

ONCALE V. SUNDOWNER OFFSHORE SERVICES INC. AND THE FUTURE OF TITLE VII SEXUAL HARASSMENT JURISPRUDENCE

I. INTRODUCTION

In 1994, Jody Oncale, a former employee of Sundowner Offshore Services Inc. ("Sundowner"), filed a claim pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII") against the drilling company, a male supervisor and two male co-workers, alleging hostile environment sexual harassment.¹ The complaint alleged that fellow crew members sexually harassed Oncale during three incidents in October 1991.² In the first incident, co-workers Brandon Johnson and Danny Pippen allegedly restrained Oncale while supervisor John Lyons unzipped his pants, pulled out his penis and placed it on Oncale's neck.³ The next day, Lyons allegedly forced Oncale to the ground, pulled out his penis and put it on Oncale's arm.⁴ The third incident took place in a shower stall on Sundowner premises where Lyons allegedly threatened to rape Oncale and forcibly pushed a bar of soap into Oncale's anus.⁵ Despite Oncale's complaints, supervisory personnel did nothing to stop the harassment and Oncale quit due to fear of being raped or forced to have sex.⁶

Despite the severity of the harassment, in *Oncale v. Sundowner Offshore Services, Inc.*, the District Court for the Eastern District of Louisiana granted defendant's motion for summary judgment holding

¹ See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd and remanded*, 118 S. Ct. 998 (1998); Petitioner's Brief at 2, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568).

² See Respondent's Brief at 1, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568).

³ See *Oncale*, 83 F.3d at 118; Catherine A. MacKinnon, *Oncale v. Sundowner Offshore Services, Inc.*, 96-568, *Amici Curiae Brief in Support of Petitioner*, 8 UCLA WOMEN'S L.J. 9, 13 (1997). In addition to the physical assault, Lyons allegedly verbally abused Oncale during this incident stating that he was going to "fuck [Oncale]." See Respondent's Brief at 2.

⁴ See MacKinnon, *supra* note 3, at 13.

⁵ See *Oncale*, 83 F.3d at 118-19.

⁶ See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998). Lyons made repeated threats to rape Oncale including: "If I don't get you now, I'll get you later. I'm going to get you. You're going to give it to me . . ." and "You told your daddy, huh? Well, it ain't going to do you no good because I'm going to fuck you anyway." See MacKinnon, *supra* note 3, at 13-14.

that Oncale failed to state a Title VII sexual harassment claim.⁷ The United States Court of Appeals for the Fifth Circuit affirmed the decision.⁸ The district court dismissed Oncale's claim not because the harassment was insufficiently severe to create a hostile work environment, but because Jody Oncale is a man.⁹ Thus, in a twist of sex discrimination irony, Oncale's claim would not have been dismissed "but for" his gender.¹⁰

It is not surprising that courts have struggled with this irony in developing a body of same-sex sexual harassment jurisprudence.¹¹ The judiciary has labored since the enactment of Title VII to define the scope of the statute as it applies to gender discrimination and sexual harassment.¹² Title VII of the Civil Rights Act of 1964 prohibits discrimination in the conditions or terms of employment based on sex.¹³ Title VII does not expressly prohibit sexual harassment.¹⁴ In fact, sexual harassment did not exist as a legal concept when Congress enacted Title VII.¹⁵ Moreover, Congress only added the language prohibiting sex discrimination as a last-ditch effort to defeat the bill, which was intended primarily to eliminate race discrimination in the workplace.¹⁶ Congress ultimately passed Title VII without debate or discussion on its prohibition against gender discrimination.¹⁷ The dearth of legislative history on sex discrimination offers little guidance to courts asked

⁷ See *Oncale v. Sundowner Offshore Servs., Inc.*, 1995 WL 133349 *1, *2 (E.D. La. 1995), *aff'd*, 83 F.3d 118 (5th Cir. 1996), *rev'd and remanded*, 118 S. Ct. 998 (1998).

⁸ See *Oncale*, 83 F.3d at 121.

⁹ See *Oncale*, 1995 WL at *2.

¹⁰ Mr. Oncale's first name is Joseph. See *Oncale*, 83 F.3d at 118. He is also referred to as Jody. See 20/20: *Man to Man* (ABC television broadcast, Nov. 6, 1997).

¹¹ See *infra* notes 90-173 and accompanying text.

¹² See generally, Melissa Manaugh Feldmeier, *Filling the Gaps: A Comprehensive Review of the Debate over Same-Sex Sexual Harassment*, 65 U. CIN. L. REV. 861, 861 (1997).

¹³ See 42 U.S.C. § 2000e-2(a) (1994). The statute provides:

(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

Id. Because Congress intended that the term "sex" in Title VII mean simply "man" or "woman," there is no need to distinguish between the terms "sex" and "gender" in Title VII cases. See *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996). Consequently, within this Note the terms "sex" and "gender" are used interchangeably.

¹⁴ See 42 U.S.C. § 2000e-2(a).

¹⁵ See Feldmeier, *supra* note 12, at 861.

¹⁶ See 110 Cong. Rec. 2577 (1964); Katherine H. Flynn, *Same-Sex Sexual Harassment: Sex, Gender and the Definition of Sexual Harassment Under Title VII*, 13 GA. ST. U. L. REV. 1099, 1102 (1997).

¹⁷ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); see generally Feldmeier, *supra* note 12, at 862.

to determine whether, and in what form, sexual harassment is prohibited under Title VII.¹⁸

Although the judiciary had concluded that Title VII provides a cause of action for employees who have been sexually harassed by members of the opposite sex, courts disagreed regarding Title VII's application to same-sex sexual harassment.¹⁹ In its recent decision in *Oncale v. Sundowner Offshore Services Inc.*, the United States Supreme Court held that same-sex sexual harassment is actionable under Title VII.²⁰ The Court, however, left unanswered the issue of what constitutes discrimination "because of sex" within the same-sex paradigm.²¹ Courts will now struggle with this issue in defining the scope of Title VII as it applies to gender discrimination, sexual harassment and same-sex sexual harassment jurisprudence.

This Note explores the issues surrounding the debate over Title VII's application to same-sex sexual harassment in light of the Supreme Court's decision in *Oncale*.²² Part II introduces the recognized forms of sexual harassment under Title VII and the prima facie elements of a Title VII sexual harassment claim.²³ Part III discusses the law of same-sex harassment prior to *Oncale*, focusing on the division among the courts of appeals in determining whether same-sex harassment occurs "because of sex" within the meaning of Title VII.²⁴ Part IV explores the Supreme Court's decision in *Oncale* and its resolution of the split among the circuits.²⁵ Part V argues that courts should permit only direct comparative evidence of how the harasser treats members of both genders to support a finding that sexual harassment occurred because of sex and that on remand, the district court should conclude that Joseph Oncale has failed to state a Title VII sexual harassment claim.²⁶

¹⁸ See *Meritor*, 477 U.S. at 64 ("[W]e are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'").

¹⁹ See *id.* at 73 (recognizing Title VII cause of action where male supervisor sexually harassed female employee); compare *Oncale*, 83 F.3d at 120 (holding that Title VII does not recognize male-on-male claims), *rev'd and remanded*, 118 S. Ct. 998 (1998), with *Doe v. City of Belleville*, Ill., 119 F.3d 563, 574 (7th Cir. 1996) (holding that anyone sexually harassed may pursue Title VII claim regardless of his or her gender or sexual orientation of harasser), and *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (recognizing Title VII cause of action for same-sex sexual harassment by homosexual employer toward heterosexual employee).

²⁰ 118 S. Ct. 998, 1003 (1998).

²¹ See *id.* at 1002.

²² See *supra* notes 1-21 and accompanying text; *infra* notes 27-207 and accompanying text.

²³ See *infra* notes 27-89 and accompanying text.

²⁴ See *infra* notes 90-173 and accompanying text.

²⁵ See *infra* notes 174-207 and accompanying text.

²⁶ See *infra* notes 208-45 and accompanying text.

II. JUDICIAL INTERPRETATION OF TITLE VII

Initially, the judiciary refused to interpret Title VII to prohibit sexual harassment of either women or men in the workplace.²⁷ When first asked to do so, courts balked at recognizing sexual harassment as a form of sex discrimination prohibited by Title VII.²⁸ The early decisions refusing to recognize a Title VII cause of action for sexual harassment cited a lack of congressional intent to regulate such behavior, reluctance to enter the fray of interpersonal relationships and fear that imposing liability would result in a flood of litigation.²⁹

A. *Quid Pro Quo Sexual Harassment*

The first cases to recognize Title VII sexual harassment claims involved situations of quid pro quo sexual harassment.³⁰ Quid pro quo harassment occurs when an employee is threatened with adverse employment action absent submission to sexual demands.³¹ Courts reasoned that conditioning employment benefits such as hiring, promotion and continuation of employment on submission to sexual demands imposed a condition of employment on one gender and not the other.³² Borrowing the "but for" test applied in other discrimination contexts, courts reasoned that, but for the employee's gender, he or she would not have been subjected to quid pro quo sexual demands.³³ Thus, the harassment occurred because of the employee's

²⁷ See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) [hereinafter *Tomkins I*] (holding that sexual harassment of female employee by male supervisor does not constitute sex discrimination under Title VII), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (refusing to impose liability on employer for dismissing female employee who refused sexual advances by male supervisor), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163, 165 (D. Ariz. 1975) (refusing to impose Title VII liability for male supervisor's sexual advances toward female employee), *rev'd and remanded on other grounds*, 562 F.2d 55 (9th Cir. 1977).

²⁸ See *Tomkins I*, 422 F. Supp. at 556; *Miller*, 418 F. Supp. at 236; *Corne*, 390 F. Supp. at 163, 165.

²⁹ See *Tomkins I*, 422 F. Supp. at 556—57 ("[Title VII] is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire . . ."); *Miller*, 418 F. Supp. at 236 ("The attraction of males to females and females to males is a natural sex phenomenon. . . . [I]t would seem wise for the Courts to refrain from delving into these matters . . ."); Flynn, *supra* note 16, at 1103.

³⁰ See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048—49 (3d Cir. 1977) [hereinafter *Tomkins II*]; see generally Flynn, *supra* note 16, at 1106.

³¹ See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.11(a)(1), (2) (1994).

³² See *Tomkins II*, 568 F.2d at 1046—47.

³³ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (explaining that "but-for" causation is appropriate standard under Title VII); *City of Los Angeles, Dep't of Water & Power*

sex.³⁴ The "but for" test conceptually linked sexual demands to gender discrimination and pulled quid pro quo sexual harassment within Title VII's protection.³⁵

B. *Hostile Work Environment Sexual Harassment*

In 1986, in its first treatment of sexual harassment, the United States Supreme Court in *Meritor Savings Bank, FSB v. Vinson* expanded the scope of sexual harassment beyond quid pro quo harassment, holding that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment.³⁶ In *Meritor*, a female bank employee alleged that a male vice-president subjected her to continuous sexual harassment over a four year period.³⁷ The employee, Vinson, testified that the supervisor repeatedly asked for sexual favors, fondled her in front of other employees, followed her into the women's restroom, exposed himself to her and forcibly raped her on several occasions.³⁸ The district court found that the supervisor had not sexually harassed Vinson because even if there were a sexual relationship between the two, Vinson had entered into it voluntarily and thus, it had nothing to do with Vinson's continued employment, advancements or promotions.³⁹ Because the relationship had not adversely affected any term or condition of employment, the conduct did not implicate Title VII.⁴⁰ The court of appeals reversed, holding that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII.⁴¹

In affirming the court of appeals' decision, the Supreme Court explained that Title VII is not limited to economic or tangible discrimination.⁴² The Court acknowledged that sexual harassment which cre-

v. Manhart, 435 U.S. 702, 710 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1205 (7th Cir. 1971) (Stevens, J., dissenting) (prima facie case of gender discrimination stated where evidence shows "treatment of a person in a manner which but for that person's sex would be different."); *Barnes v. Cosle*, 561 F.2d 983, 990 (D.C. Cir. 1977) ("But for her womanhood, . . . her participation in sexual activity would never have been solicited."); see also *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); *Jones v. Flagship Int'l.*, 793 F.2d 714, 719 (5th Cir. 1986); *Stewart v. Weis Markets, Inc.*, 890 F. Supp. 382, 390 (M.D. Pa. 1995).

³⁴ See *Barnes*, 561 F.2d at 990.

³⁵ See *id.*

³⁶ 477 U.S. 57, 66 (1986).

³⁷ See *Meritor*, 477 U.S. at 60.

³⁸ See *id.*

³⁹ See *id.* at 61.

⁴⁰ See *id.*

⁴¹ See *id.* at 64.

⁴² See *Meritor*, 477 U.S. at 64.

ates an offensive environment for members of one gender is an artificial barrier to equality in the workplace and therefore constitutes the type of conduct Congress intended to eradicate through Title VII.⁴³ Thus, the Court held that Title VII prohibits unwelcome sexual advances that create an offensive or hostile work environment.⁴⁴

Following the Court's pronouncement in *Meritor*, many lower courts struggled to identify impermissibly hostile work environments.⁴⁵ Specifically, the circuit courts split over whether an employee alleging a hostile environment claim under Title VII must prove that the harassment caused injury or seriously affected psychological health.⁴⁶

In 1993, in *Harris v. Forklift Systems, Inc.*, the Supreme Court reaffirmed its decision in *Meritor* and held that Title VII prohibits harassment that creates an abusive work environment even if the complained of conduct does not affect the employee's psychological health or cause the employee to suffer injury.⁴⁷ In *Harris*, the male president of an equipment rental company continuously subjected Harris, a female manager, to unwanted sexual innuendoes and insults based on her gender.⁴⁸ Harris eventually quit as a result of the harassment.⁴⁹ The lower courts rejected Harris' claim, reasoning that the male supervisor's comments could not seriously affect a woman's psychological well-being and thus, did not implicate Title VII.⁵⁰ The Supreme Court disagreed, reasoning that such a requirement would needlessly overlook other serious harms caused by a hostile work environment that create barriers to equal opportunity in the workplace.⁵¹ Thus, the Court held that Title VII does not require a victim of hostile environment sexual harassment to suffer serious psychological injury in order to state a sexual harassment claim.⁵²

⁴³ See *id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (1982)).

⁴⁴ See *id.* at 66.

⁴⁵ Compare *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (requiring serious effect on psychological well-being) and *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989), with *Ellison v. Brady*, 924 F.2d 872, 877-878 (9th Cir. 1991) (rejecting requirement of serious effect on psychological well-being).

⁴⁶ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993).

⁴⁷ See *id.* at 22.

⁴⁸ See *id.* at 19. Harris' employer told her on several occasions, in the presence of other employees, "You're a woman, what do you know?" and on one occasion called her "a dumb ass woman." *Id.* The employer also suggested that he and Harris should "go to the Holiday Inn to negotiate [Harris'] raise." *Id.*

⁴⁹ See *id.* at 22.

⁵⁰ See *id.* at 20.

⁵¹ See *Harris*, 510 U.S. at 22. The Court noted that a discriminatorily abusive work environment can detract from job performance, discourage employees from remaining on the job or keep employees from advancing. See *id.*

⁵² See *id.*

Through *Meritor* and *Harris*, the Supreme Court interpreted Title VII to prohibit opposite-sex hostile environment sexual harassment, despite the fact that the statute contains no language expressly prohibiting such conduct.⁵³ Although expansive, the Court's interpretation of Title VII's application to opposite-sex hostile environment sexual harassment is not limitless.⁵⁴ Not all workplace harassment, even sexually explicit harassment, implicates Title VII.⁵⁵ The prima facie elements of a Title VII sexual harassment claim restrict statutory protection to unwelcome harassment that occurs because of sex and that alters the terms or conditions of employment.⁵⁶

There are five required elements of a hostile environment sexual harassment claim.⁵⁷ First, the employee must belong to a protected group.⁵⁸ Within the sex discrimination context, an employee is a member of a protected group simply by being a man or woman, and thus, this element is always met.⁵⁹

Second, the employee must demonstrate that his or her supervisor subjected him or her to unwelcome sexual harassment.⁶⁰ Harassment is considered unwelcome if it were "uninvited and offensive."⁶¹ The proper inquiry is whether the plaintiff indicated by his or her conduct that the harassment was unwelcome.⁶²

Third, the employee must show that the harassment was based on sex.⁶³ In determining whether harassment occurred because of sex, the key inquiry is whether the employer subjected members of one sex to disadvantageous terms or conditions of employment to which he or she did not subject members of the opposite sex.⁶⁴ In other words, harassment occurs because of sex if, but for the victim's sex, he or she would not have been the object of sexual harassment.⁶⁵

⁵³ See 42 U.S.C. § 2000e-2(a) (1994); *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 66.

⁵⁴ See *Harris*, 510 U.S. at 21-22; *Meritor*, 477 U.S. at 67.

⁵⁵ See *Harris*, 510 U.S. at 21-22; *Meritor*, 477 U.S. at 67.

⁵⁶ See *Meritor*, 477 U.S. at 67-68; *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1377 (8th Cir. 1996).

⁵⁷ See *Quick*, 90 F.3d at 1377 (quoting *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993)).

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *Meritor*, 477 U.S. at 68 ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"); *Quick*, 90 F.3d at 1377.

⁶¹ *Burns v. McGregor Elec., Indus., Inc.*, 989 F.2d 959, 962 (8th Cir. 1993).

⁶² See *Meritor*, 477 U.S. at 68.

⁶³ See *Quick*, 90 F.3d at 1377 (quoting *Kopp*, 13 F.3d at 269).

⁶⁴ See *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

⁶⁵ See *id.*; *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

Fourth, the employee must demonstrate that the harassment was sufficiently severe or pervasive to create an objectionably hostile or abusive work environment and to alter the terms or conditions of employment.⁶⁶ Merely offensive conduct is insufficient to implicate Title VII.⁶⁷ Implicit in the fourth element is the requirement that the plaintiff subjectively perceived the environment to be abusive such that the terms or conditions of his or her employment were altered.⁶⁸ Finally, the employee must show that the employer knew or should have known of the harassment and failed to take immediate and appropriate remedial action.⁶⁹

1. "Because of Sex": The Chain of Inference Linking Opposite-Sex Sexual Harassment to Gender Discrimination

Title VII does not expressly prohibit sexual harassment.⁷⁰ To garner Title VII protection, sexual harassment must be linked to gender—the harassment must occur because of sex.⁷¹ The causal requirement is embodied in the third element of the sexual harassment *prima facie* case.⁷² Within the opposite-sex paradigm, courts have had little difficulty linking *quid pro quo* and hostile environment sexual harassment to sex discrimination.⁷³ Particularly in the typical case in which a male supervisor makes sexual overtures to a female employee, courts presume that the proposals were made because of the victim's sex.⁷⁴ This occurs because of the heterosexist assumption at work within the sexual harassment context.⁷⁵ The heterosexist assumption operates so that whenever a person sexually harasses a member of the opposite sex, it is presumed to be because of sexual attraction and thus based on gender.⁷⁶ Further evidence that the harassment occurred because of sex is generally not required to make out a *prima facie* case.⁷⁷

⁶⁶ See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002–03 (1998); *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 67.

⁶⁷ See *Oncale*, 118 S. Ct. at 1002–03; *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 67.

⁶⁸ See *Harris*, 510 U.S. at 21–22.

⁶⁹ See *Quick*, 90 F.3d at 1377 (quoting *Kopp*, 13 F.3d at 269).

⁷⁰ See 42 U.S.C. § 2000e-2(a) (1994).

⁷¹ See *Doc v. City of Belleville, Ill.*, 119 F.3d 563, 570 (7th Cir. 1997).

⁷² See *Quick*, 90 F.3d at 1377 (quoting *Kopp*, 13 F.3d at 269).

⁷³ See *Oncale*, 118 S. Ct. at 1002; *Henson*, 682 F.2d at 904.

⁷⁴ See *Hopkins v. Baltimore Gas & Elec., Co.*, 77 F.3d 745, 752 (4th Cir. 1996); *Henson*, 682 F.2d at 904.

⁷⁵ See Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691, 735–36 (1997) ("In the different-sex cases, heterosexist assumptions permit most courts to presume that the sexual conduct between people of different sexes bespeaks sexual desire.").

⁷⁶ See *Hopkins*, 77 F.3d at 752; Franke, *supra* note 75, at 735–36.

⁷⁷ See *Hopkins*, 77 F.3d at 752.

Within the same-sex sexual harassment paradigm, however, there is an opposite presumption that harassment, even when sexually explicit, does not occur because of sex.⁷⁸ Consequently, courts often label male-on-male harassment in terms that de-sexualize and de-gender the conduct.⁷⁹ Commentators suggest that male victims of same-sex harassment labor against internalized cultural norms which presume the unlikelihood of a sexual component to behavior among men.⁸⁰ Thus, male victims of same-sex sexual harassment are also victimized by an inherent disbelief that harassment between men occurs because of sex.⁸¹ Overcoming this disbelief is the primary legal hurdle in establishing a Title VII same-sex sexual harassment claim.⁸²

2. "Because of Sex": The Analogy to Intra-Racial Discrimination

In analyzing the "because of sex" requirement of the Title VII same-sex sexual harassment claim, courts have looked beyond sexual harassment jurisprudence to the broader case law of race discrimination.⁸³ Within the race discrimination context, courts have recognized the possibility of intra-racial discrimination.⁸⁴ Membership in a particular protected class does not preclude the possibility that an individual will discriminate against members of that class based on their membership in it.⁸⁵ The Supreme Court has similarly rejected the presumption that an employer will not discriminate against members of his or her own race.⁸⁶

⁷⁸ See *id.*; *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir. 1996).

⁷⁹ See *McWilliams*, 72 F.3d at 1194 (labeling conduct "horseplay"); *Johnson v. Hondo*, 904 F. Supp. 1403, 1410 (E.D. Wis. 1996) (describing harassment as a "personal grudge match"); *MackInnon*, *supra* note 3, at 21.

⁸⁰ See Marc S. Spindelman and John Stoltzberg, *Oncle: Exposing "Manhood,"* 8 UCLA WOMEN'S L.J. 3, 4 (1997).

⁸¹ See Spindelman and Stoltzberg, *supra* note 80, at 4.

⁸² See *Oncle*, 118 S. Ct. at 1002; *Hopkins*, 77 F.3d at 752-53.

⁸³ See *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1379 (C.D. Ca. 1995).

⁸⁴ See *Hansborough v. City of Elkhart Parks & Recreation Dep't*, 802 F. Supp. 199, 206 (N.D. Ind. 1992) (holding intra-racial discrimination, specifically, discrimination by black individual against another black individual because of race violates Title VII); *Walker v. Secretary of the Treasury*, I.R.S., 742 F. Supp. 670, 671 (N.D. Ga. 1990) (holding light-skinned black person may have Title VII claim against dark-skinned black person for alleged discriminatory termination of employment).

⁸⁵ See *Hansborough*, 802 F. Supp. at 206; *Walker*, 742 F. Supp. at 671.

⁸⁶ See *Castaneda v. Partida*, 430 U.S. 482, 499 (1977) ("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that an employer will not discriminate against members of his own race."). The Supreme Court has also suggested that within the gender discrimination context, a man can discriminate, because of sex, against another man by preferring a female employee for promotion. See *Johnson v. Transp. Agency, Santa Clara County*,

Within the intra-racial discrimination context, the key inquiry in determining whether discrimination occurred because of race is whether the employer treated members of one race differently than he or she treated members of other races.⁸⁷ The identity of the discriminator is irrelevant to the analysis.⁸⁸ Several courts have analogized same-sex sexual harassment to intra-racial discrimination and have held that Title VII prohibits a person, regardless of gender, from harassing another person based on sex.⁸⁹

III. THE LAW BEFORE ONCALE: SAME-SEX HARASSMENT AND THE "BECAUSE OF SEX" REQUIREMENT

The elements of a Title VII hostile environment sexual harassment claim are the same in both the opposite-sex and same-sex contexts.⁹⁰ The third element of the *prima facie* case—proving that the harassment occurred because of sex—is the primary legal hurdle for victims of same-sex hostile environment sexual harassment seeking Title VII relief.⁹¹ The federal courts within and among the circuits were split on whether same-sex hostile environment sexual harassment can be linked to gender discrimination in order to garner Title VII protection and what proof is necessary to establish the requisite link.⁹² Among the

480 U.S. 616, 624-25 (1987) (although Court rejected gender discrimination claim on other grounds, it did not consider it significant that both supervisor and employee were men).

⁸⁷ See *Hansborough*, 802 F. Supp. at 208 (granting defendant's motion for summary judgment because plaintiff did not demonstrate that members of any other race were treated differently).

⁸⁸ See *Hill v. Burrell Communications Group*, 67 F.3d 665, 668 (7th Cir. 1993) (although court found that employer had terminated employee for legitimate reason, it did not consider racial identity of employer relevant); *Feldmeier*, *supra* note 12, at 876-78.

⁸⁹ See *Walden*, 885 F. Supp. at 1103 (reasoning that it would be untenable to allow intra-racial discrimination cases but not same-sex sexual harassment cases to proceed under Title VII); *Easton*, 905 F. Supp. at 1379, 1380 (analogizing to reverse discrimination cases and holding that Title VII prohibited person, regardless of gender, from harassing another person based on his or her sex).

⁹⁰ See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002-03 (1998).

⁹¹ See *id.* at 1002. This is the key inquiry in Title VII same-sex sexual harassment because of the disbelief held by many that social intercourse between members of the same sex does not include a sexual component; particularly where both are heterosexual. See *Spindelman and Stoltenberg*, *supra* note 80, at 4.

⁹² See *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 591 (7th Cir. 1997) (recognizing cause of action for same-sex sexual harassment regardless of sexual orientation of harasser); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (recognizing cause of action for same-sex sexual harassment by male homosexual employer against male heterosexual employee); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (recognizing cause of action for same-sex sexual harassment by homosexual employer against heterosexual employee); *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996) (categorically rejecting all claims of same-sex sexual harassment), *rev'd and remanded*, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (refusing to recognize Title VII claim for same-sex sexual harassment where both alleged harassers and victim were heterosexual males).

appellate courts that had addressed the issue, the First, Fourth, Sixth, Seventh, Eighth and Eleventh Circuits had explicitly or implicitly recognized same-sex sexual harassment as a viable Title VII claim.⁹³ The Fifth Circuit had categorically rejected all same-sex Title VII claims.⁹⁴

A. Fifth Circuit: Just Say No

Several courts within the Fifth Circuit had refused to recognize same-sex sexual harassment under Title VII, reasoning that the congressional intent behind Title VII supported their rejection.⁹⁵ Proponents of categorical rejection argued that when people of the same gender harass one another, their conduct never constitutes discrimination based on sex as contemplated by Title VII.⁹⁶ This conclusion was drawn from the premise that Congress intended Title VII to prohibit inequality only between women and men in the workplace, and not between people of the same gender.⁹⁷ Thus, any interpretation of Title VII that recognizes same-sex sexual harassment claims impermissibly changes the statute's prohibition against discrimination between members of opposite genders into a general prohibition against sexually explicit conduct.⁹⁸ Recognizing a Title VII cause of action against sexually explicit conduct occurring between members of the same gender would render the statute's causal language—because of sex—superfluous.⁹⁹ Sexual harassment, which is not expressly prohibited by Title VII, would become a stand-alone cause of action.¹⁰⁰

In 1988, in *Goluszek v. Smith*, the United States District Court for the Eastern District of Illinois held that harassment by male co-workers did not create an anti-male work environment and thus was not prohibited by Title VII.¹⁰¹ The employee in *Goluszek* alleged that co-workers repeatedly made comments about his supposed sexual inexperience, showed him nude pictures of women, accused him of being gay or bisexual and made other sex-related comments.¹⁰² The court reasoned

⁹³ See *Doe*, 119 F.3d at 570; *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Yearly*, 107 F.3d at 448; *Wrightson*, 99 F.3d at 143; *Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192 (1st Cir. 1990).

⁹⁴ See *Oncale*, 83 F.3d at 120; *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994); *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

⁹⁵ See *Garcia*, 28 F.3d at 452; *Goluszek*, 697 F. Supp. 1456.

⁹⁶ See *Garcia*, 28 F.3d at 452; *Goluszek*, 697 F. Supp. 1456; Respondent's Brief at 15, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568).

⁹⁷ See *Goluszek*, 697 F. Supp. at 1456.

⁹⁸ See Respondent's Brief at 6-7.

⁹⁹ See *id.* at 16.

¹⁰⁰ See *id.* at 6.

¹⁰¹ 697 F. Supp. 1452, 1456 (5th Cir. 1988).

¹⁰² See *Goluszek*, 697 F. Supp. at 1454.

that in passing Title VII, Congress intended to eradicate discrimination arising out of an imbalance of power between the sexes.¹⁰³ The court reasoned implicitly that an imbalance of power between the harasser and victim is needed in order to seek Title VII relief, and that no such imbalance exists between members of the same sex.¹⁰⁴ Thus, the district court held that male-on-male harassment that does not create an anti-male environment is not prohibited by Title VII.¹⁰⁵

In 1994, in *Garcia v. Elf Atochem North America*, the Fifth Circuit Court of Appeals held that harassment by a male supervisor against a male employee does not violate Title VII even when the harassment has sexual overtones.¹⁰⁶ In *Garcia*, the employee alleged that his male supervisor had grabbed his crotch and had made sexual motions from behind him.¹⁰⁷ Without explanation, the court concluded that the actions of the supervisor could not constitute sexual harassment within the meaning of Title VII.¹⁰⁸ Thus, the court held that harassment by a male supervisor against a male employee does not violate Title VII even when the harassment has sexual overtones.¹⁰⁹

In its most recent pronouncement on Title VII same-sex sexual harassment, the Fifth Circuit, in 1994, in *Oncale v. Sundowner Offshore Services, Inc.*, held that same-sex hostile environment sexual harassment is not cognizable under Title VII.¹¹⁰ As discussed above, in *Oncale*, a male employee in an all-male work environment alleged that co-workers had physically assaulted and threatened to rape him.¹¹¹ With no discussion of the merits of the case, the court adopted the *Garcia* court's analysis of sexual harassment as binding precedent and held that harassment by a male supervisor against a male subordinate does not state a Title VII claim.¹¹²

B. Homosexuality Requirement

For many courts, sexual orientation was material to a Title VII claim of same-sex sexual harassment.¹¹³ While recognizing a Title VII

¹⁰³ See *id.* at 1456.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ 28 F.3d 446, 452 (5th Cir. 1994). For this holding, the court relied upon its unpublished decision in *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. 1993). See *id.* at 451-52.

¹⁰⁷ See *Garcia*, 28 F.3d at 448.

¹⁰⁸ See *id.* at 452.

¹⁰⁹ See *id.*

¹¹⁰ 83 F.3d 118, 120-21 (5th Cir. 1996), *rev'd and remanded*, 118 S. Ct. 998 (1998).

¹¹¹ See *id.* at 118-19.

¹¹² See *id.* at 120-21; *Garcia*, 28 F.3d at 448.

¹¹³ See, e.g., *Fredette*, 112 F.3d at 1510; *Yeary*, 107 F.3d at 448; *McWilliams*, 72 F.3d at 1195.

cause of action for same-sex sexual harassment, the Fourth Circuit Court of Appeals required proof that the harasser was homosexual in order to demonstrate that the harassment occurred because of sex.¹¹⁴ Both the Sixth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals recognized a Title VII same-sex sexual harassment claim where the harasser was homosexual, but had not decided whether homosexuality was dispositive to a Title VII claim.¹¹⁵ For courts concerned with the more attenuated link between same-sex hostile environment sexual harassment and gender discrimination, the sexual orientation of the harasser provided a method of proving that the harassment occurred because of sex.¹¹⁶ When the harasser was homosexual, the courts suspected that the harasser was motivated by sexual attraction.¹¹⁷ Courts then equated the harassment of a male by a homosexual male with the harassment of a female by a heterosexual male and concluded that the harassment occurred because of sex.¹¹⁸ Homosexuality linked same-sex harassment to gender discrimination in the same fashion that the heterosexist assumption connects the two within the opposite-sex paradigm and permitted Title VII protection.¹¹⁹

1. The Fourth Circuit

In 1996, in *McWilliams v. Fairfax County Board of Supervisors*, the Fourth Circuit held that a claim alleging hostile environment sexual harassment does not lie where both the alleged harassers and the victim are heterosexuals of the same sex.¹²⁰ In *McWilliams*, the plaintiff alleged that co-workers teased him about his sexual activities, exposed their genitalia to him, fondled him and on one occasion placed a condom in his food.¹²¹ In affirming the district court's grant of summary judgment, the Fourth Circuit reasoned that the conduct was not based on sex as contemplated by Title VII.¹²² Instead, the court postulated that the conduct might have been because of the perpetrators' own sexual perversion, obsession or insecurity, but not specifically

¹¹⁴ See *Wrightson*, 99 F.3d at 143 (holding that Title VII sexual harassment claim lies where homosexual male sexually harasses heterosexual male employee); *McWilliams*, 72 F.3d at 1195 (holding that Title VII claim does not lie where both alleged harasser and victim are heterosexual males).

¹¹⁵ See *Fredette*, 112 F.3d at 1510; *Yeary*, 107 F.3d at 448.

¹¹⁶ See *Fredette*, 112 F.3d at 1505.

¹¹⁷ See *id.*; *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir. 1996).

¹¹⁸ See *Fredette*, 112 F.3d at 1505; *Hopkins*, 77 F.3d at 752.

¹¹⁹ See *Fredette*, 112 F.3d at 1505; *Hopkins*, 77 F.3d at 752.

¹²⁰ 72 F.3d 1191, 1195 (4th Cir. 1996).

¹²¹ See *McWilliams*, 72 F.3d at 1193.

¹²² See *id.* at 1195-96.

because of sex.¹²³ The court reasoned implicitly that sexual harassment between heterosexuals of the same gender cannot be linked to gender discrimination.¹²⁴ Thus, the court held that Title VII does not recognize a cause of action where both the alleged harassers and the victims are heterosexuals of the same sex.¹²⁵

Later in 1996, in *Wrightson v. Pizza Hut of America, Inc.*, the Fourth Circuit revisited the issue of same-sex sexual harassment and held that a Title VII claim for same-sex hostile environment harassment may lie where the harasser is homosexual.¹²⁶ In *Wrightson*, the alleged harasser, an openly homosexual male, repeatedly made sexually explicit comments to a male employee, squeezed his buttocks and pulled out his pants in order to look down into them.¹²⁷ In reversing the district court's grant of summary judgment, the Fourth Circuit rejected the conclusion that Title VII's causal language—because of sex—foreclosed the possibility of a same-sex hostile environment claim.¹²⁸ The court reasoned tacitly that the homosexuality of the harasser caused him to harass a male employee because of the employee's gender, thereby linking the harassment to gender discrimination.¹²⁹ With the requisite connection between the harassment and gender discrimination provided by the homosexuality of the harasser, the court held that a Title VII claim for same-sex harassment may lie where the harasser is homosexual.¹³⁰

2. The Sixth and Eleventh Circuits

Both the Sixth Circuit Court of Appeals and Eleventh Circuit Court of Appeals also recognized Title VII claims for same-sex hostile environment sexual harassment.¹³¹ In 1997, in *Yeary v. Goodwill Industries-Knoxville*, the Sixth Circuit Court of Appeals held that a Title VII claim does lie where a homosexual male supervisor sexually propositions another male because of sexual attraction.¹³² The court did not decide whether the employee would have been able to seek Title VII relief if his supervisor had not been homosexual.¹³³ In *Yeary*, a homo-

¹²³ See *id.* at 1196.

¹²⁴ See *id.*

¹²⁵ See *id.* at 1195.

¹²⁶ 99 F.3d 138, 143 (4th Cir. 1996).

¹²⁷ See *Wrightson*, 99 F.3d at 139-40.

¹²⁸ See *id.* at 142.

¹²⁹ See *id.* at 143.

¹³⁰ See *id.*

¹³¹ See *Fredette*, 112 F.3d at 1510; *Yeary*, 107 F.3d at 448.

¹³² 107 F.3d at 448.

¹³³ See *Yeary*, 107 F.3d at 448.

sexual male supervisor grabbed a male employee's arm while he was arranging clothes and rubbed the back of his hand across the employee's chest and stomach.¹³⁴ The supervisor also telephoned the employee and made lewd and obscene remarks.¹³⁵ The court reasoned that harassment motivated by sexual attraction occurs because of the gender of the victim regardless of whether the harasser and victim are of the opposite sex.¹³⁶ Thus, the court held that a male employee may seek Title VII relief where a male homosexual supervisor sexually propositions him.¹³⁷

Similarly, in 1997, in *Fredette v. BVP Management Associates*, the Eleventh Circuit Court of Appeals held that Title VII provides protection where a homosexual male superior solicits sexual favors from a male subordinate.¹³⁸ In *Fredette*, a homosexual male maitre d' repeatedly propositioned a male waiter, offering employment benefits in exchange for sexual favors.¹³⁹ The court reasoned that the inferred motives of the homosexual harasser are identical to those of the heterosexual harasser since both make advances toward a victim because they prefer the victim's gender.¹⁴⁰ Thus, the harassment occurs because of sex.¹⁴¹ Without deciding whether the waiter could have sought Title VII relief absent a showing of the maitre d's homosexuality, the court held that when a homosexual male supervisor solicits sexual favors from a male subordinate, the subordinate may state a Title VII claim for sexual harassment.¹⁴²

C. *Simply But For*

A second approach suggested by courts to determine whether same-sex harassment occurred because of sex was the "but-for" test.¹⁴³ Under this analysis, an employee is harassed if, but for the employee's

¹³⁴ See *id.* at 444.

¹³⁵ See *id.*

¹³⁶ See *id.* at 447-48.

¹³⁷ See *id.* at 448.

¹³⁸ 112 F.3d 1503, 1510 (11th Cir. 1997).

¹³⁹ See *Fredette*, 112 F.3d at 1504.

¹⁴⁰ See *id.* at 1505.

¹⁴¹ See *id.*

¹⁴² See *id.* at 1510.

¹⁴³ See, e.g., *Wrightson*, 99 F.3d at 142 ("An employee is harassed . . . 'because of sex' if, 'but-for' the employee's sex, he or she would not have been the victim of discrimination."); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) ("In proving a claim for [hostile environment sexual harassment] the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment."); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("[I]n each instance the question is . . . would the complaining party have suffered the harassment had he or she been of a different gender?").

sex, he or she would not have been the victim of harassment.¹⁴⁴ Borrowed from other discrimination contexts, the "but-for" test focused on whether the harasser treated members of one sex differently from members of the other sex.¹⁴⁵ The proper inquiry, proponents argued, was not whether the gender of the victim motivated the harasser, i.e., whether sexual attraction of a homosexual supervisor motivated him to harass a male employee, but whether the harassment had the effect of singling out one sex.¹⁴⁶ Thus, neither the sexual orientation of the harasser nor the victim was material.¹⁴⁷ Disparate treatment of the sexes indicated that the harassment occurred because of sex, linking the harassment to gender discrimination and permitting Title VII protection.¹⁴⁸

1. The Eighth Circuit

In 1996, in *Quick v. Donaldson Co.*, the Eighth Circuit Court of Appeals held that the district court had erred in holding that Title VII protects a male employee from sexual harassment by a male supervisor only if the environment is anti-male or predominantly female.¹⁴⁹ In *Quick*, twelve male co-workers allegedly grabbed the crotch of a male employee over one hundred times.¹⁵⁰ Because eighty-six percent of the work force was male, the district court held that the plaintiff had not sustained his burden in demonstrating an anti-male or predominantly female environment.¹⁵¹ The Eighth Circuit rejected this standard.¹⁵² The court explained that the requisite inquiry is not whether an anti-male or predominantly female environment existed, but whether the harasser subjected members of one gender to disadvantageous terms or conditions of employment to which he or she did not subject members of the other gender.¹⁵³ The court tacitly reasoned that Title VII affords protection to those who, but for their gender, would not

¹⁴⁴ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989).

¹⁴⁵ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("The critical inquiry, 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."); *Price Waterhouse*, 490 U.S. at 242.

¹⁴⁶ See *Quick v. Donaldson*, 90 F.3d 1372, 1378 (8th Cir. 1996); Petitioner's Brief at 28, *Oncala v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568); MacKinnon, *supra* note 3, at 28-29.

¹⁴⁷ See *Quick*, 90 F.3d at 1378.

¹⁴⁸ See *id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at 1374.

¹⁵¹ See *id.* at 1374, 1375-76.

¹⁵² See *Quick*, 90 F.3d at 1378.

¹⁵³ See *id.*

have been harassed.¹⁵⁴ The court noted that evidence that an employer harassed members of one sex but not the other demonstrates that the conduct occurred because of sex.¹⁵⁵ Thus, the court rejected the anti-male environment requirement and held that the proper inquiry in determining whether harassment occurred because of sex is whether male employees were treated differently than female employees.¹⁵⁶

2. The Seventh Circuit's Charge and Retreat

The Seventh Circuit Court of Appeals took the broadest view of Title VII's prohibition against gender discrimination.¹⁵⁷ The circuit's Title VII jurisprudence recognized claims for same-sex hostile environment sexual harassment regardless of the sexual orientation of the harasser.¹⁵⁸ Moreover, at least one Seventh Circuit decision suggested that the content of sexually explicit harassment, in and of itself, can prove that the harassment occurred because of sex.¹⁵⁹ Thus, in instances where the content of the harassment is inseparable from the victim's gender, for example, calling a woman a "dumb bitch," the content is sufficient to link the sexual harassment to gender discrimination and to garner Title VII protection.¹⁶⁰

In 1997, in *Doe v. City of Belleville, Illinois*, the Seventh Circuit held that summary judgment was inappropriate where material facts permitted the inference that a heterosexual male supervisor harassed male employees because of their gender.¹⁶¹ In *Doe*, two sixteen-year-old brothers alleged that male co-workers incessantly taunted them, calling them "fat boy," "fag," "queer" and "bitch."¹⁶² On repeated occasions, a co-worker allegedly threatened to take one of the brothers out into the woods for sexual purposes and on one occasion, grabbed his crotch to determine if he were male or female.¹⁶³ In reversing the district court's grant of summary judgment, the Seventh Circuit suggested that the

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ Compare *Johnson v. Hondo, Inc.*, 125 F.3d 408, 415 (7th Cir. 1997) (holding same-sex sexual harassment actionable regardless of the sexual orientation of the harasser), and *Doe*, 119 F.3d at 576 (suggesting content of sexually explicit harassment alone is sufficient to prove that harassment occurred because of sex) with *Oncale*, 83 F.3d at 120 (categorically rejecting all claims of same-sex harassment), and *McWilliams*, 72 F.3d at 1195 (holding that Title VII claim does not lie where both alleged harassers and victim are heterosexual males).

¹⁵⁸ See *Johnson*, 125 F.3d at 413 n.5; *Doe*, 119 F.3d at 591.

¹⁵⁹ See *Doe*, 119 F.3d at 577-78.

¹⁶⁰ See *id.*

¹⁶¹ *Id.* at 566.

¹⁶² See *id.* at 566-67.

¹⁶³ See *id.* at 567.

sexually explicit content of the harassment spoke for itself in proving that the harassment occurred because of sex.¹⁶⁴ Despite the court's apparent approval of the presumption that all sexually explicit conduct occurs because of sex, the majority did not rely on it as the basis for its decision because it found additional evidence linking the harassment to the victim's gender.¹⁶⁵ Still, the court implied that same-sex harassment that is sexually explicit creates a presumption that it occurred because of gender and deserves Title VII protection.¹⁶⁶ Without relying on the presumption, the court held that summary judgment was inappropriate where material facts permitted the inference that a heterosexual male supervisor harassed male employees because of their gender.¹⁶⁷

In 1997, in *Johnson v. Honda*, the Seventh Circuit retreated from its dicta in *Doe*, holding that a male employee had not stated a Title VII claim because he failed to show that sexually explicit harassment was gender-based.¹⁶⁸ In *Johnson*, a male co-worker allegedly told Johnson that he was "going to make him suck his dick" and made comments about Johnson's girlfriend "having to suck his dick."¹⁶⁹ The co-worker also persistently brushed up against Johnson while grabbing himself.¹⁷⁰ In denying Johnson's claim, the court reasoned that besides the sexual content of the remarks, there was no evidence to suggest that the harassment occurred because of Johnson's gender.¹⁷¹ The court suggested that content is powerful evidence that tends to prove that the harassment occurred because of sex, but alone it is insufficient to link sexually explicit harassment to gender discrimination.¹⁷² Because the plaintiff offered nothing more than the sexually explicit content of the harassment to prove that it occurred because of sex, the court held that Johnson had failed to satisfy the third prima facie element of a Title VII hostile environment sexual harassment claim.¹⁷³

¹⁶⁴ See *Doe*, 119 F.3d at 576, 580, 596.

¹⁶⁵ See *id.* at 580. The court relied on its finding that the plaintiffs had been harassed because their appearance and conduct did not conform to the harassers' view of appropriate masculine behavior to link the harassment to gender. See *id.*

¹⁶⁶ See *id.* at 577-78.

¹⁶⁷ See *id.* at 566.

¹⁶⁸ 125 F.3d 408, 412, 413, 415 n.5 (7th Cir. 1997).

¹⁶⁹ See *Johnson*, 125 F.3d at 410-11.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 412.

¹⁷² See *id.*

¹⁷³ See *id.* at 412, 413.

IV. THE SUPREME COURT'S RECOGNITION OF SAME-SEX SEXUAL HARASSMENT UNDER TITLE VII

A. *The Decision*

In 1998, in *Oncale v. Sundowner Offshore Services, Inc.*, the United States Supreme Court resolved the split among the circuits and held that same-sex sexual harassment is actionable under Title VII.¹⁷⁴ The plaintiff in *Oncale* brought a Title VII hostile environment sexual harassment claim following three incidents of harassment by male co-workers and a male supervisor.¹⁷⁵ The Court acknowledged that Congress' primary purpose in enacting the statute was not to prohibit male-on-male harassment in the workplace.¹⁷⁶ The Court explained, however, that although Congress did not envision same-sex sexual harassment as the "principal evil" to be eradicated, it is a "reasonably comparable evil" covered by Title VII.¹⁷⁷

In reversing the Fifth Circuit's decision, the Court explained that no justification exists in precedent or in the statutory language of Title VII for a categorical rule against same-sex harassment claims.¹⁷⁸ Moreover, the Court dismissed concerns that recognizing liability for same-sex harassment would transform Title VII into a workplace code of civility.¹⁷⁹ The Court explained that careful attention to the prima facie elements of a sexual harassment claim mitigates the risk that Title VII will devolve into a "bad acts" statute.¹⁸⁰ Only workplace harassment that constitutes discrimination because of sex is prohibited by Title VII.¹⁸¹ Furthermore, Title VII only applies to workplace harassment that is so objectionably offensive as to alter the terms and conditions of employment.¹⁸² With these safeguards in place, the Court reasoned that sexual harassment of any kind that satisfies the prima facie elements must be afforded Title VII protection.¹⁸³

In dicta, the Court also attempted to clarify what evidentiary routes are available to establish the requisite link between sexual har-

¹⁷⁴ 118 S. Ct. 998, 1003 (1998); see also *supra* notes 91-174 and accompanying text.

¹⁷⁵ See *Oncale*, 118 S. Ct. at 1001; *supra* notes 1-7 and accompanying text.

¹⁷⁶ See *Oncale*, 118 S. Ct. at 1002.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *Oncale*, 118 S. Ct. at 1002.

¹⁸² See *id.* at 1002-03.

¹⁸³ See *id.* at 1002.

assment and gender discrimination.¹⁸⁴ The Court rejected the notion that homosexuality is the only method of proving that the harassment occurred because of sex.¹⁸⁵ The Court reasoned that the harasser need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.¹⁸⁶ Evidence of a general hostility toward one gender in the workplace can also prove that same-sex harassment occurred because of sex.¹⁸⁷ The Court also endorsed the use of direct comparative evidence regarding how the alleged harasser treated members of both sexes to prove that harassment occurred because of sex.¹⁸⁸

In *Oncale*, the Court held that same-sex sexual harassment is actionable under Title VII and suggested multiple evidentiary routes to establish the required nexus between sexual harassment and gender discrimination.¹⁸⁹ Thus, the Court reversed the Fifth Circuit's judgment and remanded the case for further proceedings to determine whether Mr. Oncale has met the prima facie elements of a Title VII sexual harassment claim.¹⁹⁰

B. Questions Remaining After *Oncale*

In its third seminal case on Title VII sexual harassment, the Supreme Court conclusively established that members of one gender can, as a matter of law, sexually harass one another within the meaning of the statute.¹⁹¹ Left unanswered by the Court's decision is what quantum of proof is necessary to prove that the harassment occurred because of sex.¹⁹² Although the *Oncale* Court discussed three evidentiary routes that a Title VII plaintiff may use to prove that same-sex sexual harassment constituted discrimination because of sex, the discussion is

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *Oncale*, 118 S. Ct. at 1002.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at 1002, 1003.

¹⁹⁰ See *id.*

¹⁹¹ See *Oncale*, 118 S. Ct. at 1003.

¹⁹² See *id.* at 1002. Although beyond the scope of this note, *Oncale* also leaves undefined the parameters of acceptable behavior between members of the same sex for purposes of Title VII liability. See *id.* at 1003. In applying the prima facie elements of a Title VII sexual harassment claim to a same-sex social context, lower courts will have to flesh out what behavior creates an abusive or hostile work environment within the same-sex social context. See *id.* Although within the opposite-sex paradigm, courts have always been required to differentiate innocuous behavior from that which a reasonable person would find severely hostile or abusive, the demarcation between the two may not be so clear within the same-sex context. See *id.*

dicta.¹⁹³ Lower courts will now struggle with this issue in continuing to develop a body of Title VII same-sex sexual harassment jurisprudence.

1. Sexual Desire

The first evidentiary route suggested in *Oncale* is sexual desire.¹⁹⁴ The Court noted that the same chain of inference linking opposite-sex sexual harassment to discrimination would be available to a plaintiff alleging same-sex harassment if there were credible evidence that the harasser was homosexual.¹⁹⁵ The Court reasoned implicitly that proof that the harasser is homosexual could lead a factfinder reasonably to assume that the harassment occurred out of sexual desire and thus occurred because of sex.¹⁹⁶ The Court cautioned, however, that sexual desire need not motivate harassing conduct to support an inference of discrimination on the basis of sex.¹⁹⁷ In so doing, the court implied that homosexuality need not be pled nor proven to establish that same-sex sexual harassment occurred because of sex.¹⁹⁸ Because factually *Oncale* involves only heterosexual males, the Court's commentary on the homosexuality requirement is only dicta.¹⁹⁹ Courts that currently impose a condition of homosexuality on all same-sex Title VII claims are thus not explicitly prohibited from doing so under *Oncale*, although the spirit of the decision clearly opposes such a requirement.²⁰⁰

2. General Hostility

The second evidentiary route suggested in *Oncale* is general hostility.²⁰¹ The Court explained that a trier of fact might reasonably find discrimination if a female harasses another female in such sex-specific and derogatory terms that it is apparent that a general hostility to the presence of women in the workplace is motivating the harasser.²⁰² Although the Court does not elaborate, its discussion suggests that the content of sexually explicit harassment alone may be sufficient to support a finding that the harassment occurred because of sex.²⁰³ While

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *Oncale*, 118 S. Ct. at 1002.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *Oncale*, 118 S. Ct. at 1002.

²⁰² See *id.*

²⁰³ See *id.*

only dicta, the Court's commentary lends support to the view taken by the Seventh Circuit Court of Appeals in *Doe v. City of Belleville, Illinois*, that same-sex harassment which is sexually explicit may be presumed to be based on sex without any further proof that the harassment occurred because of sex.²⁰⁴

3. Direct Comparative Evidence

The third evidentiary route suggested in *Oncale* is direct comparative evidence regarding how the alleged harasser treated members of both sexes in a mixed-sex workplace.²⁰⁵ The key inquiry in proving that discrimination occurred because of sex is whether the harasser treated members of one sex differently than he or she treated members of the other sex.²⁰⁶ The Court's commentary implies that it is appropriate to apply the "but for" test to determine whether same-sex sexual harassment occurred because of sex.²⁰⁷

V. COURTS SHOULD PERMIT ONLY DIRECT COMPARATIVE EVIDENCE TO SUPPORT A FINDING OF DISCRIMINATION BECAUSE OF SEX

Prior to the Supreme Court's decision in *Oncale*, courts and commentators opposed to imposing Title VII liability for same-sex sexual harassment argued that such an expansion of Title VII would impermissibly transform the statute into a general code of workplace civility.²⁰⁸ Enacted primarily to eradicate the discrimination inflicted on black employees by white employers, Title VII has been transformed over the past three decades into a much broader prohibition against reverse racial discrimination, intra-racial discrimination, reverse gender-discrimination, opposite-sex sexual harassment and now same-sex sexual harassment.²⁰⁹ These classes of prohibited conduct may seem to

²⁰⁴ See *id.*; *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 576 (7th Cir. 1997).

²⁰⁵ See *Oncale*, 118 S. Ct. at 1002.

²⁰⁶ See *id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1992) (Ginsburg, J., concurring)).

²⁰⁷ See *id.*

²⁰⁸ See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996) (to interpret Title VII to prohibit heterosexual male-on-male sexual harassment "would be to extend this vital statute's protections beyond intentional discrimination 'because of' the offended worker's 'sex' to unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.'"); Respondent's Brief at 7, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568).

²⁰⁹ See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998) (holding that same-sex sexual harassment is actionable under Title VII); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (holding that sexual harassment that creates hostile or abusive work environment violates Title VII); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983) (holding that discrimination against men violates Title VII); *TransWorld Airlines, Inc. v.*

have little to do with Congress' original intent in passing Title VII.²¹⁰ Upon close examination, however, each prohibition serves what the Supreme Court and lower courts have declared to be the underlying purpose of Title VII—to promote workplace equality.²¹¹

While workplace equality is the justification for expanding Title VII beyond race discrimination, it is also the key to reining in Title VII.²¹² Statutory protection should not be afforded to conduct that, while egregious and offensive, does not implicate workplace equality.²¹³ Such conduct, while perhaps tortious, should not constitute a Title VII violation.²¹⁴

Within the sexual harassment context, only harassment that treats men differently from women, or women differently from men, should garner Title VII protection.²¹⁵ The judiciary has endorsed this view repeatedly in focusing its inquiry on whether the harasser subjects members of one sex to disadvantageous terms or conditions of employment to which he or she does not subject members of the opposite sex.²¹⁶ In other words, harassment occurs because of sex only if, but for the victim's sex, he or she would not have been the object of sexual harassment.²¹⁷ Disparate treatment of the sexes should be the touchstone in proving that sexual harassment occurred because of sex.²¹⁸ Any other analysis would further a purpose beyond promoting workplace

Hardison, 432 U.S. 63, 71-72 (1977) ("Congress enacted Title VII based on its determination that racial minorities were subject to pervasive and systematic discrimination in employment."); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII prohibits discrimination against white employees); *Hansborough v. City of Elkhart Parks & Recreation Dept.*, 802 F. Supp. 199, 206 (N.D. Ind. 1992) (holding intra-racial discrimination violates Title VII); 110 Cong. Rec. 2581 (1964).

²¹⁰ See *TransWorld Airlines*, 432 U.S. at 71-72; 110 Cong. Rec. 2581.

²¹¹ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (reasoning that sexual harassment that occurs because of sex "offends Title VII's broad rule of workplace equality"); *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) ("The goal of Title VII is equal employment opportunity."); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (explaining that Congress intended Title VII to eliminate "all practices in whatever form which create inequality in employment opportunities due to discrimination on the basis of race, religion, sex, or national origin.").

²¹² See *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448; *TransWorld Airlines*, 432 U.S. at 71-72.

²¹³ See *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448.

²¹⁴ See *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448; *Rogers v. Lowes L'Enfant Plaza Hotel*, 28 Empl. Prac. Dec. (CCH) ¶ 32,553 at 24,470-73 (D.D.C. 1982) (sexual harassment may form basis for action for common law torts of invasion of privacy, assault and battery and intentional infliction of emotional distress).

²¹⁵ See *Oncale*, 118 S. Ct. at 1002; *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448.

²¹⁶ See *Oncale*, 118 S. Ct. at 1002; *Harris*, 510 U.S. at 25.

²¹⁷ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

²¹⁸ See *Henson*, 682 F.2d at 903.

equality and transform Title VII into a general civility code for workplace conduct.²¹⁹

A. Direct Comparative Evidence and the Heterosexist Assumption

Requiring the use of direct comparative evidence to prove that either opposite-sex or same-sex sexual harassment occurred because of sex would obviate the use of the heterosexist assumption which can undermine Title VII's goal of workplace equality.²²⁰ As discussed above, the heterosexist assumption operates so that whenever a person sexually harasses a member of the opposite sex, it is presumed to be on account of sexual attraction and thus, because of sex.²²¹ Within the same-sex paradigm, however, there is an opposite presumption that harassment does not occur out of sexual desire and thus does not occur because of sex.²²² Although the heterosexist assumption benefits victims of opposite-sex harassment by presuming away the "because of sex" requirement, it may often subvert Title VII's goal of promoting workplace equality in two ways.²²³

First, the presumption within the opposite-sex paradigm that harassment occurs because of sex can result in extending Title VII to prohibit harassment that, while tortious and egregious, is not discriminatory.²²⁴ For example, in instances of "equal-opportunity" harassment, where an employer harasses both a man and a woman, the harassment suffered by the woman is not discriminatory because the harasser is treating her similarly to members of the opposite sex rather than differently.²²⁵ The heterosexist assumption, however, would presume that she was sexually harassed because of sex and would allow her to bring a Title VII claim even though she has not been treated unequally.²²⁶ Prohibiting non-discriminatory harassment subverts Title VII's goal of promoting workplace equality.²²⁷

²¹⁹ See *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448; *McWilliams*, 72 F.3d at 1196.

²²⁰ See *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448; *Henson*, 682 F.2d at 904.

²²¹ See *Hopkins v. Baltimore Gas & Elec., Co.*, 77 F.3d 745, 752 (4th Cir. 1996); Franke, *supra* note 75, at 735-36.

²²² See *Hopkins*, 77 F.3d at 753; *McWilliams*, 72 F.3d at 1196; Spindelman and Stoltenberg, *supra* note 80, at 4.

²²³ See *Oncale*, 118 S. Ct at 1002; *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448; *Henson*, 682 F.2d at 904.

²²⁴ See *Henson*, 682 F.2d at 904.

²²⁵ See *id.*

²²⁶ See *Hopkins*, 77 F.3d at 752; Franke, *supra* note 75, at 735-36.

²²⁷ See *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448.

Second, the presumption within the same-sex paradigm that harassment does not occur because of sex can restrict Title VII from prohibiting harassment that is discriminatory.²²⁸ For example, where a heterosexual male harasses another heterosexual male, some courts have refused to extend Title VII protection because it was presumed that the harassment did not occur because of sex, even though the harasser did not treat women in a similar manner.²²⁹ Denying statutory protection to victims of discriminatory harassment frustrates Title VII's goal of promoting workplace equality.²³⁰

A requirement of direct comparative evidence would avoid this inequitable result and properly focus the inquiry on whether the harasser treated members of one sex differently from members of the opposite sex.²³¹ Thus, requiring use of direct comparative evidence to prove that harassment occurred because of sex would further Title VII's goal of workplace equality.²³²

B. *Direct Comparative Evidence and the Race Analogy*

Use of direct comparative evidence for sexual harassment would also be consistent with the framework used within other intra-group discrimination contexts.²³³ Within the context of race discrimination, the case law rejects the presumption that an employer will not discriminate against members of his or her own race.²³⁴ The relevant inquiry used within the intra-racial discrimination context to determine whether discrimination occurred because of race is whether the employer treated members of one race differently than he or she treated members of other races.²³⁵ The identity of the discriminator is irrelevant to the analysis.²³⁶ Applying this framework to the sexual harassment situation, the proper inquiry should focus on whether the harasser treated a member of one sex differently from a member of the other, regardless of the gender of the harasser or the victim.²³⁷

²²⁸ See *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994).

²²⁹ See *id.*

²³⁰ See *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448.

²³¹ See *Harris*, 510 U.S. at 25; *Teal*, 457 U.S. at 448.

²³² See *Harris*, 510 U.S. at 22; *Teal*, 457 U.S. at 448.

²³³ See *Hansborough*, 802 F. Supp. at 208.

²³⁴ See *Castaneda v. Partida*, 430 U.S. 482, 499 (1977); *Hansborough*, 802 F. Supp. at 206; *Walker v. Secretary of the Treasury, I.R.S.*, 742 F. Supp. 670, 671 (N.D. Ga. 1990).

²³⁵ See *Hansborough*, 802 F. Supp. at 208.

²³⁶ See *Hill v. Burrell Communications Group*, 67 F.3d 665, 668 (7th Cir. 1993); see also *Feldmeier*, *supra* note 12, at 876-78.

²³⁷ See *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

C. *Application of Direct Comparative Evidence Standard to Oncale*

Upon remand, the district court must determine whether Joseph Oncale has met the prima facie elements of a Title VII sexual harassment claim.²³⁸ Although the Supreme Court's decision in *Oncale* eviscerates the Fifth Circuit's position that same-sex sexual harassment can never, as a matter of law, occur because of sex, the district court is free to determine what evidentiary routes are available to a plaintiff to prove, as a matter of fact, that harassment occurred because of sex.²³⁹

To ensure the promotion of Title VII's goal of workplace equality, the district court should permit only direct comparative evidence to support a finding of discrimination based on sex.²⁴⁰ Thus, on the merits of the case, the district court should conclude that Joseph Oncale has failed to state a Title VII sexual harassment claim.²⁴¹ Mr. Oncale worked in an all-male environment.²⁴² Thus, he cannot prove that his employer subjected him to disadvantageous terms or conditions of employment to which women were not exposed.²⁴³ The harassment he suffered, although egregious, is not inequitable.²⁴⁴ Extending Title VII to protect Mr. Oncale would transform the anti-discrimination statute into merely a "bad acts" statute.²⁴⁵

VI. CONCLUSION

Since the enactment of Title VII, the judiciary has struggled to define its scope as it applies to sex. Although the statute does not explicitly prohibit sexual harassment, the Supreme Court's landmark decisions in *Meritor*, *Harris* and now *Oncale* have interpreted Title VII to provide protection against any kind of sexual harassment that meets the statutory prima facie elements.

Within the same-sex paradigm, the primary barrier to statutory redress is proving that sexual harassment occurred because of sex. The Supreme Court's decision in *Oncale* suggests three evidentiary routes to prove that harassment occurred because of sex. To further Title VII's goal of promoting workplace equality, the proper and only inquiry

²³⁸ See *Oncale*, 118 S. Ct. at 1003.

²³⁹ See *id.* at 1001-02; *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120-21 (5th Cir. 1996).

²⁴⁰ See *supra* notes 208-38 and accompanying text.

²⁴¹ See *Oncale*, 118 S. Ct. at 1001; *supra* notes 208-38 and accompanying text.

²⁴² See *Oncale*, 118 S. Ct. at 1001.

²⁴³ See *id.*; *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

²⁴⁴ See *Oncale*, 118 S. Ct. at 1001.

²⁴⁵ See *supra* notes 208-15 and accompanying text.

should be whether members of one gender were exposed to disadvantageous terms or conditions of employment to which members of the other gender were not. The use of direct comparative evidence would overcome inequitable results between opposite-sex and same-sex harassment situations. Moreover, use of direct comparative evidence in the sexual harassment paradigm would be consistent with its use in other discrimination contexts. To further Title VII's goal of promoting workplace equality, courts should permit only direct comparative evidence to support a finding that sexual harassment occurred because of sex. Thus, upon remand, the district court should conclude that Joseph Oncale has failed to state a Title VII claim of sexual harassment because he has failed to prove through direct comparative evidence that but for his gender, he would not have been the victim of sexual harassment.

DEB LUSSIER