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COMMENTS

RE-ORIENTING SEXUAL HARASSMENT: WHY FEDERAL LEGISLATION IS NEEDED TO CURE SAME-SEX SEXUAL HARASSMENT LAW

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* J.D. Candidate, May 2004, *American University, Washington College of Law*; B.S., 1999, *Massachusetts Institute of Technology*. I would like to thank Professor Susan D. Carle for her guidance and assistance with the writing of this Comment. I am also grateful to my editor, Amanda Kueter, whose advice and stewardship through the drafting process was greatly appreciated. Finally, I would like to dedicate this to Ira Hillman for his unending support, encouragement, and, most importantly, patience.

INTRODUCTION

Despite the fact that the U.S. Supreme Court has not directly ruled on the issue, it is a common refrain within employment discrimination law that federal legislation does not conclusively prohibit workplace discrimination on the basis of sexual orientation.[1] Specifically, it is argued that because Title VII of the Civil Rights Act of 1964,[2] the federal legislation that prohibits workplace discrimination, does not include sexual orientation in its enumerated protected classes, discrimination based on sexual orientation is not prohibited. However, Title VII does prohibit both workplace discrimination[3] and harassment[4] against an employee "because of . . . sex."[5] In 1989, the Supreme Court, with *Price Waterhouse v. Hopkins*,[6] concluded that discrimination based on an employee's failure to conform to sex-stereotypes is prohibited.[7] Less than a decade later, the Supreme Court's unanimous decision in *Oncale v. Sundowner*

1. *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("It is clear . . . that Title VII does not prohibit discrimination based on sexual orientation."); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation."); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals.").

2. Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (2000) (prohibiting an employer from discriminating against an employee because of race, color, religion, sex or national origin).

3. *See id.* § 2000e-2(a)(1) (prohibiting an employer from discriminating against an employee with respect to his or her "compensation, terms, conditions, or privileges of employment").

4. *See infra* Part I.C.1 (explaining the judicial development of the sexual harassment cause of action).

5. 42 U.S.C. § 2000e-2(a).

6. 490 U.S. 228 (1989).

7. *See id.* at 255-58 (expanding sex discrimination under Title VII to encompass discrimination based on sex-stereotyping). The Court held that sexually stereotypical remarks are evidence of gender-motivated action. *Id.* at 251. *See infra* notes 50-55 and accompanying text (discussing the Supreme Court's holding in *Price Waterhouse v. Hopkins*).

Offshore Services, Inc.[8] confirmed that same-sex sexual harassment cases are actionable under Title VII.[9] Together, these two cases create the possibility of Title VII relief for homosexual employees[10] who suffer from workplace harassment based on their sexual orientation.[11]

Although the absence of sexual orientation from Title VII's list of protected classes renders explicit sexual orientation discrimination technically legal under Title VII, gay and lesbian employees who suffer harassment in the workplace for failing to satisfy expectations of masculinity or femininity may still find relief under federal law.[12] Discrimination and harassment often are motivated not by a person's sexual partners, but rather by how they are perceived to violate societal sex and gender stereotypes.[13] Because *Hopkins* and *Oncale*

8. 523 U.S. 75 (1998).

9. *See infra* notes 56-71 and accompanying text (detailing the facts and holding of *Oncale*).

10. In this Comment, the term "homosexual" includes lesbian, gay, and bisexual people. The term "homosexual" has historically been used to classify diverse groups of people based on their sexual attraction to members of the same sex. *See, e.g.*, BYRNE FONE, HOMOPHOBIA: A HISTORY 4-5 (2000) (providing the history and common usage of the term "homosexual"). Depending on legal context, the definition of homosexuality changes; an individual's inclusion in the category of homosexual varies as one moves from consideration of sodomy laws to military regulations to adoptions laws. *See* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 948-56 (1989) (detailing the public identity of a "homosexual" through the legal recognition of sexual identities). Given that nearly half of the population engages in sexual activities with members of both sexes in the course of their lives, the term "homosexual" in this Comment will be recognized as a self-identified status, regardless of sexual activity or conduct. *See* ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 656 (1948) (stating that exactly forty-six percent of the population engages in both same-sex and different-sex sexual activities in the course of their adult lives); *see also* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (Robert Hurley trans., Vintage Books 1990) (1978) ("[T]he psychological, psychiatric, medical category of homosexuality was constituted . . . less by a type of sexual relations than by a certain quality of sexual sensibility.").

11. *See infra* notes 72-75 and accompanying text (discussing the practical implications of *Oncale* and *Hopkins* for gay and lesbian employees).

12. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 232-33 (1999) (arguing that there is "no analytic reason" for the Supreme Court not to interpret Title VII to protect gay men and lesbians from workplace discrimination); B.J. Chisholm, Writing Competition, *The (Back)door of* Oncale v. Sundowner Offshore Services, Inc.*: "Outing" Heterosexuality as a Gender-Based Stereotype*, 10 LAW & SEXUALITY 239, 241 (2001) (stating that *Oncale*, by failing to provide guidance to lower courts regarding how to differentiate between sex-based stereotypes and sexual orientation stereotypes, created "an opening of Title VII to actions for discrimination on the basis of sexual orientation."); *see also* Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 100 (2000) (examining the current prospects of relying on the sex discrimination prohibition in Title VII to combat sexual orientation discrimination in the workplace).

13. *See infra* notes 159-63 and accompanying text (discussing how homosexuality violates societal gender norms).

expanded Title VII's statutory proscription of discrimination "because of sex" to the point where it arguably included prohibitions on discrimination because of sexual orientation, many commentators considered both these Supreme Court decisions to be victories for gay men and lesbians.[14] Soon after *Oncale* was delivered, the press widely wrote that the decision would remove the legal barriers that prevent gay men and lesbians from seeking redress for harassment based on their sexual orientation.[15] For example, U.S. News and World Report wrote that *Oncale* "could convert existing sexual harassment doctrine into the rough equivalent of a gay civil rights law."[16]

An analysis of the post-*Oncale* cases demonstrates that, while some circuit and district courts adopt the above logic and find protection for homosexual employees under Title VII, many other courts refuse to accept such reasoning.[17] As a result, the cases are fraught with confusion over how to determine whether an employee is harassed because of his or her sexual orientation, or rather because of his or her sex.[18] Similar facts often result in drastically different legal conclusions, demonstrating that judges are utilizing inconsistent standards.[19] Additionally, some commentators argue that

14. *See, e.g.*, Chisholm, *supra* note 12, at 258 ("The Supreme Court decision in *Oncale* was hailed as a victory for employees and 'for all Americans, gay or straight, male or female.'" (quoting *Sex Ruling Now Hurts Lawsuits*, ADVOCATE (Baton Rouge, LA), Aug. 3, 1999, at 7C)); Sonya Smallets, Oncale v. Sundowner Offshore Services: *A Victory for Gay and Lesbian Rights?*, 14 BERKELEY WOMEN'S L.J. 136, 136-37 (1999) (discussing the reaction to the *Oncale* decision by the public press and gay and lesbian advocacy groups); John Cloud, *Harassed or Hazed?; Why the Supreme Court Ruled That Men Can Sue Men for Sexual Harassment*, TIME, Mar. 16, 1998, at 55 (noting that most gays and lesbians praised the Supreme Court's *Oncale* ruling).

15. *See, e.g.*, David Jackson, *Supreme Court Ruling Allows Lawsuits for Same-Sex Harassment*, DALLAS MORNING NEWS, Mar. 5, 1998, at A1 ("Some attorneys hailed the [*Oncale*] ruling as a major victory for individual rights, including those of gays and lesbians."); Tony Mauro, *Same-Sex Harassment Illegal High Court Rules in Bias Case*, USA TODAY, Mar. 5, 1998, at A1 ("Gay rights groups also applauded the ruling, which could give homosexuals their first tool to challenge harassment in the workplace."); Mary Sanchez & Stacy Downs, *Court Says Laws Apply to Same-Sex Harassment*, KAN. CITY STAR, Mar. 5, 1998, at A1 ("A Supreme Court ruling Wednesday that adds same-sex cases to federal bans against sexual harassment is being lauded as a step toward equal civil rights protections for gays and lesbians."); *Sex of Harasser Irrelevant: Justices Say Conduct, Not Gender, Counts in Workplace*, ROANOKE TIMES & WORLD NEWS, Mar. 5, 1998, at A1 ("Attorneys said the ruling gives gays and lesbians the same weapons to fight bullies that others have had.").

16. John Leo, *The Lawyers Are at it Again*, U.S. NEWS & WORLD REP., Mar. 16, 1998, at 10.

17. *See infra* Part II (analyzing the lower court case law in the aftermath of *Oncale*).

18. *See infra* Part II (showing the confusion that exists in the post-*Oncale* lower court cases).

19. *See infra* Part II (demonstrating the inconsistency of the outcomes in the post-*Oncale* cases).

discrimination based on sex inherently includes discrimination based on sexual orientation.[20] These scholars argue that the definition of sexual harassment analytically includes harassment based on sexual orientation because one's sexual orientation is an indelibly interconnected and intertwined aspect of one's gender.[21]

This Comment proposes that, in order to resolve the judicial confusion over the difference between discrimination because of sex and discrimination because of sexual orientation and to protect both heterosexual and homosexual employees from improper workplace harassment, Congress needs to pass legislation that prohibits employment discrimination on the basis of both actual and perceived sexual orientation.[22] Part I of this Comment details Title VII's legislative history, evolution, and current substantive prohibitions. Part II analyzes the post-*Oncale* cases, and examines the conflict that exists in the current state of the law. Part III discusses the nature of discrimination and bias, illustrating that accepted judicial beliefs concerning discrimination conflict with modern social theories. Part IV of this Comment explains that the Supreme Court is not likely to resolve this issue in a way that benefits victims of sexual orientation harassment. Given these roadblocks, Part IV concludes that new federal legislation, specifically the proposed Employment Non-Discrimination Act ("ENDA"),[23] is the only viable means to protect individuals, regardless of their sexual orientation, from workplace harassment based on traditional concepts of masculinity, femininity, and heterosexuality.

I. THE EVOLUTION OF TITLE VII

A. Title VII's Legislative History

In 1964, Congress enacted Title VII of the Civil Rights Act, which states that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[24]

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20. *See infra* notes 158-68 and accompanying text (detailing the similarities between sexual harassment and sexual orientation harassment).

21. *Infra* notes 158-68 and accompanying text.

22. *See infra* Part IV.B (discussing how federal legislation is needed to cure same-sex sexual harassment law).

23. The Employment Non-Discrimination Act of 2001, S. 1284, 107th Cong. (2001); The Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001).

24. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17, 2000e-2(a) (2000).

While race, religion, and national origin already had a solid foundation in constitutional anti-discrimination law,[25] sex was not previously recognized as a constitutionally prohibited basis of discrimination in areas outside of voting.[26]

The legislative history of Title VII reveals that, late in the debates and with little fanfare,[27] the House passed an amendment adding the word "sex" to the prohibitions referenced in Title VII.[28] Stories abound that Title VII opponents suggested adding what they thought to be a ridiculous provision, namely protecting women to the same extent as racial minorities, in hopes that this would cause the entire bill to be rejected.[29] While some scholars debate the veracity of these stories,[30] it is, nonetheless, evident that members of Congress did not

25. *See* U.S. CONST. amend. XIV, § 1 (providing constitutional protections to all born or naturalized United States citizens regardless of race); *id.* amend. I (protecting against governmental establishment of religion); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (equating national origin and race by holding that exclusion from jury selection because of national origin violated the Fourteenth Amendment).

26. *See* U.S. CONST. amend XIX, § 1 (amending the Constitution to protect women's right to vote). *But see* Hoyt v. Florida, 368 U.S. 57, 61 (1961) (holding that women could rationally be excluded from juries in criminal cases). In fact, it was not until the 1971 case of *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating a law giving preference to men over women in administering estates), that the Supreme Court included sex discrimination within the auspices of the Equal Protection Clause of the Fourteenth Amendment, and there in narrower circumstances than racial discrimination.

27. *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971) [hereinafter *Developments in the Law*] (detailing the legislative history of Title VII and stating that, in the contemporary view of the author, the inclusion of the word "sex" into Title VII was not debated in any great depth or length).

28. While debating Title VII, Congress amended the bill to include "sex" during a two-hour floor discussion only two days before the House sent the bill to the Senate. Such an amendment was never considered during months of committee hearings. 110 CONG. REC. 2577-84 (1964); *see also Developments in the Law*, *supra* note 27, at 1167 ("The passage of the amendment, and its subsequent enactment into law, came without even a minimum of congressional investigation into an area with implications that are only beginning to pierce the consciousness and conscience of America."). *See generally* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163, 163 (1991) (discussing the history of the inclusion of "sex" in Title VII prohibitions).

29. *See* BARBARA WHALEN & CHARLES WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 234 (1985) (stating that the addition of the term "sex" to Title VII is popularly interpreted as "the result of a deliberate ploy by foes of the bill to scuttle it"). While the bill was being debated on the House floor, Representative Howard W. Smith of Virginia allegedly proposed the one-word amendment to "clutter up" Title VII, so that it would never pass at all. 110 CONG. REC. 2581 (1964) (statement of Congresswoman Edith Green). According to historians, this sparked humorous debate on the topic and prompted some to dub the debate "Ladies' Day in the House." Freeman, *supra* note 28, at 163.

30. *See* Freeman, *supra* note 28, at 165 (arguing that, while the inclusion of "sex" into the language of Title VII was not well-debated, it was far from an "accidental breakthrough"); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J.

fully realize or consider the implications of Title VII's sex discrimination provisions at the time it was passed.[31] This uncertainty surrounding Congress's intentions forced administrative agencies to develop their own guidelines[32] and federal courts to determine the allowable reach of Title VII's prohibition of sex discrimination.[33]

B. Sexual Orientation Discrimination and Title VII

Currently, all lower federal courts that have addressed the issue agree that Title VII does not prohibit discrimination based solely on sexual orientation.[34] Indeed, a plaintiff who brings a Title VII claim alleging that he or she was a victim of discrimination "because of sexual orientation" is practically certain to fail.[35] As commentators have noted, even courts that are willing to protect homosexual plaintiffs under legal theories other than Title VII still refuse to allow any explicit sexual orientation claim to succeed under Title VII.[36]

WOMEN & L. 137, 137 (1997) (presenting information about the political strategies behind the adoption of "sex" into the Civil Rights Act of 1964 to support the argument that it was not added to the Civil Rights Act by opponents as a political ploy, but rather out of subtle political maneuvering by its proponents).

31. *See* Mary C. Manemann, *The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 NW. U. L. REV. 612, 639 (1989) (stating that Congress provided very little guidance regarding what constitutes discrimination because of sex); *see also* JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO POLICY PROCESS 54 (1975) (stating that the Equal Employment Opportunity Commission (EEOC), the agency created to enforce Title VII, viewed the sex amendment as a "fluke" that was "conceived out of wedlock").

32. Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,926 (Dec. 2, 1965) (codified as amended at 29 C.F.R. pt. 1604) (listing the Equal Employment Opportunity Commission's interpretations of Title VII's prohibitions on discrimination in employment because of sex).

33. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64-72 (1986) (developing the hostile work environment cause of action, which had no explicit legislative basis).

34. *See* Varona & Monks, *supra* note 12, at 102-26 (stating that not a single judge has accepted a Title VII claim based explicitly on a sexual orientation theory).

35. *See* I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1176 (1991) (showing that courts have not accepted Title VII charges of discrimination based on sexual orientation); Chisholm, *supra* note 12, at 255 ("Title VII has been interpreted by the courts to bar almost any claim of discrimination on the basis of sexual orientation."); Angela Gilmore, *Employment Protection for Gay Men and Lesbians*, 6 LAW & SEXUALITY 83, 96 (1996) (stating that claims alleging discrimination on grounds of sexual orientation have met with little success); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3 (1992) ("It has been firmly established that employment decisions and practices which discriminate on the basis of sexual orientation are not illegal under Title VII."); Varona & Monks, *supra* note 12, at 100-01 (suggesting that, despite arguments that sex and sexual orientation are intertwined, federal courts will almost undoubtedly dismiss a claim explicitly brought under the notion that sexual orientation is included within the statutory meaning of the word "sex").

36. Varona & Monks, *supra* note 12, at 99-100; *see, e.g.*, Doe v. City of Belleville,

Courts predominantly cite two reasons when refusing to extend Title VII coverage to include sexual orientation discrimination.[37] First, courts often conclude that protecting gay men and lesbians from discrimination falls outside Congress's intent in passing Title VII.[38] Second, courts cite the "plain meaning rule" to deny relief, asserting that the ordinary meaning of "sex" precludes coverage of sexual orientation.[39] Interestingly, courts that rely on the "plain meaning rule" typically fail to define what exactly is included in the ordinary meaning of the term "sex."[40]

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119 F.3d 563, 593 n.27 (7th Cir. 1997) (declining to accept that sexual orientation discrimination is covered by Title VII, but stating that "[t]here is, of course, a considerable overlap in the origins of sex discrimination and homophobia [and] it is not always possible to rigidly compartmentalize the types of bias that [anti-gay] epithets represent").

37. *See* Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory In the Realm of Employment Discrimination*, 6 AM. U. J. GENDER SOC. POL'Y & L. 333, 336-42 (1998) (examining the explanations that courts have employed in refusing to expand the definition of sex discrimination under Title VII, and concluding that these reasons are unfounded).

38. *See, e.g.*, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (stating that an examination of legislative history of Title VII led the court "to the concrete conclusion that Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females" and not to prohibit discrimination because of sexual orientation); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977) ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning."). *But see* Schroeder, *supra* note 37, at 339-40 (arguing that, because of the lack of any clear record regarding what Congress actually intended, judicial reliance on congressional intent is a poor explanation for denying protection against sexual orientation discrimination). Schroeder also attacks the common practice of many courts of relying on congressional failure to amend Title VII to show that the statute did not cover the conduct in question. *See id.* (citing United States v. Price, 361 U.S. 304, 313 (1960), which states that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). Congress specifically rejected an amendment to Title VII that would have placed the word "solely" in front of the words "because of," further suggesting that subsequent legislative history is not definitive. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 n.7 (198) (citing 110 CONG. REC. 2728, 13837 (1964)).

39. *See* Schroeder, *supra* note 37, at 337 (stating that many courts, in the absence of clear congressional intent, often look to the ordinary meaning of the words of Title VII when deciding to deny protection to homosexual plaintiffs); *see also* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) ("It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.") (citations omitted); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("[F]or the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise."); *cf.* Varona & Monks, *supra* note 12, at 123 (suggesting that gay plaintiffs seeking redress in the courts should cite *Oncale* and other Supreme Court precedent for the notion that congressional intent does not prevent courts from expanding on the commonly-accepted definition of "sex").

40. *See* Schroeder, *supra* note 37, at 337 (stating that the only case wherein the court attempted to elaborate on what is included in the ordinary meaning of sex was

C. *The Supreme Court's Interpretation of Title VII's Prohibition of Discrimination Because of Sex*

1. *Sexual harassment and Title VII*

In 1976, for the first time, a lower federal court recognized that Title VII allowed a "sexual harassment" cause of action.[41] There, the plaintiff successfully sued her employer after she was fired for refusing to have sex with him.[42] Since then, lower courts have allowed sexual harassment claims under two different legal theories.[43] The first is "quid pro quo" discrimination, wherein the employer denies an "economic" benefit to an employee because of the employee's refusal to have a sexual or social relationship with the employer.[44] This type of sexual harassment comports with the Supreme Court's initial characterization of Title VII as a means to prevent the erection of tangible, economic barriers by invidious discrimination.[45] The second legal theory for sexual harassment claims is the "hostile work environment," wherein non-economic discrimination is involved.[46] In 1986, the Supreme Court confirmed that Title VII prohibited both forms, making economic consequences non-dispositive for determining whether actionable harassment occurred.[47]

Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977), which limited the definition to only "traditional notions" of the word).

41. *See* Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) (holding that the retaliatory actions of a male supervisor, taken because the female employee had declined his sexual advances, constituted sex discrimination under Title VII); *see also Sexual Harassment–Hostile Work Environment*, 100 HARV. L. REV. 276, 276 (1986) [hereinafter *Sexual Harassment*] (discussing the evolution of liability for sexual harassment under Title VII and the origins of the "hostile work environment" cause of action).

42. *Williams*, 413 F. Supp. at 655-60 (discussing the facts of the case and holding that the plaintiff had a viable cause of action under Title VII).

43. *See Sexual Harassment*, *supra* note 41, at 277 (stating that, since 1976, courts have recognized two separate avenues of legal attack available to plaintiffs bringing sexual harassment claims); BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 759-79 (3d ed. 1996) (providing a detailed summary of the law of quid pro quo sexual harassment claims).

44. *See generally* Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307, 314-17 (1998) (recounting the development of the quid pro quo form of sexual harassment).

45. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136, 152 n.6 (1977) (Powell, J., concurring) (stating that "essential equality in *compensation* for comparable work is at the heart of" Title VII); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (stating that Congress enacted Title VII because of concern over the "legal injuries of an economic character occasioned by racial or other antiminority discrimination").

46. *See* LINDEMANN & GROSSMAN, *supra* note 43, at 780-836 (detailing the growing jurisprudence of the "hostile work environment" legal theory).

47. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). For non-economic discrimination to be actionable, however, the harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

In 1995, the Supreme Court further expanded Title VII by rejecting the theory that only official decisions of the employer would subject him or her to liability.[48] Instead, the Supreme Court held that unwelcome sexual advances and comments from both the employer and the victim's supervisors were actionable under Title VII.[49]

2. Price Waterhouse v. Hopkins

In *Price Waterhouse v. Hopkins*,[50] the Supreme Court concluded that the prohibition on discrimination "because of sex" included discrimination against a woman for her failure to comply with societal expectations of femininity.[51] Plaintiff Ann B. Hopkins, a female senior manager in the defendant's accounting company, sued after being advised that she had to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" if she wished to become a partner of the firm.[52] In the Court's opinion, the critical inquiry for determining whether unlawful employment discrimination occurred was whether "gender was a factor" in the employment decision.[53] Writing for the

working environment." *Id.* at 67. In determining that non-economic discrimination is included within the scope of Title VII, the Supreme Court relied heavily upon the EEOC Guidelines, which specify that conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" constitutes sexual harassment. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (2002); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (holding that, in order to create an actionable claim of "hostile work environment," the workplace must be permeated with discriminatory intimidation, ridicule, and insult that alters the conditions of the victim's employment).

48. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) (holding that an employer is vicariously liable under Title VII to a victimized employee for actionable sexual harassment caused by a supervisor); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 766 (1998) (subjecting employer to vicarious liability for an actionable hostile work environment created by a supervisor with authority). The Supreme Court delivered *Faragher* and *Ellerth* on the same day. *See* Linda Greenhouse, *The Supreme Court: The Workplace; Court Spells Out Rules For Finding Sex Harassment*, N.Y. TIMES, June 27, 1998, at A1 (reporting on the pair of 7-to-2 Supreme Court decisions regarding sexual harassment that were delivered on the final day of the Court's 1997 term).

49. *See Faragher*, 524 U.S. at 780 (reasoning that an employer is held vicariously liable under Title VII where the misconduct by a supervisor is made possible by the existence of his supervisory authority).

50. 490 U.S. 228 (1989).

51. *Id.* at 231-35. *See generally* Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1107-63 (1991) (assessing the implication of *Hopkins* on Title VII disparate treatment cases).

52. *Hopkins*, 490 U.S. at 235.

53. *Id.* at 241. Throughout the opinion, Justice Brennan uses the words "sex" and "gender" interchangeably. For example, Justice Brennan wrote that the Court takes the words "because of sex" to mean "that gender must be irrelevant to employment decisions." *Id.* at 240. *See also* Mary Anne C. Case, *Disaggregating Gender*

majority, Justice Brennan explained that employment decisions based on sex-stereotypes are actionable under Title VII because "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[54] Brennan concluded that Congress, with Title VII, intended to strike at the "entire spectrum of disparate treatment of men and women resulting from sex-stereotypes."[55]

3. Oncale v. Sundowner Offshore Services, Inc. *and Same-Sex Sexual Harassment*

In 1998, nine years after *Hopkins*, the Supreme Court addressed the issue of whether same-sex sexual harassment is actionable under Title VII in *Oncale v. Sundowner Offshore Services, Inc.*[56] Joseph Oncale, a male oil-rigger, filed a Title VII sexual harassment claim against his former employer and several co-workers, alleging that his co-workers physically assaulted him in a sexual manner and threatened him with rape.[57] Relying on Fifth Circuit precedent, the District Court held,

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From Sex And Sexual Orientation: The Effeminate Man In The Law And Feminist Jurisprudence, 105 YALE L.J. 1 (1995) (explaining how the language of the law conflates sex and gender, why it is important to distinguish between the two, and what relationships they can be seen to have to one another and to sexual orientation).

54. *Hopkins*, 490 U.S. at 250.

55. *Id.* at 251.

56. 523 U.S. 75, 76 (1998). Prior to *Oncale*, the circuits were divided on the issue of same-sex sexual harassment. Four distinct legal conclusions regarding same-sex sexual harassment existed. First, same-sex sexual harassment claims were never actionable under Title VII. *See* Garcia v. ELF Atochem N. Am., 28 F.3d 446 (5th Cir. 1994) (finding that Title VII only deals with gender discrimination). Second, same-sex sexual harassment claims were actionable under Title VII when the perpetrator was gay or motivated by sexual desire for the victim. *See* Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 446 (6th Cir. 1997) (pointing out that EEOC Guidelines explicitly provide for same-sex sexual harassment claims under Title VII); Fredette v. BVP Mgmt. Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997) (holding that a claim of gender discrimination lies where a homosexual male supervisor solicits sexual favors and conditions work benefits or detriments on receiving such favors from a male subordinate); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996) (explaining that a hostile environment claim fails where the victim and harasser are heterosexuals and of the same sex). Third, same-sex sexual harassment claims were actionable even when the harassment was not sexual in nature, and sexual orientation was not an issue. *See* Quick v. Donaldson Co., 90 F.3d 1372, 1377 (8th Cir. 1996) (finding that the broad rule of equality in the workplace encompasses a wide range of dissimilar treatment of men and women). Fourth, same-sex sexual harassment was only actionable when explicit sexual conduct was involved, regardless of the sexual orientation of the parties. *See* Doe v. Belleville, 119 F.3d 563, 587 (7th Cir. 1997) (pointing out that a plaintiff need only show that the sexual content of the harassment was pervasive in order to establish that he or she has been discriminated against because of sex); *see also* Ramona L. Paetzold, *Same-Sex Sexual Harassment: Can It Be Sex-Related for Purposes of Title VII?*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 25, 29-36 (1997) (discussing the pre-*Oncale* legal landscape).

57. *Oncale*, 523 U.S. at 77. Oncale alleged that his co-workers restrained him while his supervisor placed his penis on Oncale's neck and arm. Oncale v.

and the Fifth Circuit affirmed, that Oncale, as a man, had no Title VII cause of action for harassment by male co-workers.[58]

Justice Scalia, writing for a unanimous Court, reversed and held that Title VII reaches same-sex sexual harassment.[59] While, according to Justice Scalia, Congress did not primarily intend Title VII to combat male-on-male sexual harassment, he reasoned that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . . ."[60] Scalia wrote that courts considering Title VII's prohibitions of sexual harassment should focus on the substance of the harassment, not the attributes of the harassers,[61] analogizing to a racial discrimination case in which the Supreme Court rejected the presumption that employers would not discriminate against a member of their own race.[62]

Justice Scalia did emphasize, however, that plaintiffs must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimination . . . because of . . . sex."[63] Clarifying this point, Justice Scalia noted that Title VII is not meant to be a "general civility code" for the American workplace.[64] Furthermore, the opinion outlined the types of proof that a same-sex sexual harassment plaintiff might provide to demonstrate that the harassment is "because of sex."[65] While the first type of proof is evidence of sexual desire, Justice Scalia explicitly indicated that all harassment need not be sexual in order to fall within the scope of Title VII.[66] For example, a plaintiff might show that the harasser is motivated by a "general hostility" toward members

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Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998). Oncale was also called names "suggesting homosexuality." *Oncale*, 523 U.S. at 77. After a co-worker held Oncale so that his supervisor could force a bar of soap up his anus, Oncale quit and instituted his federal lawsuit. *Oncale*, 83 F.3d at 118-19.

58. *Oncale*, 83 F.3d at 118.

59. *See Oncale*, 523 U.S. at 82 (noting that Title VII forbids objectively offensive behavior that is severe enough to alter an individual's working environment, and that an inquiry into whether this behavior existed should be judged from the plaintiff's position, considering all relevant circumstances).

60. *Id.* at 79.

61. *See id.* at 80 (stating that Title VII's prohibitions on sexual harassment extend to all actions that meet the statutory requirements, i.e., affecting the terms and conditions of employment).

62. *See id.* at 78 (citing Castaneda v. Partida, 430 U.S. 482, 499 (1977), which held that it cannot be presumed as a matter of law that human beings of a particular group will not discriminate against other members of the same group).

63. *Id.* at 79-80.

64. *Id.* at 81.

65. *Id.* at 80-81.

66. *See id.* at 80 (finding that the critical issue in Title VII cases is whether harassing conduct is experienced by members of one sex and not by members of the other sex).

of his or her own sex.[67] Additionally, a plaintiff in a mixed-sex workplace could offer "specific evidence indicating the harasser's disparate treatment of men and women."[68]

Importantly, there is no mention in the opinion regarding Joseph Oncale's sexual orientation.[69] By avoiding the topic of his sexual orientation, the *Oncale* opinion never answers whether same-sex sexual harassment can include harassment based not simply upon the plaintiff's sex, but also upon his or her sexual orientation.[70] This ambiguity has left the burden on the lower courts to interpret *Oncale* and determine exactly where the boundary lies between sex and sexual orientation.[71]

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67. *Id.*

68. *Id.* at 80-81. Some commentators argue that these three routes impose a higher evidentiary burden for claims of same-sex sexual harassment than for claims where the harasser is a member of the opposite sex. *See* Kiren Dosanjh, *Calling on* Oncale*: Federal Courts' Post-*Oncale *Approach to the "Evidentiary Routes" to the Discriminatory Intent in Title VII Same-Sex Sexual Harassment Claims*, 33 URB. LAW. 547, 559 (2001) (arguing that *Oncale* created a higher evidentiary standard for same-sex sexual harassment claims by requiring discriminatory animus). *But see supra* notes 115-20 and accompanying text (discussing how the Third Circuit rejected the plaintiff's argument in *Bibby v. Phila. Coca Cola Bottling Co.* that *Oncale* created a higher evidentiary burden for claims of same-sex sexual harassment).

69. *Oncale*, 523 U.S. at 77 (discussing Oncale's claim and Title VII's prohibition against discrimination because of sex without discussing whether Oncale's sexual orientation was relevant). Specifically, Scalia wrote that the "precise details are irrelevant to the legal point we must decide, and in the interest of both brevity and dignity we shall describe them only generally." *Id.* at 76-77.

70. *See id.* at 80 (1998) (listing the methods that a fact-finder "might" use to find that same-sex sexual harassment actually occurred, indicating that the methods are not intended to be exhaustive or exclusive).

71. The media reaction to the *Oncale* decision indicates that *Oncale* was originally interpreted as a pro-plaintiff ruling. *See, e.g.*, *A Harassment Loophole Closed*, BOSTON GLOBE, Mar. 7, 1998, at A10 (noting that the Supreme Court's ruling that same-sex sexual harassment violates Title VII increased civil rights); Jan Crawford Greenburg, *Harassment Ban Expanded; High Court Gives Same-Sex Cases Equal Protection*, CHI. TRIB., Mar. 5, 1998, at N1 (stating that the Supreme Court decision "will significantly expand protection from sexual harassment"). However, the effects of *Oncale* have actually been rather pro-defendant. *Oncale* is mostly cited by lower courts for the notion that Title VII is not a "general civility code," and that not all unwelcomed sexual conduct is harassment. *See, e.g.*, Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1125 (D.C. Cir. 2002) (finding that a "preposterously broad" interpretation of Title VII would convert the statute from a law intended to eliminate discrimination to a law that imposes a general civility code within the workplace); Sprenger v. Fed. Home Loan Bank, 253 F.3d 1106, 1113 (8th Cir. 2001) (stating that isolated comments are not enough to offend Title VII, "lest the law become a general civility code"); Bickerstaff v. Vassar Coll., 196 F.3d 435, 452 (2d Cir. 1999) (affirming a district court's dismissal of a racial discrimination claim because Title VII is not a "general civility code").

II. INCONSISTENT TREATMENT OF VICTIMS OF SEXUAL ORIENTATION HARASSMENT IN THE WORKPLACE

A. Possibility of Relief for Victims of Sexual Orientation Harassment

In the wake of *Oncale*, many commentators argued that the combination of *Oncale* and *Hopkins* created the possibility of successful claims by gay and lesbian employees alleging workplace discrimination perpetrated by members of the same sex.[72] Prior to *Oncale*, homosexual victims of workplace harassment were often precluded from using *Hopkins* to their advantage because the harassers were either of the same sex as the employee or were not motivated by sexual desire.[73] *Oncale* removed this barrier to relief.[74] To be successful, however, plaintiffs bringing these types of claims need to convince the court that the harassment occurred because of sex, or more specifically because of a failure to conform to sex-stereotypes, and not because the plaintiff is actually or perceptually a homosexual.[75]

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72. *See* ESKRIDGE, JR., *supra* note 12, at 232 (noting that *Oncale* may reopen, at the lower federal court level, the question of whether harassment based on sexual orientation is actionable); *see also* Chisholm, *supra* note 12, at 264 (arguing that heterosexuality is a sex-based stereotype, and therefore discrimination on the basis of sexual orientation should be actionable under Title VII). In a similar context, the Seventh Circuit and the Department of Education found that prohibitions on sex discrimination extend to cover an educational institution's failure to provide relief to gay students harassed by classmates. *See* Nabozny v. Podlesny, 92 F.3d 446, 460-61 (7th Cir. 1996) (holding that the Equal Protection Clause of the Fourteenth Amendment allowed for claims alleging discrimination based on sexual orientation); Dep't of Educ., Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997) (stating that sexual harassment directed at gay or lesbian students may constitute harassment prohibited by Title IX).

73. *See, e.g.*, McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that same-sex harassment did not amount to a violation of Title VII in the absence of quid pro quo sexual advances); Garcia v. ELF Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that any harm suffered by a male employee as result of alleged sexual harassment by a male supervisor was not redressable under Title VII); Torres v. Nat'l Precision Blanking, 943 F. Supp. 952, 961-62 (N.D. Ill. 1996) (granting summary judgment against male employer after concluding that extending Title VII to include same-gender sexual harassment claims is within the power of the legislature, and not the court); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331-32 (9th Cir. 1979) (dismissing a consolidated suit with many homosexual plaintiffs and holding that Title VII's prohibition of "sex" discrimination should not be judicially extended to include sexual preference such as homosexuality).

74. *See supra* notes 56-71 and accompanying text (discussing the holding in *Oncale*).

75. *See* Verona & Monks, *supra* note 12, at 121-27 (detailing the litigation strategies that gay plaintiffs should adopt to increase the potential for a positive judicial result).

In the aftermath of *Oncale*, courts dismissed many same-sex sexual harassment cases that failed to rely on *Hopkins*' sex-stereotyping theory.[76] Thus, given *Oncale*'s failure to specifically deal with the issue of sexual orientation harassment, the success of a Title VII claim will depend on whether the presiding judge is convinced that the discrimination occurred because of sex and not because of sexual orientation.[77]

The following sections discuss the successes and failures of plaintiffs who attempted to argue that Title VII's prohibitions against sex discrimination analytically include claims of sexual orientation harassment. In comparison of both the favorable and unfavorable cases,[78] and in consideration of relevant social theories and public policy,[79] it becomes evident that current Title VII sexual orientation jurisprudence is, in the words of one professor, a "complete mess."[80]

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76. *See, e.g.*, Norris v. Diakin Drivetrain Components, No. 02-5393, 2002 WL 31096744, at *2 (6th Cir. Sept. 18, 2002) (holding that an employee's EEOC charge alleging discrimination based on sexual orientation did not give the district court subject matter jurisdiction over claim of same-sex sexual harassment); Ciccotto v. LCOR, Inc., No. 99 CIV. 11646(RMB), 2001 WL 514304, at *45 (S.D.N.Y. Jan. 31, 2001) (recommending dismissal when plaintiff failed to explicitly allege sex-stereotyping claim, and the evidence did not support inferring such a claim); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999) (affirming the district court's grant of summary judgment for the defendant and finding that the plaintiff failed to present a developed argument regarding harassment based on gender stereotyping instead of sexual orientation). Recent cases, however, suggest courts will allow gay employees' cases to proceed with discovery when plaintiffs frame their complaints as same-sex sexual harassment based on the employee's failure to conform to sex-stereotypes. *See, e.g.*, Ianetta v. Putnam Invs., Inc., 142 F. Supp. 2d 131, 134 (D. Mass. 2001) (denying defendant's motion to dismiss because gay employee had stated an actionable claim by framing his complaint as one based on harassment due to his failure to conform to gender stereotypes); Samborksi v. W. Valley Nuclear Servs., Co., No 99-CV-0213E(M), 1999 WL 1293351, at *4 (W.D.N.Y. Nov. 24, 1999) (rejecting the argument that the gravamen of plaintiff's sexual harassment suit was one of sexual orientation harassment, and concluding that, because of the traditionally male-oriented nature of Samborksi's work as a nuclear power technician, the insulting remarks very well may have been based on her sex); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999) (concluding that "simply because some of the harassment alleged by Schmedding include[d] taunts of being homosexual or other epithets connoting homosexuality, the complaint is [not] thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation.").

77. *Cf.* Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 845-46 (2002) (discussing the inherent subjectivity in determining whether sexual harassment has occurred).

78. *See infra* Part II.B-C (analyzing the post-*Oncale* cases).

79. *See infra* Part III (discussing the sociology of sexual orientation harassment).

80. Interview with Susan D. Carle, Associate Professor of Law, American University, Washington College of Law, in Washington, D.C. (June 10, 2002).

B. Analysis of Successful Cases

This section analyzes a few demonstrative cases in which courts have ruled favorably for homosexual plaintiffs bringing Title VII sexual harassment claims. Utilizing *Hopkins*-oriented arguments, with the facts framed to support such arguments, the following plaintiffs were able to convince the courts that their allegations merited protection under the law.

In *Heller v. Columbia Edgewater Country Club*,[81] the female plaintiff openly dated another woman, without attempting to hide that fact from her co-workers.[82] Her boss, who "harbored strong biases against homosexuals," made insulting comments about Heller's sexual orientation on a daily basis.[83] When Heller complained about these insults to the general manager, she was fired.[84] After Heller filed a lawsuit in federal court, the defendants moved for summary judgment, arguing that Title VII was inapplicable because the discrimination was clearly based on Heller's sexual orientation and did not fall within the "because of sex" requirement of Title VII.[85] The court denied the motion, concluding that a jury could find that the defendant "would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman."[86] The court held that Heller was entitled to the same treatment as heterosexual employees, and the fact that she was a lesbian did not excuse the sexual harassment that allegedly occurred.[87] In denying the motion for summary judgment, the *Heller* court focused on the fact that harassment actually occurred, and not the subjective beliefs of the employer regarding the victim's sexual orientation.[88]

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81. 195 F. Supp. 2d 1212 (D. Or. 2002).

82. *See id.* at 1217 (stating that Heller openly discussed her girlfriend during normal conversations).

83. *Id.*

84. *See id.* at 1220 (discussing the fact that, although the employer explained that she fired Heller for her use of inappropriate language and inability to be a team player, other evidence and testimony challenged the validity of those assertions).

85. *Id.* at 1222.

86. *Id.* at 1223.

87. *See id.* at 1222-23 (stating that claims within the purview of Title VII are not limited to sexual harassment by members of the opposite sex). *But see* Stephen J. Nathans, *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, 736 (2001) (arguing that sex stereotyping claims brought by male employees are significantly less successful than similar claims brought by female employees).

88. *See Heller*, 195 F. Supp. 2d at 1223 (noting that the abuse Heller endured was offensive and greatly affected her working environment, even if her employer's offensive conduct was not motivated by sexual desire).

In addition, the Ninth Circuit recently delivered two opinions that greatly increased the possibility that gay men and lesbians will find protection under Title VII. In *Nichols v. Azteca Restaurant Enterprises, Inc.*,[89] Mr. Sanchez, a male employee sued his former employer for sexual harassment, alleging that his male co-workers and his supervisor harassed him because he did not meet their expectations on how a man should act.[90] Sanchez was attacked for walking and carrying his tray "like a woman," derided for not having sexual intercourse with a waitress who was his friend, and repeatedly told by male co-workers and one of his supervisors that he did not act like a man.[91] Following a bench trial, the district court entered judgment for the employer.[92] Sanchez appealed, and the Ninth Circuit reversed, holding that the abuse fell within Title VII's prohibitions on harassment "because of sex."[93] The court noted that, "[a]t its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act."[94] Relying heavily upon *Hopkins*, the circuit court concluded that the verbal abuse was closely linked to sex-stereotypes, and therefore Title VII was applicable.[95]

Another recent Ninth Circuit opinion, *Rene v. MGM Grand Hotel Inc.*,[96] held that all physical assaults of a sexual nature are prohibited under Title VII, regardless of the sexual orientation of the parties involved.[97] The en banc opinion reversed a prior panel decision[98] and concluded that the harassment suffered by the plaintiff, consisting of

89. 256 F.3d 864 (9th Cir. 2001).

90. *See id.* at 869 (explaining that Sanchez believed he was harassed because he was effeminate).

91. *Id.* at 870. Specifically, Sanchez was referred to, in Spanish and in English, as "she" and "her," and was repeatedly harassed with taunts including "faggot" and "fucking female whore." *Id.* These attacks occurred at least once a week, and often several times a day. *Id.*

92. *Id.* at 871 (summarizing the district court's holding, which concluded that Sanchez's work environment was neither objectively nor subjectively hostile, and that the alleged harassment did not take place "because of sex").

93. *Id.* at 875, 877.

94. *Id.* at 874.

95. *See id.* at 875 (holding that plaintiff Sanchez established each element of his hostile environment claim: that his workplace was objectively and subjectively offensive; that a reasonable person would find it hostile or abusive; and that the victim in fact perceived it to be so).

96. 305 F.3d 1061 (9th Cir. 2002) (en banc) (plurality opinion).

97. *Id.* at 1063 (noting that five judges signed the plurality opinion and three judges signed a concurring opinion which reached the same result as the plurality but under a different rationale). Taken together, these two opinions constituted a majority of the en banc panel, and collectively resulted in the reversal of the district court opinion. *Id.* at 1068.

98. *See* Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (2001) (panel) (holding that harassment of an employee based upon his sexual orientation was not actionable sexual harassment).

being grabbed in the crotch, poked in the anus, and subjected to pictures of men having sex, fell within the purview of Title VII.[99] A concurring opinion compared the facts of this case to both *Hopkins* and *Nichols* and argued that Rene's case similarly amounted to actionable sex-stereotyping harassment.[100] While the sex-stereotyping argument failed to gain enough support among the en banc judges to have the weight of law, *MGM Grand Hotel, Inc.* clearly rejects the argument that any Title VII action will be defeated merely because the employer is motivated by the fact that the plaintiff is homosexual.[101]

By deflating the distinctions between sex and sexual orientation and making it more difficult for employers to escape liability merely because the victim is gay, these cases provide hope to homosexual employees. Sometimes, homosexual plaintiffs who are harassed and mistreated can receive protection from the law, provided they use proper reasoning and support for the case. Unfortunately, the argument that Title VII can be used to protect gay and lesbian victims of workplace discrimination is not uniformly accepted.[102] Many judges are not willing to support an interpretation of Title VII that would provide the possibility of relief for the victims of homophobic harassment in the workplace.[103]

C. Analysis of Unsuccessful Cases

Further analysis of lower court cases demonstrates that judges will often dismiss Title VII claims when the employee is homosexual. These courts conclude that, if the victim of harassment is homosexual, he or she is not protected because federal law does not protect sexual orientation.[104] For example, in a recent federal district court case in New York, the judge rejected a gay plaintiff's Title VII

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99. *See MGM Grand Hotel, Inc.*, 305 F.3d at 1067 (finding a "fairly straightforward sexual harassment claim," even when viewing the facts most favorably to the nonmoving party).

100. *See id.* at 1068-69 (stating that the similarities between this case and *Nichols* are remarkable; in both cases a gay male employee was made fun of by his male co-workers for walking like a woman and was referred to in female terms).

101. *Id.* at 1068 (stating that Title VII "prohibits [physical conduct of a sexual nature] without regard to the sexual orientation—real or perceived—of the victim").

102. *See infra* notes 104-22 and accompanying text (demonstrating that courts often reject properly pled Title VII claims by homosexual employees alleging sexual harassment).

103. *Infra* notes 104-22 and accompanying text.

104. *See* Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2(a) (2000) (granting protected status only to race, color, religion, sex, and national origin); *see also* ESKRIDGE, JR., *supra* note 12, at 231-33 (noting federal law offers no protection to gays and lesbians against employment discrimination).

claim because he felt that the plaintiff was trying to "bootstrap" sexual orientation claims onto sexual harassment laws and create a backdoor to Title VII protections.[105] This judicial fear that gay men and lesbians are attempting to hoodwink the courts into providing Title VII relief is not uncommon. The following cases are two examples of the common view that Title VII should not protect gay and lesbian employees from workplace harassment.

The Second Circuit began its opinion in *Simonton v. Runyon*[106] by acknowledging "the appalling persecution [plaintiff] Simonton allegedly endured," and conceding that the conduct engaged in by the defendants is "morally reprehensible whenever and in whatever context it occurs."[107] Simonton's co-workers, who knew of his sexual orientation, repeatedly harassed Simonton with incredibly offensive questions and comments relating to his sexual orientation.[108] When he filed his lawsuit, there was no doubt that Simonton, using the relevant *Hopkins* line of cases, properly alleged discrimination because of sex and not discrimination because of sexual orientation.[109] Nevertheless, the court held that there was no factual reason to conclude that the harassment Simonton suffered was due to his sex, and not his sexual orientation.[110] "Accepting as true all the facts that Simonton has pled, the only inference we can draw is that he was harassed because of his sexual orientation."[111] Accordingly, the court affirmed the district court's dismissal of plaintiff's complaint.[112] The *Simonton* court distinguished *Hopkins* by stressing that Simonton was known to be a gay man, and there was neither evidence that he behaved in a stereotypically feminine manner nor evidence that he endured harassment because of his nonconformity

105. *See* Martin v. N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434, 446 (N.D.N.Y. 2002) (holding that the plaintiff, a gay prison guard, failed to prove that he is effeminate, and therefore could not argue that he was sexually harassed because he failed to adhere to "gender stereotypes"). The judge called the harassment that the plaintiff suffered in *Martin* "reprehensible," but dismissed the lawsuit on the grounds that plaintiff was targeted based on his sexual orientation, not his sex. *Id.* at 446-47.

106. 232 F.3d 33 (2d Cir. 2000).

107. *Id.* at 35.

108. *See id.* (noting some of the comments made to the plaintiff, including: "go fuck yourself, fag," "suck my dick," and "so you like it up the ass?" as well as repeated acts of insulting notes placed in the work restroom and pornographic photographs posted on plaintiff's desk).

109. *See id.* at 37 (stating that Simonton alleged that he was the victim of sex-stereotyping and properly relied upon *Hopkins* to support this contention).

110. *See id.* at 38 (stating that Simonton's allegations were, at best, conclusory and did not have any factual evidentiary support).

111. *Id.* at 37.

112. *Id.* at 38.

with gender norms, instead of his sexual orientation.[113] Remarkably, plaintiffs alleging sexual harassment claims committed by members of the opposite sex do not need to present similar evidence.[114]

The plaintiff in the Third Circuit's *Bibby v. Philadelphia Coca Cola Bottling Co.*[115] argued that *Oncale* implicitly imposes heightened evidentiary requirements on gay and lesbian plaintiffs—requirements not imposed on heterosexual plaintiffs—thereby resulting in an extra burden on gay employees bringing same-sex sexual harassment actions.[116] Specifically, the plaintiff contended that the Supreme Court's opinion in *Oncale* requires homosexual employees to disprove sexual orientation discrimination rather than simply to prove sex discrimination.[117] The Third Circuit held that there was no heightened burden on homosexual employees, contending that once a plaintiff demonstrates that he or she was harassed because of his or her sex, "the sexual orientation of the plaintiff becomes irrelevant."[118] In the minds of the court, the plaintiff simply had failed to prove that he was harassed because he was a man, or that his harassment was a result of his failure to comply with societal sex-stereotypes.[119] Notably, the court failed to consider whether the fact that the male plaintiff desires to sleep with other men demonstrated nonconformity with sex-stereotypes, thus satisfying *Hopkins*.[120]

These cases demonstrate that the law does not consistently protect gay and lesbian employees who suffer severe workplace discrimination. Not only do these types of decisions turn a blind eye to harassment, but they also provide incentives to employers to defend against Title VII actions by suggesting that homophobic—rather than sexist—reasoning prompted their actions.[121] By accepting

113. *See id.* (deferring consideration of the merits of an argument of sex-stereotyping to a future, properly pled case).

114. *See* Dosanjh, *supra* note 68, at 557 (reporting the ludicrous effects that a literal reliance upon *Oncale*'s high evidentiary burden has created); *see also* Chisholm, *supra* note 12, at 262 (suggesting that this higher standard will have "severe psychological and economic consequences for the employee being scrutinized").

115. 260 F.3d 257 (3d Cir. 2001).

116. *See id.* at 261 (noting that Bibby argued that, were the court to affirm the district court opinion, it "would place a special burden on gay and lesbian plaintiffs alleging same-sex sexual harassment" by requiring them to prove that harassment was not motivated by their sexual orientation").

117. *Id.*

118. *Id.* at 265.

119. *See id.* (stating that, without these showings, Title VII does not grant a cause of action).

120. *See id.* at 263-65 (analyzing Bibby's claim in light of *Hopkins* and failing to discuss whether sexual orientation constitutes a sex-stereotype).

121. *See* ESKRIDGE, JR., *supra* note 12, at 233 (arguing that, because the "narcissistic connections" with sexism are plain, employers should not be able to use their homophobia as an excuse for creating adverse employment actions); *see also* Darren

the argument that there is a clear distinction between sexual harassment and sexual orientation harassment, these opinions violate the public policy behind Title VII of preventing invidious discrimination and instead reward homophobia.[122]

D. Role of Perceived Sexual Orientation

The above cases involved plaintiffs who openly identify themselves as homosexuals.[123] A more interesting legal situation arises when an employee is victimized by severe homophobic harassment, but is either not honest with others about his or her homosexuality or does not identify himself or herself as a homosexual. When these victims file Title VII claims, the courts must grapple with the issue of whether the mere perception of homosexuality transforms a sexual discrimination claim into a de facto sexual orientation discrimination claim.[124] The inherent problem that arises, and the problem that is often ignored by the courts, is that any perception of homosexuality that is not based on direct evidence must inherently result from a perception of nonconformance with sex-stereotypes.[125] As previously discussed, this type of discrimination is explicitly prohibited under *Price Waterhouse v. Hopkins*.[126]

Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 110 (1999) ("[T]he failure of civil rights law to provide for sexual equality may actually provide an incentive for defendants in discrimination cases to concede 'heterosexist,' rather than 'racial,' bias when the surrounding circumstances of their cases strongly suggest the operation of 'some' discriminatory motivation."); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 136-68 (1995) (discussing anti-discrimination cases in which defendants conceded sexual orientation bias, rather than gender bias because the former is an unprotected category in civil rights law).

122. *Cf.* Hutchinson, *supra* note 121, at 112 (arguing that civil rights laws that fail to prevent homophobic discrimination may also fail to recognize the connection between racism and heterosexism, and therefore will also fail to prevent racial discrimination in its homophobic forms).

123. *See supra* Part II.B-C (analyzing demonstrative Title VII cases wherein the plaintiffs openly identified themselves in the workplace as being homosexual).

124. *See* Chisholm, *supra* note 12, at 258-62 (describing the difficulty that courts have had in distinguishing between sexual orientation and perceptions of an individual's sex or gender); *see also* Verona & Monks, *supra* note 12, at 112-13 (analyzing the influence that sexual orientation perception plays in Title VII jurisprudence).

125. *See, e.g.*, Samborski v. W. Valley Nuclear Servs., Co. No. 99-CV-0213E(M), 1999 WL 1293351, at *4 (W.D.N.Y. Nov. 24, 1999) (recognizing that harassment based on the perceived sexual orientation of an employee is discrimination based on sex-stereotypes and thus actionable); *see also infra* notes 159-63 and accompanying text (detailing the similarities between gender performance and perceived sexual orientation).

126. 490 U.S. 228, 237 (1989) (prohibiting sex-stereotyping under Title VII); *see also supra* notes 50-55 and accompanying text (discussing *Hopkins* and its holding).

In *Centola v. Potter*,[127] a Massachusetts district court recently delivered an opinion that was beneficial to gay and lesbian employees, holding that the mere perception of homosexuality is not enough to transform a viable Title VII cause of action into a claim alleging sexual orientation harassment, thereby meriting dismissal.[128] The plaintiff filed a complaint alleging that he suffered over seven years of harassment from his co-workers who mocked his masculinity, portrayed him as effeminate, and implied that he was homosexual.[129] The defendants moved for summary judgment, claiming that Centola was actually making an allegation of harassment based on sexual orientation.[130]

The court, in attempting to distinguish sexual harassment from sexual orientation harassment, conceded that the line is "hardly clear."[131] Citing to "queer theory" in its opinion, the court discussed the nature and causes of sexual orientation harassment.[132] Because Centola never informed anyone at his workplace that he is a gay man, the court concluded that the motivation for the harassment must therefore be his failure to "conform with their ideas about what 'real' men should look or act like."[133] Accordingly, the court ruled that Centola "provided sufficient evidence to support the inference that he was harassed and retaliated against because of his sex and his failure to conform to his co-workers' sexual stereotypes . . . ."[134] Critically, the *Centola* opinion stated that even a "stereotypically masculine" gay male plaintiff could succeed under this theory "due to his failure to conform with sex-stereotypes about what 'real' men do;" namely, have sexual relations with women.[135] Finally, the court rejected the notion that defendants might escape liability by simply relying on a defense that homophobia guided their harassment.[136]

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127. 183 F. Supp. 2d 403 (D. Mass. 2002).

128. *See id.* at 412 (concluding that, even if the employee believed that he was being discriminated against because of his sexual orientation, the issue remains whether the employer discriminated because of sex-stereotyping or orientation).

129. *See id.* at 406 (describing the degrading and inequitable treatment the plaintiff received, including the taping pictures of Richard Simmons on his work space, asking him if he had AIDS yet, not allowing him to leave his station for coffee, and severely punishing him for small infractions).

130. *Id.* at 408.

131. *Id.*

132. *See id.* at 410 n.8 (citing to Sylvia A. Law's groundbreaking law review article, *Homosexuality and the Social Meaning of Gender*, discussed *infra* note 156, which claimed that effeminate males are harassed because they do not exhibit typical masculine norms).

133. *Id.* at 410.

134. *Id.* at 406.

135. *Id.* at 410.

136. *See id.* at 409-10 (relying on the "mixed-motive" approach to support the notion that, even if Centola's sexual orientation played a part in his harassment, his

Not all cases involving perceived sexual orientation, however, will result in decisions that favor the employee. For example, in *Dandan v. Radisson Hotel Lisle*,[137] the plaintiff, a bartender at the defendant's hotel in Illinois, was constantly insulted by his co-workers with names like "fruitcake," "fagboy," and "Tinkerbell."[138] Dandan argued that since, none of his co-workers knew his sexual orientation, the harassment must have been due to the fact that he is a man who had failed to live up to societal expectations of masculinity.[139] The court rejected this argument, concluding that "whether Dandan's co-workers knew or only suspected what his sexual orientation is makes no difference where Title VII is concerned."[140] Accordingly, the court granted summary judgment on Dandan's sexual discrimination claim in favor of his employer.[141] Effectively, the *Dandan* opinion suggests that, so long as the perception exists that the plaintiff is gay, the complaint at its heart alleges sexual orientation harassment and should be dismissed.[142]

A more startling case, *Spearman v. Ford Motor Co.*,[143] arose in the Seventh Circuit. Spearman sued Ford Motor Company alleging, among other things, that he suffered a hostile work environment as a result of his failure to conform to the "male image at Ford."[144] Spearman testified that, although he is a gay man, he never told, or otherwise made known, this fact to his co-workers.[145] Nonetheless, the court concluded as a matter of fact that Spearman's co-workers harassed him due to his "apparent homosexuality."[146] The court found that *Hopkins*' prohibitions against sex-stereotyping did not apply because Spearman's co-workers were hostile to his perceived

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employer's additional unlawful motive of discriminating against Centola because of his failure to satisfy sex-stereotypes would allow the court to impose liability).

137. No. 97 C 8342, 2000 WL 336528, at *1 (N.D. Ill. Mar. 28, 2000).

138. *See id.* (stating that this harassment began in April 1996, and intensified in cruelty in October of that year when the name calling turned into very graphic insults).

139. *See id.* at *4 (stating that Dandan claimed his co-workers could only infer as to whether he was a homosexual, and therefore "the verbal abuse can only be attributed to the fact that he is man").

140. *Id.*

141. *Id.* at *5.

142. *See id.* (arguing that there is no precedent to establish that harassing someone because he does not meet the expectation of a "real man," without actual knowledge that he is gay, constitutes discrimination because of his sex).

143. 231 F.3d 1080 (7th Cir. 2000).

144. *See id.* at 1085 (noting that Spearman claimed that the harassment he allegedly suffered was motivated by "sex-stereotypes" because he was seen as too feminine).

145. *Id.* at 1082 n.1.

146. *See id.* at 1085 (declaring that the record "clearly demonstrates" that his co-workers harassed Spearman because they believe him to be gay).

sexual orientation, and not "because he is a man."[147]

Essentially, the court ignored the fact that the harassers, unaware of the plaintiff's actual sexual orientation, must have relied upon stereotypes in order to perceive Spearman to be gay.[148] Similar gaps in logic would have led the Supreme Court in *Hopkins* to conclude that the plaintiff was discriminated against solely because of her hair length and not her failure to conform to gender stereotypes; the two are too closely intertwined to be separated.[149] Such a narrow interpretation cannot be what the Supreme Court intended by *Hopkins*.

These cases demonstrate the inconsistency that currently plagues Title VII jurisprudence. If the thought exists that the plaintiff is homosexual, regardless of the reality, courts often conclude that the harassment must be motivated by that thought, and thus conclude that such sexual orientation harassment does not fall within Title VII's reach.[150] This begs the question: how can any employee get over this hurdle and find protection under Title VII if the mere

147. *Id.* at 1085-86. To support this conclusion, the court relied upon the fact that Spearman's co-workers called him a "bitch," which, among other things, confirmed that "some" of his co-workers were hostile to his sexual orientation and not his sex. *Id.* at 1086.

148. *See id.* at 1085 (admitting that Spearman's co-workers did not know of his homosexuality).

149. *Hopkins* is the quintessential mixed-motive case, which is one where a Title VII defendant takes adverse employment action against an employee for both legitimate and discriminatory reasons. *See generally* Robert S. Whitman, Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863, 864 (1989) (stating that mixed motive cases essentially involve employment decisions motivated by both permissible and impermissible factors).

150. *See* Hamm v. Weyauwega Milk Prods., Inc., 199 F. Supp. 2d 878, 890-91 (E.D. Wis. 2002) (concluding that, despite the fact that the heterosexual plaintiff had "clearly and concisely set forth a claim for hostile work environment sexual harassment because of sexual stereotyping," and had supported this claim with a "fairly extensive factual record," plaintiff's attempts to link his co-worker's accusations of homosexuality with some perception that Hamm was not manly is too attenuated to meet his burden of showing that the harassment occurred because of his sex). The *Hamm* court held that the plaintiff must present evidence that he was harassed because he was a man and not *only* because he was perceived to be homosexual. *See id.* at 895 (holding that Hamm did not provide enough evidence concerning which male stereotypes he lacked and cited no particular incidents that showed his co-workers thought he behaved inappropriately for a man); *see also* Mims v. Carrier Corp., 88 F. Supp. 2d 706 (E.D. Tex. 2000) (dismissing heterosexual plaintiff's complaint because his harassers incorrectly perceived him to be gay, and therefore his harassment was, de facto, because of sexual orientation). The *Mims* court, through some feat of logic, concluded that Mims' complaint had not only failed to properly allege discrimination "because of sex," but had actually alleged discrimination because of "intercourse." *Id.* at 714. *But see* Carrasco v. Lenox Hill Hosp., No. 99 CIV. 927(AGS), 2000 WL 520640, at *8 (S.D.N.Y. Apr. 28, 2000) (concluding that, although the insults implied the plaintiff was homosexual, the fact that several of his co-workers knew he was married "reduces the likelihood that the co-workers intended their comments to be related to plaintiff's sexual orientation").

perception of homosexuality is enough to defeat a sexual harassment claim?

Defendants who would otherwise be found liable are being allowed to escape legal responsibility for discriminatory practices by claiming they were motivated by homophobia—rather than sexism—regardless of the truth behind such an assertion.[151] Instead of preventing and discouraging discrimination, these decisions provide incentives for employers to replace one form of invidious discrimination with another.[152] Clearly, this trend runs counter to both public policy and the purposes of anti-discrimination laws.[153]

III. SIMILARITIES BETWEEN SEXUAL HARASSMENT AND SEXUAL ORIENTATION HARASSMENT

A Seventh Circuit case recently held that "it is not objectively reasonable as a matter of law," that sexual harassment and sexual orientation harassment are related.[154] The court continued, stating that "[t]he reality is that there is a distinction between one's sex and one's sexuality under Title VII."[155] As attractive as this logic is for some courts in terms of creating a compartmentalized and clear boundary between sex and sexual orientation, sociologists tend to disagree.[156] These sociologists argue that gender is an amorphous construct not based on objective reality, but rather a "fantasy."[157]

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151. *See supra* notes 121-22 and accompanying text (describing how the current interpretation of Title VII provides incentives for employers to escape liability by admitting to homophobic intent).

152. *Supra* notes 121-22 and accompanying text.

153. *But see* ESKRIDGE, JR., *supra* note 12, at 238 (questioning whether interpreting Title VII to prohibit "America's favorite prejudice, namely, homophobia," will undermine the American public's respect for civil rights protections generally).

154. *See* Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 707 (7th Cir. 2000) (affirming the district court's conclusion that the employee's grievance alleged only harassment based on sexual orientation, which, according to the court, is not prohibited under Title VII).

155. *Id.* Interestingly, the court failed to support the contention that, under a Title VII analysis, sex and sexual orientation need to be separate entities.

156. *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) (reexamining institutions, practices, and discourses that define gender issues); Case, *supra* note 53 (examining the component parts of gender, masculinity, and femininity, and how they are perceived and valued); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988) (arguing that the "disapprobation of homosexual behavior is a reaction to the violation of gender norms, rather than simply scorn for the violation of norms of sexual behavior"); Rachel L. Toker, Note, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 HARV. C.R.-C.L. L. REV. 577, 600 (stating that "[b]ecause heterosexuality is so central to the masculine gender ideal, a man is usually viewed as gender-nonconforming if he is anything other than heterosexual").

157. *See* BUTLER, *supra* note 156, at 24-25 (arguing that gender is a performance and a set of manipulated codes and costumes, rather than a core concept of essential identity).

Various theoretical and analytical arguments are used to support the notion that sex and sexual orientation are correlated.[158] The most popular and relevant argument relies on *Hopkins* and its sex-stereotyping theory of discrimination.[159] This theory has many subtle variations, but the basic notion is that heterosexuality is a sex-based stereotype.[160] Being perceived as manly is often dependant on either having female sex partners or fulfilling culturally masculine gender expectations; femininity is defined either by being attracted to men or by meeting societal expectations of how women should act.[161] Accordingly, men and women will be viewed as gender-nonconforming if they do not meet these expectations, either because they sleep with members of their own sex or because they act outside of other gender norms.[162] Because sexual discrimination includes discrimination based on nonconformance with societal expectations of sex and gender, discrimination against an individual for not satisfying one of the most fundamental stereotypes

158. *See generally* Capers, *supra* note 35 (evaluating the arguments that sexual harassment and sexual orientation harassment are distinct and concluding that these arguments are not persuasive); Marcosson, *supra* note 35 (claiming that the federal prohibition of sex discrimination in the workplace should also protect gay employees); Schroeder, *supra* note 37, at 336 (stating that the judicial explanations for not extending Title VII to prohibit sexual orientation discrimination do not withstand close scrutiny). *But see* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 474 (2001) (arguing that employment discrimination against gay and lesbian employees can be characterized as sex discrimination, but any attempt to do so is "sociologically, theoretically, and morally flawed").

159. *See* Capers, *supra* note 38, at 1179-84 (analyzing the sex-stereotyping cases under Title VII and illustrating how this analysis could be applied to cases brought by gay and lesbian plaintiffs).

160. *See* Chisholm, *supra* note 12, at 264-71 (arguing that all sexual orientations, including heterosexuality, are sex-based stereotypes); *see also* Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 524-30 (1992) (presenting the "pre-understanding" theory which asserts that sexual orientation discrimination is based upon commonly held stereotypes about homosexuals); Valdes, *supra* note 121, at 25-26 (arguing that society has constructed a method of social categorization which inevitably links sexual orientation discrimination to sex discrimination).

161. *See generally* ESKRIDGE, JR., *supra* note 12, at 237 (stating that homosexual desire for members of their own sex, and not any particular behavioral act, is what "challenges the orthodoxy of compulsory heterosexuality"); SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 18 (1988) (arguing that homosexuals challenge fundamental sex-stereotypes because they are outside the "ranks with male heterosexual solidarity"); Law, *supra* note 156 (suggesting that the condemnation of homosexuality is a reaction to the violation of gender norms surrounding masculinity and femininity rather than scorn for being sexually deviant).

162. *See* Capers, *supra* note 35, at 1183 (suggesting that normative sex-stereotypes require men to not only be "aggressive, independent, and competitive, but also heterosexual"); Verona & Monks, *supra* note 12, at 85 (stating that all discrimination against gay people could be considered sex stereotyping because of the notion that being gay itself is gender-nonconforming).

surrounding sex should also fit into the confines of sexual discrimination as defined in *Hopkins*.[163]

Another theory explaining the connections between sex and sexual orientation discrimination is called the "formal argument."[164] This theory suggests that, if the conduct of an employee is the basis for adverse employment actions taken by an employer, and the same action taken by a member of the opposite sex would not result in a similar adverse employment action, then the discrimination must be based on sex.[165] In other words, when a woman is not harassed for having a male sex partner, but a man is harassed for having a male partner, by definition that is sex discrimination.[166] While judicial acceptance of this theory is not universal, as demonstrated in Title VII appearance and grooming cases,[167] some courts have accepted this logic when applied to same-sex sexual harassment cases.[168]

Despite the broad acceptance by sociological scholars that sexual orientation and sex are intricately interrelated and should not be separated,[169] courts do not hesitate to attempt such a feat.[170] To

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163. *See* Capers, *supra* note 35, at 1179 (stating that an analysis of the sex-stereotyping cases leads to the conclusion that the judicial exemption of sexual orientation from Title VII's ban on sex discrimination results in "unfairness and inconsistency when applied").

164. *See* ESKRIDGE, JR., *supra* note 12, at 231-32 (stating that discrimination against a gay male employee is inherently sex discrimination because the employer would not have acted negatively but for the sex of the employee, i.e., a female employee with a male lover would not have been discriminated against); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234 (1994) (arguing that homosexuals are stigmatized by their deviancy from traditional sex roles).

165. *See* Koppelman, *supra* note 164, at 208 (explaining that "[i]f a business fires Ricky, or if the state prosecutes him, because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex").

166. *Id.*

167. *See, e.g.*, Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 (9th Cir. 1977) (holding that requiring a male employee to wear a tie is not sex discrimination for purposes of Title VII); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (upholding sex-specific hair length requirement); Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress And Appearance Standards, Community Norms, And Workplace Equality*, 92 MICH. L. REV. 2541, 2542 (1994) (stating that courts have rationalized dress and appearance requirements by reference, directly or indirectly, to community norms). *But see* Jennifer L. Levi, *Proving The Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 20 (2000) (arguing that judicial leniency of gendered clothing requirements is difficult to reconcile with sex-stereotyping jurisprudence, and it can only be justified by "stark sexism").

168. *See, e.g.*, Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1228-29 (D. Or. 2002) (denying summary judgment when a jury could reasonably find that the defendant would not have acted as she allegedly did if the plaintiff were a man dating a woman instead of a woman dating a woman).

169. Another common theory on how sexual discrimination and sexual orientation discrimination are the same is the "feminist approach," which argues that

distinguish between sexual harassment and sexual orientation harassment, courts often focus on motive—inquiring whether the harasser intended to harass because of sexual orientation or to harass because of sex.[171] However, modern sociological studies indicate that discrimination and stereotyping are often not intentional, but rather the result of spontaneous and uninformed cognitive processes.[172] Accordingly, any judicial attempt by judges to characterize a fact pattern as purely sexual orientation discrimination or purely sexual discrimination fails to recognize that both are often the by-product of the same uninformed process.[173]

The subjectivity and uncertainty that permeates sexual orientation case law is not only discomforting, but it also violates accepted sociological beliefs surrounding sex and sexual orientation. There is no logical reason, as either a matter of Title VII jurisprudence or social policy, that an employer ought to be prevented from firing a lesbian because she is masculine but not prohibited from firing a lesbian because she is a lesbian.[174] Yet, many courts continue to accept the belief that there is a distinction between these two

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female empowerment and gay empowerment both require heterosexual men to relinquish their dominant role in society, something these theorists think heterosexual men are averse to do. *See* Law, *supra* note 156, at 196 (presenting the feminist approach theory to explain the hesitation of the male hegemony to relinquish power). This leads to the conclusion that both sex discrimination and sexual orientation discrimination are fueled by the same fire—the maintenance and perpetuation of male dominance. *Id.*; *see also* Amelia A. Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination*, 5 S. CAL. REV. L. & WOMEN'S STUD. 105, 106 (1995) (stating that sexual orientation discrimination is founded on the same presumption as sex discrimination, that is, traditional gender roles should be enforced).

170. *See supra* Part II (discussing judicial attempts to determine whether harassment occurred because of sex or because of sexual orientation).

171. *Supra* Part II.

172. *See* Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1247 (1995) (detailing the cognitive bias approach to discrimination and exploring its implications on both the law and public policy); Barbara F. Reskin, *The Proximate Cause of Employment Discrimination*, 29 CONTEMP. SOC'Y 319, 319-20 (2000) (suggesting that any successful campaign to combat discrimination in the workplace should begin with the recognition that discrimination often occurs as the result of non-conscious cognitive processes); *see also* Susan T. Fiske, *Stereotyping, Prejudice and Discrimination* (proposing that "[s]tereotyping, prejudice, and discrimination are partly automatic and socially pragmatic, yet at the same time individually controllable and responsive to social structure"), *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (D.T. Gilber et al. eds., 4th ed. 1998).

173. *See* Kreiger, *supra* note 172, at 1227-28 (suggesting that this confusion is what led to the adoption of the judicially created "disparate impact" theory, which looks to the statistical impact of facially neutral laws).

174. *See* ESKRIDGE, JR., *supra* note 12, at 233 (stating that this proposition should be even more evident in light of Supreme Court precedent that has stated that "antidiscrimination protections are baselines for modern citizenship").

scenarios.[175] While it is a positive development that *some* gay and lesbian employees who face severe discrimination are finding justice under Title VII, there needs to be a more reliable and consistent solution.

IV. POSSIBLE SOLUTIONS FOR THE INCONSISTENT TREATMENT OF VICTIMS OF SEXUAL ORIENTATION HARASSMENT IN THE WORKPLACE

A. Judicial Solution

Courts are reaching differing conclusions regarding whether employees who suffer harassment at work because of either real or perceived homosexuality can bring successful claims under Title VII.[176] Eventually, either the Supreme Court or the legislature will need to resolve this conflict. In the past, the Supreme Court has adopted expansive interpretations of Title VII.[177] Relying on the public policy reasoning behind the Civil Rights Act of 1964, the Supreme Court has concluded that Title VII, among other things, prohibits hostile work environment claims, allows for vicarious liability for employers who are unaware of their employees' actions, and includes prohibitions on same-sex sexual harassment.[178]

Despite this trend of expanding Title VII's reach and scope, it is unlikely that the current Supreme Court bench, were they to address this issue, would conclude that claims of sexual orientation harassment are within the purview of Title VII.[179] First, Title VII's legislative history is completely devoid of evidence that Congress intended "sex" to include sexual orientation in the statute.[180] Second,

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175. *Compare* Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (holding that Title VII prohibits discrimination against lesbians who violate sex-stereotypes), *with* Byars v. Jamestown Teachers Ass'n, 195 F. Supp. 2d 401, 411 (W.D.N.Y. 2002) (holding that Title VII does not prohibit discrimination against lesbians).

176. *See supra* Part II (discussing the different conclusions that courts are reaching when considering Title VII claims brought by victims of sexual orientation harassment).

177. *See supra* Part I.C (detailing the Supreme Court's history of interpreting Title VII prohibitions on discrimination because of sex).

178. *Supra* Part I.C.

179. *But see* Tiffany L. King, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005, 1008 (2002) (proposing that the Supreme Court should explicitly expand sex discrimination under Title VII to include sexual orientation).

180. *See supra* notes 24-33 and accompanying text (detailing the legislative history of Title VII); *see also* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (rejecting plaintiff's argument that Congress intended to incorporate a prohibition on sexual orientation discrimination within the general prohibition against discrimination based on sex). The *DeSantis* court reasoned that the legislative history of Title VII only indicates that "traditional notions of 'sex'" be included

the case law in lower courts universally indicates that explicit sexual orientation discrimination is not actionable under Title VII.[181] The Equal Employment Opportunity Commission ("EEOC"), the administrative agency responsible for enforcing the federal civil rights laws, agrees with the lower courts and takes the position that discrimination based on sexual orientation is not within Title VII's reach.[182] Third, commentators suggest that the Supreme Court's "studious avoidance of any discussion of sexual orientation in *Oncale* suggests that the Court would not extend protection" to gay and lesbian employees.[183] This particular Supreme Court bench is more conservative than past benches, as demonstrated by recent rulings that have narrowed the scope of Title VII and expressed hesitation to protect gays and lesbians.[184] Accordingly, it is unlikely that this Court would interpret Title VII's language to include prohibitions on sexual orientation discrimination.

within its prohibitions. *Id.* at 329.

181. *See, e.g.*, Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766, at *22 (6th Cir. Jan. 15, 1992) (holding that Title VII does not prohibit comments and assaults directed at plaintiff because of his alleged homosexuality); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (holding, without discussion, that "Title VII does not prohibit discrimination against homosexuals"); Pritchett v. Sizeler Real Estate Mgmt. Co., No. Civ. A. 93-2351, 1995 WL 241855, at *1 (E.D. La. Apr. 25, 1995) (noting that "it is abundantly clear that Title VII does not protect against discrimination on any basis relating to sexual orientation"); Quick v. Donaldson Co., 895 F. Supp. 1288, 1297 (S.D. Iowa 1995) ("Title VII applies only to 'discrimination on the basis of gender and should not be judicially extended to include sexual preferences such as homosexuality.'") (internal citation omitted).

182. *See* EEOC Decision 76-75, 19 Fair Empl. Prac. Cas. (BNA) 1823, *2 (1975) (explaining that there is no evidence that Congress, when enacting Title VII, intended to include "sexual practices" within the definition of "sex"); EEOC Compl. Manual (BNA) § 615.2(b)(3) (1988) (noting that a male supervisor who harasses an employee because the employee is a homosexual male has not committed sexual harassment since the conduct "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.").

183. *See* J. Banning Jasiunas, *Is ENDA the Answer? Can a "Separate But Equal" Federal Statute Adequately Protect Gays and Lesbians From Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1539 n.80 (2000) (arguing that the current judicial framework is insufficient to protect gay and lesbian workers from employment discrimination).

184. *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 2068 (2002) (holding that the continuing violation theory is no longer applicable for claims of discrete acts of discrimination, making it much more difficult for plaintiffs to meet statutory deadlines); Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (holding that a New Jersey law prohibiting sexual orientation discrimination by public accommodations could not be applied to force the Boy Scouts to reinstate a gay troop leader).

B. Federal Legislative Solution and the Employment Non-Discrimination Act

Municipalities, in the 1970s, were the first governments to pass laws prohibiting sexual orientation discrimination.[185] Wisconsin, in 1983, became the first state to adopt such a law statewide.[186] According to a report released by the Policy Institute of the National Gay and Lesbian Task Force in January 2000, local anti-discrimination laws that include sexual orientation as a protected category nowcover more than 100 million Americans.[187] Currently, however, only thirteen states provide statewide protection for employees who experience workplace discrimination on account of their real or perceived sexual orientation.[188]

Since 1975, members of Congress have proposed legislation that would expand federal law to include a national ban on sexual

185. *See generally* WAYNE VAN DER MEIDE, NAT'L GAY & LESBIAN TASK FORCE, LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES (2000) (summarizing current state and municipal laws that safeguard and/or assist lesbian, gay, transgender, and bisexual people), *available at* http://www.ngltf.org/downloads/legeq99.pdf (last visited Jan. 6, 2003). For example, Article IV of the Chapel Hill North Carolina City Code makes sexual orientation discrimination illegal in public employment. *Id.* at 68. The Hartford, Connecticut, Municipal Code bans discrimination because of sexual discrimination in public employment, private employment, and housing. *Id.* at 38. Chapter 13.28 of the Berkeley, California, Municipal Code prohibits discrimination on the basis of sexual orientation in public and private employment, housing, union practices, education, public accommodation, and credit. *Id.* at 27. *See also* ESKRIDGE, JR., *supra* note 12, at 356-71 (listing examples of federal, state, and municipal laws against sexual orientation discrimination between 1972 and 1998).

186. *See* WIS. STAT. ANN. §§ 66.432, 106.50, 111.31, 230.18, 234.29 (West 2000) (prohibiting sexual orientation discrimination in employment and housing). The District of Columbia passed a similar statute five years prior. *See* D.C. CODE ANN. § 2.1401.01 (2001) (prohibiting sexual orientation discrimination comprehensively); *see also Statutory Protections for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625, 1628-30 (1996) (detailing the history of legislation protecting employees in private employment from sexual orientation discrimination).

187. *See* Press Release, National Gay and Lesbian Task Force, Nondiscrimination Laws Now Cover 100 Million Americans, New Report Finds (Jan. 3, 2000) (highlighting that the number of people covered by anti-discrimination statutes dramatically increased from 1990-2000), *available at* http://www.ngltf.org/news/release.cfm?releaseID=256 (last visited Jan. 6, 2003).

188. *See* Human Rights Campaign Found., The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans: A Semiannual Snapshot 2 (2002) (chronicling the growth of beneficial employment laws and policies for gay men and lesbians that were adopted in the six months prior to March 2002), http://www.hrc.org/publications/sow2002/snapshot.pdf (last visited Jan. 6, 2003); Press Release, Human Rights Campaign, HRC Commends New York as it Becomes 13th State to Enact Non-Discrimination Legislation (Dec. 19, 2002) [hereinafter Press Release, New York] (noting that the New York Legislature recently passed statewide protection from discrimination in employment, housing, public education, education and credit for gay men and lesbians), *available at* http://www.hrc.org/newsreleases/2002/021219sonda.asp (last visited Jan. 18, 2003).

orientation discrimination.[189] The first bill sought to amend Title VII by adding "affectional or sexual preference" as a protected category.[190] For the next two decades, this tactic persisted, and federal bills continually attempted to amend various sections of the Civil Rights Act of 1964 or other federal civil rights legislation to include prohibitions on sexual orientation discrimination.[191] None of these bills ever achieved significant support.[192]

In the 1990s, proponents of pro-gay initiatives changed their strategy and introduced the Employment Non-Discrimination Act ("ENDA").[193] For many reasons, ENDA was a new start. For example, ENDA is limited to prohibiting discrimination in the employment setting and does not extend into other legal realms, such as housing.[194] In this regard, ENDA's basic provisions are facially similar to those of Title VII.[195] Like Title VII, ENDA forbids employers from

189. *See, e.g.*, Civil Rights Amendments Act of 1975, H.R. 166, 94th Cong. (1975) (proposing to amend the Civil Rights Act of 1964 to prohibit discrimination in the basis of "affectional or sexual preference"); Civil Rights Amendments Act of 1977, H.R. 451, 95th Cong. (1977) (proposing to amend the Civil Rights Act of 1964 to prohibit sexual orientation discrimination in: (1) public accommodations; (2) public facilities; (3) public education; (4) federally assisted opportunities; (5) equal employment opportunities; (6) housing; and (7) educational programs receiving federal assistance); Civil Rights Amendments Act of 1979, H.R. 2074, 96th Cong. (1980) (resubmitting the same proposal as was included in H.R. 2998 during the 95th Congress).

190. *See* H.R. 166, 94th Cong. § 11 (1975) (defining, for purposes of the Civil Rights Act, "affectional or sexual preference" to mean "having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment").

191. *See, e.g.*, Civil Rights Amendments Act of 1991, S. 574, 102d Cong. (1991) (attempting to amend both the Civil Rights Act of 1964 and the Civil Rights Act of 1968 to prohibit discrimination on the basis of sexual orientation); Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong. (1999) (attempting "[t]o amend the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination on the basis of affectional or sexual orientation, and for other purposes."); *see also* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085-86 & 1085 n.11 (7th Cir. 1984) (describing numerous failed attempts by Congress to amend Title VII).

192. *See* Barney Frank, *Civil Rights, Legislative Wrongs*, ADVOCATE, Feb. 15, 2000, at 9 (stating that attempts to amend Title VII would continue to fail because it gives opponents of affirmative action the chance to remove the voluntary affirmative action provision from the Civil Rights Act of 1964). Congressman Frank is an openly gay representative from Massachusetts. Marcelo Vilela, *Out in Congress*, *at* http://www.house.gov/frank/k_state.html (last visited Jan. 6, 2003).

193. *See* The Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994); The Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995). In the Senate, the primary sponsors were Senators Edward Kennedy and Lincoln Chafee. S. 2238. The primary sponsors for the House bill were Representatives Gary E. Studds and Barney Frank. H.R. 1863. Because of the similarities between the House and Senate bills, this Comment cites solely to the Senate bill when discussing the structure and content of the proposed legislation.

194. *See* S. 2238 (prohibiting employment discrimination on the basis of sexual orientation).

195. *Compare* Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e to 2000e-17, 2000e-2(a)(1) (2000) (making it unlawful for an employer to "to fail or refuse to hire

discriminating with regard to hiring, firing, or terms of employment; it forbids retaliatory conduct; and it would be enforced by the Equal Employment Opportunity Commission.[196]

Importantly, sexual orientation is defined in the bill to include both real and perceived heterosexuality and homosexuality.[197] The inclusion of perceived sexual orientation as a protected status ensures that ENDA would not be limited to protecting only gay and lesbian employees from workplace discrimination.[198] ENDA would also act to protect heterosexual employees from workplace discrimination resulting from their nonconformity with gender expectations.[199] Furthermore, the bill prohibits employers from discriminating against an employee because of the fact that he or she has homosexual associates, such as a gay or lesbian child or friend.[200]

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or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment"), *with* S. 2238, § 3 (prohibiting an employer from subjecting "an individual to different standards or treatment on the basis of sexual orientation . . . [or] otherwise discriminat[ing] against an individual on the basis of sexual orientation"). *See also* 140 CONG. REC. 14,179 (1994) (statement of Coretta Scott King) ("This bill [S. 2238] would grant the same rights to victims of discrimination based on sexual orientation that are extended to victims of racial, gender, and religious discrimination and those who have been unfairly treated in the workplace because of their age, ethnicity, or disability.").

196. *See* S. 2238, § 3 (prohibiting disparate treatment based on sexual orientation); *id.* § 9 (giving the EEOC the "same powers . . . as the [EEOC has] to administer and enforce Title VII"); *id.* § 12 (prohibiting both retaliation against an individual for filing an ENDA complaint and coercion of an individual to refrain from filing an ENDA complaint); *see also* Charles V. Dale, *The Employment Non-Discrimination Act of 2002: Legal Analysis of S. 1284, A Bill to Prohibit Sexual Orientation Discrimination in Employment* (Cong. Research Serv., Order Code RL31440, 2002) (detailing the essential provisions of ENDA in comparison to Title VII).

197. *See* S. 2238, § 18(12) ("[T]he term 'sexual orientation' means lesbian, gay, bisexual or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations."). Interestingly, there is no similar language in Title VII prohibiting discrimination because of a "perceived" characteristic. This would likely result in litigation to determine the scope of legal protection afforded to those who are discriminated against because of their "perceived" orientation. *See* Dale, *supra* note 196, at 2 (discussing the difficulties in predicting the effects of including "perceived" in the definition of sexual orientation).

198. *See* Pat Putignano, *Why DOMA and not ENDA?: A Review of Recent Federal Hostility to Expand Employment Rights and Protection Beyond Traditional Notions*, 15 HOFSTRA LAB. & EMP. L.J. 177, 192 (1997) (discussing ENDA's applicability to both heterosexual and homosexual employees).

199. *See supra* Part II.D (discussing the lower court confusion over the role of perception in Title VII sexual harassment claims).

200. *See* Putignano, *supra* note 198, at 192 (stating that ENDA also aims to protect against workplace discrimination based on associations with gay men and lesbian women); *see also The Employment Non-Discrimination Act: Hearing on H.R. 1863 Before the Subcomm. on Gov't Programs of the House Comm. on Small Bus.*, 104th Cong. 34-37 (1996) [hereinafter *Hearing on H.R. 1863*] (statement of Karen Solon) (testifying that a child development center revoked a job offer because her foster child was lesbian, despite commendations from her community for extraordinary work with children).

Rather than accomplishing its goal by amending Title VII, ENDA is a stand-alone bill.[201] Congress recently passed other stand-alone bills relating to workplace discrimination, such as the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA").[202] The benefits of this strategy are simple—by not threatening to alter the scope of currently existing legislation, the bill has a greater chance of success.[203]

Because ENDA is not an amendment to Title VII, it affords its drafters the opportunity to respond to criticisms presented in previous debates surrounding pro-gay legislation.[204] To deflect the criticism that gay and lesbian employees were seeking "special rights," the bill's drafters specifically narrowed the scope of the anti-discrimination provisions that are present in Title VII.[205] For example, ENDA expressly rejects the possibility that its implementation will lead to "affirmative action" for gay men and lesbians.[206] Also, it includes a provision that precludes the use of the "disparate impact" theory of discrimination, as recognized under Title VII, which would prohibit employer action that is facially neutral but has a disproportionate effect on homosexual employees.[207] Lastly, ENDA explicitly excludes religious

201. *See* Dale, *supra* note 196, at 1 (discussing how ENDA differs from prior proposed legislation because it is not an amendment to Title VII). *But cf.* Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong. (2001) (introducing a new law, sponsored by Congressman Edolphus Towns, which would amend Title VII to add sexual orientation).

202. *See* American with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (2000) (prohibiting discrimination against individuals with disabilities in a stand-alone statute); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000) (prohibiting arbitrary age discrimination in employment by way of a stand-alone statute).

203. *See* Jasiunas, *supra* note 183, at 1545-46 (quoting Congressman Barney Frank's opinion regarding the greater chance of success for a stand-alone statute than for amending Title VII).

204. *See Employment Non-Discrimination Act of 1997: Hearing on S. 869 Before the Comm. on Labor & Human Res.*, 105th Cong. 2 (1997) [hereinafter *Hearing on S. 869*] (statement of Sen. James M. Jeffords, Committee Chairperson) (reintroducing ENDA and stating that "[i]n light of some of the concerns raised by ENDA's opponents in the last Congress, we made several significant changes to the bill"); Dale, *supra* note 196, at 2 (stating that ENDA "involves a host of considerations not before Congress when it enacted Title VII").

205. Sharon M. McGowan, *The Fate of ENDA in the Wake of Maine: A Wake-Up Call to Moderate Republicans*, 35 HARV. J. ON LEGIS. 623, 626-28 (1998) (describing the legislative history of ENDA).

206. *See* S. 2238, 103d Cong. § 4 (1994) (prohibiting quotas and preferential treatment on the basis of sexual orientation). *But see* Kenneth A. Kovach & Peter E. Millspaugh, *Employment Non Discrimination Act: On the Cutting Edge of Public Policy*, 39 BUS. HORIZONS 65, 71 (1996) (suggesting that informal quota systems might evolve as a result of ENDA, because sexual orientation would likely be included in any individual company's affirmative action policy).

207. *See* S. 2238, § 5 (explicitly stating that any employment practice that has a

organizations[208] and the armed forces[209] from its reach.

While addressing sexual orientation discrimination in a stand-alone statute increases the chances of passage, it could result in some negative repercussions. Specifically, it will reinforce notions that sexual orientation discrimination is different than discrimination based on sex.[210] Additionally, some scholars argue that, due to the judicial reluctance to afford broad protections to gay men and lesbians, courts may not read a stand-alone statute as expansively as Title VII.[211] The ultimate result may be that the protection offered by a stand-alone bill will be less than if Congress amends Title VII.[212] Nonetheless, ENDA would begin to provide similar protections to gay men and lesbians who face discrimination in the workplace as those already afforded other groups under Title VII.

In the past eight years, Congress has held three sessions of formal hearings on ENDA.[213] Opponents testified against ENDA, arguing

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disparate impact, as the term is defined in the Civil Rights Act of 1964, tit. 7, 42 U.S.C. § 2000e-2(k) (2000), on the basis of sexual orientation will not suffice to establish a prima facie violation of ENDA). Disparate impact is the theory that, based on statistics, a company rule or policy discriminates where it disproportionately affects a member of a class protected under legislation without regard to the employer's lack of intent to discriminate. *See generally* Martha Chamallas, *Evolving Conceptions of Equality under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983) (detailing the history, in considerable depth, between the two judicially recognized theories of liability under Title VII, namely, disparate treatment and disparate impact).

208. *See* S. 2238, § 7 (exempting religious organizations from the Act unless the employee's duties pertain solely to activities of the organization that generate business taxable income under § 411(a) of the Internal Revenue Code of 1996); *see also* Dale, *supra* note 196, at 4 (stating that the exemption for religious organizations appears to be modeled after a parallel exemption found in Title VII, which allows religious institutions to discriminate on the basis of religion).

209. *See* S. 2238, § 8(a)(1) (stating that the terms of the Act do not apply to members of the Armed Forces); *see also* Dale, *supra* note 196, at 3 (stating that courts also have concluded that uniformed military personnel are similarly outside the reach of Title VII).

210. *See* Jasiunas, *supra* note 183, at 1556 (discussing potential interpretive problems that will arise due to the Act's treatment of sexual orientation in stand-alone legislation). The Supreme Court already has demonstrated that it treats sexual orientation differently from other classes protected under anti-discrimination laws. *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that a Georgia statute that prohibited consensual sodomy by members of the same sex did not violate their fundamental rights), *with* Virginia v. Loving, 388 U.S. 1 (1967) (holding that an anti-miscegenation law that prohibited marriage between men and women of different races violated their fundamental rights).

211. *See* Jasiunas, *supra* note 183, at 1555 (discussing litigation by the Lambda Legal Defense Fund in a California case interpreting the provisions of a state stand-alone anti-discrimination statute).

212. *See id.* at 1555-56 (contending that the federal courts will not recognize the same legal theories under ENDA as those developed under Title VII).

213. *See generally Employment Non-Discrimination Act of 1994: Hearing on S. 2238 Before the Comm. on Labor & Human Res.*, 103d Cong. (1994) [hereinafter *Hearing on S. 2238*]; *Hearing on H.R. 1863*, *supra* note 200; *Hearing on S. 869*, *supra* note 204.

that it would confer "special rights" to homosexuals.[214] Consider John Ashcroft's statements opposing ENDA while he was a senator: "We should be wary of telling young people that . . . you can sue someone for failing to hire you if you can allege that you are a homosexual—you will not be able to do that if you have ordinary sexual orientation."[215] Opponents also relied on the "flood gates" argument, which posits that masses of litigation would flood the courthouses.[216] For example, Senator Orrin Hatch argued during the floor debates on ENDA that it would cause a "litigation bonanza" and would "lead to scores of thousands of new lawsuits."[217] Interestingly, another major argument that surfaced during the debates on ENDA was the "drought" argument, which, in contrast to the "flood gates argument," states that federal legislation is not needed because discrimination against gay men and lesbians is not common.[218] Contrary to this argument, however, a recent poll reports that forty percent of homosexual employees have been discriminated against at work, suggesting that the need for protection is very real.[219]

In 1996, Senator Edward Kennedy forced a vote on ENDA in the Senate by using threats of legislative delay tactics.[220] While most

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214. The "special rights" argument has been a central element of anti-gay rhetoric for over a decade. *See* 142 CONG. REC. S10132 (daily ed. Sept. 10, 1996) (statement of Sen. Orrin Hatch) (opposing ENDA because it would provide "[s]pecial protected status in the law" to gays and lesbians); *see also* Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 374 (1997) (noting that the "coded rhetoric of 'special rights' enables opponents of gay rights to tap into deep and powerful reservoirs of social anxiety and anger about other anti-discrimination laws based on race, gender, and disability-particularly affirmative action measures—even as these opponents claim to champion existing civil rights protections.").

215. 142 CONG. REC. S10,000 (daily ed. Sept. 6, 1996) (statement of Sen. John Ashcroft).

216. *See, e.g.*, *Hearing on S. 2238*, *supra* note 213, at 92 (statement of Robert H. Knight, Dir. of Cultural Affairs, Family Research Council) (stating that ENDA "will entangle businesses of all types in expensive litigation").

217. *See* 142 CONG. REC. S10132 (daily ed. Sept. 10, 1996) (statement of Sen. Orrin Hatch) (opposing ENDA); *see also* 142 CONG. REC. S10136 (statement of Sen. Trent Lott) (stating that ENDA is "just a guarantee of multiple lawsuits").

218. *See Hearing on H.R. 1863*, *supra* note 200, at 21 (statement of Rep. Glenn Poshard, Member, Subcomm. of Gov't Programs) (questioning the need for ENDA because there "is really nothing going on in the workplace to the extent that the gay community is articulating to the American public").

219. *See* Press Release, CBS Market Watch, Survey: 40% of Gays Report Bias in the Workplace (Sept. 12, 2002) [hereinafter Workplace Bias Survey] (reporting that "two out of five gay and lesbian employees say they've been discriminated against at work"), http://www.outandequal.org/programs/2002oews/survey40.htm (last visited Jan. 6, 2003). Of these, twenty-three percent said they have experienced harassment on the job, twelve percent claimed they were denied a promotion, and nine percent said their employment was terminated unfairly. *Id.*

220. *See* Carolyn Lochhead, *Gay Marriage Bill Scheduled for Vote in Senate Tuesday—Democrats Change Course*, S.F. CHRON., Sept. 7, 1996, at A2 (discussing the tactics that Sen. Edward Kennedy used to force a vote).

observers expected the bill to be easily defeated,[221] ENDA failed to pass by a 49-50 vote, with the one absent vote belonging to a Democratic senator who had supported other pro-gay initiatives.[222] This close call bolstered ENDA supporters and committed them to mounting a new campaign.[223]

Senator Kennedy reintroduced the bill in essentially the same form in the following session of Congress.[224] A year later, President Clinton became the first President to speak on gay issues in the State of the Union Address when he called on Congress to pass ENDA.[225] However, each congressional term that followed ended with no significant action on the bill.[226] Supporters became optimistic when the Senate committee responsible for the bill approved ENDA in April 2002 and urged the full Senate to pass the legislation.[227] Although Senate Majority Leader Tom Daschle pledged to allow a

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221. McGowan, *supra* note 205, at 625-31 (noting that "[m]any expected ENDA to suffer a resounding defeat" in 1996, and that all the senatorial sponsors expressed surprise at how well the vote went).

222. *See* 142 CONG. REC. S10138-39 (daily ed. Sept. 10, 1996) (statement of the Presiding Officer) (announcing the defeat of the bill); *see also Gay Rights Issue Won't Go Away; Senate Fluke Isn't Enough To End The Quest For Employment Equality*, L.A. TIMES, Sept. 12, 1996, at B8 (stating that the absent vote belonged to Senator David Pryor, who was in Arkansas supporting his son's recovery from cancer surgery). Senator Pryor told the Arkansas Democrat-Gazette that he "probably" would have voted for ENDA, thereby tying the vote and allowing Vice President Al Gore to cast the tie-breaking vote. *See* Terry Lemons, *Senate Votes To Bar Same-Sex Marriages Gay Worker Rights Bill Fails 49-50*, ARK. DEMOCRAT-GAZETTE, Sept. 11, 1996, at 1A (reporting on the ENDA's losing vote in the Senate).

223. *See* McGowan, *supra* note 205, at 625 (noting the encouragement that Senators felt after ENDA was narrowly defeated); Johnathan Weisman, *Close Senate Vote on Jobs Bill Buoys Gay Rights Supporters*, CQ WKLY., Sept. 14, 1996, at 2597 (stating the ENDA supporters were "emboldened by a near miss on the first gay rights vote in Senate history").

224. The Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997). The only minor difference in the second version of ENDA is that it would prohibit the EEOC from collecting statistics about the sexual orientation of employees and further prevents the EEOC from compelling employers from doing so. *See Hearing on S. 869*, *supra* note 204, at 2 (opening statements of Sen. James M. Jeffords, Chairman, Senate Comm. on Labor & Human Resources) (explaining that allowing the EEOC to collect data regarding sexual orientation might violate employee's privacy rights).

225. *See* Press Release, Human Rights Campaign, President Clinton Includes Combating Discrimination Against Gay and Lesbian Americans as a Priority in State of the Union Address (Jan. 19, 1999) (applauding President Clinton for supporting both ENDA and another anti-hate crimes bill in his annual State of the Union address), http://www.hrc.org/newsreleases/1999/990119.asp (last visited Jan. 6, 2003).

226. *See* Christopher Labonte & Daryl Herrshaft, *An ENDA in Sight? Workplace Parity Bill Heads to Full Senate for Vote*, HRC Q., Summer 2002, at 9 (chronicling ENDA's journey through Congress).

227. *See* Lou Chibbaro, Jr., *Senate Republicans Withhold Names From Anti-ENDA Report*, WASH. BLADE, Dec. 6, 2002, at 11 [hereinafter Chibbaro, Jr., *Anti-ENDA Report*] (stating that the Senate Committee on Health, Education, Labor & Pensions approved the bill by a voice vote).

vote before the end of the 107th Congress,[228] he ultimately failed to keep this pledge, allowing the bill to die when the Senate adjourned in November 2002.[229] Due to the Republican Party winning control of the Senate in the 108th Congress,[230] leadership of the Senate Committee with jurisdiction over the bill changed hands from Senator Edward Kennedy, co-sponsor and supporter of the bill, to Senator Judd Gregg, a conservative who opposes gay rights.[231] As such, passage of the bill in the immediate future seems unlikely.[232]

However, supporters of ENDA have not lost all hope. As the 107th Congress ended, the bill enjoyed the support of forty-five Senate co-sponsors and 193 House co-sponsors.[233] Recently, four of the Republican senators who sit on the Senate Committee that oversees ENDA refused to sign a Republican report opposing the legislation,[234] indicating that this is no longer a purely partisan issue.[235] Further,

228. *See* Labonte & Herrshaft, *supra* note 226, at 8 (noting that Sen. Daschle made this pledge at an Human Rights Campaign dinner).

229. *See* Chibbaro, Jr., *Anti-ENDA Report*, *supra* note 227 (stating that ENDA died when the Senate adjourned at the end of the 107th Congress without acting on the bill).

230. *See* David Stout, *Though Final Count is in Flux, G.O.P. Has Lock on the Senate*. N.Y. TIMES, Nov. 7, 2002, at B7 (reporting that, while one Senate race was still undecided, the control of the Senate was won by the Republican party in the November 2002 election); David Von Drehle, *Victory's Ripples Spread; Gephardt to Quit as Minority Leader; Democratic Presidential Aspirants Scramble*, WASH. POST, Nov. 7, 2002, at A1 (reporting that the Republican party reclaimed control of the Senate in the midterm 2002 elections).

231. *See* Chibbaro, Jr., *Anti-ENDA Report*, *supra* note 227 (writing that Sen. Judd Gregg is expected to bottle up the newly introduced version of the bill in committee).

232. *See* Lou Chibbaro, Jr., *GOP Senate May Jeopardize Gay Rights Bill, Dems Charge*, WASH. BLADE, Nov. 8, 2002, at 12 [hereinafter Chibbaro, Jr., *GOP Senate*] (reporting that Democrats said that Republican control of the Senate will "jeopardize efforts to pass pro-gay legislation in Congress").

233. *See* HUMAN RIGHTS CAMPAIGN, 107TH CONGRESS: THE SCORECARD [hereinafter SCORECARD] (providing a list of all Senators and Representatives and how they stand on ten gay-related bills, including ENDA), *available at* http://www.hrc.org/Congress/107/scorecard.pdf (last visited Jan. 6, 2003); *see also* HUMAN RIGHTS CAMPAIGN, THE EMPLOYMENT NON-DISCRIMINATION ACT (expressing the bipartisan congressional support for, and other related information about, this proposed pro-gay legislation), *at* http://www.hrc.org/issues/federal_leg/enda/ index.asp (last visited Jan. 6, 2003).

234. *See* Chibbaro, Jr., *Anti-ENDA Report*, *supra* note 232 (stating that Senators John Warner, Susan Collins, Mike DeWine, and Pat Roberts all declined to join Sen. Gregg in signing on to the committee's minority report opposing ENDA).

235. *See* Press Release, National Gay and Lesbian Task Force, Majority of Republicans Support Sexual Orientation Nondiscrimination Laws, New Survey Data Shows (June 26, 2001) (stating that sexual orientation non-discrimination laws enjoy bipartisan support), *available at* http://www.ngltf.org/news/release.cfm?releaseID=398 (last visited Jan. 6, 2003). Currently, twenty-one of the 194 co-sponsors in the House and four of the forty-five co-sponsors in the Senate are Republican. SCORECARD, *supra* note 233; *see also* Sen. Edward Kennedy, *Should Congress Pass the Employment Non-Discrimination Act? ENDA Will Prevent Discrimination?*, ROLL CALL, Feb. 15, 1999, at 21 (stating that ENDA has bipartisan support, as evidenced by the endorsements of people ranging from Coretta Scott King to Barry Goldwater).

polls indicate that Americans are increasingly realizing that employment discrimination against gays and lesbians is morally wrong.[236] Additionally, corporate support for the bill is surprisingly large, mostly because of the need for talented employees, regardless of sexual orientation, and the business costs associated with sexual orientation discrimination.[237] One recent study conducted by the National Commission on Employment Policies found that discrimination against gay and lesbian employees "translates into a $47 million loss attributable to training expenditures and unemployment benefits alone."[238] Currently, over thirty major U.S. corporations express support for ENDA.[239] Finally, other state and federal pro-gay initiatives have recently been implemented throughout the nation.[240] In light of this trend in pro-gay legislation

236. *See* Workplace Bias Survey, *supra* note 219 (reporting that seventy-seven percent of those polled said sexual orientation should not be a factor in evaluating job performance and fifty percent favor the inclusion of sexual orientation in written non-discrimination policies); LIZ WINELD & SUSAN SPIELMAN, STRAIGHT TALK ABOUT GAYS IN THE WORKPLACE 23 (2d ed. 2001) (finding that the percentage of Americans who believe that civil rights laws for gays and lesbians are intended to secure "equal rights" and not "special rights" is up to fifty-four percent from only forty-one percent in 1995); ALAN S. YANG, NAT'L GAY & LESBIAN TASK FORCE FOUND., THE 2000 NATIONAL ELECTION STUDY AND GAY AND LESBIAN RIGHTS: SUPPORT FOR EQUALITY GROWS (finding 63.9% of Americans support sexual orientation non-discrimination laws, while only 30.9 percent oppose them), *available at* http://www.ngltf.org/ downloads/NES2000.pdf (last visited Jan. 6, 2003); ALAN S. YANG, NAT'L GAY & LESBIAN TASK FORCE FOUND., FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 1973-1999 (observing trends in national polling data that suggest greater acceptance of gays and lesbians by the American population), *available at* http://www.ngltf.org/ downloads/fwtr99.pdf (last visited Jan. 6, 2003).

237. *See* Labonte & Herrshaft, *supra* note 226, at 9-10 (stating that more than thirty major U.S. corporations support ENDA); *see also* Kovach & Millspaugh, *supra* note 206, at 67-68 (stating that many companies have already instituted policies that prohibit discrimination based upon sexual orientation in their personnel policies). Additionally, ENDA has drawn almost universal support from organized labor. *Id.* at 69.

238. *See* Kovach & Millspaugh, *supra* note 206, at 70 (quoting a study that states that an estimated 42,000 gay workers are dismissed each year due to their sexual orientation). The impact of a hostile work environment on gay workers' productivity has been estimated at $1.4 billion in lost output each year. *Id.*

239. *See* Labonte & Herrshaft, *supra* note 226, at 9 (listing the companies that testified in support of ENDA to include FleetBoston, Eastman Kodak, Shell Oil Co., Microsoft, Prudential Financial, General Mills, and Hewlett-Packard); Press Release, Human Rights Campaign, ENDA Senate Hearing Features Unprecedented Support From Large Corporations And Small Businesses (Feb. 27, 2002) (stating that business leaders and sixty-five companies have endorsed ENDA), *at* http://www.hrc.org/ newsreleases/2002/020227enda.asp (last visited Jan. 6, 2003).

240. *See* Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998) (amending a previous executive order to include prohibitions on discrimination in federal employment because of sexual orientation); Press Release, New York, *supra* note 188 (applauding the New York Legislature for recently enacting statewide pro-gay workplace legislation); *see also* Chibbaro, Jr., *GOP Senate*, *supra* note 232 (stating that the November 2002 elections saw the defeat of three anti-gay referenda and the

with growing bi-partisan support from both politicians and the American public, it seems certain that ENDA, or something equivalent, will eventually become part of federal law.[241]

When ENDA, or legislation similar to it, is eventually enacted by Congress and signed into law by the President, the problems that developed in Title VII jurisprudence will begin to disappear.[242] No longer will plaintiffs who are victimized by repeated offensive harassment be denied a judicial remedy because of their sexual orientation.[243] Similarly, employers will no longer be given an incentive to rationalize adverse employment actions as being the result of permissible homophobic motivation.[244] Not only will ENDA erase the confusion and inconsistency that currently exists in the lower courts' interpretation of Title VII regarding sexual orientation, but it will also provide the only solution that is both plausible and beneficial to gay and lesbian workers.[245]

CONCLUSION

The Supreme Court has continued to interpret and alter Title VII's scope and strength since its original implementation in 1964.[246] With *Hopkins*, the Court clearly held that harassment based on one's

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election of at least thirty-four openly gay candidates throughout the nation); Alia Ibrahim, *District Registers Domestic Partners; Congress Blocked Law for 10 Years*, WASH. POST, July 9, 2002, at B1 (reporting that after a ten-year battle, Congress stopped their repeated block of the city's Health Care Expansion Act of 1992, which provides health care benefits to same-sex partners of government employees).

241. *See, e.g.*, Thomas H. Barnard & Timothy J. Downing, *Emerging Law On Sexual Orientation and Employment*, 29 U. MEM. L. REV. 555, 567 (1999) (arguing "it is probable that some time in the near future, ENDA will pass and become law").

242. *See* Dale, *supra* note 196, at 8 (discussing the relief available under ENDA and stating that the bill is intended to provide relief to the same extent as Title VII); William D. Araiza, *ENDA Before it Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1, 1 (2002) (arguing that ENDA is a valid expression of congressional enforcement power under the Fourteenth Amendment, and its provision allowing state employees to sue their employers for certain types of retrospective relief would likely withstand Supreme Court scrutiny); *see also* ESKRIDGE, JR., *supra* note 12, at 233 (stating that ENDA would "clear up the logical inconsistencies or tensions" created in the wake of *Oncale*).

243. For example, plaintiffs like the one in *Simonton v. Runyon*, 232 F.3d 33, 35-36 (2d Cir. 2000), would no longer be told by judges that the harassment they suffered was clearly egregious and reprehensible, yet be denied judicial relief because they were homosexual. *See supra* notes 106-14 and accompanying text (discussing the facts and holding in *Simonton*).

244. *See supra* notes 121-22 and accompanying text (discussing the incentives that current Title VII jurisprudence places on employers to defend against sexual harassment charges by claiming they were actually motivated by homophobia).

245. *See supra* Part IV.A (discussing why a judicial solution that is beneficial for gay and lesbian employees is unlikely).

246. *See supra* Part I.C (discussing the Supreme Court's history of interpretation the prohibition on sex discrimination in Title VII).

failure to conform to gender expectations is actionable.[247] Recent district and circuit courts limited this holding, however, by concluding that its reasoning does not apply to those whose failure to conform results in the subjective belief that they are homosexual.[248] While some gay and lesbian employees who suffered harassment based on their sexual orientation have successfully found protection under Title VII, such success is far from universal.[249] A survey of the lower court opinions involving sexual orientation and Title VII shows that confusion exists regarding the proper reach of federal anti-discrimination legislation. The Supreme Court is not likely to clarify this confusion in a manner that is beneficial to gay men and lesbians, or to the number of heterosexual victims who suffer harassment for their failure to conform to gender stereotypes.[250]

Because a judicial solution is not probable, the only appropriate and plausible solution is federal legislation.[251] ENDA, which would protect employees from discrimination and harassment based on their sexual orientation, is the most promising avenue to clear up the confusion in the circuits created by *Oncale* and its progeny.[252]

If, and when, Congress passes ENDA, or legislation similar to it, the consequences for employment law will be far-reaching. Subjectivity in the courtroom surrounding whether gay and lesbian employees deserve protection would end. Even heterosexual employees who suffer from homophobic taunts would be protected. Ultimately, more protection under the law would exist and less discrimination in workplaces would occur. ENDA is a bold, important step in ensuring that employment discrimination of all kinds is ultimately eradicated.

247. *See supra* notes 50-55 and accompanying text (reporting the holding in *Hopkins* and its implications for Title VII).
248. *See supra* Part II.C (analyzing the cases following *Oncale* that rejected Title VII claims filed by gay and lesbian employees).
249. *See supra* Part II.B (discussing the cases that have held that Title VII can protect gay and lesbian employees from discrimination).
250. *See supra* Part III.A (discussing the possibility of a judicial solution to the current problems in sexual orientation discrimination law and concluding that there is little hope for a positive resolution by the Supreme Court).
251. *See supra* Part III.B (reporting on pending federal legislation which seeks to prohibit sexual orientation discrimination in the workplace).
252. *Supra* Part III.B.