

SAME-SEX SEXUAL HARASSMENT AFTER *ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.*: OVERCOMING THE HISTORY OF JUDICIAL DISCRIMINATION IN LIGHT OF THE “COMMON SENSE” STANDARD

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The New Yorker Magazine published an article less than a month before the Supreme Court issued its opinion in *Oncale v. Sundowner Offshore Services, Inc.*,¹ stating:

[a]s is demonstrated by the history of scandal from Helen of Troy to Monica of Beverly Hills, sex has a way of befogging the higher intellectual faculties; and, as is demonstrated by the prosperity of the legal profession, the law in general is not always a model of un-

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1. 118 S. Ct. 998 (1998).

ambiguous clarity.²

The author managed to summarize not only the history of sexual harassment law, but also its future in one simple sentence.

The Supreme Court finally addressed the issue of same-sex sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.*, on March 4, 1998.³ However, in an attempt to clarify the law, the Court imposed subjective "common sense" and "reasonable person" standards.⁴ These standards added to the unsettled nature of sexual harassment law in situations when someone harasses a person of the same gender and the perpetrator does not harass in search of sexual gratification.⁵

Before the Supreme Court decided *Oncale*, district and circuit courts of appeal divided themselves on the issue of same-sex sexual harassment.⁶ At first glance, the differing opinions seem to depend on the personal views of the judges themselves. However, further analysis reveals that the cases are divided along a sexual orientation line, a line that the *Oncale* decision does not resolve.⁷

Title VII protection is not dependent on sexual orientation.⁸ Nevertheless, courts in the past manipulated the concept of sexual discrimination, creating a form of judicial discrimination that protects heterosexuals, regardless of whether the heterosexual person is the harasser or the harassed.⁹ As a general rule, if the harasser is homosexual, courts find a valid cause of action for same-sex sexual harass-

2. Jeffrey Toobin, *The Trouble with Sex: Why the Law of Sexual Harassment Has Never Worked*, THE NEW YORKER, Feb. 9, 1998, at 48.

3. See *Oncale*, 118 S. Ct. at 998 (holding that same-sex sexual harassment is actionable under Title VII).

4. See *id.* at 1003 (stating that same-sex sexual harassment should be judged from "the perspective of a reasonable person in the plaintiff's position. . .").

5. See *id.* at 1002 (noting that sexual harassment is not always about sexual activity).

6. See, e.g., *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994) (holding that same-sex sexual harassment is not actionable under Title VII); *Fredette v. BVP Management Assocs.*, 112 F.3d 1503 (11th Cir. 1997) (holding that same-sex sexual harassment is actionable under Title VII), *cert. denied*, 118 S. Ct. 1188 (1998).

7. See *Oncale*, 118 S. Ct. at 1002 (noting that same-sex sexual harassment claims under Title VII need not be based on "implicit proposals of sexual activity," and, therefore, the sexual orientation of either party may or may not be relevant or dispositive).

8. See *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (stating that "Title VII does not prohibit discrimination against homosexuals").

9. See *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (stating that Title VII does not provide a remedy for an employee when the sexual conduct of a supervisor is directed towards both sexes because in such a case the sexual harassment is not based on sex because both sexes are treated equally); see also *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (affirming the lower court holding that an "employee did not have a claim for hostile work environment in violation of Title VII based on heterosexual-male-on-heterosexual-male harassment"), *cert. denied*, 117 S. Ct. 72 (1996); *infra* notes 119-36, 292-318 (analyzing and comparing cases involving same-sex sexual harassment claims).

ment regardless of the plaintiff's sexual orientation.¹⁰ Alternatively, if the harasser is heterosexual, the court is unlikely to find a valid cause of action for same-sex sexual harassment, regardless of the plaintiff's sexual orientation.¹¹ Even more disturbing is that if the harasser is heterosexual, and the plaintiff is homosexual, (or if the harasser perceives the plaintiff as not "a good enough man,"¹² and therefore assumes the victim to be homosexual), the court is even less likely to find a cause of action.¹³ The result is discrimination against homosexual persons through judicial protection of heterosexual *machismo* behavior.¹⁴ Essentially, the courts are more likely to impose liability in same-sex sexual harassment claims when the harasser is homosexual.¹⁵ The increased possibility of sexual harassment litigation involving homosexuals may act as a deterrent to businesses otherwise willing to hire homosexuals.¹⁶ This judicial discrimination discourages employers from recognizing and addressing homosexual employee complaints about sexually harassing conduct.¹⁷

The *Oncale* opinion states that there is a cause of action for same-sex sexual harassment.¹⁸ However, the vague "common sense" language, combined with a "reasonable person" standard, allows for con-

10. See discussion *infra* Part III (discussing and comparing cases that demonstrate the history of same-sex sexual harassment in the Eleventh Circuit).

11. See *infra* text and accompanying notes 119-36 (detailing the facts and analysis of a case in the Northern District of Alabama in which the court dismissed same-sex sexual harassment as "horseplay").

12. See *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988) (discussing the factual scenario leading to the employee's claim of same-sex sexual harassment).

13. See *id.* at 1456 (finding no cause of action when the harassment started with the plaintiff being questioned as to why he had no wife or girlfriend. The court held that the harassment was not the kind that created an anti-male environment; and such conduct was not the type Congress intended covered by Title VII.).

14. See *supra* note 9 and accompanying text (discussing judicial discrimination); see also *infra* notes 274-318 and accompanying text (reviewing and analyzing the facts and holdings of several cases involving same-sex sexual harassment where both parties are heterosexual, or where one party is heterosexual and the other is homosexual).

15. See *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983) (holding same-sex sexual harassment actionable under Title VII where harasser was homosexual); see also *infra* notes 51-65 and accompanying text (discussing the early Middle District of Alabama decision holding that the plaintiff established same-sex sexual harassment where the harasser was homosexual and the harassed was heterosexual); *infra* notes 223-32 and accompanying text (discussing an Eleventh Circuit holding finding same-sex harassment where the supervisor was homosexual and the court determined that the discrimination occurred because the employee was heterosexual).

16. *Joyner*, 597 F. Supp. at 537.

17. See *id.* at 538-40 (concerning a same-sex sexual harassment claim where supervisors did not act appropriately after an employee informed them of the sexually harassing conduct of his immediate supervisors).

18. See *Oncale*, 118 S. Ct. at 1002-03 (stating that when the conduct of a supervisor is severely hostile or abusive from the perspective of a reasonable person, then the harassment is actionable under Title VII).

tinual judicial discrimination, because lower courts can classify *machismo* behavior as "simple teasing or roughhousing."¹⁹ This article discusses the future of same-sex sexual harassment claims by examining the history of same-sex sexual harassment law. First, this article explains the standard for a sexual harassment claim under Title VII. Second, this article discusses the Supreme Court's opinion in *Oncale v. Sundowner Services, Inc.* Third, this article examines the history of same-sex sexual harassment under Title VII, using the Eleventh Circuit as a model. Last, this article challenges lower courts to step away from their previous discriminatory treatment of homosexuals to create a body of law that consistently finds liability based on harassment "because of sex."

I. THE BASIS FOR SAME-SEX SEXUAL HARASSMENT CLAIMS

The Civil Rights Act of 1964,²⁰ as amended by the Civil Rights Act of 1991,²¹ lists actions that constitute unlawful employment practices.²² The statute specifically states:

[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.²³

Sexual harassment is a type of sex discrimination.²⁴ There are two kinds of sexual harassment claims, *quid pro quo*, and hostile work environment.²⁵

The first type of sexual harassment claim is *quid pro quo* sexual harassment. *Quid pro quo* sexual harassment is the traditional form of sexual harassment: "you sleep with me and I will promote you/not fire you."²⁶ To establish a *prima facie* case of *quid pro quo* sexual

19. *Id.* at 1003.

20. 42 U.S.C. § 2000e (1997).

21. *Id.*

22. *Id.*

23. *Id.* § 2000e-2(a)(1) (1997).

24. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (stating that the courts rely upon the EEOC's issued Guidelines, which specify that sexual harassment is a type of sex discrimination, and that the Supreme Court may resort to them for guidance).

25. See George Noel Lawrence, *What Everyone Should Know About Sexual Harassment, But Was Afraid to Ask*, 60 TEX. B.J. 1024, 1027-31 (1997) (defining the two kinds of sexual harassment).

26. See *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (discussing the characteristics of *quid pro quo* sexual harassment situation in which "the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee"); see also 29 C.F.R. § 1604.11 (1997) (defining conduct that constitutes violations of Title VII, including requests for sexual favors when submission is made a term or condition of employment);

harassment, a plaintiff must show that: (1) they belong to a protected group; (2) they were subjected to unwelcome sexual harassment; (3) the harassment was based on sex; and (4) the harassment altered the terms, conditions or privileges of employment.²⁷

The second type of sexual harassment is the hostile work environment.²⁸ The elements required to establish a prima facie case for a hostile work environment sexual harassment claim include the following: (1) the person belongs to a protected class; (2) he or she was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment was "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment;" and (5) "the employer knew or should have known of the harassment . . ." and failed to act, (*respondeat superior*).²⁹

Courts often rely upon persuasive authority in determining whether a cause of action exists under Title VII for same-sex sexual harassment.³⁰ One argument is that no claim for same-sex sexual harassment exists without the legislative intent to create one.³¹ When Congress passed the Civil Rights Act of 1964, a southern Congressman who wanted to quash the bill moved to add sex to the Act's protections at the last minute.³² Therefore, discussion regarding the legislature's intent in adding sex as a protected class is minimal.³³ As a result, courts often use the legislature's silence surrounding inclusion of sex as a protected class under Title VII as an indication that the legislature never intended to cover same-sex sexual harassment under Title VII.³⁴ It is unlikely that the legislature ever considered same-sex

CATHERINE MCKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32-37 (discussing and distinguishing the two types of sexual harassment).

27. See *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1361 (11th Cir. 1994) (describing the elements required to establish a prima facie case of quid pro quo sexual harassment and applying these elements to find the employer liable for sexual harassment).

28. See *Meritor*, 477 U.S. at 65 (declaring that hostile work environment sexual harassment is a form of sex discrimination and actionable under Title VII); see also MCKINNON, *supra* note 26, at 40-47 (discussing and defining hostile work environment sexual harassment).

29. See *Henson*, 682 F.2d at 903-05 (describing the requisite element of a prima facie hostile work environment claim).

30. See *Meritor*, 477 U.S. at 63 (using the legislative history of Title VII to interpret its meaning and application); see also *Henson*, 682 F.2d at 908 n.18.

31. See Theos D. McKinney, III., *Recent Developments in the Law Regarding Same-Sex Sexual Harassment*, SB56 ALI-ABA 29, 32 (1997) (describing some courts' reliance on legislative intent to justify not recognizing same-sex sexual harassment).

32. 110 CONG. REC. 2577-84 (1964).

33. *Id.*

34. See *Fredette v. BVP Management Assocs.*, No. 94-325-CIV-ORL-18, 1995 U.S. Dist. LEXIS 13954, at *11-12 (M.D. Fla. July 6, 1995) (discussing the intentions of the legislature), *granted in part and denied in part*, 905 F. Supp. 1034 (M.D. Ala. 1995), *rev'd*, 112 F.3d 1503 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998).

sexual harassment as a cause of action in their 1960s deliberations. Nevertheless, a majority of trial court judges dismiss the "never intended" argument, reasoning that because Title VII applies to both genders equally,³⁵ a cause of action exists as long as the harassment is based on sex.³⁶

II. THE UNITED STATES SUPREME COURT DECIDES THE ISSUE CONCERNING SAME-SEX SEXUAL HARASSMENT

Justice Scalia delivered a short but powerful decision on March 4, 1998, in *Oncale v. Sundowner Offshore Services, Inc.*³⁷ The Court created three important aspects in sexual harassment law: (1) the Court established a cause of action for same-sex sexual harassment; (2) the Court imposed a reasonable person standard to evaluate whether same-sex sexual harassment exists in each particular case; and (3) the Court explained that "[c]ommon sense and an appropriate sensitivity to social context . . ."³⁸ is the standard used to distinguish sexual harassment from simple "teasing and roughhousing."³⁹

Joseph Oncale filed a sexual harassment claim after his supervisor and two co-workers restrained him while placing one of their penises on Oncale's neck, threatened homosexual rape, and forcefully pushed a bar of soap into Oncale's anus.⁴⁰ The Fifth Circuit Court of Appeals did not rule in favor of Oncale because the court did not make a factual determination regarding first, the threats of homosexual rape, and second, the homosexuality of the defendant.⁴¹

On appeal, the Supreme Court used precedent in establishing a cause of action for same-sex sexual harassment.⁴² The Court stated that, "[there is] no justification in the statutory language or our

35. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-82 (1983) (discussing how the Court applied an equal protection analysis to Title VII claims and how this reasoning can apply to both male and female employees).

36. See *infra* notes 164-81 and accompanying text (analyzing a court decision that reviewed and rejected the legislative intent argument by citing to precedent that focused only on the language of Title VII. That court concluded that the only important issue was whether the sexual harassment was "because of" the employee's sex, regardless of the sex of the two parties.).

37. 118 S. Ct. 998 (1998).

38. *Id.* at 1003 (commenting on the importance of considering the social context of the behavior that is in question).

39. *Id.*

40. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996) (describing the harassment suffered by the plaintiff), *rev'd*, 118 S. Ct. 998 (1998).

41. *Id.*

42. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001-02 (1998) (reviewing prior court decisions involving Title VII claims of sex discrimination, including cases dealing with sexual harassment as well as hiring practices).

precedents for a categorical rule excluding same-sex harassment claims from coverage of Title VII."⁴³ The Court addressed the precedent of no male-on-male sexual harassment and dismissed the legislative history argument by explaining that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."⁴⁴

Most significantly, the Court stated "that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position considering all the circumstances."⁴⁵ By imposing a reasonable person standard, the Court allowed the social conscience of society to dictate the standard.⁴⁶ In addition, the Court attempted to guide the reasonable person standard by explaining that common sense is used to distinguish between "teasing and roughhousing."⁴⁷

The Court illustrates "roughhousing" with a creative and simple example:

[a] professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field - even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.⁴⁸

The problem with placing "teasing" and "roughhousing" outside the scope of same-sex sexual harassment is that in the past, courts failed to find a cause of action in same-sex sexual harassment cases by using this exact language.⁴⁹ By establishing this broad and subjective standard, the Court acknowledged and consented to, what is, in reality, judicial discrimination.⁵⁰

43. *Id.* at 1002.

44. *Id.*

45. *Id.* at 1003.

46. *See id.* (stating that describing a physical act or repeating the offensive words is not enough to capture the true impact of the incident).

47. *Oncale*, 118 S. Ct. at 1002-03.

48. *Id.* at 1003.

49. *See supra* notes 8-14 and accompanying text (commenting on the apparent judicial protection of heterosexual employees and co-workers who sexually harass employees); *see also infra* notes 119-36 and accompanying text (relating the facts and holding of a case involving same-sex sexual harassment described by the court as "horseplay").

50. *Oncale*, 118 S. Ct. at 1002-03.

III. THE HISTORY OF SAME-SEX HARASSMENT CLAIMS IN THE ELEVENTH CIRCUIT

A. *Middle District of Alabama*

The Middle District of Alabama decided the first reported same-sex sexual harassment case in the Eleventh Circuit in 1983.⁵¹ The plaintiff, Joyner, was a shop mechanic and later a driver for a transportation company.⁵² At a local drive-in restaurant, the terminal manager approached Joyner, who subsequently entered the terminal manager's car.⁵³ The terminal manager touched Joyner's "private parts" and asked him to engage in homosexual acts.⁵⁴ Joyner refused and then told the chairman of the board about the incident.⁵⁵ The chairman seemed shocked and assured Joyner he would investigate the incident further.⁵⁶ The chairman then called the general manager of the company, who later assured Joyner that he resolved the problem.⁵⁷ However, days later the terminal manager told Joyner that he knew of Joyner's complaint and implied that if he had the authority he would fire Joyner.⁵⁸ The defendant transferred Joyner to a new position, but with the transfer came a loss of seniority, and the defendant ultimately laid Joyner off.⁵⁹ Joyner continually inquired about the possibility of reemployment but was given a series of excuses by both the terminal manager and the general manager chairman.⁶⁰ Ultimately, Joyner was the only full-time driver not recalled after the layoff, and the company hired a new employee for his job.⁶¹

The lower court did not frame the issue as one involving same-sex sexual harassment.⁶² Instead, the court identified the issue as whether unwelcome homosexual harassment constitutes a claim un-

51. See *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983) (declaring that homosexual harassment violates Title VII because sexual harassment is discrimination based on sex, and Title VII violations apply in a heterosexual as well as a homosexual context), *aff'd*, 749 F.2d 732 (11th Cir. 1984).

52. *Id.* at 539.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Joyner*, 597 F. Supp. at 539.

57. *Id.*

58. *Id.*

59. *Id.* at 539-40.

60. *Id.* at 540.

61. *Joyner*, 597 F. Supp. at 541-42.

62. *Id.* at 541.

der Title VII using the quid pro quo framework.⁶³ The court determined that there is such a cause of action, and applied the standards for proving a prima facie case of quid pro quo sexual harassment to the facts of Joyner's case.⁶⁴ While the court did not use the actual buzzwords "same-sex harassment," it did establish a cause of action for sexual harassment between two people of the same gender.⁶⁵

The same-sex sexual harassment debate heated up in the Middle District of Alabama in early 1995.⁶⁶ Once again, the plaintiff alleged quid pro quo same-sex sexual harassment.⁶⁷ Prescott, the plaintiff, was the Staff Sales Manager for Independent Life Insurance Company.⁶⁸ Meeks was the District Manager, and Prescott's direct supervisor.⁶⁹ Meeks allegedly subjected Prescott to harassment by unwanted touching, threatening Prescott's employment status, and promising professional advancement if he responded to Meeks' advances.⁷⁰ Prescott claimed that when he refused Meeks' advances, Meeks created a false record of insubordination, and ultimately terminated him.⁷¹

The defendant, Independent Life Insurance, asserted that homosexual same-sex sexual harassment was not actionable under Title VII.⁷² The court rejected the defendant's argument, and found quid pro quo same-sex sexual harassment actionable under Title VII.⁷³ The court based its holding on Congress' choice to use the unmodified term "sex" when referring to sexual harassment, rather than "member of the opposite sex."⁷⁴ According to the court, Congress intended to prohibit discriminatory treatment by a supervisor or company because of an employee's sex; a cause of action for same-sex sexual harassment arises when, but for the employee's gender, the

63. *Id.* at 541-42.

64. *Id.*

65. See generally *id.* at 541-42 (developing a *prima facie* standard for cases of homosexual harassment under Title VII).

66. *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545 (M.D. Ala. 1995) (discussing the differences between quid pro quo and hostile environment same-sex sexual harassment).

67. *Id.* at 1548.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Prescott*, 878 F. Supp. at 1548.

72. See *id.* at 1549 (referring to *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822 (D. Md. 1994)).

73. *Id.* at 1550.

74. *Id.*

harassment would not have occurred.⁷⁵ The court held that Prescott established a claim for homosexual same-sex sexual harassment because Meeks asked for sexual favors in exchange for continued employment, and Prescott's treatment was based on gender.⁷⁶

The Middle District of Alabama again addressed whether a cause of action exists for same-sex sexual harassment in *McElroy v. TNS Mills, Inc.*⁷⁷ The plaintiff, McElroy, was a forklift operator in a warehouse.⁷⁸ He had a series of reprimands, was often late or absent from work, and many employees considered him to have a drinking problem.⁷⁹ Brooks was McElroy's supervisor and often told McElroy that he looked or smelled good, but never made any physical contact with him.⁸⁰ McElroy complained, but his supervisors did not take his complaints seriously.⁸¹ McElroy's co-workers teased him about having to work with Brooks alone.⁸² A witness testified that Brooks told her that he was homosexual and frequented a gay bar.⁸³

One day, McElroy arrived at the beginning of a shift smelling of alcohol and Brooks confronted him.⁸⁴ Brooks told him to clock out and come back the next day.⁸⁵ McElroy denied drinking any alcohol prior to arriving at work.⁸⁶ The following day, McElroy had a meeting with the plant superintendent who attempted to convince McElroy not to quit, but McElroy quit anyway.⁸⁷ McElroy never indicated that he was quitting because of Brooks' behavior, or because Brooks sexually harassed him.⁸⁸ However, soon after he quit, McElroy filed a claim with the Equal Employment Opportunity Commission alleging sexual harassment by Brooks.⁸⁹

The court rejected the defendant's argument that a cause of action did not exist for same-sex hostile work environment sexual harass-

75. *Id.* at 1550-51.

76. *Prescott*, 878 F. Supp. at 1551.

77. *McElroy v. TNS Mills, Inc.*, 953 F. Supp. 1383 (M.D. Ala. 1996).

78. *Id.* at 1384.

79. *Id.* at 1385.

80. *Id.*

81. *Id.*

82. *McElroy*, 953 F. Supp. at 1385.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *McElroy*, 953 F. Supp. at 1385-86.

88. *Id.* at 1386.

89. *Id.*

ment.⁹⁰ Instead, the court followed *Prescott*,⁹¹ and found the distinction between quid pro quo and hostile work environment irrelevant.⁹² In dicta, the court declined to follow the Fourth Circuit's decision in *Mayo v. Kiwest Corp.*,⁹³ which held that there is no hostile environment same-sex sexual harassment when both parties are heterosexuals of the same sex.⁹⁴ The court in *McElroy* states that the "gravamen of the cause of action is the creation of a hostile work environment based on gender. Hence, whether or not either party is [a] homosexual [person] seems to the Court to be immaterial."⁹⁵

Most recently, the Middle District of Alabama addressed same-sex sexual harassment in *Sneed v. Montgomery Housing Authority*.⁹⁶ Beverly Sneed was an assistant housing complex manager with the Montgomery Housing Authority.⁹⁷ She was excessively absent during the years 1990 and 1991, which her employer noted on her yearly evaluations.⁹⁸ During July of 1992, Carol Brown, Sneed's supervisor, allegedly discussed lesbian activities with a tenant.⁹⁹ Soon after, Brown allegedly put her arm around Sneed and stroked Sneed's hair.¹⁰⁰ Brown complied when Sneed told her to stop.¹⁰¹

After Sneed received a warning letter for excessive absences, she complained about Brown's advances.¹⁰² The Housing Authority conducted a short investigation by meeting with both Sneed and Brown.¹⁰³ Sneed requested a transfer, and two months later the Housing Authority transferred her.¹⁰⁴ Sneed's new supervisor was unhappy with her work, and called her in for a meeting.¹⁰⁵ Sneed alleged that

90. *Id.* at 1387.

91. *Prescott*, 878 F. Supp. at 1549 (discussing the differences between quid pro quo and hostile environment same-sex sexual harassment).

92. *McElroy*, 953 F. Supp. at 1387.

93. 94 F.3d 641 (4th Cir. 1996).

94. See *McElroy*, 953 F. Supp. at 1388 n.3 (citing *Mayo v. Kiwest Corp.*, 94 F.3d 641 (4th Cir. 1996)).

95. *Id.* at 1388.

96. 956 F. Supp. 982 (M.D. Ala. 1997).

97. *Id.* at 983.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Sneed v. Montgomery Hous. Auth.*, 956 F. Supp. 982, 983 (M.D. Ala. 1997).

102. *Id.* at 984.

103. *Id.*

104. *Id.* at 985.

105. *Id.*

she was verbally attacked for her poor work quality.¹⁰⁶ She further alleged that the stress of the confrontation aggravated her diabetes, and she requested another transfer.¹⁰⁷ Again, the Housing Authority granted her the transfer, and Sneed's attorney indicated that she would begin her new position on January 19, 1993.¹⁰⁸ However, Sneed was too ill to return to work.¹⁰⁹ Her attorney failed to inform the company that she was ill.¹¹⁰ Sneed eventually resigned on February 3, 1993, without ever returning to work.¹¹¹ In her resignation, Sneed claimed that the Housing Authority did not provide her with safe working conditions, and she therefore refused to sign a release form for her claims in exchange for another transfer.¹¹² Sneed claimed that she was a victim of sexual harassment.¹¹³

In determining whether Sneed was a victim of sexual harassment, the court followed *Prescott* and concluded that Title VII allowed an action for same-sex sexual harassment.¹¹⁴ The court examined the case as a hostile environment claim because there were no facts to support a case for quid pro quo sexual harassment.¹¹⁵ The court found that the timing of plaintiff's sexual harassment charge undermined her credibility because Brown and Sneed worked together for years without incident.¹¹⁶ The court also concluded that Sneed's claim lacked credibility because it was only made after a high-level supervisor threatened to terminate her due to poor job performance.¹¹⁷ Accordingly, the court held that Sneed failed to carry the burden of proof necessary to prevail on her sexual harassment claim.¹¹⁸

B. Northern District of Alabama

The Northern District of Alabama addressed the issue of same-sex sexual harassment only once in *Martin v. Norfolk Southern Railway*

106. *Sneed*, 956 F. Supp. at 985.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Sneed*, 956 F. Supp. at 986.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Sneed*, 956 F. Supp. at 987.

117. *Id.*

118. *Id.*

Co.¹¹⁹ Edwin Martin was a Mechanical Supervisor at Norfolk Southern's Birmingham railway yard.¹²⁰ Hornbuckle was Martin's immediate supervisor.¹²¹ Thomasson worked under Martin, and Summerlin was also a mechanical supervisor.¹²² Hornbuckle, Thomasson, and Summerlin sexually harassed Martin during the period they worked together.¹²³ More specifically, Martin alleged that Hornbuckle grabbed his genitals and made inappropriate remarks, including calling Martin "pretty," and telling Martin he wanted "to bend him over a chair and have sex with him."¹²⁴ Summerlin, along with Hornbuckle, offered to expose his penis to Martin and asked to see Martin's penis.¹²⁵ Summerlin pulled his pants down, exposed his buttocks to Martin, and grabbed Martin on several occasions.¹²⁶ Thomasson also grabbed Martin, put him in a headlock, tried to kiss him, pinched him, told him he was cute, and stated that Martin's girlfriend was ugly.¹²⁷ None of the three propositioned Martin to have sex, and there was no evidence that any of the men were homosexual.¹²⁸

Martin spoke with Hornbuckle and other supervisors in the company about the harassment.¹²⁹ He neither contacted the company's Equal Employment Opportunity Department, nor notified the Master Mechanic.¹³⁰ Martin eventually took medical leave, and when he did not return to work at the end of the leave, the company terminated him.¹³¹

The court discussed hostile environment and sexual harassment at length, stating that a fundamental reason hostile work environment sexual harassment is actionable as sex discrimination is because of the harasser's perceived need for sexual gratification.¹³² The court then reasoned that because same-sex heterosexual hostile environment sexual harassment has no presumption of, or need for, sexual

119. 926 F. Supp. 1044 (N.D. Ala. 1996).

120. *Id.* at 1046.

121. *Id.*

122. *Id.*

123. *Id.* at 1046-47.

124. *Martin*, 926 F. Supp. at 1046-47.

125. *Id.* at 1046.

126. *Id.* at 1047.

127. *Id.*

128. *Id.*

129. *Martin*, 926 F. Supp. at 1047.

130. *Id.*

131. *Id.* at 1048.

132. *Id.* at 1049.

gratification, there was no sex discrimination.¹³³ The court cited *Tietgen v. Brown's Westminster Motors, Inc.*,¹³⁴ which proposed that same-sex heterosexual sexual harassment can be as innocuous "as mere locker room antics, joking, or horseplay."¹³⁵ The court finally concluded that there was no cause of action for same-sex heterosexual sexual harassment, and dismissed Martin's claim.¹³⁶

C. Southern District of Georgia

The Southern District of Georgia addressed same-sex sexual harassment in *McCoy v. Johnson Controls World Services, Inc.*¹³⁷ McCoy, a security guard, alleged sexual and racial harassment by two other female security guards, Ivey and Black.¹³⁸ Ivey rubbed her breasts against McCoy's chest, rubbed McCoy between her legs, and forced her tongue into McCoy's mouth.¹³⁹ Black, who was often assigned to the same car as McCoy, referred to McCoy as "stupid poor white trash" and "white bitch," and told McCoy they were going to make her quit.¹⁴⁰

On a motion to dismiss, the court upheld a cause of action for same-sex sexual harassment.¹⁴¹ First, the court listed the elements of a prima facie case of sexual harassment under *Henson*.¹⁴² The court stated that the third element, requiring that the harassment be "based upon sex," was established by showing that "but for the fact of her sex, [plaintiff] would not have been the object of harassment."¹⁴³ The court further held that to prove the harassment was based on sex, McCoy must show that her harassers "did not treat male employees in a similar fashion."¹⁴⁴ Using the *Henson* analysis, McCoy established sexual harassment "by showing her harassers only harassed women and, thus, did not treat men in a similar fashion."¹⁴⁵

133. *Id.*

134. 921 F. Supp. 1495 (E.D. Va. 1996).

135. See *Martin*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (citing *Tietgen v. Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996)).

136. *Id.* at 1050.

137. *McCoy v. Johnson Controls World Servs., Inc.*, 878 F. Supp. 229 (S.D. Ga. 1995).

138. *Id.* at 231.

139. *Id.*

140. *Id.*

141. *Id.* at 232.

142. *McCoy*, 878 F. Supp. at 232 (referencing *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982)).

143. *Id.* at 232 (quoting *Henson*, 682 F.2d at 903).

144. *Id.*

145. *Id.*

D. Middle District of Georgia

The Middle District of Georgia addressed same-sex sexual harassment in *McCoy v. Macon Water Authority*.¹⁴⁶ In this case, the court denied a hostile work environment claim in a summary judgment motion.¹⁴⁷ McCoy was the supervisor and sole employee at two water plants for the Macon Water Authority.¹⁴⁸ His supervisor was Charles Birkencamper, the manager at a different plant.¹⁴⁹ McCoy testified that Birkencamper asked him about the size of his penis, asked him about the size of his girlfriend's vagina to figure out how big his penis was, and commented on his body.¹⁵⁰ Birkencamper also speculated about McCoy's sexual performance, invited McCoy to car shows out of town in order to share a hotel room, and told McCoy about intimate relations he had with a male friend.¹⁵¹ Another employee testified that Birkencamper also told her about his male friend's body.¹⁵² Birkencamper even refused to allow McCoy to attend a seminar so that McCoy would go with Birkencamper to a different seminar held at Jekyll Island, giving Birkencamper an opportunity to see McCoy in a bikini bathing suit.¹⁵³

McCoy complained to Thompson, the Director of Plant Operations, who told McCoy to avoid Birkencamper.¹⁵⁴ Thompson held a staff meeting and warned the staff not to discuss "things of a personal nature."¹⁵⁵ Following the staff meeting, Birkencamper did not make any more comments.¹⁵⁶ When a local television station inquired about the situation, the Executive Director of the Macon Water Authority, Holcomb, became involved.¹⁵⁷ After questioning McCoy and two other employees, Holcomb wrote McCoy stating that there was no justification for a charge of sexual harassment.¹⁵⁸ On the same day, McCoy received a new schedule which he found "excessively de-

146. 966 F. Supp. 1209 (M.D. Ga. 1997).

147. *Id.* at 1213.

148. *Id.* at 1214.

149. *Id.*

150. *Id.*

151. *McCoy*, 966 F. Supp. at 1214.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *McCoy*, 966 F. Supp. at 1214.

157. *Id.*

158. *Id.*

manding."¹⁵⁹ McCoy filed an equal employment opportunity charge, and when Holcomb learned about the charge, he called McCoy into his office for a meeting, which McCoy described as threatening.¹⁶⁰ Following the meeting, McCoy filed an additional charge with the EEOC alleging retaliation.¹⁶¹ Soon after, McCoy's company instructed him to report to another supervisor, Bledsoe. They also moved his records to Bledsoe's office and ordered other employees to spy on McCoy.¹⁶² McCoy resigned because of the continued retaliation.¹⁶³

The court reviewed the *Goluszek v. Smith*¹⁶⁴ legislative intent argument, which denied same-sex sexual harassment claims,¹⁶⁵ but then stated that the Eleventh Circuit's *Henson*¹⁶⁶ decision bound the court.¹⁶⁷ Citing *Henson*, the court reasoned that "[a] sexual harassment plaintiff need not show that every member of his or her sex was subject to the harassment, but only that 'but for the fact of [his or] her sex, [he or] she would not have been the object of harassment.'"¹⁶⁸ The court also used the reasoning found in *Wrightson v. Pizza Hut, Inc.*,¹⁶⁹ which focused on the plain language of Title VII, with specific emphasis on the words "because of . . . sex."¹⁷⁰ The court concluded that the only relevant inquiry under Title VII "is whether the harassment was directed at the plaintiff as a result of the plaintiff's sex."¹⁷¹

The court further reasoned that the "but for" approach "requires an inquiry into the 'sexual preference' of the harasser."¹⁷² Quoting *Martin v. Norfolk Southern Railway Co.* from the Northern District of Alabama,¹⁷³ the court determined that "[t]he presumption arises from the sexually oriented harassing conduct and [that it] is predicated upon the perceived need for sexual gratification."¹⁷⁴ Because of the

159. *Id.*

160. *Id.*

161. *McCoy*, 966 F. Supp. at 1214.

162. *Id.* at 1214-15.

163. *Id.* at 1215.

164. 697 F. Supp. 1452 (N.D. Ill. 1988).

165. *See McCoy*, 966 F. Supp. at 1215 (citing *Goluszek*, 697 F. Supp. at 1456).

166. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

167. *McCoy*, 966 F. Supp. at 1216.

168. *See id.* (quoting *Henson*, 682 F.2d at 904).

169. *See id.* (citing *Wrightson v. Pizza Hut*, 99 F.3d 138 (4th Cir. 1996)).

170. *Id.* For a discussion of *Wrightson*, see *infra* text and accompanying notes 297-302.

171. *Id.*

172. *McCoy v.*, 966 F. Supp. at 1217.

173. For a discussion of *Martin*, see *supra* text and accompanying notes 119-36.

174. *McCoy*, 966 F. Supp. at 1217.

demand by the harasser for sexual gratification, the victim was singled out because of his or her gender.¹⁷⁵ The court concluded that Title VII provides a cause of action for homosexual same-sex sexual harassment, but does not provide a cause of action for heterosexual same-sex sexual harassment.¹⁷⁶

The *McCoy* court found that a claim for homosexual same-sex sexual harassment existed because McCoy presented enough evidence to show a genuine issue of material fact as to whether he was sexually harassed.¹⁷⁷ McCoy presented evidence sufficient for a court to find the harassment was "based on his sex"¹⁷⁸ by showing Birkencamper was not interested in women, and a woman in the office would not have been subjected to similar treatment.¹⁷⁹

The court also determined McCoy presented enough evidence to prove that the sexual harassment affected a "term, condition, or privilege of employment."¹⁸⁰ McCoy presented evidence that he was repeatedly asked intimate anatomical questions and questions about his sex life, and that he experienced mental and physical symptoms as a result of the work environment.¹⁸¹

E. Middle District of Florida

The Middle District of Florida first addressed same-sex sexual harassment in *Fredette v. BVP Management Assoc.*¹⁸² Robert Fredette was a backwaiter at Arthur's 27, a restaurant on the twenty-seventh floor of the Lake Buena Vista Palace Hotel in Lake Buena Vista, Florida.¹⁸³ Mr. Dana Sunshine was Fredette's manager who had influence over hiring, firing, scheduling, and teaming of waiters.¹⁸⁴

Sunshine made continual sexual advances toward Fredette.¹⁸⁵

175. *Id.*

176. *Id.*

177. *Id.*

178. See *supra* text and accompanying notes 28-29 (defining the third element of a hostile work environment claim); see also *McCoy*, 966 F. Supp. at 1218 (describing the third element as a "critical" one, causing courts to generally support a conclusion that there is no same-sex sexual harassment).

179. *McCoy*, 966 F. Supp. at 1218.

180. See *id.* (citing the fourth element of a hostile work environment claim); see also *supra* text accompanying note 18.

181. *McCoy*, 966 F. Supp. at 1218.

182. *Fredette v. BVP Management Assocs.*, No. 94-325-Civ. ORL-18, 1995 U.S. Dist. LEXIS 13954 (M.D. Fla. 1995); see *Fredette v. BVP Management Assocs.*, 905 F. Supp. 1034 (M.D. Fla. 1995), *rev'd*, 112 F.3d 1503 (11th Cir. 1997).

183. *Fredette*, 1995 U.S. Dist. LEXIS 13954, at *2.

184. *Id.*

185. *Id.* at *2-5.

When Fredette first started working at Arthur's 27, Sunshine told Fredette he knew a "good way" Fredette could become captain.¹⁸⁶ Fredette responded to Sunshine that he preferred to be promoted as a result of hard work, and Sunshine responded, "hard is exactly what it takes."¹⁸⁷ Fredette objected to Sunshine's advances, who told Fredette to go ahead and complain to personnel, because previous complaints had not hurt Sunshine's employment record.¹⁸⁸ Sunshine also ogled and propositioned other male waiters, promoted a waiter to captain in exchange for sexual favors, and told Fredette when confronted, "[y]ou can do what you want, but I control your income."¹⁸⁹ When Fredette complained to an assistant manager, the manager told him "the gay issue is a dead issue."¹⁹⁰ Sunshine also made sexual comments and suggestions to Fredette outside the workplace.¹⁹¹

On New Year's Eve, 1992, Sunshine grabbed Fredette, stared at his groin, and then made an obscene comment about Fredette's appearance.¹⁹² Due to the stress of the unwanted sexual attention, on January 3, 1993, Fredette became intoxicated at an adjacent bar and caused a disturbance.¹⁹³ The disturbance led to Fredette's suspension from work.¹⁹⁴ The restaurant also required Fredette to seek alcohol counseling and submit to random drug tests.¹⁹⁵

Soon after, Fredette reported Sunshine's inappropriate behavior to David Mitchell, the hotel's human resources manager, and told him that he had seen a counselor.¹⁹⁶ Fredette further detailed his complaints against Sunshine to Mitchell.¹⁹⁷ The same day, another waiter verified many of Fredette's complaints.¹⁹⁸ The director of human resources met with Sunshine and gave him a written reprimand.¹⁹⁹ Over

186. *Id.* at *3.

187. *Id.*

188. *Fredette*, 1995 U.S. Dist. LEXIS 13954, at *3.

189. *Id.* at *4.

190. *Id.*

191. *See id.* (noting that Sunshine's sexual partner admitted to other employees that they could get better table assignments and, thus, make more money if they engaged in sexual conduct with Sunshine).

192. *Fredette*, 1995 U.S. Dist. LEXIS 13954, at *4.

193. *Id.* at *5.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Fredette*, 1995 U.S. Dist. LEXIS 13954, at *5.

198. *Id.*

199. *Id.*

the next year, two others filed complaints against Sunshine.²⁰⁰

Fredette's relationship with Sunshine deteriorated rapidly.²⁰¹ Sunshine no longer propositioned Fredette, but began to enforce previously unenforced workplace rules.²⁰² Sunshine told Fredette not to speak to other waiters, assigned Fredette to fewer and lower tipping tables, and had an alleged friend file a complaint stating Fredette threatened him.²⁰³ On the advice of his doctor, Fredette resigned and subsequently filed charges for sexual harassment.²⁰⁴

In court, the defendants, BVP Management Associates,²⁰⁵ contended that same-sex sexual harassment is not actionable under Title VII.²⁰⁶ Magistrate Baker rejected the defendant's argument, but first explained the reasoning of courts that have found no cause of action for same-sex sexual harassment by analyzing *Garcia v. Elf Atochem North America*²⁰⁷ and *Goluszek v. H.P. Smith*.²⁰⁸ According to Baker, the *Garcia* and *Goluszek* courts held that Title VII does not cover same-sex sexual harassment because Title VII addresses gender discrimination, and Congress intended the statute to promote "equal employment opportunity through freedom from discriminatory workplace intimidation."²⁰⁹ The *Goluszek* court further concluded that Title VII was enacted to cure abuse of power imbalance "by the powerful which results in discrimination against a discrete and vulnerable group."²¹⁰ A sexual harassment claim is actionable under Title VII only if the offender expresses through words or deeds that the victim is inferior because of his or her sex.²¹¹ Therefore, this type of discrimination could not exist for a male who works in a male-dominated work environment.²¹²

Magistrate Baker rejected the *Garcia* and *Goluszek* argument and

200. *Id.*

201. *Id.* at *6.

202. *Fredette*, 1995 U.S. Dist. LEXIS 13954, at *6.

203. *Id.*

204. *Id.*

205. *See id.* at *2 (noting that defendant BVP Management Associates operated Arthur's 27, the restaurant where Mr. Sunshine and Mr. Fredette worked).

206. *Id.* at *7.

207. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994).

208. *See Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (discussing same-sex sexual harassment in terms of gender discrimination); *see also Fredette*, 1995 U.S. Dist. LEXIS 13954, at *12-13 (discussing the reasoning of the courts in both *Garcia* and *Goluszek*).

209. *See Fredette*, 1995 U.S. Dist. LEXIS 13954, at *13 (citing *Goluszek*, 697 F. Supp. at 1456).

210. *See id.* (quoting *Goluszek*, 697 F. Supp. at 1456).

211. *See id.* (citing *Goluszek*, 697 F. Supp. at 1456).

212. *Id.*

explained that it is the employee discriminated against, rather than the discriminating supervisor, who is the proper focus of inquiry.²¹³ Further, the Magistrate concluded, regardless of the supervisor's sexual orientation, Title VII would not fulfill its goal if supervisors could harass employees with exemption.²¹⁴ Continuing, Baker pointed out under *Garcia* and *Goluszek*, based on the employee's gender and the supervisor's attention thereto, the employee was denied the opportunity to work in an environment free of discrimination.²¹⁵ Thus, Magistrate Baker held Title VII provides a cause of action for same-sex sexual harassment.²¹⁶

The defendant filed an objection to the Magistrate's report.²¹⁷ After reviewing the Magistrate's report and recommendation, BVP's objection to the Magistrate's report and Fredette's response to BVP's objection, the court granted BVP's summary judgment motion on the Title VII claim.²¹⁸ Judge Sharp pointed to Seventh, Eighth, and Ninth Circuit case law, which provides that "'sex' as used in Title VII is not synonymous with 'sexual preference.'"²¹⁹ He further writes that harassment by a male supervisor against a male subordinate does not necessarily state a claim, even if there are sexual overtones, because Title VII addresses gender discrimination.²²⁰

Judge Sharp reasoned that the discrimination occurred only after Fredette refused the manager's advances, and stemmed from both the refusals and the fact that Fredette had a different sexual orientation than Sunshine.²²¹ The court concluded Title VII does not provide a cause of action for same-sex sexual harassment because of one's sexual orientation or preference, and therefore, Fredette did not state a claim under Title VII.²²²

The plaintiff appealed to the Eleventh Circuit Court of Appeals which overturned the lower court's decision, holding that a cause of

213. *Id.* at *16.

214. *Fredette*, 1995 U.S. Dist. LEXUS 13954, at *16.

215. *Id.* at *17.

216. *Id.*

217. *Fredette*, 905 F. Supp. at 1035.

218. *See id.* (finding no cause of action for discrimination based on sexual orientation or preference).

219. *See id.* at 1037 (citing *Ulane*, 742 F.2d at 1082, *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (*per curiam*); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979)).

220. *See Fredette*, 905 F. Supp. at 1037 (quoting *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994)).

221. *Id.*

222. *Id.*

action for same-sex sexual harassment exists under Title VII.²²³ The Eleventh Circuit presented the issue as whether "the sexual harassment of a male employee by a *homosexual* male supervisor is actionable under Title VII."²²⁴ The court of appeals used the statutory language of Title VII²²⁵ and determined that same-sex discrimination occurs "because of such an individual's . . . sex."²²⁶ Interestingly, the court analogized same-sex harassment to reverse discrimination, stating a claim is viable because "the widespread acknowledgment of the viability of reverse-discrimination claims (which often involve the same-sex context) stands as an implicit rejection of BVP's position."²²⁷ The court then cited persuasive Fifth and Sixth Circuit authority.²²⁸ The Fifth Circuit denied a same-sex sexual harassment claim.²²⁹ The Sixth Circuit held that, "when a male sexually propositions another male *because of sexual attraction*, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male - that is, 'because of sex.'"²³⁰ The *Fredette* court also analyzed the reasoning of *Goluszek*, which the Eleventh Circuit district court reviewed.²³¹ Ultimately, the court held that "when a homosexual male supervisor solicits sexual favors from a male subordinate and conditions work benefits or detriment on receiving such favors, the male subordinate can state a viable Title VII claim for *gender* discrimination."²³²

The Middle District of Florida also addressed same-sex sexual harassment in *Marciano v. Kash n' Karry Foodstores, Inc.*²³³ Marciano, a night shift clerk, was supervised by Cantlin.²³⁴ Cantlin told Marciano he had a "cute butt" and often wolf whistled at him.²³⁵ Cantlin ex-

223. *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997).

224. *Id.* (emphasis added).

225. *Id.* at 1504-05.

226. *See id.* (citing Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)).

227. *Id.* at 1506.

228. *See Fredette*, 112 F.3d at 1506 (citing *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997) (finding repeated sexual advances by homosexual male on male actionable under Title VII); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996) (finding no merit in same-sex sexual harassment claims), *rev'd*, 118 S. Ct. 998 (1998)).

229. *See Fredette*, 112 F.3d at 1508 (citing *Oncale*, 83 F.3d at 120 (stating that "all same-sex sexual harassment claims" are barred)).

230. *See id.* at 1506 (quoting *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997)).

231. *McCoy*, 965 F. Supp. at 1216.

232. *Fredette*, 112 F.3d at 1510 (emphasis added).

233. No-94-1657-Civ-T-17A, 1996 U.S. Dist. LEXIS 10491 (M.D. Fla. July 1, 1996).

234. *Id.* at *2.

235. *Id.*

posed himself to Marciano and told him to "suck it . . . you know you want it."²³⁶ Marciano complained numerous times and asked for a transfer, which the management repeatedly denied.²³⁷ Soon after Cantlin exposed himself to Marciano, the management terminated Cantlin, and only a few days later, Kash n' Karry asked Marciano to resign.²³⁸

The defendant maintained same-sex sexual harassment was not actionable under Title VII based on *Fredette*.²³⁹ The court distinguished this case from *Fredette* (tried in the district court) on factual grounds; *Fredette* is a quid pro quo case while *Marciano* is a hostile environment case.²⁴⁰ The court reasoned that Congress intended Title VII to create a workplace free of gender harassment.²⁴¹ Sexual orientation is an incidental occurrence, which is irrelevant in hostile environment cases.²⁴² The court further distinguished *Fredette* by noting that plaintiff *Fredette*'s cause of action failed because he refused to accept sexual advances.²⁴³ In this case, as in all hostile environment cases, there was no allegation that the supervisor's acts resulted from plaintiff's refusal to accept the supervisor's sexual advances.²⁴⁴ Thus, the court denied the summary judgment motion.²⁴⁵

F. Southern District of Florida

The Southern District of Florida first addressed the issue of same-sex sexual harassment in *Llampallas v. Mini-Circuits Lab, Inc.*²⁴⁶ Llampallas and Blanch were admitted lesbians who met in New Jersey in 1977.²⁴⁷ Soon after they came to Florida, Blanch became the General Manager at Mini-Circuits.²⁴⁸ Llampallas was an assembler.²⁴⁹ Llampallas' employer eventually promoted her to a position second in rank to

236. *Id.*

237. *Id.*

238. *Marciano*, 1996 U.S. Dist. LEXIS 10491, at *2.

239. *Id.* at *7.

240. *Id.* at *9.

241. *Id.* at *8.

242. *Id.*

243. *Marciano*, 1996 U.S. Dist. LEXIS 10491, at *2.

244. *Id.*

245. *Id.* at *10.

246. No. 93-2053-CIV-ATKINS, 1995 U.S. Dist. LEXIS 21199, 66 Empl. Prac. Dec. (CCH) P43,699 (S.D. Fla. May 19, 1995).

247. *Id.* at *3.

248. *Id.*

249. *Id.*

Blanch.²⁵⁰ Throughout their relationship, Blanch told Llampallas if their relationship ended, she would terminate Llampallas.²⁵¹ Llampallas ended the sexual relationship in 1990.²⁵² Blanch insisted they resume sexual relations and again threatened to terminate Llampallas.²⁵³

Nine months later, Blanch called the president of the company, Kaylie, and told him that she was resigning because she could no longer work with Llampallas.²⁵⁴ Kaylie told Blanch not to quit and requested that Llampallas fly to New York to meet with him.²⁵⁵ When Llampallas got to New York, Kaylie placed her on suspension with pay.²⁵⁶ Kaylie told Llampallas he was thinking about opening a new facility, and she would be the production supervisor.²⁵⁷ Kaylie eventually told Llampallas he was not going to open another plant, and terminated Llampallas.²⁵⁸

The *Llampallas* court held, without explanation, that same-sex sexual harassment is actionable under Title VII.²⁵⁹ The court also concluded that Blanch subjected Llampallas to quid pro quo sexual harassment.²⁶⁰ Kaylie was strictly liable for Blanch's actions.²⁶¹ and Mini-Circuits' termination of Llampallas violated Title VII.²⁶²

The Southern District of Florida also addressed same-sex sexual harassment in *Sullivan v. National Railroad Passenger Corp.*²⁶³ Kevin Scott, Barry Sullivan's superior at Amtrak, became intoxicated on a business trip, placed his hand below Sullivan's waist, and told Sullivan to "come to my room for a short while. . . . You won't regret it."²⁶⁴ Sullivan refused, and from that point, Scott's performance evalua-

250. *Id.* at *4.

251. *Llampallas* 1995 U.S. Dist. LEXIS 21199, at *4.

252. *Id.*

253. *Id.* at *4.

254. *Id.* at *6.

255. *Id.* at *6-7.

256. *Llampallas*, 1995 U.S. Dist. LEXIS 21199, at *7.

257. *Id.*

258. *Id.* at *7.

259. *See id.* at *15 (citing *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983), *aff'd per curiam*, 749 F.2d 732 (11th Cir. 1984)).

260. *Id.* at *20.

261. *Llampallas*, 1995 U.S. Dist. LEXIS 21199, at *20.

262. *Id.*

263. No. 95-0037-CIV-GRAHAM, 1996 U.S. Dist. LEXIS 20699, 73 Fair Empl. Prac. Cas. (BNA) 263 (S.D. Fla. Nov. 14, 1996).

264. *Id.* at *14.

tions of Sullivan dropped.²⁶⁵ Scott told Sullivan that there was no place for him in the organization. Scott then referred Sullivan to the Inspector General for missing gift certificates and cellular phone misuse.²⁶⁶

The court held that "same-sex sexual harassment involving ostensibly homosexual advances is actionable under Title VII."²⁶⁷ In reaching this conclusion, the court cited numerous circuit court cases providing a cause of action for same-sex sexual harassment under Title VII.²⁶⁸ The court then cited from the liberal language of the EEOC Compliance Manual,²⁶⁹ and interpreted the language of Title VII.²⁷⁰ According to the *Sullivan* court, the statute's phrasing, "'because of one's sex'" prohibits discrimination against an individual "because of" that individual's "sex."²⁷¹ In the case of same-sex homosexual sexual harassment, the victim is being discriminated against because he or she is of the same sex as the harasser.²⁷² Therefore, Title VII provides a cause of action for same-sex harassment involving homosexual advances.²⁷³

IV. ELEVENTH CIRCUIT REASONING

Even before the Supreme Court decided *Oncale*,²⁷⁴ a cause of action for same-sex sexual harassment already existed in the Eleventh Circuit.²⁷⁵ Unfortunately, the holding was very narrow and only covered homosexual same-sex sexual harassment.²⁷⁶ Many district courts followed the logic of *Prescott* and found that Congress intended to prohibit discriminatory treatment based on sex, and held that a cause of

265. *Id.* at *14-15.

266. *Id.*

267. *Id.* at *7.

268. No. 95-0037-CIV-GRAHAM, 1996 U.S. Dist. LEXIS 20699, at *3, 73 Fair Empl. Prac. Cas. (BNA) 263 (S.D. Fla. Nov. 14, 1996). The court cited: *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733, 130 L. Ed. 2d 636 (1995); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993).

269. Sexual Harassment § 615.2(b)(3), 2 EEOC Compliance Manual (BNA) 615:0004 (1987).

270. *Sullivan v. National R.R. Passenger Corp.*, No. 95-0037-CIV-GRAHAM, 1996 U.S. Dist. LEXIS 20699, at *6, 72 Fair. Empl. Prac. Cas. (BNA) 263 (S.D. Fla. Nov. 14, 1996).

271. *Id.*

272. *Id.* at *7.

273. *Id.*

274. *Oncale*, 118 S. Ct. at 998.

275. *Fredette*, 112 F.3d at 1503.

276. *Id.* at 1510 (clarifying "the narrowness of our holding today").

action exists when, but for the employee's gender, the harassment would not have occurred.²⁷⁷

In supporting a cause of action for same-sex sexual harassment, *Prescott* closely follows *Henson v. City of Dundee*,²⁷⁸ without actually citing it. *Henson* describes the critical third element of a sexual harassment claim, "based on sex," which is established by showing "but for the fact of [his or] her sex, [he or] she would not have been the object of harassment."²⁷⁹ The Eleventh Circuit District Courts, which explain their reasoning and do not use *Prescott* to find a cause of action for same-sex sexual harassment, rely on *Henson*.²⁸⁰ Following the authority established by the district courts, the Eleventh Circuit Court of Appeals used *Henson* to find a cause of action for same-sex sexual harassment.²⁸¹

The only case holding that a cause of action for same-sex sexual harassment does not exist is also the only case in the eleventh circuit to address heterosexual same-sex sexual harassment: *Martin v. Norfolk Southern Railway Co.*²⁸² The court avoided the *Henson* and *Prescott* decisions, and instead, reasoned that sexual harassment is based on a need for sexual gratification.²⁸³ When there is no presumption of sexual gratification (as with same-sex heterosexual sexual harassment), sex discrimination ceases to exist and the acts can be attributed to mere joking.²⁸⁴ *Fredette* established that a cause of action exists for homosexual same-sex sexual harassment.²⁸⁵ However, *Martin* is still persuasive authority in light of the Supreme Court's "common sense" and "teasing and roughhousing" language.²⁸⁶

277. See *supra* note 66, at 1550. Other cases using the *Prescott* reasoning are *McElroy v. TNS Mills, Inc.*, *supra* text and accompanying notes 77-90, and *Sneed v. Montgomery Hous. Auth.*, *supra* text accompanying notes 96-118.

278. 682 F.2d 897, 903-04 (11th Cir. 1982) (holding no sexual harassment between opposite sex co-workers).

279. *Id.* at 903. The other elements provide that, "the employee belongs to a protected group," "the employee was subject to unwelcome sexual harassment," "the harassment complained of affected a 'term, condition, or privilege' of employment," and "[r]espondent [was a] superior." *Id.*

280. Cases using the *Henson* logic are: *McCoy v. Johnson Controls World Servs., Inc.*, *supra* notes 137-45 and accompanying text, *McCoy v. Macon Water Authority*, *supra* notes 146-63, 165, 167-72 and accompanying text, and although it does not cite *Henson*, *Sullivan*, *supra* text accompanying notes 270-73, uses similar reasoning.

281. *Fredette*, 112 F.3d at 1505 (finding that "observation in *Henson* is equally applicable to the situation where a homosexual male propositions another male").

282. See cases cited *supra* notes 119-33, 135-36 and accompanying text.

283. See *supra* text accompanying notes 132-36.

284. See *supra* text accompanying notes 135-36.

285. *Fredette*, 112 F.3d at 1504.

286. *Oncala*, 118 S. Ct. at 1003.

V. JUDICIAL DISCRIMINATION BASED ON SEXUAL ORIENTATION

Cases that allow a cause of action for homosexual same-sex sexual harassment, but not heterosexual same-sex sexual harassment, discriminate based on sexual orientation. If the plaintiff can fulfill all of the elements of either quid pro quo or hostile environment sexual harassment, then he or she should have a cause of action. The sexual orientation of the parties should be a contributing circumstance, not a determinative factor.

The United States Supreme Court addressed a similar issue in *Romer v. Evans*.²⁸⁷ *Romer* was a constitutional challenge to a recent Colorado Constitutional Amendment that "prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians."²⁸⁸ The Constitutional Amendment, Justice Kennedy writes, "is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."²⁸⁹ The Court declared the Colorado Constitutional Amendment unconstitutional.²⁹⁰

The language of Title VII is clear: "[It is] an unlawful employment practice for an employer . . . to discriminate . . . because of an individual's . . . sex"²⁹¹ The statute does not mention sexual orientation, and the courts therefore should not consider sexual orientation. Furthermore, based on the Supreme Court's *Romer* opinion, judges should not disqualify a class of persons from the right to seek specific protection from the law due to their sexual orientation.

Martin is a perfect example of the judicial protection of *machismo* behavior, that adversely affects the rights of homosexual persons.²⁹² By allowing heterosexuals to harass an individual who is either homosexual or perceived to be a homosexual, the court discriminates against persons based on their sexual orientation.²⁹³ *Martin* was told he looked like he had AIDS and was often grabbed.²⁹⁴ Nonetheless, the court determined there was no sexual harassment because nei-

287. 517 U.S. 620 (1996).

288. *Id.*

289. *Id.* at 633.

290. See *id.* at 635 (stating that, "[a] state cannot so deem a class a stranger to its laws").

291. 42 U.S.C. § 2000e-2(a)(1) (1997).

292. *Martin*, 926 F. Supp. at 1050.

293. *Henson*, 682 F.2d at 897.

294. *Martin*, 926 F. Supp. at 1047.

ther Martin nor his male harassers were homosexual.²⁹⁵ If the harassment was based on Martin's sex, Martin should have had a cause of action under *Henson* regardless of the parties sexual orientation.²⁹⁶ Utilizing the plain language of Title VII and the Court's opinion in *Romer*, sexual orientation should not be a determinative factor when evaluating a same-sex sexual harassment claim.

The Fourth Circuit considered sexual orientation in *Wrightson v. Pizza Hut*,²⁹⁷ *McWilliams v. Fairfax County Board of Supervisors*,²⁹⁸ *Mayo v. Kiwest Corp.*,²⁹⁹ and *Hopkins v. Baltimore Gas & Electric Co.*³⁰⁰ Most recently, *Wrightson* addressed same-sex sexual harassment when a homosexual supervisor at Pizza Hut harassed a heterosexual employee.³⁰¹ For the first time, the Fourth Circuit Court of Appeals found a cause of action for homosexual same-sex sexual harassment.³⁰²

McWilliams and *Mayo* have similar fact patterns.³⁰³ As an automotive mechanic with the County Transportation Agency, *McWilliams'* co-workers bombarded him with a variety of offensive sexual conduct.³⁰⁴ These co-workers were known as the "lube boys."³⁰⁵ The "lube boys" taunted *McWilliams* with sexual remarks such as "[t]he only woman you could get is one who is deaf, dumb and blind," offered him money for sex, fondled and blindfolded him, tied him up and then forced him to his knees where one would put his finger in *McWilliams'* mouth to simulate oral sex.³⁰⁶

Jerry Mayo worked for *Kiwest*, a construction and real estate management company.³⁰⁷ Richard Flanagan, Mayo's supervisor, made sexually explicit and vulgar comments to Mayo including "you smell

295. See *id.* (stating, "[t]here is . . . no evidence that Martin or any of the individual defendants are homosexual").

296. *Henson*, 682 F.2d at 903.

297. 99 F.3d 138 (4th Cir. 1996).

298. 72 F.3d 1191 (4th Cir. 1996).

299. No. 95-2638, 1996 WL 460769, at *1, 1996 U.S. App. LEXIS 20445, 71 Fair Empl. Prac. Cas. (BNA) 736, 69 Empl. Prac. Dec. (CCH) P 44,383 (4th Cir. Aug. 15, 1996).

300. 77 F.3d 745 (4th Cir. 1996).

301. *Wrightson*, 99 F.3d at 139.

302. See *id.* at 143 (holding that "a same-sex 'hostile work environment' sexual harassment claim may lie under Title VII. . .").

303. *McWilliams*, 72 F.3d at 1191; *Mayo*, 1996 U.S. App. LEXIS 20445, at *3.

304. *McWilliams*, 72 F.3d at 1193.

305. *Id.*

306. *Id.*

307. *Mayo*, 1996 U.S. App. LEXIS 20445, at *2.

good enough to fuck," "blow me," "suck me," and "lick my sack."³⁰⁸ Flanagan told other employees Mayo was homosexual.³⁰⁹ Flanagan published a photo, which he had falsely created by superimposing Mayo's head on another man's body, that depicted Mayo wearing only black underwear.³¹⁰ Despite the flagrant acts, the *McWilliams* court held no claims for sexual harassment exist when both the alleged harasser and victim are heterosexual and of the same-sex.³¹¹

The *Mayo* court applied *McWilliams* and dismissed the cause of action because Mayo did not allege Flanagan was a homosexual.³¹² Both cases are examples of judicial protection of *machismo* behavior and judicial action prohibiting a class of persons from seeking a legal remedy based on their actual or perceived sexual orientation.³¹³ The bottom line is the homosexual (or perceived homosexual) plaintiff does not have the right to pursue a claim if the defendant is not homosexual.³¹⁴

The court in *Hopkins* discussed the rationale for finding a same-sex sexual harassment claim by looking at previous cases, and by following *McWilliams*, which held that there is no cause of action for same-sex sexual harassment.³¹⁵ The evidentiary burden to establish harassment based on sex is a showing that the harasser acted for sexual gratification.³¹⁶ The court rejected the notion that sexually oriented activity towards another man automatically imposes liability under Title VII, and conceded that although there "ought to be a law against' . . . puerile and repulsive workplace behavior . . . Title VII is not that law."³¹⁷ Relying on the four cases addressed by the court of appeals, the Fourth Circuit also incorrectly makes sexual orientation a determinative factor.³¹⁸

The Eighth Circuit brought same-sex sexual harassment law to a new level by ignoring the parties' sexual orientation in *Quick v. Donaldson Co., Inc.*³¹⁹ *Quick* is a rare example of a heterosexual person

308. *Id.* at *2-3.

309. *Id.*

310. *Id.* at *3-4.

311. *McWilliams*, 72 F.3d at 1195.

312. *Mayo*, 1996 U.S. App. LEXIS 20445, at *11-12.

313. *McWilliams*, 72 F.3d at 1195; *Mayo*, 1996 U.S. App. LEXIS 20445, at *4.

314. *Id.*

315. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749-52 (4th Cir. 1996).

316. *Id.* at 752.

317. *See id.* (quoting *McWilliams*, 72 F.3d at 1196).

318. *Id.*

319. 90 F.3d 1372 (8th Cir. 1996).

harassing a heterosexual person of the same sex.³²⁰ Phil Quick was a welder and press operator at an Iowa muffler production plant.³²¹ The employees and supervisors at the plant would "bag" each other for sport.³²² At trial, a witness described "bagging" as anything from "intentional grabbing and squeezing of another person's testicles" to "walk[ing] past another and making a feinting motion with his hand toward the other's groin."³²³ Quick claimed that co-workers "bagged" him over 100 times with most of the incidents occurring in 1991.³²⁴ In August 1991, a co-worker held Quick down while another worker squeezed Quick's left testicle, which produced swelling and bruising.³²⁵ Other co-workers falsely labeled Quick a homosexual, stuck tags on his forklift stating "Gay and Proud," and wrote "queer" on his work identification card.³²⁶ Quick complained repeatedly about the "bagging," assault, and harassment, but his superiors ignored the complaints.³²⁷ In 1992, the plant manager finally circulated a memo defining "bagging" as sexual harassment.³²⁸ The plant managers also reviewed the sexual harassment policy with their supervisors, and instructed the supervisors to review the policy with their subordinates.³²⁹ Soon after, the "bagging" ended.³³⁰

The Eighth Circuit first analyzed these facts under the requirements delineated for a hostile environment sexual harassment claim.³³¹ The court determined Quick's workplace created the requisite hostile environment circumscribed by Title VII.³³² Next, the court addressed the district court's rejection of a cause of action for same-sex sexual harassment.³³³ The Eighth Circuit attacked the district court's argument that "the challenged conduct was not of a genuine sexual nature and therefore not sexual harassment . . . [and] neither bagging nor the physical attacks expressed sexual interest nor in-

320. *Id.*

321. *See id.* at 1374 (explaining plaintiff's occupation and employer).

322. *See id.* (describing defendant's workplace environment).

323. *Id.* at 1374.

324. *Quick*, 90 F.3d at 1375.

325. *Id.*

326. *See id.* (describing Quick's treatment at his workplace).

327. *See id.* (explaining Quick's response to the harassment he endured at work).

328. *Id.* at 1375.

329. *Quick*, 90 F.3d at 1372.

330. *See id.* (explaining actions taken by the employer in response to Quick's complaints).

331. *See id.* at 1377-78 (applying to plaintiff's case the Title VII factors to establish sex discrimination based on a hostile work environment).

332. *Id.*

333. *Id.* at 1378-79.

volved sexual favors or comments."³³⁴ Instead, the court held:

[a] worker 'need not be propositioned, touched offensively, or harassed by sexual innuendo' in order to have been sexually harassed Intimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. Moreover, physical aggression, violence, or verbal abuse may amount to sexual harassment.³³⁵

The Eighth Circuit stated that, "[t]he district court also incorrectly concluded that the alleged harassment was not based on gender because it found the underlying motive was personal enmity or hooliganism."³³⁶

The Eighth Circuit reached a sound result in *Quick*.³³⁷ Sexual harassment is not always about wanting to have sex with the victim.³³⁸ *Quick* clearly established that sex, not sexual gratification, is the basis for sexual harassment.³³⁹ The legislature did not make sexual gratification a prerequisite for a sexual harassment claim.³⁴⁰ According to statute, discrimination merely needs to be based on sex.³⁴¹ The *Quick* reasoning parallels the statute's plain language but could easily have been determined to be joking or roughhousing.³⁴²

Many district courts in the Eleventh Circuit consider the sexual orientation of the parties.³⁴³ *Martin v. Norfolk Southern Railway Corp.* does not recognize a cause of action for heterosexual same-sex sexual harassment.³⁴⁴ The Northern District of Alabama used the same reasoning as the *Quick* court,³⁴⁵ that is, heterosexual same-sex sexual harassment does not create a cause of action due to the absence of a desire for sexual gratification.³⁴⁶

334. *Quick*, 90 F.3d at 1378-79.

335. See *id.* at 1379 (quoting *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d, 964-65 (8th Cir. 1993) (citing *Burns*, 989 F.2d at 965 and *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988))).

336. *Id.*

337. *Id.* at 1380.

338. *Id.* at 1379.

339. *Quick*, 90 F.3d at 1379.

340. See *id.* at 1377 (citing 42 U.S.C. § 2000e-2(a)(1) (1998)).

341. 42 U.S.C. § 2000e-2 (1998).

342. *Quick*, 90 F.3d at 1377; 42 U.S.C. § 2000e-2; *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998).

343. *Prescott v. Independent Life & Accident Ins.*; cases cited *supra* notes 66-76; *Martin v. Norfolk S. Ry. Corp.*, *supra* notes 124-36; *McCoy v. Macon Water Auth.*, *supra* notes 151-63, 168-81; *Fredette v. BVP Management Assocs.*, *supra* notes 182-206, 209-30; *Sullivan v. National R.R. Passenger Corp.*, *supra* notes 270-73.

344. See *supra* text accompanying notes 124-36.

345. See *supra* text accompanying notes 124-36.

346. *Martin*, 926 F. Supp. at 1049.

The most outrageous case in the Eleventh Circuit is the district court's opinion in *Fredette*.³⁴⁷ The district court's reasoning is flawed because if same-sex sexual harassment is discrimination based on sexual orientation, so is opposite-sex sexual harassment.³⁴⁸ A heterosexual woman who harasses her heterosexual male secretary is harassing him based on his heterosexual orientation.³⁴⁹ *Fredette's* reasoning would destroy the male secretary's cause of action as well.³⁵⁰ Harassing a person because they are gay or lesbian and harassing them because they are a man or a woman are two different things.³⁵¹ The woman in the hypothetical harasses her secretary based on his sex, not on his sexual orientation, just as Mr. Sunshine harassed *Fredette* based on his sex, not his sexual orientation.³⁵²

While no Eleventh Circuit case finds a cause of action in neutral terms, similar to *Quick*, courts address the issue in dicta. In *Fredette*, the Eleventh Circuit Court of Appeals' opinion recognized *Quick* in a footnote, noting the opinion could be construed as holding that there is a viable claim under Title VII for heterosexual same-sex harassment.³⁵³ Unfortunately, the court did not take a stand on the issue.³⁵⁴ *McElroy v. TNS Mills, Inc.* addressed the sexual orientation question and declined to follow *Mayo* dicta.³⁵⁵ Instead, *McElroy* held that sexual orientation is immaterial.³⁵⁶

VI. THE LOWER COURTS' CHALLENGE IN INTERPRETING THE *ONCALE* OPINION

The Court's broad language in *Oncale* is sure to spin litigators in a furious attempt to equate the facts of their case with the "teasing" and "roughhousing" example, or to distinguish it.³⁵⁷ Unfortunately, Justice Scalia used an example of the obvious, not the close call.³⁵⁸ The close call is left to the district court and the circuit court of appeals

347. See *supra* text accompanying notes 182-206, 209-30.

348. *Fredette*, 112 F.3d at 1510.

349. *Id.* at 1509.

350. *Id.*

351. *Id.* at 1504.

352. *Id.*

353. See *Fredette*, 112 F.3d at 1507 n.6 (recognizing the *Quick* precedent).

354. See *id.* (noting that the court does not need to deal with the "more difficult question" of same-sex sexual harassment).

355. See *supra* notes 77-90, 92-100.

356. See *supra* notes 77-90, 92-100.

357. *Oncale*, 118 S. Ct. at 1003.

358. *Id.*

judges to decide.³⁵⁹

Unfortunately, courts have already used the "teasing" and "roughhousing" standard to stand for the proposition that there is no cause of action for same-sex sexual harassment.³⁶⁰ The lower courts are going to need to look past society's preference for *machismo* behavior and determine if the discrimination is "based on sex." By including the "teasing" and "roughhousing" examples, the Supreme Court gives the district court and circuit court of appeals judges a way to find that there is no cause of action for same-sex sexual harassment even when the sexual harassment is "based on sex."

In a time when courts are more often the fact finders when ruling on summary judgment motions, the persons who are going to suffer the most harm from this opinion are the persons who need the most protection, specifically, homosexuals.³⁶¹ Conservative judges throughout the United States are going to use the Supreme Court's language to continue to protect *machismo* behavior.³⁶² Just as in the *Martin* case, those individuals perceived as homosexual persons are going to be teased and taunted, and courts are going to find that the harassment is not actionable unless the harassment is clearly based on sex.³⁶³ A woman in similar circumstances does not suffer the same harassment.³⁶⁴

Only time will tell where the court will go on the same-sex sexual harassment issue. Based on the history of same-sex sexual harassment law, the Supreme Court's opinion in *Oncale* and the way "sex has a way of befogging the higher intellectual faculties,"³⁶⁵ the same-sex sexual harassment road is sure to have potholes and sharp turns that not even the Supreme Court anticipates.

359. *Id.*

360. See *supra* text accompanying note 19.

361. *Oncale*, 118 S. Ct. at 1003.

362. *Id.*

363. *Martin*, 926 F. Supp. at 1044.

364. *Id.*

365. Toobin, *supra* note 2, at 48.