1-1-2002

Same-Sex Sexual Harassment Under Title VII: The Line of Demarcation Between Sex and Sexual Orientation Discrimination

Nicholas Hua

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Nicholas Hua, Comment, Same-Sex Sexual Harassment Under Title VII: The Line of Demarcation Between Sex and Sexual Orientation Discrimination, 43 SANTA CLARA L. REV. 249 (2002).
Available at: http://digitalcommons.law.scu.edu/lawreview/vol43/iss1/5
SAME-SEX SEXUAL HARASSMENT UNDER TITLE VII:
THE LINE OF DEMARCTION BETWEEN SEX AND
SEXUAL ORIENTATION DISCRIMINATION

Nicholas Hua*

“Once [you] begin the dance of legislation . . . you must struggle
through its mazes as best you can to its breathless end—if any there
be.”

—Former President Woodrow Wilson

I. INTRODUCTION

The physical, sexual, and verbal psychological abuse inflicted
upon men has long been ignored as a form of gender discrimination.2
Only recently in Oncale v. Sundowner Offshore Services, Inc.3 the
United States Supreme Court recognized that males could bring a
sexual harassment claim against other males to remedy this type of
abuse.4 Title VII of the Civil Rights Act of 1964 prohibits employment
discrimination through sexual harassment to the extent that the
harassment occurs “because of sex”—not because of sexual
orientation.5 Title VII thus turns on the meaning and implication of
what constitutes “because of sex.”6

* Senior Articles Editor, Santa Clara Law Review, Volume 43. J.D. Candidate, Santa
Clara University School of Law; B.A., University of California, Berkeley.
1. See John M. Kernochan, Statutory Interpretation: An Outline of Method, 3 THE
DALHOUSIE L. J. 333 (1976), quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT
2. See Hilary S. Axam & Deborah Zalesne, Simulated Sodomy and Other Forms of
Heterosexual “Horseplay”: Same Sex Sexual Harassment, Workplace Gender Hierarchies,
and the Myth of the Gender Monolith Before and After Oncale, 11 YALE J.L. & FEMINISM
4. See id.
6. This comment uses “sex” interchangeably with “gender.” Where the meaning of
“sex” differs, the change of terminology and interpretation will be duly noted.
The Equal Employment Opportunity Commission (EEOC) and the courts that examine same-sex sexual harassment claims have struggled for years to define the meaning of “because of sex” in Title VII. The overlapping nature of sex, sexual orientation, and sexuality further complicates the task of distinguishing whether and in what circumstances verbal and/or physical harassment are motivated by “sex” rather than by “sexual orientation.”

From August through November 1991, Joseph Oncale suffered a series of assaults and batteries caused by coworkers and supervisors who threatened to “f... [him] in the behind.” The final harassment occurred in the shower where they attempted to force a bar of soap in his anus while threatening to rape him. When Oncale reported these incidents to the Safety Compliance Clerk, Oncale was told that the clerk had also been “picked [on...]’ and was called a name suggesting homosexuality.” The clerk’s comment indicates that Oncale’s harassers targeted him, at least in part, because of his sexual orientation or perceived homosexuality. The Supreme Court, however, attributed the provocation to Oncale’s gender rather than his

7. See ERNEST C. HADLEY & GEORGE M. CHUZI, SEXUAL HARASSMENT: FEDERAL LAW, Chap. 3.I.B.10 (1997 ed.). For the proposition that the EEOC has been unclear on its stance on same-sex sexual harassment, compare Campbell v. Dep’t of Health & Human Servs., 01831816 (1983) and Machinik v. Veterans Admin., 01882988 (1988) (EEOC cases reinforcing the notion that males are not within the purview of Title VII discrimination because of sex) with DePaul v. Postmaster Gen., 01912729 (1992) (stating that the EEOC disagrees with the position that coworker’s conduct was not based on sex).

8. See Axam, supra note 2, at 240. Because sex shares an “epiphenomenal relationship to gender,” every sex discrimination case is “grounded in normative gender rules and roles.” See id.


10. See id.

11. See Oncale, 523 U.S. at 77.

12. See id.

13. See id.
sexual orientation, holding that the harassment must meet the statutory requirement—"because of sex."\(^{14}\)

The Ninth Circuit Court of Appeals in *Rene v. MGM Grand Hotel, Inc.*\(^{15}\) reviewed facts similar to those in *Oncale*, yet reached a contrary result.\(^{16}\) Rene's male supervisor and male coworkers inserted their fingers into his anus through his clothes, grabbed his crotch, caressed his face, and touched his body "like they would do to a woman."\(^{17}\) They even called him "sweetheart" and *muñeca*, Spanish for female doll.\(^{18}\) Despite the dual influences of gender and sexual orientation harassment, the Court found persuasive Rene's subjective belief that he was harassed for his sexual orientation as a gay man.\(^{19}\)

Absent Rene's admission, the only thing certain with such a subjective standard is its lack of certainty and guidance in determining when the sexual harassment is triggered by Title VII's "because of sex." This uncertainty will continue to confuse the courts and create apprehension in the workplace between employer and employee, who are left wondering whether to seek redress or pursue affirmative or remedial action.\(^{20}\) Although the decision in *Oncale* settled the issue that same-sex sexual harassment is actionable under Title VII, Justice Scalia's "cryptic"\(^{21}\) and carefully crafted language sought to avoid a

---

\(^{14}\) See id. at 80.

\(^{15}\) See *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 2001), rev’d, 305 F.3d 1061 (2002) (en banc).

\(^{16}\) See id.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) See id. at 1210. Rene stated in his deposition that he was harassed for being openly out at work. If Rene had honestly believed that being called a female doll and being touched like a woman demonstrated his harassers' intent to harass him because of his gender, it is not clear whether the court would find the conduct violative of "because of sex." Were it the case that Oncale believed he was harassed for being gay, despite contrary evidence suggesting otherwise, the subjective belief test for satisfying Title VII's "because of sex" is far from leading to a satisfying result. This test in *Rene* seems inconsistent to the founding principles of Title VII. See discussion infra Part II.

\(^{20}\) See generally *Oncale*, 523 U.S. at 79. In the context of a "hostile work environment" sexual harassment claim, the state and federal courts have taken a "bewildering variety of stances." Id. For instance, in the Fifth Circuit, it is a per se rule that any occurrence of same-sex sexual harassment claims is unenforceable under Title VII. See Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988). There are other decisions that permit such claims only if the plaintiff can prove that the harasser was motivated by sexual desire on the part of the harasser. See generally McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) and Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996). Still, other courts suggest that workplace harassment, sexual in nature, is always actionable, regardless of sex, sexual orientation or motivations.

\(^{21}\) See Richard Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining*
gender non-conformity theory and "embraced a sexual desire theory of causation."  

Part II of this comment evaluates same-sex sexual harassment cases in the federal courts of appeals and attempts to untangle the web of confusion over the meaning of Title VII's prohibition against discrimination "because of sex." This comment argues that the central source of confusion in same-sex sexual harassment cannot be resolved by requiring victims to prove causation through the harasser's sexual desire for the plaintiff. Sexual desire is grounded in remnants of traditional opposite-sex sexual harassment, and is inadequate as a standard to distinguish such a dichotomy. Part II explores the historical contours of sexual harassment lawsuits, which led to the enactment of Title VII; analyzes statutory interpretation of Title VII as applied to race and pregnancy discrimination, and examines the Fair Employment and Housing Act (FEHA), California's own version of a modified Title VII. Since so many courts are entrenched in confusion, it is important to discuss the nexus between sex and sexual orientation from a scientific perspective. As Part II delineates, without manageable guidelines leading to lucidity in "sex" discrimination, confusion will continue to reign in same-sex sexual harassment cases. Part IV offers an analysis of the ongoing confusion caused by treating gender-based harassment and sexual orientation-based harassment as two distinct and separate doctrines. Lastly, Part V proposes that the current test for determining same-sex sexual harassment, although helpful in limited instances, is insufficient to guide the courts out of this confusion, and thus should be abandoned in favor of a clearer standard.


23. See discussion infra Part II.
24. See discussion infra Part IV.
25. See discussion infra Part IV.
26. See discussion infra Part II.
27. See discussion infra Part II.A.2-A.3.
29. See discussion infra Part II.C.
30. See discussion infra Part III.
31. See discussion infra Part IV.
32. See discussion infra Part V.
II. BACKGROUND

Courts in the past two decades have witnessed an explosion of diverse sexual harassment claims in the workplace. No longer is sexual harassment confined strictly to the realm of male-female interactions, where a female is victimized by a male. Last year, over 2,000 claims of sexual harassment reported to the EEOC were filed by men, and this figure has been steadily on the rise since the early 1990s. Surprisingly, the number of same-sex sexual harassment cases surpassed opposite-sex sexual harassment cases in published decisions in 2001.

Unlike traditional claims of sexual harassment involving offensive interactions between women and men, recent same-sex sexual harassment cases are often very complex and raise different issues than earlier courts' analyses of "traditionally defined" sexual harassment cases. In its statutory interpretation, a court must determine when the harassing conduct can be classified as sex discrimination or when it is a product of sexual orientation discrimination. Because federal courts

34. See id.
35. See U.S. Equal Employment Opportunity Commission, Sexual Harassment Charges EEOC & FEPA's Combined: FY 1992-FY 2000, available at http://www.eeoc.gov/stats/harass.html (last visited Oct. 20, 2001) [hereinafter EEOC Statistics]. Of the 15,836 sexual harassment claims filed in 2000 with the EEOC, 2,154 comprised of claims by men (13.6%). Id. In contrast, of the 10,532 claims in 1992, 958 were from men (9.1%). Id. Unfortunately, these claims do not reflect whether the harasser was of the same gender. See also HADLEY & CHUZI, supra note 7. "Most of the cases involving allegations of same sex harassment to reach the courts and EEOC have involved men." Id.
37. See also discussion infra Part IV.
of appeals confronted with same-sex sexual harassment disputes have for years been struggling with the "because of sex" terminology, it is important to return to the original statutory language and the legislative history surrounding Title VII, before venturing into recent federal case law.  

Prior to the enactment of Title VII of the Civil Rights Act of 1964, civil rights administrative agencies were entrusted with the responsibility of evaluating complaints of alleged discrimination. In reviewing potential civil rights violations, these agencies regarded themselves as mediators between employers and employees. Although strong public policy concerns urged the eradication of discrimination in the workplace, the agencies often failed to act on behalf of the employees' best interests. The only positive outcome of the agencies' inability to protect the rights of employees was the enactment of Title VII, which led to the establishment of the Equal Employment Opportunity Commission (EEOC).

A. Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 covers various "Titles" or areas of anti-discrimination law. Title VII, otherwise known as title 42 U.S.C. section 2000e governs fair employment practices at the federal level, declaring it unlawful to discharge or fail to hire an individual on the basis of certain proscribed classifications. In relevant part, it states:

It shall be unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or


See id.

See id.

The EEOC is an executive agency that is empowered to receive, file, and investigate complaints of discrimination. See 42 U.S.C. §§ 2000e-4, e-5(b). Title VII was subsequently amended in 1972 to enable the EEOC to bring suit in federal court to remedy discrimination after attempts at mediation and conciliation proved ineffective. See also 42 U.S.C. § 2000e-4(g)(discussion of special powers and authorities of the EEOC).


(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 46

While the statutory language appears clear, ascertaining which classifications fall within the definition of "race, color, religion, sex, or national origin" is not a simple feat. 47 Within the area of sex discrimination specifically, one jurist commented that the intricacies of "'sex' [are] not straightforward" and there is a multitude of questions surrounding its meaning. 48 Prior to reviewing the evidence in the case, the same jurist had the preconceived notion, as do many judges, that sex is merely a "matter of whether you are [born] male or female." 49

Understanding the ways in which "sex" is ascribed would prove beneficial to lower courts and employers attempting to distinguish between harassment involving sexual orientation and harassment based on gender. 50 To understand the connection between sex and sexual orientation, an appropriate discussion reviews how legal protections against "sex" discrimination emerged 51 and were clarified by subsequent legislation. 52

1. The Original Legislation

There were several congressional attempts to pass a civil rights

46. 42 U.S.C. § 2000e-2. (emphasis added). Parts (a), (b), and (c) of Section 703 prohibit discrimination "because of . . . race, color, religion, sex, or national origin." Discrimination unrelated to these factors or that involves classifications other than race, color, religion, sex or national origin will not violate this statute. See Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 560 (7th Cir. 1987) ("No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII ... do[es] not interfere.").

47. MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION CASES AND MATERIALS 23 (2d ed. 1995).


49. See id.

50. See discussion infra Part IV.

51. After a discussion of the legislative history, this comment will examine how courts interpret the meaning of "sex" for the purpose of Title VII.

52. Title VII has been amended four times since its initial appearance on the statute; the most relevant for this discussion is the 1978 amendment, known as the Pregnancy Discrimination Act.
package aimed specifically at targeting discrimination against racial minorities. The key players were mainly in the Kennedy Administration. After a series of extensive revisions by the House Judiciary Committee, one of the administration’s proposals was submitted for debate on the House floor. There, Representative Howard Smith, a Democrat from Virginia and the Chair of the House Rules Committee, suggested the addition of protection for victims of sex discrimination. The purpose of his amendment was to defeat the entire legislation by attempting to cast it as an absurd proposition. Despite his effort, the bill as amended survived the debate without any substantive discussion about the meaning of “because of sex” and its potential effects on workplace sexual harassment.

While the drafters of Title VII had fair employment practices in mind, they apparently did not anticipate that the prohibition against “sex” discrimination would cause so much tension in sexual harassment cases, let alone same-sex sexual harassment. Only House Representative Edith Green, a Democrat from Oregon, expressed some misgivings with the quick enactment of Title VII into law. Representative Green cautioned that “there will be problems for businesses [and] for managers.” Her warning, however, was not specific enough or sufficient to warrant further discussion over the meaning of “sex” and its relevance to same-sex sexual harassment. Although women reaped economic and social benefits from the legislative carelessness in Title VII, the impulsive lawmaking on the part of Congress in the area of “sex” discrimination has left this term as

53. See Player et al., supra note 47, at 24
54. See id. (citing H.R. 7152 (1993)).
55. 110 Cong. Rec. 2577-84 (1964).
56. See id.
57. See id. See also Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (“This sex amendment was abruptly added to the statute’s prohibition against racial discrimination . . . [as a] ploy seeking to ‘scuttle the adoption of the Civil Rights Act.’”).
58. See id.
59. See 110 Cong. Rec. 2577-84 (1964). The weight of the discussion of Title VII centered on racial discrimination. Even a bare mention of same-sex sexual harassment is conspicuously lacking in the legislative history since the naming of the injury of sexual harassment emerged during the 1970s. See Delpo, supra note 21.
60. See Cong. Q. Almanac, 88th Cong. 2d Sess. 338, 348 (1964). As the only female member to oppose the amendment, Representative Green also stated that “this is not the time or place for adding sex to Title VII’s list of discrimination.” Id.
61. See id. Some commentators speculated that the “problems” Representative Green was referring to concerned sexual harassment in the workplace. See Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 816-17 (1991) (“[Title VII’s] opponents include a number of Congressmen who hoped that the inclusion of ’sex’ would highlight the absurdity of the effort as a whole, and contribute to its defeat.”).
62. See Estrich supra note 61, at 813.
one of the most troubling and difficult to define. According to a report on the proposed legislation, no member of Congress submitted the Civil Rights Act of 1964 for debate or review in any of the House subcommittees.

Sexual harassment as a legal concept never existed prior to the 1970s. The omission in the wording of Title VII, according to a literalist interpretation, means that Congressional silence permits invidious and arbitrary discrimination in the workplace to escape federal protection. Title VII, however, is chiefly concerned with the "imbalance of power" between employers and employees and the misuse of that power. In sexual harassment disputes, Title VII is intended to protect employees from being subjected to a hostile work environment and from the pressures of sexual demands by those in powerful positions. The rationale is that employees in subordinate positions are unwilling to succumb to such pressures but are unfortunately powerless to counter them if the employees wish to preserve their employment. Where anti-discrimination law affords such protection, the employees should not have to face an ultimatum between choosing employment and enduring the harassment.

The need for federal protection becomes apparent in light of the confusion in the federal courts. Congress made two attempts to pass the Civil Rights Act prior to 1964. The provision "because of sex" in

---

63. This lack of legislative substance left courts unguided as to what Title VII meant by "because of sex." Title VII also failed to provide a list of offenses or employment actions that would violate the statute.
64. 1964 U.S. CODE CONG. & ADM. NEWS 2355, 2431 (1964).
65. See Delpo, supra note 21, at 2 (Sexual harassment as a phrase was first coined by the EEOC in 29 C.F.R. § 1604.11 (1996): "(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 incident occurred."). Part of the confusion with the administrative promulgation is that it is silent on same-sex sexual harassment.
68. See id.
69. See id. at 1455 (emphasis added). See also Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986). In effect, the actions of the harasser, indicated by words or actions, makes the statement that the victim is inferior because of his sex.
70. See 1964 U.S. CODE CONG. & ADM. NEWS, supra note 64, at 2426.
Title VII withstood revision from Congress until 1978, when “sex” was expanded to include employment decisions motivated by “pregnancy, childbirth, or medically related conditions.”

2. The Pregnancy Discrimination Act of 1978

Prior to 1978, it was legally permissible for an employer to refuse to hire women on the basis of pregnancy or motherhood. The original language of Title VII of the Civil Rights Act of 1964 did not prohibit discrimination because of pregnancy, only “because of sex.” Although biology dictates that one sex bears the burden of pregnancy and childbirth, pregnancy discrimination as a form of sex discrimination was not specifically recognized in the original text of Title VII. However, the resulting unequal employment relationship between women and men can be seen as early as the late 1960s and remains a reality today. Prior to the 1978 Pregnancy Discrimination Act, which statutorily amended Title VII, courts confined to a literal reading of Title VII enabled employers to use pregnancy or childbirth as reasonable grounds to terminate the employment relationship, denying women equal employment opportunities. In circumstances where employers used pregnancy as a pretext for invidious sex discrimination against women, a literal interpretation of Title VII meant no protection for women.

71. See Desantis v. Pacific Tel. & Tel Co., 608 F.2d 327 (9th Cir. 1979).
74. See id.
75. 78 STAT. 253 (1964).
76. If an employer denies employment to women with preschool age children but not men with pre-school age children, this may constitute discrimination on the basis of sex rather than any one with preschool age children. See Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (holding that familial status based on preschool-age children is not a protected class under Title VII).
77. The background wherein pregnancy discrimination against women arose serves as an impetus and forceful public policy consideration to ameliorate the plight of women as a group, who has been sheltered from maximizing the bread-winning experiences that men have long relished. Title 42 U.S.C. section 2000e-(k) states that the Pregnancy Discrimination Act “shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion.” Id. However, the provision of the Pregnancy Discrimination Act will be subject to the terms and conditions stated in a bona fide collective bargaining agreement regarding abortion. Id.
Dissatisfied with the predicament of this outcome and a literal reading of "sex" discrimination, Congress passed the Pregnancy Discrimination Act and added section 701(k) into Title VII. Title 42 U.S.C. section 2000e-(k) presents an expansive reading of "because of sex" and sets forth additional definitions of "sex," in pertinent part, as follows:

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.

Employment decisions that were once based on so-called neutral "factors other than sex," such as "pregnancy, childbirth, or related medical conditions" are now proscribed considerations, no longer immune from a Title VII challenge. Even when benign factors—such as a desire to protect unborn children from lead poisoning—are used to rationalize an employment practice that shelters and isolates women from certain positions in the workplace, a violation of Title VII has occurred. In such cases, the violation is not as a result of the original legislation in 1964, but "by reason of the Pregnancy Discrimination Act."

3. The Parr Expansive Reading of Title VII "Because of Race"

Parr v. Woodmen of the World Life Insurance Society contains an important analytical tool for understanding prior court confusion in reviewing the Title VII classification against racial discrimination. In

---

79. See id.
80. See id.
82. For further discussion of the Pregnancy Discrimination Act, see supra notes 74, 78-81 and accompanying text.
order to supplement a legislative omission that is a material term of the statute, it is clear that the court did not strictly interpret "because of race" in Parr to find the employer improperly used racial consideration in its employment decision. In Parr, an insurance company refused to hire a salesperson, not because of his race (white), but because of his marriage to an African-American woman. Just as confusion over the meaning of "because of sex" currently divides federal courts along political lines, many courts in the past have long struggled with how to analyze "because of race" and have "gone both ways."

In determining what is or should be a protected class under Title VII, the court held that "it makes no difference whether the plaintiff specifically alleged in his complaint that he has been discriminated against because of his race." To the extent that racial classification was improperly used by the employer, the court in Parr believed race to be so interrelated to the identity of the person discriminated against that "it would be a folly" not to read Title VII broadly and find a violation.

Since the court's expansion of Title VII in Parr, employment practices that discriminate against an individual's relationship with another person because of that person's particular race are prohibited "associational" discrimination.

4. Title VII and California's Fair Employment and Housing Act

State legislatures seeking to curb sexual harassment in the workplace generally look to federal statutes and case law for guidance interpreted other Title VII "because of" classifications.

85. See Parr, 791 F.2d at 890.
86. See id. See Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973) (The Court stressed that Title VII prohibits discrimination against an individual because of "such individual's race," and that the "plaintiff makes no complaint that he has suffered any detriment on account of his race."). See also Whitney v. Greater N.Y. Corp. of Seventh Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975) (holding that white woman discharged for having a social relationship with an African-American man stated a claim for discrimination under Title VII—because of race).
87. See Parr, 791 F.2d at 892.
88. See id.
89. See id. If discrimination stems as a result of the discriminated person's race, there is a direct nexus between the defendant's discriminatory conduct giving rise to the harm to the plaintiff. If the discrimination stems not directly but rather in relations, or from persons closely associated with plaintiff, the discrimination may also violate Title VII.
in structuring their anti-discrimination statutes.\textsuperscript{90} Currently, at least sixteen states have enacted some form of legislation dealing with same-sex sexual harassment.\textsuperscript{91} In drawing the boundaries of actionable same-sex sexual harassment claims, states like California were cognizant of the limitations of Title VII and its failure to extend protection for sexual orientation discrimination.\textsuperscript{92}

California and federal law alike prohibit discrimination in the workplace and have identified sexual harassment as an unlawful employment practice.\textsuperscript{93} Both California and federal statutes recognize "sex" as a protected class, but only California's Fair Employment and Housing Act (FEHA) extends protection on the basis of "sexual orientation."\textsuperscript{94} Section 12940(j)(1) of the California Government Code, also known as the FEHA, provides that it shall be unlawful:

For an employer ... because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring.\textsuperscript{95}

Similar to federal law, California recognizes two theories of

\begin{footnotesize}
\begin{footnote}

91. See \textit{ARIZ. REV. STAT. § 41-1461} (West 2002); \textit{CAL. GOV'T CODE § 12940(j)(1)} (West 2002); \textit{FLA. STAT. ANN. § 760.10(1)(a)} (West 2002); \textit{775 ILL. COMP. STAT. ANN. §§ 5/1-5/101} (West 2002); \textit{IOWA CODE § 216} (West 2002); \textit{KAN. STAT. ANN. §§ 44-1001 et seq.} (West 2002); \textit{ME. REV. STAT. ANN. Tit. 5 §§ 4551-4554} (West 2002); \textit{MASS. GEN. LAWS. Ch. 151B §§ 1(18), 4(16A), 9} (West 2002); \textit{MICH. COMP. LAWS §§ 37.2102(1), 37.2103(h)} (West 2002); \textit{MICH. STAT. ANN. §§ 3.548 (103)(h), (b)} (West 2002); \textit{MINN. STAT. ANN. §§ 363.01(10)(a)(3), (14), 363.03(1), (2), 480(a),8(3)} (West 2002); \textit{N.J. STAT. ANN. §§ 10:5-1 through 10:5-42, 10:5-5(hh), 10:5-12 (West 2002); N.Y. EXEC. LAWS § 296(1); N.Y. CITY ADMIN. CODE §§ 8-107(1), 296(a), 296-a.} (West 2002); \textit{OHI0 REV. CODE ANN. §§ 4112-4112.02} (West 2002); \textit{PA. STAT. ANN. Tit. 43 § 951} (West 2002); \textit{WASH. REV. CODE § 49.60.180(3)} (West 2002); \textit{W. VA. CODE §§ 5-11-1 through 5-11-20} (West 2002). See also Rotunno, supra note 90 (state-by-state discussion of anti-discrimination statutes).

92. See, e.g., \textit{CAL. GOV'T CODE § 12940(j)(1)} (the sexual harassment component of California's Fair Employment and Housing Act, which expressly includes sexual orientation discrimination.).


94. See \textit{CAL. GOV'T CODE § 12900 et seq.}

95. See \textit{CAL. GOV'T CODE § 12940(j)(1)}. (emphasis added).
\end{footnote}
\end{footnotesize}
sexual harassment: quid pro quo and hostile work environment.\textsuperscript{96} Under the hostile work environment theory, sexual harassment in the workplace is a form of sex discrimination that alters the "terms, conditions, or privileges" of employment by creating a hostile, offensive, or intimidating work environment.\textsuperscript{97} An employer tolerating sexual harassment against its employees is deemed to have adversely altered the terms of the employment relationship in violation of Title VII and the FEHA,\textsuperscript{98} because tangible employment loss need not include the loss of a job, income, or cause the victim actual physical injury in order for sexual harassment to violate Title VII.\textsuperscript{99}

Under the FEHA, common law agency doctrines do not bar an employee from bringing a claim against the employer based on coworker harassment, even if the supervisor has no knowledge, actual or constructive, of the harassment.\textsuperscript{100} The FEHA is unique in that the "focus of [its] cause of action . . . is whether the victim has been subjected to sexual harassment" instead of overemphasizing the motivation of the harasser.\textsuperscript{101} The intent of the California Legislature was to construe "gender" liberally to include "harassment between males," requiring only a showing that the work environment is sufficiently severe, hostile, and abusive—thereby departing from the

\textsuperscript{96} This comment explores only hostile work environment claims. The other type of sexual harassment claim is quid pro quo, which occurs when job benefits are conditioned in exchange for acquiescence to requests for sexual favors. See Mogilefsky v. Superior Court, 20 Cal. App. 4th 1409 (1993) (substantive analysis of Cal. Gov't Code § 12940(j)(1)).

\textsuperscript{97} See Swenson v. Potter, 2001 WL 3365393, n.5 (9th Cir. 2001) ("We used the term 'hostile work environment' only as a threshold indicator of the type of harassment alleged (i.e., as opposed to quid pro quo harassment."). See also, Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986). It is quid pro quo sexual harassment where job benefits or conditions are offered to employees for acquiescence to an employer's request for sexual favors. See, e.g., Collins v. Baptist Mem'l Geriatric Ctr., 937 F.2d 190 (5th Cir. 1991).

\textsuperscript{98} See Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir. 2000).

\textsuperscript{99} See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) ("The language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment.'").

\textsuperscript{100} See CAL. GOV'T CODE § 12940(j)(3) (making supervisor and employee personally liable for their harassing conduct regardless if the employer or covered entity knew or should have known of the conduct and failed to take corrective measures to remedy the harassment against the victim).

\textsuperscript{101} See Mogilefsky, 20 Cal. App. 4th at 1418. The FEHA in many respects goes beyond offering more protection against sexual harassment than in Title VII. The list of protected classes is far more extensive than under Title VII. California has a public policy to "protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical conditions, marital status, sex, age or sexual orientation." See CAL. GOV'T CODE § 12920. The entire country should have such a public policy as that of California.
2002] SAME-SEX SEXUAL HARASSMENT 263

amorphous Title VII standard of “because of sex.”

B. Recent Federal Cases Interpreting “Because of Sex”

The current split in Ninth Circuit case law on same-sex sexual harassment has stirred substantial confusion as to how DeSantis v. Pacific Telephone & Telegraph Co., Inc.103 should be understood and how claims of same-sex sexual harassment can give rise to appropriate legal action.104

More than two decades ago, the Ninth Circuit Court of Appeals, in DeSantis,105 defined Title VII’s “because of sex” provision narrowly to “refer[ ] to an person’s gender and not to sexual practices.”106 Under DeSantis, an employer would not be liable for discriminating against a person on the basis of sexual orientation.107 Positive attitudes toward homosexuals since DeSantis may have influenced how courts today view same-sex sexual harassment.108 However, the Ninth Circuit Court in Rene stated that DeSantis is still “good law” and noted that other circuits have followed it.109 However, a few months later another panel of Ninth Circuit judges “abrogated DeSantis” with its holding that harassment of male employees by other males qualified as “because of sex.”

Presently, nine federal courts of appeals and the United States Supreme Court have addressed the applicability of Title VII’s “because of sex” language in same-sex sexual harassment cases.110 The courts

102. See Mogilefsky, 20 Cal. App. 4th at 1416.
103. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).
105. DeSantis, 608 F.2d 327 (9th Cir. 1979).
106. See id. at 332 (internal quotations omitted).
107. See id.
108. See Rene, 243 F.3d at 1209 (noting how positive attitudes toward homosexuality have changed resulting in DeSantis being questioned). See also Lambda Legal Defense and Education Fund, Sexual Orientation Discrimination in Employment: A Guide to Remedies (1998), available at http://www.lamdalegal.org (discussing Kilborn, Gay Rights Groups Take Aim at Restaurant Chain That’s Hot on Wall Street, N.Y. TIMES, April 9, 1992, at A12, col. 1. In 1991, the Cracker Barrel restaurant chain had a policy of refusing to hire people “whose sexual preferences fail to demonstrate normal heterosexual values which have been the foundation of families in our society.” Subsequent to making national headlines, Cracker Barrel recanted and disregarded its own policy statement and practices because of negative public opinion and pressure.).
109. See Rene, 243 F.3d at 1209.
110. See Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 874 (9th Cir. 2001).
111. The following federal circuit court cases address same-sex sexual harassment under
have articulated some evidentiary standards to determine how sex classification can be triggered under Title VII. Most of these standards have proved unavailing because they have their genesis in traditional sexual harassment claims, and therefore, are inadequate analogues to same-sex sexual harassment disputes.

1. Arguments Opposing Recognition of Same-Sex Sexual Harassment Under Title VII

In traditional sexual harassment between man and woman, courts have had little trouble concluding that harassment is based on sex if a heterosexual male implicitly or explicitly makes sexual advances or gestures toward a female. In same-sex cases, some courts refuse to even characterize male-on-male physical behavior as sexual harassment, because acting aggressive is "horseplay," inherent in the rough ways that males interact with one another. The use of the term

Title VII: Garcia v. ELF Atochem N. Am., 28 F.3d 446 (5th Cir. 1994); Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3d Cir. 1990); Morgan v. Mass. Gen. Hosp., 901 F.2d 186 (1st Cir. 1990); Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997); Fredette v. BVP Mgmt. Assocs., 112 F.3d 1503 (11th Cir. 1997), cert. denied, 523 U.S. 1003 (1998); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745 (4th Cir. 1996), cert. denied, 524 U.S. 927 (1996); Dillon v. Frank, 1992 WL 5436 (6th Cir.); Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864 (9th Cir. 2001); Rene v. MGM Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001), rev'd, 305 F.3d 1061 (2002) (en banc). Due to space limited, only a selected number of same-sex sexual harassment federal circuit cases alleging Title VII violations will be evaluated and discussed in this comment. A comprehensive study is beyond the scope of this comment, but a blueprint for how same-sex sexual harassment can be deconstructed and examined as an outgrowth of "because of sex."


113. Traditional sexual harassment cases that involve sexual desire or attraction for the victim infrequently come into play in same-sex sexual harassment disputes. Thus far, only one recent federal case involves a male harasser propositioning a male victim. See Moto v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512 (5th Cir. 2001) (“because of sex” requirement easily satisfied due to aggressive sexual advances made by the department head toward the visiting professor). Additionally, Meritor Sav. Bank v. Vinson is frequently cited in opposite-sex sexual harassment cases where sexual desire or animus gives rise to a hostile work environment claim. See 477 U.S. 57 (1986). See also Delpo, supra note 21, at 5. Sexual desire presupposes the reason a woman suffers harassment is because the male harasser is sexually attracted to the victim. Within this purview, the defining characteristic of sexual desire paradigm ignores the power dynamic inherent in the harasser’s and the victim’s respective positions in the work force and in society as whole. See infra Part IV.

114. See Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257, 262 (3d Cir. 2001) (“It is easy to conclude or infer that the [male-to-female] behavior is motivated by her sex.”). However, it is far from easy or simple to presume male-on-male same-sex sexual harassment is “because of sex.” Theoretically, courts would also have no problem concluding that harassment against a man by a woman is sex-based sexual harassment. Modern media culture also gives rise to affirmation of opposite-sex sexual harassment consciousness. See generally MICHAEL CRICHTON, DISCLOSURE (1994) (male employee as the victim of female harassing superior).

115. See, e.g., Garcia v. ELF Atochem N. Am., 28 F.3d 446 (5th Cir. 1994).
horseplay in a same-sex sexual harassment allegation was seen in *Garcia v. ELF Atochem of North America,*\(^{116}\) where plaintiff's heterosexual supervisor approached him from behind and grabbed his crotch, moving it in a sexually suggestive manner.\(^{117}\)

In *Drinkwater v. Union Carbide Corp.,*\(^ {118}\) the court also equated sex with gender rather than sexual orientation.\(^{119}\) Realizing that a power imbalance exists between men and women, the court viewed male-on-male sexual harassment claims as inappropriate, because unlike women, there is no abuse of power against men by other men, as men are viewed as each other's equals.\(^{120}\) In contrast, women's sexuality "defines women as women in this society, so violations of [women's sexuality] are abuses of women as women," because they insinuate that women are the weaker sex.\(^ {121}\)

### 2. The Sexual Desire Test

Clear evidence that a harasser is provoked by a victim's sexual orientation precludes the likelihood of meeting the statutory requirement of "because of sex" under Title VII.\(^ {122}\) In *Bibby v. Philadelphia Coca-Cola Bottling Co.,*\(^ {123}\) a reinstated plaintiff was taunted with homophobic slurs: "Everybody knows you're [as] gay as a three dollar bill . . . . Everybody knows you're a faggot . . . ."\(^ {124}\) He was also called a "sissy."\(^ {125}\) Short of such a clear case of homophobia, "the question of how to prove that same-sex sexual harassment is because of sex is not easy to answer."\(^ {126}\)

\(^{116}\) See id.

\(^{117}\) See id. at 448. Courts in the past have been reluctant to categorize male-on-male sexual attacks and verbal taunts as sexual harassment because of the notion that boys engage in rough-play, often called "horseplay." Even if the harassment has sexual overtones, it is not a per se violation of Title VII. See id. at 451-52 (quoting Giddens v. Shell Oil Co., 67 Fair Empl. Prac. Cases (BNA) 576 (5th Cir. 1993)) ("Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones.").

\(^{118}\) Drinkwater v. Union Carbide Corp., 904 F.2d 853, 853 (3d Cir. 1990).

\(^{119}\) See id. "Sex . . . logically refer[s] to membership in a class delineated by gender."

Id.

\(^{120}\) See id. at 860.

\(^{121}\) See id.

\(^{122}\) See Rene v. MGM Hotel, Inc., 243 F.3d 1206, 1206 (9th Cir. 2001), rev'd, 305 F.3d 1061 (2002) (en banc); see also supra notes 15-19 and accompanying text.


\(^{124}\) Id. at 259-60.

\(^{125}\) Id. at 260.

\(^{126}\) See id. at 262.
3. The Hostility Toward Opposite Sex Test (Anti-Male/Anti-Female)

Under the third traditional analysis of workplace sexual harassment, the harassing conduct may be properly classified as "because of sex" when the harasser demonstrates hostility toward the victim's sex.\textsuperscript{127} Behaviors fall under this standard if, for example, "a woman chief executive officer of an airline believes that women should not be pilots and treats women pilots with hostility amounting to harassment."\textsuperscript{128} The same would hold true if, for instance, a male doctor takes adverse employment action against a male nurse premised on the notion that being a man means preclusion from serving the duties of a nurse, a traditionally-held female position.\textsuperscript{129} Regardless of the various scenarios, this "hostility" paradigm essentially examines "whether members of one sex are exposed to disadvantageous terms or conditions of employment which members of the other sex are not."\textsuperscript{130}

In \textit{Quick v. Donaldson Co.},\textsuperscript{131} a male heterosexual worked in an environment where other male employees frequently engaged in "bagging," a practice in which men attempt to grab and squeeze one another's testicles.\textsuperscript{132} For over two years, plaintiff was subjected to this unwanted behavior from his male coworkers.\textsuperscript{133} When reviewing the district court's opinion, the Eighth Circuit noted that the lower court's tone was dismissive and reflected the view that "boys were acting like boys," instead of recognizing same-sex sexual harassment.\textsuperscript{134}

4. The Sex Stereotype Test

Employment decisions based on a person's gender stereotypes may also violate Title VII. In \textit{Price Waterhouse v. Hopkins},\textsuperscript{135} an

\textsuperscript{128} See Bibby, 260 F.3d at 262.
\textsuperscript{129} See id.
\textsuperscript{130} See Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996). \textit{See also} Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269-70 (8th Cir. 1993). The hostility toward one sex model explicitly entails consideration of male and female gender.
\textsuperscript{131} See Quick, 90 F.3d at 1372.
\textsuperscript{132} See id.
\textsuperscript{133} See id. at 1374.
\textsuperscript{134} See id. at 1296. The district court categorized the practice of "bagging" as "unnecessary juvenile behavior." \textit{Id.}
accounting firm was precluded from denying a female associate partnership on account of her failure to conform to the firm's expectation that female senior managers should dress and appear feminine. \(^{136}\) The stereotypical view of the female professional is that she should not exhibit "male traits" by demonstrating overbearing, dominant, or aggressive behavior. \(^{137}\) By reserving these traits for men, employers in the competitive fields of business or law are essentially ensuring professional success and accolades to males, whose aggressiveness is expected in securing multi-million dollar accounts, similar to the one secured by Ann Hopkins in *Price Waterhouse*. \(^{138}\) Employing sex stereotypes about a person, as to his or her status as a male or female, invariably concerns sex discrimination with overt acts or by reason of sex stereotyping in violation of Title VII. This situation may arise in several same-sex sexual harassment scenarios that mirror the plight of Hopkins in *Price Waterhouse*. \(^{139}\)

a. *The Effeminate Man*

An effeminate man may also state a same-sex sexual harassment claim against fellow male employees or supervisors in circumstances where he is harassed because of preconceived notions of masculinity and maleness. \(^{140}\) In *Nichols v. Azteca Restaurant Enterprises, Inc.*, \(^{141}\) Antonio Sanchez hosted and waited tables for approximately four

---

\(^{136}\) See id. One of the male partners described Hopkins' personality as being "too macho," and that she needs to learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up." Other negative evaluations of Hopkins included comments that she needed "a course at charm school" and that her aggressiveness indicated that she "overcompensated for being a woman." Id. at 235.

\(^{137}\) See id. at 257-58. Some partners objected to Hopkins' use of profanity "because it's a lady using foul language." See also James O. Castagnera, *Sex Discrimination Based Upon Sexual Stereotyping*, 53 AM. JUR. TRIALS 299 (1995 & 2001 Supp.). Another stereotype used to keep women in their place and out of the work force is that women are emotional, irrational, or hysterical. The word "hysterical" dates back to Western civilization when Hippocrates, the "Father of Modern Medicine" theorized women's emotions were caused by their wombs influencing their body and mind, being cured only by marriage. Id. (quoting ROBERT C. CARSON & JAMES NEAL BUTCHER, *ABNORMAL PSYCHOLOGY IN MODERN LIFE* 201 (Harper Collins, 9th ed. 1992)).

\(^{138}\) See *Price Waterhouse*, 490 U.S. at 235.

\(^{139}\) See id. at 236.

\(^{140}\) See Nichols v. Azteca Rest. Enter., Inc. 256 F.3d 864, 873 (9th Cir. 2001). Affording protection for effeminate males which do not conform with societal preconceived notions of masculinity and maleness invariably would exclude protection for males who do fit into masculine stereotypes but nonetheless suffer invidious discrimination and harassment. See also Bianchi v. City of Philadelphia, 767 A.2d 31 (3d Cir. 2001) (unpublished) (no sex stereotype argument that masculine firefighter did not conform to stereotypes of masculinity and maleness).

\(^{141}\) See id.
years, during which time his supervisor and coworkers harassed him, calling him a “faggot” and “a fucking female whore.” They also repeatedly referred to him using female pronouns “she” and “her,” and ridiculed him for carrying his waiter’s tray “like a woman.” The Ninth Circuit Court of Appeals concluded that this series of harassing interchanges was “closely related to gender” in violation of Title VII.

In contrast, in Dillon v. Frank, a postal employee on several occasions was called a “fag,” and had his name written in graffiti on the walls of the restroom stating that Dillon performs oral sex on men. Arguing sex stereotyping, Dillon alleged “he was not deemed ‘macho’ enough by his coworkers,” and the “abuse relating to [his perceived] homosexuality [was visited upon him] solely because he was [an inferior] man.” Similar to Price Waterhouse, Dillon’s claim also bears closely to his gender. However, the court disregarded his sex stereotyping claim on the ground that “Dillon’s co-workers deprived him of a proper work environment because they believed [he was a] homosexual,” as opposed to harassing him because of his gender.

b. The Single, Celibate Guy

In addition to those who are too effeminate, men who choose to remain bachelors and not date or have intercourse with women are ridiculed by coworkers on the basis of gender stereotyping. Since male virility is frequently equated with masculinity, the failure of a man to engage romantically with women may signal to coworkers that the celibate man is not “man enough” and/or is homosexual. Because same-sex sexual harassment could be provoked by either of these inferences, the interconnectedness of sex and sexual orientation is implicated as a result of society’s perception of an inadequate man.

143. See id.
144. See id.
145. See Nichols, 256 F.3d at 869.
147. See id. The graffiti on the wall stated that “Dillon sucks dicks.” See id.
149. See id.
150. See Schultz, supra note 148, at 1778.
151. See id. In mixed motive cases, the harasser’s state of mind may include both legitimate and illegitimate factors.
152. See discussion infra Part IV.
Depending on the chosen profession or career, gender stereotypes may have a far more serious and adverse effect on the Title VII harassed victim. For example, the male mechanic who is unmarried and asexual may experience harassing aggressive behavior by those who are threatened by his chosen lifestyle or bachelor status. In Goluszek v. Smith, an electronic repair mechanic who worked in an all-male environment was chastised by male coworkers for lacking the necessary sexual prowess and experience dating women to “fit in.” Because Goluszek was unmarried and blushed easily at references to sexual topics, he was an easy target for harassment based on his sex. Unable to compartmentalize the harassment as either the off-spring of sexual lust for the victim or a general hostility toward other male coworkers, the court had difficulty determining that the harassment in this instance was based on gender.

c. The Earring Wearing Teenager

Males on the brink of puberty often appear boyish and, to an extent, feminine or not quite as masculine as fully-grown men, may also be sexually harassed because of sex in the same way as the effeminate man or single/celibate guy—under a theory of sexual stereotyping. Take, for example, the case of Doe v. City of Belleville, wherein two heterosexual teenage twin brothers worked in an all-male environment during the summer. They endured a barrage of verbal and physical abuse about their respective sexual orientations and physical prowess. Coworkers recommended he date another female coworker to “get laid.”


155. See id.

156. See id. at 1453.

157. See id. He was taunted for not having a girlfriend, for living with his mother, and for being sexually inexperienced. Coworkers recommended he date another female coworker to “get laid.” Id.

158. See id. at 1456.

159. Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).

160. See id. However, the use of Doe is merely for illustrative purposes to highlight another gender-based stereotype of masculinity in light of the Price Waterhouse case.
physical appearances. One teen was called "fat boy," while the other was labeled a "fag" and "queer" because he wore an earring. One coworker, a "hulking former marine," told the brother with the earring to return to San Francisco with all the other "queers," and repeatedly questioned his gender. This same aggressor also threatened to perform various unwanted sexual acts upon the plaintiff. Not only were the coworkers abusive, but the head supervisor also participated in the verbal taunting of the two teens.

Although most of the Doe opinion is no longer good law, its discussion relating to Price Waterhouse remains viable. Thus, harassment predicated on a perception that a man has certain stereotypically feminine characteristics, such as a soft voice, slight physique, or long hair, may violate Title VII, because these remarks may relate to stereotypes about his gender.

C. Empirical Studies on Sexual Orientation

In constitutional jurisprudence, courts that sometimes afford greater protection to homosexuals discriminated against because of sexual orientation do so because they believe sexual orientation is an immutable characteristic. Immutability is defined as "the condition of a characteristic or trait" that is "(1) either unalterable by a voluntary act of will by the individual or alterable only with substantial cost or difficulty to the individual; and (2) not having been acquired through the voluntary choice of the individual."

161. See id.
162. See id. at 567.
163. See id. Plaintiff's harasser asked him, "are you a boy or a girl?" Id. See also WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1584 (7th ed. 1996). In the fifth and eleventh definitions: "Queer" is defined as a disparaging and offensive slang remark that someone is a "homosexual" or "effeminate; unmanly," and specifically referring to a "male homosexual." Id.
164. See Doe, 119 F.3d at 567.
165. See id.
166. See Price Waterhouse, 490 U.S. 228 (1989).
167. See id. at 581. The Court's interpretation that sexual harassment violates Title VII merely because of the nature of the content of the harassment has been expressly abrogated by the Supreme Court in the Oncale decision.
168. See Edward Stein, Evaluating The Sex Discrimination Argument For Lesbian And Gay Rights, 49 UCLA L. REV. 471 (2001). See also Woodard v. Gallagher, 1992 WL 252279 at *3 (Fla. Cir. Ct. 1992) ("[T]he only reason they have not been granted heightened equal protection rights is because the difference in them touches people's deeply ingrained heterosexual orientation both personally and culturally. The heterosexual orientation is biologically, psychologically, and morally ingrained in our culture ... ").
169. See Samuel A. Marcosson, Constructive Immutability, 3 U. PA. J. CONST. L. 646 (2001). "Few people would dispute that a characteristic may be regarded as immutable even
The rationale behind stronger protection against discrimination based on immutability is that it would be unfair to permit discrimination on the basis of a characteristic that is impossible or difficult to change. Proponents who argue a biologically-based theory—that sexual identity is innate or biologically determined—often cite ground-breaking scientific research suggesting that humans are a product of our biology. Whether homosexuality is caused by “nature or nurture,” that is, a product of our biology or our environment, or a combination thereof remains unanswered and controversial.

Consider the particulars of a grooming discrimination case that addresses the special challenges of people afflicted with pseudofolliculitis barbae (PFB), a rare skin disease. Here, growing a beard to help cover the skin disorder was seen as an immutable trait even though those affected by the employer’s grooming policy could (theoretically) shave their facial hair. Interestingly, race has not been universally considered immutable. Historically, whether an individual’s race was considered immutable depended on the region of the country wherein he resided, and the socio-political environment of the time. However, proponents of biologically-based theory are not...

---

170. See Stein, supra note 168, at 478.
171. See discussion infra Part II.C.
173. See Bradley v. Pizzaco, 7 F.3d 795 (8th Cir. 1993). Plaintiff suffered from a rare skin condition affecting approximately fifty percent of the African American population. Only twenty-five percent of the African Americans inflicted with this disease could shave their facial hair without too much pain. Title VII’s prohibition against discrimination on the basis of “religion” includes “all aspects of religious observance and practice,” which includes grooming or business attire standards imposed by an employer. Id.
174. See id.
175. See id. at 612 (“The record shows PFB almost exclusively affects black males and white males rarely suffer from PFB [skin condition]. . .”).
176. See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960s to 1980s, 58-59 (1986) (highly regarded groundbreaking work that explores the theory that race is a social construct and not a fixed state of permanence.).
177. See id. In the landmark case Plessy v. Ferguson, Homer Plessy had “seven-eighth Caucasian and one-eighth African blood" and was extremely fair skinned; nevertheless his presence in the “whites only” section of the train violated the 1890 Louisiana segregation
1. The Hypothalamic Difference

Simon LeVay, a neuro-biologist, studied the hypothalamus of human beings to determine the sexual differences between homosexual and heterosexual men. In the scientific community, it is universally accepted that the anterior hypothalamus regulates the sexual behavior of human beings. LeVay measured the interstitial nuclei of the anterior hypothalamus (INAH) from postmortem tissues of "women, men who were presumed to be heterosexual, and homosexual men." Only in INAH-3 was the difference significant: INAH-3 was twice as large in heterosexual men than in homosexual men. Based on these results, LeVay concluded that this difference "indicates that [the] INAH is dimorphic with sexual orientation, at least in men, and suggests that sexual orientation has a biological substrate."
2. The Gay Gene

Dean Hamer, a molecular biologist at the National Institutes of Health, was an early pioneer in conducting research linking sexual orientation to genetic makeup. Hamer investigated genetics in male sexual orientation by "pedigree and linkage analyses on 114 families of homosexual men" in order to determine if the gay gene is derived from familial lineage. To conduct this research, Hamer interviewed more than 1,000 gay men and their families to determine whether other family members were attracted romantically, whether in fantasy or in actuality, to members of the same sex.

Hamer found that an "increased rate of same-sex orientation in the maternal uncles and male cousins . . . but not in their fathers or paternal relatives" suggests "the possibility of sex-linked transmission in a portion of the population." In a group of forty families in which there were twin gay brothers and "no indication of nonmaternal transmission," there was a "correlation between homosexual orientation and the inheritance of polymorphic markers on the X

homosexual and heterosexual men are allegedly caused by changes that take place during prenatal stages of childbirth. See id. For a definition of sexual dimorphism, see WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY at 1755 (Random House Publishing, Inc. 1996) Sexual dimorphism is defined as the "condition in which the males and females in a species are morphologically different . . . ." For a legal discussion assessing various scientific arguments for immutability of sexual orientation, see E. Gary Spitko, A Biologic Argument For Gay Essentialism-Determinism: Implications For Equal Protection and Substantive Due Process, 18 U. HAW. L. REV. 571, 578 (1996).

186. Dean Hamer received his doctorate from Harvard Medical School and his bachelor's degree from Trinity College in Connecticut. For twenty-four years, he worked at the National Institutes of Health, where he served as the Chief of the Section on Gene Structure and Regulation in the Laboratory of Biochemistry of the National Cancer Institute. He has published over 100 scientific papers in the area of recombinant DNA, drug and vaccine production, and gene regulation. See Dr. Dean Hamer's Webpage, available at http://rex.nci.nih.gov/RESEARCH/basic/biochem/hamer.htm (last visited Jan. 7, 2002).

187. See id. Hamer's work linking genetics to sexual orientation have "changed the way we think about human behavior and raise a host of important scientific, social and ethical issues." Id. See also Dean H. Hamer et al., A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, SCIENCE 261:320-326 (1993) [hereinafter Hamer, Linkage]; DEAN H. HAMER & PETER COPELAND, THE SCIENCE OF DESIRE (Simon & Schuster, New York, 1994); Simon LeVay & Hamer DH, Evidence for a Biological Influence in Male Homosexuality, in SCI. AM. 270:20-25 (1994).

188. See Hamer et al., Linkage, supra note 187, at 321-27.

189. See HAMER & COPELAND, supra note 187, at 54-55 (1994). Those interviewed stated that they had always known of their sexual orientation, evident before puberty and expected it would never change. See id. at 65-73.

190. See Hamer et al., Linkage, supra note 187.
chromosome in approximately 64%" of the sibling twins tested.  

Additionally, the "subtelomeric region," abbreviated as Xq28 and located on the long arm of the sex chromosome had a "multipoint lod score of 4.0 (P=10(-5))." This score means that there is "a statistical confidence level of more than 99% that at least one subtype of male sexual orientation is genetically influenced." 

In 1999, Hamer's findings were re-tested by other scientists, who confirmed that homosexuality is both familial and an inherited trait, carried on the X chromosome. Critics of the so-called "gay genes" argue that the influence of genes on sexual orientation is not conclusive. Other scientists have provided estimates that genetic contributions influence sexual orientation at a rate as high as 70%. The remaining influences are caused by a "complex mixture of biological developments and environmental stimuli. But how much power each wields is as yet unknown."

III. IDENTIFICATION OF THE PROBLEM

Men are increasingly bringing sexual harassment claims under Title VII against male coworkers and supervisors, believing that they


192. Id.

193. See Hamer et al., Linkage, supra note 187.

194. See Bailey, J. et al., A Family History Study of Male Sexual Orientation Using Three Independent Samples, BEHAV. GENETICS 29:79-86 (1999). Criticizing population samples gathered by prior studies due to self-selection methodology, Professor Bailey of Northwestern University, Department of Psychology, carefully gathered three independent samples to replicate findings consistent with the X-linkage. Bailey found that there is a high degree of certainty that the percentage of siblings rated as homosexual or bisexual ranged from 7%-10% for brothers and 3%-4% for sisters. See also Mubarak Dahir, Why Are We Gay?, THE ADVOCATE, July 17, 2001, at 30, 35. Of the fifty-six gay men with identical twin brothers, 52% of them also had a gay twin. Among the fifty-four fraternal twins, it was the case that 22% were gay. Lastly, in the adoption control group, only 11% of the fifty-seven men had gay brothers. See id.

195. Robert Pitzer, a psychiatrist at Columbia University, believed that 66% of male homosexuals and 44% of lesbians could convert to heterosexuality if they are "highly motivated." See Dahir, supra note 194, at 38. Critics of Pitzer cite to his over-reliance on test subjects who were affiliated with religious right-wing organizations. See id. Additionally, his methodology included interviewing 200 "ex-gays." Id.

196. See id. at 35.

197. See id. at 35-37. Pillard, a psychiatrist at Boston University School of Medicine, who also participated in the Bailey studies commented that "[all] this [research] shows that sexual orientation is largely genetics." Id.
same-sex sexual harassment

should be as equally protected by the law as their female counterparts. The issues arising under Title VII’s “because of sex” provision, however, have long been challenged through the courts.

The foundation upon which “because of sex” stands can be characterized as unstable at best, and makes for fertile and interesting discussion of the conflicting decisions in the federal courts, particularly in the Ninth Circuit. With the large body of case law unclear on the issues addressed in this comment, more attempts to draw the line of demarcation between sex and sexual orientation are expected in the federal courts in the upcoming years.

The interplay between gender and sexual orientation as indicated by comments such as “fucking female whore” and “faggot” makes it difficult to determine when the harassment amounts to gender discrimination, sexual orientation discrimination, or a mixture of both forms of discrimination. A court seeking to conclude that such ambiguous harassment is the product of gender discrimination need not look further than Nichols to find a holding that the behavior is “closely related to gender.” However, a conclusion could also be drawn just as easily, that calling someone a “faggot” demonstrates the harasser’s state of mind, based on sexual orientation discrimination.

As an additional challenge, homophobic slurs may play off gender remarks in certain circumstances, as evidenced when terms such as “sissy” or “faggot” are used to insult and degrade a male. Without clear standards applied to when the “sex” factor is triggered in same-sex sexual harassment claims under Title VII, the confluence of state-of-mind and gender-based comments further confounds an already confusing area of law, making it difficult to discern when the harassment is “because of sex.”

198. See EEOC Statistics, supra note 35. The very idea that men suffer sexual harassment is seen, all too frequently, as some sort of joke. With the large and increasing number of males being harassed by other males and females, no longer is same-sex sexual harassment seen as a meritless or absurd claim.
200. For a list of federal circuit cases discussing same-sex sexual harassment cases under Title VII, see supra note 111.
202. See id. at 869.
204. See discussion infra Part IV.
Statutory interpretation confined to words such as “because of sex,” without a clear definition and understanding from Congress adds additional complexity in analyzing “sex” in same-sex sexual harassment cases. As evidenced by the rising number of same-sex sexual harassment claims in the workplace, ambiguous statutory language only fuels further confusion, often leading to untenable results, which will continue to befuddle the courts. As a matter of public concern and policy, this confusion must be corrected and remedied.

IV. ANALYSIS

A. Reasons for the Courts’ Confusion

While this comment opens with the prophetic words penned by former President Wilson in 1885, its message underscores the current confusion over statutory interpretation of Title VII. The process of legislation continuously requires revisions and modifications until a statute’s gaps are narrowed and its shortcomings eliminated. For example, during a time when pregnancy and childbirth were seen as hindering a woman’s equal access to the fair employment that men have long enjoyed, the need and push for legislative change resulted in Congress passing the Pregnancy Discrimination Act. Through that Act, Congress infused new meanings into the original nondescript phrase, “because of sex” and gave “sex” as a protected class new meaning, through its close nexus to childbirth and pregnancy.

While Title VII’s birth into American society may have heralded principles of racial equality and justice unheard of in prior times, its beginning also engendered much confusion over basic statutory terms. The current confusion unfolding in the courts over classifying harassing conduct in sex discrimination is indicative of the courts’ struggle to define Title VII’s protected classes. However, “because

205. See Kernochan, supra note 1.
206. See id.
207. See Pregnancy Discrimination Act, 92 STAT. 2076.
of sex” was not the first time the judicial system grappled with one of Title VII’s “because of” classifications. Equally bewildering to the courts in the past has been the phrase, “because of race,” as aptly noted in the Parr case.211

Protection against “sex” discrimination was not one of the initial concerns of the drafters of Title VII, until an opposing politician threw “sex” into the mix of Title VII in order to discourage passage of the entire Civil Rights Act of 1964.212 Within this context, it is understandable that confusion remains at a peak in the courts even today. Civil code countries213 historically have criticized the U.S. legislative process as unintelligible and overly complicated, resulting in confusing and inconsistent court decisions.214

A literalist or textualist interpretation that merely examines the four-corners of the statute ignores the apparent interconnectivity between a woman’s gender, pregnancy, and childbirth. This method of analysis may not be the sufficient to clear the confusion in same-sex sexual harassment. As an indication, other states have modified their anti-discrimination statutes to avoid Title VII’s glaring problems.215 These problems should prompt Congress to revise Title VII again.

B. Traditional Rationale Against Same-Sex Sexual Harassment Claims Is Gender Discrimination

A traditional analysis of power imbalance, as seen in Drinkwater, reinforces stereotypes about the sexes.216 In particular, the message conveyed is that women are less powerful and need protection, while the same need does not exist for men. Power imbalance analysis, in

---

211. See id.
212. See 110 CONG. REC. 2577-84 (1964).
213. BLACK'S LAW DICTIONARY 176 (6th ed. 1991). Civil code is derived from the French Napoleonic code in 1804. When Napoleon became emperor, the name was changed to “Code Napoleon,” by which it is not officially styled by its original name of “Code Civil.” Louisiana’s legal system is modeled after the “Code Civil.” Id.
214. A civilian legal system differs from a common law system much as rationalism differs from empiricism, or deduction from induction. The civilian naturally reasons from principles to inference, the common law lawyer from inferences to principles. But the predominance of the statutes on the continental is not so strong anymore. The law is increasingly developed by judges, giving more room to inductive methods. See KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 271 (3d ed. 1998, trans. Tony Weir).
215. See supra note 91 and accompanying text.
essence, reifies and strengthens patriarchy and paternalism within our society, both of which, like racial discrimination, were socially acceptable for all of the nineteenth and most of the twentieth centuries. Furthermore, there are several problems left unresolved after Drinkwater.\footnote{217} First, the asymmetrical power imbalance between the sexes may vary, depending on the employment relationship and the relative positions of power and physical strength of the harasser and the victim.\footnote{218} Further, the power imbalance analysis does not take into account specific circumstances where men in positions of power, or men who are physically more domineering, can subjugate and/or subject other men to the type of harassment women in inferior employment positions have long endured.\footnote{219} To hold the position that males are always wielding power and are dominant brands them unfairly and stereotypically as perpetual harassers. Unfortunately, this stance also makes a male’s status as a harassed victim invisible in same-sex sexual harassment cases.\footnote{220} This contradicts the goals of Title VII, which were to remove “artificial, arbitrary, and unnecessary barriers”\footnote{221} against an individual based on stereotypical notions of class. This meant that “even a true generalization about the class is an insufficient reason for disqualifying [or terminating] an individual.”\footnote{222}

Another rationale relied upon by the courts for excluding same-sex sexual harassment claims is the notion that men are just behaving

\begin{itemize}
  \item \footnote{217}{See id.}
  \item \footnote{218}{See id. The Court’s analysis in Drinkwater fails to account for situations where women hold the high-powered supervisory authority over men, or that neither sex dominates one another. Id.}
  \item \footnote{219}{For an example of male subjugation and inferiority, where two teenagers are sexually and physically victimized by several men, including a muscular and “hulking former marine.” See Doe v. City of Belleville, 119 F.3d 563, 567 (7th Cir. 1997).}
  \item \footnote{220}{See HADLEY & CHAZI, supra note 7, at Chap. 3, §10. For same-sex sexual harassment cases, most sexual harassment complaints are by men bringing actions against other men. Id. As for opposite-sex harassment against men, one need not look further than popular fiction to find that men have also been subjected to sexual harassment by women. See CRICHTON, supra note 114. See also Weston v. County of Pennsylvania, 2001 WL 1491132 (E.D. Pa.) (female sexually harassing male coworker in an incarceration working environment).
  \item \footnote{221}{See Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (discussion of Title VII’s purpose of preventing artificial, arbitrary, and unnecessary barriers to employment).
  \item \footnote{222}{See City of Los Angeles Dep’t of Water and Power v. Manhart, 435 U.S. 702 (1978). The basic principle of equal treatment dictates that minority, as well as majority, are protected by Title VII, regardless of broad and over-generalized stereotypes. See also McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Section 703(a)(1) of Title VII prohibits the discharge of “any individual” because of “such individual’s race,” whether he or she belongs to the minority or majority. See also 110 CONG. REC. 2578 (1964). The legislative history of Title VII was intended to “cover white men and white women and all Americans” (Statement by Representative Celler), and there is “an obligation not to discriminate against whites.” Id. (Memorandum of Senator Clark).}
like their natural selves, acting like boys or "horseplaying."\textsuperscript{223} Although "horsing around" implies consent, consent is not a given. In fact, a Title VII plaintiff does not agree to unwanted physical and sexual violation of his person. The stereotypes that permeate the horseplay and power imbalance rationales are nothing more than guises for gender-based stereotypes, replete throughout analyses by the \textit{Quick} and \textit{Garcia} courts.\textsuperscript{224} Furthermore, a court engages in gender discrimination every time it excuses harassing behavior merely because the offender uttered crude verbal taunts to men rather than to women. As stated in \textit{Quick}, sexual harassment is a form of sex discrimination, particularly in same-sex scenarios, whenever "members of one sex are exposed to disadvantageous terms or conditions" not imposed on the other sex.\textsuperscript{225}

C. \textit{The Confusion Continues}

The sexual desire analysis has also caused confusion for the courts. The court in \textit{Goluszek} struggled to achieve clarity by using sexual desire in its analysis, which instead was the source of much of its confusion.\textsuperscript{226} Since the harassment was neither an outgrowth of sexual desire for the victim nor due to a general hostility against males, the \textit{Goluszek} court had difficulty understanding the gender connection in same-sex sexual harassment.\textsuperscript{227} Searching for sexual desire in same-sex sexual harassment cases is a problematic framework because the theory was originally designed to analyze and resolve harassing male-female interactions.\textsuperscript{228} Thus, this theory is difficult to apply in same-sex harassment cases.\textsuperscript{229} Sexual desire will rarely produce the necessary "sex" element in same-sex sexual harassment, unless the harasser offers a confession that he targets the victim because of sex, or that he is a closeted homosexual in search of male coworkers to victimize.\textsuperscript{230} Any sexual desire analysis is a myopic perspective, and generally inapplicable in same-sex harassment disputes. As an instrument for inferring whether gender or sexual orientation plays any role in the harassment, sexual desire will only continue to distract

\begin{itemize}
\item \textsuperscript{223} See Axam, \textit{supra} note 2.
\item \textsuperscript{224} See discussion \textit{supra} Part II.
\item \textsuperscript{225} See \textit{Quick} v. Donaldson Co., 90 F.3d 1372, 1379 (8th Cir. 1996).
\item \textsuperscript{226} See \textit{Goluszek} v. Smith, 697 F. Supp. 1452, 1455-56 (N.D. Ill. 1988).
\item \textsuperscript{227} See \textit{id}.
\item \textsuperscript{228} See Meritor Sav. Bank, 477 U.S. at 58.
\item \textsuperscript{229} See \textit{Goluszek}, 697 F. Supp. at 1456. See also \textit{Hadley & Chuizi}, \textit{supra} note 7 (discussing the \textit{Goluszek} v. Smith case for recognizing the notion that Title VII was only intended to protect female victims from sexual harassment in a male-dominated world).
\item \textsuperscript{230} See Moto v. Univ. of Texas Houston Health Sci. Ctr., 261 F.3d 512 (5th Cir. 2001).
\end{itemize}
courts, as it did in Goluszek, from delineating sex and sexual orientation discrimination.

Like racial identity, a person’s sexual identity is one of the components that make the person whole. It would be folly to permit discrimination to persist on the basis of sexual orientation. Still, courts continue to operate in a state of confusion, because they are attempting to separate aspects of identity that are inseparable.\(^\text{231}\) By doing so, courts would be employing arbitrary conjectures, which would make it impossible for them to distinguish correctly when harassing conduct occurs because of sex or sexual orientation. Even if the victim believes that the harassment springs from animus towards homosexuals, the tormented victim may not be in the best position, psychologically, to evaluate his predicament, or ascertain the harasser’s motivations.\(^\text{232}\) For this reason, it would be unwise for a court to use subjective testimony from a traumatized victim to infer his harasser’s state of mind.

It may not always be clear that the harassment is predicated on sexual orientation instead of gender, as in situations involving the meek and effeminate male. In Rene, the court accepted plaintiff’s subjective belief that he was harassed for being a known homosexual, without taking into account the underlying stress a harassed victim in plaintiff’s condition often endures.\(^\text{233}\) However, a plaintiff’s belief should not obviate the gender-specific themes motivating the harassment. Specifically, being called a female doll in Spanish and being “touched like a woman” tend to show that gender was the controlling force behind the harassment.\(^\text{234}\)

In essence, the majority in Rene imposed on plaintiff an unrealistic burden of proof that he should use his insight to read his harassers’ discriminatory intent. To conclude this way ignores the victim’s subjugation, belaboring under the constant harassment. This requirement imposed by the courts is subjective and thus insurmountable because an emotional victim cannot be certain why his perpetrators targeted him. This subjectivity inherent in the majority’s

\(^{231}\) See Schultz, supra note 148, at 1713.

\(^{232}\) It is questionable as to how Medina Rene’s state of mind, after experiencing the type of verbal, physical, and sexual abuses inflicted upon him, could correctly conclude that the harassment took place because of his sexual orientation. See Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1211 (9th Cir. 2001), rev’d, 305 F.3d 1061 (2002) (en banc).

\(^{233}\) See id.

\(^{234}\) See id.
opinion in Rene prompted appellate review to determine if Rene was appropriately decided—the en banc court held it was not.\textsuperscript{235} It is clear that evidence of being called a female doll suggests that the harassment may be gender discrimination, even when homophobic tendency is equally at work.

D. The Line Between Sex and Sexual Orientation

The theory of sex stereotyping also shows the interconnectedness of sex and sexual orientation. Homosexuality is seen as a type of gender deviance, ripe for aggressive, dominant, heterosexual males to ridicule and harass. Being asexual and celibate while working alongside other masculine mechanics, Goluzsek was expected to have a girlfriend or be married to a woman.\textsuperscript{236} The type of “rough” and hard physical labor in which Goluzsek was employed further intensified the need to conform to the male stereotype of sexual virility or suffer the consequences.\textsuperscript{237} As a possible heterosexual standard, being unmarried and living at home with his mother raised suspicions that he was either both inadequate as a man or a homosexual, uninterested in women.\textsuperscript{238} Faced with these two possible explanations for why the harasser caused the sexual harassment, it is unfeasible for a court to correctly choose either motive. In fact, both motives are intertwined and may equally influence a harasser’s intent to mistreat Goluzsek.

To further complicate matters, another variation of gender deviance involves the link between homosexuality and effeminacy for a male or masculinity for a female. In Nichols, Sanchez was harassed for carrying his tray “like a woman” and for acting like a “faggot.”\textsuperscript{239} The court recognized that the harassing conduct involved both gender and sexual orientation considerations, because of sex stereotyping.\textsuperscript{240} The court however failed to explain that the use of gender is the triggering mechanism for sexual orientation, because to the harasser,

\begin{itemize}
    \item \textsuperscript{235} See Rene, 243 F.3d at 1211. The plurality opinion of the en banc court, as penned by Judge William Fletcher, held that “an employee’s sexual orientation . . . neither provides nor precludes a cause of action for sexual harassment . . . [t]hat the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant.” Rene, 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc).
    \item \textsuperscript{236} See generally Goluzsek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).
    \item \textsuperscript{237} See id.
    \item \textsuperscript{238} See id.
    \item \textsuperscript{239} See Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 870 (9th Cir. 2001).
    \item \textsuperscript{240} See id.
\end{itemize}
homosexuality is nothing more than the failure of the victim to conform to gender norms and act according to male social roles in the presence of other males.

In contrast, the court in Dillon missed the close connection between sex and sexual orientation. Dillon alleged that the harassment was caused by his coworkers’ perception of him as an inferior man, not “macho” enough to work with them. Dillon’s coworkers denigrated his masculinity and questioned his manhood by resorting to homophobic slurs and attacks. These facts demonstrate the confluence of gender and sexual orientation, which interact to show that harassment based on sexual orientation is, in essence, based on gender. These two factors are intertwined and inseparable as aspects of a person’s identity. Solely arguing sex stereotyping, without a gender deviation interpretation, results in an arbitrary decision as seen in Dillon, as compared to the decision reached in Price Waterhouse.

Imagine the following hypothetical based upon the facts of Price Waterhouse regarding the tenuous line between gender and sexual orientation discrimination. After being asked to “walk more femininely, talk more femininely, dress more femininely . . . [and] wear make-up,” how would a court interpret Hopkins’ superiors telling her to “stop being such a dyke?” It is likely that courts, dealing with both gender and sexual orientation harassment, would continue to resort to arbitrary conjectures resulting in further inconsistency or speculation.

Although a plaintiff may have a mixed-motive claim based on “gender plus” sexual orientation discrimination, the problem arises when the harassing conduct is only viewed as limited to animus toward homosexuals. Sexual harassment in the workplace against openly “out” homosexual males at work is a form of employer-sanctioned “gay-bashing.” A person who is targeted because of his sexual orientation is also targeted as a man who does not measure up to the standards of being a masculine heterosexual. Taunting a woman for

241. See Dillon v. Frank, 1992 WL 5436 (6th Cir.).
242. See id.
243. See id.
244. See Schultz, supra note 148, at 1785.
245. See id.
246. See id. The phrase “being out” means being a known homosexual.
being a lesbian or for acting like one is similarly assailing her on the basis of her gender, irrespective of her actual sexual orientation, as seen in *Price Waterhouse*.

Just because a hostile work environment is the result of homosexual slurs does not mean that the anti-gay expression is strictly confined to sexual orientation, devoid of any gender motivation. The line between sex and sexual orientation discrimination meets and remains at a connected point.

E. Immutable or Not

Some legal scholars argue that it is unfair to discriminate against a person on the basis of immutable characteristics, such as race, gender, or sexual orientation. Immutability, however, has been liberally construed to include the facial hair on African-American men who cannot remove their beard due to PBF skin disease. For those suffering from PBF, hair removal would result in substantial difficulty, cost, or pain to the victims.

The immutability theory of sexual orientation does not operate in a social vacuum. A person's race is only immutable to the extent society accords it recognition. Scientific data, though not completely conclusive, suggest that homosexuality is biologically determined, and the influence of a person's biology and environment would make it extremely difficult for an individual to alter his/her sexual orientation. Assuming that sexual orientation is not immutable, as some judges so conclude, there is the possibility for self-identified heterosexual men to engage in male-on-male sexual activities, which might trigger the sexual desire analysis in same-sex sexual harassment. In this context, lines drawn based on sexual orientation are futile, because self-identified "heterosexual" males would actually enjoy sexual interaction with other males. In this scenario, it would be impossible to distinguish the occurrences wherein the harassing conduct would constitute sex or sexual orientation discrimination.

Sexual desire, therefore, hardly resolves the difficulty in
delineating harassing conduct as grounded in either sex or sexual-orientation discrimination. Ideally sexual desire analysis should be limited to use only in situations where a harasser acts with clear sexual desire for his victim. Using a sexual desire analysis in most situations, without clear discriminatory intent of that desire—which invariably and infrequently occurs—does little to resolve this dilemma.

Immutable or not, even if a person could change his sexual orientation in either direction, discriminating against a person who feels sexually connected to members of the same sex seems to be an irrational explanation for permitting employers to tolerate a hostile work environment. Some believe that homosexuality is immutable, and not a preferred option, because no rational person chooses to suffer severe harassment and discrimination.

Homosexuals face daily bombardments by heterosexual standards for relationships, and there is an intense pressure to conform to pervasive heterosexual social norms. Being surrounded by heterosexual demonstrations of affection, many homosexuals still believe that their sexual identity is unalterable. With the general consensus among Americans that discrimination against sexual minorities is wrong and irrational, a person who is performing well above an employer's expectations should not be terminated or

253. Not eloquently stated, but with clear, unmistakable clarity, one teenager realized that despite being surrounded by heterosexual affection and love, as on television, in the movies, and from family members and friends, it took him "many years to accept—not choose, but accept—his sexuality," until he finally realized that "if everything I saw, heard, and went through didn't make me [a] straight [heterosexual], then I finally realized my being gay wasn't going to change. And then it hit me: why should I change? I'm a good person the way I am." See Marcossan, supra note 169, at 716 (2001).

constructively forced to resign due to ensuing sexual harassment unrelated to his diligence and performance as an employee.\textsuperscript{255}

Regardless of whether "the exact origins of sexual desire are unknown, there is consensus that a person's sexual orientation, homosexual or heterosexual, cannot be changed by a simple decision-making process... Thus, sexual orientation per se is not a characteristic over which an individual has had any responsibility acquiring."\textsuperscript{256}

Working in an atmosphere where same-sex sexual harassment is tolerated, a male victim will have difficulty achieving success in his career. In the case of women like Ann Hopkins in \textit{Price Waterhouse}, the corporate system designed with gender stereotypes puts professional women who fail or refuse to conform to those stereotypes at a unfair disadvantage.\textsuperscript{257} Whether the employer is conscious of such practices, this system provides masculine men and feminine women an easier path to success.

V. PROPOSAL

This comment, as a general premise, is grounded in the belief that harassing conduct is firmly imbedded in the notion that an often sexist and homophobic socio-legal system permeates uneven and unequal worker-employer relations. The power imbalance present in opposite sex sexual harassment is just as real and difficult for any person being harassed and victimized to challenge, regardless of whether it is opposite or same-sex sexual harassment. The way through this labyrinth of confusion in same-sex sexual harassment can be found by focusing on the reasons for the causes of the confusion. In doing so, any legislative change can serve to educate employers and employees alike who are faced with same-sex sexual harassment. This will also assist the courts in reviewing similar claims.

The legal structure as it currently stands is too quick to dismiss the harassing conduct of "boys being boys."\textsuperscript{258} The system needs to be

\textsuperscript{255} See discussion supra Part II.C.
\textsuperscript{258} See, e.g., Quick v. Donaldson Co., 90 F.3d 1372, 1376 (8th 1996). The district court regarded the harassing conduct of these males as juvenile behavior, dismissing the
deconstructed and reconceptualized as one in which targeting male coworkers is treated differently from harassment on the basis of gender. In predominantly male environments, such as working among fellow mechanics in Goluszek, or Hopkins working in an accounting firm in Price Waterhouse, adherence to a system that harms another person on the basis of sexual orientation, or perceived sexual orientation, should form the basis of gender discrimination. The gender element necessary in discrimination law is that gender is connected to a person’s sexual orientation. It is imperative for the courts and legislature to recognize this interconnectivity and effectuate steps to remedy this problem.

A. Toward Recognizing Same-Sex Sexual Harassment as Sex Discrimination

Both the legislature and the judiciary should especially be concerned with defining the boundaries wherein sex and sexual orientation coexist. Given that a person’s sexual orientation is so deeply connected to his or her sex that there is no meaningful way to divorce the two, courts should reevaluate their position of allowing male harassers to go unpunished for creating a hostile work environment. The line of demarcation between homosexuality and gender can more clearly be seen through gender deviance and the sex stereotyping theory as in Price Waterhouse.

The potential arbitrariness in statutory interpretation may result in numbing the effectiveness of Title VII in meeting its purpose—to eradicate employment discrimination and create a safe working environment for everyone, men and women alike. In litigating same-sex sexual harassment and considering the incentive for parties to portray alleged harassment in the light most favorable to their respective side, it is important for Congress to legislate manageable standards to eliminate the confusion in same-sex sexual harassment claims.

B. Statutory Revision

States such as California have fixed the statutory gaps in Title VII through their states’ respective anti-discrimination statutes. The Fair Employment and Housing Act should prompt Congress to recognize male-on-male sexual harassment as harmless on this basis. See id. See 42 U.S.C. § 2000e.
the need to correct the void that other states perceive as a problem. In the Civil Rights Act of 1964, the amorphous “because of sex” standard needs clarification, especially as same-sex sexual harassment is considered an actionable claim of sex discrimination.\textsuperscript{260} Congress did not initially provide the courts any guidance as to how to interpret the words “because of sex.” With the rise of same-sex sexual harassment claims, the need for statutory revision becomes apparent. Particularly noteworthy, Congresswoman Green cautioned against writing “because of sex” into Title VII without any discussion of the consequences.\textsuperscript{261} Approximately half of a decade later, it is time for the discussion of “because of sex” as it applies to same-sex sexual harassment, in light of this comment’s analysis of the confusion in the federal courts. As other problems in Title VII have surfaced and been ameliorated by subsequent legislative revisions, so too should same-sex sexual harassment now be reexamined, when the courts have been far from clear and consistent. To accomplish this goal successfully, any revision must consider the missing piece in same-sex sexual harassment jurisprudence—the interplay between sex and sexual orientation.

C. The Line of Demarcation Between Sex and Sexual Orientation

Sex and sexual orientation are closely connected and often simultaneously operative in same-sex sexual harassment. To delineate when this occurs, the three scenarios discussed in Part II and IV should assist the courts and legislature in fashioning judicial and legislative standards. These three illustrations show when sexual orientation coexist with gender: (1) references to a male’s sexual prowess or lack thereof could trigger Title VII; (2) comments directed at physical behavior or effeminacy such as Sanchez carrying his waiter’s tray “like a woman” are rooted in stereotypes about how a man or woman should act; (3) if the harasser insults the victim’s clothes or accessories, because they are typically associated with what a woman wears, that is another sign that the harassment is motivated by gender.\textsuperscript{262} These facts serve to assist the courts in interpreting how the harassment can translate to gender-based discrimination. In addition, homosexual men

\textsuperscript{261} See supra notes 61-62 and accompanying text.
\textsuperscript{262} This example was seen in the Doe v. City of Belleville case, involving harassment of the teenager for wearing an earring. See 119 F.3d 563 (7th Cir. 1997).
perceived as inferior or inadequate may fit any of these illustrations.

D. Presumption that the Harassment Is Because of Sex

Unless the harassment is clearly attributable to animus toward homosexuals, the only solution for the court is to include a rebuttable presumption that the harassment fits within Title VII "because of sex." As a rebuttable presumption, the employer would be given an opportunity to present facts and evidence challenging such claims should they lack merit.

Under this framework, the harasser could not escape liability by showing that he targeted his victim because of effeminacy, which is connected to gender stereotypes in violation of Title VII. Instead, the harasser would need to make a showing that he has always tormented homosexuals, and will continue to harass plaintiff for reasons other than those related to gender.

V. CONCLUSION

Sexual desire, as a direct origin of opposite-sex sexual harassment, is an inappropriate standard to resolve the confusion in same-sex sexual harassment. The line of demarcation between sex and sexual orientation discrimination becomes blurred by the use of sexual desire.

As the ultimate objective of Title VII is to remove unnecessary and arbitrary barriers to employment, a person should not be hindered from work because the employer harasses or condones coworkers' harassment of an employee. Whether a person is male or female, masculine or feminine, heterosexual or homosexual, sexual harassment should not deny equal opportunity to work free from physical and verbal abuse.

From race to pregnancy, to determine who falls under the category of a protected class, the courts, through subsequent legislation or by means of judicial interpretation, have given Title VII a common sense meaning. Since confusion continues to cloud the courts' review of gender and sexual-orientation based harassment, ignoring the intricacies of sexual orientation inherent in gender dynamics will only further vex our judicial system and worsen this complex problem.

263. See supra note 221 and accompanying text.
264. See Schultz, supra note 148, at 1796.