Santa Clara University
School of Law

Santa Clara Law Review

Volume 40 | Number 1 Article 1

1-1-1999

The Thin Line Between Love and Hate: Same-Sex Hostile-Environment Sexual Harassment

Marianne C. DelPo

ARTICLES

THE THIN LINE BETWEEN LOVE AND HATE: SAME-SEX HOSTILE-ENVIRONMENT SEXUAL HARASSMENT

Marianne C. DelPo*

If Clarence Thomas subjected a male employee to the same treatment he allegedly visited upon Anita Hill,[1] the same federal law that prohibits cross-gender workplace hostile-environment sexual harassment would be available to the male victim seeking redress. Justice Thomas and his eight colleagues on the United States Supreme Court announced this rule in 1998 in *Oncale v. Sundowner Offshore Services, Inc.*[2] Over a year later, what is substantially less clear is how courts should apply the *Oncale* holding to same-sex cases, particularly those involving facts similar to those presented in *Oncale*: same-sex hostile-environment sexual harassment by a heterosexual harasser whose behavior and motivation is more hateful than sexually predatory. This is potentially a problem because in holding that Title VII prohibits sexual harassment identically for same-sex harassers as for cross-gender ones, the Court has opened the door to further litigation of fact patterns like those presented by *Oncale*. Since cross-gender hostile-environment sexual harassment has

* Assistant Professor of Law, Bentley College, Waltham, Massachusetts. J.D., Boston University; M.A., University of Liverpool; B.A., Harvard University.

1. Anita Hill testified before Congress that Justice Thomas, then Director of the EEOC, subjected her, then his subordinate, to the sort of repeated, unwelcome sexual advances and offensive sexual comments which, if true, would likely constitute the hostile-environment variety of federally prohibited workplace sexual harassment. *See* JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994).

2. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

been deemed illegal whether the harasser desires or hates his victim, so too must same-sex hostile-environment harassment be actionable under Title VII in either situation.[3]

This article reviews the cross-gender hostile-environment sexual harassment law as well as the limited same-sex sexual harassment case law available to glean a gender-neutral standard for evaluating all hostile-environment sexual harassment claims. Far from an oxymoron, this gender-neutral standard is critical to the effective implementation of the *Oncale* ruling. Illegal sexual harassment may occur regardless of the gender combination of harasser and "harassee" and regardless of whether the harasser is motivated by desire or hatred.[4]

I. BACKGROUND—SEXUAL HARASSMENT JURISPRUDENCE

A. *A Brief History: Two Types of Sexual Harassment Recognized as Forms of Sex Discrimination*

Title VII of the Civil Rights Act of 1964 is the source of the federal prohibition of workplace sexual harassment.[5] However, the anti-discrimination statute itself is silent on sexual harassment, outlawing only workplace discrimination "because of . . . sex."[6] The Equal Employment Opportunity Commission ("EEOC") was the first governmental body to define illegal workplace sex discrimination to include "sexual harassment,"[7] a term first coined in the early 1970s to describe the sort of unwelcome sexual advances that were then rampant between male supervisors and female subordinates.[8] The U.S. Supreme Court, while not bound by administrative agency guidelines as it is by congressional legislation,[9] none-

3. *See id.* Indeed the Court explicitly acknowledged the inclusion of such claims in its holding: "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* at 80.

4. *See id.* at 75.

5. *See* 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 1999).

6. *Id.* § 2000e-2(a)(1).

7. 29 C.F.R. § 1604.11 (1996) (emphasis added). "(a) Harassment on the basis of sex is a violation of section 703 of Title VII. . . . (b) In determining whether alleged conduct constitutes *sexual harassment*, the Commission will look at . . . the totality of the circumstances, such as the nature of the sexual advances and the context in which the incidents occurred." *Id.*

8. *See* J. RALPH LINDGREN & NADINE TAUB, THE LAW OF SEX DISCRIMINATION 201-07 (2d ed. 1993).

9. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976).

theless adopted the EEOC statutory interpretation that federal workplace anti-discrimination law prohibits sexual harassment. Further, in *Meritor Savings Bank v. Vinson*[10] the Court held that Title VII outlaws not only the traditional quid pro quo variety of sexual harassment, but also the more modern "hostile-environment" type.[11]

Quid pro quo sexual harassment occurs when submission to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature is made a term or condition of the victim's employment or is used as the basis for employment decisions affecting the victim.[12] This is the "old fashioned," explicit, "if you want to get ahead, or at least keep your job, you'll have sex with me" type of harassment. In contrast, hostile-environment sexual harassment is less of a blatant threat to the victim's employment status. This harassment occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature has the purpose or effect of unreasonably interfering with the victim's work performance or creating an intimidating, hostile, or offensive working environment.[13] The success of a quid pro quo claim rests largely on the plaintiff's ability to prove both the unlawful conduct and the presence of a threat—explicit or implicit—of ill consequences for failure to submit to the conduct.[14] On the other hand, successful hostile-environment claims do not require proof of a threat; rather, in addition to proof of the prohibited conduct, these claims turn on the plaintiff's ability to show that the conduct created a hostile environment. That is, though the harassment need not cause a tangible psychological injury, it must be more than merely offensive: a reasonable person must find the conduct sufficiently severe or pervasive to constitute a hostile or abusive work environment.[15]

Although the two types of sexual harassment claims are different, both require proof that the "harasser treats a member or members of one sex differently from members of the

10. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
11. *See id.* at 65-67.
12. *See id.* at 65.
13. *See Meritor Savings Bank*, 477 U.S. at 65.
14. *See* 29 C.F.R. § 1604.11(a)(1) (1996).
15. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993).

other sex."[16] This is the premise of any sex discrimination claim,[17] and the basis for the inclusion of sexual harassment as a type of illegal workplace sex discrimination. In agreeing with the EEOC that sexual harassment violates Title VII, the Supreme Court held that "when a supervisor sexually harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the basis of sex."[18] Title VII, both the EEOC and the Supreme Court have concluded, "affords employees the right to work in an environment free from *discriminatory* intimidation, ridicule, and insult."[19]

B. *Application of Related Legal History to Same-Sex Sexual Harassment Claims*

1. *Gender Versus Sexual Orientation*

Legal resources available to assist in an analysis of how to apply *Oncale's* expansion of Title VII coverage to same-sex sexual harassment are limited. Lower federal courts[20] and the EEOC[21] have long assumed that "sex" means "gender" in the context of Title VII. Thus, resolution of sex discrimination claims under Title VII has turned on whether the offensive treatment occurred "because of" the victim's gender, not his or her sexual orientation.[22] To the extent that same-sex sexual harassment raises issues of sexual orientation, no precedent exists for prohibiting such harassment "because of"

16. EEOC Compl. Man. (CCH) ¶ 3101, § 615.2(b)(3), at 3204 (July 1987).

17. *See id.*

18. *Meritor Savings Bank*, 477 U.S. at 64 (alteration in original) (emphasis added).

19. *Id.* at 65 (referring to EEOC precedents) (alteration in original) (emphasis added). *See generally* 45 Fed. Reg. 74676 (1980).

20. *See, e.g.*, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

21. *See* Empl. Prac. Guide (CCH), Commission Dec. No. 76-67 §§ 605.17 and 615.2, ¶¶ 2117 and 3101, at 2195-201, No. 77-28, § 615.2, ¶ 3101, at 3203-04.

22. *See id.* While this is a sensible and logical statutory interpretation based on the limited legislative history available on the addition of "sex" to the list of characteristics prohibited by Title VII as criteria for workplace decisions, the U.S. Supreme Court actually has yet to address this issue directly. One way to resolve the latest question of Title VII coverage of same-sex sexual harassment would have been for the Court simply to define the statutory term "sex" to include sexual orientation as well as gender. This would have been quite an extreme step, however, since it was apparently far beyond the contemplation of Congress both when Title VII originally was drafted and when it was more recently amended.

sexual orientation.[23]

The limited treatment of "sex discrimination" in the legislative history of Title VII suggests that the lower federal courts' construction of the statutory term "sex" is in fact correct.[24] The sketchy legislative history that does exist "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of *men and women*' in employment."[25] Disparate treatment includes discriminatory conduct that "create[s] a work environment abusive to employees because of their race, *gender*, religion, or national origin [because such an environment] offends Title VII's broad rule of workplace equality."[26] Although the Supreme Court has never directly confronted this issue, it implicitly accepted the lower courts' construction of the statutory term "sex" by using the term "gender" interchangeably with "sex" in *Harris v. Forklift Systems.*[27] The *Harris* Court clarified the "reasonable person" standard for hostile-environment sexual harassment claims by focusing on the severity of mean-spirited harassing behavior visited upon the victim because she was a woman.[28] Thus, as the Supreme Court's own language indicates, any statutory construction that outlaws same-sex sexual harassment must be based on differential treatment due to gender since Congress meant gender and not sexual orientation when it included "sex" in Title VII's list of prohibited bases for workplace decisions.[29] Unfortunately, little else is clear about the congressional intent in outlawing sex discrimination.

2. *EEOC Guidelines for Same-Sex Situations*

Since there is a paucity of legislative history available to determine congressional intent of the parameters of sex discrimination,[30] EEOC Guidelines and Supreme Court statutory interpretation are the most authoritative, although secondary, legal resources available.[31] Therefore, it is critical to re-

23. *See DeSantis*, 608 F.2d 327, 329-30.

24. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-67 (1986).

25. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (emphasis added).

26. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (emphasis added).

27. *See id.*

28. *See id.* at 20.

29. *See* 110 CONG. REC. 2577-84 (1964).

30. *Id.*

31. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-64 (1986).

view EEOC Guidelines and the Supreme Court decisions on sexual harassment[32] for guidance as to who qualifies as a victim of illegal workplace sexual harassment under Title VII. The EEOC Guidelines, while explicitly stating that Title VII does not cover charges of discrimination based on sexual orientation,[33] also explicitly state that "[t]he victim and the harasser may be of the same sex."[34] The Guidelines also provide, as an illustrative example, a hypothetical case where a male supervisor makes unwelcome sexual advances toward a male employee but not toward a female employee.[35] Thus, while the *victim's* sexual orientation may not be the basis of a sexual harassment claim, the *harasser's* orientation may be relevant in so far as it causes him to visit unwelcome sexual advances on one gender (his own) and not the other. In *Oncale*,[36] the Supreme Court explicitly acknowledged the actionability of such a claim.[37]

3. Oncale*: The Supreme Court on Same-Sex Sexual Harassment*

Importantly, when the Supreme Court held in *Oncale* that same-sex sexual harassment is actionable under Title VII, the fact pattern before the Court was quite different from that of the sexually predatory homosexual harasser presented in the EEOC illustrative example.[38] In contrast, the harassers in *Oncale* were heterosexual (as was their victim) and the alleged harassing behavior, while clearly sexual in nature, presented no evidence of homosexual desire.[39] Joseph Oncale alleged that his supervisor and two co-workers sexually harassed him while he was employed on an offshore oil rig in late 1991.[40] Among the activities in Oncale's complaint were (1) co-workers restraining Oncale while the supervisor placed his

32. *See Harris*, 510 U.S at. 17; *Meritor Savings Bank*, 477 U.S at. 57.

33. *See* EEOC Compl. Man. (CCH) ¶ 3101, § 615.2(b)(3) (Example 2), at 3204 (July 1987) (citing Comm'n Decision Nos. 76-67 and 77-28).

34. *See id.* at § 615.2(b)(3).

35. *See id.* (Example 1).

36. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

37. *See id.* at 80 ("The same chain of inference [that sexual proposals would not have been made to someone of the other sex] would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.").

38. *See id.*

39. *See id.*

40. *See id.* at 77.

penis on Oncale's neck and, on another occasion, on Oncale's arm and (2) the supervisor forcibly pushing a bar of soap into Oncale's anus while a co-worker restrained Oncale as he was showering on workplace premises.[41]

Thus, *Oncale* opens the door for same-sex claims by heterosexual as well as homosexual harassers. Indeed, Justice Scalia's succinct opinion unequivocally establishes four things:

(1) Title VII's prohibition of workplace discrimination "because of . . . sex" protects men as well as women;[42]
(2) Title VII's prohibition of workplace discrimination "because of . . . sex" includes claims where the plaintiff and the defendant are of the same sex;[43]
(3) "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex";[44] but
(4) workplace harassment is not automatically sex discrimination "merely because the words used have sexual content or connotations." Rather, to rise to the level of sex discrimination, the behavior must meet the *additional* statutory requirement that the victim is being treated differently "because of" his or her gender.[45]

Scalia also reiterated the standard set forth in *Harris*[46] that not all offensive sexual conduct is illegal in the workplace, but rather only that which "a reasonable person in the plaintiff's position would find severely hostile or abusive."[47] Thus, while men may be plaintiffs and may claim harassment by other men, a three-pronged standard of proof for all hostile-environment sexual harassment cases emerges:

(1) the conduct itself must be of a sexual nature;
(2) the conduct must be visited on the victim because of the victim's gender; and
(3) the conduct must be objectively bad enough to consti-

41. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).
42. *See id.* at 78.
43. *See id.* at 79.
44. *See id.* at 80.
45. *See id.* at 81.
46. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
47. *Oncale*, 523 U.S. at 81.

tute a hostile environment.[48]

The second prong of this standard presents unique challenges when applied to the same-sex harasser. *Oncale* itself offers little insight into how to apply Title VII's "because of . . . sex" requirement to these situations and the federal appellate courts have been inconsistent in their attempts to apply the EEOC Guidelines and Supreme Court jurisprudence to the emerging issue of same-sex sexual harassment.

C. *Pre-*Oncale*: Circuit Chaos*

Before *Oncale,* the circuits were split three ways on this issue. First, there was the viewpoint expressed by the Fifth Circuit in *Oncale* that no same-sex sexual harassment claim is cognizable under Title VII.[49] This position is erroneous under the Supreme Court's *Oncale* reversal.[50] At the other end of the legal spectrum, the Eighth Circuit,[51] a number of district courts,[52] and at least one state court[53] allowed *all* same-sex sexual harassment claims to proceed under Title VII, provided that they met the proof requirements of a quid pro quo or hostile-environment case.[54] The third fork of the pre-*Oncale* same-sex sexual harassment decisions took a middle ground, recognizing only some same-sex sexual harassment

48. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).

49. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 119 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

50. *See Oncale*, 523 U.S. at 75 (1998).

51. *See* Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996). Other circuits had indicated, in dicta, a willingness to entertain same-sex sexual harassment claims. *See* McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186 (1st Cir. 1990).

52. *See, e.g.*, Waag v. Thomas Pontiac Buick, 930 F. Supp. 393 (D. Minn. 1996); Tanner v. Prima Donna Resort, Inc., 919 F. Supp. 351 (D. Nev. 1996); Williams v. District of Columbia, 916 F. Supp. 1 (D.D.C. 1996); King v. M.R. Brown, Inc., 911 F. Supp. 161 (E.D. Pa. 1995); Ecklund v. Fuisz Tech., Ltd., 905 F. Supp. 335 (E.D. Va. 1995); Raney v. District of Columbia, 892 F. Supp. 283 (D.D.C. 1995); Nogueras v. University of P.R., 890 F. Supp. 60 (D.P.R. 1995); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133 (C.D. Ill. 1995); EEOC v. Walden Book Co., 885 F. Supp. 1100 (M.D. Tenn. 1995); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545 (M.D. Ala. 1995); Sardinia v. Dellwood Foods, Inc., No. 94 Civ. 5458, 1995 WL 640502 (S.D.N.Y. Nov. 1, 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983); Wright v. Methodist Youth Servs., 511 F. Supp. 307 (N.D. Ill. 1981).

53. *See* Melnychenko v. 84 Lumber Co., 676 N.E.2d 45 (Mass. 1997).

54. *See* discussion *infra* Part I.C.2.

claims as actionable under Title VII. This view had the support of the Fourth, Sixth, and Eleventh Circuits.[55] These circuits applied the "but for" test articulated by both the EEOC and the Supreme Court in originally justifying the inclusion of sexual harassment in the definition of prohibited sex discrimination:[56] but for the victim's sex (i.e., gender), the victim would not have been harassed. That is, since the victims are being treated differently than they would if their gender were different, they are being discriminated against "because of . . . sex."[57] This middle fork allowed same-sex sexual harassment claims, but only cases involving gay harassers had been held to pass this test.[58]

1. Wrightson, Yeary, Fredette: *Title VII Prohibits Same-Sex Sexual Harassment Where the Harasser is Gay*

Prior to *Oncale*, the Fourth, Sixth, and Eleventh Circuits had reviewed cases where homosexual superiors had made unwelcome sexual advances towards male subordinates.[59] The courts in *Wrightson v. Pizza Hut*,[60] *Yeary v. Goodwill Industries-Knoxville, Inc.*,[61] and *Fredette v. BVP Management Associates*[62] each found that the victim was indeed treated differently "because of . . . sex."[63] All three circuits applied the EEOC Guideline, which states that "the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex."[64] Further, each of

55. *See* Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996); Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997); Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997).

56. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986); 29 C.F.R. § 1604.11(a) (1997). "The 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." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

57. 42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

58. *Compare Wrightson*, 99 F.3d 138, *Yeary*, 107 F.3d 443, *and Fredette*, 112 F.3d 1503, *with* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir.), *cert. denied*, 519 U.S. 819 (1996).

59. *See supra* note 55.

60. *Wrightson*, 99 F.3d at 138.

61. *Yeary*, 107 F.3d at 443.

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

63. *See Wrightson*, 99 F.3d at 142; *Yeary*, 107 F.3d at 448; *Fredette*, 112 F.3d at 1510.

64. EEOC Compl. Man. (CCH) ¶ 3101, § 615.2(b)(3), at 3204 (1999).

these circuits, as well as the EEOC,[65] distinguished between a gay *harasser* who chooses his[66] victim because of his *gender* (but *not* because of his *sexual orientation*) and a gay *victim* who is harassed because of his *sexual orientation*.[67] All three courts, and the EEOC, held the former situation to be actionable under Title VII because "the reasonably inferred motives of the homosexual harasser are identical to those of the heterosexual harasser—i.e., the harasser makes advances towards the victim because the victim is a member of the gender the harasser prefers."[68] However, none of the courts addressed a situation of same-sex sexual harassment between heterosexuals, although such a case was acknowledged to present more difficult issues,[69] and the EEOC position on such a case was unclear prior to *Oncale*.[70]

While the *Wrightson*, *Yeary*, and *Fredette* courts essentially analyzed their respective cases correctly, they formulated their holdings in a way that failed to address the individualized enmity type of hostile-environment claim presented by *Oncale*. In effect, each of these courts dealt with the "easy case." Where sexual harassment is based on individualized sexual attraction, the "based on sex" test is easily met: but for the gender of the victim he or she would not be attractive to the harasser and so would not be subject to the unwelcome sexual advances. Certainly these are cases where discriminatory treatment occurs because of the gender of the victim, as noted by the EEOC in extending Title VII protection to these victims.[71] The more difficult type of case is that presented by *Oncale*, where the harasser is heterosexual and

65. *See id.* at 3204 (Examples 1 & 2).

66. The use of the male pronoun here is simply because the parties in all three cases were male. There is nothing in the EEOC or any of these three cases to indicate that their analysis would be any different if presented with female-on-female harassment. *See* EEOC Compl. Man. (CCH) § 615, at 3201-264; *Wrightson*, 99 F.3d at 142; *Fredette*, 112 F.3d at 1503.

67. *See Wrightson*, 99 F.3d at 142; *Yeary*, 107 F.3d at 448; *Fredette*, 112 F.3d at 1510.

68. *Fredette*, 112 F.3d at 1505. *Accord Yeary*, 107 F.3d at 448. The latter situation, though not before these three courts, is explicitly rejected by the EEOC. EEOC Compl. Man. (CCH) ¶ 3101, § 615.2(b)(3) (Example 2), at 3204 (July 1987) (citing Comm'n Decision Nos. 76-67 & 77-28).

69. *See, e.g.*, *Fredette*, 112 F.3d at 1507.

70. *See generally* EEOC Compl. Man. (CCH) ¶ 3101, § 615.2(b)(3), at 3204 (1999).

71. *See Fredette*, 112 F.3d at 1505.

thus apparently motivated by hatred rather than by desire.[72]

2. Quick: *Title VII Allows All Same-Sex Sexual Harassment Claims*

Before *Oncale,* only the Eighth Circuit had held that the harasser need not be gay for a same-sex sexual harassment claim to proceed under Title VII.[73] *Quick v. Donaldson*[74] was essentially a case of "goosing" and "bagging":[75] the plaintiff alleged that co-workers grabbed or squeezed his testicles some 100 times.[76] The plaintiff was heterosexual[77] and was harassed by other heterosexual males,[78] apparently for reasons similar to those in *Oncale*: he was disliked for not fitting in with other males in the work environment.[79] The harassment of Phil Quick, like that of Joseph Oncale, was not in the form of "sexual advances,"[80] or "requests for sexual favors,"[81] but rather involved unwelcome comments of a sexual nature and unwelcome physical contact with Quick's genitals.[82] This type of treatment arguably fits into the third category of behavior defined by the EEOC to constitute sexual harassment: "other verbal or physical conduct of a sexual nature."[83] The *Quick* court accepted this categorization of the offending behavior under Title VII,[84] and rejected a requirement of an anti-male environment for a claim of harassment between heterosexual males. The court held that, "[p]rotection under

---

72. *See* Oncale v. Sundowner Offshore Servs., 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998). This assumes that the brief factual discussion implies by its silence on the issue that both harassers and victim were heterosexual.

73. *See* Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996).

74. *Id.*

75. *See id.* at 1374 (defining "bagging" to be either the intentional grabbing and squeezing of another's testicles or when one uses one's hands to intentionally come into contact with another's groin area). "Goosing" has been defined as poking or digging someone in some sensitive spot, especially between the buttocks with an upward thrust of a finger or hand from the rear. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3rd ed. 1993).

76. *See Quick*, 90 F.3d at 1374.

77. *See id.* at 1374, n.1.

78. *See id.* at 1376.

79. *See id.* at 1376; Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

80. *See* 29 C.F.R. § 1604.11(a) (1996).

81. *Id.*

82. *See Quick*, 90 F.3d at 1374.

83. 29 C.F.R. § 1604.11(a) (1998).

84. *See Quick*, 90 F.3d at 1379.

Title VII is not limited to only disadvantaged or vulnerable groups. It extends to all employees and prohibits disparate treatment of an *individual*, man or woman, based on that person's sex."[85]

The *Quick* court outlined the elements of a Title VII hostile-environment sexual harassment claim more specifically than the *Oncale* Court:[86]

(1) membership in a protected group, which the Supreme Court has acknowledged can be either gender;[87]
(2) subjection to unwelcome sexual harassment;
   (a) "unwelcome" being uninvited and offensive,[88]
   (b) "sexual" not being limited to behavior or comments explicitly sexual in nature but also including acts of physical aggression or violence[89] and incidents of verbal abuse which constitute discriminatory intimidation, ridicule, or insult,[90] and
   (c) "harassment" not necessarily causing a tangible psychological injury, but being sufficiently severe or pervasive to constitute a hostile or abusive work environment in the eyes of both the actual victim and a reasonable person;[91] and
(3) exposure to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.[92]

Since the *Oncale* facts are similar to those of *Quick*, the *Quick* court would most likely have found that each of these elements was met in *Oncale*.[93] Most likely Oncale's contact with his supervisor's penis[94] was both uninvited and offensive. While the assaults on Oncale may not have been explicitly sexual, the *Quick* court rejected the notion that the offensive

85. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (emphasis added).
86. *See Quick*, 90 F.3d at 1377-78.
87. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).
88. *See* Burns v. McGregor Elec. Indus., 989 F.2d 959, 962 (8th Cir. 1993).
89. *See* Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988); *Burns*, 989 F.2d at 964-65.
90. *See Meritor Savings Bank*, 477 U.S. at 65; *Quick*, 90 F.3d at 1377 (citing *Hall*, 842 F.2d at 1014; and *Burns*, 989 F.2d at 964-65).
91. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).
92. *See id.* at 24.
93. *See Quick*, 90 F.3d at 1377-79.
94. *See Oncale*, 83 F.3d at 118-19.

behavior must be an expression of sexual interest and focused instead on the sexual nature of the organs involved in the assault.[95] Further, having a bar of soap forcibly inserted in his anus by his supervisor while being restrained by a co-worker qualifies as "severe"[96] conduct which is probably also "physically . . . humiliating"[97] and potentially "affect[ing Oncale']s psychological well-being."[98] Finally, *Quick*, like *Oncale*, rejected the notion that when a same-sex harasser is heterosexual and is hence motivated by "personal enmity or hooliganism,"[99] rather than by sexual desire, the harassment is not gender-based.[100] Instead, the *Quick* court stated that "the key inquiry [for determining whether discrimination was based on sex] 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.'"[101] It appears that, like the "bagging" in *Quick*, assaults of the type inflicted on Oncale were not being visited upon female employees, despite the apparent absence of any anti-male work environment.[102]

D. *Post*-Oncale *Same-Sex Sexual Harassment Cases*

The Supreme Court, in reviewing *Oncale*, applied reasoning parallel to, but less detailed than, that of the *Quick* court.[103] Still, the Supreme Court remanded the case, leaving the application of the law to the *Oncale* facts to the lower court.[104] In so doing the Court left the lower federal courts to fashion a standard for same sex hostile-environment sexual harassment cases. To date these courts have largely avoided the "hard" case, presented by an *Oncale*-type fact pattern, of a heterosexual harasser motivated by hatred rather than desire.

---

95. *See Quick*, 90 F.3d at 1379.

96. *See id.* at 1378 (listing factors suggested by *Harris*, 510 U.S. at 22, for use in assessing whether alleged conduct was "sufficiently severe or pervasive" to affect a plaintiff's conditions of employment).

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

98. *Id.*

99. *Id.*

100. *See id.*

101. *Quick*, 90 F.3d at 1378 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

102. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

103. *Compare Oncale*, 523 U.S. at 75, *with Quick*, 90 F.3d at 1377-79.

104. *See Oncale*, 523 U.S. at 82.

Since *Oncale*, three circuits have addressed same-sex sexual harassment cases: the Eleventh, Fourth, and Seventh Circuits.[105] Only one of these cases dealt with a heterosexual harasser[106] and none is particularly helpful in developing an applicable standard for such claims. Moreover, the Fifth Circuit, to which *Oncale* was remanded for further proceedings consistent with the Supreme Court's decision, merely passed the buck, remanding the case back to the district court "for further proceedings in accordance with the opinion of the Supreme Court."[107] The district court has yet to issue a decision.

1. *The Eleventh Circuit:* Llampallas v. Mini-Circuits

In *Llampallas v. Mini-Circuits*,[108] the Eleventh Circuit, which already upheld as actionable same-sex sexual harassment by a homosexual harasser in *Fredette*,[109] analyzed a claim based on a workplace lesbian romance gone sour.[110] In *Llampallas*, plaintiff's claim that she was fired in retaliation for refusing to resume a long-term lesbian relationship with a co-worker failed, despite the court's acknowledgment that such a same-sex sexual harassment fact pattern is actionable under Title VII.[111] In this case, Llampallas complained not about the unrelenting requests to resume the sexual relationship, but rather solely about the firing.[112] Since someone other than the harassing co-worker fired her and the court found that plaintiff lacked any proof that the company president who fired her was motivated by the jilted lover, Llampallas's claim failed.[113] The court found that the facts "belie[d] a determination that the causal link lay between [the co-worker's] sexually discriminating animus towards Llampallas

105. *See* Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236 (11th Cir. 1998); Scott v. Norfolk Southern Corp., No. 97-1490, 1998 U.S. App. LEXIS 13470 (E.D. Va. June 24, 1998); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *cert. granted, vacated by* ___ U.S. ___, 118 S. Ct. 1183 (mem.) (remanding for further proceedings in light of *Oncale*); Shepherd v. Slater Steels Corp., 168 F.3d 998 (7th Cir. 1999).

106. *Scott*, 1998 U.S. App. LEXIS 13470.

107. *Oncale*, 140 F.3d at 596.

108. Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236 (11th Cir. 1998).

109. By denying certiorari, the Supreme Court allowed this ruling to stand, consistent with its holding in *Oncale*.

110. *See Llampallas*, 163 F.3d at 1236.

111. *See id.* at 1247.

112. *See id.* at 1241.

113. *See id.* at 1248.

and Llampallas' discharge."[114] Thus, Llampallas was unable to prove intentional discrimination by her employer as required under a Title VII claim.[115]

2. *The Fourth Circuit:* Scott v. Norfolk Southern

In *Scott v. Norfolk Southern Corp.*,[116] the Fourth Circuit became the only circuit since *Oncale* to address a claim of a *heterosexual* harasser engaging in same-sex sexual harassment.[117] However, the *Scott* court merely reinstated a retaliatory claim after finding that plaintiff's underlying same-sex sexual harassment claim was cognizable and, thus, something against which the employer could now properly be alleged to retaliate.[118] No district court decision has yet been issued.

3. *The Seventh Circuit:* Doe v. City of Belleville *and* Shepherd v. Slater Steels Corp.

The Seventh Circuit, to which the Supreme Court remanded *Doe v. City of Belleville*[119] in the wake of *Oncale*, is the only circuit to actually attempt to apply *Oncale* to a same-sex sexual harassment fact pattern. This case involved allegations by two sixteen-year-old boys that they were called "queer" and "fag" and were threatened with homosexual rape by their supervisor while working for the city of Belleville, Illinois.[120] Since the Supreme Court's remand order[121] there has been no reported decision.

In *Shepherd v. Slater Steels Corp*,[122] the Seventh Circuit reversed the entry of summary judgment in favor of the defendant employer because it held that the plaintiff's allegations, if proven at trial, could form the basis of a same-sex

114. *Id.* at 1248.

115. *See id.* at 1249.

116. Scott v. Norfolk Southern Corp., No. 97-1490, 1998 U.S. App. LEXIS 13470 (E.D. Va. June 24, 1998).

117. *See id.*

118. *See id.* (noting that the Fourth Circuit previously had recognized same-sex sexual harassment claims only when the harasser was alleged to be homosexual or bisexual).

119. Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated by* ___ U.S. ___, 118 S. Ct. 1183 (1998) (mem.) (remanding for further proceedings in light of *Oncale*).

120. *See Doe*, 119 F.3d at 567.

121. *Doe*, 118 S. Ct. at 1183.

122. Shepherd v. Slater Steels Corp., 168 F.3d 998 (7th Cir. 1999).

sexual harassment claim.[123] The plaintiff claimed that the harasser continually exposed his penis to him and made sexual comments about the plaintiff's body.[124] These facts, if proved, could form the basis of a claim of same-sex sexual harassment by a *homosexual* harasser.[125] The harasser made comments that plaintiff was handsome and, on at least one occasion, allegedly "rubbed himself into an erection." The harasser threatened once to "fuck [the victim] in the ass" and, on another occasion, to give him "a nice hot shower."[126] While this case starts the post-*Oncale* application of Title VII to same-sex sexual harassment claims, it does not advance the development of a standard to discern when, *absent* evidence of sexual desire, harassing behavior of a sexual nature may nonetheless be "because of . . . sex."[127]

Cases concerning heterosexual same-sex harassers hang in the wings, awaiting analysis. One way to fashion an appropriate standard to analyze these cases is to separate out the relevant cross-gender precedents—that is, to separate the "hatred" cases from the "desire" cases.

II. ANALYSIS

A. *Two Distinct Types of Hostile-Environment Sexual Harassment*

Hostile-environment[128] claims can be divided into two

123. *See id.* at 1012.

124. *See id.* at 1001.

125. *See id.* at 1010. The court acknowledged an alternative jury reading of the facts, namely that the harasser "was not at all interested in [the plaintiff] sexually, but made these types of remarks and engaged in this type of behavior simply because he was exceedingly crude and/or because he knew that this type of sexually charged conduct would make [the plaintiff] uncomfortable." *Id.* at 1010.

126. *Id.* at 1009-1010.

127. *See* 42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

128. A hostile environment has been defined as a workplace affected by sexually abusive or offensive conduct to such a degree that a reasonable person would find the conduct to which the victim is subjected sufficiently severe or pervasive such that it unreasonably interferes with the victim's right to work in an environment free of discriminatory intimidation, ridicule, and insult. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986). *See also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (noting that factors relevant to this assessment include frequency and severity of the conduct, whether the conduct is physically threatening or humiliating, whether the conduct unreasonably interferes with the victim's work performance, and the effect of the conduct on the

types: "desire" claims and "hatred" claims. A "desire" hostile-environment claim is really a variation on a quid pro quo claim. The harasser desires the victim and creates an unreasonably offensive work environment by unrelenting, unwelcome sexual advances.[129] The difference between "desire" and quid pro quo harassment is simply that submission to the advances is not made a term or condition of the victim's employment.[130] This can be because the harasser lacks the power to do so (e.g., a co-worker)[131] or because the harassment falls short of that level of coercion.[132] Nonetheless, federal courts,[133] the EEOC,[134] and the Supreme Court[135] all have come to accept that "harassment leading to non-economic injury can violate Title VII . . . where '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.'"[136]

Such an illegal work atmosphere also may be created by "hatred" hostile-environment harassment. "Hatred" hostile-environment harassment is about enmity, rather than desire, for the victim. In this situation, the harasser inflicts humiliating, degrading, mean-spirited treatment of a sexual nature on the victim because the harasser resents or disdains the victim—either individually or as part of a group. The easier sexual harassment case is the latter—where, for example, a female victim is hated by a male harasser because she is a woman and the harasser dislikes all women (or, at least, all women performing a particular job).[137] The harder case is where the hatred is individualized and the harasser does not similarly mistreat all members of the victim's gender, but

---

victim's psychological well-being).

129. *See, e.g.*, *Meritor Savings Bank*, 477 U.S. at 57.

130. *Compare* FTC Credit Practices Rule, 29 C.F.R. § 1604.11(a)(1) (1996), *with* 29 C.F.R. § 1604.11(a)(3) (1996).

131. *See* 29 C.F.R. § 1604.11(d) & (e) (1996).

132. *See, e.g.*, *Meritor Savings Bank*, 477 U.S. at 67-68.

133. *See id.* at 66 (noting that federal courts accepted hostile-environment claims even before the Supreme Court did so).

134. *See* 29 C.F.R. § 1604.11(a)(3) (1996).

135. *See Meritor Savings Bank*, 477 U.S. at 66.

136. 29 C.F.R. § 1604.11(a)(3).

137. *See, e.g.*, Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982) ("[A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.").

where the hatred is nonetheless somehow tied to the victim's sex such that the mistreatment would not have occurred had the victim been of the opposite gender.[138] For example, the harasser may resent the victim's particular employment position or feel that the victim does not fit into the harasser's notions of what a person of the victim's gender should be like.

While harassment motivated by individualized hatred may not seem clearly sexual, claims have been held actionable where a male mistreats a female out of such individualized hatred and where the content of the harassment is related to the victim's gender or is of a sexual nature.[139] The EEOC addresses this issue by stating:

> Sexual harassment is sex discrimination not because of the sexual nature of the conduct to which the victim is subjected but because the harasser treats a member or members of one sex differently from members of the opposite sex. However, it is the sexual nature of the prohibited conduct which makes this form of sex discrimination sexual harassment.[140]

In other words, the motivation need not be sexual—just resulting in disparate treatment based on gender—but the prohibited conduct itself must be sexual in some way.

Indeed, the *Harris*[141] decision dealt with just such a fact pattern.[142] Teresa Harris's supervisor "insulted her because of her gender [and told her,] 'You're a woman, what do you know' and 'We need a man as the rental manger' [and that] she was 'a dumb ass woman.'"[143] She was also "often made . . . the target of unwanted sexual innuendo[e]s," such as being asked to get coins from her supervisor's front pants pocket and to pick up objects up that he had thrown on the ground in front of her.[144] Once, when Harris was arranging a deal with a customer, her supervisor asked her, in front of other employees, "'What did you do, promise the guy . . . some [sex] . . . ?'"[145] Harris was mistreated out of hatred, not sexual desire, but the harassment was sexual because of the sexual

138. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
139. *See id.*
140. EEOC Compl. Man. (CCH) ¶ 3102, § 615.3(a), at 3205 (Jan. 1982).
141. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
142. *See Harris*, 510 U.S. at 19.
143. *Id.*
144. *Id.*
145. *Id.* (alterations in original).

nature of the comments and conduct. Since Harris would not have been treated this way if she were male, the sexual harassment was discriminatory and thus prohibited by Title VII.[146] Although this has been the most difficult type of claim for courts to extrapolate to same-sex scenarios, it is the most useful template for same-sex "hatred" cases such as *Oncale*.

B. *Desire and Hatred in Same-Sex Cases*

1. *Quid Pro Quo and Desire Harassment: the "Easy" Cases*

In *Oncale*,[147] the Supreme Court correctly extended Title VII protection to both quid pro quo and "desire" hostile-environment same-sex sexual harassment claims for all of the reasons discussed above[148] and set forth in *Wrightson*,[149] *Fredette*,[150] and *Yeary*.[151] Indeed, the EEOC Guidelines already had explicitly adopted this position,[152] and, as these circuit courts aptly observed, this result was all but dictated by the Supreme Court's own language in *Meritor Savings Bank*: "[w]ithout question, when a supervisor sexually harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the basis of sex."[153] Thus, when unwanted sexual advances (an undisputed form of sexual harassment[154]) are visited upon someone with either a quid pro quo or a hostile-environment result (both accepted injuries to sustain a Title VII sexual harassment claim[155]) and where the harasser would not make such advances but for the victim's gender, then the gender of the *harasser* is immaterial. In these situations, the victim experiences sexual harassment whether the harassing supervisor is male or female. The same standards of proof articulated by the Supreme Court for cross-gender

146. *See id.* at 21-23.
147. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).
148. *See* discussion *supra* Part I.C.1.
149. Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996).
150. Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997).
151. Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997).
152. EEOC Compl. Man. (CCH) ¶ 3101, § 615.2(b)(3), at 3204 (July 1987).
153. Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986) (emphasis added).
154. *See* FTC Credit Practices Rule, 29 C.F.R. § 1604.11(a) (1996).
155. *See Meritor Savings Bank*, 477 U.S. at 65-66. *See also* 29 C.F.R. § 1604.11(a)(1) & (3) (1996).

cases should now become applicable for these same-sex claims: has the plaintiff proven that submission to the alleged advances was a term or condition of employment,[156] or would a reasonable person find the environment created by the alleged advances hostile or abusive?[157]

2. *Hatred Harassment: Proof Problems*

The quid pro quo and "desire" hostile-environment cases are the "easy" same-sex sexual harassment claims. The more difficult question is how to extend protection against "hatred" harassment to same-sex victims. The Supreme Court has acknowledged the actionability of "hatred" claims: "[H]arassing conduct need not by motivated by sexual desire to support an inference of discrimination on the basis of sex."[158] But the Court has insisted that a plaintiff still prove that the offensive behavior is being visited upon the plaintiff "because of" the plaintiff's sex.[159] How do we prove this?

The legal analysis of "hatred" claims in the same-sex arena, like that of "desire" claims, should parallel the proof model employed in cross-gender cases. "Hatred" and "desire" claims share the basic elements of hostile-environment sexual harassment.[160] The differences between "hatred" and "desire" claims are the motivation of the harasser and the nature of the harassing behavior. Motivation is relevant, as it is in cross-gender cases, to the extent that the statute has been construed to require proof that the harassment is "because of . . . sex."[161] However, it should be irrelevant whether the motivation is *desire* for the victim because of his or her sex or *hatred* of the victim because of his or her sex, as long as one or the other is shown to be present. The nature of the harassment is relevant, as it is in cross-gender claims, to the extent that it must fit into one of the three categories of behavior described by the EEOC definitional guideline: "sexual advances, requests for sexual favors, and *other verbal or physical conduct of a sexual nature.*"[162] "Desire" claims usu-

156. *See Meritor Savings Bank*, 477 U.S. at 67. *See also* 29 C.F.R. § 1604.11(a)(1) (1996).

157. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

158. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

159. 42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

160. *See* 29 C.F.R. § 1604.11(a)(3) (1996). *See also Harris*, 510 U.S. at 20.

161. 42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

162. 29 C.F.R. § 1604.11(a) (1996) (emphasis added).

ally involve one of the former two types of behavior, whereas "hatred" claims are usually based on the third type of behavior, such as the harassing behavior in *Harris*.[163] While proof of the sexual nature of the harassment in a "hatred" claim often may not be particularly difficult—e.g., Oncale's supervisor's penis being placed on Oncale's neck and arm while he was being restrained[164]—proof that the motivation is due to the victim's gender may be significantly more difficult in a "hatred" claim than in a "desire" case.

Few courts have been willing to accept "hatred" hostile-environment claims where individuals harass "one of their own" out of individualized hatred.[165] The resistance is based on a notion that one cannot hate one's own gender, so the harassment must be motivated by hatred of the victim—having nothing to do with his or her gender—and, thus, the mistreatment is not occurring "because of" the victim's sex.[166] While the sexual nature of the harassment in some cases[167] seems to indicate that the hatred is, in fact, tied into the victim's gender in some way, the *Quick* dissent[168] and the Fourth Circuit[169] both somewhat persuasively distinguish same-sex "hatred" harassment from cross-gender "hatred" harassment. The distinguishing feature between these types of cases, according to the *Quick* dissent and the Fourth Circuit, is that while both may concern conduct that is sexual in nature, the two situations are not necessarily both motivated by the victim's gender.

The Fourth Circuit, in *McWilliams v. Fairfax County*, recently addressed a case where a heterosexual male was subjected to verbal taunts and physical assaults—both of a sexual nature—by heterosexual co-workers.[170] However, the *McWilliams* court rejected a same-sex "hatred" sexual harassment claim, holding that:

---

163. *See* discussion *supra* Part II.A

164. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

165. *See, e.g.*, *Oncale*, 83 F.3d at 118; Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).

166. *See* 42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

167. *See, e.g.*, *Oncale*, 83 F.3d at 118; Quick v. Donaldson, 90 F.3d 1372 (8th Cir. 1996); *Goluszek*, 697 F. Supp. at 1452.

168. *See Quick*, 90 F.3d at 1380-82 (Nangle, J., dissenting).

169. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996), *cert. denied*, 510 U.S. 819 (1996).

170. *See id.* at 1193-94.

> [W]e do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here (nor comparable female-on-female conduct) is considered to be "because of the [target's] '*sex*.'" Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focused speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's *sex*.[171]

The *Quick* dissent agreed with the *McWilliams* court that extending Title VII's prohibitions to include same-sex "hatred" sexual harassment claims would offer "unmanageably broad protection"[172] never intended by Congress or the Supreme Court.[173] The *Quick* dissent justified excluding same sex "hatred" claims from Title VII coverage, while allowing cross-gender "hatred" claims, by arguing that in the latter:

> The "because of sex" element is implied in these cases, not because there is a predominantly male or anti-female environment, but because "sexual behavior directed at a woman [by a man] raises the inference that the harassment is based on her sex." Such an inference is not raised when heterosexuals of one gender harass other heterosexuals of the same gender.[174]

The *Quick* majority disagreed with the dissent that sexual behavior directed at a member of one's own gender fails to raise an inference that the harassment is based on the victims sex.[175] The *Quick* majority would leave it to a jury—as is the norm[176]—to draw whatever inferences seem appropriate from the facts presented and, thereby, to decide whether the element of "because of . . . sex" is present in a same-sex "hatred" sexual harassment claim.[177] The dissent, along with the Fourth Circuit in *McWilliams*,[178] considered this to be a mat-

171. *Id.* at 1195-96.
172. *Id.* at 1196.
173. *See id.*
174. *Quick*, 90 F.3d at 1381 (Nangle, J., dissenting) (citations omitted).
175. *See id.* at 1378-79.
176. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 20-24 (1993) (discussing application of reasonable person standard by fact-finder).
177. *See Quick*, 90 F.3d at 1378-79.
178. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996), *cert. denied*, 510 U.S. 819 (1996).

ter of law.[179] In *Oncale*, the Supreme Court concurred with the *Quick* majority, stating, "A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[180]

Same-sex "hatred" sexual harassment claims may be difficult to prove because it is often unclear why such harassment occurs. Still, this is an issue of fact and thus is appropriately left for the jury, unless it can be said that no reasonable jury could find a gender-related motivation in these fact patterns.[181] This author submits that a reasonable jury in cases such as *Oncale*, *Quick*, and *McWilliams* indeed could find that each victim was harassed because of his gender. At the heart of much sex discrimination lie gender stereotypes that demean, insult, and interfere with the victim's career progress. Such gender stereotypes are no less false, unfair, or damaging when they result in unwelcome and abusive sexual taunting and assault by members of the victim's own gender. If the victim is ridiculed by a supervisor or co-workers because the victim does not fit into acceptable gender stereotypes of what a member of his or her gender should be like, then the victim's gender is at the heart of the reason for the harassment. If that harassment is of a sexual nature, then it is gender-motivated, sexual, and, if sufficiently severe to pass a reasonable person test, illegal under Title VII.

As with cross-gender claims, the key factual inquiry is into whether the harassment is occurring because of the victim's gender. The EEOC Guidelines urge fact-finders to look at the totality of the circumstances.[182] This, of course, includes the nature of the sexual conduct,[183] from which inferences of gender-motivated hatred may reasonably be drawn. Furthermore, as both *Quick*[184] and the EEOC[185] point out, the

179. *See Quick*, 90 F.3d at 1381 (Nangle, J., dissenting).
180. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).
181. *See id.*
182. *See* 29 C.F.R. § 1604.11(b) (1996).
183. *See id.*
184. *Quick*, 90 F.3d at 1378.
185. *See* EEOC Compl. Man. (CCH) ¶ 3101, § 615.2(b)(3), at 3204 (July 1987).

ultimate proper "motivation" inquiry is: would the victim have been harassed if he or she were of the opposite gender? If the answer is no, as it appears to be in *Oncale*, *Quick*, and *McWilliams*, then an inference of gender-related motivation is no less legitimate in a same-sex setting than it has been held to be in a cross-gender situation.[186]

III. CONCLUSION

Few courts have addressed "hatred" same-sex hostile-environment sexual harassment cases to date. Those that have dealt with the issue have largely ruled against plaintiffs. However, *Oncale* has explicitly made such claims actionable under Title VII. Therefore, courts must begin to fashion a standard by which to assess these cases. The courts rejecting "hatred" same-sex hostile-environment cases have focused on the fact that it is not always clear that the harassment is motivated by the victim's sex.[187] While it is true that such motivation is relevant since Title VII requires that the discrimination be "because of . . . sex,"[188] this is a factual inquiry, not a legal one. Therefore, it is inappropriate to determine as a matter of law that, absent evidence of sexual advances,[189] same-sex sexual harassment is not occurring because of the victim's gender. This is a jury question in a cross-gender case; it should also be a jury question in a same-sex case.

A comparison of the fact patterns of successful cross-gender "hatred" cases with rejected same-sex "hatred" claims reveals that a legal double standard is in effect. As pointed out by the *Quick* dissent, when a man directs sexual behavior at a woman there is an inference that the harassment is based on sex, but juries are not permitted to make the same

186. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1985).

187. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998); Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).

188. 42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

189. Regarding the type of harassing behavior exhibited in "hatred" cases, the language of the EEOC guidelines not only leaves room for including such behavior in its definition of prohibited activities, but, in fact, the phrase "other verbal or physical conduct of a sexual nature" is superfluous and redundant if it is not meant to address something other than sexual advances and requests for sexual favors, which are both separately listed within the definition as examples of prohibited activity. *See* 29 C.F.R. § 1604.11(a) (1996).

inference when a man directs sexual conduct at another man. Why are juries allowed to use the nature of the conduct as circumstantial evidence of motivation in cross-gender cases but not in same-sex cases? When the harassment takes the form of sexual comments, sexual gestures, and physical contact with sexual organs, it may well be harassment motivated by the victim's gender, which should properly fall within Title VII's prohibition. If the harassment is not gender-motivated, then the jury should be trusted to reject the claim.

In reaching this result, the Supreme Court and Congress have not extended protection to harassment because of sexual orientation. If the harassment is motivated solely by the victim's sexual orientation, then it is not occurring "because of . . . sex." If, in contrast, the harassment is motivated by the harasser's hatred for an individual who does not display stereotypical characteristics of his or her gender, then the harassment is occurring because of the victim's gender and the claim should be allowed to proceed. As for the "sexual" nature of the harassment itself, this too need not turn on the sexual orientation of the victim. It is the content and type of the harassing behavior which should be scrutinized for "sexuality" (as a way to assess its fit into the EEOC definitions of prohibited conduct), not the sexual orientation of the victim. The victim's sexual orientation should be irrelevant. In *Oncale*,[190] *Quick*,[191] and *McWilliams*[192] the victims were allegedly heterosexual.[193] The sexual nature of the harassment—goosing, bagging, penis on shoulder or arm, soap forced up anus—would be no more or less evident if these victims were gay. Moreover, a victim should not have to choose between proving their harasser to be gay (to prove a quid pro quo or "desire" claim) or "coming out" themselves (to prove a "hatred" claim) to seek redress. Fortunately, *Oncale* allows for same-sex sexual harassment protection without requiring proof of the sexual orientation of either party.[194]

A same-sex "hatred" harassment claim may seem far

190. *Oncale*, 523 U.S. at 75.
191. Quick v. Donaldson, Co., 90 F.3d 1372 (8th Cir. 1996).
192. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996).
193. *See supra* note 72; *Quick*, 90 F.3d at 1376; *McWilliams*, 72 F.3d at 1196.
194. *See Oncale*, 523 U.S. at 75.

afield of the original intent of Title VII[195] or even the early sexual harassment claims.[196] However, in acknowledging such a claim in *Oncale*, the Supreme Court pointed out that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[197] The proof requirements already in place for all sexual harassment claims will ensure that these same-sex claims do not become either a form of protection for discrimination on the basis of sexual orientation or a broad protection for all forms of harassment of a sexual nature. To be prohibited by Title VII the harassment must not only be sexual in nature but must also occur because of the victim's gender (not sexual orientation) and must rise to the level of a hostile environment.

195. *See* 110 Cong. Rec. 2577-84 (1964).
196. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 57 (1986).
197. *Oncale*, 523 U.S. at 79.