

SAME-SEX SEXUAL HARASSMENT CLAIMS AFTER *ONCALE*: DEFINING THE BOUNDARIES OF ACTIONABLE CONDUCT

RICHARD F. STORROW*

TABLE OF CONTENTS

Introduction	678
I. Sex Discrimination and Sexual Harassment	682
A. Judicial Treatment of Hostile Work Environment Claims	685
B. Same-Sex Sexual Harassment	689
II. Developing the Contours of Actionable Same-Sex Sexual Harassment	693
A. The Fourth Circuit	699
1. <i>McWilliams v. Fairfax County Board of Supervisors</i> and <i>Wrightson v. Pizza Hut of America, Inc.</i>	700
2. Departures from <i>McWilliams</i> and <i>Wrightson</i>	702
B. The Seventh Circuit	705
III. Commentary on Same-Sex Sexual Harassment	715
A. Approach One: In Support of Same-Sex Claims	716
B. Approach Two: Against Same-Sex Claims	718
C. Another Look	721
1. Heterosexuality is not protected by Title VII	722
2. Juries do not award higher damages in same-sex cases	726
IV. The Positive Effects of Recognition	733
A. Prohibition of Sexual Orientation Discrimination	734
B. Presumptive Heterosexuality and Homosexual Expression	736
Conclusion	742

* Visiting Assistant Professor, *University of Illinois College of Law*. J.D., 1993, *Columbia University School of Law*; M.A., 1989, *Columbia University*; B.A., 1987, *Miami University*. I wish to thank Carlos Ball and Elaine Shoben for their helpful comments on an earlier version of this Article.

INTRODUCTION

The United States Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*¹ declared that claims of same-sex sexual harassment are cognizable under Title VII of the Civil Rights Act of 1964. This decision ended the debate in the federal courts over this question by expressly disapproving of the Fifth Circuit's rejection of such claims.² At the time of the Supreme Court's decision in *Oncale*, the trend in the judiciary was decidedly in favor of recognition of same-sex sexual harassment claims; courts have been at odds, however, in their struggle to define what constitutes actionable same-sex sexual harassment. One federal appeals court has announced a rule that requires a prima facie showing of the alleged harasser's homosexuality for a same-sex claim to survive a motion to dismiss.³ Another appeals court has expressly rejected this approach and looks only to the alleged harasser's conduct to evaluate actionability.⁴ Two other circuit courts of appeals have as yet not expressed whether such harassment is actionable only when the harasser is a homosexual.⁵ The struggle continues in light of *Oncale*'s cryptic message about when same-sex sexual harassment is actionable.⁶

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

2. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998).

3. See *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141 (4th Cir. 1996); see also *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996) (holding that male victim of harassment must attempt to prove that harasser is homosexual to show harassment occurred because of victim's sex); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996) (stating that claim of hostile work environment cannot be sustained where both parties are same gender and not homosexual).

4. See *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996) ("[T]he key inquiry is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring))).

5. See *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (concluding that decision would not indicate whether harassment based on sexual orientation serves as grounds for Title VII claim), *cert. denied*, 118 S. Ct. 1184 (1998); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (declining to address issue of whether same-sex sexual harassment can be sustained when the harasser is homosexual).

6. See Dominic Bencivenga, *Same-Sex Harassment: Ruling Puts Work Environment Under Scrutiny*, N.Y. L.J., Mar. 12, 1998, at 5 ("While the Court made clear that discrimination because of sex can be shown in a variety of ways, it gave little guidance for determining when untoward conduct crosses the line to sex-based discrimination."); John Cloud, *Harassed or Hazed? Why the Supreme Court Ruled That Men Can Sue Men for Sexual Harassment*, TIME, Mar. 16, 1998, at 55 ("Having said what it doesn't mean, however, the high court left wide open what it does mean to discriminate 'because of' gender."); Jan Crawford Greenburg, *Liability at Crux of Sex Harassment Case; Suit May Settle When Employers Must Pay*, CHI. TRIB., Mar. 24, 1998, at N1 (stating that *Oncale* "offered lower courts little practical guidance in determining whether a person makes a valid claim of same-sex harassment"); Randy McClain, *The Same-Sex Harassment Issue; Louisiana Same-Sex Case Stirs Nation-Wide Interest*, BATON ROUGE SUN. ADVOCATE, Mar. 22, 1998, at 11 (noting Supreme Court's failure precisely to define when sexual remarks or suggestive behavior "crosses the line between horse play and harassment"). But see Jeffrey M. Schlossberg, *The*

Commentators on same-sex sexual harassment mirror the circuit courts in expressing widely varying viewpoints on what approach the judiciary should adopt in evaluating same-sex sexual harassment claims brought under Title VII and its state analogues.⁷ These viewpoints rest on equally varying bases, from appeals to the plain language of Title VII, to policy arguments grounded in concern for the civil rights of gays and lesbians.⁸ Some scholars argue simply that same-sex sexual harassment claims are consistent with Supreme Court precedent and the plain language of Title VII alone and thus should be evaluated the way opposite-sex harassment claims are.⁹ Others, most notably Catharine MacKinnon, argue that same-sex harassment claims advance Title VII's underlying goal of outlawing gender role stereotyping in the workplace but do not advocate a specific method for evaluating such claims.¹⁰ Those who disagree with MacKinnon argue that same-sex harassment claims subvert the objectives of Title VII no matter how they are evaluated.¹¹ Scholars, particularly those concerned with gay and lesbian rights, contradict the views of gay rights activists and claim that same-sex harassment claims operate to the detriment of gays and lesbians in the workplace.¹² These commentators believe that courts will use these claims to exacerbate the already regrettable state of gay and lesbian civil rights by perpetuating notions of "normal" sexuality.¹³ The feared result is that gays and lesbians will continue to suffer disproportionate censure of their sexual expression and, in the absence of legislation prohibiting discrimination on the basis of sexual orientation, will encounter escalating discrimination in the workplace.¹⁴

Pendulum Swings Back in Sexual Harassment Cases, N.Y. L.J., Mar. 17, 1998, at 1 (stating that *Oncale* court's articulation of parameters of permissible behavior helps define and reduce spectrum of actionable conduct).

7. See *infra* Part III (outlining different perspectives on same-sex harassment).

8. See *infra* notes 240-80 and accompanying text.

9. See Katherine H. Flynn, Note & Comment, *Same-Sex Sexual Harassment: Sex, Gender and the Definition of Sexual Harassment Under Title VII*, 13 GA. ST. U. L. REV. 1099, 1110-11 (1997) (explaining that some courts have used Congressional intent behind Title VII as reason to reject same-sex harassment claims).

10. See Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 715 (1997) (characterizing MacKinnon's primary objection to sexual harassment as concern about sexual stereotyping).

11. See *id.* at 753 (describing some courts' interpretation of Title VII as remedy for discrimination against subordinate groups, by privileged groups).

12. See Pamela J. Papish, *Homosexual Harassment or Heterosexual Horseplay? The False Dichotomy of Same-Sex Sexual Harassment Law*, 28 COLUM. HUM. RTS. L. REV. 201, 203-04 (1996) (indicating that these fears are based on view that courts may interpret some sexual conduct as "horseplay" if performed by heterosexuals, but not if performed by homosexuals).

13. See Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375, 389 (1995) (claiming that courts have based their decisions in same-sex harassment cases on traditional notions of "normal" heterosexual behavior).

14. See Kara L. Gross, Note, *Toward Gender Equality and Understanding: Recognizing That*

These approaches to the question of the evaluation of same-sex claims are incomplete. On the one hand, the majority of commentators ignore the reality that, under current law, same-sex cases are not evaluated in the same manner as opposite-sex cases.¹⁵ There is a presumption of heterosexuality in opposite-sex cases that alleviates the need for courts to evaluate the causation prong of sexual harassment claims.¹⁶ In same-sex cases, however, presumptive heterosexuality is not applied in the same way,¹⁷ rendering the causation prong of Title VII sexual harassment claims the object of much attention and analysis. Moreover, although application of presumptive heterosexuality in same-sex cases is prevalent, application of presumptive homosexuality in same-sex cases is rare.¹⁸ On the other hand, commentators fearful of the negative effects of litigating same-sex claims argue from empirically unsupportable premises, ultimately overstating the dangers that the existence of same-sex harassment claims poses to gay and lesbian rights and failing to note the more serious problems of a legal system devoid of such claims.¹⁹

Now that the Supreme Court has recognized same-sex sexual harassment claims because such claims are consistent with the language and objectives of Title VII, it bears noting that recognition of such claims under Title VII will have several desirable effects. First, these claims will not be used as a new tool in the oppression of gay men and lesbians under the law, as some commentators claim.²⁰ Instead, same-sex harassment claims will be a vehicle for outlawing sexual orientation discrimination by creating an incentive for the heterosexual majority, via illustrations in individual cases that heterosexuality is not a characteristic protected by Title VII, to lobby for passage of an amendment to Title VII or for passage of the Employment Non-Discrimination Act. Same-sex harassment claims will likewise high-

Same-Sex Sexual Harassment Is Sex Discrimination, 62 BROOK. L. REV. 1165, 1214 (1996) (speculating that some courts pursue Title VII claims against homosexuals more vigorously than against heterosexuals).

15. See Franke, *supra* note 10, at 731 (explaining that the use of presumptive heterosexuality results in different outcomes for same-sex and opposite-sex harassment cases).

16. See *id.* (asserting that courts automatically conclude that heterosexual males harass women sexually).

17. See *id.* (finding that presumptive heterosexuality causes courts to view similar conduct differently depending on whether it is directed at members of the harasser's own gender or members of the opposite sex).

18. See *infra* notes 387-425 and accompanying text (discussing presumption of heterosexuality often used in same-sex cases).

19. See Papish, *supra* note 12, at 220-21 (clarifying that Title VII recognition of same-sex harassment will help homosexuals as they are the most frequent victims of sexual harassment in the workplace).

20. See E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexualist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 81 (1997) (claiming that recognition would create new ways of regulating homosexual behavior).

light cases of gender stereotyping in the workplace and will emphasize the need for Title VII to address and consistently proscribe such stereotyping. This emphasis will ultimately inspire the judiciary to recognize sexual orientation discrimination as sex discrimination, rendering new legislation unnecessary for the protection of gays and lesbians in the workplace.

Second, same-sex harassment litigation will shed light on the inconsistencies in Title VII jurisprudence created by the use of presumptive heterosexuality in sexual harassment cases. As a result, the public will begin to recognize that certain conduct now deemed horseplay or the product of homophobic animus (and thus under current law not proscribed by Title VII) in fact has sexual desire as its cause and should therefore be actionable as sexual harassment. In addition, recognition will remove the negative effects of the law's trivializing or altogether ignoring homosexual subjectivity and desire, as is currently the case under anti-discrimination law,²¹ and will prevent these effects from influencing workplace relations. For all these reasons, the Supreme Court has taken the right step in recognizing same-sex sexual harassment claims. The issues raised by the now resolved cognizability question have far-reaching implications for Title VII sexual harassment jurisprudence and thus warrant discussion. A detailed study of how courts will evaluate the actionability of same-sex sexual harassment claims in light of *Oncale* is especially crucial at this juncture.

Part I of this Article summarizes the contours of sexual harassment law and emphasizes the inquiry undertaken to evaluate hostile work environment claims. Part II unravels the tangle of case law in the area of same-sex sexual harassment to reveal that there is a trend in the courts to define the parameters of impermissible conduct in the workplace between persons of the same sex quite apart from inquiries into the sexual orientations of those persons. In this way, the courts are gradually aligning the inquiry in these cases with the inquiry in cases of opposite-sex sexual harassment. Part III of this Article explores commentators' opinions on the subject and challenges the views of those who maintain that same-sex sexual harassment claims cannot be adequately evaluated until Title VII prohibits discrimination on the basis of sexual orientation. Part IV of this Article explores the likely desirable effects of the litigation of same-sex sexual harassment claims. Specifically, the litigation of same-sex harassment claims improves the prospects of passage of an amendment

21. See *id.* at 83 (criticizing juries for failing to take into account the perspective of homosexual defendants in same-sex harassment cases).

to Title VII or passage of the Employment Non-Discrimination Act. Both of these pieces of legislation would outlaw discrimination on the basis of sexual orientation. In addition, judicial recognition in same-sex harassment jurisprudence that Title VII sex discrimination proscriptions encompass sex stereotyping of both men and women will by extension lead to judicial acceptance of sexual orientation discrimination as sex discrimination. This will render new anti-discrimination legislation unnecessary. Finally, same-sex harassment claims will inspire judicial efforts to streamline and unify the analysis of all sexual harassment claims by exposing the undesirable effects of the presumption of heterosexuality on sexual harassment jurisprudence. These efforts will promote consistency, judicial economy, and, ultimately, a more reasoned and just application of Title VII.

I. SEX DISCRIMINATION AND SEXUAL HARASSMENT

Title VII of the Civil Rights Act of 1964 prohibits discrimination by employers "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."²² The statute in its current form, as amended by the Civil Rights Act of 1991,²³ provides a cause of action for victims of such sex discrimination to obtain equitable relief, compensatory, or punitive damages.²⁴ It also grants the right of a jury trial to either party to a dispute.²⁵

Although not expressly mentioned in Title VII, sexual harassment is a form of sex discrimination.²⁶ Recognition of sexual harassment as a form of sex discrimination is based on the theory that it is a barrier to equality of the sexes in the workplace: "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."²⁷ Sexual harassment may consist of either *quid pro quo* harassment, where a supervisor makes employment or employment benefits contingent

22. 42 U.S.C. § 2000e-2(a)(1) (1994).

23. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §§ 1981-2000h).

24. See 42 U.S.C. § 1981(a)(1), (b)(1).

25. See *id.* § 1981(c)(1).

26. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (explaining that Title VII forbids sexual harassment that results in abusive work environment). This position has been criticized. See, e.g., Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 351-52 (1990) (explaining that equation of sexual harassment with sex discrimination poses problems in cases involving "equal opportunity" harassers); Michelle Ridgeway Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1098-99 (1989) (highlighting problems associated with characterizing sexual harassment as gender discrimination under Title VII).

27. *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

upon some type of sexual consideration from the employee,²⁸ or hostile work environment harassment, in which sexual conduct towards an employee, engaged in by a supervisor or co-worker because of the employee's sex, adversely affects the employee's work performance or renders the employment environment intimidating or offensive.²⁹ In either case, the victim's employer is liable for damages if knowledge of the harassment can be imputed to the employer and the employer fails to take corrective action.³⁰ The perpetrator, however, normally is not liable.³¹

28. See *Meritor*, 477 U.S. at 65.

29. See *id.* at 65-66 (reviewing case law that established Title VII right to be free from discrimination in the workplace).

30. See 29 C.F.R. § 1604.11(c)-(d) (1996) (applying liability to employers for harassment by co-workers if the employer had actual or constructive notice of the behavior and if the employer did not take immediate and effective steps).

There is a split of authority in the lower courts as to whether an employer, in order to be held liable, must have knowledge of the actions which create a hostile work environment. See SUSAN M. OMILIAN & JEAN P. KAMP, *SEX-BASED EMPLOYMENT DISCRIMINATION* § 11.08 (1990). The EEOC's guidelines, however, impose strict liability on employers for sexual harassment by supervisory employees. See 29 C.F.R. § 1604.11(c)-(d). Strict liability is also imposed in cases of *quid pro quo* harassment by supervisory employees. See generally OMILIAN & KAMP, *supra*, §§ 23.01, 23.05 (employer liable for *quid pro quo* sexual harassment by supervisors). Strict liability is still debated. Even though a company has an anti-sexual harassment policy, any such policy is insufficient for the employer to avoid liability. See *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979). The Supreme Court recently heard oral argument in a case involving this issue, *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997); see also Linda Greenhouse, *High Court Hears 2 Sex-Harassment Liability Cases*, N.Y. TIMES, Mar. 26, 1998, at A19. Likewise, the Supreme Court is poised to decide whether, to recover in a *quid pro quo* case, the plaintiff must have suffered tangible job detriment after rebuffing the unwelcome advances. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997), *cert. granted sub nom. Burlington Indus. v. Ellerth*, 118 S. Ct. 876 (1998).

31. See Joseph M. Kelly & Bob Watt, *Damages in Sex Harassment Cases: A Comparative Study of American, Canadian, and British Law*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 79, 90 (1996) ("Damages pursuant to the [Civil Rights Act of 1991] may not be assessed against the harassing supervisor." (citing *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993))); Robert Lukens, Comment, *Workplace Sexual Harassment and Individual Liability*, 69 TEMPLE L. REV. 303, 305 (1996) (noting that majority of courts prohibit individual liability in Title VII sexual harassment cases); see also *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995) (holding that Title VII does not define "employer" to mean supervisor in individual capacity); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir. 1995) (deciding that Title VII does not hold the agent of employer liable as an individual); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995) (asserting that harassment victim cannot sue supervising employee in supervisor's personal capacity); *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995) (stating that employees cannot be personally liable under Title VII); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994) (refusing to find workplace harasser individually liable because harasser was not victim's employer). But see, e.g., *Ball v. Renner*, 54 F.3d 664, 667 (10th Cir. 1995) (suggesting that employee with "employer-like authority" may be held individually liable under Title VII); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451 (5th Cir. 1994) (defining immediate supervisors as employers when they possess those with the power to hire and fire employees); *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989) (holding that employee in supervisory position with "significant control" over "hiring, firing or conditions of employment" can be held personally liable under Title VII); *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986) (implying that agents of employer can be held personally liable under Title VII); *Caldwell v. KFC Corp.*, 958 F. Supp. 962 (D.N.J. 1997) (noting claim for individual liability could be brought under state antidiscrimination law).

The Equal Employment Opportunity Commission (EEOC) is the administrative body charged with enforcing Title VII.³² The EEOC defines actionable sexual harassment as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."³³ Sexual harassment exists when any one of three criteria is met:

- (1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
- (2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
- (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.³⁴

According to the EEOC, discrimination claims that do not involve one or more of these criteria are not sexual harassment.³⁵

32. See 29 C.F.R. § 1601.1 (1996) (setting out EEOC civil rights enforcement procedures).

33. *Id.* § 1604.11(a).

34. *Id.*

35. See UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 615.6(a) (1987) [hereinafter EEOC COMPLIANCE MANUAL]. The EEOC withdrew proposed guidelines, see 58 Fed. Reg. 51,266, 51,267-68 (1993) (discussing proposed 29 C.F.R. §§ 1609.1-1609.2), that would have clarified that non-sexual sex-based conduct is actionable under Title VII. See *id.* at 51,267; see also Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 401 n.310, 422-23 n.404 (1995) (discussing potential effects of proposed regulations).

Nonetheless, the majority rule in the federal courts is that nonsexual sex-based conduct (termed "gender-based" conduct by some courts, see, e.g., *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1378-80 (C.D. Cal. 1995), *rev'd on other grounds*, 114 F.3d 979, 982 (9th Cir. 1997) (per curiam)), can create a hostile environment. See, e.g., *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996) (stating that harassment need not be explicitly sexual in nature, nor have explicit sexual overtones); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993) (rejecting argument that offensive acts constituting sexual harassment claim must be of an overtly sexual nature); *Andrews v. City of Phila.*, 895 F.2d 1469, 1485 (3d Cir. 1990) (stressing that sexual content does not always have to be present in offensive behavior for behavior to count as unlawful discrimination); *Lipsett v. University of P.R.*, 864 F.2d 881, 905 (1st Cir. 1988) (suggesting that misogynistic but non-sexual harassment creates hostile work environment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (recognizing that intimidation and hostility toward women can result from non-sexual advances); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (citing cases that expand the definition of sexual harassment to include actions that lack overtly sexual conduct); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (defining sexual harassment as any unequal treatment that would not occur but for the victim's gender); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (noting causation element satisfied by behavior that targets women and is based on gender). Commentators have concurred. See, e.g., L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 567 (1995) (positing that "the issues implicated by gender harassment are no different than those raised by sexual harassment"); Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1366 (arguing that gender-based harassment can meet the criteria for an actionable hostile work environment); Susan Perissinotto Woodhouse, Comment, *Same-Gender Sexual Harassment: Is It Sex Discrimination Under Title VII?*, 36 SANTA CLARA L. REV. 1147, 1156 (1996)

A. *Judicial Treatment of Hostile Work Environment Claims*

To prevail in a Title VII hostile work environment action, a plaintiff must assert and prove that: (1) she belongs to a group protected by the statute;³⁶ (2) she was subjected to unwanted harassment "in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature";³⁷ (3) the harassment was based on sex;³⁸ (4) the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an "intimidating, hostile, or offensive working environment";³⁹ and (5) the employer knew or should have known of the harassment and failed to take proper remedial action.⁴⁰

In any sexual harassment action, the plaintiff's membership in a protected class depends solely on that plaintiff's status as a man or a woman.⁴¹ As such, both men and women can bring suits for sexual harassment.⁴² In opposite-sex sexual harassment cases, the causation issue of whether the harassment was based on sex is generally not a disputed element.⁴³ Either the conduct itself in such cases is presumed to reveal sexual attraction,⁴⁴ or the perpetrator's failure to

(explaining that conduct need not be sexual for sexual harassment claim (citing *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *1 (6th Cir. Jan. 15, 1992))). But see *Bolden v. PRC, Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) ("General harassment if not racial or sexual is not actionable."). For a discussion of how courts, even in jurisdictions which recognize gender-based misconduct as sexual harassment, relegate nonsexual misconduct "to a separate disparate treatment analysis or disregard it altogether," see Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1732-38 (1998).

36. See *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir. 1997) (laying out elements of prima facie claim of hostile environment created by sex discrimination).

37. *Id.*

38. See *id.*

39. *Id.*; see also *Bundy v. Jackson*, 641 F.2d 934, 943-6 (D.C. Cir. 1981) (explicating the correct concept of hostile work environment).

40. See, e.g., *Yeary*, 107 F.3d at 445; *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (describing elements of hostile work environment claim); *Quick*, 90 F.3d at 1377 (discussing requirements for claim); *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982).

Some jurisdictions have adopted a somewhat different formulation. See, e.g., *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 860 (3d Cir. 1990) (citing *Andrews*, 895 F.2d at 1482). The *Andrews* test requires intensive and ongoing sexual harassment that affects plaintiff and would affect a reasonable person. See *id.*

41. See *Quick*, 90 F.3d at 1377; cf. *McCoy v. Macon Water Auth.*, 966 F. Supp. 1209, 1216 (M.D. Ga. 1997) (clarifying that Title VII protects both genders; the sex of the victim or harasser is irrelevant).

42. See *Drinkwater*, 904 F.2d at 860 (referring to cases in which men brought sexual harassment claims); *Huebschen v. Department of Health & Soc. Servs.*, 547 F. Supp. 1168, 1176-77 (D. Wis. 1982) (describing facts of male employee's sexual harassment suit), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983).

43. See, e.g., *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) (noting no conflict in opposite-sex harassment cases that harassment is based on sex); *Rasmusson v. Copeland Lumber Yards, Inc.*, No. 96-258, 1997 WL 769366, at *5 (D. Nev. Oct. 31, 1997) ("There is a general presumption that when a woman is harassed by a man, it is 'because of her sex.'").

44. See *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.) (stating that

treat members of the opposite gender in a similar fashion reveals animus towards the victim's gender.⁴⁵

where individual is sexually harassed by someone of the opposite sex, there is a presumption that the harassment is because of the victim's gender), *cert. denied*, 117 S. Ct. 70 (1996); *Burns v. McGregor Elec. Indus.*, 955 F.2d 559, 564 (8th Cir. 1992) (clarifying that, when a man harasses a woman in a sexual manner, his behavior raises the inference that his actions are based on sex); *Andrews*, 895 F.2d at 1482 n.3 ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course."); *Henson*, 682 F.2d at 904 (explaining that differential treatment based on sex occurs when male supervisor expresses feelings of sexual attraction to female employee); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (describing presumption of sexual attraction that arises from sexually harassing behavior of men towards women); see also RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 359 (1992) (asserting that gender-based motivation is often easy to prove and is evident when female alleges that male harassed her); Deborah N. McFarland, Note, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 *FORDHAM L. REV.* 493, 494 n.6 (1996) (stating that, in opposite-sex harassment cases, courts assume that attraction explains harasser's behavior toward victim; discrimination exists, therefore, because the sexes are not treated equally).

Note that despite the use of "but-for" in certain courts' construction of the causation element, the harassing conduct need not have occurred *solely* because of the sex of the victim; sex need only have been a contributing factor. See 42 U.S.C. § 2000e-2(m) (1994) (establishing that sex need only have been "motivating factor"); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.6 (1989) ("[T]o construe the words 'because of' as colloquial shorthand for 'but for causation' is to misunderstand them." Plaintiff does not have to show but-for causation to prevail, but "if she does so, she prevails."); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) (explaining that sex of victim need only be a "substantial factor" in harassment). But see Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995) (deciding that claim for harassment must demonstrate that offensive conduct would not have occurred but for victim's sex). Note, too, that in opposite-sex cases, it is not a defense for the employer to allege that the harasser was gay. See Anne-Marie Harris, *Sex Harassment Enters the Same-Sex Era*, NAT'L L.J., Apr. 13, 1998, at A20 ("[I]f same-sex harassment is only actionable under Title VII when the harasser is homosexual, then a 'homosexual defense' ought to exist in cases in which harasser and victim are of the opposite sex.").

45. See, e.g., *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1009 (7th Cir. 1994) (characterizing critical question as whether plaintiff was harassed because of her sex); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (holding that harassment victim must establish hostile workplace claim by showing that, but for her gender, victim would not have been subject to harassment); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (reaffirming "but for" causation test for harassment); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In each instance, the legal problem . . . [is] the exaction of a condition which, but for his or her sex, the employee would not have faced."); *Griswold v. Fresenius USA, Inc.*, 978 F. Supp. 718, 728 (N.D. Ohio 1997) ("[A]n employee may suffer harassment based on sex that is motivated by pure misanthropy or misogyny.").

The causation standard and the methods by which causation can be shown have sparked debate in both the courts and in the legal academy about whether Title VII contains a loophole allowing harassing acts perpetrated by either a bisexual or an equal opportunity harasser to go unpunished. See, e.g., *Bundy*, 641 F.2d at 942 ("Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike."); *Ecklund v. Fuisz Tech.*, 905 F. Supp. 335, 350 (E.D. Va. 1995) (noting that a harasser who harasses both men and women poses no disparate treatment problem); Sandra Levitsky, Footnote 55: *Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 *MINN. L. REV.* 1013, 1014 (1996) (explaining *Barnes v. Costle* court's establishment of the bisexual defense loophole); Schultz, *supra* note 35, at 1780 n.502 (noting tenuous extension of courts' focus on sexual attraction to cases involving bisexual harassers); Jessica Block, Case and Statute Comment, *Same-Sex Harassment—Employment Discrimination—Civil Rights*, 82 *MASS. L. REV.* 250, 252 (1997) (objecting to "imposing on a same-sex harassment plaintiff the burden of comparing the treatment of the two genders in the workplace, especially where the

Whether the activities complained of are unwelcome, however, generally is disputed.⁴⁶ In order to constitute harassment, the conduct must be "unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."⁴⁷

To be actionable, the sexual harassment must be sufficiently severe and pervasive so as to alter the conditions of employment and bring about an "abusive working environment."⁴⁸ "[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."⁴⁹ In order to establish that the harassment was sufficiently pervasive and severe, the plaintiff must show a practice or pattern of sustained and nontrivial harassment against her.⁵⁰ She must also reasonably perceive⁵¹ the

conduct at issue is . . . clearly sexual in nature," since doing so allows an equal opportunity harasser to escape liability and places inappropriate focus on the "subjective intentions of the harasser, as opposed to any objective evaluation of the repugnancy of his or her behavior"); Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 348 nn.85-86 (1988) (noting that Title VII contains bisexual loophole). But see *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) ("[E]ven if [the harasser] used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby 'cure' his conduct toward women. . . . [W]e do not rule out the possibility that both men and women working [for defendant] have viable claims . . . for sexual harassment."); *Raney v. District of Columbia*, 892 F. Supp. 283, 288 (D.D.C. 1995) (finding that bisexual harassment actionable if harasser targets only one gender); Debra R. Wolland, Recent Case, *A Quick Case for Including Same-Sex Harassment under Title VII: Quick v. Donaldson Co., Inc.*, 90 F.3d 1372 (8th Cir. 1996), 20 HARV. J.L. & PUB. POL'Y 615, 617 n.24, 622 (1997) (explaining that Quick reaches "a result more faithful to Title VII" than do other same-sex sexual harassment cases and explaining that the problem of the bisexual harasser is avoided by viewing disparate treatment as a sufficient but not necessary condition of liability). See generally *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1336-37 (D. Wyo. 1993) (explaining difference between bisexual and equal opportunity harasser and concluding there is viable claim against the equal opportunity harasser who does not harass men and women in the same way); Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals under Title VII*, 27 RUTGERS L.J. 383, 407 n.127 (1996) (differentiating between bisexual harasser ("one who harasses out of sexual desire") and equal opportunity harasser ("one who harasses out of an intent to demean")).

46. See *Moylan*, 792 F.2d at 749 (determining that whether conduct was unwelcome or not is a question of fact); *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 712 (E.D. Wis. 1996) (stating that no per se rules exist to define "unwelcome"; instead courts must examine facts of each case and the "intimidation, frequency, and interference" of harassment (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993))).

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

48. *Harris*, 510 U.S. at 21 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

49. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991); see also Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 843-47 (1991) (arguing that courts use pervasiveness standard to excuse objectionable harassment that occurs infrequently or irregularly).

50. See *Harris*, 510 U.S. at 21.

51. The existence of a hostile environment should be evaluated from both an objective and a subjective perspective:

[C]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

conduct as an alteration of employment conditions that create a hostile working environment.⁵²

In considering whether sexual harassment created a hostile environment, courts determine whether the totality of the circumstances reveals that the harassment was sufficiently severe and pervasive to create a discriminatorily abusive work environment.⁵³ There need be no tangible job detriment for a plaintiff to prevail.⁵⁴ The trier of fact must judge the circumstances according to how a reasonable person would respond under similar conditions.⁵⁵ For purposes of this

Id. at 21-22.

52. *See id.*

53. *See id.* at 23 (considering factors that include "frequency," "severity," and physically threatening nature of harassment).

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. § 1604.11(b) (1996).

54. *See Harris*, 510 U.S. at 17.

55. *See Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986). Some controversy surrounds whether the standard to be used in this inquiry is that of the reasonable person, the reasonable woman, or the reasonable victim. *See, e.g., Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1210 (1989) (objecting to use of subjective standard because equality between the sexes would not benefit from a "pretextual or wholly idiosyncratic" point of view); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 450 (1997) (promoting the standard of a respectful person to address the shortcomings of current inquiries into reasonableness); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 537-40 (1991) (arguing that cases applying reasonable woman standard engage in form of censorship); Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37 (1993) (noting feminist theorists' belief that "[i]n the hands of some courts, deployment of the reasonable person standard makes it appear as if there can only be one objective assessment of human behavior, masking the reality that men and women often experience sexual conduct differently"); Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 666-67 (1993) (remarking that reasonableness standard has traditionally been used to determine liability by evaluating defendant's behavior); Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 313 (1991) ("A standard that makes more sense within the context of Title VII's goal of eliminating the employment barriers facing victims of discrimination is the viewpoint of a 'reasonable woman' or a 'reasonable victim.'"); Paul, *supra* note 26, at 362 n.116 (hypothesizing that the term "reasonable person" assumes that object of description is male even though most victims of sexual harassment are female; courts prefer gender-neutral language because it seems likely to lead to consistent application of law in cases brought by both females and male victims); George Rutherglen, *Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL'Y 487, 496 (1995) (emphasizing that gender-neutral standards like "reasonable person" overlook fact that gender was primary motivation behind harassment); Walter Christopher Arbery, Note, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503, 505 (1993) (noting that Title VII aims to eradicate employment discrimination and encourage equal treatment for all workers); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 902 (1993) (arguing for standard that would examine inappropriateness of defendant's alleged behavior from the perspective of the putative "reasonable victim"); Catherine M. Maraist, Note, *Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required*

analysis, it is sufficient that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁵⁶

B. Same-Sex Sexual Harassment

The Supreme Court has stated that Title VII is meant "'to strike at the entire spectrum of disparate treatment of men and women' in employment."⁵⁷ Noting the paucity of legislative history revealing Congress's intentions in enacting the relevant portion of the statute,⁵⁸ the Court has interpreted the statute's plain language in a gender-neutral fashion.⁵⁹ The Supreme Court has deemed the plain language of the statute and its previous use of gender neutral language to construe the statute to be evidence that hostile environment sexual harassment of a subordinate by a supervisor of the same gender is actionable under Title VII in the same way that harassment of a subordinate of the opposite gender is.⁶⁰ Prior to the Supreme Court's ruling, five federal courts of appeals and numerous federal district courts looked to the plain language of the statute and to the Supreme Court's use of gender-neutral language as support for their conclusion that same-sex sexual harassment was cognizable.⁶¹ Some

by *Harris v. Forklift Systems, Inc.*, 57 LA. L. REV. 1343, 1352-57 (1997) (canvassing commentary of courts about how and when the subjective prong laid down in *Harris* can be fulfilled).

56. *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

57. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

58. There has been discussion surrounding the question of whether the legislative history of Title VII reveals that the inclusion of "sex" in the statute was a last-minute attempt to undermine its passage. See 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. WOMEN & L. 137, 139 (1997); Schultz, *supra* note 35, at 1697 n.50.

59. See *Meritor*, 477 U.S. at 64; see also *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995) (explaining that language used by the *Meritor* court in defining sexual harassment as discrimination based on sex was not limited to opposite sex situations). But see *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1048 (N.D. Ala. 1996) (noting that hostile environment sexual harassment is different from sex discrimination because it derives from judicial interpretation; an evaluation of its reach involves other considerations (citing *Meritor*, 477 U.S. at 57)).

60. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998).

61. See, e.g., *Doe v. City of Belleville*, 119 F.3d 563, 573 (7th Cir. 1997) (noting that Title VII draws no distinction based on gender, anyone may bring suit regardless of their sex or harasser's sex), *vacated*, 118 S. Ct. 1183 (1998); *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 447 (6th Cir. 1997) (ruling that same-sex sexual harassment cases fall within "'traditional' notions of sex discrimination"); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (stating that language of Title VII is gender-neutral); see also *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir.) (explaining that protection of Title VII extends to all employees, not only to specific disadvantaged groups), *cert. denied*, 117 S. Ct. 70 (1996); *Caldwell v. KFC Corp.*, 958 F. Supp. 962, 968 (D.N.J. 1997) (finding that victim need not be opposite sex of harasser); *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 702 (E.D. Wis. 1996) (noting that language of

courts also found the cognizability of same-sex claims supported by the recognition of reverse discrimination claims under Title VII⁶² and

Title VII is so broad that it does not limit actions to heterosexual harassment); *Rasmusson v. Copeland Lumber Yards*, No. CV-N-96-258, 1997 WL 769366, at *3 (D. Nev. Oct. 31, 1997); *Storey v. Chase Bankcard Servs., Inc.*, 970 F. Supp. 722, 725 (D. Ariz. 1997); *Griswold v. Fresenius USA, Inc.*, 978 F. Supp. 718, 729 (N. D. Ohio 1997); *Swage v. Inn Phila.*, Civ. A. No. 96-2380, 1996 WL 368316, at *2-3 (E.D. Pa. June 21, 1996) (stating that same-sex sexual harassment is actionable under Title VII); *Peric v. Board of Trustees*, 96 C 2354, 1996 WL 515175, at *3 (N.D. Ill. Sept. 4, 1996) (acknowledging that statute contains gender-neutral terms); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996) (rejecting claim that Title VII does not apply to same-sex harassment); *Ton v. Information Resources, Inc.*, 95 C 3565, 1996 WL 5322, at *5-6 (N.D. Ill. Jan. 3, 1996) (noting broad language of Title VII and fact that it is unlawful to discriminate on basis of sexual factors), *aff'd sub nom. Bolaszewski v. Georgia-Pac. Corp.*, 1996 U.S. App. LEXIS 29139 (2d Cir. Nov. 8, 1996); *King v. Town of Hanover*, 959 F. Supp. 62, 66 (D.N.H. 1996) (finding that nothing in Title VII places restrictions on same-sex sexual harassment cause of action), *aff'd*, 116 F.3d 965 (1st Cir. 1997); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1409 (E.D. Wis. 1996) (stating that victim does not have to be opposite sex of harasser), *aff'd*, 125 F.3d 408 (7th Cir. 1997); *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 273 (D. Utah 1996) (noting that anti-male harassment does not require showing that environment was poisoned for all males); *Easton v. Crossland Mortgage. Corp.*, 905 F. Supp. 1368, 1378-80 (C.D. Cal. 1995) (explaining that plain language of Title VII does not preclude same-sex sexual harassment), *rev'd on other grounds*, 114 F.3d 979 (9th Cir. 1997) (per curiam); *Sardinia v. Dellwood Foods, Inc.*, 94 Civ. 5458, 1995 WL 640502, at *5 (S.D.N.Y. Nov. 1, 1995) (asserting that, under Title VII, same sex discrimination is plainly illegal); *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995) (noting that EEOC unequivocally found that same-sex harassment to be illegal); *Nogueras v. University of P.R.*, 890 F. Supp. 60, 63 (D.P.R. 1995) (stressing that plain language of Title VII makes same-sex harassment unlawful); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995) (finding same-sex harassment illegal under Title VII); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (challenging *Goluszek's* narrow focus on an anti-male environment as not reflective of the "current state of anti-discrimination jurisprudence"); *McCoy v. Johnson Controls World Servs. Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) (reasoning that same-sex sexual harassment violates Title VII); *Ladd v. Sertoma Handicapped Opportunity Program, Inc.*, 917 F. Supp. 766, 767 (N.D. Okla. 1995) (stressing that Supreme Court has interpreted Title VII to prohibit same-sex harassment); *Sardinia*, 1995 WL 640502, at *4-5 (criticizing *Goluszek* for reasoning from vague, gender-neutral language of student Note published two years prior to *Meritor*). *But see* *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 739 (N.D. Ill. 1996) (going beyond holding of *Goluszek* to hold that harassment by one gender of another is only scenario proscribed and that same-sex sexual harassment could never be gender discrimination); *Martin*, 926 F. Supp. at 1048 (suggesting that plain language argument is unrevealing because sexual harassment is a product of judicial interpretation).

Several states have recognized same-sex sexual harassment claims under state law analogues to Title VII. *See, e.g., Storey*, 970 F. Supp. at 731 (recognizing claim of same-sex sexual harassment under Arizona Civil Rights Act); *Doe v. Capital Cities*, 58 Cal. Rptr. 2d 122, 126 (Cal. Ct. App. 1996) (interpreting California law as applying equally to both same-sex and opposite-sex harassment); *Melnychenko v. 84 Lumber Co.*, 676 N.E.2d 45, 48 (Mass. 1997) (noting that sexual harassment is not limited to opposite-sex misconduct); *Barbour v. Michigan Dep't of Soc. Servs.*, 497 N.W.2d 216, 218 (Mich. Ct. App. 1993) (citing federal courts' consensus that same-sex harassment is actionable); *Cummings v. Koehnen*, 556 N.W.2d 586, 589 (Minn. Ct. App. 1996) (finding that same-sex harassment violates state law), *aff'd*, 568 N.W.2d 418 (Minn. 1997); *Zalewski v. Overlook Hosp.*, 692 A.2d 131, 136 (N.J. Super. Ct. Law Div. 1996) (stating that same-sex harassment claim based on gender stereotyping was cognizable); *Yukoweil v. IBM, Inc.*, 643 N.Y.S.2d 747, 748 (App. Div. 1996); *Tarver v. Calx Corp.*, No. 96 CA 149, 1998 WL 74378, at *6 (Ohio Ct. App. Jan. 29, 1998) (holding same-gender sexual harassment cognizable under Ohio analogue to Title VII); *Doe v. Department of Transp.*, 931 P.2d 196, 199-200 (Wash. 1997).

62. *See, e.g., Fredette*, 112 F.3d at 1506 (stating that acknowledgment of reverse-discrimination claims supports recognition of same-sex sexual harassment); *Storey*, 970 F. Supp.

the EEOC's position on the matter.⁶³ Other federal courts of appeals stated in dicta or implied that same-sex hostile environment sexual harassment claims were cognizable under Title VII.⁶⁴ Still other

at 726; *Caldwell*, 958 F. Supp. at 968 (noting that same-sex harassment claims are analogous to reverse discrimination, which is actionable under Title VII); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995) (insisting that same-sex harassment claims must be actionable to comport with reverse discrimination claims under Title VII); *Easton*, 905 F. Supp. at 1379 (noting that "people of color are not the only individuals that can the claim protection of Title VII"); *Nogueras*, 890 F. Supp. at 63 (determining that Title VII expressly prohibits discrimination in any form based on both sex and race); *Griffith*, 887 F. Supp. at 1137 n.4 (allowing that same-sex harassment claims could be viewed as similar to reverse discrimination claims); *Walden Book Co.*, 885 F. Supp. at 1103 (stressing that it would be illogical to permit reverse discrimination claims but invalidate same-sex claims under Title VII); *Prescott*, 878 F. Supp. at 1550 (noting similarity between same-sex harassment claims and reverse discrimination claims under Title VII); *Swage*, 1996 WL 368316, at *3 (arguing that it is illogical to allow reverse discrimination claims but disallow same-sex harassment claims under Title VII).

Naturally, the more analogous case would concern discrimination against a member of a protected group by another member of that group. Such claims are cognizable. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 489 (1977) (reasoning that discrimination against Mexican-American was unlikely because many Mexican-Americans hold elected positions in country); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) (finding that discharge of white woman by white supervisor might constitute race discrimination); *Hansborough v. City of Elkhart Parks & Recreation Dep't*, 802 F. Supp. 199, 201 (N.D. Ind. 1992) (stating that discrimination by black person against black person on the basis of race violates Title VII); *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 724 (D.P.R. 1992) (asserting that discrimination by a Puerto Rican against another Puerto Rican is actionable under 42 U.S.C. § 1981).

63. The text of the EEOC's position is as follows:

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

EEOC COMPLIANCE MANUAL, *supra* note 35, § 615.2(b)(3) (emphasis in original); *see also Fredette*, 112 F.3d at 1505 (stating EEOC's view that victim does not have to be opposite sex of harasser); *Caldwell*, 958 F. Supp. at 968 (asserting that Title VII protects employees from same-sex discrimination); *Hondo*, 940 F. Supp. at 1409 (noting that EEOC finds sex to be irrelevant in Title VII claims); *Williams*, 916 F. Supp. at 8 (recognizing that EEOC inquiry focuses on gender rather than sexual orientation); *Peric*, 1996 WL 515175, at *3 (stating that EEOC makes it clear that victim does not have to be opposite sex of harasser); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996) (granting Title VII protection to same-sex harassment); *Swage*, 1996 WL 368316, at *2 (reporting that EEOC applies Title VII regulations to same-sex harassment); *Community Nursing Servs.*, 932 F. Supp. at 271 (noting that EEOC regards same-sex harassment as actionable under Title VII); *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335, 337 (E.D. Va. 1995) (concluding that EEOC has clearly articulated its position that Title VII protects victims of same-sex discrimination); *Ladd*, 917 F. Supp. at 767 (contending that victim and harasser do not have to be of opposite sexes); *Sardinia*, 1995 WL 640502, at *6 (delineating EEOC position that same-sex harassment is actionable); *Raney*, 892 F. Supp. at 287 (determining that EEOC works against acts of same-sex harassment); *Storey*, 970 F. Supp. at 725 (D. Ariz. 1997); *Rasmusson*, 1997 WL 769366, at *3; *Griswold*, 978 F. Supp. at 729 (N.D. Ohio 1997).

64. *See, e.g., McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996) (observing that disallowing homosexual actions under Title VII is inherently unfair); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (stating that members of both genders have claims against male harassers under Title VII); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (noting that same-sex harassment claims are actionable under Title VII); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (charging that sexual harassment encompasses same-sex harassment); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047

courts declined to address cognizability in cases involving evidence deemed insufficient to amount to actionable sexual harassment.⁶⁵

There has been agreement among most courts that quid pro quo claims involving parties of the same sex are cognizable under Title VII,⁶⁶ as are sex discrimination claims not involving allegations of sexual or gender-based harassment.⁶⁷ Prior to *Oncale*, a minority of courts denied recognition of same-sex sexual harassment claims involving allegations of either quid pro quo or hostile environment harassment.⁶⁸ These courts described such claims as at odds with Congress' intent to outlaw sex discrimination resulting from "the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person."⁶⁹ Thus, these

n.4 (3d Cir. 1977) (observing that Title VII claims are not contingent on gender characteristics alone); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (finding that discrimination claims concerning sexual misconduct should be based on "but for" standard in regard to victim's gender).

65. See, e.g., *Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996) (suggesting that showing that conduct was based on gender is an elementary requirement); *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48 (6th Cir. 1996) (making clear that allegations must demonstrate sexual misconduct), *cert. denied*, 117 S. Ct. 170 (1996); *Purington v. University of Utah*, 996 F.2d 1025, 1028-31 (10th Cir. 1993) (resolving that claim of sexual harassment is barred due to fact that numerous factors were not established); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192 (1st Cir. 1990) (noting that sexual harassment claim must be clearly demonstrated to have cause of action under Title VII); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1181-82 (N.D. Ind. 1995) (stating that conduct in question is not actionable); *Ryczek v. Guest Servs., Inc.*, 877 F. Supp. 754 (D.D.C. 1995) (granting summary judgment on plaintiff's claim of sexual harassment); see also *Schmitz*, 1997 WL 218258, at *2 (noting that Ohio law contains analogous section to Title VII that includes broad prohibition of employment discrimination).

66. See, e.g., *Barnes*, 561 F.2d at 990 n.55 (noting that both opposite-sex and same-sex quid pro quo actions present identical legal problems); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 399 (D. Minn. 1996) (noting that Title VII protects employees against same-gender sexual harassment); *Ton*, 1996 WL 5322, at *7 (discussing EEOC standards for sexual harassment showing under Title VII); *Prescott*, 878 F. Supp. at 1549-50 (detailing that defendant corporation was strictly liable for quid pro quo requirements of sexual favors).

67. See, e.g., *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (noting that key inquiry is whether employee was discriminated against because of his or her sex, regardless of employer's sexual preference).

68. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998) (noting that Fifth Circuit holds that same-sex sexual harassment is not actionable under Title VII); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-53 (5th Cir. 1994) (holding that same-sex harassment could not constitute claim under Title VII); *Jackson v. Arthur Anderson & Co.*, No. 3:96-CV-2206-D, 1997 WL 74709, at *2 (N.D. Tex. Feb. 11, 1997) (stating that Fifth Circuit does not recognize same-sex sexual harassment under Title VII); *Harris v. National Precision Blanking*, No. 95 C 6022, 1987 WL 448042, at *3 (N.D. Ill. May 30, 1997) (denying Title VII claim of same-sex harassment); *Sarff v. Continental Express*, 894 F. Supp. 1076, 1082 (S.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir. 1996) (stating that Title VII does not ban sexual discrimination based on sexual orientation); *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995) (acknowledging that same-sex harassment was not cognizable under Title VII); *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995) (explaining that Fifth Circuit does not allow Title VII claim for same-sex harassment); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (noting that male-on-male sexual harassment was not actionable where harassment did not create anti-male environment in the workplace).

69. See *Benekritis*, 882 F. Supp. at 525 (quoting *Goluszek*, 697 F. Supp. at 1456).

courts reasoned, a male in a male-dominated environment has no claim for sexual harassment against another male, since, even if the victim was harassed *because* he was male, there would be insufficient evidence to show the existence of an anti-male environment in the workplace.⁷⁰ Other courts deemed same-sex sexual harassment non-cognizable, even where an anti-male or anti-female environment could be shown. These courts reasoned that Congress did not intend to recognize same-sex sexual harassment, and that same-sex sexual harassment claims were inherently claims of sexual orientation discrimination, discrimination on the basis of sexual prudery, or discrimination on the basis of effeminacy, mental disability or other vulnerability.⁷¹

II. DEVELOPING THE CONTOURS OF ACTIONABLE SAME-SEX SEXUAL HARASSMENT

Courts' prior disagreement concerning the cognizability of same-sex sexual harassment has been resolved by the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.* *Oncale* came on the heels of a spate of Fifth Circuit and district court decisions determining that same-sex sexual harassment was noncognizable⁷² but expressed doubt as to the rationale for this position. In *Oncale*, Joseph Oncale, a roustabout on an offshore oil rig, was threatened with homosexual rape, was restrained by a co-worker while a second placed

70. See *id.*; see also *Oncale*, 83 F.3d at 120 (clarifying that same-sex harassment is not tantamount to sexual discrimination, absent showing that employer treated plaintiff differently because of gender); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 494 (W.D. Wash. 1995) (collecting cases and noting that "plaintiff [did] not allege that his workplace was other than predominantly male, or that an anti-male environment was created").

71. See, e.g., *Oncale*, 83 F.3d at 120; *Garcia*, 28 F.3d at 451-53 (noting that same-sex harassment claims are distinct from male/female claims and do not fall within intended protection of Title VII); *Harris*, 1997 WL 448042, at *3 (finding that same-sex harassment claims were not intended to fall within scope of Title VII); *Torres v. National Precision Blanking*, 943 F. Supp. 952, 958-61 (N.D. Ill. 1996) (contending that Congress did not intend to encompass same-sex claims in enacting Title VII); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1050 (N.D. Ala. 1996) (determining that not all harassment with sexual overtones is actionable under Title VII).

72. See, e.g., *Oncale*, 83 F.3d at 118; *Garcia*, 28 F.3d at 445. District courts within the Fifth Circuit were constrained to follow *Garcia's* language as binding, albeit not altogether comfortably. See, e.g., *Larry v. North Miss. Med. Ctr.*, 940 F. Supp. 960, 963 (N.D. Miss. 1996); *Hahn v. Bentsen*, No. CIV.A.93-3820, 1996 WL 383129, at *9 (E.D. La. July 3, 1996); *Sarff*, 894 F. Supp. at 1082; *Blake v. City of Laredo*, 58 F.3d 637 (5th Cir. June 9, 1996) (per curiam) (unpublished); *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995); *Polly v. Houston Lighting & Power Co.*, 803 F. Supp. 1 (S.D. Tex. 1992); *Rodriguez v. Valteau*, No. Civ. A. 97-0658, 1997 WL 602191 (E.D. La. Sept. 29, 1997). But see *Pritchett v. Sizeler Real Estate Management Co.*, No. CIV. A. 93-2351, 1995 WL 241855, *2 (E.D. La. Apr. 25, 1995); *Castellano v. Whole Foods Market, Inc.*, No. H-94-2673, slip op. at 7-8 (S.D. Tex. Oct. 26, 1995); *Riser v. Haggard Clothing Co.*, No. 3:95-CV-3129-G, 1997 WL 361644, at *2 (N.D. Tex. June 25, 1997) (in action for attorney's fees, declining to find plaintiff's claim "frivolous and baseless" given conflict in the courts and the Supreme Court's grant of certiorari in *Oncale*).

his penis on Oncale's neck, and finally was restrained by a co-worker in the shower while a second co-worker forced a bar of soap into Oncale's anus.⁷³ The appellate court questioned the precedential value of *Garcia*, noting that "so long as the plaintiff proves that the harassment is because of the victim's sex, the sex of the harasser and victim is irrelevant,"⁷⁴ but nonetheless concluded it was bound by *Garcia* "in the absence of an intervening contrary or superseding decision by the Court en banc or the Supreme Court."⁷⁵ In reaching its determination, the *Oncale* Court did not address the harassers' sexual orientations or whether their conduct exhibited a sexual attraction to Oncale, suggesting that conduct aimed at the genitals is enough to constitute actionable sexual harassment.⁷⁶ The defendant appealed, and the Supreme Court, after requesting advice on the matter,⁷⁷ was advised by the Department of Justice to grant certiorari.⁷⁸ The Supreme Court granted certiorari⁷⁹ and unanimously reversed the Fifth Circuit's decision.

The Supreme Court's decision in *Oncale* contains remarkable parallels to *Meritor*⁸⁰ in that it establishes a cause of action for sexual harassment, this time by plaintiffs against those of the same sex,⁸¹ but leaves the "work of defining standards to the lower courts."⁸² Like

73. See *Oncale*, 83 F.3d at 118-19.

74. *Id.* at 119.

75. *Id.* (citing *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991)). At least one commentator, has argued that the *Garcia* court's pronouncement against the cognizability of same-sex claims was dicta. See Shahan, *infra* note 168. There is little support for this statement, given that noncognizability was one of the court's grounds for rejecting *Garcia*'s claim. Unlike district courts in circuits where pronouncements on the cognizability of same-sex claims is unquestionably found in dicta, see, e.g., *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); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977), district courts within the Fifth Circuit have been constrained to follow *Garcia*'s language as binding, albeit not altogether comfortably. See, e.g., *Larry*, 940 F. Supp. at 963; *Hahn*, 1996 WL 383129, at *9; *Sarff*, 894 F. Supp. at 1082; *Blake*, 58 F.3d at 637; *Myers*, 874 F. Supp. at 1548; *Polly*, 803 F. Supp. at 1. But see *Pritchett*, 1995 WL 241855, *2; *Castellano*, No. H-94-2673, slip op. at 7-8 (stating that the *Garcia* court's pronouncement was dicta).

76. Note that in *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1296 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996), the court described the conduct, "bagging," as sexual only insofar as "the aggressor aims his non-sexual aggression on genitals."

77. The Department's position is that "the law protects all employees from sex discrimination, regardless of their gender or sexual orientation." Edward Felsenthal, *U.S. Urges Court to Hear Same-Sex Harassment Case*, WALL ST. J., May 27, 1997, at B8.

78. See *Oncale v. Sundowner Offshore Servs.*, 117 S. Ct. 607 (1997).

79. See *Oncale*, 118 S. Ct. at 998-1000.

80. See Schlossberg, *supra* note 6, at 1 (describing *Oncale* as "[r]estating principles established over a decade ago in *Meritor*").

81. See *Oncale*, 118 S. Ct. at 1001-02.

82. Marcia Coyle, *Justices Tackle Sex Harassment; Four Cases Offer Chances to Rewrite This Area of Law*, NAT'L L.J., Mar. 23, 1998.

Meritor, *Oncale* offers "little practical guidance"⁸³ to courts trying to determine the actionability of allegations of sexual harassment beyond the admonition to pay "careful attention to the requirements of the statute"⁸⁴ and to use "common sense."⁸⁵ The Court did make it clear that homosexuality is relevant in cases where perpetrators solicit sexual activity from victims of the same sex but that the severity and pervasiveness requirements and due regard paid to "social context" would assist courts and juries in distinguishing horseplay from discrimination.⁸⁶ Notably, the *Oncale* decision does not indicate disapproval of the Fourth Circuit's decision in *McWilliams* and *Wrightson*, discussed below. It merely states that in the absence of showing homosexuality to prove a harasser's motivation by sexual desire, a plaintiff could allege gender-based discrimination. This statement is consistent with the Fourth Circuit's position and that of other courts which even before *McWilliams* and *Wrightson* recognized the distinction between harassment of a sexual nature and gender-based harassment.

The struggle for courts after *Oncale* is defining the contours of actionable same-sex sexual harassment.⁸⁷ Although there are similarities between the courts' application of the prima facie elements of sexual harassment to opposite-sex cases and their application of these elements to same-sex cases, there are salient differences as well.⁸⁸ The most marked difference is the greater emphasis some courts place on the importance of the causation element in same-sex harassment cases.⁸⁹ As noted above, the causation prong requires essentially that the plaintiff show that the harassment would not have occurred had he or she been of the opposite sex.⁹⁰ Some courts have suggested that the causation element is as presumptive in same-sex cases as it is in opposite-sex cases,⁹¹ but, given that motive and causa-

83. See Greenburg, *supra* note 6, at N1.

84. *Oncale*, 118 S. Ct. at 1002.

85. See *id.* at 1003.

86. See *id.*

87. See Thorpe, *supra* note 35, at 1392 (identifying various shortcomings of courts that already recognize gender-based discrimination as actionable per se).

88. See Dale Carpenter, *Same-Sex Sexual Harassment Under Title VII*, 37 TEX. L. REV. 699, 717 (1996) (comparing different modes of inquiry applied to both same-sex and opposite-sex harassment claims).

89. See Levitsky, *supra* note 45, at 1018 (discussing causation standards applied by courts in analyzing Title VII claims).

90. See Caldwell v. KFC Corp., 958 F. Supp. 962, 969 (D.N.J. 1997) (noting that key inquiry in harassment claim is establishing that gender is a substantial factor in conduct (citing *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977))). The court in *Blake v. Grede Foundries, Inc.*, No. 96-1322, 1997 WL 157126, at *4 (D. Kan. Mar. 20, 1997), gave a unique twist to the causation language: "[I]f either the motivation or the manner of expression of offensive behavior is sexually based, sexual harassment has occurred."

91. See, e.g., *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1507 (11th Cir. 1997),

tion may be less evident in same-sex cases,⁹² many courts view causation as the linchpin of same-sex sexual harassment claims. In evaluating the actionability of the conduct in these cases, courts have looked with special care at different aspects of the charged conduct in judging whether it meets the causation requirement of Title VII. Reasoning that sexual harassment is a reflection of the harasser's sexual attraction to the harassee, courts have looked to whether sexual attraction of the harasser towards the victim is apparent to satisfy the causation requirement.⁹³ For a plaintiff to make this showing, some courts require proof of the homosexuality of the harasser,⁹⁴ while other courts deem sexual orientation merely relevant⁹⁵ or completely

rev'g 905 F. Supp. 1034 (M.D. Fla. 1995) (finding similarity in intent behind same-sex and opposite sex harassment), *cert. denied*, 118 S. Ct. 1184 (1998); *Gerd v. United Parcel Serv.*, 934 F. Supp. 357, 361 (D. Colo. 1996) (finding claim for relief under Title VII); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (when harassment of male by a homosexual male is "sexually oriented," the harassment is presumed to be based on sexual attraction); *Tietgen v. Brown's Westminster Motors Inc.*, 921 F. Supp. 1495 (E.D. Va. 1996) (asserting presumption that sexual harassment occurs because victim is male); *McCoy v. Johnson Controls World Servs.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) ("[S]exual harassment of any kind is in fact 'based upon sex' and is considered sexual discrimination."); *Papish*, *supra* note 12, at 208 (discussing various approaches of federal courts in analyzing same-sex harassment claims).

92. See *Gerd*, 934 F. Supp. at 361 (noting that motive and causation are often less evident in same-sex harassment actions); *Martin*, 926 F. Supp. at 1049 (noting that same-sex harassment is often difficult to establish due to lack of conclusive evidence of causation); *Tietgen*, 921 F. Supp. at 1501 (marking that same-sex harassment is more difficult to discern as misconduct than heterosexual harassment); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 807 (N.D. Ind. 1995) (suggesting that causation is more nebulous in same-sex cases than in opposite-sex cases).

93. See, e.g., *Caldwell*, 958 F. Supp. at 962 (noting that plaintiff must establish attraction element and that conduct occurred because of victim's sex); *Shermer v. Illinois Dep't of Transp.*, 937 F. Supp. 781, 784 (C.D. Ill. 1996) ("[W]ithout proof that a harasser acted out of sexual attraction, it is very difficult for a plaintiff to prove a same-sex hostile environment claim.").

94. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.) (noting that proving homosexuality must include more than suggestive conduct), *cert. denied*, 117 S. Ct. 70 (1996); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.) (iterating that homosexual harassment claims under Title VII should be substantiated and proven in establishing underlying basis of claim), *cert. denied*, 117 S. Ct. 72 (1996); *Martin*, 926 F. Supp. at 1050 (reasoning that evidence of homosexuality is key inquiry in same-sex harassment claims under Title VII); *Dixon v. State Farm Fire & Cas. Ins. Co.*, 926 F. Supp. 548, 550-51 (E.D. Va. 1996) (discussing burden of proving harasser's sexual orientation). But see *Ford v. Rigidply Rafters, Inc.*, No. Y-96-1699, 1998 WL 154409, at *2 (D. Md. Apr. 1, 1998) (characterizing *Oncale* as a rejection of this approach).

95. See, e.g., *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998); *McCoy v. Macon Water Auth.*, 966 F. Supp. 1209, 1217 (M.D. Ga. 1997) (holding that Title VII recognizes a cause of action where male employee was harassed by same-sex, homosexual superior); *Wehrle v. Office Depot, Inc.*, 954 F. Supp. 234, 236 (W.D. Okla. 1996) (articulating that homosexual superior's misconduct toward member of same sex was illicit under Title VII); *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 711-12 (E.D. Wis. 1996) (describing homosexuality as relevant only to the victim's subjective view of the harassment); *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 273 (D. Utah 1996) (arguing that homosexual harassment by member of same sex establishes cause of action); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 402-03 (D. Minn. 1996) (discussing defendant's sexual orientation in assessing sexual harassment claim); *Martin*, 926 F. Supp. at 1049 (presuming causation where homosexual harasses member of same sex); *Tietgen*, 921 F. Supp. at 1501-02 (finding link between causation and harasser's

irrelevant.⁹⁶ Other courts use the perpetrator's conduct to infer sexual attraction⁹⁷ or sexual orientation.⁹⁸ At least one court looks solely to the explicit sexual nature of the conduct, be it an "intrusion upon sexual privacy" or "explicit comments on gender."⁹⁹ Inability to show

sexual orientation); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995) (stating that, if harasser is homosexual, causation is presumed); *Sardinia v. Dellwood Foods, Inc.*, No. 94 Civ. 5458, 1995 WL 640502, at *5-6 (S.D.N.Y. 1995) (noting that harassment and discrimination can occur without sexual attraction); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 544 (M.D. Ala. 1983) (noting that homosexual harassment caused job detriment in violation of Title VII); *Griswold*, 978 F. Supp. at 730 n.5 (N.D. Ohio 1997).

96. See, e.g., *Wehrle*, 954 F. Supp. at 236 (finding homosexuality of perpetrator irrelevant); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996) ("Just as courts do not inquire into the sexual preferences of the victim in cases of opposite sex harassment, the sexual preference of the victim should be a non-issue in a same-sex sexual harassment case."); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1411 (E.D. Wis. 1996) (holding that perpetrator's sexuality was irrelevant and opining that proof of harasser's homosexuality does not establish that the victim was harassed because of his gender), *aff'd*, 125 F.3d 408 (7th Cir. 1997); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996) (asserting that sexual orientation of harasser is irrelevant under Title VII); *Marciano v. Kash N' Karry Foodstores, Inc.*, No. 94-1657-CIV-T-17A, 1996 WL 420879, at *3-4 (M.D. Fla. July 1, 1996) (holding homosexuality irrelevant in same-sex hostile environment case and noting factual disputes as to the actionability of the conduct); *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335, 338-39 (E.D. Va. 1995) (noting importance of differential treatment because of one's gender); *Shermer*, 937 F. Supp. at 784 (criticizing requirement of proof of harasser's homosexuality as relying on trait not mentioned in Title VII rather than on conduct that statute prohibits); see also *Cummings v. Koehnen*, 556 N.W.2d 586, 589 (Minn. Ct. App. 1996) (holding that Minnesota Human Rights Act does not require proof of harasser or victim's gender, but only that a hostile work environment was created), *aff'd*, 568 N.W.2d 418 (Minn. 1997).

A related concern has been raised by gay advocates that "same-sex harassment cases will turn into witch hunts if they are permitted to hinge on the sexual orientation of those involved." Robin Estrin, *Mass. High Court Takes up Issue of Same-Sex Harassing*, COMMERCIAL APPEAL (Memphis), Oct. 11, 1996, at A5 (quoting Mary Bonauto, a lawyer with Gay & Lesbian Advocates & Defenders).

97. See, e.g., *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (stating that aggressor's conduct is actionable when it appears that he finds male co-worker attractive); *Tietgen*, 921 F. Supp. at 1501 ("If a male employer touches a male employee in a sexual manner, or invites the male employee to engage in sexual conduct, the employer likely does so because the employee is male."); see also Samuel A. Marcossin, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992) (arguing that sex discrimination can be found solely in the sexual nature of the conduct in a sexual harassment case).

98. See, e.g., *Dixon*, 926 F. Supp. at 551 (arguing that sexual solicitation was sufficient to draw conclusion that harasser was homosexual); *Tietgen*, 921 F. Supp. at 1500 n.8, 1502 (noting that solicitation for sexual favors from individual of same sex supports inference that alleged harasser is either homosexual or bisexual); *Waag*, 930 F. Supp. at 401 (recognizing that unwelcome homosexual advances, like unwelcome heterosexual advances, arise presumptively because of plaintiff's gender); *Pritchett v. Sizeler Real Estate Management Co.*, Civ. A. No. 93-2351, 1995 WL 241855, at *3 (E.D. La. Apr. 25, 1995) (stating that it is improper to exempt a supervisor's conduct from Title VII claim solely because of supervisor's sexual orientation). *Waag* and *Caldwell* assert, and *Pritchett* suggests, that without such presumptions, a homosexual supervisor will escape liability for conduct for which a heterosexual supervisor would be liable. See *McFarland*, *supra* note 44, at 494 n.6 (concluding that perpetrator's choice of victim indicates sexual orientation because it is presumed that victim was harassed because of gender).

99. See *Gerd v. United Parcel Serv.*, 934 F. Supp. 357, 361 (D. Colo. 1996) (noting that determinative inquiry focuses on causation and sexual nature of acts); *Waag*, 930 F. Supp. at 401; *Peric v. Board of Trustees*, No. 96 C 2354, 1996 WL 515175, at *3 (N.D. Ill. Sept. 4, 1996) (observing that harasser's sexual demands could only be demanded of another man). But see *Ward v. Ridley Sch. Dist.*, 940 F. Supp. 810, 812-13 (E.D. Pa. 1996) (requiring showing of sex-

attraction frustrates claims, unless the perpetrator's treatment of the opposite gender, in the form of discriminatory intimidation, ridicule and insult,¹⁰⁰ the EEOC's "crucial inquiry,"¹⁰¹ reveals animus towards his or her own gender.¹⁰²

On the other side of the spectrum, some courts have required the allegation of an anti-male environment to show causation.¹⁰³ One court has even required a showing of an imbalance of power between the perpetrator and the victim.¹⁰⁴ Other courts have declared that an anti-male environment is merely relevant.¹⁰⁵

ual attraction because not all sexual conduct directed by one man towards another is actionable), *aff'd*, 124 F.3d 189 (3d Cir. 1997).

100. See *Rasmussen*, 988 F. Supp. at 1301 (quoting *Harris*, 510 U.S. at 21).

101. EEOC COMPLIANCE MANUAL, *supra* note 35, § 615.2(b)(3) ("[T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex."). But see *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 702 (E.D. Wis. 1996) (rejecting position that whether the harasser treats a member or members of one sex differently from members of the other sex is crucial to inquiry).

102. See *Eschbach v. County of Lehigh*, No. Civ. A. 95-7276, 1997 WL 109611, at *1 (E.D. Pa. Feb. 28, 1997) (attributing significance to female supervisor's statement that she liked male coworker better because he had a penis); *Shermer v. Illinois Dep't of Transp.*, 937 F. Supp. 781, 784 n.2 (C.D. Ill. 1996) (signifying proof that harasser dislikes own gender (citing *Sardinia v. Dellwood Foods, Inc.*, No. 94 Civ. 5458, 1995 WL 640502 (S.D.N.Y. Nov. 1, 1995))); *Tietgen*, 921 F. Supp. at 1501 (observing that male supervisor may display bitterness or malignity to male employee because he prefers to work with females); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 807 (N.D. Ind. 1995) (requiring showing of anti-male bias and noting difficulty of doing so via sexually explicit words or conduct); see also *Sneed v. Montgomery Hous. Auth.*, 956 F. Supp. 982 (M.D. Ala. 1997) (failing to establish hostile work environment or show that co-worker had animus towards own gender); *Andrews v. City of Phila.*, 713 F. Supp. 760, 770 n.6 (E.D. Pa. 1989) (finding sexual harassment despite minimal evidence of sexual conduct), *aff'd in part and vacated in part*, 895 F.2d 1469 (3d Cir. 1990); Paul, *supra* note 26, at 350 (describing general animus toward any member of the scorned group as an essential attribute of discrimination).

103. See, e.g., *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 494 (W.D. Wash. 1995) (ruling that plaintiff failed to prove that an anti-male environment existed); *Blozis*, 896 F. Supp. at 806 (reasoning that workplace atmosphere was not anti-male); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1180 (N.D. Ind. 1995) (requiring showing of gender-biased atmosphere but noting that anti-male environments are rarely shown); *Fleenor v. Hewitt Soap Co.*, No. C-3-94-182, 1995 WL 386793, at *3 (S.D. Ohio Dec. 21, 1994) (stating that sexual harassment claim depends on creation of anti-male work environment); *Polly v. Houston Lighting & Power Co.*, 803 F. Supp. 1, 5 (S.D. Tex. 1992) (determining that failure to show anti-male work environment was factor in dismissal); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (concluding that harassment did not create an anti-male work environment). But see Paul, *supra* note 26, at 335 (arguing that inclusion of abuse of power in definition of sexual harassment is too restrictive because definition does not reflect what occurs in many hostile work environment situations between co-workers, unless one assumes that males in any position enjoy more power than women); Susan Silberman Blasi, Comment, *The Adjudication of Same-Sex Sexual Harassment Claims Under Title VII*, 12 LAB. LAW. 291, 301 (1996) (stating that it cannot be assumed that creating a hostile environment for one person represents the creation of a hostile environment for everyone else in that person's category).

104. See *Benekritis v. Johnson*, 882 F. Supp. 521, 525 (D.S.C. 1995) (requiring an imbalance of power for harassment to be actionable).

105. See, e.g., *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 402 (D. Minn. 1996) (describing determination concerning whether members of one sex were treated differently as relevant but not necessary); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995) (concluding that impact on other workers of the same sex is relevant but not

Recent rulings by courts exhibit less concern solely with causation than with the character of the harassing conduct and how it embodies evidence both of causation and a hostile work environment.¹⁰⁶ Courts, largely unguided by the Supreme Court, are beginning to evaluate how the nature of the conduct reflects causation, as it is said to do in opposite-sex cases.¹⁰⁷ The struggle for courts now lies with defining what constitutes sexual conduct between persons of the same sex. Initial attempts to forge this definition have involved assessing causation by evaluating whether the conduct in a given case is of a sexual nature or merely constitutes non-sexual horseplay.¹⁰⁸ This shift in the causation inquiry reflects a movement toward aligning the contours of same-sex claims with the inquiry made in opposite-sex claims.¹⁰⁹

Same-sex sexual harassment cases in the Fourth and Seventh Circuits are illustrative of the trends described. A discussion of the case law in these circuits is important because these cases exemplify the most significant analytical approaches currently employed in same-sex cases, and factually, these cases reflect the full range of same-sex sexual harassment cases nationwide. A study of case law in these circuits also reveals that district courts evaluating same-sex claims have engaged in judicial activism by subtly questioning and ultimately departing from binding precedent, thereby influencing the analysis of future same-sex claims.

A. *The Fourth Circuit*

The Fourth Circuit recognized same-sex sexual harassment claims

essential to prevailing on sexual harassment claim). *But see* Paul, *supra* note 26, at 360-61 (arguing that sexual harassment claims are essentially individual and not group-rights claims).

106. *See, e.g.,* Gerd v. United Parcel Serv., 934 F. Supp. 357, 361 (D. Colo. 1996) (emphasizing "but for" standard for sexual harassment determination (citing Williams v. District of Columbia, 916 F. Supp. 1, 7 (D.D.C. 1996))); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1336 (D. Wyo. 1993) (characterizing the *Meritor* standard as reflecting movement away from "but for" analysis of gender harassment toward analysis of whether conduct creates a hostile work environment); *see also* Papish, *supra* note 12, at 232.

107. *See infra* notes 150-77 and accompanying text

108. *See, e.g.,* Blake v. Grede Foundries, Inc., No. 96-1322, 1997 WL 157126, at *4 (D. Kan. Mar. 20, 1997) (holding that sexual harassment has occurred if offensive behavior motivated by sex or manner of expression was sexual in nature (citing Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1000 (10th Cir. 1996))); King v. Town of Hanover, 959 F. Supp. 62, 66 (D.N.H. 1996) (inferring that conduct occurred because plaintiff was male, despite defendant's contention that harasser was not homosexual and behavior was merely "workplace banter"), *aff'd*, 116 F.3d 965 (1st Cir. 1997); Gerd, 934 F. Supp. at 360 (noting that even where "locker room" activity has occurred, the conduct may be actionable in a mixed motive context if it violates Title VII); McCoy v. Johnson Controls, Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (noting that all sexual harassment is based on sex and can be considered sexual discrimination).

109. *See* Ecklund v. Fuisz Tech., Ltd., 905 F. Supp. 335, 340 (E.D. Va. 1995) (determining that the behavior involved is more important than the sex of the perpetrator).

beginning with *McWilliams v. Fairfax County Board of Supervisors*.¹¹⁰ In *McWilliams*, the court ruled that same-sex sexual harassment was actionable only where the homosexuality of the harasser could be shown.¹¹¹ This ruling was confirmed by the court in the case of *Wrightson v. Pizza Hut of America, Inc.*¹¹² Same-sex sexual harassment jurisprudence in this circuit's district courts is evolving to the point where allegations that the harasser's conduct reveals a sexual attraction to the victim, regardless of the harasser's sexual orientation, form the basis of an actionable claim. In this way, despite the position of the Fourth Circuit, causation can be shown entirely apart from any showing of the harasser's "true" orientation.

1. *McWilliams v. Fairfax County Board of Supervisors and Wrightson v. Pizza Hut of America, Inc.*

In *McWilliams*, a cognitively disabled male named Mark McWilliams was subjected by his co-workers to teasing, questions about his sexual activities, requests to masturbate him, and physical assaults involving placing a broomstick to his anus and fondling him to the point of erection.¹¹³ Forced to his knees on one occasion, McWilliams was blindfolded and made to "fellate" a harasser's finger.¹¹⁴ The court held that sexual behavior between heterosexuals of the same sex is never actionable under Title VII.¹¹⁵ In dicta, the court suggested that the claim would be actionable in a same-sex case where the perpetrator's homosexuality or sexual attraction toward the victim is shown.¹¹⁶

110. 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996).

111. *See id.* at 1193.

112. 99 F.3d 138 (4th Cir. 1996). Before *McWilliams* and *Wrightson*, the District of South Carolina had issued conflicting opinions on this matter. Compare *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995) (finding no cognizability based on *Garcia* and *Golaszek*), with *Roe v. K-Mart Corp.*, No. CIV.A.2:93-2372-18AJ, 1995 WL 316783, at *2 (D.S.C. Mar. 28, 1995) (finding same-sex claims cognizable based on the gender-neutral language of *Meritor* and the EEOC's position).

113. *See id.* at 1193.

114. *See id.*

115. *See id.* at 1196.

116. *See id.* at 1195. This dicta regarding the homosexuality of the harasser was rendered binding precedent by the court in *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 141 (4th Cir. 1996). In *Yeary v. Goodwill Industries-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997), a homosexual supervisor "notorious for harassing male employees" touched an employee's arm, chest and stomach, forced the employee to the wall in his office and whispered obscene comments about his physical appearance, and called the employee at home to make further lewd comments. *See id.* at 444. The court, noting that the Fourth Circuit requires proof of the perpetrator's homosexuality, ruled that same-sex sexual harassment is cognizable under Title VII. *See id.* at 447-48. The court declined to address the issue whether same-sex sexual harassment is actionable only when the harasser is a homosexual. *See id.* at 448.

The court in *Fredette v. BVP Management Associates*, 112 F.3d 1503 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998), a factually similar case, likewise declined to decide the question, stating, "The distinction the Fourth Circuit has recognized is easily perceived. We readily understand a homosexual male's advances towards another male to occur 'because of

This dicta regarding the homosexuality of the harasser was rendered binding precedent by the court in *Wrightson v. Pizza Hut of America, Inc.*¹¹⁷

In *Wrightson*, Arthur Wrightson's gay supervisor and gay fellow employees attempted, over a period of seven months, to induce him and two other heterosexual male employees to engage in homosexual sex acts.¹¹⁸ The harassment suffered by Wrightson consisted not only of verbal descriptions of homosexual sex and invitations to engage in sex but involved touching of a sexual nature as well.¹¹⁹ The court, noting the reservation of the question by the *McWilliams* court, held that "a claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual."¹²⁰ The court based its holding on the "simple logic" that "an employer of either sex can discriminate against his or her employees of the same sex because of their sex."¹²¹

In the Fourth Circuit at least, knowing that the harasser is homosexual appears to entail the same presumption—that the conduct was based on sex—that applies to opposite-sex cases where the sexual orientation of the harasser is never questioned. The difference is that in opposite-sex cases, the heterosexuality of the harasser is presumed, and the presumption is irrebuttable.¹²² In same-sex cases, homosexuality must be alleged and can be rebutted.¹²³ Absent proof

sex"; we understand this both out of common experience and in recognition of the parallels between this situation and the paradigm case of harassment involving a heterosexual male and a female victim, in which we have determined that the causation element of Title VII is easily met. Whether the kind of harassment at issue in *McWilliams* . . . occurs "because of sex" is a more difficult question, both in terms of common experience and the law.

Id. at 1507.

117. 99 F.3d at 141.

118. *See id.* at 139.

119. *See id.* at 139-40.

120. *Id.* at 141.

121. *Id.* at 142.

122. *See generally* *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 748-49 (4th Cir. 1996) (distinguishing same-sex sexual harassment from opposite sex harassment by observing that plaintiff in same-sex harassment case must overcome presumption that actions were not based on sex), *cert. denied*, 117 S. Ct. 70 (1996).

123. Objecting to the Fourth Circuit's rebuttable presumption that all parties are heterosexual, Shahan states inaccurately that "[a]ny presumption regarding the parties' sexual preference is new to Title VII jurisprudence." Amy Shahan, Comment, *Determining Whether Title VII Provides a Cause of Action For Same-Sex Sexual Harassment*, 48 BAYLOR L. REV. 507, 517 (1996). In fact, it is a staple in opposite-sex cases to assume the heterosexuality of the parties. *See Moylan v. Maries County*, 742 F.2d 746, 749 (8th Cir. 1986). Even same-sex cases address and make this point. *See, e.g., Hopkins*, 77 F.3d at 752 (finding that opposite gender sexual harassment is coupled with presumption that harassment occurred because of the victim's gender and would not have been directed toward another male); *Martin v. Norfolk S. Ry.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (arguing that presumption of sexual gratification and sex discrimination are improper in same-sex sexual harassment cases because it cannot be assumed that alleged conduct occurred because of employee's gender); *Tietgen v. Brown's Westminster Motors, Inc.*,

from McWilliams of the homosexuality of his harassers, the court presumed that McWilliams' harassers were heterosexual.¹²⁴ It thus characterized the harassing conduct as puerile horseplay and McWilliams as hyper-sensitive.¹²⁵ This characterization of the events was aided by the court's abridged version of the facts of the case. Not until the dissent does the reader learn that one of the perpetrators in the case "fondled" McWilliams' penis to erection, asked to be permitted to masturbate him, and made sexual overtures to him in the men's restroom.¹²⁶

The majority, noting the "heterosexuality" of the perpetrators, stated simply that causation could not be inferred from this conduct, because it was "merely suggestive of homosexuality."¹²⁷ Conclusive homosexuality was available in *Wrightson*, on the other hand, only because the homosexuality of the perpetrators was known. In seeking to define what constitutes sexual conduct between men, *McWilliams* and *Wrightson* stand for the proposition that such conduct does not occur where the plaintiff cannot establish the aggressor's homosexuality independent from conduct-based inferences, even where that conduct includes fondling the victim's genitals and soliciting sexual contact.

2. Departures from *McWilliams* and *Wrightson*

Although at least one district court within the Fourth Circuit fol-

921 F. Supp. 1495, 1501 (E.D. Va. 1996) (observing that causation is more difficult to establish in same-sex sexual harassment cases because society is more accustomed to heterosexual interactions); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1383 (C.D. Cal. 1995), *rev'd on other grounds*, 114 F.3d 979 (9th Cir. 1997) (per curiam) (remarking that male-female or female-male context sexual or gender-oriented comments are presumptively discriminatory, but same-sex conduct of this nature is not, since it is "uncommon in society"); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 807 (N.D. Ind. 1995) (establishing that harassment based on gender is more important in same-sex sexual harassment cases); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1181 (N.D. Ind. 1995) (characterizing male-female distinction as important only in same-sex harassment cases); see also Leigh M. Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN'S RTS. L. REP. 39 (1990) (describing the "heterosexual presumption," which takes for granted that all women and men are heterosexual and originates from socialized heterosexual bias). But see *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 401 (D. Minn. 1996) (concluding that unwelcome homosexual advances, like unwelcome heterosexual advances, occur presumptively because of the plaintiff's gender).

124. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996).

125. See *id.*

126. See *id.* at 1198-99 (Michael, J., dissenting). Judge Michael asserted that the acts in the case were sufficiently direct and suggestive by themselves to support the claim. See *id.* at 1198. The judge concluded that Title VII is implicated whenever a person physically abuses a co-worker for sexual satisfaction or propositions or pressures a co-worker out of sexual interest or desire. See *id.*

127. *Id.* at 1195-96.

lowed *McWilliams*,¹²⁸ the Fourth Circuit and certain district courts within it, as if anticipating *Oncale*, soon added glosses to the *McWilliams* holding that significantly diluted its force.¹²⁹ *Hopkins v. Baltimore Gas & Electric Co.*¹³⁰ was the first case to depart from the bright line drawn by *McWilliams*, presenting a view of same-sex claims that comports more with the *McWilliams* dissent. In *Hopkins*, George Hopkins' supervisor bumped him, placed a magnifying glass over his crotch, kissed him at his wedding, stared at him in the bathroom, commented on his appearance, and made inappropriate sexual comments.¹³¹ Although the court agreed with the *McWilliams* court that sexually suggestive conduct between two men is presumed to be devoid of sexual desire, it nonetheless stated that showing the harasser's sexual attraction to the victim is the principal way to prove causation.¹³² The court admitted that to show such sexual attraction required more than "merely suggestive" conduct,¹³³ but did not follow the *McWilliams* court's stated requirement that the plaintiff allege and prove the harasser's homosexuality.¹³⁴

*Tietgen v. Brown's Westminster Motors, Inc.*¹³⁵ was decided after *McWilliams* and *Hopkins*. In that case, Tietgen's supervisor embarked on a "campaign of ridicule, intimidation, embarrassment and harassment at work" that ultimately became "uncontrollable and bizarre."¹³⁶ The

128. See, e.g., *Gibson v. Tanks, Inc.*, 930 F. Supp. 1107, 1109 (M.D.N.C. 1996) (granting partial summary judgment because there was no allegation in the complaint or in evidence that either the plaintiff or the harasser was homosexual; declining to draw an inference of sexuality from harassing conduct); see also *Ward v. Ridley Sch. Dist.*, 940 F. Supp. 810 (E.D. Pa. 1996) (finding harassment was not because of plaintiff's sex, and therefore granting summary judgment for defendant pursuant to *McWilliams*), *aff'd*, 124 F.3d 189 (3d Cir. 1997).

129. Notably, many courts before the decision in *McWilliams* had declined to view same-sex sexual harassment as a homosexuality issue. See, e.g., *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1411 (E.D. Wis. 1996) (stating that harasser's sexual preference is irrelevant), *aff'd*, 125 F.3d 408 (7th Cir. 1997); *Gerd v. United Parcel Serv.*, 934 F. Supp. 357, 361 (D. Colo. 1996) (ruling, without consideration of homosexuality issue, that sexually offensive touching by male defendants of male plaintiff was actionable under Title VII); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996) (finding that Title VII does protect individuals from same-sex sexual harassment); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996) (observing that text of Title VII is gender neutral); *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335, 337-38 (E.D. Va. 1995) (stating that gender-neutral interpretation by EEOC clearly supports proposition that Title VII does not require cross-gender discrimination); *Blozis v. Mike Raiser Ford, Inc.*, 896 F. Supp. 805, 806-07 (N.D. Ind. 1995) (finding same-sex harassment actionable if harassment occurs because of victim's gender); *Vandever v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1181 (D. Minn. 1996) (reasoning that same-sex harassment is actionable under Title VII only if plaintiff alleges harassment because of sex).

130. 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

131. See *id.* at 747-48.

132. See *id.* at 752.

133. See *id.*

134. See *id.* at 751 (identifying proof of sexual attraction as chief way to demonstrate sex-based harassment).

135. 921 F. Supp. 1495 (E.D. Va. 1996).

136. *Id.* at 1497.

court distinguished this conduct from the "particularly cruel" horseplay in *McWilliams* and found that the alleged conduct occurred because of the employee's gender.¹³⁷ In *Tietgen*, the court reasoned that the supervisor's "earnest sexual solicitations" permitted—even absent an allegation on the part of the plaintiff—an inference that the harasser was a homosexual.¹³⁸ The court supported its holding with the rationale that, "[i]f a male employer touches a male employee in a sexual manner, or invites the male employee to engage in sexual conduct, the employer likely does so because the employee is male."¹³⁹

This presumption is remarkably similar to the presumption made by courts in opposite-sex sexual harassment cases and represents a shift from the *McWilliams* court's sole focus on the harasser's sexual orientation,¹⁴⁰ to what constitutes sexual conduct between persons of the same sex. Notably, the conduct in *Tietgen* was no *more* sexual than was the conduct in *McWilliams*; in the main, the *Tietgen* court's ruling conflicts with *McWilliams* while purporting to be in harmony with it. Further, the *Tietgen* court did not limit proof of causation in same-sex cases to a showing of sexual attraction as did the *McWilliams* and *Hopkins* courts. Proof of causation, stated the court, does not have to be about sexuality; a male could just as inappropriately subject other males to "vitriolic treatment" because he prefers working with females.¹⁴¹ The rule emanating from the case is as follows: if a plaintiff can show that a supervisor "did indeed solicit sexual acts from him, the jury may properly infer that [the supervisor] did so because of [the plaintiff's] sex within the meaning of Title VII."¹⁴²

In *Dixon v. State Farm Fire & Casualty Insurance Co.*,¹⁴³ Dixon's male supervisor called him nightly and gave him gifts, cards, letters and hugs over a period of five years.¹⁴⁴ Expanding on *Tietgen*, the court found that this conduct satisfied causation because the sexual attraction of the perpetrator could be shown not only by direct invitations

137. See *id.* at 1502.

138. See *id.*

139. *Id.* at 1501.

140. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir.) (refusing to extend Title VII to situations where both victim and harasser are homosexuals), *cert. denied*, 117 S. Ct. 72 (1996).

141. See *Tietgen*, 921 F. Supp. at 1501. This view conflicts with Blasi's assertion that a "true" case of same-sex sexual harassment requires a showing of sexual attraction. See Blasi, *supra* note 103, at 322; see also *Blake v. Grede Foundaries, Inc.*, No. 96-1322, 1997 WL 157126 (D. Kan. Mar. 20, 1997) (plaintiff suffered harassing taunts calling his sexuality into question); *Eschbach v. County of Lehigh*, No. CIV.A.95-7276, 1997 WL 109611 (E.D. Pa. Feb. 28, 1997) (female plaintiff subjected to vitriolic treatment by female supervisor.)

142. See *Tietgen*, 921 F. Supp. at 1502.

143. 926 F. Supp. 548 (E.D. Va. 1996).

144. See *id.* at 549.

to sex but by behavior revealing of "some degree of intimacy."¹⁴⁵ At the end of this analysis, the court reiterated the *McWilliams* dissent's concern that the inquiry not shift from the perpetrator's conduct to an examination of his "true" sexual orientation.¹⁴⁶ The importance of the case is its position that sexual attraction can be inferred from indications of romantic interest, conduct less susceptible to being characterized as locker room antics than that which gave rise to *McWilliams* or *Tietgen*.

Within the Fourth Circuit, and apparently consistently with *Oncale*, district courts have departed from the Court of Appeals' rulings that homosexuality or sexual attraction must be shown in same-sex sexual harassment cases,¹⁴⁷ and have even gone so far as to characterize *Oncale* as a rejection of both *McWilliams* and *Wrightson*.¹⁴⁸ These courts now allow inferences from conduct suggestive of homosexuality or sexual attraction to satisfy the causation requirement.¹⁴⁹ Moreover, the conduct allowed to support such inferences varies. Whereas the facts of *Tietgen* are suggestive of a sexual attraction of the supervisor toward the employee, the facts of *Dixon* could easily be characterized (and were by the defendant in that case) as love and affection lacking a sexual component, especially in the absence of any invitations to engage in sex.¹⁵⁰ *Dixon* represents that indications of romantic interest are consistent with sexual attraction, however, which supports causation altogether apart from any discussion of sexual orientation.

B. The Seventh Circuit

The Seventh Circuit, after much disagreement among district courts within the circuit, declared same-sex sexual harassment claims cognizable.¹⁵¹ An examination of Seventh Circuit district courts' opinions released prior to this declaration illustrates the varied lines along which these district courts have disagreed with one another.

145. See *id.* at 551 n.1.

146. See *id.*

147. See *id.* at 551 (reasoning that plaintiff's showing of obsessive behavior by male supervisor was enough to show that harassment occurred because of gender, thus, not requiring proof of homosexuality or attraction); *Tietgen*, 921 F. Supp. at 1500 (holding that Title VII addresses sex discrimination regardless of the employer/employee gender combination involved).

148. See *Ford v. Rigidply Rafters, Inc.*, No. Y-96-1699, 1998 WL 154409, at *2 (D. Md. Apr. 1, 1998) (in a retaliation case, characterizing *Oncale* as rejecting *McWilliams* and *Wrightson*). But see *Harris*, *supra* note 44, at A20 (noting that *Oncale* "did not directly address the question of the parties' sexual orientation in same-sex harassment cases").

149. See *supra* notes 150-77 and accompanying text.

150. See *Dixon*, 926 F. Supp. at 549.

151. See *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1409 (E.D. Wis. 1996), *aff'd*, 125 F.3d 408 (7th Cir. 1997).

Early decisions within the Seventh Circuit were in conflict.¹⁵² In one of the first same-sex harassment cases in the country, *Wright v. Methodist Youth Services*,¹⁵³ the court denied a motion to dismiss brought by the employer in a same-sex quid pro quo sexual harassment action.¹⁵⁴ On the question of cognizability, the court stated that "Title VII should clearly encompass" the claim.¹⁵⁵ The court cited *Bundy v. Jackson*¹⁵⁶ and *Barnes v. Costle*¹⁵⁷ for the proposition that a male supervisor's sexual advances towards a male employee that would not be made towards a female employee are cognizable as sex discrimination to the same extent as the conventional scenario, a male supervisor's advance towards a female employee that would not be made towards a male employee.¹⁵⁸ Anticipating other decisions, the court made no mention of the sexual orientation of either the harasser or the victim, noting simply that the advances themselves were "homosexual."¹⁵⁹

In *Goluszek v. H.P. Smith*,¹⁶⁰ the court reached the opposite conclusion in a same-sex hostile environment sexual harassment case. Anthony Goluszek, a factory worker, was repeatedly questioned about being unmarried, urged to have sexual relations with women, and accused of being gay.¹⁶¹ The only physical contact mentioned in the court's report of the facts was that a co-worker poked Goluszek in the buttocks with a stick.¹⁶²

In a much more detailed analysis than that which appeared in *Wright*, the court determined that, although Goluszek had satisfied the elements of actionable sexual harassment, his claim would fail because Congress did not intend Title VII to outlaw such conduct.¹⁶³ According to the court, Congress intended to outlaw abuses by the powerful against the vulnerable to degrade the victim by attacking his or her sexuality.¹⁶⁴ Because he worked in a predominantly male envi-

152. Compare *Wright v. Methodist Youth Servs., Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981) (holding same-sex quid pro quo sexual harassment actionable), with *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (holding that same-sex hostile environment is not actionable in the absence of proof of an anti-male environment).

153. 511 F. Supp. 307 (N.D. Ill. 1981).

154. See *id.* at 319.

155. See *id.* at 310.

156. 641 F.2d 934 (D.C. Cir. 1981).

157. 561 F.2d 983 (D.C. Cir. 1977).

158. *Wright*, 511 F. Supp. at 310.

159. See *id.* at 308; see also *Parrish v. Washington Nat'l Ins. Co.*, No. 89 C 4515, 1990 WL 165611, at *2 (N.D. Ill. Oct. 16, 1990) (stating that evidentiary showing of homosexual advances is sole requirement).

160. 697 F. Supp. 1452 (N.D. Ill. 1988).

161. See *id.* at 1453-54.

162. See *id.* at 1454.

163. See *id.* at 1456.

164. See *id.*

ronment, the court concluded that Goluszek could not make such a showing.¹⁶⁵

The courts following this approach reasoned that Congress' only purpose in enacting Title VII was to foster equal employment opportunity and that this purpose was not furthered by protecting employees from harassment by co-workers of the same gender.¹⁶⁶

Although the reasoning of *Goluszek* was initially well received, and was adopted by the Fifth Circuit in *Garcia v. Elf Atochem North America*,¹⁶⁷ it faltered soon thereafter, inviting excoriating criticism, most notably from a decision of the Southern District of New York, *Sardinia v. Dellwood Foods, Inc.*¹⁶⁸ In that case, Richard Sardinia's supervisors grabbed his genitals and buttocks, called him "babe" and "faggot," told him he had a "nice ass" suitable for anal intercourse, discussed the size of Sardinia's penis and threatened him with dismissal.¹⁶⁹ Sardinia alleged that no harassment of females took place at Dellwood Foods.¹⁷⁰ Denying the defendant's motion for judgment on the pleadings, the court asserted that *Goluszek* constituted artful, sua sponte argument and was utterly devoid of merit.¹⁷¹ More rele-

165. *But see* *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir. 1971) (holding that it is not integral to finding a Title VII violation that the discrimination be directed at all members of gender).

The *Quick* court took issue with the *Goluszek* court's suggestion that protection under Title VII is limited to disadvantaged or vulnerable groups. *See Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996). *Quick* comports with *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1503 (E.D. Va. 1996), in its explanation that actionable sexual harassment does not depend on sexual conduct: A worker "need not be propositioned, touched offensively, or harassed by sexual innuendo" in order to have been sexually harassed. *See Quick*, 90 F.3d at 1379 (quoting *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964 (8th Cir. 1993)). 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. *See id.* (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988)). Having been settled, the *Quick* case will not proceed to trial. *See Ann Davis, When Ribaldry Among Men is Sex Harassment*, WALL ST. J., June 5, 1997, at B1 (noting that *Quick* was settled after the Eighth Circuit found that the plaintiff could have been a victim of sexual harassment and the case could thus proceed to trial).

166. *See Goluszek*, 697 F. Supp. at 1456 (stating Title VII's objective as equal opportunity); *see also Harris v. National Precision Blanking*, No. 95 C 6022, 1997 WL 448042, at *3 (N.D. Ill. May 30, 1997) (noting that Title VII violations concern employment discrimination complaints); *Torres v. National Precision Blanking*, 943 F. Supp. 952, 953 (N.D. Ill. 1996) (ruling, consistent with *Schoiber*, that same-sex harassment claim was not actionable); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 739 (N.D. Ill. 1996) (going beyond the holding of *Goluszek* to find that harassment by one gender of another is the only scenario proscribed and that same-sex sexual harassment could never be gender discrimination); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 494 (W.D. Wash. 1995) (asserting that plaintiff must allege anti-male environment).

167. 28 F.3d 446, 452 (5th Cir. 1994).

168. No. 94 Civ. 5458, 1995 WL 640502, at *4-6 (S.D.N.Y. Nov. 1, 1995).

169. *See id.* at *1.

170. *See id.*

171. *See id.* at *4. The *Sardinia* court criticized most roundly the *Goluszek* court's reliance on a student Note that employed gender neutral language and did not discuss the legislative intent behind the enactment of Title VII. *See Note, Sexual Harassment Claims of Abusive Work Environ-*

vant to this discussion, however, the court decided that Sardinia had stated a claim for sexual harassment, because his allegations permitted the inference that he was discriminated against on the basis of his sex and that unwelcome sexual advances had created a hostile environment.¹⁷²

Contrary to what some courts have characterized as *Goluszek's* bald statement of the non-cognizability of same-sex harassment claims,¹⁷³ the opinion itself makes no such statement but instead presents a unique approach to evaluating such claims. The defendant, H.P. Smith, did not question the claim's general cognizability; the employer asserted only that Goluszek could not prove the essential causation element of the claim.¹⁷⁴ In fact, the court stated bluntly that the harassment faced by Goluszek was pervasive and continuous and that a woman in his position would have had a valid claim of sexual harassment.¹⁷⁵ The court even implied, making no reference to the sexual orientation of Goluszek or of his harasser, that the plaintiff was harassed because of his sex.¹⁷⁶ Goluszek owed his failure to satisfy the causation element of the claim to his inability to show that H.P. Smith's premises was "an environment that treated males as inferior."¹⁷⁷ One would assume that Goluszek would, according to this reasoning, need to show that other males were similarly harassed to satisfy the causation element. The court implied, however, that even this showing would not be sufficient to prove causation.¹⁷⁸ According

ment Under Title VII, 97 HARV. L. REV. 1449, 1450 (1984) (arguing that Title VII does not adequately compensate victims of sexual harassment or deter civil rights violations). The court commented that the Note was published two years before the Supreme Court's decision in *Meritor*. See *Sardinia*, No. 94. Civ. 5458, 1995 WL 640502, at *4 n.4; see also *Raney v. District of Columbia*, 892 F. Supp. 283, 286-87 (D.D.C. 1995) (questioning *Goluszek's* use of the Note as evidence of legislative history because it does not discuss such history); *Williams v. District of Columbia*, 916 F. Supp. 1, 8-9 (D.D.C. 1996); *Rasmusson v. Copeland Lumber Yards, Inc.* CV-N-96-258, 1997 WL 76366 (D. Nev. Oct. 31, 1997); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996).

172. See *Sardinia*, 1995 WL 640502, at *6. But see *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1410 (E.D. Wis. 1996) (characterizing conduct in case similar to *Sardinia* as mere crude behavior), *aff'd*, 125 F.3d 408 (7th Cir. 1997).

173. See *Oncala v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998); *Storey v. Chase Bankcard Servs.*, 970 F. Supp. 722, 729 (D. Ariz. 1997).

174. See *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

175. See *id.*

176. See *id.*

177. *Id.* In support, the court cited the following language from the dissent in *Rabidue v. Osceola Refining Co.*: "The overall circumstances of plaintiff's workplace evince an anti-female environment." *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting). Of course this language merely describes the environment in that particular case and does not refer to an element of a sexual harassment claim. The *Goluszek* court's reference to *Rabidue* suggests that a showing of environmental animus towards the plaintiff's gender is required to advance any hostile environment sexual harassment claim, whether opposite-sex or same-sex.

178. See *Goluszek*, 697 F. Supp. at 1456.

to the court, the fact that an environment is male-dominated, either by virtue of the number of men in the workplace or because males are in positions of power, makes it impossible as a matter of law to show that males were treated in an inferior way.¹⁷⁹ The import of this language is that if a plaintiff could show an environment inimical to his or her gender, by showing that members of the opposite gender were *not* treated in an inferior way, then that plaintiff's same-sex harassment claim could proceed.¹⁸⁰

Goluszek is unrepresentative of the current state of hostile environment sexual harassment law in requiring a showing of environmental animus towards the plaintiff's gender.¹⁸¹ Only one court, reversed on appeal, has followed *Goluszek*'s reasoning.¹⁸² Other courts have used selective citations to *Goluszek* to hold that same-sex harassment is never cognizable under Title VII.¹⁸³ At least one court has used *Goluszek* as support for the cognizability of same-sex claims and has

179. *See id.*

180. Two years after *Goluszek*, the Northern District of Illinois entertained another claim of same-sex hostile environment sexual harassment in *Parrish v. Washington National Insurance Co.*, No. 89 C 4515, 1990 WL 165611 (N.D. Ill. Oct. 16, 1990). In *Parrish*, the plaintiff alleged that he had been the victim of brushing against his leg by an unknown male supervisor. *See id.* at *1. The court did not analyze the cognizability of same-sex harassment claims and did not cite *Goluszek*, but deemed the alleged conduct not sufficiently pervasive or sexual enough to constitute actionable sexual harassment. *See id.* at *3. "Indeed," wrote the court, "Mr. Parrish has stopped short of characterizing his allegations as a homosexual incident." *Id.* at *4.

181. *See Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982) (holding that key element of Title VII claim of sexual harassment is intentional adverse treatment on the basis of gender).

182. *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1295 n.6, 1296 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996), came closest to reflecting *Goluszek*'s rationale, declining to hold that same-sex sexual harassment is never cognizable. Instead the court held that male-to-male harassment *without any discriminatory treatment* is not prohibited by Title VII. *See id.*

183. Some courts acknowledged *Goluszek*'s rationale but decided ultimately that same-sex claims are never cognizable. *See Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (interpreting *Goluszek*'s references to dominance and vulnerability to require that harasser and victim be of opposite gender); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 494 (W.D. Wash. 1995) (rejecting same-sex sexual harassment); *Polly v. Houston Lighting & Power Co.*, 803 F. Supp. 1, 6 (S.D. Tex. 1992) (ruling that same-sex harassment claims are not cognizable). The *Martin* court interpreted *Goluszek*'s references to dominance and vulnerability as requiring that the harasser and the victim be of opposing genders. *See Martin*, 926 F. Supp. at 1049. Cases outside the Fifth Circuit have also deemed same-sex harassment claims noncognizable. *See McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.) (affirming unreported lower court decision finding that employers had no knowledge of coworkers' conduct), *cert. denied*, 117 S. Ct. 72 (1996); *Mayo v. Kiwest Corp.*, 898 F. Supp. 335, 336 (E.D. Va. 1995) (holding that there was no claim for same-sex sexual discrimination under Title VII), *aff'd*, 94 F.3d 641 (4th Cir. 1996); *Benekritis v. Johnson*, 882 F. Supp. 521, 525 (D.S.C. 1995) (accepting *Goluszek* reasoning and dismissing plaintiff's claim of same-sex sexual harassment); *Fleenor v. Hewitt Soap Co.*, C-3-94-182, 1995 WL 386793 (S.D. Ohio Dec. 21, 1994), *aff'd on other grounds*, 81 F.3d 48 (6th Cir.), *cert. denied*, 117 S. Ct. 170 (1996); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994) (finding no cause of action for same-sex sexual harassment), *aff'd on other grounds*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790 (N.D. Ind. 1994) (ruling that plaintiff's claim must be dismissed because Title VII does not address same-sex sexual harassment).

implied that if a plaintiff could show that he was harassed because of his gender, this showing would be sufficient to demonstrate an anti-male atmosphere.¹⁸⁴

Later developments in the Seventh Circuit underscored the disagreement among the district courts. Although Chief Judge Richard Posner of the Court of Appeals for the Seventh Circuit announced twice in dicta that same-sex harassment claims are cognizable,¹⁸⁵ one judge in the Northern District of Illinois questioned the import of this dicta.¹⁸⁶ Stating that "the court may not forecast a superior court's holding prior to its issuance," Judge Charles Norgle went beyond the holding of the *Goluszek* court in *Schoiber v. Emro Marketing Co.*¹⁸⁷ to rule that harassment by one gender of another is the only type of sexual harassment proscribed by Title VII.¹⁸⁸ In reaching this conclusion, Norgle cited *Ulane v. Eastern Airlines, Inc.*, a case involving a transsexual that brought a claim for sex discrimination under Title VII after being fired.¹⁸⁹ The *Ulane* court determined that the traditional definition of sex excluded transsexuals from the purview of the statute in the same way that it excluded homosexuals and transvestites.¹⁹⁰ Using this language, Norgle concluded that "same-gender sexual harassment cannot be wholly separated from sexual orientation, preference, identification, and affectation."¹⁹¹ Therefore, Nor-

184. See *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 808 (N.D. Ind. 1995) (suggesting that anti-male atmosphere could be established through the causation prong).

185. See *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996) (suggesting that excluding same-sex sexual harassment from coverage would necessitate too literal an interpretation of sex discrimination); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (declining to conclude that sexual harassment of women by men is the only actionable type of claim).

186. See *Schoiber v. Emro Marketing Co.*, 941 F. Supp. 730, 738 (N.D. Ill. 1996) (asserting that Judge Posner's dicta in *Baskerville* must be disregarded).

187. *Id.* (citing *Khan v. State Oil Co.*, 93 F.3d 1358, 1365-66 (7th Cir. 1996), *vacated*, 118 S. Ct. 275 (1997)). In *Schoiber*, the supervisor touched, grabbed, kissed, made sexually explicit and degrading remarks to, and exposed his genitalia to the plaintiff. See *id.* at 731-32. The supervisor also made other unwelcome sexual advances and requests for sexual favors. See *id.* at 732. In *Torres v. National Precision Blanking*, 943 F. Supp. 952 (N.D. Ill. 1996), in which Norgle used the identical opinion he had used to dismiss *Schoiber*, the supervisor inserted his finger into the plaintiff's rectum, bragged about how much of the finger he was able to insert, and held his penis while asking male employees whether they wanted a "piece" of it. See *id.* at 952; see also *Harris v. National Precision Blanking*, No. 95-C 6022, 1997 WL 448042, at *3 (N.D. Ill. May 30, 1997).

188. See *Schoiber*, 941 F. Supp. at 740.

189. 742 F.2d 1081 (7th Cir. 1984).

190. See *id.* at 1084.

191. See *Schoiber*, 941 F. Supp. at 739-40. This language contradicted the statement of another Northern District of Illinois case, *Parrish v. Washington National Insurance Co.*, No. 89 C 4515, 1990 WL 165611 (N.D. Ill. Oct. 16, 1990), concerning the actionability of same-sex sexual harassment:

This is not inconsistent with the general rule that discrimination based on homosexuality is not actionable under Title VII. If a plaintiff complains of unwelcome homosexual advances, the offending conduct is based on the employer's sexual preference and necessarily involved the plaintiff's gender, for an employee of the non-preferred

gle reasoned, "a male cannot, as a matter of law, sue for sexual harassment by a fellow male under Title VII, no matter the sexual orientations of the two."¹⁹²

Almost simultaneously, three other district judges announced positions contrary to Norgle's. In *Ton v. Information Resources, Inc.*,¹⁹³ Judge Harry Leinenweber deemed same-sex quid pro quo sexual harassment actionable, citing *Wright* as support.¹⁹⁴ In *Peric v. Board of Trustees of the University of Illinois*¹⁹⁵ and *Shermer v. Illinois Department of Transportation*,¹⁹⁶ Judges Suzanne Conlon and Richard Mills respectively deemed same-sex hostile environment sexual harassment actionable, each citing *Baskerville* as support.¹⁹⁷ James Shermer's claim was dismissed on summary judgment; his supervisor's suggestion that Shermer slept with men was deemed an attack on Shermer's sexual orientation, not on his gender, and thus was found not actionable.¹⁹⁸ Nick Peric's claim, on the other hand, survived the employer's motion to dismiss.¹⁹⁹ Although Peric's supervisor also made comments suggesting Peric was gay, the supervisor solicited sex from Peric and fondled Peric's genitals.²⁰⁰ The court combined causation and conduct, in the same way district courts in the Fourth Circuit have, by stating that the supervisor "demanded Peric engage in homosexual acts with him. Meyer could only have demanded such acts from another man."²⁰¹

Simultaneously with *Schoiber*, the Eastern District of Wisconsin issued two same-sex sexual harassment cases, *Johnson v. Hondo, Inc.*,²⁰² affirmed by the Seventh Circuit, and *Miller v. Vesta, Inc.*²⁰³ In *Johnson*,

gender would not inspire the same treatment. Thus, unwelcome homosexual advances, like unwelcome heterosexual advances, are actionable under Title VII.

Id. at *7.

192. *Schoiber*, 941 F. Supp. at 737.

193. No. 95-C-3565, 1996 WL 5322 (N.D. Ill. Jan. 3, 1996), *aff'd sub nom.* Bolaszewski v. Georgia-Pac. Corp., 1996 U.S. App. LEXIS 29139 (2d Cir. Nov. 8, 1996).

194. *See id.* at *7.

195. No. 96-C-2354, 1996 WL 51575 (N.D. Ill. Sept. 6, 1996).

196. 937 F. Supp. 781 (C.D. Ill. 1996). *Shermer's* predecessor in the Central District of Illinois was *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133 (C.D. Ill. 1995), in which the court held same-sex sexual harassment claims to be actionable. *See id.* at 1137.

197. *See Shermer*, 937 F. Supp. at 783 (discussing probability that same-sex sexual harassment constituted cause of action within the Seventh Circuit); *Peric*, 1996 WL 51575, at *2 (stating that *Baskerville* supports finding that same-sex sexual harassment is actionable).

198. Note that in *Goluszek*, Goluszek was likewise accused of being gay or bisexual. *See Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1454 (N.D. Ill. 1988).

199. *See Peric*, 1996 WL 51575, at *3 (denying defendant's motion for summary judgment on hostile environment claim).

200. *See id.* at *3.

201. *Id.*

202. 940 F. Supp. 1403 (E.D. Wis. 1996), *aff'd*, 125 F.3d 408 (7th Cir. 1997).

203. 946 F. Supp. 697 (E.D. Wis. 1996). In *Miller*, the plaintiff was a married female whose co-employee left notes in her locker expressing her desire to commence a sexual relationship.

the court deemed same-sex sexual harassment claims cognizable, but determined that Craig Johnson's allegations of harassment were not actionable.²⁰⁴ In this case, Craig Johnson's co-employee Ollie Hicks continually taunted Johnson by suggesting that Johnson would like to fellate Hicks. On these occasions, Hicks would touch himself as if masturbating. The two employees eventually came to blows, and both were fired by the company.²⁰⁵ The district court granted summary judgment for the employer, noting that "Hicks never physically touched Johnson, never threatened Johnson, never exposed himself to Johnson, never called Johnson at home or came to his home, and never sent him anything in writing."²⁰⁶ The district court concluded that what did occur "was not sufficiently severe or pervasive" to be actionable harassment, and could not be characterized as harassment because of Johnson's gender.²⁰⁷ The appellate court concurred, noting that the sexual content of harassment does not necessarily mean the harassment is based on gender.²⁰⁸

Miller, discussed in more detail in Section IV below, was a case of mild sexual harassment, ultimately deemed non-actionable.²⁰⁹ In *Miller*, the court determined that same-sex sexual harassment was cognizable,²¹⁰ but parted company with nearly all other courts evaluating the actionability of same-sex claims.²¹¹ The *Miller* court rejected the EEOC's position that whether the harasser treats a member or members of one sex differently from members of the other sex is crucial to the inquiry.²¹² It found support for this departure in *McDonnell v. Cisneros*,²¹³ a case in which a sexual harassment claim was held actionable where verbal harassment occurred against both male and female employees.²¹⁴ The *Miller* court reasoned that "[d]isparate treatment of the genders is evidence of [sexual] harassment, but it is not a requirement."²¹⁵ Among other things, the *Miller* court emphasized that sexual harassment analysis should not focus on whether the

She also gave the plaintiff a birthday card. The plaintiff alleged that the alleged harasser stared at her and followed her into the restroom. There was no allegation of touching. *See id.* at 708-09.

204. *See Hondo*, 940 F. Supp. at 1406.

205. 125 F.3d 408 (7th Cir. 1997).

206. *Id.*

207. *Id.* at 412.

208. *See id.*

209. *See Miller*, 946 F. Supp. at 713.

210. *See id.* at 702.

211. *See id.* at 703.

212. *See id.* at 705-06.

213. 84 F.3d 256 (7th Cir. 1996).

214. *See id.* at 259.

215. *Miller*, 946 F. Supp. at 706.

perpetrator sought sexual gratification through his or her conduct,²¹⁶ but should instead evaluate the "unwelcomeness" of this conduct, given Title VII's focus on the victim.²¹⁷

The Seventh Circuit's short-lived decision in *Doe v. City of Belleville*,²¹⁸ the first Seventh Circuit decision to hold that claims of same-sex sexual harassment are cognizable, was a landmark ruling with far-reaching implications for Title VII jurisprudence. In *Doe*, coworkers subjected brothers H. and J. Doe to verbal abuse and threats of rape.²¹⁹ H., who wore an earring, received the brunt of the abuse, which primarily focused on his gender and sexual orientation.²²⁰ He was called a "fag" and a "queer" by his co-workers, and was asked whether he was a man or a woman.²²¹ One of H.'s coworkers repeatedly threatened to rape him, and was encouraged in this threat by other coworkers.²²² This same coworker eventually cornered H. and placed his hand on H.'s genitals to confirm that H. was male.²²³ At the trial level, the district court found in favor of the defendants, concluding that the Does suffered conduct suggesting they were homosexuals and not conduct discriminating against them on the basis of their sex.²²⁴ The court also implied that the conduct suffered by the Does was non-sexual, since the Does testified that they were not sexually propositioned.²²⁵

The Seventh Circuit reversed, characterizing the charged conduct as sexual in nature²²⁶ because it focused on H.'s gender.²²⁷ More significantly, however, the court found support for the Does' claim in the fact that H. was harassed for not conforming to male standards.²²⁸

216. See *id.* at 712. Thus, the sexual orientation of the perpetrator is irrelevant. The *Miller* court was not even willing to allow that the homosexuality of the perpetrator could factor into the totality of the circumstances contributing to a hostile environment, but determined that homosexuality was relevant only to considering the victim's subjective view of the harassment. See *id.* at 713.

217. The *Miller* court invoked *Meritor* and the Seventh Circuit cases *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), and *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007 (7th Cir. 1994), in support of its victim-centered approach. See *Miller*, 946 F. Supp. at 711.

218. 119 F.3d 563 (7th Cir. 1997), *vacated*, 118 S. Ct. 1183 (1998).

219. See *Doe*, 119 F.3d at 566.

220. See *id.*

221. See *id.*

222. See *id.*

223. See *id.* at 567.

224. See *id.*

225. See *id.*

226. See *id.* at 568.

227. See *id.* at 576-77 (finding that overt remarks concerning H.'s gender and threats of sexual assault constituted sufficient proof that the harassment was connected to H.'s gender); see also *id.* at 580 (stating that grabbing of person's testicles undoubtedly was act related to that person's gender).

228. See *id.*; see also *id.* at 581 (asserting that a man is sexually harassed when his masculinity is called into question by co-workers).

The court disagreed with, and distinguished, the decisions of other courts that have ruled that men discriminated against for exhibiting nonconforming gender traits have no claim of sex discrimination under Title VII.²²⁹ The court was less specific with regard to distinguishing between harassment and horseplay, concluding merely that distinguishing between the two was "a matter of common sense."²³⁰ It did, however, call into question the presumption employed by a majority of courts that a harasser in an opposite-sex case is heterosexual.²³¹ The court remarked that conforming to this presumption would be "a dramatic step in the evolution of sexual harassment law with troubling implications for claims of opposite-sex harassment and same-sex harassment alike."²³²

The Seventh Circuit's decision in *Doe* was a significant departure from case law on same-sex sexual harassment in two primary respects. First, the Seventh Circuit did not require consideration of whether similar treatment by the harasser of the opposite sex would constitute sexual harassment.²³³ Second, the court refused to tie same-sex sexual harassment claims to the harasser's sexual attraction to the victim.²³⁴ *Doe*, unlike existing case law, posited that unwelcome sexual conduct in the workplace is deeply humiliating and is proscribed for the simple reason that it is tied in some way to gender.²³⁵ The court asserted that, where sexual harassment is of an explicitly sexual nature, the male plaintiff need not offer proof that his gender motivated the harasser and that a similarly situated female worker would not have been harassed.²³⁶ In seeking to define the ambit of proscribed sexual conduct, the court included behavior such as invasions of sexual privacy or open remarks related to gender, even if that behavior did not constitute an overt sexual advance.²³⁷ *Doe* ventured further than any other decision in analyzing fully the various concerns raised by same-sex cases, and it offered the most controversial analytical paradigm for these cases to appear to date. It is thus not

229. See *id.* at 582 (distinguishing *Rathert v. Village of Peotone*, 903 F.2d 510 (7th Cir. 1989), and *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979)). But see *Blake v. Grede Foundries, Inc.*, No. 96-1322-JTM, 1997 WL 157126 (D. Kan. Mar. 20, 1997) (ruling that same-sex harassment is actionable when it takes the form of remarks implying that man working in traditionally female position is homosexual); *Zalewski v. Overlook Hosp.*, 692 A.2d 131, 136 (N.J. Super. Ct. Law Div. 1996) (holding that same-sex harassment claim based on gender stereotyping was cognizable).

230. See *Doe*, 119 F.3d at 591; cf. *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998).

231. See *Doe*, 119 F.3d at 587.

232. See *id.*

233. See *id.* at 574.

234. See *id.* at 591.

235. See *id.* at 574.

236. See *id.* at 575.

237. See *id.*

surprising that the Supreme Court, after granting certiorari in *Doe*, vacated the decision and remanded it to the Seventh Circuit to reconsider its decision in light of *Oncale*.²³⁸ This action on the part of the Supreme Court suggests the Supreme Court's unwillingness to allow instances of sex stereotyping to form the basis of sexual harassment claims.²³⁹

III. COMMENTARY ON SAME-SEX SEXUAL HARASSMENT

Like courts that have reached divergent conclusions as to how to evaluate same-sex sexual harassment claims, commentators on the subject disagree on how courts should approach such claims. Some commentators maintain that Title VII prohibits same-sex sexual harassment to the same extent as it prohibits opposite-sex sexual harassment.²⁴⁰ Others assert that recognition of same-sex claims subverts the objectives of Title VII²⁴¹ and is contrary to the civil rights interests both of victims of same-sex sexual harassment in general²⁴² and of gays and lesbians in particular. Under this view, gays and lesbians are ill-advised to seek redress for sexual harassment under Title VII, at least until discrimination on the basis of sexual orientation is legislatively proscribed.²⁴³

238. See *Doe v. City of Belleville*, 118 S. Ct. 1183 (1998), vacating 119 F.3d 563 (7th Cir. 1997).

239. See Linda Greenhouse, *Same-Sex Harassment Issue Furrows Court Brow*, N.Y. TIMES, Mar. 10, 1998, at A14 (suggesting disposition of *Doe* indicates that "not all the Justices were completely comfortable with allowing a same-sex harassment case to proceed far beyond the cryptic boundaries of [*Oncale*]").

240. See generally Carlos R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 79 (1995) (declaring that Title VII should apply to same-sex harassment claims as well as to opposite-sex claims); Lisa Wehren, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 91 (1995) (asserting that Title VII should apply to same-gender claims because sexual harassment involves sexual conduct based on gender); Blasi, *supra* note 103, at 317-23 (concluding that recognition of same-sex sexual harassment equalizes the norms of workplace conduct for all people); Trish K. Murphy, Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125 (1995) (proposing that Title VII should apply to same-gender sexual harassment because it will protect all victims of discriminatory treatment based on sex); Shahan, *supra* note 123, at 527 (asserting that the courts should interpret Title VII broadly in order to eliminate all workplace harassment and discrimination); Regina L. Stone-Harris, Comment, *Same-Sex Harassment—The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 ST. MARY'S L.J. 269 (1996) (suggesting legal basis for judicial consideration of same-sex cases and arguing gender irrelevant for sexual harassment purposes).

241. See, e.g., McFarland, *supra* note 44, at 493 (arguing that same-sex sexual harassment is not within the ambit of Title VII protection against sex discrimination); Woodhouse, *supra* note 35, at 1179-80 (asserting that Title VII is not intended to deter same-gender sexual harassment).

242. See generally McFarland, *supra* note 44, at 536 (advocating broader proscriptions against sexual harassment than Title VII currently provides).

243. See, e.g., Grose, *supra* note 13, at 378 (arguing that allowing Title VII protection of same-sex harassment will promote homophobia in workplace); Spitko, *supra* note 20, at 60

A. *Approach One: In Support of Same-Sex Claims*

Commentators that support the recognition of same-sex claims,²⁴⁴ reflecting the view of certain courts,²⁴⁵ argue that all individuals can be victims of sexual harassment and, depending on the conduct alleged in individual cases, can satisfy the requirements of a *prima facie* case of sexual harassment regardless of the gender of the perpetrator or victim.²⁴⁶ From a policy standpoint, one commentator believes that this view reflects the aim of Title VII to equalize the norms of workplace conduct for all.²⁴⁷ This commentator also claims that certain courts' past failure to recognize same-sex claims has been due to the erroneous view that these claims are sexual orientation discrimination claims at their core, masquerading as sex discrimination claims.²⁴⁸ According to this commentator, these courts overlooked that, "while the sex and sexual orientation of the victim are inherently involved with the harasser's choice of a victim," the victim is not a participant in the selection process.²⁴⁹ A related view is that same-sex sexual harassment is sexual harassment, viewed not as a matter of equality of opportunity or of different treatment but as a matter of sexual subordination, because it perpetuates gender stereotypes in

(suggesting that Title VII application to same-sex harassment would encourage employers to discriminate against gay applicants). *But see* Stone-Harris, *supra* note 240, at 311, 323 (advocating passage of federal legislation to ban workplace discrimination on the basis of sexual orientation but arguing that, in the meantime, same-sex sexual harassment should be prohibited under current case law).

244. *See supra* note 240 and accompanying text.

245. *See* *McWilliams v. Fairfax Co. Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.) (holding same-sex heterosexual harassment not actionable under Title VII), *cert. denied*, 117 S. Ct. 72 (1996); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994) (refusing to recognize same-sex sexual harassment as valid cause of action under Title VII).

246. *See* *Carpenter*, *supra* note 88, at 702 (noting the lack of a doctrinal or logical basis for distinguishing abusive treatment claims from unwelcome sexual advances claims in the same-sex context where no distinction is made in the opposite-sex context); *Wehren*, *supra* note 240, at 91 ("If the harassing conduct amounts to actionable sexual harassment in the cross-gender context, the same exact conduct cannot be said to be outside the purview of Title VII merely because it is directed at a person of the same gender."); *Shahan*, *supra* note 123, at 511 (concluding that plaintiffs in same-sex sexual harassment suits can satisfy *prima facie* elements of sexual harassment in the same way that plaintiffs in opposite-sex suits can); *Stone-Harris*, *supra* note 240, at 311 (arguing that same-sex sexual harassment should be prohibited under current case law); *Murphy*, *supra* note 240, at 1137 (arguing that cognizability is supported by Title VII's lack of gender limitations on the parties to a sexual harassment dispute); *see also* *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995) (discussing how facts alleged in same-sex case can satisfy each element of sexual harassment claim); *McCoy v. Johnson Controls World Servs., Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) ("To be sure, sexual advances can be 'unwelcome' regardless of the harasser's gender.").

247. *See* *Blasi*, *supra* note 103, at 319-20.

248. *See id.* at 308-09, 312, 321-22; *see also* *Bencivenga*, *supra* note 6, at 5 ("Plaintiffs who are unable to bring a sexual orientation case through city or state law, may bring these claims masquerading as Title VII and have their day in court," said Gary D. Friedman, a partner at Mayer, Brown & Platt.").

249. *See* *Blasi*, *supra* note 103, at 320.

the workplace that have a detrimental effect on opportunities for women.²⁵⁰ Some commentators conclude that the past controversy surrounding recognition of same-sex sexual harassment claims emphasizes the need for a legislative amendment to Title VII—or separate legislation altogether—outlawing discrimination on the basis of sexual orientation.²⁵¹ These commentators share the view that the sexual orientation of either the perpetrator or the victim should be irrelevant in an analysis of a same-sex harassment claim and that courts should instead focus on the nature of the harasser's conduct and its effect on the victim.²⁵²

Catharine MacKinnon, "the single individual most responsible for raising the issue of sexual harassment,"²⁵³ espouses a combination of these views. MacKinnon asserts that recognition of a claim of sexual

250. See Calleros, *supra* note 240, at 79 (asserting that "same-sex harassment presents the same potential for domination and degradation of an employee on the basis of his or her gender as does heterosexual harassment"); Carpenter, *supra* note 88, at 723; Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 47 (noting that exclusion of effeminate men from Title VII protection is odd considering that such men exhibit characteristics associated with women, "the subordinated group the statutory language was principally designed to protect"); Levitsky, *supra* note 45, at 1041 (charging that sex stereotyping enhances traditionally dominant male roles in workplace); Papish, *supra* note 12, at 230-31 (explaining Marcossion's argument that same-sex harassment is actionable under Title VII because it perpetuates gender stereotypes in the workplace); Schultz, *supra* note 35, at 1776; Stone-Harris, *supra* note 240, at 326 ("Such conduct should be no more tolerated by the law than other forms of discrimination because it perpetuates gender stereotypes of how 'real men' and 'real women' should behave, interferes with productivity in the workplace, and stands as a barrier to the goal of Title VII—promoting workplace equality."); Ronald Turner, *Same-Sex Sexual Harassment: A Call for Conduct-Based and Gender-Based Applications of Title VII*, 5 VA. J. SOC. POL'Y & L. 151, 195 (1997) (arguing that Title VII should prohibit "misconduct directed at males or females who are harassed because, in the eyes of some, they are not sufficiently 'masculine' or 'feminine'").

251. See McFarland, *supra* note 44, at 541-42 (proposing new legislation that would outlaw certain forms of harassment as well as discrimination on the basis of sexual orientation); Stone-Harris, *supra* note 240, at 323 (advocating passage of federal legislation to ban workplace discrimination on the basis of sexual orientation).

252. See Locke, *supra* note 45, at 414 ("[C]ontent-based inquiry more accurately reflects the courts' current interpretation of the term and the underlying principles behind sexual harassment jurisprudence."). Locke states that "it is the content of the harassment rather than the motives of the harasser which courts should analyze in deciding a cause of action." *Id.* at 413. Locke further advocates the rejection of the "based on sex" inquiry and its replacement by an inquiry into the sexual nature of the harassing conduct, *see id.* at 408, and advocates application of "a content-based analysis for all harassment which focuses on the sexual nature of the harassment and its effect on the victim." *Id.* at 401; *see also* Corey Taylor, Comment, *Same-Sex Sexual Harassment in the Workplace Under Title VII: The Legal Dilemma and the Tenth Circuit Solution*, 46 U. KAN. L. REV. 30 (1998) (arguing that courts should address the unwelcomeness of the conduct and its effect on the victim); Turner, *supra* note 250, at 194 (positing that "determinations concerning the actionability of [same-sex sexual harassment] claims should rest on an examination of the alleged conduct directed at the target, and not on either the alleged harasser's sexual orientation or the reason(s) underlying the harasser's actions."); Michelle Angelone, Note, *Same-Sex Harassment Under Title VII: Quick v. Donaldson Co. Breathes New Life Into The Post-Garcia State of the Law*, 9 U. FLA. J.L. & PUB. POL'Y 61, 82 (1997) (urging courts to examine the conduct in a sexual harassment case "to determine if such harassment falls under a relevant Title VII provision").

253. Rutherglen, *supra* note 55, at 487.

harassment perpetrated by a lesbian against another woman is consistent with Title VII's goal of equalizing the distribution of power between men and women.²⁵⁴ More recently, she has asserted that same-sex sexual harassment, whether of males or females, is sex discrimination when it is based on singling out the victim for "gendered reasons."²⁵⁵ Further, MacKinnon posits that recognition supports gay and lesbian challenges to a system of male dominance.²⁵⁶

B. Approach Two: Against Same-Sex Claims

Commentators against same-sex sexual harassment claims advance the view that recognition of same-sex sexual harassment claims under Title VII is a mistaken application of the law because, ultimately, such claims do not reflect the goals of Title VII to empower the powerless and to eliminate sex discrimination in the workplace.²⁵⁷ These commentators argue that same-sex claims are essentially claims of sexual orientation discrimination.²⁵⁸ Another view is that, given the heterosexism and homophobia of society,²⁵⁹ recognition of these claims will have an adverse impact on gays and lesbians in their struggle for equal rights.²⁶⁰

254. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 206 (1979) ("A woman who is fired because of her refusal to submit to a lesbian supervisor is just as fired—and her firing is just as related to her gender—as if the perpetrator were a man.")

255. Spitko, *supra* note 20, at 72 n.79 (referring to Catharine MacKinnon's response to his article).

256. See *id.*

257. See Grose, *supra* note 13, at 380, 382; Woodhouse, *supra* note 35, at 1151 (claiming that the better approach for same-sex sexual harassment victims is the claim of intentional infliction of emotional distress).

258. See, e.g., MACKINNON, *supra* note 254, at 205 ("Until discrimination on the basis of homo-sexuality is considered sex discrimination for other purposes, one can predict that gay sexual harassment will probably not be considered sex discrimination."); Grose, *supra* note 13, at 385 (arguing that, absent proscriptions of discrimination on the basis of sexual orientation, Title VII "offers no doctrinal basis to prohibit same-sex sexual harassment"); McFarland, *supra* note 44, at 515 n.122 (stating that "sexuality, and thus sexual orientation, are integral factors in sexual harassment analysis"); Woodhouse, *supra* note 35, at 1180 (arguing that, at their root, same-sex sexual harassment claims are sexual orientation discrimination claims). But see Shahan, *supra* note 123, at 526.

Allowing Title VII to apply in cases in which the aggressor chooses a victim based on sexual preference is not analogous to protecting sexual preference. The aggressor harasses the victim because of that victim's sexual characteristics. The victim need not be homosexual. In essence, by not providing coverage for same-sex sexual harassment, the courts are protecting sexual preference in that only heterosexual aggressors are singled out for liability for harassment based upon sex.

Id. Shahan ignores that homosexuals could conceivably—and do—discriminate against other homosexuals on the basis of their sexual orientation.

259. See Grose, *supra* note 13, at 389 ("In applying Title VII to [same-sex sexual harassment], the courts have relied on society's notion of 'normal' sexuality and stereotypes about lesbians and gay men."); Spitko, *supra* note 20, at 79-80 (contending that courts are homophobic and heterosexist).

260. See Grose, *supra* note 13, at 385-86; Spitko, *supra* note 20, at 81.

Carolyn Grose's version of this position is that Title VII should not be employed to remedy same-sex sexual harassment because doing so will increase tolerance for heterosexism and homophobia in the workplace.²⁶¹ She believes that, absent protection for gay men and lesbians against discrimination and harassment on the basis of their sexual orientation, applications of "Title VII to same-sex sexual harassment [will] rely on and perpetuate society's commitment to regulate, if not to prohibit, any 'abnormal' expressions of sexuality,"²⁶² and will ultimately both obscure Title VII's objective of remedying the oppression of women and ignore the reality that lesbians inhabit a world apart from socially constructed male power.²⁶³

Professor Gary Spitko's objection to recognition of these claims is that, in the absence of new legislation, courts hearing same-sex claims will not adequately protect gays and lesbians from discrimination on the basis of sexual orientation. He suggests that until Title VII proscribes discrimination on the basis of sexual orientation,²⁶⁴ same-sex sexual harassment claims will disadvantage gay employees, because the jury awards employers will face in same-sex cases relative to opposite-sex cases will discourage them from hiring or retaining gay employees.²⁶⁵ Professor Spitko theorizes that courts will view same-sex sexual harassment claims through a lens of normative heterosexuality, resulting in disproportionate sanctions against expres-

261. See Grose, *supra* note 13, at 378-79.

262. *Id.* at 379.

263. See *id.* at 384-85.

264. Some scholars have argued that Title VII *does* prohibit discrimination on the basis of sexual orientation. See generally Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian"?*, 8 HASTINGS WOMEN'S L.J. 1, 22 (1997) (stating that discrimination on the basis of gender nonconformity is sex discrimination); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Marcossan, *supra* note 97, at 3 (arguing that "sexual orientation harassment is indistinguishable from gender-based sexual harassment, for it is plainly sexual in nature, and it is based on the ultimate gender stereotype"); Schultz, *supra* note 35, at 1786; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Culture*, 83 CAL. L. REV. 3, 304 (1995) [hereinafter Valdes, *Queers*] (suggesting that, if Title VII sex and gender discrimination proscriptions were applied consistently, discrimination on the basis of sexual orientation would be prohibited); Wehren, *supra* note 240, at 123-25 (arguing that because one's sexual orientation depends on gender classification, sexual orientation discrimination is essentially discrimination based on gender); I. Bennett Capers, Note, *Sexual Orientation and Title VII*, 91 COLUM. L. REV. 1158, 1183-84, 1186 (1991) (reasoning that consistent Title VII analysis by courts would prohibit sexual orientation discrimination, which is essentially discrimination based on sex stereotyping); Marie Elena Peluso, Note, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1536, 1560 (1993) (arguing sexual orientation is a suspect or quasi-suspect classification meriting protection under Title VII).

265. See Spitko, *supra* note 20, at 80; see also *id.* at 86-89 (explaining that a reasonable heterosexual jury will find justified provocation for murder where victim made homosexual advances).

sions of same-sex sexual conduct in the workplace.²⁶⁶

Although Grose's and Spitko's views differ,²⁶⁷ they both see an imbalance in the way the legal system regulates expressions of sexuality in the workplace.²⁶⁸ According to Grose, same-sex sexual harassment cases tend to be brought by heterosexuals accusing gays and lesbians of harassing them.²⁶⁹ Grose claims that the jurisprudence in this area protects heterosexual expressions, leaving homosexual expressions disproportionately censured and thus implicitly protecting heterosexuals on the basis of their sexual orientation.²⁷⁰ According to Grose, recognition results in a fundamental imbalance favoring impunity for heterosexuals and liability for homosexuals.²⁷¹ This is especially problematic for Grose, given that discrimination on the basis of homosexuality is not statutorily proscribed while discrimination on the basis of heterosexuality impliedly is proscribed.²⁷²

Spitko's version of this disproportionality argument employs more empirical evidence than Grose's argument to posit that, absent statutory prohibition of discrimination on the basis of sexual orientation, heterosexual juries will issue higher damages awards in same-sex sexual harassment cases than in opposite-sex cases,²⁷³ inspiring employers to discriminate in hiring against openly gay people.²⁷⁴ Spitko also asserts that heterosexual judges will dismiss disproportionately cases of

266. See *id.* at 85-86. But see *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1174 (D. Nev. 1995) (declining "to determine whether it is reasonable to perceive a work environment as hostile and abusive merely because a person might be uncomfortable with homosexuality," and holding that "the homosexual content of the alleged conduct is not relevant to determining whether the alleged conduct adequately demonstrates a hostile environment"); *id.* at 1175 n.6 ("Alternatively, it may be hostile or abusive to plaintiffs because they are heterosexual or homophobic. In this case, the work environment is hostile or abusive to plaintiffs due to their own sexual orientation or their hostility to another orientation. Such discrimination, or harassment is not prohibited by § 2000e."); *id.* at 1176 ("Pictures, literature and discussions of homosexual conduct do not inherently intimidate, ridicule, or insult men."); *Melnychenko v. 84 Lumber Co.*, 676 N.E.2d 45, 48 (Mass. 1997) (holding that male employees that were sexually harassed by male supervisor could recover from their employer under Chapter 151B, even though supervisor was heterosexual); *Sardinia v. Dellwood Foods, Inc.*, No. 94 Civ. 5458, 1995 WL 640502, at *7 n.6 (S.D.N.Y. Nov. 1, 1995) ("[I]t is imperative to note that being homosexual does not deprive someone of protection from sexual harassment under Title VII, it is merely irrelevant to it." (quoting *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1180 (N.D. Ind. 1995))); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 193 (1st Cir. 1990) (holding, in same-sex sexual harassment case, that asking someone to dance does not affect that person's psychological well-being).

267. See Spitko, *supra* note 20, at 89 n.160 (discussing differences between his analysis and that of Carolyn Grose).

268. See *id.*

269. See Grose, *supra* note 13, at 377 n.8.

270. See *id.* at 388, 392; see also Locke, *supra* note 45, at 396 (claiming, based on early cases, that courts hold only known homosexuals liable for same-sex sexual harassment).

271. See Grose, *supra* note 13, at 393.

272. See *id.*

273. See Spitko, *supra* note 20, at 73-74.

274. See *id.* at 80.

opposite-sex harassment whose fact patterns are far more egregious than same-sex cases.²⁷⁵ He concludes that recognition will not be a civil rights gain for gay people.²⁷⁶ Spitko offers an alternative standard: courts should recognize same-sex sexual harassment claims in the context of "mixed-sex interaction."²⁷⁷ In other words, if the behavior in question would violate Title VII if it occurred between persons of opposite sexes, similar conduct between members of the same sex must also be found to violate Title VII.²⁷⁸

C. Another Look

Current scholarship approving of same-sex sexual harassment claims does little to address the concerns of those expressing disapproval. Blasi's and Shahan's view, that plaintiffs bringing same-sex sexual harassment claims can fulfill the elements of a prima facie case of sexual harassment in the same way that plaintiffs bringing cross-sex claims do, although reflected in case law, does not address the potential for courts evaluating same-sex claims to dilute the civil rights of gays and lesbians.²⁷⁹ Papish's and MacKinnon's ideas are grounded in a narrow view of the intent of Title VII that has been used by courts in the past to dismiss same-sex claims. These viewpoints do not fully address whether same-sex claims will entail some social cost to gays

275. See *id.* at 86.

276. See *id.*

277. See *id.* at 95.

278. See *id.* at 96.

279. Woodhouse expresses no view on this subject; gay rights advocates, however, do. See Cloud, *supra* note 6, at 55 (noting that most gays and lesbians praise the Supreme Court's *Oncale* ruling); Mark A. Cohen, *Employees Recover for Same-Sex 151B Claim; Plaintiffs Harassed by Heterosexual Male*, MASS. LAW. WKLY., Feb. 24, 1997, at 1 (quoting Boston lawyer Mary Lisa Bonauto, who filed an amicus brief in *Melnichenko* on behalf of the Massachusetts Gay & Lesbian Advocates: "There is no question that the [supervisor's] conduct would be punished if the three employees [who were harassed] were women and the supervisor was a man. . . . There shouldn't be a different result just because the employees happen to be men.") (alterations in original); Haya El Nasser, *Sexual Harassment's New Twist*, USA TODAY, July 7, 1997, at 3A (reporting Lambda Legal Defense and Education Fund's support for recognition of same-sex harassment claims); John Gallagher & J. Jennings Moss, *Hefty Cash Awards in Recent Bias Cases Could Be a Sign that Juries Are Looking Beyond a Plaintiff's Sexual Orientation*, ADVOCATE, June 24, 1997, at 78 (expressing views of some gay lawyers that "alleging harassment may be the best way for a gay person who lives in an area without an anti-gay discrimination law to fight for his or her rights"); Stephen Hudak & Sandra Clark, *Ridge Tool Same-Sex Harassment Suit Rejected*, PLAIN DEALER, Jan. 10, 1997, at 1A (reporting Lambda Legal Defense and Education Fund's support for recognition of same-sex harassment claims); John Leo, *The Lawyers are at It Again*, U.S. NEWS & WORLD REP., Mar. 16, 1998, at 10 (describing *Oncale* as a victory for gays, given its potential to turn "existing sexual harassment doctrine into the rough equivalent of a gay civil rights law"); Judy Peres & Glen Elsasser, *High Court To Weigh Same-Sex Harassment; Oil Rig Worker Has Right To Sue Former Employer*, U.S. SAYS, CHI. TRIB., June 10, 1997, at N12 (writing that, although sexual orientation not integral to *Oncale* case, gay rights groups support recognition of same-sex sexual harassment); Deb Price, *Supreme Court Heads in the Right Direction with Harassment Ruling*, DETROIT NEWS, Mar. 14, 1998, at C5 ("[A]ny time the U.S. Supreme Court acknowledges that gay people ought to be treated like everyone else, it's headed in the right direction.").

and lesbians that should be avoided.

On the other hand, neither Spitko's nor Grose's view that same-sex claims will ultimately be a civil rights loss for lesbians and gays is supported either logically or by empirical evidence. Although oppression of gays and lesbians does exist and new legislation prohibiting discrimination on the basis of sexual orientation may be desirable, disapproval of same-sex claims does nothing to address such oppression and may even thwart the likelihood that legislative enactments will follow. This is because same-sex sexual harassment jurisprudence is finally making clear that heterosexuality is not a protected characteristic under Title VII.²⁸⁰ Recognition of this fact and its ramifications will be an incentive for heterosexuals to advocate such protection. Further, a legal system without same-sex claims would foreclose claims of persons in same-sex sexual harassment cases not involving gay defendants or victims, and would also fail to capture self-styled heterosexuals' homophobic conduct, which is often marked by acts of a highly sexual nature. In addition, the absence of same-sex claims would perpetuate ignorance about the prevalence and place of expressions of same-sex sexuality in the workplace, which itself would be a civil rights loss for gays and lesbians.

1. Heterosexuality is not protected by Title VII

The disproportionality theory advanced by Grose and Spitko requires acceptance of the view that discrimination on the basis of heterosexuality is proscribed by Title VII. This theory also depends on acceptance of the view that heterosexual expressions are not prohibited in the workplace to the same degree as homosexual expressions, and that juries issue disproportionately higher damages awards in same-sex sexual harassment cases. The evolving law of Title VII, however, allows neither heterosexuals nor homosexuals to recover for discrimination based on sexual orientation. Although new legislation may be desirable to correct this gap in protection against invidious discrimination, disapproval of same-sex sexual harassment as a cause of action does not advance the likelihood of obtaining this legislation.

In Grose's estimation, courts are likely to construe cases brought by gays as cases of sexual orientation discrimination not covered by Title VII while continuing to hold heterosexual harassment to be gender-based discrimination within the ambit of Title VII.²⁸¹ Grose presents a hypothetical to illustrate this theory. A lesbian employee is

280. See *infra* Part III.C.1.

281. See Grose, *supra* note 13, at 388.

offended by her co-workers' explicit discussions about their heterosexual sex practices, but has no sexual harassment claim under Title VII.²⁸² In an analogous scenario, a heterosexual female employee is offended to hear her lesbian co-workers discuss their sexual practices.²⁸³ This time, according to Grose, the behavior is actionable since "homosexual expression . . . is clearly actionable under Title VII."²⁸⁴ Recent case law, however, indicates that homosexual expression, at least of the type described in Grose's hypothetical, is no more actionable as sexual harassment than is heterosexual expression. In other words, attacks on an employee's heterosexuality are no more capable of forming the basis of a claim of sexual harassment than are attacks on an employee's homosexuality.²⁸⁵

Grose raises two cases in support of her hypothetical. These cases both involved homosexual harassers, but their approaches to same-sex sexual harassment are anomalous. The decision in *Hart v. National Mortgage & Land Co.*,²⁸⁶ for example, a California decision from 1987, suggests that the court believed the plaintiff's sex discrimination complaint was deficient because he admitted a belief that the perpetrator did not wish to have sex with him.²⁸⁷ Yet Grose neglects to cite *Mogilefsky v. Superior Court*,²⁸⁸ another California decision in which the court criticized *Hart* and the trial court's reliance on it in dismissing the action:

Hart is of questionable value as a legal precedent. The reviewing court's failure to deal with the undeniably sexual nature of the conduct to which Hart was subjected is, to say the least, troublesome. Such conduct, whether motivated by hostility or by sexual interest, is always "because of sex" regardless of the sex of the victim. Indeed, real parties in interest herein admit that if Hart had been a woman, the conduct alleged in that case would "unquestionably have constituted sexual harassment under [the applicable statute]." The *Hart* court's failure to mention, much less discuss, this double standard leaves the opinion vulnerable to criticism.²⁸⁹

The *Mogilefsky* case makes clear that there need be no showing of the homosexuality of the harasser for a case of same-sex sexual harass-

282. See *id.* at 389-90, 392.

283. See *id.*

284. *Id.* at 392.

285. See *id.* at 393.

286. 235 Cal. Rptr. 68 (Cal. Ct. App. 1987) (holding no sexual harassment of employee when alleged harasser did not touch employee).

287. See *id.* at 70.

288. 26 Cal. Rptr. 2d 116 (Cal. Ct. App. 1993) (finding sexually suggestive remarks with no physical touching did not rise to level of sexual harassment).

289. *Id.* at 119.

ment to proceed.

Grose also cites *Joyner v. AAA Cooper Transportation*,²⁹⁰ an early quid pro quo same-sex sexual harassment case. In that case, the employee's supervisor approached him, placed his hands on the employee's genital area and solicited sex.²⁹¹ The court concluded that the causation element of the claim was met because the supervisor was a homosexual.²⁹² Although this same reasoning has been employed in other cases and is remarkably similar to the presumption of heterosexuality employed in opposite-sex cases to render an evaluation of the causation element superfluous, it has been questioned and discarded in recent decisions as an unhelpful means of evaluating same-sex claims.²⁹³ Grose's point that courts focus on the orientation of the harasser and parcel out liability on that basis is thus unsupported. The weight of current Title VII jurisprudence asserts that Title VII prohibits harassing sexual expressions in the workplace regardless of the sexual orientation of the harasser.

A recent case heard by the District Court of Wisconsin conflicts with Grose's view. In *Miller v. Vesta, Inc.*,²⁹⁴ Elizabeth Miller, a female heterosexual, brought a sexual harassment action under Title VII alleging that a lesbian at her work site had attempted to initiate a sexual relationship. Miller complained to management, who then elicited a promise from the lesbian that no further solicitations would be forthcoming.²⁹⁵ Thereafter the lesbian gave Miller a birthday card, followed her into the restroom, and stared at her.²⁹⁶ In her objections to the magistrate judge's conclusion that she had no claim, Miller made reference to the "deeply repugnant" nature of homosexuality in the workplace, and argued that she, a married heterosexual female, should not have had to repel lesbian advances in order to retain her employment.²⁹⁷ The court made it clear that the actions at issue did not rise to the level of actionable sexual harassment, and explicitly declined to hold that the homosexual character of the harassment could be considered as an exacerbating factor rendering the harassment more severe than comparable opposite-sex

290. 597 F. Supp. 537 (M.D. Ala. 1983) (identifying homosexual advances as prima facie case of sexual discrimination).

291. *See id.*

292. *See id.*

293. *See supra* note 96; *see also infra* note 305.

294. 946 F. Supp. 697 (E.D. Wis. 1996) (holding that plaintiff had no sexual discrimination claim for same-sex harassment).

295. *See id.* at 708.

296. *See id.* at 708-09.

297. *See id.* at 711.

harassment.²⁹⁸ The court stated that “[t]o hold that homosexual harassment of heterosexuals automatically creates a hostile environment in violation of Title VII would grant protection based upon a plaintiff’s sexual orientation. However, heterosexuality, as a sexual orientation, is simply not a protected characteristic under Title VII.”²⁹⁹ Likewise, in an earlier case, *Fox v. Sierra Development Co.*,³⁰⁰ three heterosexual males objected to their supervisors’ “writing, drawing, and explicitly discussing homosexual sex acts.”³⁰¹ The court concluded that, although these acts were sexual in nature, evidence of discriminatory hostility was lacking.³⁰² The court based its conclusion on the fact that “[p]ictures, literature and discussions of homosexual conduct do not inherently intimidate, ridicule, or insult men.”³⁰³ The court further commented that the plaintiffs may have experienced a hostile work environment because they were heterosexual or homophobic, but that “[s]uch discrimination, or harassment is not prohibited.”³⁰⁴ These cases are not mere anomalies in the case law treating same-sex sexual harassment claims. Other courts have made clear that, in judicial evaluation of sexual harassment claims, the sexual orientations of the parties³⁰⁵ and any homosexual aspects of the con-

298. *See id.* at 711-12.

299. *Id.* at 712.

300. 876 F. Supp. 1169 (D. Nev. 1995).

301. *Id.* at 1173.

302. *See id.* at 1174 ([T]he homosexual content of the alleged conduct is not relevant to determining whether the alleged conduct adequately demonstrates a hostile environment.”).

303. *Id.* at 1176.

304. *Id.* at 1175 n.6.

305. *See, e.g.,* McCoy v. Macon Water Auth., 966 F. Supp. 1209 (M.D. Ga. 1997) (noting that the sex of harasser and sex of harassed person are not relevant); Marciano v. Kash N’ Karry Foodstores, Inc., No. 94-1657 CIV-T-17A, 1996 WL 420879, at *2 (M.D. Fla. July 1, 1996) (explaining that the sexual orientation of either party is irrelevant); Wehrle v. Office Depot, Inc., 954 F. Supp. 234, 236 (W.D. Okla. 1996) (explaining that allegation of the perpetrator’s homosexuality is irrelevant); Johnson v. Hondo, Inc., 940 F. Supp. 1403, 1411 (E.D. Wis. 1996) (noting that the purported homosexuality of the perpetrator irrelevant; sexuality does not prove that conduct were directed towards victim because of victim’s gender; sexuality is not the legal issue), *aff’d*, 125 F.3d 408 (7th Cir. 1997); Shermer v. Illinois Dep’t of Transp., 937 F. Supp. 781 (C.D. Ill. 1996) (stating that the sexual orientation of the perpetrator should not be key to proof of sexual harassment); Gerd v. United Parcel Serv., Inc., 934 F. Supp. 357, 361 (D. Colo. 1996) (finding that sexual preferences of victim are irrelevant); Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393, 402 n.10 (D. Minn. 1996) (stating that homosexual victims are protected against same-sex sexual harassment); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (stating that the sexual preferences of the victim and the harasser are irrelevant to Title VII claims and that “Title VII protects all persons, whether male or female, heterosexual or homosexual, from discrimination based on sex” (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986))); Williams v. District of Columbia, 916 F. Supp. 1, 7 (D.D.C. 1996) (noting orientation of harasser is irrelevant to same-sex sexual harassment claims); Blozis v. Mike Raiser Ford, Inc., 896 F. Supp. 805, 807 (N.D. Ind. 1995) (determining that same-sex sexual harassment is not an issue of homosexuality); Vandeventer v. Wabash Nat’l Corp., 887 F. Supp. 1178, 1180 (N.D. Ind. 1995) (“[B]eing homosexual does not deprive someone of protection from sexual harassment under Title VII, it is merely irrelevant to it.”); Sardinia v. Dellwood Foods, Inc., No. 94 Civ. 5458, 1995 WL 640502, at *6 n.6 (S.D.N.Y. Nov. 1,

duct are irrelevant.³⁰⁶

Given the foregoing, it is difficult to see just how Title VII supports Grose's statement that "the legal system by definition privileges heterosexuality while denigrating homosexuality."³⁰⁷ This is not of course to say that no other areas of the law work "to the detriment of homosexuality,"³⁰⁸ just that current Title VII sexual harassment jurisprudence does not appear to do so.

2. *Juries do not award higher damages in same-sex cases*

Spitko claims that heterosexual expressions are not prohibited in the workplace to the same degree as homosexual expressions.³⁰⁹ He states that "any given sexual comment or behavior will be judged more harshly by the finder of fact when the claimed victim of alleged harassment is of the same sex as the alleged harasser than when he is of the other sex"³¹⁰ and that juries will issue disproportionately higher damages awards in same-sex sexual harassment cases. According to Spitko, this prejudicial distinction arises because societal heterosexism views homosexual expressions as more harassing than analogous heterosexual expressions.³¹¹ Both of these statements are belied by current sexual harassment jurisprudence.

Spitko points to *Weiss v. Coca-Cola Bottling Co. of Chicago*,³¹² *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,³¹³ *Ebert v. Lamar Truck Plaza*,³¹⁴ and *Johnson v. Ramsey County*³¹⁵ to support his position. In *Caleshu*, the plaintiff complained of being subjected over a period of five months to unwelcome offensive touching, forcible deep kissing, and to her supervisor's exposure of his genitals.³¹⁶ As in *Sneed v. Montgomery Housing Authority*,³¹⁷ the finder of fact simply did not

1995) (stating that being homosexual does not deprive person of protection from sexual harassment).

306. See, e.g., *Tanner*, 919 F. Supp. at 356.

307. Grose, *supra* note 13, at 393.

308. *Id.* at 394.

309. See Spitko, *supra* note 20, at 73.

310. *Id.* at 85.

311. See *id.*

312. 90 F.2d 333 (7th Cir. 1993) (holding no actionable claim of Title VII sexual discrimination arose where opposite-sex incidents were relatively isolated).

313. 737 F. Supp. 1070 (E.D. Mo. 1990) (discussing employee's failure to establish Title VII harassment and hostile work environment), *aff'd*, 985 F.2d 564 (8th Cir. 1991).

314. 878 F.2d 338, 339 (10th Cir. 1989) (refusing to find sexual harassment against female employees by opposite-sex employer).

315. 424 N.W.2d 800 (Minn. Ct. App. 1988) (finding judge liable for battery, although evidence did not support finding of sexual harassment within statute of limitations period).

316. See *Caleshu*, 737 F. Supp. at 1070.

317. 956 F. Supp. 982 (M.D. Ala. 1997) (noting that sexual harassment complaints were not shown to be a motivating factor in plaintiff's dismissal).

credit Caleshu's allegations³¹⁸ and emphasized that some of the events were alleged to have occurred outside of work, rendering them irrelevant.³¹⁹ *Weiss*, which was similar to *Hart* and relied upon by both Grose and Spitko, has been criticized as inharmonious with other Title VII sexual harassment decisions.³²⁰ *Ebert* is similarly anomalous; in that case the acts of alleged harassment were not found to have been based on sex, a rarity in opposite-sex cases, as noted above.³²¹ This determination was due to the female plaintiffs' having used language as foul as that which the alleged perpetrators used, in addition to the perpetrators' directing the language "indiscriminately at both male and female coworkers."³²² Finally, the claim in *Ebert* was undercut by the employer's prompt response to the complaints.³²³

Spitko's disproportionality theory is also based on the view that juries will issue higher damages awards in same-sex cases than in opposite-sex cases.³²⁴ According to Spitko, these higher damages awards will in turn inspire employers to discriminate against gays and lesbians.³²⁵ The only case upon which Spitko bases this view is *Johnson v. Ramsey County*,³²⁶ a Minnesota battery suit.³²⁷ Spitko describes *Johnson* as a case in which a supervisor kissed his male subordinate, and the subordinate won \$375,000 in punitive and emotional damages,³²⁸ but *Johnson* involved much more than Spitko would have us believe. The supervisor in question, Alberto Miera, was in fact a Minnesota district court judge, appointed by Governor Rudy Perpich in 1983 and elected in 1984,³²⁹ who sexually harassed his male court reporter Johnson as well as female court employees.³³⁰ The court remitted the jury's future, compensatory, and punitive damages awards of \$375,000 to a total of \$125,000. This award was upheld on appeal. The case received extensive exposure through the media,³³¹ and

318. Note that in any sexual harassment case, an employer may raise the defense that the allegations are untrue.

319. See *Caleshu*, 737 F. Supp. at 1076-78.

320. See *Hernandez v. Wangen*, 938 F. Supp. 1052, 1058 (D.P.R. 1996) (suggesting that conduct such as repetitive sexual advances may be sufficiently severe to affect reasonable person's work productivity).

321. See *supra* note 43 and accompanying text.

322. See *Ebert v. Lamar Truck Plaza*, 715 F. Supp. 1496, 1499 (D. Colo. 1987), *aff'd*, 878 F.2d 338 (10th Cir. 1989).

323. See *Ebert v. Lamar Truck Plaza*, 878 F.2d 338, 339 (10th Cir. 1989).

324. See Spitko, *supra* note 20, at 84.

325. See *id.*

326. 424 N.W.2d 800 (Minn. Ct. App. 1988).

327. Johnson's sexual harassment claim was time-barred and summary judgment was granted on his intentional infliction of emotional distress claim. See *id.* at 801, 810.

328. See Spitko, *supra* note 20, at 58 n.120.

329. See *In re Miera*, 426 N.W.2d 850, 852 (Minn. 1988).

330. See *id.* at 851.

331. See *Ramsey County*, 424 N.W.2d at 805.

Miera decided not to seek re-election in 1990. The public outcry at the time was less about Miera's sexual orientation than about his breach of ethics and the public's trust.³³² In fact, Miera was not only held liable for battery but was publicly censured for his unethical activities.³³³ One month after the verdict, Miera was publicly reprimanded for attorney and judicial misconduct pursuant to a disciplinary proceeding brought before the Supreme Court of Minnesota.³³⁴ The court invoked Canons 1³³⁵ and 2A³³⁶ of the Code of Judicial Conduct to conclude that Miera, a public servant, had breached the public's trust by engaging in disreputable and illegal behavior.³³⁷ The court noted that "courts in other jurisdictions have reached similar conclusions, imposing discipline for unwelcome sexual advances even outside an employer-employee relationship,"³³⁸ and commented:

Judges must conform to a higher standard of conduct than is expected of lawyers or other persons in society. . . . The legal system

332. See, e.g., *Letters from Readers*, STAR TRIB., Oct. 9, 1989, at 10A.

The issue is not Miera's personality, as his mother implies, but the importance of an honest and effective judiciary, free from scandal. Judges decide the lives, fortunes and fates of numerous of their fellow citizens and must be held to the highest professional ethical standards. To expect or to allow less is cheating the citizens of Minnesota and Ramsey County.

Id.; *Letters from Readers*, STAR TRIB., Sept. 27, 1990, at 18A ("Miera, in a recent Star Tribune interview, made reference to an interpretation of the Code of Judicial Conduct. Maybe he should be more concerned with his own conduct, and how it is interpreted by the people he serves." (quoting Tom Walker, New Hope)).

333. See *Ramsey County*, 424 N.W.2d at 805.

334. See *Miera*, 426 N.W.2d at 850.

335. A.B.A. CODE OF JUDICIAL CONDUCT Canon 1 (1972). Canon 1 of the Code of Judicial Conduct requires judges to conform to a high standard of conduct "so that the integrity and independence of the judiciary may be preserved." *Id.*

336. *Id.* Canon 2A. Under Canon 2A, judges must "respect and comply with the law" and act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.*

337. See *Ramsey County*, 424 N.W.2d at 800.

338. *Miera*, 426 N.W.2d at 856; see also Jody Meier, *Sexual Harassment in Law Firms: Should Attorneys be Disciplined Under the Lawyer Codes?*, 4 GEO. J. LEGAL ETHICS 169 (1991); Lauren Blau, *Holden Denies Harassing Former Secretary*, L.A. DAILY J., Oct. 24, 1995, at 2; Russ Bleemer, *Censure Urged for Judge Who Harassed Law Clerk*, N.J. L.J., Feb. 1, 1993, at 7; Michael Booth, *Publicity and Sex Harassment Suits: Perfect Together*, N.J. L.J., Dec. 11, 1995, at 1; Editorial, *Bork Never Had It This Bad*, L.A. DAILY J., Oct. 10, 1991, at 6; Editorial, *Military Injustice*, L.A. DAILY J., Nov. 28, 1995, at 6; Editorial, *On Packwood . . . He Should Resign*, L.A. DAILY J., Dec. 23, 1992, at 6; Margo L. Ely, *Judge Convicted of Sexual Assault Wins Reversal*, CHI. DAILY L. BULL., Feb. 12, 1996, at 6 (reporting on judge's criminal prosecution for acts of sexual harassment and assault); Michael J. Hall, *Anita Hill, Hillary Clinton Address Packed House*, L.A. DAILY J., Aug. 11, 1992, at 11; Matthew Heller, *Court Torn Apart; Sex Harassment Charges Against Judge Stun Victorville Attorneys*, L.A. DAILY J., May 23, 1996, at 1; Arleen Jacobius, *Thomas Opponents Call on Senate to Delay Vote*, L.A. DAILY J., Oct. 8, 1991, at 3; Susan McRae, *Panel Reproves Judge Accused of Harassment*, L.A. DAILY L.J., Feb. 15, 1994, at 1; B.J. Palermo, *Battery Case Against Judge Goes to the Jury*, L.A. DAILY J., Apr. 27, 1995, at 3; B.J. Palermo, *Judge Attacked Her, Lawyer Says*, L.A. DAILY J., Apr. 21, 1995, at 3; B.J. Palermo, *Worker's Comp Judge Convicted of Sexual Battery on Attorney*, L.A. DAILY J., May 1, 1995, at 1; Deborah Pines, *Anita Hill Speaks on Harassment*, NAT'L L.J., May 11, 1992, at 17; James Rowley, *Senate Delays Thomas Vote for a Week to Study Charges*, L.A. DAILY J., Oct. 9, 1991, at 3.

depends on public confidence in judges, whose power rests in large measure on the ability to command respect for judicial decisions. Whether or not directly related to judicial duties, misconduct by a judge brings the office into disrepute and thereby prejudices the administration of justice.³³⁹

The court concluded that Miera's behavior "jeopardizes confidence in the integrity of the judiciary and brings the office into disrepute."³⁴⁰ Miera was suspended from office without pay for one year,³⁴¹ and thereafter did not seek reelection.³⁴² The *Miera* case is more an illustration of a breach of the public's confidence in a public servant than it is of public outrage against homosexual expression in the workplace.³⁴³

These factors arguably undermine, at least in part, the notion that the jury's verdict in *Johnson* was fueled by anti-gay animus. The level of public censure in response to Miera's harassing acts would not have arisen in the similar case of a private employer and thus this case is unsupportive of Spitko's conclusion. Given the foregoing, Miera's status as a public servant, a factor Spitko fails to mention, contributed in large measure to any disproportion in the damages awarded to Johnson.

Further undercutting the utility of *Johnson* as an example of how juries' anti-gay bias will result in higher damages awards against gay harassers is the fact that the most extraordinary awards in sexual harassment suits are invariably granted by juries hearing opposite-sex cases. This is true in Minnesota, where the largest jury award, later reduced, was \$3.25 million to an individual employee.³⁴⁴ California, the jurisdiction used by Grose to support her conclusions of anti-gay bias in the courts, also has a history of astronomical awards in opposite-sex harassment cases. One such case was *Weeks v. Baker & McKenzie*,³⁴⁵ an opposite-sex case in which the legal secretary of one of the

339. *Miera*, 426 N.W.2d at 855.

340. *Id.* at 856.

341. *See id.* at 859.

342. *See* Paul Gustafson, *Judge Miera Won't Seek Reelection; Urges Perpich to Fill Seat with Hispanic*, STAR TRIB. (MINN.), May 26, 1990, at 1B; *St. Paul; Rosas Joins District Court Bench*, STAR TRIB. (MINN.), Sept. 29, 1990, at 3B (reporting the swearing in of Salvador Rosas, the newest judge on the District Court Bench, who replaced Judge Miera).

343. Note that another factor contributing to the large award may have been the fact that court reporters undergo specialized training and have limited employment opportunities. *See* David Peterson, *Resolution of Hennepin Judge's Sex-Harassment Case Is Questioned*, STAR TRIB. (MINN.), May 25, 1993, at 1A ("The high court recognized in [*Miera*] that court reporters—whom judges can fire at will, and who have specialized training suiting them for little else—are 'particularly vulnerable to abuse of power.'" (quoting *Miera*, 426 N.W.2d at 856)).

344. *See* Margaret Zack, *Women Follow Suit; Burgeoning Sex-Harassment Charges Tell Shocking Tales*, STAR TRIB. (MINN.), July 20, 1992, at 1A. Another jury awarded \$602,494 to a female insurance agent in December 1991. *See id.*

345. No. 943043, 1994 WL 636488, at *1 (Cal. Super. Sept. 30, 1994) (finding repeated sex-

law firm's partners was awarded \$50,000 in compensatory damages and a total of \$6,225,000 in punitive damages in a case involving conduct far less egregious than found in most of the same-sex cases cited in this Article.³⁴⁶ The award did not include the plaintiff's attorneys' fees, which were estimated to exceed \$500,000. A judge later remitted the punitive damages award to \$3.5 million.³⁴⁷

Furthermore, Spitko fails to discuss how the *Johnson* verdict and Miera's future employment prospects might be different now that Minnesota's human rights law forbids discrimination on the basis of sexual orientation and the Minnesota Supreme Court has recognized same-sex sexual harassment as a viable claim.³⁴⁸ Miera certainly could recover damages under the law if he were discriminated against by his new employer on the basis of his allegedly bisexual orientation.³⁴⁹ A new employer, though, would simply respond that she chose not to hire (or chose to fire) Miera because he had been a sexual harasser. Obviously, Spitko is less concerned about persons in Miera's position and more concerned about the impact cases like *Johnson* will have on job opportunities for gays and lesbians who are *not* known harassers. This concern seems misplaced, based as it is on the assumption that employers will presume that gays are more likely than heterosexuals to harass their employees and in this way expose employers to astro-

ual harassment that was severe and pervasive).

346. In *Weeks*, the partner of a law firm placed candy in his secretary's breast pocket as they walked out of a restaurant; lunged toward her with cupped hands as if he were going to grab her breasts and stated, "What's wrong? Are you afraid I'm going to grab you?"; repeatedly inquired "What's the wildest thing you've ever done?" during a lunch at a local restaurant; and "grabbed her butt" in the presence of two other employees as they were packing some items into a van. See Cerisse Anderson, *\$4 Million Sexual Harassment Award Upset*, N.Y. L.J., Apr. 3, 1992, at 1 (acknowledging that punitive damages are not available for most discrimination claims in New York); Barry A. Hartstein, *Weeks v. Baker & McKenzie: A Potential "Blueprint" for Sexual Harassment Litigation*, 20 EMPLOYEE REL. L.J. 657 (1995). Plaintiffs in opposite-sex harassment cases receive higher damages awards than plaintiffs in same-sex cases, even where the conduct in opposite-sex cases is less egregious. *\$81 M Liability Delivered to UPS in Sex Bias Case*, NAT'L L.J., Mar. 23, 1998, at A9 (reporting jury verdict of \$80.75 million in opposite-sex harassment case involving stalking and poking in breast of individual employee).

347. See William Vogeler, *Record Verdict Cut; Judge Halves Harassment Award*, ABA J., Feb. 1995, at 18 (commenting on reduction in punitive award from \$6.9 million to about \$3.5 million).

348. See MINN. STAT. § 363.01(41), (45) (1997); *Cummings v. Koehnen*, 556 N.W.2d 586, 589 (Minn. Ct. App. 1996), *aff'd*, 568 N.W.2d 418 (Minn. 1997).

The definition of sexual harassment does not require an inquiry into the gender or sexual orientation of either the harasser or the victim. The only requirement is that the conduct or communication be of a sexual nature. Accordingly, we conclude a plain reading of the statute allows a claim of sexual harassment, without regard to the harasser or victim's gender or sexual orientation, if a victim can prove a harasser's verbal or physical conduct or communication was of a sexual nature, and created an intimidating, hostile, or offensive employment environment.

Id.

349. See Gallagher & Moss, *supra* note 279, at 78 (reporting "series of sizable awards" favorable to gays).

nomical damages awards.³⁵⁰ Just the opposite appears likely, especially given that most sexual harassment suits involve victims and perpetrators of the opposite sex, most workplaces are dominated by heterosexual persons, and damages awarded in opposite-sex cases are as extraordinary (or more so) than those awarded in same-sex cases.³⁵¹

Some developments on the landscape of same-sex sexual harassment jurisprudence appear, at first blush, to support Spitko's theory. As a closer look reveals, these cases offer questionable support for his conclusion. In *EEOC v. Walden Book Co.*,³⁵² the jury awarded the plaintiff \$1.6 million in punitive damages and \$75,000 in compensatory damages.³⁵³ Unlike most same-sex sexual harassment cases, however, the plaintiff in *Walden* suffered "years of harassment by his gay supervisor."³⁵⁴ It is likely that the jury's verdict reflected the pervasiveness of the harassment, especially given that none of the incidents were excluded from the action on the theory that they were time barred.³⁵⁵

In Ohio, an eight-member jury unanimously decided to issue a

350. It must be noted that Spitko's thesis focuses on "the gay defendant" in same-sex sexual harassment cases. In most same-sex cases, however, the sexuality of the defendant is unknown or is presumed to be heterosexual. "Defendant" may be a problematic or misleading term, given that, although the harasser is often named as a defendant in these cases, for the most part "individual employees cannot be held liable under Title VII." *Dici v. Pennsylvania*, 91 F.3d 542, 551-52 (3d Cir. 1996). To the extent Spitko in seeking to broaden his thesis conflates homosexuality and same-sex conduct, see Spitko, *supra* note 20, at 85; see also Woodhouse, *supra* note 35, at 1159, he commits what he accuses Judge Richard Posner of doing inappropriately—conflating homosexuality with sodomy. See Spitko, *supra* note 20, at 74 n.150. He ignores the fact that same-sex sexual conduct is engaged in by self-defined heterosexual men as well.

351. See Kelly & Watt, *supra* note 31, at 132 (reporting larger verdicts in cross-sex cases, especially female-against-male cases, than in same-sex sexual harassment cases); see also \$81 M Liability Delivered to UPS in Sex Bias Case, *supra* note 346, at A9 (reporting jury verdict of \$80.75 million in opposite-sex harassment case involving poking breast of and stalking individual employee); Patty Henetz, *Getting to the Roots of Gender Discrimination; Discrimination Goes Beyond Sex*, Professor Says, SALT LAKE TRIB., Mar. 15, 1998, at A1 (reporting award of \$2 million to plaintiffs in opposite-sex harassment case and judge's reduction of award to \$750,000); *Jury Awards Ex-Highway Worker \$930,000; Men on the Job Harassed Her, Federal Suit Charged*, ST. LOUIS POST DISPATCH, Nov. 4, 1997, at D7 (case of opposite-sex, gender-based harassment); Matthew Lubanko, *Harassment Insurance a Hot Item*, HARTFORD COURANT, Mar. 22, 1998, at A1 (reporting award of \$6.6 million to "lone claimant" in opposite-sex harassment case).

352. 885 F. Supp. 1100 (M.D. Tenn. 1995).

353. See *Harassment Victim Awarded \$1.6 Million*, 1995 Daily Lab. Rep. (BNA) 98 (May 22, 1995).

354. *Id.*

355. Under Title VII, a plaintiff must file a charge with the EEOC within 180 days of the alleged violation. See 42 U.S.C. § 2000e-5(e) (1994). The limitations period commences on the date that the discriminatory act occurred. See *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Under a continuing violations theory, a plaintiff is relieved from the burden of proving that the entire violation occurred within the actionable period. See *Berry v. Board of Supervisors*, 715 F.2d 971, 979 (5th Cir. 1983). Under this theory, a plaintiff may seek redress for unlawful discriminatory acts which took place in a period barred by the statute of limitations if there occur related acts within the requisite period. See *Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977).

\$1.65 million award in favor of an allegedly heterosexual male plaintiff who sued his allegedly heterosexual male supervisor for sexual harassment.³⁵⁶ The ongoing acts were described as denunciations "that included a discussion of a sexual act."³⁵⁷ Since the perpetrator received only a reprimand from the company, the jury may have wished to punish the company for not responding to complaints of sexual harassment.³⁵⁸ Notably, Ohio's human rights law does not prohibit discrimination on the basis of sexual orientation.³⁵⁹ In California, a Los Angeles Superior Court jury awarded \$1.7 million in compensatory and \$2.5 million in punitive damages in a same-sex sexual harassment case. After the verdict, however, the parties settled the dispute for substantially less than that amount.³⁶⁰ The post-verdict settlement suggests that the parties understood that the award would not survive judicial scrutiny and would be remitted, like the awards in *Johnson* and *Weeks*, particularly given that verdicts in same-sex sexual harassment cases in other countries³⁶¹ have been very low and in the United States are frequently lower than the national average.³⁶² This fact likely induces same-sex sexual harassment claimants to settle their cases rather than take them to trial.³⁶³

Spitko's theory that juries will return disproportionate damages awards in same-sex cases is speculative. In actuality, any disparity in the outcomes of the cases seems better explained by the fact that the inverse ratio of severity and pervasiveness "has not been consistently applied in practice,"³⁶⁴ rather than by anti-gay bias. Spitko does not mention that sexual harassment awards are often large,³⁶⁵ and does

356. See James Ewinger, *Jury Rules Worker Harassed by Boss; Same-Sex Suit Trial Was a First for Ohio*, PLAIN DEALER, Mar. 25, 1997, at 1B.

357. See *id.*

358. See *id.*

359. See OHIO REV. CODE ANN. § 4112.02(A) (Banks-Baldwin 1994) (detailing what constitutes unlawful discrimination in Ohio).

360. See Davis, *supra* note 165, at B1.

361. See STEPHEN O. MURRAY, AMERICAN GAY 1 (1996) ("[T]he panicked mobilization against homosexuals in the United States seems approached only by that in Canada and the British Isles.").

362. See Kelly & Watt, *supra* note 31, at 132 (reporting larger verdicts in cross-sex cases, especially female-against-male cases, than in same-sex sexual harassment cases); see also Frank Davies, *Sexual Harassment Suit Takes a Twist*, MIAMI HERALD, July 20, 1997, at B1 (reporting award of reinstatement and \$50,000 back pay in same-sex sexual harassment case); Gallagher & Moss, *supra* note 279, at 78 (reporting award of \$75,000 in Kentucky same-sex sexual harassment case); Steve Salerno, *An End to Harassment Hysteria*, WALL ST. J., Mar. 31, 1998, at A22 (average sexual-harassment plaintiff who wins her case in court is awarded \$256,000).

363. See Davis, *supra* note 165, at B1 (mentioning that the parties in *Quick v. Donaldson Co.* and *Gerd v. United Parcel Service* reached a settlement prior to trial).

364. McFarland, *supra* note 44, at 540.

365. See Beverley H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. J. 43, 44 (1993) (citing study estimating that sexual harassment costs a large American company \$6.7 million a year); Salerno, *supra* note 362, at A22 (average sexual-

not mention mechanisms that, at least in theory, could provide more consistency in this area, such as the trial judge's prerogative to vacate or reduce an award, or to grant post-trial motions challenging the verdict.³⁶⁶ In addition, Spitko fails to note that awards in sexual harassment cases have been on the rise across the board³⁶⁷ and that this trend is explained by the advent of compensatory and punitive damages in Title VII cases.³⁶⁸

The few cases cited by Spitko as support for the proposition that courts disproportionately censure homosexual expressions in the workplace actually support the opposite view: courts disproportionately trivialize homosexual expressions and award far less in damages to plaintiffs who complain about them than to plaintiffs who complain of advances by co-workers or supervisors of the opposite sex. This problem is the real threat to gay civil rights. When homosexual sexual expressions are found to be trivial or even humorous and are excluded from the ambit of conduct proscribed by Title VII, such treatment speaks to the attempted erasure of homosexual expressions, not to their disproportionate prohibition and censure. Grose's and Spitko's proposals hint that this result would be positive and liberating for gays and lesbians, as it would remove homosexual expressions from regulation by heterosexist institutions. As the following section reveals, quite the opposite is true.

IV. THE POSITIVE EFFECTS OF RECOGNITION

The vision of commentators who are pessimistic about same-sex sexual harassment claims is too narrow and fails to address two critical problems. First, a legal system without same-sex claims would fail to emphasize to the heterosexual majority the limitations of employment discrimination proscriptions that fail to forbid discrimination on the basis of sexual orientation. Second, failure to litigate same-sex claims would trivialize and dismiss homosexual conduct as puerile, thereby valorizing heterosexual expression as more deserv-

harassment plaintiff who wins her case in court is awarded \$256,000).

366. Spitko does admit, however, that the punitive damages award in *Johnson* was remitted from \$300,000 to \$50,000. See Spitko, *supra* note 20, at 85 n.136.

367. See Jolie Solomon, *An Insurance Policy with Sex Appeal*, NEWSWEEK, Mar. 16, 1998, at 44 (reporting jump in record amount paid in EEOC case from \$1.3 million in 1996, to \$10 million in 1998); Greg Weatherford, *Increasingly, Courts Are Called Upon to Work Out Harassment Confusion*, RICHMOND TIMES-DISPATCH, Mar. 23, 1998, at D15 (reporting increase in payments to plaintiffs from \$7.1 million in 1991, to \$49.4 million in 1997, and an increase in 1997 of 81.5% from 1996).

368. See Mathews, *supra* note 55, at 307 (noting concern "that juries will be prone to grant damages far in excess of the actual injury, and that many uninjured workers nonetheless will file lawsuits because of the potential lure of a large payoff").

ing of attention, concern, and censure, and would exclude causes of action that do not implicate sexual orientation but raise the issue of gender stereotyping in the workplace. Litigating same-sex sexual harassment claims is essential to prevent the problems wrought by not litigating them from infecting Title VII jurisprudence.

A. *Prohibition of Sexual Orientation Discrimination*

Referring to same-sex sexual harassment, a lawyer who represents a gay former sales trainee harassed by co-workers at a Wall Street securities firm recently commented, "[I]t's time for people who are heterosexual to stand up against this kind of behavior."³⁶⁹ Recognition of same-sex sexual harassment claims will ensure that they do. Same-sex sexual harassment jurisprudence, more than any other brand of jurisprudence brought under Title VII, has already illustrated to heterosexuals their inability to advance claims of discrimination based on sexual orientation. Through cases such as *Miller* and *Fox*, heterosexuals have been exposed to the fact that heterosexuality is not protected under Title VII and that they may be harassed and demeaned on the basis of that characteristic without recourse under the statute. More such illustrations will fail to materialize if same-sex sexual harassment claims are not litigated, ultimately exacerbating Grose's concern that heterosexuality is implicitly a characteristic protected by Title VII. On the other hand, if such claims are litigated, and heterosexuals are thereby further reminded that their sexual orientation is not protected by Title VII, they will have an incentive to lobby for protections against discrimination on the basis of sexual orientation to make sure that heterosexuality-based discrimination cannot be practiced with impunity.³⁷⁰ In light of surprising cases such as *Miller* and *Fox*, some heterosexuals, who have most likely never considered that they could legally be discriminated against based on their sexual orientation, will promote support for the passage of an amendment to Title VII or for passage of the Employment Non-Discrimination Act ("ENDA") to outlaw sexual orientation discrimination in the workplace. ENDA already commands significant support in both the Senate and the House of Representatives³⁷¹ and

369. Davis, *supra* note 165, at B1.

370. See, e.g., *Karpowicz v. Blue Cross & Blue Shield of Mass., Inc.*, Civ. A. No. 96-10050-MLW, 1996 WL 528372, at *1 (D. Mass. Aug. 19, 1996) (addressing claim by heterosexual under Massachusetts Law Against Discrimination, which proscribes sexual orientation discrimination).

371. At the last vote on this issue, forty-nine senators voted in favor of ENDA, just one vote short of passing. "There is strong bipartisan support and strong public support for [ENDA]. An impressive majority of Americans—68%—support the Act." STATEMENT OF SENATOR EDWARD KENNEDY ON THE EMPLOYMENT NON-DISCRIMINATION ACT (last modified Oct. 28, 1997)

could well command even greater support by the heterosexual majority now that same-sex sexual harassment claims have been recognized by *Oncale*.³⁷² In the absence of same-sex claims, cases like *Miller* and *Fox*, instrumental in focusing attention on the limitations for heterosexuals of the lack of a prohibition of discrimination on the basis of sexual orientation,³⁷³ will not be litigated. The visibility that these cases offer, and that cases involving homosexual persons fired for their sexual orientation have not offered, will advance the cause of obtaining protection against sexual orientation discrimination in the workplace. Without same-sex claims, then, an opportunity for majoritarian support of an amendment to Title VII to forbid discrimination on the basis of sexual orientation or of passage of ENDA would be lost.

Apart from the potential benefit of passage of legislation to remedy the gap in Title VII protection against sexual orientation discrimination is the certainty that litigation of same-sex sexual harassment claims will focus attention on the impermissibility of gender stereotyping in the workplace. Emphasizing the impermissibility of discriminatory gender stereotyping, which the courts already prohibit,³⁷⁴ will provide a vehicle for judicial recognition of sexual orientation discrimination as sex discrimination because, as many scholars have noted, discrimination on the basis of sexual orientation is in essence rooted in sex stereotyping.³⁷⁵ These cases are more likely to arise in

< <http://www.senate.gov/member/ma/kennedy/general/statements/72103enda.html>>. President Clinton has voiced his support for the bill, Statement by President Clinton Employment Non-Discrimination Act (last modified Dec. 11, 1997) <<http://www.aclu.org/congress/endaclinton.html>>, but the House has yet to vote on the measure. See Price, *supra* note 279, at C5; see also Stone-Harris, *supra* note 240, at 319 (advocating passage of federal legislation to ban workplace discrimination on the basis of sexual orientation).

372. See Price, *supra* note 279, at C5 (noting that *Oncale*'s decision that sexual harassment is illegal only when it amounts to sex discrimination emphasizes the need for ENDA.)

373. See *Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996) (stating that the relevant sex and perspective are that of the victim, not the harasser).

374. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (finding that stereotyped remarks may evidence gender discrimination); *Blake v. Grede Foundries, Inc.*, No. 96-1322-JTM, 1997 WL 157126, at *3 (D. Kan. Mar. 20, 1997) (ruling that same-sex "harassment in the form of gestures suggesting homosexuality because [plaintiff] was a male working in a traditionally female position" was actionable); *Williams v. Saxbe*, 413 F. Supp. 654, 658 (D.D.C. 1976) (noting that, although Congress did want to eliminate discrimination based on sexual stereotypes, it also wished to forbid any discrimination based on sex); *Zalewski v. Overlook Hosp.*, 692 A.2d 131, 134 (N.J. Super. Ct. Law Div. 1996) (finding that same-sex harassment claim based on gender stereotyping was cognizable); *Sprogis v. United Air Lines, Inc.* 444 F.2d 1194, 1198 (7th Cir. 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); *Lindahl v. Air France*, 930 F.2d 1434 (9th Cir. 1991); Franke, *supra* note 10, at 74 (positing that sexual harassment acts to reinforce gender stereotypes in the workplace).

375. See, e.g., Arriola, *supra* note 264, at 22 (positing that discrimination on the basis of gender nonconformism is sex discrimination); Marc A. Fajer, *Can Two Real Men Eat Quiche Together?*

the context of sexual harassment rather than in the context of sex discrimination claims not involving allegations of sexual harassment, because discrimination on the basis of gender nonconformism often takes the form of violence and is easier to hide where this violence does not arise.³⁷⁶ Absent same-sex harassment claims, then, an opportunity for the judiciary to recognize sexual orientation qua sex discrimination would be lost.

B. Presumptive Heterosexuality and Homosexual Expression

Current same-sex sexual harassment case law, while attempting to focus exclusively on sexual conduct, at times defines such activity between persons of the same sex as juvenile and trivial, or vulgar and boorish, but not, as Grose and Spitko have theorized, as more serious and hostile than cross-sex expressions.³⁷⁷ This view of homosexual expression has the effect of erasing its import and of reducing it in importance vis-à-vis similar expressions between persons of opposite sexes.³⁷⁸

The erasure of homosexual expression is especially patent in same-sex sexual harassment cases where the sexual orientation of the parties is not known.³⁷⁹ In these cases, courts describe colorably homo-

Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men, 46 U. MIAMI L. REV. 511 (1992) (arguing that sexual orientation harassment is indistinguishable from gender-based sexual harassment, for it is plainly sexual in nature, and it is based on gender stereotypes); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Valdes, *Queers*, *supra* note 264, at 23-25; Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Vontilation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 169-70 (1996) [hereinafter Valdes, *Hetero-Patriarchy*]; Wehren, *supra* note 240, at 123-25 (arguing that, because one's sexual orientation depends on a classification as a certain gender, sexual orientation discrimination is essentially discrimination based on gender); Capers, *supra* note 264, at 1183-84, 1186 (positing that discrimination on the basis of sexual orientation is essentially discrimination based on sex stereotyping, and, as such, is prohibited by Title VII, were the statute to be applied consistently); Marcosson, *supra* note 97, at 3; Peluso, *supra* note 264, at 1536, 1560 (arguing that sexual orientation is a suspect or quasi-suspect classification and, as such, merits protection under Title VII).

376. See Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1103 (1996) (noting that adverse employment actions for gender nonconformity "will occur without explicit references to gender, or will involve a gender stereotype couched in purportedly neutral language" and asserting that "[d]eviation from gender norms incurs tremendous social disapproval, and even ritualized violence"); James D. Wilts, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 990 (1997) (describing violence against women and sexual minorities as predicated upon assumptions of gender polar construction).

377. See, e.g., *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 713 (E.D. Wis. 1996) (describing the "the salient factor here as those of a junior high school crush").

378. "We can choose to persecute or ignore sexual nonconformists within our culture—either will do." Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TULANE L. REV. 529, 542 n.32 (1997). In this regard, Spitko's alternative proposal is sound. See *supra* notes 285-86 and accompanying text.

379. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.5 (4th Cir.)

sexual activity as mere locker room antics and horseplay, even where sexual solicitation and genital contact occur,³⁸⁰ or where the conduct is violent and coerced³⁸¹ or involves threats of rape.³⁸² The presumption that the parties to these cases are heterosexual³⁸³ drives this evaluation and allows courts to redefine conduct aimed at the genitals or elsewhere as "assuming a whole different meaning" in a same-sex case on the mere basis that heterosexuals cannot be sexually attracted to persons of the same sex.³⁸⁴ It is not entirely clear what this wholly different meaning is, at least not initially. The meaning apparently stops short of anything that could be related to sexual attraction between persons of the same sex. Judge John Nangle, dissenting in *Quick v. Donaldson Co.*, attempted the following explanation: "When [squeezing of the genitals] occurs between heterosexual males one is struck by the vulgarity of these actions. If this conduct were to occur to females by males, however, the impression is entirely different and the inference of sex discrimination is raised."³⁸⁵

The suggestion here is that although a man's grabbing and squeezing the genitals of another man is merely vulgar, his grabbing the

(noting that there was no proof that either the plaintiff or defendants were homosexual), *cert. denied*, 117 S. Ct. 72 (1996).

380. See *id.* at 1195 (dismissing hostile-environment claim because claim cannot lie where alleged harassers and victim are of identical sex).

381. See *Quick v. Donaldson Co.*, 90 F.3d 1372, 1381 (8th Cir. 1996) (Nangle, J., dissenting) (stating that action of heterosexual males in singling out another unpopular heterosexual male for harassment does not constitute a sexual harassment claim under Title VII).

382. See *Doe v. City of Belleville*, 119 F.3d 563, 574 (7th Cir. 1997) ("[C]ourts by and large have been unwilling to make the same assumption when a man harasses another man in the workplace, however rife the harassment may be with sexual innuendo, sexual contact, and other conduct of an explicitly sexual nature.") (citations omitted), *vacated*, 118 S. Ct. 1183 (1998); *Oncale v. Sundowner Offshore Servs.*, No. Civ. A. 94-1483, 1995 WL 133349, at *2 (E.D. La. Mar. 24, 1995) (granting summary judgment for defendants because male plaintiff has no cause of action for sexual harassment where defendants are male), *aff'd*, 83 F.3d 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998).

383. See *supra* note 258 and accompanying text; see also Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 947 (1989) (stating that assumption of heterosexuality applies in almost all social interactions); Locke, *supra* note 45, at 398 (explaining courts' reliance on stereotyped views of sexual interaction and assumption that men are heterosexual unless proven otherwise); Schultz, *supra* note 35, at 1781 n.504.

384. See, e.g., *Quick*, 90 F.3d at 1381 ("When the alleged offender and the alleged victim share the same gender, similar sexually suggestive words and acts can take on a whole other meaning." (quoting *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1383 (C.D. Cal. 1995), *rev'd on other grounds*, 114 F.3d 979 (9th Cir. 1997) (per curiam))); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) ("[I]n the case of same-sex [presumed] heterosexual hostile working environment sexual harassment, the presumption of sexual gratification and thus, sex discrimination, ceases to exist."). Note that the EEOC's position is that unwelcome intentional touching of "intimate body areas" is sufficiently offensive to alter the conditions of a working environment in violation of Title VII. See BARBARA LINDEMANN, *SEXUAL HARASSMENT IN EMPLOYMENT* 177 (1992).

385. *Quick*, 90 F.3d at 1381 (Nangle, J., dissenting).

genitals of a woman is motivated by sexual attraction.³⁸⁶ And yet the only difference between these two scenarios is the victim's gender. The existence of a sexual motivation for the oppressor's conduct is thus dependent on this difference, because, according to the courts, his actions towards these two *must not mean the same thing*.³⁸⁷

The slippage in this reasoning may not be apparent if one takes for granted that supporting it is the notion that most people in society are heterosexual and have sexual attraction solely toward persons of the opposite sex. While this hidden premise may be correct, it is certainly no reason to fail to recognize that some persons are not heterosexual, or at least not exclusively so.³⁸⁸ The presumption of heterosexuality is perhaps especially misapplied to sexual harassment cases where the conduct in question is arguably homoerotic, for homoerotic urges by heterosexuals are not unknown³⁸⁹ and are not of necessity paradoxical.³⁹⁰ Presumptive heterosexuality hobbles the argument that the conduct in a given case is colorably homoerotic and permits courts, *sua sponte*, as well as society in general to categorize sexual behavior as non-sexual and ultimately as reflective of accept-

386. See *Doe*, 119 F.3d at 578 ("Likewise, when a woman's breasts are grabbed or when her buttocks are pinched, the harassment necessarily is linked to her gender.").

387. See *Torres v. National Precision Blanking*, 943 F. Supp. 952, 960 n.14 (N.D. Ill. 1996) ("[A]n inference [that the harassment was based on sexual attraction] cannot be created by harassment between members of a single gender.").

388. See ROBIN BAKER, *SPERM WARS: THE SCIENCE OF SEX* 242 (1996) (maintaining, without authority, that "the vast majority (80 percent) of those who have sex with men also have sex with women"); EDWARD LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 299 (1994) (reporting on study showing that 10.1% of men experience same-gender sexuality, whether based on behavior, desire or identity); *id.* at 301 (noting, in study, sizable groups who do not consider themselves to be either homosexual or bisexual but have had adult homosexual experiences or express some degree of desire). Notably, eleven percent of the men in the Laumann study who had had a same-gender sex partner in the year prior to the survey did not report either same-gender desire or identity. See LAUMANN ET AL., *supra*, at 388 n.18.

389. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 537, 546 (1994) (describing the "layered instabilities" of public heterosexual identity and describing inclusion in J. Michael Bailey and Richard C. Pillard's study of male twins "self-described heterosexuals with high scores for homoerotic fantasy"); Arthur J. Jacobson, *Legal Emotion: The Women's Story in Totem and Taboo*, 16 CARDOZO L. REV. 1139, 1159 (1995) (describing heterosexual practice, with reference to Sigmund Freud's *Totem and Taboo*, as an early form of veiling homoerotic aims); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 55 (1996) (noting the difficulty of maintaining "that heterosexuality is pure of sodomitic practice and homoerotic impulse" (quoting Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1738 n.51 (1993))); Teemu Ruskola, Note, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 YALE L.J. 2531, 2548 (1994) (noting that in Qing, China, the right of men to buy sex from women, as well as men, was respected).

390. See LAUMANN ET AL., *supra* note 388, at 291 ("[W]e have identified three dimensions of homosexuality: same-gender sexual behavior (and its associated practices), same-gender desire and sexual attraction, and self identity as a homosexual."); *id.* at 301 ("[H]omosexuality is fundamentally a multidimensional phenomenon that has manifold meanings and interpretations, depending on context and purpose.").

able gender norms.³⁹¹ Although presumptive heterosexuality depends on the existence of homosexuality,³⁹² it acts as a mask, hiding any association of heterosexual self-definition with homoerotic conduct³⁹³ and allowing acts of genital fondling, assaults on the genitals and threats of rape³⁹⁴ to be dismissed under the rule "boys will be boys."³⁹⁵ In addition, presumptive heterosexuality drives the conclusion drawn in some cases that the harassment in question reveals bias against homosexuals instead of any degree of sexual attraction of the harasser toward the victim,³⁹⁶ thus reinforcing acceptable gender

391. The military has entertained its troops throughout this century with drag shows involving a practice known as "camping" whereby troops flaunt their gender roles by cross-dressing and same-sex flirting. These practices are said to provide entertainment and foster bonding among heterosexual men. An excellent example of such a show was put on by nurses and troops in the musical *South Pacific*. See William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 627 (1994).

392. See Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1827-29 (1996) ("The constitution of homosexuals is also the constitution of heterosexuals, heterosexuals now liberated to engage in homosocial or homoerotic acts that fall short of their being branded as homosexual themselves.").

393. See BAKER, *supra* note 388, at 245-47.

Sexual hypocrisy is of particular interest. This is because there are some aspects of sexual behavior for which the most successful exponents are those who try, through force or criticism, to prevent other people from behaving in a particular way while secretly behaving in precisely that way themselves. We should not be surprised, therefore, whenever we find that rule makers and enforcers are in fact the people who most indulge in behavior they seek to prevent in others.

Id.; see also Eskridge, *supra* note 391, at 627-28 (relating evidence that the military depends on homoerotic expression between heterosexual men, but must keep its reliance hidden); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 576 (1991) ("In the process of self-definition we [males] define the Other—the feminine, the homosexual—for the purpose of repressing the Other in ourselves.").

394. See Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 868, 946 n.215 (1996) ("Gang rape effectuates male bonding for a variety of purposes, [among these] the expression of otherwise repressed homoerotic affinities.") (internal citations omitted); L.M. Sixel, *Wrongs Without Remedy: Federal Laws Offer Little Relief from Same-Sex Harassment*, HOUSTON CHRON., Sept. 17, 1995, at 1 (describing hazing-like ritual in which a new worker's pants are forcibly removed by other employees who then rub grease around the worker's genitals and buttocks).

395. Eskridge, *supra* note 391, at 629 ("If the military publicly acknowledged the gay presence in this male subculture, the shower room camaraderie might shatter, and the boot camp game might lose its zip.").

396. See BAKER, *supra* note 388, at 247 ("Inevitably, some homophobes are also hypocrites, displaying public homophobia while secretly behaving bisexually."); Henry E. Adams et al., *Is Homophobia Associated with Homosexual Arousal?*, 105 J. ABNORMAL PSYCH. 440, 444 (1996) (presenting evidence that homophobia in males is a product of shame over homosexual arousal); Halley, *supra* note 389, at 946.

It is a truism in the gay and lesbian communities that such self-identified heterosexuals, in order to maintain their counterfactual denial of their own homoerotic experience, zealously foment the very stigma they are so concerned to avoid. They, more than any other group, are concerned that the line between gay and straight be rigid, immovable, bright.

Id.; see also *Polly v. Houston Lighting & Power Co.*, 803 F. Supp. 1, 5 (S.D. Tex. 1992) (stating that the harassment was not "demanding sexual favors, rather the acts that were committed were done with jealous or malicious animus").

norms.³⁹⁷ Presumptive heterosexuality in sexual harassment cases may be taken advantage of not only by self-styled heterosexual defendants but by homosexual individuals exhibiting conformity with such gender norms;³⁹⁸ in such cases, conduct Title VII should proscribe will not be captured. Notably, although the presumption of heterosexuality operates in courts that recognize same-sex sexual harassment claims, it also likely drove the reasoning of courts that refused altogether to recognize claims of same-sex sexual harassment.³⁹⁹

Albeit fatal to victims of same-sex sexual harassment whose claims are dismissed as alleging mere horseplay, presumptive heterosexuality allows claims of opposite-sex harassment to proceed unfettered by judicial scrutiny of causation.⁴⁰⁰ The reason for this is unclear, especially in a court system eager to issue summary judgment in employment discrimination cases in the interest of judicial economy. These same courts scrutinize with great care the causation element in same-sex cases and express concern that without such caution, mere heterosexual horseplay will be actionable.⁴⁰¹ The reason for this is equally unclear, given that "[s]exual harassment law already provides the means for distinguishing between isolated instances of non-severe harassment and the truly hostile working environment."⁴⁰²

397. Many times anti-homosexual discrimination is more about reaffirming one's own heterosexuality than it is about any malice toward homosexuals. See Halley, *supra* note 389, at 955-56.

398. See MURRAY, *supra* note 361, at 20.

To encourage heterosexuality and to deter exploration of and identification with homosexuality, many societies reward those who engage in homosexual behavior without appearing gender-deviant to remain invisible Masculine gay men and feminine lesbians have been and continue to be rewarded for not announcing homosexual desires and behavior publicly—or even recognizing it in themselves.

Id.; see also *id.* at 250-51 (arguing society's equation of homosexuality and effeminacy is reinforced by masculine-appearing men passing as straight).

399. See, e.g., *Polly*, 803 F. Supp. at 4-5. In this case, the perpetrator exposed his genitalia to the victim, grabbed and squeezed the victim's genitalia, pinched his buttocks and chest, and forced a broom handle against his anus. See *id.* at 4. The court concluded that this physical abuse exceeded mere horseplay but granted summary judgment on the ground that Title VII's "ordinary and historical" meaning did not encompass this type of claim. See *id.* at 6.

400. It should be noted, however, that courts routinely issue summary judgment against plaintiffs in opposite-sex cases on the basis of the conduct's not being severe or pervasive or on the basis of the employer's swift response to complaints of sexual harassment. See *Olson v. City of Lakeville*, No. C3-97-390, 1997 WL 561254 (Minn. Ct. App. Sept. 9, 1997) (affirming summary judgment for employer where same-sex harassment was neither severe nor pervasive); OMILIAN & KAMP, *supra* note 30, § 22.09 (describing pattern of dismissing cases derived from collection of cases); see also Schultz, *supra* note 35, at 1721 (suggesting that courts dismiss claims for lack of severity and pervasiveness because they look only at sexual conduct).

401. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir.) (contending that dismissal of same-sex sexual harassment claim is compelled by causation language requiring that discrimination be "because of" the plaintiff's sex; to extend the statute to include this conduct would broaden unmanageably its protections to "matters of sex"), *cert. denied*, 117 S. Ct. 72 (1996).

402. *Doe v. City of Belleville*, 119 F.3d 563, 575 (7th Cir. 1997), *vacated*, 118 S. Ct. 1183

Francisco Valdes would see the discrepancies wrought by presumptive heterosexuality in sexual harassment law as the product of the androsexism and heterosexism⁴⁰³ that underlie the current "analytically misguided and practically impotent anti-discrimination status quo in contemporary law."⁴⁰⁴ For Valdes, the current state of the law devalues relations deemed lacking in instrumental potential.⁴⁰⁵ To counteract this devaluation, he encourages women and sexual minorities to strive for legal recognition and protection of these relations.⁴⁰⁶ In contrast to Grose and Spitko, who argue for exclusion of same-sex sexual harassment claims from the ambit of Title VII,⁴⁰⁷ Valdes calls for "informed and principled applications of existing rules . . . in order to cohere law with reality in a way that actually helps to check the full gamut of sex/gender discrimination."⁴⁰⁸

This coherence of law and reality will not occur absent recognition of same-sex sexual harassment claims. The courts must go farther in their movement toward a focus on sexual conduct,⁴⁰⁹ and must not only abandon inquiries into the sexual orientation of the victim and the perpetrator in such cases, as some commentators have argued, but must abandon presumptive heterosexuality as well. Presumptive heterosexuality obstructs the streamlining and uniformity that is desirable in employment discrimination jurisprudence by establishing

(1998).

403. Androsexism refers to the form of sexism biased in favor of the male; heterosexism is biased in favor of cross-sex relationships or heterosexuality. See Valdes, *Hetero-Patriarchy*, *supra* note 375, at 162 n.4. The combination of these two forms of sexism is defined as the privileging of masculine, heterosexual men and the subordination of all other sex/gender types under hetero-patriarchy. See *id.* at 169-70.

[T]he ideology of compulsory hetero-patriarchy rests on four key tenets: the bifurcation of personhood into "male" and "female" components under the active/passive paradigm; the polarization of these male/female sex/gender ideals into mutually exclusive, or even opposing, identity composites; the penalization of gender atypicality or transitivity; and the devaluation of persons who are feminized. The combined impact of these four tenets is compulsory hetero-patriarchy.

Id. at 170.

404. Valdes, *Hetero-Patriarchy*, *supra* note 375, at 169.

405. See *id.* at 164 (noting that this results in devaluation of the social and legal values of human desire and intimacy).

406. See *id.* at 209 (asserting that reevaluating desire, pleasure and intimacy as important parts of human life should be part of the search for liberation undertaken by women and sexual minorities).

407. See *supra* notes 257-78 and accompanying text.

408. Valdes, *Queers*, *supra* note 264, at 304.

409. See Cullen P. Cowley, *Same-Gender Harassment and Homosexuality in Title VII Sexual Harassment Litigation*, 50 WASH. U. J. URB. & CONTEMP. L. 443, 460 (1996) (advocating that courts ignore the sexual orientation of the harasser and focus on the harasser's conduct and the victim's gender); Christopher W. Deering, Comment, *Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because Of" Sex*, 27 CUMB. L. REV. 231, 295-96 (1996) (arguing that courts should not focus on the harasser's sexual orientation in determining whether a plaintiff was harassed because of his or her sex, but should focus instead on the conduct of the harasser).

analytical distinctions based on the genders of the parties that are ultimately unjustified under a reasoned interpretation of Title VII.⁴¹⁰ Moreover, a requirement that a victim of harassment allege and prove the sexual orientation of her harasser imposes a burden of proof not anticipated by case law interpreting the statute.⁴¹¹ Furthermore, it diverts the focus of the inquiry from the effect of the conduct on the plaintiff's working environment to considerations, nebulous at best, of the intent and motivation of the perpetrator.⁴¹² Sexual harassment jurisprudence to date has not exhibited a concern for the subjectivity of the perpetrator in such cases,⁴¹³ and no convincing argument has been advanced for doing so now.

CONCLUSION

Now that the Supreme Court has recognized same-sex harassment claims brought under Title VII of the Civil Rights Act of 1964, much work remains to be done in the courts regarding the disagreement over how such claims should be evaluated. In evaluating the causation prong of the test for sexual harassment, some courts have ruled that a showing by the plaintiff that the perpetrator is homosexual is crucial for a same-sex case to escape dismissal, but other courts have disapproved of this approach and have focused squarely on whether sexual attraction can be inferred from the conduct or whether the victim would have been treated similarly had he or she been of the opposite sex.

Among lower courts, there is a movement at present toward labeling the conduct in sexual harassment cases as sexual or non-sexual, depending on its content. Conduct permitting inferences of sexual or romantic interest has been deemed sexual in nature, while other

410. See *Doe v. City of Belleville*, 119 F.3d 563, 587 (7th Cir. 1997) (asserting that it would trouble court to give assumptions of heterosexuality the weight of a presumption), *vacated*, 118 S. Ct. 1183 (1998).

411. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1198 (4th Cir.) (recognizing that evidence of sexual orientation may be relevant to the case, but requiring it as an element of plaintiff's case would overburden the statute), *cert. denied*, 117 S. Ct. 72 (1996).

412. See *id.* (stating that requiring evidence of sexual orientation would lead to difficult and elusive pursuit for the harasser's "true" sexual preferences).

413. See *Block*, *supra* note 45, at 252 (sexual harassment must be judged by the perspective of a reasonable person in the plaintiff's situation rather than by the motives of the harasser); *Locke*, *supra* note 45, at 400 (inappropriateness of relying on harasser's motives in determining whether sexual harassment has occurred); see also *Andrews v. City of Phila.*, 895 F.2d 1469, 1483 (3d Cir. 1990); *id.* at 401 n.95 (attributing significance to absence from EEOC guidelines of mention of harasser's motives as "necessary precondition to a finding of harassment" (citing 29 C.F.R. § 1604.11(a) (1994))); *Lisett v. University of P.R.*, 864 F.2d 881, 895 (1st Cir. 1988); *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 561 (1st Cir. 1986). In disparate treatment cases, however, intent is important. See *Henson v. City of Dundee*, 682 F.2d 897, 905 n.11 (11th Cir. 1982); *Schultz*, *supra* note 35, at 1716 n.151.

conduct has been deemed mere horseplay—even when it has displayed an arguably homoerotic cast—ostensibly due to the presumed heterosexuality of the parties.

Similarly, commentary on same-sex sexual harassment reflects disagreement among scholars over how same-sex sexual harassment claims should be evaluated. Some scholars advance the view that same-sex claims, according to a faithful reading of Title VII should be evaluated according to the same criteria used in opposite-sex cases. Other scholars, describing what they see as the likely adverse impact of same-sex claims on the civil rights of gays and lesbians, state that same-sex sexual harassment claims should not be evaluated at all.

In this vein, Carolyn Grose has argued that litigation of same-sex claims will perpetuate heterosexist regulation of homosexual expression in the workplace in ways that will subordinate gays and lesbians. Professor Gary Spitko has expressed his fear that the higher damages awards juries issue in same-sex sexual harassment cases, as compared to opposite-sex cases, will inspire employers to discriminate against gays. Both Grose and Spitko believe that the harassing acts of gays and lesbians will be sanctioned disproportionately to analogous acts of heterosexuals. They therefore argue that plaintiffs must not bring same-sex sexual harassment claims under Title VII until the legislature or the judiciary prohibits employment discrimination based on sexual orientation.

Both approaches to the question fail to recognize certain salutary effects that will arise from the Supreme Court's recognition of same-sex claims. On the one hand, recognition that same-sex sexual harassment claims are consistent with Title VII's purposes does not address the current disjunction in the courts between the analysis of opposite-sex claims and the analysis of same-sex claims. Specifically, this position ignores that the application of presumptive heterosexuality to opposite-sex cases alleviates the need for courts to evaluate the causation prong of a sexual harassment claim, while its application in same-sex cases renders the causation prong the object of much attention and analysis. On the other hand, commentators pessimistic about same-sex claims base their positions on unsupportable premises, ultimately exaggerating the dangers same-sex claims pose to gays and lesbians in the workplace and failing to recognize the more serious dangers created and opportunities lost did these claims not exist.

In attempting to cohere sexual harassment analysis and the situations to which that analysis is applied, courts must first address the most patent disjunction between the inquiry in opposite-sex cases

and the inquiry in same-sex cases. Whereas presumptive heterosexuality is employed in most opposite-sex cases to render analysis of the causation element unnecessary, in same-sex cases, causation is an issue with very nearly a life of its own. In a judicial system desirous of benefiting from the streamlining offered by summary dismissals and judgments, this disjunction is troubling and speaks to the eagerness of courts to avail themselves of more ways to dispose of same-sex disputes than are used to dispose of opposite-sex disputes. Particularly troubling is the conclusion in certain cases that conduct that is arguably the product of homoerotic attraction is merely heterosexual horseplay. Given that courts making this assessment offer no bright line by which to distinguish between heterosexual horseplay and sexual conduct, the air of certainty with which courts make these determinations is not only curious but risks denying a class of plaintiffs Title VII protection on the tenuous basis that courts deem heterosexuals incapable of homosexual expression.

In an effort to capture all cases of sexual harassment as sex discrimination, courts must dispose of the presumption of heterosexuality in both opposite-sex and same-sex cases. A full analysis of the causation prong should occur as a matter of course in all sexual harassment cases and should focus on defining the conduct in a sexual harassment case as sexual or non-sexual. In effecting this evaluation, due regard must be given to instances where the sexually harassing conduct has been aimed at the victim's genitals, where the victim has been subjected to willful exposure of the harasser's genitals or to violent acts of simulated sexual activity and to other such circumstances which are difficult, if not impossible, to classify as non-sexual.

It is not yet time to conclude that the law can have no effect on cohering law with reality in the domain of sexual harassment law. For gays and lesbians, given that presumptive heterosexuality in sexual harassment jurisprudence trivializes or altogether ignores homosexual subjectivity and desire, same-sex sexual harassment claims may seem an unattractive avenue for avoiding further subordination by heteropatriarchy. Litigation of same-sex sexual harassment claims, though, presents greater benefits than does failure to litigate them. Litigation of these claims is, for example, more likely to lead to prohibition of sexual orientation discrimination than if these claims did not exist, since same-sex sexual harassment cases are finally making clear that heterosexuality is not a protected characteristic under Title VII. Further, an alignment of the analysis in opposite-sex claims with the focus on sexual conduct analysis marking recent same-sex sexual harassment decisions in the lower courts will offer the courts insight

into the wide spectrum of human sexual conduct which has been obscured by resort to presumptive heterosexuality.

In forging an encompassing jurisprudence more reflective of the goals of Title VII, an obvious first step is for the courts to view same-sex sexual harassment claims in the same way they do opposite-sex claims. The courts must harmonize the analysis in sexual harassment cases generally by discarding reliance on presumptions of heterosexuality or homosexuality and focusing squarely on the conduct in such cases and whether such conduct can reasonably be characterized as sexual. The threshold in this inquiry should be low, in order to allow juries to evaluate the conduct with due regard to the circumstances surrounding it. Judicial economy will not be sacrificed by this approach; the causation element will receive increased scrutiny in cases of opposite-sex harassment, and both opposite-sex and same-sex harassment cases will be subject to dismissal based on the isolated or genuinely trivial nature of the conduct or an employer's prompt response to its knowledge of harassment. Such an alignment of the analysis of sexual harassment claims should be a reasonable and just application of *Oncale's* recognition of same-sex sexual harassment under Title VII.

