March 2012

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THE EVOLUTION OF SAME-SEX SEXUAL HARASSMENT LAW: A CRITICAL EXAMINATION OF THE LATEST DEVELOPMENTS IN WORKPLACE SEXUAL HARASSMENT LITIGATION

FRANCIS ACHAMPONG*

I. INTRODUCTION

The law of sexual harassment has proved to be one of the fastest evolving areas of law in the United States over the past two decades.1 Sexual harassment was not recognized as a legitimate cause of action until the 1970s,2 even though Title VII of the Civil Rights Act of 1964 provided that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."3

In 1976, sexual harassment was finally recognized as a valid cause of action under Title VII in cases involving economic loss or tangible job-related detriment resulting from workplace sexual harassment.4 A cause of action was also subsequently recognized

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4 See Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd and remanded on other grounds, 587 F.2d 1240 (D.C. Cir. 1978) (holding that a male supervisor who had retaliated against a female worker for denying his sexual advances was liable
in cases where, although there was no job detriment, a hostile working environment had resulted from sexual harassment. As a result, the term "sexual harassment" began to appear in American nomenclature in 1981.\textsuperscript{5} District courts resisted the cognizability of recognizing sexual harassment suits under Title VII fearing that the cases would lead down a "slippery slope."\textsuperscript{6} Alternatively, some courts feared that recognition of a cause of action for sexual harassment would encourage federal lawsuits\textsuperscript{7} and force the courts to become interpreters of actions in the workplace,\textsuperscript{8} thereby creating a demand for 4,000 federal judges instead of 400.\textsuperscript{9}

In 1981, the Equal Employment Opportunity Commission ("EEOC"), which had long recognized sexual harassment as a form of sex discrimination under Title VII, amended its Guidelines on Discrimination Because of Sex ("Guidelines") to add a section expressly dealing with sexual harassment.\textsuperscript{10} Section

\textsuperscript{5} See Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981) (recognizing a hostile environment as a violation of Title VII, and holding the emotional and psychological work environment to constitute "conditions of employment"); \textit{see also} Sharon L. Oswald & William L. Woerner, \textit{Sexual Harassment in the Workplace: A View Through the Eyes of the Courts}, 41 LAB. L.J. 786, 788 (1990) (noting that the use of the term "sexual harassment" began in 1981).

\textsuperscript{6} See B. Glenn George, \textit{The Back Door: Legitimizing Sexual Harassment Claims}, 73 B.U. L. REV. 1, 11 (1993) (noting that sexual harassment behaviors were not defined and therefore courts feared that they would be inundated with suits due to this ambiguity).

\textsuperscript{7} See Corne v. Baush & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (stating that liability under Title VII in the sexual harassment context would increase the potential for federal lawsuits whenever two employees made sexual or amorous comments or actions toward one another), \textit{vacated without op.}, 562 F.2d 55 (9th Cir. 1977).

\textsuperscript{8} See Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) (realizing the difficulty that may arise in sexual harassment suits because subtle actions and flirtations could be considered violations, and noting that these actions are usually part of everyday interactions between males and females), \textit{rev'd}, 600 F.2d 211 (9th Cir. 1979).

\textsuperscript{9} See Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 557 (D.N.J. 1976) (stressing that if sexual harassment was recognized in the employment context, any social interaction could lead to a claim if problems in that relationship arose), \textit{rev'd}, 568 F.2d 1044 (3d Cir. 1977).

\textsuperscript{10} \textit{See} EEOC Compl. Man. (BNA) § 615.2(a) (1998).
1604.11(a) of the Guidelines defined sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (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 working environment.11

This Guideline recognized two forms of workplace sexual harassment: quid pro quo,12 and hostile environment sexual harassment.13

In 1986, the United States Supreme Court, in Meritor Savings Bank v. Vinson,14 recognized a "hostile environment" as a valid cause of action under Title VII.15 The Meritor Savings Bank court held that a plaintiff may recover for a hostile environment if she, or he,16 shows that unwelcome sexual conduct based on gender was "sufficiently severe or pervasive 'to alter the

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12 See 29 C.F.R. § 1604.11(a)(1)-(2) (describing quid pro quo sexual harassment); see also Heyne v. Caruso, 69 F.3d 1475, 1478 (9th Cir. 1995) (noting that quid pro quo sexual harassment is established when the complainant shows "that an individual 'explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct' ") (quoting Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994)).
13 See 29 C.F.R. § 1604.11(a)(3) (describing hostile environment sexual harassment); see also Gallant v. Board of Trustees, 997 F. Supp. 1231, 1234 (N.D. Cal. 1998) (holding that in a hostile environment requests and conduct of a sexual nature are unwelcome and severe).
15 See id. at 73. The district court had ruled against the plaintiff because it found that her relationship with her supervisor, with whom she had slept on about 40 to 50 occasions for fear of losing her job, was voluntary. See id. at 60-61. The Supreme Court held that the issue was not the voluntariness of the relationship, but whether the supervisors conduct was welcome. See id. at 68.
16 The prohibition against sex discrimination protects "any individual." See 42 U.S.C. § 2000e-(2)(a) (1994). The EEOC states that "[a] man as well as a woman may be the victim of sexual harassment, and a woman as well as a man may be the harasser." EEOC Compl. Man. (BNA) § 615.2(b)(1) (1998); see also Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 445 (6th Cir. 1997) (noting that Title VII's prohibition applies "equally to men and women") (relying on Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983)).
conditions of... employment and create an abusive working environment.'

In its Guidelines, the EEOC also stated:

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

In accordance with this Guideline, the law of workplace sexual harassment evolved in the courts to encompass third party harassment. Two variants of third party harassment were recognized: (1) where the employer's own job requirements, such as a dress code, lead to sexual harassment by a third party; and (2) where independently of any employer policy, the employer knows, or should know of third party harassment of employees, yet takes no remedial action that is within its control.

The first variant was recognized in *EEOC v. Sage Realty Corp.*, where the employer required its female lobby attendants...
to wear a uniform,\textsuperscript{22} making the plaintiff the target of sexual propositions as a result of the sexually revealing nature of the uniform.\textsuperscript{23} The employer failed to take remedial action despite the employee's complaints and ultimately fired her.\textsuperscript{24} The court held that the employer violated Title VII when it fired the plaintiff for refusing to wear the uniform.\textsuperscript{25} The plaintiff was awarded back pay for wrongful discharge.\textsuperscript{26}

The second variant was recognized in \textit{Magnuson v. Peak Technical Services},\textsuperscript{27} where the court was faced with the issue of whether a court could find an employer liable for sexual harassment by non-employees under Title VII. The court ultimately held that an employer could be liable if it had knowledge of the harassment and, nonetheless, failed to take remedial action.\textsuperscript{28}

The next significant stage in the evolution of workplace sexual harassment law was the enactment of the Civil Rights Act of 1991,\textsuperscript{29} which extended the protections of Title VII of the Civil Rights Act of 1964\textsuperscript{30} to include previously exempt federal employees, such as presidential appointees and employees of the Sen-

\textsuperscript{22} See id. at 604.
\textsuperscript{23} See id. at 605.
\textsuperscript{24} See id. at 607.
\textsuperscript{25} See id. at 607–08.
\textsuperscript{26} See id. at 613; see also Marentette v. Michigan Host, Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980) (stating “that a sexually provocative dress code imposed as a condition of employment which subjects persons to sexual harassment could well violate the true spirit and the literal language of Title VII”). Furthermore, the EEOC's Compliance Manual on grooming standards states that merely requiring females to “wear sexually provocative uniforms” is evidence of sexual harassment in some cases. EEOC Compl. Man. (BNA) § 619.4(a) (1998).
\textsuperscript{28} See id. at 513. It denied the defendant's motion for summary judgment. See id. at 514. A decade earlier in an administrative decision, the EEOC found an employer, who owned a restaurant, liable for sexual harassment of an employee by a customer who was a close friend of the owner. The owner had failed to take corrective action despite the employee's complaints, and eventually fired her for threatening legal action. See id. at 513. See generally Francis Achampong, Third Party Harassment and Other Significant Recent Developments in Sexual Harassment Law: A Discussion of the Latest Developments in Workplace Sexual Harassment Litigation, 28 SUFFOLK U. L. REV. 631 (1994) (discussing sexual harassment in the workplace and liability for the employer where knowledge exists or should exist and no action is subsequently taken by the employer).
Not only did it widen the scope of protected employees, it also expanded the existing remedies under Title VII, ranging from injunctive relief (including reinstatement, back pay, lost benefits, attorney's fees, certain litigation costs, and interest) to compensatory damages for intentional discrimination (including damages for emotional pain, suffering, mental anguish, and loss of enjoyment of life), and punitive damages in cases where the employer engaged in discrimination which was malicious or recklessly indifferent to the employee's civil rights. The amount of both compensatory and punitive damages cannot exceed (1) $50,000 for employers with 15 to 100 employees; (2) $100,000 for employer with 101 to 200 employees; (3) $200,000 for employers with 201 to 500 employees; and (4) $300,000 for employers with more than 500 employees.

The 1991 Act gave a plaintiff suing for damages the right to a jury trial and expert fees. In mixed motives cases where the employer would have made the same decision absent the discriminatory factors, the plaintiff can only recover declaratory and injunctive relief, and attorney's fees and costs, but not damages, reinstatement, hiring, back pay, or promotion.

The next major development was the acceptance by courts that a single event could result in a hostile environment if serious enough. In King v. Board of Regents of the University of Wisconsin System, the Seventh Circuit accepted the possibility that one event could result in a hostile environment. Then in Barrett v. Omaha National Bank, where the harasser touched the

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32 For example, members of the staff of elected state officials, persons on their policy making staff, or advisers who advise elected state officials on the exercise of their official powers. See 2 U.S.C. § 1220 (1994).
35 See id.
37 See id.
39 898 F.2d 533, 537 (7th Cir. 1990) (noting that although a single act may be enough to create a hostile work environment, the strength of the claim is affected by the number and intensity of the incidents).
40 584 F. Supp. 22, 30 (D. Neb. 1983) (holding that one incident of offensive
plaintiff in an offensive manner while the plaintiff was “inside a vehicle from which there was no escape,” the court found the incident to amount to actionable harassment. The EEOC later made it clear that a single, unusually severe incident of harassment can create an abusive working environment, especially where the harassment involves physical conduct.41

The next major developments in the continuing evolution of the law came in 1993, when the Supreme Court had occasion to issue its second sexual harassment decision in *Harris v. Forklift Systems, Inc.*42 The court found that the district court had applied the wrong standard by requiring sexual harassment to affect the plaintiff’s psychological well-being.43 Writing for the court, Justice O’Connor said that:

Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.44

The elimination of any requirement of psychological harm eased a plaintiff’s ability to establish a prima facie case in circuits that heretofore had required proof of psychological harm, emotional trauma, anxiety, or psychological debilitation.45

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41 *See EEOC, Policy Guidance on Current Issues of Sexual Harassment, 3 EEOC Compl. Man. (BNA), N:4031, N:4046 (Mar. 19, 1990).*

42 *510 U.S. 17 (1993).*

43 *See id. at 22.*

44 *Id.*

45 *See generally Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (requiring discrimination to detrimentally affect the plaintiff); Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (requiring harassment to significantly affect the plaintiff’s psychological well-being), *vacated in part on reh’g, 900 F.2d 27 (4th Cir. 1990); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987) (finding that the Supreme Court’s requirement of an “‘abusive working environment’... may be satisfied by a showing” of psychological harm) (citations omitted); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619 (6th Cir. 1986) (requiring sexual harassment to seriously affect the plaintiff’s psychological well-being); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 214 (7th Cir. 1986) (requiring the harassment to result in psychological debilitation); Downes v. FAA, 775 F.2d 288, 292 (Fed. Cir. 1985) (requiring that conduct “be sufficiently severe and persistent to affect seriously the psychological well-being of an employee”) (citation omitted).*
The *Harris* decision also adopted a two-pronged perspective for viewing a hostile environment, requiring both that the victim subjectively view the work environment as abusive, and that a reasonable person also find it objectively abusive. This replaced the various tests employed in various circuits for determining the existence of a hostile environment.

Finally, the issue of same-sex harassment became the next pressing issue in the evolution of workplace sexual harassment law, to the point that numerous courts confronted either the issue or made declarations in dicta on the cognizability of same-sex sexual harassment cases under Title VII. In 1995 alone, many district courts considered the issue, with the majority accepting the legitimacy of same-sex sexual harassment as a valid Title VII cause of action.

The purpose of this paper is to critically examine the issue of same-sex sexual harassment, the Supreme Court's resolution of the issue in its recent decision in *Oncale v. Sundowner Offshore Services, Inc.*, and the potential impact of the interplay between the Supreme Court's decision and the other major developments outlined above on future litigation and employer liability for workplace sexual harassment.

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46 See 510 U.S. at 21–22.

47 Some courts have used a "reasonable person" test as in *Radthe v. Everett*, 501 N.W.2d 155, 166 (Mich. 1993); some have used a "reasonable woman" standard as in *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); some have used a reasonable person of the same sex standard, as in *Yates v. Avco Corp.*, 819 F.2d 630, 636–37 (6th Cir. 1987); and others used variations of a two-pronged standard. See generally *Andrews*, 895 F.2d at 1482 (requiring the harassment to detrimentally affect the plaintiff as well as a reasonable person of the same sex); *Paroline*, 879 F.2d at 105 (requiring the harassment to affect both the plaintiff and a reasonable person). See e.g., *Achampong, supra* note 1, at 315–18 (discussing the potential impact of the adoption of this two-pronged perspective).


II. THE EVOLUTION OF SAME-SEX SEXUAL HARASSMENT LAW: THE POSITION BEFORE ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.

A. Title VII's Prohibition Against Sex Discrimination and its Legislative History

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Title VII makes it unlawful to discriminate against an individual in terms of compensation, terms, conditions, or privileges of employment, because of their race, color, religion, sex, or national origin. Sexual harassment is a form of sex discrimination and, therefore, a violation of Title VII.

Title VII's legislative history shows that the prohibition against sex discrimination was added by opponents of the bill in a last-ditch effort to block the bill from becoming law. The bill, however, passed with the amendment. The legislative history is silent on the issue as to whether "sex" discrimination includes "same-sex" discrimination and, thus, sheds little or no light on this issue. This has led courts that have considered the issue to lean in different directions.

B. The EEOC's Position on Same-Sex Sexual Harassment

According to the EEOC:

A finding of sexual harassment does not depend on the existence of any one given set of facts. Sexual harassment can occur in a wide variety of circumstances and encompass many variables. Although the most widely recognized fact pattern is that in which a male supervisor sexually harasses a female employee, this form of harassment is not the only one recognized.

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54 Compare Fredette v. BVP Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997) (finding nothing in the legislative history that expressly excludes "same-sex harassment claims from the purview of Title VII"), cert. denied, 118 S. Ct. 1184 (1998), with Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 145 (4th Cir. 1996) (Murnaghan, J., dissenting) (stating that interpreting the "because of . . . sex" language in Title VII to prohibit same-sex harassment is to stretch the language of Title VII).
by the EEOC. The Commission’s view of sexual harassment includes, but is not limited to, the following considerations:

(1) A man as well as a woman may be the victim of sexual harassment, and a woman as well as a man may be the harasser.

(3) 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.55

The EEOC, in an example illustrating its position, states that:

If a male supervisor of male and female employees makes unwelcome sexual advances toward a male employee because the employee is male but does not make similar advances toward female employees, then the male supervisor’s conduct may constitute sexual harassment since the disparate treatment is based on the male employee’s sex.56

The EEOC makes it clear that if the harassment by a male supervisor of a male employee is because of the male employee’s homosexuality, then the harassment is not based on the employee’s gender, but on his sexual preference, and is therefore not sexual harassment.57

In Hopkins v. Baltimore Gas & Electric Co.,58 the Fourth Circuit Court of Appeals stated that “[a]lthough the courts are not bound by the EEOC’s interpretation of Title VII, it is nevertheless appropriate to consider the EEOC’s interpretation because of the EEOC’s charge to enforce the Act.”59 The EEOC’s definition of sexual harassment60 has been adopted by the courts, and its

55 2 EEOC Compl. Man. (BNA) § 615.2(b) (1998) (citation omitted).
56 Id.
57 See id.
58 77 F.3d 745 (4th Cir. 1996).
59 Id. at 750 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).
60 See 29 C.F.R. § 1604.11(a) (1998).
C. Judicial Attitudes Toward Same-Sex Sexual Harassment Under Title VII

There was a split of authority amongst the federal circuit courts and the district courts that had addressed the issue of same-sex sexual harassment. One court referred to the lower federal courts considering the issue as "hopelessly divided." This section undertakes an analysis and critique of the various positions taken by the federal courts on the same-sex sexual harassment issue before its resolution by the Supreme Court in Oncale v. Sundowner Offshore Services, Inc.

1. An Analysis and Critique of the Position of Circuits Accepting the Cognizability of All Same-Sex Harassment Claims

a. Quick v. Donaldson Co.

In Quick, the Eighth Circuit Court of Appeals accepted the actionability of all same-sex sexual harassment cases, regardless of the motivation for the harassment. In Quick, a hostile work environment resulted from two years of physical and verbal harassment of the plaintiff by co-workers. The harassment included approximately one hundred incidents of "bagging," which is the intentional grabbing and squeezing of another person's testicles. Quick complained to supervisors about the harassment but no remedial action was taken. Almost two years after the incidents began, the employer circulated a memo classifying bagging as harassment, at which point the bagging apparently

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63 McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 n.4 (4th Cir. 1996).


65 90 F.3d 1372 (8th Cir. 1996).

66 See id. at 1374.

67 Id.

68 See id. at 1375.
ended.\textsuperscript{69} As a result of the bagging and other physical and verbal harassment, "Quick obtained medical and psychological treatment."\textsuperscript{70}

A United States Magistrate held that there was no evidence that the employer had "an anti-male or predominantly female environment," or that the bagging was sexual in nature.\textsuperscript{71} It found the cause of the harassment to be "personal enmity or hooliganism," not Quick's sex.\textsuperscript{72}

On appeal, the Eighth Circuit agreed with the Supreme Court that "[n]either a man nor a woman is required to run a 'gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.'"\textsuperscript{73} In discussing the element of membership in a protected group in making out a prima facie case, it saw the term "sex" as meaning either "man" or "woman" and as "bar[ring] workplace sexual harassment against women because they are women and against men because they are men."\textsuperscript{74}

In discussing the element of unwelcome sexual harassment, the court said that "[t]he type of conduct that may constitute sexual harassment includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature... [but that] [t]he harassment need not be explicitly sexual in nature, though, nor have explicit sexual overtones."\textsuperscript{75} The court further stated that "[s]ince sexual harassment can occur in many forms, it may be evidenced by acts of physical aggression or violence and incidents of verbal abuse."\textsuperscript{76}

The court then discussed the "because of sex" requirement, finding that the key inquiry is "whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"\textsuperscript{77} It stated that "[t]he motive behind the discrimination is not at issue be-

\begin{itemize}
\item \textsuperscript{69} See \textit{id}.
\item \textsuperscript{70} \textit{Id}.
\item \textsuperscript{71} \textit{Id.} at 1376.
\item \textsuperscript{72} \textit{Id}.
\item \textsuperscript{73} \textit{Id.} at 1377 (quoting \textit{Meritor Sav. Bank v. Vinson}, 477 U.S. 57, 67 (1986)).
\item \textsuperscript{74} \textit{Id}.
\item \textsuperscript{75} \textit{Id.} (citations omitted).
\item \textsuperscript{76} \textit{Id}.
\item \textsuperscript{77} \textit{Id.} at 1378 (quoting \textit{Harris v. Forklift Systems, Inc.}, 510 U.S. 17, 25 (1993)).
\end{itemize}
cause 'an employer could never have a legitimate reason' for creating . . . a hostile work environment.'\textsuperscript{78}

The court rejected the district court's standard in purporting to limit protection to only disadvantaged or vulnerable groups, finding that Title VII "extends to all employees and prohibits disparate treatment of an individual, man or woman, based on that person's sex."\textsuperscript{79} The court held that "the district court . . . erred in requiring Quick to show evidence of an anti-male or predominantly female work environment."\textsuperscript{80}

The court also found that "the district court . . . erred in determining that the challenged conduct was not of a genuine sexual nature and therefore not sexual harassment . . . [because] neither [the] bagging nor the physical attacks expressed sexual interest."\textsuperscript{81} The court stated that a worker "need not be propositioned, touched offensively, or harassed by sexual innuendo' in order to have been sexually harassed,"\textsuperscript{82} and that "physical aggression, violence, or verbal abuse may amount to sexual harassment."\textsuperscript{83} It held the district court's finding that the "harassment was not gender-based because . . . the underlying motive was personal enmity or hooliganism" to be erroneous, holding the proper inquiry to be whether members of one sex are subjected to disadvantages, terms, or conditions of employment to which members of the other sex are not.\textsuperscript{84} The court found that the record contained no incidents of bagging females, thus raising a genuine issue as to whether the harassment was gender-based and reversed the award of summary judgment to the employer.\textsuperscript{85}

Dissenting, Judge Nangle stated "that the majority opinion sets a precedent for improperly expanding Title VII to cover any form of harassment experienced in the workplace."\textsuperscript{86} He did not

\textsuperscript{78} Id. (quoting Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994)).
\textsuperscript{79} Id. (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)).
\textsuperscript{80} Id. This requirement was first articulated by Judge Ann C. Williams in Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988), and adopted by the Fifth Circuit in Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994).
\textsuperscript{81} Quick, 90 F.3d at 1378-79.
\textsuperscript{82} Id. at 1379 (quoting Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964-65 (8th Cir. 1993)).
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} See id.
\textsuperscript{86} Id. at 1380.
believe that a cause of action existed under Title VII for the offending conduct, or that harassment of a heterosexual male by other male heterosexuals could create a hostile environment under Title VII, although reprehensible conduct may be involved.87

b. A Critique of Quick: Blurring the Line Between Sexual Harassment and Sex-Based Harassment

The Quick decision may be supported by the court's reading of Title VII and its legislative history, which contain nothing to suggest that its protections exclude same-sex harassment. It is further supported by its reliance on Harris's directive to inquire as to whether members of only one sex have been subjected to discrimination in order to determine the "because of sex" element in a sexual harassment claim. It appears, however, to go too far insofar as it purports to hold that "physical aggression, violence, or verbal abuse may amount to sexual harassment"88 without requiring that such conduct be of a sexual nature.89 The conduct, however, must be explicitly or implicitly sexual in order to constitute sexual harassment.

As previously discussed, the EEOC definition of sexual harassment recognizes two forms of sexual harassment: quid pro quo sexual harassment and hostile environment sexual harassment.90 Courts have incorporated the EEOC's definition of sexual harassment in fashioning the elements of a prima facie case in both types of sexual harassment.

In quid pro quo sexual harassment, the plaintiff must establish that he was a member of a protected group, that the unwelcome sexual conduct was based on sex, that employment conditions were affected by the victim's response, and that the employer was liable.91 In hostile environment sexual harassment, the victim must establish membership in a protected

87 See id. at 1380 (citing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195-96 (4th Cir. 1996)).
88 Id. at 1379.
89 See id. at 1377 (stating that the conduct need not be explicitly sexual nor have explicit sexual overtones to constitute sexual harassment).
90 See supra notes 12-13 and accompanying text.
91 See Henson v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982). The court distilled these elements from those of a prima facie case of disparate treatment as laid down in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See id. at 905 n.11.
group, unwelcome sexual conduct based on sex, and an effect on employment conditions.

The conduct complained of in a same-sex sexual harassment case must, therefore, clearly be of a sexual nature. Grabbing and squeezing another's testicles arguably constitutes "physical conduct of a sexual nature," and where the acts are so severe or pervasive as to result in a hostile environment, the legal definition of sexual harassment, has been met. Without sexual content, however, physical aggression, violence, or verbal abuse could not be accurately characterized as sexual harassment, even though it may qualify as sex-based harassment. The EEOC has stated that:

Sexual harassment is a form of sex discrimination in which the prohibited conduct is sexual in nature, not just sex-based. Additionally, the allegedly discriminatory conduct must fall within the definition of sexual harassment set forth in §1604.11(a) of the Guidelines. If the alleged discrimination does not meet one or more of the criteria in §1604.11(a), then it is not sexual harassment.

The EEOC makes clear that "[v]erbal conduct—no matter how offensive—which neither discriminates on the basis of sex nor is sexual in nature clearly cannot be sexual harassment." Also, physical conduct "must be of a sexual nature to constitute sexual harassment." Thus, the Quick court's statements as to what may constitute sexual harassment were too broad since they blur the line between sexual harassment and sex-based harassment of a non-sexual nature. Although sex-based harassment violates Title VII's prohibition of sex discrimination and is therefore actionable, it is nonetheless not accurate to characterize it as sexual harassment.

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92 Unwelcome sexual conduct has been defined as "sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature." Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619 (6th Cir. 1986).
93 See id. (requiring a showing of unreasonable interference with work performance); Henson, 682 F.2d at 904 (noting that the harassment "must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment").
95 EEOC Compl. Man. (BNA) § 615.6(a) (1998).
96 Id. at § 615.6(a).
97 Id. at § 615.6(a)(2).
In the same-sex context, harassment based on the perpetrator's perception that the victim does not measure up to their idea of what makes one a "male," a "man," or "masculine," or what makes one a "female," a "woman," or "feminine," as the case may be, ought to be seen as gender discrimination in line with the Supreme Court's decision in *Price Waterhouse v. Hopkins*,\(^9\) which outlawed gender stereotyping. If the conduct is of a sexual nature, then it is sexual harassment. If not, then it is sex-based harassment. Thus, as the *Quick* court correctly stated,\(^9\) the motive for the harassment, be it sexual desire or hatred, is irrelevant as long as the conduct is unwelcome conduct of a sexual nature that discriminates on the basis of sex.

Judge Nangle's dissenting opinion argued that where heterosexual males harass another heterosexual male (or where the conduct is female-on-female conduct), it is not because of the victim's sex.\(^{100}\) If the plaintiff, however, alleges that the harassment is because he or she does not measure up to the perpetrator's notions of masculinity or femininity, then that presents a factual question as to whether the conduct is based on sex. In that event, it would be inappropriate to preclude a jury from deciding whether there is a cause of action as Judge Nangle would.\(^{101}\)

2. An Analysis and Critique of the Position of Courts Rejecting the Cognizability of Same-Sex Sexual Harassment

a. *Garcia v. Elf Atochem North America*\(^{102}\)

The Fifth Circuit is the only circuit that outright rejected the cognizability of same-sex sexual harassment claims under Title VII. In *Garcia*, a male employee brought a Title VII action alleging sexual harassment by a male foreman. In reviewing the

\(^{9}\) 490 U.S. 228, 251 (1989).

\(^{99}\) See *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996).

\(^{100}\) *Id.* at 1380 (Nagle, J., dissenting) (citing with approval the decision in *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195–96 (4th Cir. 1996)).

\(^{101}\) See *id.* at 1381 (Nagle, J., dissenting) (stating that "[t]he fundamental difference between [his] dissent and the majority seems to be who should decide whether a cause of action lies for such conduct" and asserting that it was "a question of law for the court" to decide).

\(^{102}\) 28 F.3d 446 (5th Cir. 1994).
district court's grant of summary judgment to the employer, the Fifth Circuit held that the plaintiff did not have a cause of action under Title VII for alleged sexual assault by his supervisor. Citing an unpublished earlier opinion, the court held that "[h]arassment by a male supervisor against a male subordinate [did] not state a claim under Title VII even though the harassment ha[d] sexual overtones." The court stated that "what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also." The court further cited the district court's decision in Goluszek v. Smith, and implied that same-sex harassment was not gender discrimination. Other than its references to earlier authority, the Fifth Circuit offered no articulation of its position on same-sex sexual harassment.

b. Blake v. City of Laredo

The Fifth Circuit had occasion to revisit the issue of same-sex sexual harassment in Blake. The court, however, in another unpublished opinion, simply recognized Garcia as binding precedent on the issue of same-sex sexual harassment.

c. Oncale v. Sundowner Offshore Services, Inc.

In Oncale, the plaintiff alleged sexual harassment by his supervisor and co-workers in the form of threats of homosexual rape, restraining him and placing a penis on his neck and arm, and pushing a bar of soap into his anus. Oncale quit his job and brought suit alleging both quid pro quo and hostile environment sexual harassment. The district court relied on Garcia and awarded summary judgment to the employer. The court stated

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103 Id. at 451-52 (quoting Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993)) (alteration in original).
104 Id. at 452.
106 Garcia, 28 F.3d at 452.
107 58 F.3d 637 (5th Cir. 1995) (per curiam) (unpublished table decision).
108 See id.
109 83 F.3d 118 (5th Cir. 1996), overruled, 523 U.S. 75 (1998). The Supreme Court reversed the Fifth Circuit and held that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII." Oncale, 523 U.S. at 82.
110 See Oncale, 83 F.3d at 118–19.
111 See id. at 119.
that it was "'compelled to find that Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.'"\textsuperscript{112}

In examining the precedential value of \textit{Garcia}, the court concluded that one panel of the Fifth Circuit could not overrule a prior panel's decision even though the \textit{Garcia} analysis had been rejected by other jurisdictions. The court stated that only a decision by the court en banc or the Supreme Court could supersede a prior panel's decision.\textsuperscript{113} The court traced the history of same-sex jurisprudence in the Circuit to \textit{Giddens}, commenting that the holding of that case was unclear, but that it appears to have held "that male-on-male harassment with sexual overtones is not sex discrimination without a showing that [the] employer treated the plaintiff differently because of his sex."\textsuperscript{114} The court observed that "\textit{Garcia} . . . extended \textit{Giddens} to bar all same-sex sexual harassment claims," and that an earlier District Court decision in \textit{Goluszek v. Smith}\textsuperscript{115} was in accord with this holding.\textsuperscript{116} The court therefore saw \textit{Garcia} as binding precedent.

d. A Critique of \textit{Oncale}

The Fifth Circuit in \textit{Oncale} seems to have been saying that it is not clear why it held an anomalous position on the issue of same-sex harassment, but that its hands were tied by precedent, and only a full panel of the court or the Supreme Court could do anything about it. That put the Fifth Circuit's jurisprudence on the same-sex issue at the lowest end of the scale of reasoned decisions from the multiplicity of courts ruling on the issue. Further examination of the precedents cited by the court reveals, however, that the \textit{Goluszek} decision purported to articulate a reasoned basis for prohibiting same-sex claims under Title VII.

\textsuperscript{112} \textit{Id.} (citation omitted).
\textsuperscript{113} \textit{See id.} (citing Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991)).
\textsuperscript{114} \textit{Id.} at 120; \textit{see also} Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993) (per curiam) (unpublished table decision) (noting that same-sex sexual harassment is not a viable claim under Title VII because Title VII is intended to remedy gender-based discrimination).
\textsuperscript{115} 697 F. Supp. 1452 (N.D. Ill. 1988).
\textsuperscript{116} \textit{Oncale}, 83 F.3d at 120. \textit{See infra} notes 117–30 and accompanying text for a discussion of \textit{Goluszek v. Smith}. 
e. *Goluszek v. Smith*  

In *Goluszek*, the plaintiff alleged that he was sexually harassed by other male employees. Although the court noted that there was some evidence that the employer "reacted differently to female claims of sexual harassment than [to] male claims," the court found that the conduct of Goluszek's co-workers was not the type that Title VII was designed to protect. Judge Ann Williams reiterated the requirement that "the plaintiff must demonstrate that but for [his or her] sex the plaintiff would not have been the object of harassment," and held that "the defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII." "The discrimination Congress was concerned about... is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group." She continued to explain that "[t]he 'sexual harassment' that is actionable under Title VII 'is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.'" She accepted the possibility that the plaintiff may have been harassed because he is male, but ruled that the harassment was not of a kind that created an anti-male environment, and granted the defendant's motion for summary judgment.

f. A Critique of *Goluszek*

Although the imbalance of power has been proffered as a reason for the incidence of workplace sexual harassment, it is not a prerequisite thereto. To require that one be in an environment dominated by the other sex in order for sexual harassment to be cognizable would legitimize sexual harassment by a male of a female in a work environment that was predominantly female,

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118 See id. at 1453.
119 Id. at 1455–56.
120 Id. at 1456.
121 Id. (citing Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 HARV. L. REV. 1449, 1451–52 (1984)).
122 Id.
123 See id.
and where females held the highest positions. That, however, would clearly be contrary to Title VII's goal to ensure a workplace free of discrimination. It is also clear that sexual harassment does not have to be directed at a group to be cognizable. It may be directed at an individual who must be a member of a protected class. Both women and men are members of protected classes based on the simple fact of their gender. Thus sexual harassment of a female or a male because of their gender is actionable regardless of what gender dominates the workplace.\textsuperscript{125}

Goluszek has been criticized for relying on a law student note that neither explored Congressional intent nor advocated the theoretical model the court adopted.\textsuperscript{126} The opinion was further criticized for not reflecting the "current state of anti-discrimination jurisprudence."\textsuperscript{127}

Yet Goluszek was highly influential in leading many courts to hold same-sex sexual harassment to be outside the purview of Title VII.\textsuperscript{128} Thus, the court in Fredette v. BVP Management Associates\textsuperscript{129} noted that many cases rejecting same-sex harassment relied on Goluszek although the court found the rationale in Goluszek to be flawed inasmuch as it purported to lay down a restrictive rule requiring harassment to be in a workplace dominated by the opposite gender.\textsuperscript{130}

\textsuperscript{125} See EEOC Compl. Man. (BNA) § 615.2(b) (1998). The EEOC manual states that "[a] man as well as a woman may be the victim of sexual harassment." Id. at § 615.2(b)(1). The "crucial inquiry is whether the harasser treats a member or members of one sex differently from the members of the other sex." Id. at § 615.2(b)(3).


\textsuperscript{127} Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (pointing out that requiring the plaintiff to belong to a powerless and dominated group would defeat reverse discrimination suits under Title VII).


\textsuperscript{129} 112 F.3d 1503 (11th Cir. 1997), cert. denied, 118 S. Ct. 1184 (1998).

\textsuperscript{130} See id. at 1509.
3. An Analysis and Critique of the Position of Circuits Adopting a Middle-Ground Position on Same-Sex Sexual Harassment

While some circuits take one of two extremes in either accepting or rejecting the cognizability of all same-sex sexual harassment actions, other circuits chart a middle-ground position where same-sex sexual harassment is actionable, but not in every instance. This section discusses those courts that lay down the specific criteria that must be met in order for same-sex sexual harassment to be cognizable.

a. McWilliams v. Fairfax County Board of Supervisors

In McWilliams, a male plaintiff alleged sexual harassment and physical abuse by male supervisors and co-workers. The acts included another worker exposing his genitals to McWilliams, putting a broomstick to his anus, fondling him, putting a finger in his mouth to simulate an oral sex act, and offering him money for sex. No remedial action was taken in spite of his complaints to two supervisors. The plaintiff suffered emotional harm and left his employment on medical leave.

In a suit based on Title VII and other grounds, the district court granted the employer summary judgment on the ground that the employer had neither actual nor constructive knowledge of the harassment. The Fourth Circuit held on appeal that the more fundamental reason for denying the claim was "that such a claim does not lie where both the alleged harassers and the victim are heterosexuals of the same sex." The court noted that none of the claims alleged that any of the harassers were homosexual, even though one of them, Witsman, had fondled McWilliams, expressed love for him, and offered him money for

131 See Quick, 90 F.3d at 1379.
132 See Oncale v Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996), rev'd, 523 U.S. 75 (1998); Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994).
133 72 F.3d 1191 (4th Cir. 1996).
134 See id. at 1193.
135 See id. at 1193–94. McWilliams made complaints on three occasions of non-physical incidents involving co-workers. See id. at 1193.
136 See id. at 1194. When asked about his emotional state by a supervisor, he "replied that he was upset about his parents' divorce, a failed relationship with a woman, and a potential reduction in force" by his employer. Id.
137 See id.
138 Id. at 1195.
139 See id. at 1195.
The court emphasized that its holding was limited to heterosexual males in a hostile environment context, not cases of a homosexual harasser or victim or both, or quid pro quo sexual harassment of a male victim by a heterosexual male supervisor who prefers a woman for particular work. The court reserved decision on the issue as to whether same-sex harassment involving a homosexual would be cognizable under Title VII, observing that the courts were hopelessly divided on the issue, and that the Supreme Court had not yet addressed it.

The court stated that it did not believe that harassment of a heterosexual male by other heterosexual males, or "comparable female-on-female conduct," was harassment based on the victim's sex. The court reasoned that the conduct may be "because of" the victim's personality or conduct or the perpetrator's warped mentality "[but not specifically 'because of' the victim's sex."

In his dissent, Judge Michael did not believe that the plaintiff had to specifically allege and prove the perpetrators' homosexuality. He felt enough facts were alleged in the record to raise a factual issue as to whether the harassment was because of the plaintiff's sex.

b. A Critique of *McWilliams*'s Requirement of a Specific Allegation of Homosexuality

The dissent is a better reasoned opinion, since a jury could very well find that Witsman was harassing McWilliams "because of" McWilliams's sex due to Witsman's "sexual interest or desire" for him, without requiring a specific allegation of homosexuality in addition to the factual allegations in the record. Evidence of homosexuality would be relevant in a jury trial, although to require it to be alleged could be overly burdensome on the plaintiff, especially where the plaintiff is not sure of the motive for the

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140 See id. at 1193.
141 See id. at 1195 n.4.
142 See id.
143 Id. at 1195–96.
144 Id. at 1196.
145 See id. at 1198 (stating "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").
146 See id. at 1198–99.
147 Id. at 1198.
harassment. A plaintiff might not want to risk a defamation lawsuit for an untrue allegation regarding the harasser’s sexual orientation before discovery allows the plaintiff to ascertain the same through interrogatories or a deposition. The issue should be properly left to a jury in a case such as *McWilliams*.

c. A Critique of *McWilliams’s* Misapplication of the “But For” Test

The *McWilliams’s* majority felt that there “ought to be a law” prohibiting the behavior in this case, but did not believe Title VII was that law. The majority’s unnecessarily narrow reading of the “because of... sex” language of the statute denies legitimate claims of sexual harassment in the workplace. Thus, if the conduct is of a sexual nature, even though motivated, not by sexual attraction, but by a belief that the plaintiff does not measure up to the harassers’ perceptions of maleness, masculinity, or manhood, a claim for sexual harassment is still stated because the discrimination is still “but for” the victim’s sex. In *Price Waterhouse v. Hopkins*, the Supreme Court found employment practices which evaluate women based on gender stereotypes are discriminatory and prohibited by Title VII. Where the conduct is explicitly or implicitly devoid of sexual content, a claim for sex-based harassment may still be stated under Title VII.


In *Wrightson*, the Fourth Circuit had occasion to revisit the issue of same-sex sexual harassment in a case involving sexual harassment of a heterosexual male subordinate from an openly homosexual male supervisor and five other openly homosexual male co-workers. The harassment, which was in the presence of and within the knowledge of upper management, continued

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148 *Id.* at 1196.

149 It is still “verbal or physical conduct of a sexual nature” within the EEOC Guidelines. 29 C.F.R. § 1604.11(a) (1998).

150 490 U.S. 228, 250 (1989).


152 99 F.3d 138 (4th Cir. 1996).

153 *See id.* at 139. Wrightson does not allege that female and homosexual males were not harassed by the homosexual employees. *See id.*
despite Wrightson's complaints to management. The supervisor sexually harassed the plaintiff by pressuring him to have homosexual sex, graphically describing homosexual activity, and touching Wrightson in "sexually provocative ways." Although the manager and assistant manager warned the harassers that their conduct violated federal law, no formal action was ever taken.

The district court relied on Garcia's holding that Title VII did not recognize same-sex sexual harassment in dismissing Wrightson's suit. On appeal, the Fourth Circuit noted that in McWilliams it had "expressly reserved the question of whether Title VII prohibits same-sex 'hostile work environment' harassment where the perpetrator of the harassment is homosexual." The court "squarely address[ed] this issue, and h[e]ld that a claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual."

The Wrightson court, unlike the trial court, found that the statute did not require that the harasser and the victim be of different sexes for the harassment to be cognizable under Title VII. The court reasoned that the statute was gender neutral and determined that it should be applied in a neutral manner.

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154 See id.
155 Id. at 139–40. Three other heterosexual male employees were similarly harassed by Howard. See id. at 140. The homosexual employees verbally harassed the heterosexual male employees despite frequent objections to the conduct. See id.
156 Id. at 140–41.
157 Garcia v. Elf Atochem N. Am., 28 F.3d 446, 446–52 (5th Cir. 1994) (stating that Title VII does not pertain to "[h]arassment by a male supervisor against a male subordinate").
159 Wrightson, 99 F.3d at 141 (citing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 n.4 (4th Cir. 1996)).
160 Id.
161 Id. at 142 (finding that the statute merely prohibited discrimination between employers and employees based on gender).
162 See id. at 142. The Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), recognized that Congress's intent when it enacted Title VII was "to promote hiring on the basis of job qualifications, rather than on the basis of race or color." Id. at 243 (quoting Sen. Case and Sen Clark, 110 CONG. REC. 7247 (1964)). The Court stated that gender cannot play any role in an employment decision, al-
The court found no requirement that the perpetrator and the target be of different sexes in the statute's requirement that the harassment be "because of" sex. The latter requirement, in the court's opinion, is met when "but-for" the employee's sex, he or she would not have been the victim of the discrimination. The court found no "logical connection" between Title VII's requirement that the discrimination be "because of" the employee's sex and a requirement that a harasser and victim be of different sexes. The court stated further that "the EEOC addresses the very circumstance before us, concluding, as we do, that a claim under Title VII may lie." It therefore reversed the trial court's decision.

e. A Critique of the Dissent in Wrightson: A Misunderstanding of the "But For" Test

Judge Murnaghan dissented from the majority opinion, arguing that including homosexual male harassment of a heterosexual male under Title VII's "because of" sex provision was a stretch of the language. He also argued that the result produced more discrimination because the standard failed to recognize heterosexual-on-heterosexual harassment. He preferred the Garcia court's rationale because it treated all same-sex harassment alike by denying their cognizability.

though a more qualified person may be hired. See id. at 244.

163 Wrightson, 99 F.3d at 142.
164 Id. The court relied on the Price Waterhouse standard for causation. See id. at 142 n.2; Price Waterhouse, 490 U.S. at 244 (concluding that a plaintiff must show the employer relied on sex-based considerations).
165 Wrightson, 99 F.3d at 142; see also O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996) (noting that Title VII requires at least a logical connection between each element of the prima facie case and the illegal discrimination).
166 Wrightson, 99 F.3d at 143; see also Janet Castro, Redefining the Parameter of Title VII in Accordance with Equal Protection Standards: The United States Supreme Court's Recognition of Same-Sex Sexual Harassment as a Form of Discrimination, 9 SETON HALL CONST. L.J. 123, 150-51 (1998) (noting that courts have consulted the EEOC Compliance Manual).
167 See Wrightson, 99 F.3d at 144.
168 Id. (Murnaghan, J., dissenting). In so opining the dissenting judge relies upon the court's refusal in McWilliams, 72 F.3d at 1196, "to extend [Title VII] protections beyond intentional discrimination 'because of' the offended worker's 'sex' to unmanageably broad protection." Id.
169 See Wrightson, 99 F.3d at 145.
170 See id. (stating that the statute was intended to decrease the incidence of discrimination).
ghan's arguments are, however, not persuasive, since Title VII's legislative history does not in any way suggest that same-sex sexual harassment cannot be "because of" sex. The answer is not to bar all same-sex harassment in reliance on Garcia—a case that contains laconic and perfunctory statements precluding same-sex harassment without any cogent substantive reasons.

A better alternative is to recognize same-sex sexual harassment whether it involves homosexual-on-heterosexual conduct or heterosexual-on-heterosexual conduct, as long as the conduct is both sexual in nature and based on the victim's gender. The latter requirement is satisfied whether the harassment is based on sexual attraction or some form of animus because the victim does not measure up to the harasser's perception or image of what a man, male, woman, or female is supposed to be. If the conduct is not sexual in nature then it is not sexual harassment. The conduct could, however, be actionable sex-based harassment if it is because of the victim's sex, which would include not only sexual attraction or desire, but also animus.

f. Yeary v. Goodwill Industries-Knoxville, Inc.

In Yeary, the Sixth Circuit was faced with the issue of "whether same-sex sexual harassment is actionable under Title VII." The court rejected the defendant's argument that only "opposite-sex" discrimination is actionable under Title VII, and referred to the EEOC's Compliance Manual. The court noted that the Supreme Court in Meritor Savings Bank v. Vinson had deferred to the interpretations promulgated by the EEOC because of its power to enforce Title VII violations through regulatory action.

The court noted that: the Eighth Circuit in Quick had taken one extreme position of recognizing all same-sex sexual harassment claims; the Fifth Circuit in Garcia and Oncale had taken

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171 107 F.3d 443 (6th Cir. 1997).
172 Id. at 444. The lower court denied the defendant's motion to dismiss, but stayed the proceedings and allowed an interlocutory appeal. See id.
173 Id. at 446 (citing Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 750 (4th Cir. 1996)).
175 See Yeary, 107 F.3d at 446.
176 The court argued that Garcia "relied on a rather elliptical unpublished decision, providing little independent analysis" before barring all same-sex sexual har-
the other extreme position of denying all same-sex sexual harassment claims; and "[t]he Fourth Circuit ha[d] taken a middle ground, rejecting the type of same-sex sexual harassment" allowed to go forward in Quick, but allowing the type of harassment presented in Wrightson, which was the same scenario that faced the court in Yeary.177 The court did not find it necessary to decide whether sexual affiliation-homosexuality was a prerequisite for actionability. The court delineated a "sexual attraction" test, wherein the only requirement is that the proposition be the result of sexual attraction.178

The court determined that the harasser was sexually attracted to Yeary, and stated that this is essentially the same situation that occurs when the harasser is male and the victim is female.179 Affirming the district court, the Sixth Circuit stated that "[c]onsequently, we find no substantive difference between either of those situations and that present here. While the defendants are correct that same-sex sexual harassment cases may potentially present difficult questions for a court, this case is not one that does."180

g. Fredette v. BVP Management Associates181

Finally, in Fredette, a male employee sued his employer under Title VII for both hostile environment and quid pro quo sexual harassment by a homosexual male supervisor.182 The supervisor made repeated propositions for sexual favors in return for job benefits and retaliated when Fredette refused and reported the matter to management.183 Another male employee who submitted to the behavior obtained work-related benefits.184 The district court judge granted the defendant summary judgment and concluded that there was no genuine issue of material fact as

\[\text{Id. at 447.} \]

177 Id.
178 Id. at 448.
179 See id. at 447–48.
180 Id. at 448.
181 112 F.3d 1503 (11th Cir. 1997).
182 See id. at 1504. The plaintiff was a waiter in the defendant’s restaurant and alleged that the manager of the restaurant sexually harassed him. See id.
183 See id.
184 See id.
to whether the harassment occurred because of his sex.\textsuperscript{185} The Eleventh Circuit expressed the issue as whether "the sexual harassment of a male employee by a homosexual male supervisor is actionable under Title VII."\textsuperscript{186}

The court first examined the language of Title VII and observed that the statute prohibits discrimination by an employer, whether male or female, against any individual, whether male or female because of the individual's sex.\textsuperscript{187} The court stated that harassment is driven by sexual attractions to the victim; sexual orientation of the harasser is irrelevant.\textsuperscript{188} The court then examined Title VII's legislative history and found "nothing... that suggests an express legislative intent to exclude same-sex sexual harassment claims from the purview of Title VII." The court noted that "[t]he obvious Congressional focus on discrimination against women has not precluded the courts from extending the protections of Title VII to men."\textsuperscript{189} The court also argued that the "widespread acknowledgment of the viability of reverse-discrimination claims... stands as an implicit rejection of" the noncognizability of same-sex sexual harassment.\textsuperscript{190}

The court examined the split among various courts on the issue and concluded that "the weight of the case law and the better-reasoned cases support Fredette's claim."\textsuperscript{191} It noted that numerous district courts had accepted the actionability of same-
sex sexual harassment claims, and that only the Fifth Circuit had denied the cognizability of such claims. The court examined Oncale and Garcia and found it difficult to accord much persuasive force to them because they were "accompanied by no reasoning whatsoever." The court also found that the conduct in Garcia did not involve a homosexual supervisor soliciting sexual favors from a male subordinate.

The court observed that many cases rejecting same-sex sexual harassment relied on Goluszek, where the court required same-sex sexual harassment of a male victim to create an anti-male environment in order to be actionable. It criticized Goluszek's rationale as flawed and inconsistent with cases allowing reverse-discrimination suits where the workplace is male dominated. The court held, therefore, that when "a homosexual male supervisor solicits sexual favors from a male subordinate and conditions work benefits or detriment on receiving such favors," a Title VII claim can be stated. Fredette is a well-reasoned case based on an extensive examination of judicial authorities, Title VII's language and legislative history, and the EEOC's position on same-sex sexual harassment.

The court made it clear that it was not making actionable sexual harassment based on sexual orientation of the victim. Nor was it deciding whether heterosexual male hazing and

192 See Fredette, 112 F.3d at 1508 n.10.
194 See Fredette, 112 F.3d at 1508 (discussing the Oncale and Garcia cases).
195 See id. It found the facts of Garcia more like those in McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193–94 (4th Cir. 1996). See Fredette, 112 F.3d at 1508. McWilliams dealt with sexually oriented speech but not solicitation of sexual favors. See id.
196 See Fredette, 112 F.3d at 1509; see also Goluszek, 697 F. Supp. at 1456 (stating that a Title VII claim is only actionable where the work environment is dominated by members of one gender and thus becomes hostile to the other gender).
197 See Fredette, 112 F.3d at 1509; see also Johnson, 480 U.S. 616, 631 (indicating that a Title VII claim can be stated even if the workplace is dominated by members of your own gender); United Steel Workers v. Weber, 443 U.S. 193, 198–99 (involving a racial discrimination suit in which the African-American plaintiffs made up less than 15% of the workforce).
198 Fredette, 112 F.3d at 1510.
199 See id. The EEOC has also made a distinction between the solicitation of sexual favors by an employer or supervisor and discrimination based on one's sexual orientation. See EEOC Compl. Man. (BNA) § 615.2(b)(3) (1998).
razzing because of sex was actionable under Title VII because that issue was not before them. Since that issue was not before the court, any pronouncements thereon would have been merely dicta rather than binding precedent. This paper has argued that where harassment of a heterosexual male by other heterosexual males is sexual in nature and based on the victim's sex, including where, for example, the harasser takes exception to a heterosexual male's masculinity or maleness, it is actionable sexual harassment even if the motive is not sexual desire for the victim. Where sexual content is missing, it is actionable as sex-based harassment as opposed to sexual harassment.

4. A Synopsis of Circuits Pronouncing on the Cognizability of Same-Sex Sexual Harassment in Dicta

Although not all circuits had occasion to decide squarely the issue as to the cognizability of same-sex sexual harassment, some had made pronouncements in dicta as to their inclination to accept the cognizability of same-sex sexual harassment under Title VII.

As early as 1977, the D.C. Circuit in *Barnes v. Costle* indicated its willingness to accept the actionability of same-sex harassment when it stated that:

> It is no answer [to the conclusion that the harassment at bar constituted sex discrimination] to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced.

Again, in *Tomkins v. Public Service Electric & Gas Co.*, the Third Circuit rejected the defendant's argument that a female plaintiff had not been the victim of sex discrimination because

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200 See Fredette, 112 F.3d at 1507.
201 561 F.2d 983 (D.C. Cir. 1977).
202 Id. at 990 n.55. The D.C. Circuit reiterated this inclination in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), where it referred to its statement in *Barnes* and "noted that in each instance the question is one of but-for causation[, namely, whether] the complaining employee [would] have suffered the harassment had he or she been of a different gender." Id. at 942 n.7 (citing *Barnes*, 561 F.2d at 990 n.55).
203 568 F.2d 1044 (3d Cir. 1977).
male employees could also have been propositioned by the male supervisor, stating that "Title VII prohibits discrimination against men as well as women." The Seventh Circuit stated in *Baskerville v. Culligan International Co.* that it would not "exclude the possibility that sexual harassment of... men by other men, or women by women would not also be actionable in appropriate cases." It stated a year later in *McDonnell v. Cisneros,* "that a difference in sex is not a necessary condition of... sexual harassment," and suggested thereafter in *Doe v Belleville* that workplace sexual harassment is always actionable regardless of the harasser's sex, sexual orientation, or motivations.

In *Steiner v. Showboat Operating Co.*, the Ninth Circuit said that it "[did] not rule out the possibility that both men and women working at Showboat [might] have viable claims against [a supervisor who abused both sexes] for sexual harassment." In *Marrero-Rivera v. Department of Justice,* the First Circuit stated that:

> Although the statute originally recognized and sought to combat the realities of a work force where women were generally employees of men—creating a confluence in the work situation of the power imbalance historically present between men and women, and the power imbalance between employer and em-

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204 See id. at 1047.

205 Id. at 1047 n.4 (citing Rosen v. Public Serv. Elec. & Gas Co., 409 F.2d 775 (3rd Cir. 1969); see also Williams v. Saxbe, 413 F. Supp. 654, 658 (D.D.C. 1976) (stating that a violation of Title VII does not depend on anything "peculiar to one of the genders" and thus would appear to be equally applicable to men or women).

206 50 F.3d 428 (7th Cir. 1995).

207 Id. at 430.

208 84 F.3d 256 (7th Cir. 1996).

209 Id. at 260.

210 119 F.3d 563, 566 (7th Cir. 1997). The *Doe* case involved two brothers who took summer jobs with the City of Belleville, Illinois. See id. They quit after only two months because of harassment they were subjected to by male, heterosexual co-workers. See id. The plaintiffs in this case filed suit alleging that they were sexually harassed under Title VII of the Civil Rights Act of 1964. See id. The district court ruled in favor of the defendants because it reasoned that since all the parties were heterosexual, the plaintiffs failed to make the required showing under Title VII. See id.

211 25 F.3d 1459 (9th Cir. 1994).

212 Id. at 1464 (emphasis omitted).

213 36 F.3d 1089 (1st Cir. 1994) (unpublished decision) (affirming the district court's finding that Title VII has been held to apply to same gender harassment).
ployee—the statute has also been held to apply to same gender sexual harassment.\footnote{214}

Finally, in \textit{Saulpaugh v Monroe Community Hospital},\footnote{215} Judge Van Graafeiland stated in a concurring opinion that “[m]oreover, harassment is harassment regardless of whether it is caused by a member of the same or opposite sex.”\footnote{216}

5. Conflict Among the Districts on Same-Sex Sexual Harassment

The issue of cognizability of same-sex sexual harassment under Title VII rose significantly in the district courts. In 1995 alone, at least 25 districts were faced with the issue.\footnote{217} Although there was deep division among, and sometimes within, the districts,\footnote{218} the greater majority of the cases favored recognizing same-sex sexual harassment as a valid cause of action under Title VII.\footnote{219} Although an examination of every lower court decision on this issue is beyond the scope of this paper, a synopsis of some of the cases on both sides of the issue reveals the depth of the division among the districts and brings to clear focus how urgent Supreme Court resolution had become.

\footnote{214} Marrero-Rivera v. Department of Justice, 800 F. Supp. 1024, 1027 (D.P.R. 1992). This was a reaffirmation of the court’s earlier position as stated in \textit{Morgan v. Massachusetts Gen. Hosp.}, 901 F.2d 186 (1st Cir. 1990), where although a cause of action was recognized, the court held that the appellant had failed to show a genuine issue of material fact. \textit{See id.}

\footnote{215} 4 F.3d 134 (2d Cir. 1999). \textit{Id. at} 148 (Van Graafeiland, J., concurring).


\footnote{218} \textit{See Fredette v. BVP Management Assocs.}, 112 F.3d 1503, 1506 (11th Cir. 1997) (noting that the weight of the case law and the better-reasoned cases support the viability of same-sex sexual harassment under Title VII).
a. A Synopsis of District Court Decisions Accepting Same-Sex Sexual Harassment

As early as 1983, in *Wright v. Methodist Youth Services*,\(^{220}\) the district court for the Northern District of Illinois accepted the actionability of same-sex sexual harassment under Title VII in a case involving harassment of a male subordinate by a homosexual superior. Denying the defendant's motion to dismiss, the court stated that "discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination."\(^{221}\) That same year, in *Joyner v. AAA Cooper Transportation*,\(^{222}\) a plaintiff who had rebuffed the sexual advances of his homosexual male superior and was laid off along with other co-workers, but not recalled along with the others, was allowed to sue for sexual harassment. The company had hired a new employee in spite of the experience, satisfactory performance, and desire of the plaintiff to return to the company.\(^{223}\) The court found a Title VII violation and ordered equitable relief including reinstatement and back pay.\(^{224}\)

One of the many cases in 1995\(^{225}\) to accept same-sex sexual harassment as actionable under Title VII was *EEOC v. Walden Book Co.*,\(^{226}\) where the EEOC filed a Title VII action on behalf of the plaintiff who claimed constructive discharge from a hostile environment resulting from sexual harassment by his homosexual male supervisor. Ruling on a motion to dismiss the case on


\(^{221}\) Id. at 310 (quoting *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981)); see also *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).


\(^{223}\) See id. at 540.

\(^{224}\) Id. at 544–45.


\(^{226}\) 885 F. Supp. 1100 (M.D. Tenn. 1995).
the pleadings as having failed to state a valid cause of action under Title VII, the court held that same-sex sexual harassment is a valid cause of action under Title VII.227

b. A Synopsis of District Court Decisions Rejecting Same-Sex Sexual Harassment

In 1995 alone several district courts considered and rejected the viability of same-sex sexual harassment as a cause of action under Title VII. These included Oncale v. Sundowner Offshore Services,228 Mayo v. Kiwest Corp.,229 Benekritis v. Johnson,230 Myers v. City of El Paso,231 and Ashworth v. Roundup Co.232 Before being reversed on appeal, the district courts in Quick,233 Fredette,234 and Wrightson235 all rejected same-sex harassment as not being a valid cause of action under Title VII.

Many of the cases that have rejected the cognizability of same-sex sexual harassment under Title VII have principally relied on the rationale of Goluszek v. Smith,236 which would only recognize a Title VII claim where the work environment is dominated by members of one gender and is hostile to the other gender. The Goluszek court stated that there must be an imbalance

227 Id. at 1103-04 (holding that "[w]hen a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, and not doing so to employees of the opposite sex, it absolutely is a situation where, but for the subordinate's sex, he would not be subjected to that treatment.").


233 Quick v. Donaldson Co., 895 F. Supp. 1288 (S.D. Iowa 1995), rev'd, 90 F.3d 1372 (8th Cir. 1996). In reversing the decision, the court of appeals stated that "harassment must have also affected a term, condition, or privilege of employment in order to be actionable." Quick, 90 F.3d at 1378.

234 Fredette v. BVP Management Assocs., 905 F. Supp. 1034 (M.D. Fla. 1995), rev'd, 112 F.3d 1503 (11th Cir. 1997). The court of appeals found a lack of legislative history to the contrary to indicate that a person can have a valid cause of action for same-sex sexual harassment. See id. at 1510.

235 Wrightson v. Pizza Hut of Am., Inc., 909 F. Supp. 367 (W.D.N.C. 1995), rev'd, 99 F.3d 138 (4th Cir. 1996). The court of appeals stated that there was no indication within Title VII's legislative history to indicated that Congress did not support a cause of action arising out of same-sex sexual harassment claims. See Wrightson, 99 F.3d at 144.

of power and an abuse of that imbalance by the powerful, resulting in discrimination against a vulnerable group. The existence of an imbalance of power between men and women and the exploitation of that imbalance by men who viewed the entry of women into the workplace as a threat has been proffered as an explanation of the incidence of workplace sexual harassment. A power imbalance is, however, not a precondition for sexual harassment.

6. The Need for Supreme Court Resolution

The hopeless division in the circuits and districts called for Supreme Court resolution of the same-sex sexual harassment issue. The division was compounded by the Supreme Court's denial of certiorari in a number of cases that sought review. In McWilliams v. Fairfax County Board of Supervisors, the Fourth Circuit lamented that the Supreme Court had failed to address the issue and that the lower federal courts were "hopelessly divided." In Oncale v. Sundowner Offshore Services, the Fifth Circuit lamented its powerlessness to overrule its decision in Garcia stating that: "In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court." The Supreme Court granted certiorari to consider whether the Fifth Circuit erred and whether male on male sexual harassment claims are actionable under Title VII's prohibition against "discrimination . . . because of . . . sex."

238 See MACKINNON, supra note 124.
240 72 F.3d 1191 (4th Cir. 1996).
241 Id. at 1195 n.4.
243 Id. at 119.
In recommending a solution to the impasse in the federal courts on the same-sex sexual harassment issue, some commentators proposed that courts focus on the alleged conduct and its effect, as opposed to causation. Others suggested that courts focus on the alleged misconduct "before applying the but for" test, and that "sex" be interpreted to mean "sex-related" as opposed to "gender." Skeptical of Supreme Court resolution, one author advocated a legislative solution.

III. SUPREME COURT RESOLUTION OF THE ISSUE OF SAME-SEXsexual harassment: ONCALE REVISITED

A. Same-Sex Sexual Harassment is Actionable

In reviewing the Fifth Circuit's decision in Oncale, the Supreme Court finally resolved the issue of the actionability of same-sex sexual harassment under Title VII. Writing for a unanimous court, Justice Scalia stated that "[i]f our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of... sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." Justice Scalia further stated that "[w]e see no justification in the statutory language of our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."

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245 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, 232 (1996) (stating that the effect of the harassment on the victim's ability to perform his or her work-related responsibilities is a critical area of inquiry) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).


247 See id. at 315–24 (advocating passage of the Employment Non-Discrimination Act first introduced to Congress in 1994); see also Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 GEO. L.J. 1, 9 (1992) (arguing that a legislative amendment to Title VII is necessary to change, "the firmly established distinction between sexual orientation discrimination and sex discrimination").

248 Oncale, 523 U.S. at 79 (omission in original).

249 Id.
The Court refused to read into the statute any legislative intent that would bar same-sex harassment claims. The Court stated that "[o]ur holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."  

B. The Harassment Must Be Because of Sex

Addressing concerns that holding same-sex sexual harassment cognizable under Title VII would risk transforming the statute into a civility code, the Court argued that careful attention to the requirements of the statute would adequately meet that risk. The Court defined the parameters of its holding by pointing out that Title VII does not prohibit all verbal and physical harassment in the workplace; it is directed only at discrimination "because of sex." Mere sexual content in workplace harassment does not automatically render it discriminatory.

Justice Scalia cited the Court's earlier decision in *Harris v. Forklift Systems, Inc.*, and stated that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."  

The Court reiterated its position in *Meritor* and *Harris* to the effect that Title VII does not reach innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex; instead, it forbids only behavior that is so objectively offensive as to alter the conditions of the victim's employment. The conduct must be severe or pervasive enough to create an objectively hostile or abusive working environment. Thus, "ordinary socializing in the workplace [in the form of] male-on-male horseplay or intersexual flirtation" does not constitute actionable sexual harassment under Title VII.

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250 Id. at 80.
251 See id.
252 Id.
253 See id.
255 *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25).
256 See id. at 81.
257 See id.
258 Id. at 81–82 (stating that a court evaluating the totality of the circumstances must distinguish actionable harassment and "simple teasing or roughhousing among
The Court also reiterated the need to view the situation for the objective severity of the harassment from the perspective of a reasonable person in the plaintiff's position. The Court pointed out that the social context of the harassment must also be carefully considered so that the difference between the harmless smacking of the buttocks of a professional football player by his coach as he goes onto the field, and the potential actionability of the same conduct directed toward a secretary of either sex in the office can be distinguished.

Unlike the Fourth Circuit, which would recognize only same-sex sexual harassment cases motivated by sexual desire, the Supreme Court adopted the position of the Seventh and Eighth Circuits by stating that harassing conduct need not be motivated by sexual desire to support an inference of "discrimination on the basis of sex." Citing an example of a situation that might constitute discrimination "because of sex," the Court alluded to the possibility of a female victim who is harassed in sex-specific and derogatory terms by another woman so as "to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." In any event, the plaintiff must prove that the discrimination was "because of sex."

259 See Oncale, 523 U.S. at 81 (citing Harris, 510 U.S. 17, 23 (1993)).
260 See id.
261 See Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 144 (4th Cir. 1996) (holding that a cause of action exists under Title VII for an employee who is targeted for sexual harassment by a homosexual); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996) (stating that one of the elements that a plaintiff must establish in claiming sexual harassment is that the harassment be based on sex) (relying on Swentek v. U.S. Air., 830 F.2d 552, 557 (4th Cir. 1987)).
262 See Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997) (suggesting that workplace sexual harassment is always actionable regardless of the harasser's sex, sexual orientation, or motivations).
263 See Quick v. Donaldson, 90 F.3d 1372, 1378 (8th Cir. 1996) (stating that the motive behind the discrimination is irrelevant because "[a]n employer could never have a legitimate reason for creating or permitting a hostile work environment") (quoting Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994)).
264 Oncale, 523 U.S. at 80.
265 Id. The court also noted that "[a] same-sex harassment plaintiff may also ... offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." Id. at 80–81.
266 Id. at 81 (stating that the proper standard is "because of ... sex").
C. A Critique of the Supreme Court's Decision

Although the Supreme Court correctly held that same-sex sexual harassment is actionable under Title VII, the Court's delineation of the parameters of the critical phrase—"because of sex"—leaves much to be desired. Its lack of sufficient specificity leaves lower courts with an unclear standard in applying the test to same-sex sexual harassment cases. The Court's opinion is rather general in its guidance of lower courts. The Court, however, clearly articulates that not all offensive conduct is sexual harassment, pointing out that the conduct must rise to the level of discrimination because of the victim's gender.267

The Court did not address the all-important question of whether same-sex sexual harassment, based on the harasser's perception that the victim does not meet the harasser's stereotypical view of femininity or masculinity, constitutes discrimination "because of sex."268 Apart from the Fifth Circuit, no other circuit had a problem finding that same-sex sexual harassment based on sexual desire was actionable.269 Thus, the Court did not provide the necessary guidance in an area where the circuits were grasping for answers to the question of whether and when same-sex sexual harassment that is not motivated by sexual desire could be found to constitute sexual discrimination under Title VII.

The Court's rather general example involving the unlikely event that a woman with a general hostility toward women in the workplace, harassed another woman in sex-specific and derogatory terms, sheds little light on the issue. Would a female supervisor who subjected another female subordinate in the workplace to demeaning sexual taunts and rumors because of a perceived threat to her future advancement, where management has expressed a desire to promote the female subordinate to an executive position in the future, have engaged in illegal sex discrimi-
nation if a hostile environment results? Would the fact that the hostility is not generally directed toward females in the workplace, as Justice Scalia suggests, but only toward a specific female, preclude actionability under Title VII?

The Supreme Court’s directive to courts and juries is simply not enough. To use “[c]ommon sense, and an appropriate sensitivity to social context . . . to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive” fails to give sufficient guidance. What a harasser regards as simple roughhousing may be viewed by a reasonable person in the plaintiff’s position as having created a hostile work environment. The Court’s test fails in this regard by laying down a general guideline containing both standards as if they are mutually exclusive. The Court did not address the Eighth Circuit’s analysis of Title VII, which appeared to lay down the rather broad principle that physical aggression, violence, or verbal abuse may amount to sexual harassment without specifically requiring the behavior to have sexual content. Although the Court seems to indirectly address this issue by specifically mentioning “sex-specific and derogatory terms” and requiring more than conduct that is “merely tinged with offensive sexual connotations,” it is lamentable that the Court did not provide sufficient specificity in its opinion to guide lower courts in their application of the heretofore elusive “because of sex” standard. In doing so the Court has failed to provide the lower courts with the tools to avoid the illogical results, seen in the divergent positions on the issue, that existed before the Supreme Court’s decision.

IV. POTENTIAL IMPACT OF ONCALE ON FUTURE SEXUAL HARASSMENT LITIGATION

In the years preceding the Supreme Court’s decision in Oncale, more than forty courts had addressed the question of same-sex sexual harassment either squarely or in dicta. A number
of these courts rejected the cognizability of same-sex sexual harassment under Title VII. Thus, the Oncale decision legitimizes same-sex sexual harassment actions in jurisdictions that previously rejected their viability under Title VII.

With the increased awareness of sexual harassment, beginning with the Senate confirmation hearings after Clarence Thomas was nominated to the Supreme Court, and culminating with the sexual harassment lawsuit filed by Paula Jones against the President of the United States as well as the astronomical rise in sexual harassment lawsuits since 1991, the likely result of the Oncale decision is to add fuel to the ongoing drive to eliminate discriminatory harassment from the American workplace. In 1991, 6,892 sexual harassment suits were filed nationwide. In 1993, just two years after the confirmation hearings, 12,537 suits were filed. An estimated 15,000 sexual harassment cases were filed in 1996, and the estimate for 1998 is 15,618. Oncale sends a signal that the Supreme Court is committed to eliminating workplace sexual harassment, which will likely result in increased confidence on the part of victims of sexual harassment to avail themselves of Title VII remedies.

Although some commentators do not see the Supreme Court decision in Oncale as creating major new liabilities, others recognize that it could result in increased litigation if employers do not

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277 Paula Jones’ sexual harassment claim was dismissed by Judge Susan Webber Wright on a summary judgment motion. See Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998).

278 See Tony Mauro, Court Clears Air on Sexual Harassment, USA TODAY, Nov. 10, 1993, at A1 (stating that the number of complaints doubled from 1991 to 1993).

279 See id.

280 See id.

281 See NBC’s World News Tonight (NBC television broadcast, Oct. 20, 1997).

282 See Sexual Harassment Charges and Dismissals Escalate, 76 HR FOCUS 4 (Apr. 1, 1999).
take satisfactory remedial measures.\textsuperscript{283} Admittedly, liability for same-sex sexual harassment is not new.\textsuperscript{284} Its recognition in every jurisdiction, however, will likely increase employer liability. This potential increase in employer liability becomes more evident when viewed against the backdrop of other significant recent developments in workplace sexual harassment law, and the combined effect of these developments are weighed.\textsuperscript{285}

First, in \textit{Harris v. Forklift Systems, Inc.},\textsuperscript{286} the Supreme Court held that a sexual harassment plaintiff need not establish psychological harm to make out a prima facie case of hostile environment sexual harassment. Thus, although a plaintiff suing for same-sex sexual harassment on a hostile environment theory must prove that the behavior was "so objectively offensive [that it] alter[ed] the 'conditions' of the victim's employment,"\textsuperscript{287} an employer may not defeat the plaintiff's case simply because the harassment did not affect the plaintiff's psyche.\textsuperscript{288}

Second, a same-sex sexual harassment action may be filed by an employee because of the actions of a third party or non-employee, thus potentially increasing employer liability.\textsuperscript{289} Recently, it was reported that many employers were unaware of the potential liability for third-party harassment, and that such

\textsuperscript{283} See Mark A. Hoffman & Michael Prince, \textit{Same-Sex Harassment Liability Unlikely to Rise}, 32 BUS. INS. 2, 10 (Mar. 9, 1998).
\textsuperscript{284} See generally supra notes 54–61 and accompanying text.
\textsuperscript{286} 510 U.S. 17, 22–23 (1993).
\textsuperscript{288} See \textit{Harris}, 510 U.S. at 22–23.
claims were on the rise. Some predicted that litigation in this area would become a raging torrent in the near future.

A third development, whose potential interplay with same-sex sexual harassment is likely to increase plaintiffs’ recoveries, involves the courts’ recognition that one single event may be sufficient to create a hostile environment. Thus, one single incident, if serious enough, may ground a same-sex sexual harassment suit resulting from the actions of a supervisor, co-worker, or non-employee.

Finally, the ability of a sexual harassment plaintiff to recover monetary damages by virtue of the Civil Rights Act of 1991 further exacerbates potential employer liability for same-sex sexual harassment. A same-sex sexual harassment plaintiff may recover up to $300,000 in compensatory and punitive damages for intentional discrimination, depending on the size of the employer. The damages may be for future “pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,” as well as reasonable attorney’s fees and expert fees. The statutory caps do not apply to back pay, front pay, interest, past pecuniary losses, or other Title VII relief.

With legal fees included, the average cost of liability for sexual harassment was estimated to be $600,000 in 1994, and the

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290 See Hansen, supra note 276, at 26 (stating that many employers are unaware that they may be liable for the actions of a customer or a third party).
291 See id. (stating that the number of complaints are rising and employers who fail to protect their employees are at risk).
292 See Bohen v. City of East Chicago, 799 F.2d 1180, 1189 (7th Cir. 1986) (stating that “[a] single act of a sufficiently high-ranking policy maker is sufficient to establish an entity’s policy or custom” to create actionable sexual harassment); see also Gilardi v. Schroeder, 672 F. Supp. 1043, 1046-47 (N.D. Ill. 1986) (finding that the actions of a male employee toward a female employee constituted sexual harassment), aff’d, 833 F.2d 1226 (7th Cir. 1987); Barrett v. Omaha Nat’l Bank, 584 F. Supp. 22, 23 (D. Neb. 1983), aff’d, 726 F.2d 424 (8th Cir. 1984) (stating that the pivotal actor in the harassment was an employee).
294 See 42 U.S.C. § 1981a(b)(3). Up to $50,000 may be recovered from an employer with 15 to 100 employees; up to $100,000 from employers with 101 to 200 employees; up to $200,000 from employers with 201 to 500 employees; and up to $300,000 from employers with more than 500 employees. See id.
1991 Act was believed to have been responsible for the increase from previous years.\textsuperscript{298} The proposed Equal Remedies Act of 1997 would potentially further exacerbate employer liability for same-sex sexual harassment inasmuch as it proposes to eliminate the caps imposed by the Civil Rights Act of 1991 on recoveries for sex discrimination.\textsuperscript{299}

Evidencing the unrelenting push to rid the workplace of discriminatory harassment, \textit{Oncale} will spur employers to take more serious steps to institute effective anti-harassment policies and complaint procedures. Another likely effect of the decision, as the costs of sexual harassment litigation increase, is an increased use of alternative dispute resolution to reduce costs.\textsuperscript{300}

The EEOC, in recently proposed amendments to its regulations dealing with federal sector equal employment opportunity, will require "that agencies establish or make available alternative dispute resolution programs during the EEO[C] pre-complaint process."\textsuperscript{301} The program would supplement the provisions in the current regulation that encourage the use of alternative dispute resolution at all stages of the complaint process.\textsuperscript{302}

Finally, \textit{Oncale} is likely to increase employer interest in Employment Practices Liability Insurance specifically designed to cover liability for sexual harassment. These policies are a recent product of the insurance marketplace, and are sold either as separate policies or as an endorsement to an existing policy, such as a Directors’ and Officers’ Liability Policy.\textsuperscript{303}


\textsuperscript{299} See S. 516, 105th Cong. (1997). The bill was introduced by Senator Edward Kennedy on April 7, 1997. It was read twice and referred to the Committee on Labor and Human Resources.

\textsuperscript{300} See Sally Roberts, \textit{Resolving to Cut Litigation Costs; Employers are Turning to ADR for Workplace Disputes}, 29 BUS. INS. 1, 1 (May 1995) (asserting that more employers are considering alternative dispute resolution to resolve disputes). Some companies reported dramatic reductions in litigation expenses since instituting alternative dispute resolution procedures in employment contracts. See id.


\textsuperscript{302} See id.

V. CONCLUSION

The Supreme Court's recognition of the cognizability of same-sex sexual harassment under Title VII of the Civil Rights Act of 1964 is a logical step in the continuing evolution of workplace sexual harassment law. Although the decision lacks specificity on the application of the elusive "because of sex" standard in same-sex sexual harassment cases, it lays the necessary foundation for lower courts to define the parameters of the law on same-sex sexual harassment. The combined interplay of the Oncale decision and other major recent developments in sexual harassment law exacerbates potential employer liability in this quickly evolving area of employment law. The decision is likely to heighten employer efforts to combat the incidence of discriminatory harassment in the workplace. It is also likely to generate more employer interest in available risk management techniques to reduce and finance the costs of workplace sexual harassment litigation.