was discriminated against because of his sex. Relying on the Fifth Circuit's decision in Garcia v. Elf Atochem North America, the district court granted summary judgment, holding that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." After the Fifth Circuit affirmed, the Supreme Court granted certiorari.

Justice Scalia delivered the opinion for a unanimous Court. Justice Scalia began the Court's analysis by discussing the statutory language of Title VII and noting that the prohibition against discrimination "because of . . . sex" protects both men and women. In the past, Justice Scalia pointed out, the Court rejected any presumption that members of "one definable group will not discriminate against other members of that group." Justice Scalia

---

76 Oncale, 83 F.3d at 118.
77 Id. at 118-19.
78 Oncale, 523 U.S. at 77.
79 Id. at 77.
80 Oncale, 83 F.3d at 119. Oncale requested that his pink slip indicate that he "voluntarily left due to sexual harassment and verbal abuse." Oncale, 523 U.S. at 77 (quotations in original). When questioned at his deposition as to why he quit, Oncale stated, "I felt that if I didn't leave my job, that I would be raped or forced to have sex." Id. (quotations in original).
81 Oncale, 523 U.S. at 77.
82 28 F.3d 446 (5th Cir. 1994).
83 Oncale, 1995 WL 133349 at *2 (citing Garcia, 28 F.3d at 451-52).
84 Oncale, 83 F.3d at 118.
86 Oncale, 523 U.S. at 75. Justice Thomas filed a one sentence concurring opinion, indicating that he joined the Court "because [it] stress[ed] that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'" Id. at 82 (Thomas, J., concurring).
87 Id. at 78 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)).
88 Id. (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)).
stated that if there were any doubt, “we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”

Reviewing a split in authority by lower courts on the actionability of same-sex sexual harassment in the context of hostile work environment claims, Justice Scalia noted that courts had taken a “bewildering variety of stances.”90 The Justice stated that there was no justification in either the statutory language or Supreme Court precedent for a rule excluding same-sex sexual harassment from the protection of Title VII.91 Acknowledging that male-male sexual harassment was certainly not “the principal evil Congress was concerned with when it enacted Title VII[,]” the Justice noted that statutory proscriptions often exceed the principal evil sought to be remedied to reach reasonably comparable evils.92 Thus, the Justice declared that Title VII’s prohibition of “‘discriminat[ion] . . . because of . . . sex’ in the ‘terms or ‘conditions of employment’” necessarily includes sexual harassment “of any kind that meets the statutory requirements.”93

In dicta, Justice Scalia set forth examples of evidentiary methods that plaintiffs may use to prove same-sex sexual harassment.95 The Justice noted that in opposite-sex sexual harassment situations, courts and juries have easily drawn an inference of discrimination from conduct involving proposals of sexual activity.96 Thus, the Justice reasoned, the same method is available to a same-sex sexual

90 Id. at 79.
91 Id. at 79. Justice Scalia noted that some courts, including the Fifth Circuit in this case, have held that “same-sex sexual harassment claims are never cognizable under Title VII.” Id. (citing Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988), as an example). Justice Scalia pointed out that a few courts have held that such claims are actionable “only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire).” Id. (comparing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) with Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996)). Finally, the Justice observed that other courts have suggested that “workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations.” Id. (citing Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997)).
92 Id. at 79. The Justice stated that it is ultimately the provisions of laws that govern, not the concerns of legislators. Id.
93 Id. at 79-80 (quotations in original).
94 Id. at 80.
95 Id. at 80-81.
96 Id. at 80.
harassment plaintiff who can show credible evidence of the harasser’s homosexuality.\textsuperscript{97}

The Court emphasized, however, that plaintiffs do not need to prove that the harassing conduct was the result of a sexual desire in order to sustain an inference of discrimination “because of sex.”\textsuperscript{98} For example, Justice Scalia stated, a plaintiff could conceivably convince a jury to find discrimination “because of sex” if the victim was harassed “in such sex-specific and derogatory terms” by a member of the victim’s sex as to clearly show that the harasser was “motivated by general hostility to the presence of [members of the victim’s sex] in the workplace.”\textsuperscript{99} Another method, the Court continued, would be for a plaintiff to offer direct comparative evidence of how the harasser behaved toward members of both sexes in the workplace.\textsuperscript{100} Justice Scalia concluded that regardless of what evidentiary method plaintiffs use, he or she always bears the burden of proving that the conduct at issue actually amounted to discrimination “because of sex.”\textsuperscript{101}

The Court dismissed the argument of Sundowner and amici that recognition of liability for same-sex sexual harassment would convert Title VII into a “general civility code” for the workplace.\textsuperscript{102} First, the Justice pointed out, the risk of Title VII being construed as a “general civility code” in the workplace is no greater for same-sex harassment than it is for opposite-sex harassment.\textsuperscript{103} Second, the Justice noted that not all verbal or physical harassment in the workplace is prohibited by Title VII, only discrimination “because of sex.”\textsuperscript{104} Finally, Justice Scalia emphasized that Title VII “does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.”\textsuperscript{105}

Justice Scalia stated that the Court has never held that workplace harassment using words of a sexual nature is \textit{per se} discrimination “because of sex.”\textsuperscript{106} Rather, the critical inquiry under Title VII is “whether members of one sex are exposed to disadvantageous terms

\begin{thebibliography}{10}
\textsuperscript{97} \textit{Oncale}, 523 U.S. at 80.  
\textsuperscript{98} Id.  
\textsuperscript{99} Id.  
\textsuperscript{100} Id. at 80-81.  
\textsuperscript{101} Id. at 81.  
\textsuperscript{102} Id. at 80.  
\textsuperscript{103} \textit{Oncale}, 523 U.S. at 80.  
\textsuperscript{104} Id.  
\textsuperscript{105} Id. at 81.  
\textsuperscript{106} Id. at 80.  
\end{thebibliography}
or conditions of employment to which members of the other sex are not exposed. Justice Scalia proclaimed that Title VII's prohibition of harassment "because of sex" does not require an asexual or androgynous workplace, but instead simply forbids behavior so objectively offensive that it alters the conditions of employment.

The Justice noted that the objective severity of workplace harassment must be judged from the view of a "reasonable person in the plaintiff's position, considering 'all the circumstances'" with "careful consideration of the social context in which [the] particular behavior occurs and is experienced by its target." Justice Scalia indicated that common sense and a proper understanding of social context will allow fact finders to distinguish between mere teasing or roughhousing between members of the same sex, and conduct that a reasonable person would think severely hostile or abusive.

IV. POST-ONCALE RESPONSE OF THE LOWER FEDERAL COURTS

Ironically, much like Justice Scalia's characterization of pre-Oncale lower court interpretations of same-sex sexual harassment claims, post-Oncale courts have taken a "bewildering variety of stances" in evaluating same-sex sexual harassment claims involving gender stereotyping. The various approaches that post-Oncale courts have taken are roughly divided into four categories: (1) courts that fail to mention Price Waterhouse and favor a restrictive view of "sex;" (2) courts that treat gender stereotyping claims as claims of sexual orientation discrimination; (3) courts that imply that a cause of action based on gender stereotyping exists under Title VII, but nevertheless disallow the particular claim; and (4) courts that recognize a cause of action based on gender stereotyping and uphold

107 Id. (quoting Harris v. Forklift Sys., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).
108 Id. at 81. The Court noted that conduct not severe enough to create an objectively hostile work environment is beyond the purview of Title VII. Id. That requirement, the Court stated, has always been regarded as crucial in order to ensure that fact finders "do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'" Id. (quotations in original).
109 Oncale, 523 U.S. at 81 (quoting Harris, 510 U.S. at 23).
110 Id. For example, the Court pointed out that a professional football player's work environment is not hostile if his coach "smacks him on the buttocks;" but identical behavior would reasonably be abusive if directed towards the coach's secretary (male or female) at the office. Id.
111 Id. at 82.
112 Id. at 79.
the particular claim.

A. Courts that Fail to Discuss Price Waterhouse and Favor a Restrictive View of "Sex"

Some lower courts have rejected same-sex sexual harassment claims without even mentioning Price Waterhouse. Dandan v. Radisson Hotel Lisle\textsuperscript{115} is an example. Beginning on his first day of work, Edward Dandan was criticized by co-workers nearly every day for having feminine speech patterns and mannerisms, as well as being barraged with insults such as “didn’t your boyfriend do you last night?” and “I hate you because you are a faggot.”\textsuperscript{114} Without discussing Price Waterhouse, the court rejected Dandan’s claim that the harassment was based on sex because he did not measure up to his co-workers’ expectations of how a man should act.\textsuperscript{115} Noting that such an argument had no precedential underpinning, the court held that Dandan failed to allege any facts showing that he was harassed because he was a man.\textsuperscript{116}

Some courts have gone further by explicitly rejecting the gender-based view of the “because of sex” requirement.\textsuperscript{117} In Klein v. McGowan,\textsuperscript{118} the male plaintiff was subjected to various forms of same-sex harassment. Klein’s supervisor, a male, told him “If I ever find out you’re queer, I’ll fire you.”\textsuperscript{119} Additionally, various male co-

\textsuperscript{115} No. 97 C 8342, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000).
\textsuperscript{114} Id. at *1.
\textsuperscript{115} Id. at *4.
\textsuperscript{116} Id.
\textsuperscript{117} Bibby v. Philadelphia Coca Cola Bottling Co., 85 F. Supp. 2d 509, 517 (E.D. Pa. 2000) (noting that “it seems clear from the context of the statute that Congress intended the word ‘sex’ in Title VII to refer to biological distinctions”), aff’d on other grounds, 260 F.3d 257 (3d Cir. 2001), cert. denied, No. 01-874, 2002 WL 233415, at *1 (Feb. 19, 2002); Klein v. McGowan, 36 F. Supp. 2d 885, 889 (D. Minn. 1999), aff’d, 198 F.3d 705 (8th Cir. 1999); Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 75-76 (D. Maine 1998), aff’d in part on other grounds, 194 F.3d 252 (1st Cir. 1999). The Higgins court noted that “sex” and “gender” are distinguishable terms; the former referring to an individual’s immutable physical characteristics and the latter encompassing “personality features and socio-sexual roles typically associated with ‘masculinity’ and ‘femininity.’” Higgins, 21 F. Supp. 2d at 75. The Higgins court suggested that the Supreme Court’s decision to vacate Doe v. City of Belleville in light of Oncale implied that the Court favors the biological view of “sex.” Id. at 75 n.9. The decision to vacate Doe and its implications are discussed infra Part V.B.

In Spearman v. Ford Motor Co., the Seventh Circuit, although citing and discussing Price Waterhouse, stated that “Congress intended the term sex to mean biological male or biological female and not one’s sexuality or sexual orientation.” 231 F.3d 1080, 1084 (7th Cir. 2000) (internal quotations omitted), cert. denied, 532 U.S. 995 (2001).
\textsuperscript{118} 36 F. Supp. 2d 885 (D. Minn. 1999), aff’d, 198 F.3d 705 (8th Cir. 1999).
\textsuperscript{119} Id. at 887.
workers called him “homo,” made fun of his car, and expelled flatulence in his work area.\textsuperscript{129}

Klein alleged that the harassment was based on sex because it was due to “the sexual aspect of [his] personality.”\textsuperscript{121} In its only citation to \textit{Oncale}, the court acknowledged that while male-on-male sexual harassment is actionable under Title VII, courts must inquire “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”\textsuperscript{122} Noting that Klein’s workplace was almost entirely male, the court held that he could not show that one sex was treated worse than the other.\textsuperscript{123}

The court rejected Klein’s argument that the harassment was based on “the sexual aspect of [his] personality,” noting that it would not liken the sexual side of Klein’s personality with his sex for Title VII purposes.\textsuperscript{124} The court drew a line between biological sex and gender, noting that the two are not equivalent for Title VII purposes.\textsuperscript{125} Without discussing \textit{Price Waterhouse}, the court opined that discrimination based on one’s gender, which encompasses traits such as masculinity, is not proscribed by Title VII.\textsuperscript{126}

\textbf{B. Courts that Transform Gender Stereotyping Claims into Sexual Orientation Discrimination Claims}

Some courts, such as the Eastern District of New York in \textit{Trigg v. New York City Transit Authority},\textsuperscript{127} have effectively ignored evidence of gender stereotyping and instead have characterized harassing conduct as directed at the plaintiff’s perceived sexual orientation.\textsuperscript{128} Since no court has held that discrimination based on sexual orientation is actionable under Title VII,\textsuperscript{129} these courts have

\begin{thebibliography}{10}
\bibitem{} \textit{Id.}
\bibitem{} \textit{Id.} at 889.
\bibitem{} \textit{Id.} (citing \textit{Oncale}, 523 U.S. at 80).
\bibitem{} \textit{Id.}
\bibitem{} \textit{Klein}, 36 F. Supp. 2d at 889-90.
\bibitem{} \textit{Id.} at 890. The court considered harassment based on gender and harassment based on the sexual aspect of an individual’s personality as equivalent to harassment based on sexual orientation. \textit{Id.} at 889-90.
\bibitem{} \textit{Id.} at 890. Adopting the reasoning of the District of Maine in \textit{Higgins}, the court felt that the Supreme Court’s decision to vacate \textit{Doe v. City of Belleville} raised serious doubts about whether the gender-based view of “sex” is viable. \textit{Id.}
\bibitem{} \textit{Id.} at *6; see also \textit{Spearman v. Ford Motor Co.}, 231 F.3d 1080, 1084-86 (7th Cir. 2000), \textit{cert. denied}, 532 U.S. 995 (2001).
\bibitem{} Although the Supreme Court has never directly addressed the issue, all circuits that have addressed the issue have indicated that Title VII does not prohibit
\end{thebibliography}
dismissed these suits as failing to state a valid claim for relief.supra

During his employment, Jason Trigg, a homosexual male, was called “faggot,” “faggot ass,” and “sissy” by his male co-workers. Trigg was also told that he needed to carry things “more manly,” and that “women [could] pack a skid better.” Trigg brought suit against his employer under Title VII, asserting that he was discriminated against because of gender stereotypes—his alleged failure “to exhibit his masculinity in a stereotypical fashion.”

The court rejected Trigg’s argument. The court noted that although the Second Circuit’s opinion in Simonton v. Runyon implied that a sexual harassment suit based on nonconformity with gender stereotypes would be cognizable under Title VII, “[t]his theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.” The court pointed out that Trigg’s amended complaint was “rife with references to his sexual orientation,” and stressed that Trigg indicated that he was discriminated against because he was a man in only four paragraphs. This, along with an excerpt from Trigg’s deposition testimony, the court concluded, compelled the finding that sexual orientation, not gender stereotyping, was the basis for Trigg’s grievance. Thus, the court granted the Transit Authority’s motion for summary judgment.

discrimination on the basis of sexual orientation. See supra note 10 and accompanying text.

supra

See Trigg, 2001 WL 868336, at *15; Spearman, 231 F.3d at 1085-86.

Trigg, 2001 WL 868336, at *6. Trigg indicated that he never informed anyone in the workplace that he was gay. Id. at *2.

Id. at *6, 8.

Id. at *5.

Id. at *5-6.

232 F.3d 33 (2d Cir. 2000).

Trigg, 2001 WL 868336, at *5 (quoting Simonton, 232 F.3d at 38).

Id. at *6. Apparently, the court thought that remarks such as “sissy” and phrases like “[Trigg should] learn how to carry bags . . . more manly” were directed at Trigg’s perceived homosexuality and not at his failure to conform to male stereotypes. See id.

Id. The court reached this conclusion despite acknowledging that Trigg’s deposition testimony contained complaints of both sexual orientation and gender stereotype discrimination. Id. Incredibly, the passage of deposition testimony that the court cited and ostensibly relied on to conclude that the “sine qua non” of Trigg’s grievance was sexual orientation discrimination and not gender stereotyping contained statements that Trigg felt harassed by comparisons to women in the way he did his job and comments that he “wasn’t going to make it in the job if [he] was not more manly.” Id.

Id. at *15.
In *Spearman v. Ford Motor Co.*, the Seventh Circuit acknowledged sex stereotyping by plaintiff's co-workers, but nevertheless held that Spearman failed to state a valid claim for relief under Title VII. Earlier in the opinion, the Seventh Circuit declared that "Congress intended the term sex to mean biological male or biological female and not one's sexuality or sexual orientation." Citing *Price Waterhouse*, the court acknowledged that sex stereotyping can constitute evidence of discrimination based on sex. But the court held that the stereotypical remarks by Spearman's co-workers were made because of their hostility to Spearman's perceived homosexuality, "not to harass him because he is a man."

**C. Courts Suggesting Recognition of a Title VII Cause of Action Based on Gender Stereotyping, but Disallowing the Underlying Claim**

Some courts have implied that a claim for same-sex harassment based on gender stereotypes would be valid in an appropriate case, but rejected the particular claims due to deficient pleadings. For example, the plaintiff in *Bibby v. Philadelphia Coca Cola Bottling Co.* was a homosexual male who claimed that numerous male co-workers

---

141 Id. at 1087.
142 Id. at 1084.
143 Id. at 1085.
144 Id. at 1085-86.
145 Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001), cert. denied, No. 01-874, 2002 WL 233415, at *1 (Feb. 19, 2002); see also Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259-61 & n.4 (1st Cir. 1999) (noting that *Price Waterhouse* permits a man to ground a Title VII claim "on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity," but declining to reach the merits of the issue because plaintiff failed to raise the argument below); Bianchi v. Philadelphia, No. 99-CV-2409, 2002 WL 23942, at *4-7 (E.D. Pa. Jan. 7, 2002) (recognizing that discrimination based on failure to conform with gender stereotypes violates Title VII, but granting defendant's motion for summary judgment because plaintiff did not present enough evidence to "raise the inference that his harassers targeted him because he failed to conform with their ideal of masculinity"); Cicotto v. LCOR, Inc., No. 99 CIV. 11646(RMB), 2001 WL 514304, at *4-6 (S.D.N.Y. Jan. 31, 2001) (acknowledging that courts have accepted Title VII claims based on discrimination for failure to conform to gender stereotypes, but granting defendant's motion to dismiss because the record did not support a claim based on sexual stereotyping and "the alleged harassment was not sufficiently severe or pervasive to create an objectively hostile or abusive work environment"); cf. Simonton v. Runyon, 232 F.3d 33, 37-38 (2d Cir. 2000) (declining to express an opinion on whether discrimination based sexual stereotypes is actionable under Title VII because plaintiff failed to plead sufficient facts for consideration of the issue).
146 260 F.3d 257 (3d Cir. 2001), cert. denied, No. 01-874, 2002 WL 233415, at *1 (Feb. 19, 2002).
harassed him because of his sex. 147 One co-worker in particular repeatedly verbally harassed Bibby with comments such as “everybody knows you’re gay [sic] as a three dollar bill,” “everybody knows you’re a faggot,” and “everybody knows you take it up the ass.” 148 This same employee also called Bibby a “sissy,” and on one occasion physically assaulted him. 149

The Third Circuit observed that, since Title VII does not proscribe discrimination based on sexual orientation, Bibby could only seek relief for discrimination based on sex. 150 After discussing Oncale’s impact on sexual harassment jurisprudence, the court recognized that there are several situations where same-sex harassment can constitute discrimination “because of sex.” 151 Citing Oncale, the Third Circuit stated that same-sex harassment is “because of sex” when the evidence shows that “the harasser sexually desires the victim,” and also when the harasser shows hostility to the presence of the victim’s sex in the workplace. 152 But the court opined that the evidentiary methods set forth in Oncale were not meant to be exhaustive. 153 After citing Price Waterhouse and the Seventh Circuit’s decision in Doe v. City of Belleville, 154 the Third Circuit posited that a plaintiff might be able to prove that same-sex harassment was “because of sex” through evidence that the conduct was motivated by the victim’s alleged noncompliance with gender stereotypes. 155

Notwithstanding the Third Circuit’s apparent recognition of a gender stereotype argument, the court ultimately rejected Bibby’s Title VII claim. 156 The court noted that, whatever evidentiary method is employed, Title VII plaintiffs must always prove that the harassing

147 Id. at 259-60.
148 Id.
149 Id.
150 Id. at 261 (citing Simonton, 232 F.3d at 35; Higgins, 194 F.3d at 259; Williamson v. A.G. Edwards & Sons, Inc. 876 F.2d 69, 70 (8th Cir. 1989)). The court also noted that Congress has on several occasions rejected legislation that would extend Title VII to cover discrimination based on sexual orientation. Id.
151 Id. at 262.
152 Bibby, 260 F.3d at 262.
153 Id. at 264.
154 119 F.3d 563 (7th Cir. 1997). Doe is a pre-Oncale case recognizing that same-sex sexual harassment plaintiffs may prove that harassment is “because of sex” through evidence of gender stereotyping. Id. at 580. The Supreme Court vacated and remanded Doe for further reconsideration in light of Oncale. City of Belleville v. Doe, 525 U.S. 1001 (1998). The decision to vacate Doe has spurred significant debate over the viability of the use of gender stereotyping evidence to prove same-sex sexual harassment. This issue is discussed infra Part V.B.
155 Bibby, 260 F.3d at 262-63.
156 Id. at 264.
conduct at issue "was not merely tinged with offensive sexual connotations, but actually constituted discrimina[tion] . . . because of . . . sex."157 The court held that Bibby failed to do this because he did not allege that he was harassed because he was a man or that he was harassed because he failed to conform to his gender stereotype.158 Thus, the court reasoned, no reasonable factfinder could conclude that Bibby was discriminated against "because of sex."159

D. Courts that Recognize a Cause of Action Based on Gender Stereotyping and Uphold the Underlying Claim

To date, the only post-Oncale court that has both accepted the argument that harassment based on gender stereotypes is harassment "because of sex" and upheld the plaintiff's Title VII claim is the Ninth Circuit.160 In Nichols v. Azteca Restaurant Enterprises, Inc.,161 the plaintiff162 was subjected to frequent verbal abuse during the course of

158 Id.
159 Id.
160 Nichols v. Azteca Rest. Enters. 256 F.3d 864, 875 (9th Cir. 2001). While the Ninth Circuit is the only post-Oncale court to uphold a plaintiff's claim for discrimination based on gender stereotypes, other courts have acknowledged that such a claim, if proven, constitutes discrimination "because of sex."

For example, in Schmedding v. Tnenac Co., the Eighth Circuit reversed the lower court's dismissal of plaintiff's claims and remanded the case for further proceedings. 187 F.3d 862, 865 (8th Cir. 1999). The court held that plaintiff's allegations that co-workers "falsely labeled him as homosexual in an effort to debase his masculinity," if proven, stated a claim that he was harassed "because of sex." Id. at 865; see also Centofla v. Potter, No. CIV. 99-12662-NG, 2002 WL 122296, at *1 (D. Mass. Jan. 29, 2002) (denying defendant's request for summary judgment because plaintiff provided sufficient evidence in support of his claim that he was harassed "because of his sex and his failure to conform with his co-workers' sexual stereotypes"); Lanetta v. Putnam Inv., Inc., 142 F. Supp. 2d. 131, 134 (D. Mass. 2001) (denying defendant's motion to dismiss because plaintiff's allegations that he was harassed for failing to conform to gender stereotypes stated a claim under Title VII).

In Montgomery v. Independent School District No. 709, the District of Minnesota, analogizing Title VII law, held that allegations of harassment based on the perception that a male student did not measure up to his male peers' stereotypes of masculinity stated a valid claim for relief under Title IX. 109 F. Supp. 2d 1081, 1090-95 (D. Minn. 2000).

164 256 F.3d 864 (9th Cir. 2001).
165 The named plaintiff, a woman named Michelle Nichols, was not the focus of the court's decision. Rather, the opinion centered around conduct aimed at co-plaintiff Antonio Sanchez, a male, by his male co-workers. The court addressed the claims of Nichols and co-plaintiff Anna Christine Lizarraga in an unpublished memorandum decision. Id. at 869 n.1 (citing Nichols v. Azteca Rest. Enters., No. 99-35579, 2001 WL 804002 (9th Cir. July 16, 2001)).
his employment.\textsuperscript{165} His male co-workers constantly ridiculed him by referring to him as “she” and “her,” telling him that he carried his serving tray “like a woman,” and calling him “faggot” and a “fucking female whore.”\textsuperscript{164} After a bench trial, the district court ruled that the workplace was “neither objectively nor subjectively hostile” and that the harassment was not “because of sex.”\textsuperscript{165}

The Ninth Circuit reversed.\textsuperscript{166} After reviewing the record, the court held that the unrelenting abuse plaintiff suffered amounted to an objectively and subjectively hostile work environment.\textsuperscript{167} Addressing the claim that the harassment was “because of sex,” the court agreed with the plaintiff’s contention that \textit{Price Waterhouse} “applies with equal force to a man who is discriminated against for acting too feminine.”\textsuperscript{168} The court recognized that the abuse directed at plaintiff was due to the belief that he “did not act as a man should act.”\textsuperscript{169} The court explained that \textit{Price Waterhouse} bars discrimination based on gender stereotypes, and that rule squarely applied to proscribe the conduct here.\textsuperscript{170} Thus, the court held that, in light of \textit{Price Waterhouse}, the harassment plaintiff experienced was “because of sex.”\textsuperscript{171}

V. ANALYSIS

At first glance \textit{Oncale} appears to provide a great deal of clarification in Title VII jurisprudence. To be sure, in holding that

\textsuperscript{165} \textit{Id.} at 870.

\textsuperscript{164} \textit{Id.} Plaintiff reported that the incidents of abuse happened at least weekly and often several times each day. \textit{Id.}

\textsuperscript{165} \textit{Id.} at 871.

\textsuperscript{166} \textit{Id.} at 875.

\textsuperscript{167} \textit{Azteca}, 256 F.3d at 873. The court noted that the district court’s factual findings suggested that the court believed that the conduct occurred, but did not view it to be serious. \textit{Id.} at 872-73. The court stated that the district court was clearly erroneous in finding that plaintiff did not perceive the work environment to be hostile and further noted that even \textit{Azteca} did not contend that a reasonable man would not have found the conduct sufficiently severe and pervasive so that it altered the terms and conditions of plaintiff’s employment. \textit{Id.} at 873.

\textsuperscript{168} \textit{Id.} at 874 (citing \textit{Oncale} v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998)).

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.} at 874-75. The court acknowledged that its decision in \textit{DeSantis v. Pacific Telephone \& Telegraph Co.}, 608 F.2d 327 (9th Cir. 1979), held that discrimination of a man based on an effeminate appearance did not state a claim under Title VII. \textit{Azteca}, 256 F.3d at 875. The court noted, however, that \textit{DeSantis} predated \textit{Price Waterhouse}. \textit{Id.} The court recognized that since \textit{DeSantis’} holding conflicted with \textit{Price Waterhouse’s} rule barring discrimination on the basis of gender stereotypes, \textit{DeSantis} was no longer good law. \textit{Id.} at 874-75.

\textsuperscript{171} \textit{Azteca}, 256 F.3d at 875.
same-sex sexual harassment is actionable under Title VII, the Court resolved a rather significant circuit split.\textsuperscript{172} \textit{Oncale} does not, however, offer a clear answer as to how same-sex plaintiffs can prove that harassing conduct was “because of sex.” While examples of evidentiary methods are casually mentioned in dicta, the Court was conspicuously silent on the issue of gender stereotyping and the opinion does not mention or cite \textit{Price Waterhouse}.\textsuperscript{173}

\textit{Oncale}’s shortcomings should not be the proverbial tail that wags the dog. Although lower courts have struggled to interpret \textit{Oncale},\textsuperscript{174} a careful reading of the opinion in light of the Court’s prior precedent compels the conclusion that same-sex sexual harassment plaintiffs can prove a Title VII violation through evidence that they were harassed due to gender stereotypes.

A. \textit{Oncale}’s Evidentiary Methods: Not an Exhaustive List

As an initial matter, it is critical to point out that the evidentiary methods \textit{Oncale} set forth for proving claims of same-sex harassment are not exhaustive, but merely instructive. Lower courts that have held or implied the contrary\textsuperscript{175} have disregarded \textit{Oncale}’s plain language.

The \textit{Oncale} Court listed three examples of how a same-sex sexual harassment plaintiff could prove that the harassment was “because of sex.”\textsuperscript{176} Close attention must be given to the language the Court used when listing them. Justice Scalia’s use of the terms “might,” “for example,” and “may” as opposed to more definitive language demonstrates that these were merely examples of how a same-sex plaintiff could prove that harassment was “because of sex.”\textsuperscript{177}

\textsuperscript{172} \textit{Oncale}, 523 U.S. at 79-80.

\textsuperscript{173} See generally id.

\textsuperscript{174} See discussion supra Part IV.


\textsuperscript{176} \textit{Oncale}, 523 U.S. at 80-81. The listed methods were (1) if the plaintiff shows credible evidence of the same-sex harasser’s homosexuality; (2) if the victim was harassed “in such sex-specific and derogatory terms” as to clearly show that the same-sex harasser was “motivated by general hostility to the presence of [member’s of the victim’s sex] in the workplace;” and (3) direct comparative evidence of how the harasser treated members of both sexes in the workplace. \textit{Id.} at 80-81.

\textsuperscript{177} See Lester, supra note 10, at 103 (arguing that the \textit{Oncale}’s use of “might,” “for
Moreover, the final sentence in Justice Scalia’s discussion of how a same-sex plaintiff can prove a Title VII violation—“Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex”—shows that the Court’s concern was not the method of proof, but rather ensuring that the conduct be proven to be “because of sex.”

B. The Supreme Court’s Acceptance of Gender Stereotyping and the Gender-based View of “Sex”

Since the list of evidentiary methods set forth in Oncale is not meant to be an exhaustive one, it follows that same-sex sexual harassment plaintiffs could, theoretically, prove that harassment was “because of sex” if the conduct was based on the victim’s failure to conform to gender stereotypes. This theory does not hold water, however, unless it can be shown that the Supreme Court would endorse the gender-based view of “sex,” as opposed to a more restrictive view.

Some post-Oncale courts continue to endorse a restrictive view of “sex.” The confusion over the meaning of “sex” has been further

---

178 Oncale, 523 U.S. at 81 (internal quotations omitted) (emphasis added).

179 Most courts agree that the list is non-exhaustive. See, e.g., Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 262-64 (3d Cir. 2001) (noting that there are other ways of proving harassment “because of sex” besides those set forth in Oncale), cert. denied, No. 01-874, 2002 WL 233415, at *1 (Feb. 19, 2002); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (recognizing that a plaintiff can prove discrimination “because of sex” through the use of gender stereotypes); Shepard v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) (“[W]e discern nothing in the Supreme Court’s [Oncale] decision indicating that the examples it provided were meant to be exhaustive rather than instructive.”); Schmedding v. Tnemac Co., 187 F.3d 862, 865 n.4 (8th Cir. 1999) (noting that the three methods of proof set forth in Oncale are only examples); Weston v. Pennsylvania, No. Civ.A. 98-3899, 2001 WL 1491132, at *5 n.6 (E.D. Pa. Nov. 20, 2001) (explaining that the Oncale Court did not indicate that the evidentiary examples set forth were intended to be exhaustive); see also Stephen J. Nathans, Comment, Twelve Years After Price Waterhouse and Still No Success for ‘Hopkins in Drag’: The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII, 46 VILL. L. REV. 713, 733, 736 (2001) (arguing that Oncale’s evidentiary methods were not intended to be exhaustive).

aggravated by the Supreme Court's decision to vacate and remand the Seventh Circuit's decision in Doe v. City of Belleville\textsuperscript{181} for further consideration in light of Oncale.\textsuperscript{182} Doe, a pre-Oncale case, involved a pair of sixteen-year-old brothers who were subjected to unrelenting abuse by their male co-workers.\textsuperscript{183} The boys were constantly called "fag," "queer," and "bitch."\textsuperscript{184} One of the brothers was ridiculed for wearing an earring and a co-worker inquired of the same brother, "Are you a boy or a girl?"\textsuperscript{185} The boys were accused of having anal sex with each other, and on one occasion, after stating "I'm going to finally find out if you are a girl or a guy," a co-worker grabbed one of the brother's testicles.\textsuperscript{186}

The brothers filed suit against the City of Belleville alleging that they had been sexually harassed in violation of Title VII.\textsuperscript{187} Holding that same-sex sexual harassment is actionable under Title VII, the Seventh Circuit reversed the district court's grant of summary judgment in the city's favor.\textsuperscript{188} The court relied on two alternative holdings. First, the court opined that where same-sex sexual harassment "is overtly sexual and sex-based," the conduct is actionable regardless of whether the victim was targeted because he is a man.\textsuperscript{189} In the alternative, the court, citing Price Waterhouse, stated that should proof other than the overt sexual character of the conduct be required, plaintiffs could prevail because they had demonstrated that they were singled out "because the way in which [they] projected the sexual aspect of [their] personality (and by that we mean . . . gender) did not conform to [their] coworkers' view of

\textsuperscript{181} 119 F.3d 563 (7th Cir. 1997).
\textsuperscript{182} City of Belleville v. Doe, 523 U.S. 1001 (1998). Like Oncale, the decision to vacate and remand Doe was unanimous. \textit{Id.}
\textsuperscript{183} Doe, 119 F.3d at 566.
\textsuperscript{184} \textit{Id.} at 567.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.} at 566.
\textsuperscript{189} Doe, 119 F.3d at 577-80.
appropriate masculine behavior. . . .\textsuperscript{190}

Lower court decisions, such as \textit{Klein} and \textit{Higgins v. New Balance Athletic Shoe, Inc.},\textsuperscript{191} have interpreted the Supreme Court's decision to vacate \textit{Doe} as an endorsement of a restrictive view of "sex," thus precluding same-sex plaintiffs from proving discrimination "because of sex" through evidence of gender stereotyping.\textsuperscript{192} \textit{Klein}, for example, reasoned that the decision to vacate \textit{Doe} raised serious doubts about whether the gender-based view of sex is viable.\textsuperscript{193} These courts have misread \textit{Oncale}’s precedential effect. When read together, \textit{Oncale} and \textit{Price Waterhouse} stand for the proposition that the Court has tacitly accepted the gender-based view of "sex," and evidence of gender stereotyping can be used to prove discrimination "because of sex."

First, the reasoning of decisions such as \textit{Klein}, \textit{Higgins}, and \textit{Dandanan} is severely flawed by the courts' failure to cite \textit{Price Waterhouse}. The \textit{Dandanan} court, for example, declared that the plaintiff’s stereotype argument “ha[d] no precedential underpinning.”\textsuperscript{194} But this fails to recognize that the Supreme Court had already accepted such an argument, albeit in the context of opposite-sex sexual harassment.\textsuperscript{195}

Second, \textit{Oncale} cited \textit{Doe} as holding that "workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations."\textsuperscript{196} To be sure, this aspect of \textit{Doe} is inconsistent with \textit{Oncale}’s requirement that same-sex sexual harassment must be because of (read: motivated by) the victim’s sex in order to be actionable under Title VII.\textsuperscript{197} Thus, the Court was justified in vacating and remanding \textit{Doe} for further consideration in light of \textit{Oncale} for this reason. But what decisions such as \textit{Klein} and \textit{Higgins} have failed to consider, is that the decision to vacate and remand \textit{Doe} does not cast doubt on \textit{Doe}’s holding that same-sex plaintiffs can prove harassment "because of sex" through evidence of gender stereotyping.\textsuperscript{198} Indeed, Justice Scalia did not

\textsuperscript{190} \textit{Id.} at 580.


\textsuperscript{192} \textit{Klein}, 36 F. Supp. 2d at 890; \textit{Higgins}, 21 F. Supp. 2d at 75 n.9.

\textsuperscript{193} \textit{Klein}, 36 F. Supp. 2d at 890.

\textsuperscript{194} \textit{Dandanan}, 2000 WL 336528, at *4.

\textsuperscript{195} \textit{See generally Price Waterhouse}, 490 U.S. 228 (1989).

\textsuperscript{196} \textit{Oncale}, 523 U.S. at 79 (internal citations omitted) (emphasis added).

\textsuperscript{197} \textit{See id.} at 79-82.

\textsuperscript{198} Courts have recognized that the \textit{Doe} remand does not affect the gender stereotyping aspect of the opinion. \textit{See} Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 263 n.5 (3d Cir. 2001) (noting that in light of \textit{Price Waterhouse}, there is
mention gender stereotyping at any point in his *Oncale* opinion, nor did he give any indication that the Court had turned its back on *Price Waterhouse*.

Third, courts embracing a restrictive view of "sex" are ignoring established rules of statutory interpretation. Since Title VII is a remedial statute, the category of "sex" ought to be interpreted broadly.

*Price Waterhouse* is still good law. A faithful reading of the case cannot be squared with the biological or any other restrictive view of "sex" because *Price Waterhouse* expressly held that when an employer acts on the basis of stereotypical beliefs about a particular gender, that employer has acted "because of sex." The biological view of "sex" forbids any distinction between men and women other than biology. However, the *Price Waterhouse* Court conspicuously noted that "in forbidding...discriminat[ion] against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

The Court's endorsement of the gender-based view of "sex" in *Price Waterhouse* is implicit in its emphasis on the specific facts of the case; Hopkins was treated differently because she was "macho," "overcompensated for being a woman," "needed to take a course at charm school," and needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." These considerations are only relevant when one considers personality attributes of the sexes, socio-sexual

---

199 See generally *Oncale*, 523 U.S. 75.
200 See Varona & Monks, supra note 15, at 91-92 (noting that in order to achieve its objectives, it is essential that Title VII be construed liberally); Zalesne, supra note 2, at 397 (arguing that since Title VII is a remedial statute, "because of sex" should be interpreted broadly to include "anything relating to sexual issues, behavior, anatomy, or identity, as long as the harassment implicates and exploits power imbalances between the sexes").
201 *Price Waterhouse*, 490 U.S. at 250.
202 Axam & Zalesne, supra note 40, at 236.
203 *Price Waterhouse*, 490 U.S. at 251 (citing Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
204 See id. at 295.
roles, character traits, and expressions of masculinity and femininity. In other words, reliance on these facts only makes sense under the gender-based view of sex.

Finally, any attempt to distinguish *Price Waterhouse* as not applying in the context of same-sex sexual harassment is without merit. First, since *Price Waterhouse* was written in gender-neutral language, its reasoning applies to both sexes. Second, *Oncale* stated that "Title VII's prohibition of discrimination because of sex protects men as well as women." This confirms that the same standards of liability that apply to opposite-sex sexual harassment apply with equal force to the context of same-sex sexual harassment. Thus, under *Oncale* and *Price Waterhouse*, same-sex sexual harassment plaintiffs can ground a Title VII claim on proof that they were discriminated against because of failure to conform to gender stereotypes.

---

205 Axam & Zalesne, supra note 40, at 236; Varona & Monks, supra note 15, at 94-96; Zalesne, supra note 2, at 403.

206 Other scholars have also recognized that *Price Waterhouse* endorsed the gender-based view of sex. See, e.g., Zalesne, supra note 2, at 408 (arguing that *Price Waterhouse* recognized that "gender is not based merely on physical attributes, but also on the expected roles a person should play in society").

207 Varona & Monks, supra note 15, at 84.

208 *Oncale*, 523 U.S. at 78 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)) (internal quotations omitted).

209 Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001) (indicating that *Price Waterhouse* "applies with equal force to a man ... discriminated against for acting too feminine"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[t]he court has grounded an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, ... a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity."). But see Axam & Zalesne, supra note 40, at 210 (criticizing *Oncale* as "revert[ing] to a biologically centered definition of 'sex'").

210 *Azteca*, 256 F.3d at 874-75 (concluding that *Price Waterhouse*’s prohibition of discrimination on the basis of sex stereotypes applies to the context of same-sex discrimination); Higgins, 194 F.3d at 261 n.4 ("[A] man can ground a [Title VII] claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."); Jones v. Pac. Rail Servs., No. 00 C 5776, 2001 WL 127645, at *2 (N.D. Ill. Feb. 14, 2001) (recognizing that actionable sexual harassment includes harassment based on failure to meet stereotyped expectations of masculinity); cf. Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001) (implying that a plaintiff could prove discrimination "because of sex" through evidence of gender stereotyping), cert. denied, No. 01-874, 2002 WL 233415, at *1 (Feb. 19, 2002); Schmeding v. Tnemac Co., 187 F.3d 862, 865 (8th Cir. 1999) (holding that allegations that plaintiff was falsely labeled a homosexual and debased his masculinity stated a claim for discrimination "because of sex"); Cicotte v. LCOR Inc., No. 99 CIV. 11646(RMB), 2001 WL 514304, at *4-6 (S.D.N.Y. Jan. 31, 2001) (acknowledging that courts have accepted Title VII claims based on discrimination for failure to conform to gender stereotypes); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090-93 (D. Minn. 2000) (holding
C. The "Because of Sexual Orientation" Problem

As discussed in Part IV.B., some courts have transformed claims of same-sex sexual harassment based on gender stereotyping into claims of harassment based on sexual orientation. In *Trigg*, the plaintiff was called a "sissy" and was told that he needed to act "more manly." Incredibly, the district court concluded that these stereotypical remarks were not "because of sex," but instead aimed at his perceived homosexuality. In *Spearman*, the Seventh Circuit dismissed the plaintiff's claim as one of harassment based on sexual orientation even though the court explicitly acknowledged that he was subjected to sex stereotyping. The response of courts such as *Trigg* and *Spearman* are inconsistent with *Oncale* and *Price Waterhouse* because these courts fail to recognize that discrimination based on one's perceived sexual orientation can be discrimination "because of sex.”

Although courts are arguably justified in dismissing a complaint to the extent it relies on harassment based on sexual orientation, dismissal of the entire complaint is not necessarily warranted in light of *Oncale* and *Price Waterhouse*. Simply because harassment is "rife with references to sexual orientation" does not mean that harassment is because of sexual orientation and not "because of sex.” Indeed, heterosexuality itself is a gender-based stereotype.

---

213 I emphasize the word "arguably" because the Supreme Court has never held that Title VII does not permit claims for harassment based on sexual orientation. Although all lower courts to address the issue have held that Title VII does not prohibit discrimination based on sexual orientation, see supra note 10 and accompanying text, at least some commentators read *Oncale* as potentially opening the door to recognition of such a cause of action. See Varona & Monks, supra note 15, at 101-02 (arguing that "in theory... the Supreme Court has left the door open for lower courts to recognize Title VII claims based on sexual orientation" after *Oncale*). Cf. B.J. Chisolm, The (Back)Door of *Oncale v. Sundowner Offshore Services, Inc.*: "Outing" Heterosexuality as a Gender-based Stereotype, 10 LAW & SEXUALITY 239, 267 (2001) ("*Oncale* has opened the door for courts to consider parties' sexual orientation.")

This is a question for another day, however, as this Comment does not purport to address *Oncale's* effect on the actionability of discrimination because of sexual orientation.

215 Interestingly, Justice Scalia pointed out that the Court has never held that harassment is discrimination "because of sex" merely because the words used have sexual content or connotations. *Oncale*, 523 U.S. at 80. It logically follows that
and men are frequently identified as homosexual not because of their sexual behavior, but because of actions that do not conform to the stereotypical heterosexual male.\textsuperscript{217} Thus, comments such as “faggot,”\textsuperscript{218} “homo,”\textsuperscript{219} “queer,”\textsuperscript{220} “everybody knows you’re gay,”\textsuperscript{221} and “didn’t your boyfriend do you last night?”\textsuperscript{222} can be “because of sex” because the harassed individual does not conform to the harasser’s view of appropriate gender behavior.\textsuperscript{223}

harassment is not necessarily discrimination because of sexual orientation merely because the words reference an individual’s homosexuality.

\textsuperscript{216} Chisolm, supra note 213, at 268; cf. Varona & Monks, supra note 15, at 89 (arguing that gender identity is a stereotype).

\textsuperscript{217} Varona & Monks, supra note 15, at 88 (arguing that “animus against homosexuals is often based on bias against gender nonconformity”). Varona and Monks later conclude that “anti-gay discrimination should always be considered sex stereotyping.” Id. at 114 (emphasis added). Cf. Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 CORNELL L. REV. 1169, 1219 (1998) (arguing that targeting non-masculine men for harassment reinforces the “association of men with a sexualized masculinity and illustrates the consequences of departure from this socially ordained role”).

\textsuperscript{218} Nichols v. Azteca Rest. Enters., 256 F.3d 864, 870 (9th Cir. 2001).

\textsuperscript{219} Klein v. McGowan, 36 F. Supp. 2d 885, 887 (D. Minn. 1999), aff’d, 198 F.3d 705 (8th Cir. 1999).

\textsuperscript{220} Id.


\textsuperscript{223} Professor Zalesne cogently explains this truism:

Male victims of hostile environment harassment by other males tend to be either homosexual, perceived by co-workers as homosexual, or outwardly demonstrate feminine characteristics. In all these situations, arguably, the employee is being harassed because of his gender role identity—that is, the harassment is motivated by the employee’s failure to live up to gender expectations. The same traits or behavior exhibited by a man would not be objectionable to the harasser if displayed by a woman. It is the fact that they are displayed by a man that inspires the harasser’s hostility. . . . [Thus, the] sexual harassment, in effect, is motivated by the employee’s gender.

Zalesne, supra note 2, at 407.

Professor Delpo argues that if harassment is motivated solely by a victim’s sexual orientation it is not “because of sex.” Marianne C. Delpo, The Thin Line Between Love and Hate: Same-Sex Hostile-Environment Sexual Harassment, 40 SANTA CLARA L. REV. 1, 25 (1999). If, however, the conduct is motivated by the harasser’s animus for a person who does not conform to gender stereotypes, then the harassment is “because of sex.” Id.

Courts are beginning to accept this line of reasoning. See Schmedding v. Tmneac Co., 187 F.3d 862, 865 (8th Cir. 1999) (holding that allegations that plaintiff was falsely labeled a homosexual to debase his masculinity were sufficient to state a claim that he was harassed “because of sex”), Carrasco v. Lennox Hill Hosp., No. 99 Civ. 927(AGS), 2000 WL 520640, at *9 (S.D.N.Y. Apr. 28, 2000) (recognizing that insinuations of plaintiff’s homosexuality may have been “‘because of sex,’ as they
The conclusion that harassment based on one’s perceived sexual orientation can amount to discrimination “because of sex” is consistent with the purposes and goals of Title VII. Title VII was meant to remove all arbitrary and capricious hurdles in employment and to give employees “the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”\textsuperscript{224} Moreover, it is widely recognized that “Title VII is a remedial statute that, under established rules of construction, should be interpreted broadly.”\textsuperscript{225}

The Trigg and Spearman courts dismissed the respective Title VII claims without carefully evaluating the facts surrounding the harassment.\textsuperscript{226} The courts assumed that the presence of comments such as “faggot”\textsuperscript{227} automatically meant that the discrimination was solely because of the victims’ sexual orientation. The courts’ approach failed to consider the importance of the motivation behind the harassment, however. Thus, the courts failed to follow Oncale by

were of a sexual nature and related directly to a male’s sexual behavior,” but

missing claim because the harassment was not sufficiently severe to create “an objectively hostile or abusive work environment”).

In Montgomery v. Independent School District No. 709, the plaintiff was subjected to unrelenting verbal abuse beginning in kindergarten and continuing on a daily basis through the tenth grade. 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000). Many of the taunts were directed at his perceived sexual orientation, such as “fag,” “gay,” “Jessica,” “girl,” “princess,” “fairy,” “homo,” “femme boy,” “bitch,” “queer,” “pansy,” and “queen.” \textit{Id}. The court observed that at the time the abuse began, it was highly unlikely that plaintiff had developed a sexual preference, engaged in homosexual conduct, identified himself as homosexual, or even understood the difference between homosexual and heterosexual. \textit{Id}. at 1090. Rather, the court noted, it was much more plausible that the students tormented plaintiff “based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.” \textit{Id}. Thus, the court held that plaintiff alleged facts to support a claim that he was harassed based on gender stereotypes in violation of Title IX. \textit{Id}.

\textsuperscript{224} Zalesne, \textit{supra} note 2, at 411 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)); \textit{see also} Axam & Zalesne, \textit{supra} note 40, at 234-35 (noting that Title VII was intended to remove arbitrary barriers in employment and ensure that individuals are able to compete “based on their competence as workers rather than on their protected identity traits”).

\textsuperscript{225} Zalesne, \textit{supra} note 2, at 397; \textit{see also} Varona & Monks, \textit{supra} note 15, at 91-92 (noting that in order to achieve its objectives, it is essential that Title VII be construed liberally).

\textsuperscript{226} \textit{See} Trigg, 2001 WL 868336 at *4-7, 15; Spearman, 231 F.3d at 1085-87. The Trigg court also erred in another fashion. The court’s rationale that plaintiff did not state a claim for same-sex harassment under Title VII because he only alleged discrimination because of his sex (i.e. because he is a man) in four paragraphs of the complaint was plain error. \textit{Oncale} did not purport to establish any minimum pleading requirement for same-sex discrimination claims other than that the discrimination must be alleged to be “because of sex.” Trigg clearly satisfied this requirement on the face of his complaint. \textit{See} Trigg, 2001 WL 868336 at *6.

\textsuperscript{227} Trigg, 2001 WL 868336 at *6; Spearman, 231 F.3d at 1082.
focusing on the words instead of determining whether the conduct was because of (i.e., motivated by) sex.\footnote{It must be noted that remarks “based on sex stereotypes do not inevitably prove” that harassment was “because of sex.” \textit{Price Waterhouse}, 490 U.S. at 251. But such comments are certainly evidence that the harassment was “because of sex.” \textit{Id}. This is precisely why the harasser’s motivation is so important.}

The Ninth Circuit’s approach in \textit{Azteca} demonstrates the proper analytical approach courts should use when evaluating same-sex sexual harassment claims. The court acknowledged that \textit{Price Waterhouse} applied in the same-sex harassment context, and recognized that a male same-sex plaintiff could ground a Title VII claim on evidence that he was discriminated against “for acting too feminine.”\footnote{\textit{Azteca}, 256 F.3d at 874-75.} Like most same-sex sexual harassment cases, the evidence in \textit{Azteca} included comments that referenced the plaintiff’s perceived homosexuality.\footnote{\textit{Id}. at 870.} But the court did not accept this evidence at face value. Instead of concluding that the harassment was based on sexual orientation, the court analyzed the conduct in the context that it occurred.\footnote{\textit{Id}. at 874-75. The court noted that plaintiff Sanchez was attacked for having feminine mannerisms. \textit{Id}. at 874. He was mocked for not engaging in sexual intercourse with a female friend, and he was repeatedly reminded that he did not measure up to his co-workers gender-based stereotypes. \textit{Id}.} The court focused on determining the \textit{reason why} the harassers picked on their victim.\footnote{\textit{See id}. at 874-75.} Ultimately, the court concluded that the harassment was “because of sex” since plaintiff was abused for not acting the way his harasser’s thought a man should act.\footnote{\textit{Id}. at 874-75.}

\textbf{D. Pleading Deficiencies}

The only category of post-\textit{Oncale} cases not discussed thus far are courts that implicitly recognize Title VII claims based on gender stereotyping, but dismiss for pleading deficiencies. While the analyses of such courts are not inconsistent with \textit{Oncale} or \textit{Price Waterhouse}, an important point merits discussion: perhaps Justice Thomas’ concurrence in \textit{Oncale} deserves more attention than it has received.

In \textit{Oncale}, Justice Thomas concurred “because the Court stresse[d] that in every sexual harassment case, the plaintiff must \textit{plead} and ultimately prove Title VII’s statutory requirement that there
be discrimination "because of... sex." At least one post-\textit{Oncale} decision has liberally construed pleading requirements in cases involving discrimination based on gender stereotyping. Decisions such as \textit{Bibby} and \textit{Cicotto v. LCOR, Inc.}, however, have dismissed such claims for failing to specifically allege discrimination based on gender stereotypes or failing to allege facts sufficient to establish discrimination "because of sex."

The lesson learned from cases such as \textit{Bibby} and \textit{Cicotto} is simple. When drafting a complaint for same-sex discrimination based on gender stereotyping, an attorney should do a minimum of three things. First, the attorney should allege that the plaintiff was discriminated against "because of sex." Second, the attorney should allege that the reason the plaintiff was harassed was because he did not conform to his harasser’s view of appropriate gender stereotypes. Finally, the attorney should plead the specific facts supporting that the plaintiff was discriminated against based on gender stereotypes.

\textbf{CONCLUSION}

Currently, there are several different approaches courts take when evaluating same-sex sexual harassment claims under Title VII. The disagreement among courts tends to focus on two key areas: the interpretation of "sex," and the appropriate evidentiary methods that plaintiffs may use to prove discrimination "because of sex." As a practical matter, how a court interprets the jurisprudential effect of \textit{Oncale} and \textit{Price Waterhouse} will often be outcome determinative in each particular case.

\textit{Price Waterhouse} supports both a broad interpretation of the word "sex" and that evidence of gender stereotyping can be used to prove

\footnotesize
\begin{itemize}
\item \textit{Oncale}, 523 U.S. at 82 (Thomas, J., concurring) (emphasis added).
\item Schmedding v. Tnemac Co., 187 F.3d 862, 865 (8th Cir. 1999) (noting that "although the complaint [was] not a model of clarity," Schmedding alleged sufficient facts to state a claim for harassment "because of sex"). The court stated that it did not read \textit{Oncale} as establishing a heightened pleading requirement in sexual harassment cases. \textit{Id.} at 865 n.4.
\item Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (declining to consider plaintiff’s claim because he failed to allege that he was harassed because he was a man or that he was harassed because he failed to conform to his gender stereotype), \textit{cert. denied}, No. 01-874, 2002 WL 233415, at *1 (Feb. 19, 2002); \textit{Cicotto}, 2001 WL 514304 at *4-6 (dismissing Title VII claim because the record did not support a claim based on gender stereotyping); \textit{see also} Simonton v. Runyon, 232 F.3d 33, 37-38 (2d Cir. 2000) (declining to address plaintiff’s claim because he failed to plead sufficient facts for consideration of the issue of discrimination based on gender stereotyping).
\end{itemize}
discrimination “because of sex.” The soundest reading of Oncale compels the conclusion that these principles apply with equal force to same-sex discrimination cases. Only when courts accept this concept will Congress’s goal of eliminating arbitrary and capricious discrimination in employment be achieved.

238 See Price Waterhouse, 490 U.S. at 250-51.