Wrightson v. Pizza Hut of America, Inc.: The Fourth Circuit's Simple Logic of Same-Sex Sexual Harassment under Title VII

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With the enactment of Title VII of the Civil Rights Act of 1964, the United States Congress prohibited private employers from discriminating on the basis of sex.[1] In doing so, Congress unwittingly initiated a long judicial search for the definition of sex discrimination.[2] During this search, various courts have determined that both men and women can discriminate and be discriminated against on the basis of sex,[3] that discrimination on the basis of sexual orientation is not sex discrimination,[4] and that sexual harassment is sex discrimination.[5] Now, thirty years after its enactment, Title VII has given the federal courts a new challenge: same-sex sexual harassment.[6]

The federal district courts have not shied away from this challenge, but their efforts have tended to produce more confusion than elucidation.[7] Currently, the federal circuit courts are split as to

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1. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2(a)(1) (1994)).

2. *See infra* notes 80-85 and accompanying text (noting the paucity of legislative history for the meaning of "sex" in Title VII).

3. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (prohibiting sexual harassment against both men and women).

4. *See, e.g.*, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) ("Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality." (footnotes omitted)).

5. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." (alteration in original)). *See generally* Dawn A. Ellison, Comment, *Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX*, 75 N.C. L. REV. 2049 (1997) (discussing institutional liability for sexual harassment under Title IX).

6. Courts often use "same-sex" and "same-gender" interchangeably. This Note uses "same-sex" to refer to the courts' use of either term. See *infra* notes 86-99 and accompanying text for discussion and criticism of the courts' definitions of these terms.

7. This area of the law has been very active. Many cases have been decided just since February 1996. Some courts have found same-sex sexual harassment claims actionable. *See, e.g.*, McCoy v. Macon Water Auth., 966 F. Supp. 1209, 1217 (M.D. Ga. 1997); Miller v. Vesta, Inc., 946 F. Supp. 697, 706 (E.D. Wis. 1996); Wiley v. Burger King, No. CIV.A.96-4859, 1996 WL 648455, at *1 (E.D. Pa. Nov. 7, 1996); Johnson v. Hondo, Inc., 940 F. Supp. 1403, 1409 (E.D. Wis. 1996); McElroy v. TNS Mills, Inc., 953 F. Supp. 1383, 1387 (M.D. Ala. 1996); Gerd v. United Parcel Serv., 934 F. Supp. 357, 360-61 (D.

whether Title VII includes a cause of action for same-sex sexual harassment,[8] and the Supreme Court has yet to address the issue.[9] In the fall of 1996, the Fourth Circuit added its voice to this debate in *Wrightson v. Pizza Hut of America, Inc.*[10] In *Wrightson*, the court held that same-sex sexual harassment claims are viable under Title VII, but it confined that ruling to situations in which the perpetrator is homosexual.[11]

This Note addresses the Fourth Circuit's decision in *Wrightson*, with particular emphasis on its use of the perpetrator's sexual orientation as a basis of a Title VII claim.[12] After reviewing the facts and conclusions of the case, the Note traces the history and development of the Title VII sexual harassment claim.[13] Next, the Note describes the split among the circuit courts by detailing the circuit courts' various approaches to same-sex sexual harassment claims.[14] The Note then examines broader issues, including whether Title VII should cover same-sex sexual harassment and, if so, whether it should retain the sexual orientation distinction made by *Wrightson*.[15] Finally, the Note examines the need for consistency in this area of the law and the potential for guidance from the Supreme

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Colo. 1996); Swage v. Inn Philadelphia & Creative Remodeling, Inc., No. CIV.A.96-2380, 1996 WL 368316, at *2 (E.D. Pa. June 21, 1996); Wehrle v. Office Depot, Inc., 954 F. Supp. 234, 236 (W.D. Okla. 1996); Johnson v. Community Nursing Servs., 932 F. Supp. 269, 273 (D. Utah 1996); Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1500-01 (E.D. Va. 1996); Williams v. District of Columbia, 916 F. Supp. 1, 7 (D.D.C. 1996). Other courts, however, have found no cause of action under Title VII. *See, e.g.*, Jackson v. Arthur Anderson [sic] & Co., No. CIV.A.3:96-CV-2206-D, 1997 WL 74709, at *1 (N.D. Tex. Feb. 11, 1997); Torres v. National Precision Blanking, 943 F. Supp. 952, 961-62 (N.D. Ill. 1996); Schoiber v. Emro Mktg. Co., 941 F. Supp. 730, 737-38 (N.D. Ill. 1996); Shermer v. Illinois Dep't of Transp., 937 F. Supp. 781, 784-85 (C.D. Ill. 1996); Larry v. North Miss. Med. Ctr., 940 F. Supp. 960, 963 (N.D. Miss. 1996); Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1050 (N.D. Ala. 1996); King v. Town of Hanover, 959 F. Supp. 62, 66 (D.N.H. 1996), *aff'd on other grounds*, 116 F.3d 965 (1st Cir. 1997).

8. *See infra* notes 120-241 and accompanying text (detailing the split among the circuit courts). While the federal district courts have considered the issue of same-sex sexual harassment with greater frequency than the circuit courts, their opinions are not considered in detail here for the sake of brevity and because the circuit courts present the same general reasoning used at the district court level.

9. On June 9, 1997, the Supreme Court granted certiorari to Joseph Oncale to examine a May 20, 1996 decision by the Fifth Circuit. *See* Oncale v. Sundowner Offshore Servs., Inc., 117 S. Ct. 2430 (1997), *granting cert. to* 83 F.3d 118 (5th Cir. 1996); *see also infra* notes 193-202 and accompanying text (discussing *Oncale*).

10. 99 F.3d 138 (4th Cir. 1996).

11. *See id.* at 141.

12. *See infra* notes 271-84 and accompanying text.

13. *See infra* notes 17-119 and accompanying text.

14. *See infra* notes 120-241 and accompanying text.

15. *See infra* notes 242-320 and accompanying text.

Court.[16]

In March 1993, sixteen-year-old Arthur Wrightson, a heterosexual male, began work as a cook and waiter at a Pizza Hut in Charlotte, North Carolina.[17] His immediate supervisor was Bobby Howard, an openly homosexual male.[18] Wrightson's co-workers included five other openly homosexual men and three heterosexual men.[19] In November or December 1993, the homosexual employees, including Howard, "began sexually harassing Wrightson and the other heterosexual male employees" by pressuring them into homosexual sex.[20] This harassment occurred daily "for seven months, in the presence of and within the knowledge of upper management."[21]

Howard harassed Wrightson in various ways. For example, he graphically described his homosexual lifestyle to Wrightson[22] and made crude suggestions regarding homosexual sex.[23] Howard also touched Wrightson in a sexually provocative manner while inviting Wrightson to engage in homosexual behavior.[24] During this activity, the heterosexual men subjected to harassment, including Wrightson,

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16. *See infra* notes 321-29 and accompanying text.

17. *See Wrightson*, 99 F.3d at 139. Because the district court granted Pizza Hut's motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Wrightson's complaint for failure to state a claim, the court of appeals accepted as true, for the purpose of the appeal, the facts alleged in Wrightson's complaint and affidavits. *See id.*; *see also* Martin Marietta Corp. v. International Telecomm. Satellite Org., 991 F.2d 94, 97 (4th Cir. 1992) (holding that on appeal from a dismissal for failure to state a claim, the appellate court must accept as true the facts as alleged by the plaintiff). Thus, the facts described here are those alleged by the plaintiff.

18. *See Wrightson*, 99 F.3d at 139.

19. *See id.*

20. *Id.* Wrightson did not allege that the homosexual workers sexually harassed female employees or homosexual men. *See id.* Instead, he alleged that when a new male worker started work, the homosexual employees would try to determine if he was heterosexual or homosexual. *See id.* If he was heterosexual, then the harassment would begin. *See id.*

21. *Id.* Wrightson formally complained to management about the harassment. *See id.*

22. *See id.*

23. *See id.* at 140.

24. *See id.* The touching included running his hands through Wrightson's hair, massaging Wrightson's shoulders, intentionally rubbing his (Howard's) genital area against Wrightson's buttocks, and trying to look down Wrightson's pants. *See id.* Howard also harassed the other heterosexual male employees, attempting to kiss one of them and suggesting that others try anal sex. *See id.* Other homosexual male employees also participated in the harassment. *See id.* For example, one homosexual male employee told the heterosexual men he wanted to have his teeth taken out to make oral sex better. *See id.* Another homosexual male employee asked a heterosexual male employee on a date and told another that Wrightson obtained more breaks "because he performed oral sex." *Id.*

"made it absolutely clear" to the homosexual men that this behavior "was unwelcome."[25] For example, they repeatedly told the harassers to stop, threatened to file complaints, and finally did complain directly to management.[26] Nevertheless, the harassment continued.[27]

According to Wrightson's complaint, the manager of the Pizza Hut, Jennifer Tyson, and the assistant manager, Romeo Acker, knew about the harassment and the objections to it.[28] Tyson even admitted to Wrightson's mother, Cathy Celentano, "that she was aware of the harassment and also that Howard's actions constituted sexual harassment."[29] On one occasion, Tyson called a staff meeting in which she ordered the homosexual employees to stop the harassment and told them their actions "violated federal law."[30] However, following the meeting, the harassment intensified, and the homosexual men openly "joked about the possibility of a federal sexual harassment suit."[31] No disciplinary action was ever taken against the homosexual male employees.[32]

In August 1995, Wrightson filed an action against Pizza Hut in the United States District Court for the Western District of North Carolina, alleging sexual discrimination in violation of Title VII.[33] Wrightson alleged that actions by Howard and the other homosexual employees had resulted in a " 'hostile work environment' in violation of Title VII."[34]

The district court dismissed the suit, holding that Wrightson had failed to state a claim because "[t]here is no evidence that Congress intended to prohibit intra-gender harassment in enacting Title VII."[35] The court relied on the Fifth Circuit's holding that "same-gender harassment is not actionable under Title VII, even if the harassment

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25. *Id.*

26. *See id.*

27. *See id.*

28. *See id.* Wrightson and his mother complained to management several times, and Tyson and Acker observed the harassment on several occasions. *See id.*

29. *Id.*

30. *Id.*

31. *Id.* at 140-41.

32. *See id.* at 140. Tyson contended that she felt unable to control the activities. *See id.*

33. *See id.* at 141-42 (citing 42 U.S.C. § 2000(e) (1994) (containing Title VII of the Civil Rights Act of 1964)).

34. *Id.* at 141. For a discussion of the elements of hostile work environment claims under Title VII, see *infra* text accompanying note 117.

35. Wrightson v. Pizza Hut of Am., Inc., 909 F. Supp. 367, 368 (W.D.N.C. 1995), *rev'd*, 99 F.3d 139 (4th Cir. 1996).

has sexual overtones."[36] The Fourth Circuit rejected this reasoning and reversed the lower court, holding that a hostile work environment claim may be brought for same-sex sexual harassment under Title VII "where the perpetrator of the sexual harassment is homosexual."[37]

In so holding, the Fourth Circuit recognized that no other circuit court had squarely addressed the issue of whether same-sex sexual harassment is actionable when the perpetrator is homosexual, but that several circuits had suggested that same-sex sexual harassment claims may lie in at least some circumstances.[38] The court began its analysis by examining *McWilliams v. Fairfax County Board of Supervisors*,[39] its sole prior decision on same-sex sexual harassment under Title VII.[40] In *McWilliams*, the court held that "no Title VII

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36. *Id.* (citing Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994)). For a discussion of *Garcia*, see *infra* notes 186-92 and accompanying text.

37. *Wrightson*, 99 F.3d at 141. The court did not state whether the victim must be heterosexual, as was the case here. Thus, after *Wrightson*, the question of whether a same-sex sexual harassment claim may be brought by a homosexual against another homosexual remains undecided in the Fourth Circuit.

38. *See id.* at 141 n.1 (citing Quick v. Donaldson Co., 90 F.3d 1372, 1380 (8th Cir. 1996) (reversing a summary judgment against a man who claimed sexual harassment by other men); McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996) (suggesting that a same-sex sexual harassment claim could lie under Title VII); Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 119 (5th Cir.) (finding that binding precedent made it necessary to decline review of a district court ruling that there is no same-sex sexual harassment claim under Title VII), *reh'g and suggestion for reh'g en banc denied*, 95 F.3d 56 (1996), *cert. granted*, 117 S. Ct. 2430 (1997); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (suggesting that a same-sex sexual harassment claim could lie under Title VII); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (suggesting that sexual harassment may be found regardless of the sex of the perpetrator or the victim, as long as it is "based on the sex" of the victim)). There are additional circuit court decisions that recognize same-sex sexual harassment claims in at least some circumstances. *See* Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997) (finding that same-sex sexual harassment claims will stand when harassment is "because of . . . sex"); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) (suggesting that the sex of the harasser is irrelevant to a Title VII claim); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192 (1st Cir. 1990) (finding a cause of action for homosexual-on-heterosexual same-sex sexual harassment under Title VII); Joyner v. AAA Cooper Transp., 749 F.2d 732 (11th Cir. 1984), *aff'g* 597 F. Supp. 537, 541-42 (M.D. Ala. 1983) (holding that homosexual male harassment of another man violates Title VII). *See generally infra* notes 145-241 and accompanying text (describing in more detail how the other circuit courts have ruled on same-sex sexual harassment).

39. 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996).

40. *See Wrightson*, 99 F.3d at 141. Following *McWilliams*, the Fourth Circuit considered another same-sex sexual harassment case, *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996). The *Hopkins* court, however, never reached the Title VII issue, and thus *Hopkins* is not direct precedent for *Wrightson*. *See infra* notes 132-41 and accompanying text (discussing *Hopkins*).

cause of action for 'hostile work environment' sexual harassment lies when both the perpetrator and target of the harassment are heterosexuals of the same sex."[41] The court noted that in *McWilliams*, however, it had reserved consideration of a claim of same-sex sexual harassment in circumstances when the perpetrator was homosexual.[42]

The *Wrightson* court then examined Title VII, which provides that " '[i]t shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge ... or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex.' "[43] Relying on Supreme Court precedent, the court recognized that "[t]he 'work environment' constitutes a 'term[], or condition[], or privilege[] of employment.' "[44] Thus, the court concluded that " 'a cause of action [exists] under Title VII for persons forced to work in an environment where sexual harassment has created a hostile or abusive atmosphere.' "[45]

Next, the court listed the four requirements necessary for an employee to prove a hostile work environment claim: "(1) that he was harassed 'because of' his 'sex'; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer."[46] The court explicitly declined to create a further statutory requirement that the perpetrator of the harassment be of a different sex than the victim, and instead looked strictly at the wording of the statute.[47] The court reasoned that "the statute obviously places no gender limitation whatsoever on the perpetrator or the target of the harassment."[48] That is, Title VII prohibits perpetrators of either sex from

41. *Wrightson*, 99 F.3d at 141 (citing *McWilliams*, 72 F.3d at 1195).

42. *See id.* (citing *McWilliams*, 72 F.3d at 1195 n.4).

43. *Id.* at 141-42 (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)) (alterations in original).

44. *Id.* at 142 (quoting language found generally throughout *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986)) (alterations in original).

45. *Id.* (quoting Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (citing *Meritor Sav. Bank*, 477 U.S. at 66-67)) (alterations in original).

46. *Id.* (citing *McWilliams*, 72 F.3d at 1195; *Swentek*, 830 F.2d at 557).

47. *See id.* ("The district court below interpreted Title VII to require also that the perpetrator of the 'hostile work environment' sexual harassment be of a different sex than the target of the harassment in order for the harassment to be cognizable under Title VII. We discern no such requirement in the statute.").

48. *Id.*

discriminating against individual employees of either sex.[49]

Furthermore, the court determined that Title VII's causal requirement that discrimination be " 'because of' the employee's sex," did not require the perpetrator and the victim to be of different sexes.[50] The court concluded that an employee could satisfy this condition if he or she can show that " 'but for' the employee's sex, he or she would not have been the victim of the discrimination."[51] Based on "simple logic," the court then determined that "an employer of either sex can discriminate against his or her employees of the same sex because of their sex, just as he or she may discriminate against employees of the opposite sex because of their sex."[52] The court offered the Equal Employment Opportunity Commission's ("EEOC") interpretation of Title VII as additional support for this logic:

> "The victim does not have to be of the opposite sex from the harasser.... [T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way."[53]

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49. *See id.*

50. *Id.*

51. *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). Actually, the concept of "because of the employee's sex" is different from "but for the employee's sex." *See Price Waterhouse*, 490 U.S. at 240-46. In *Price Waterhouse*, the Supreme Court concluded that "since ... the words 'because of' do not mean '*solely* because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id.* at 241.

52. *Wrightson*, 99 F.3d at 142. The court explained that, for example, a male employer might discriminate against male employees but not against female employees, and a female employer might discriminate against female employees and not against male employees, but that would constitute discrimination " 'because of' " the employee's sex just as much as discrimination against employees of the opposite sex would. *See id.*

53. *Id.* at 143 (quoting EEOC Compl. Man. (CCH) § 615.2(b)(3) (1987)) (alterations in original, including the court's deemphasis of the word "not" as it is used in the parenthetical statement "not on the victim's sexual preference"). The EEOC offers a fact situation similar to this case as an example of a valid Title VII action:

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

EEOC Compl. Man. (CCH) § 615.2(b)(3). For more discussion of the EEOC's interpretation of same-sex sexual harassment under Title VII, see *infra* note 87 and accompanying text.

Using this logic, the *Wrightson* court held that a same-sex hostile work environment sexual harassment claim under Title VII may lie when "a homosexual . . . employer discriminates against an employee of the same sex or permits such discrimination."[54]

However, despite the potential for an expansive interpretation of Title VII in *Wrightson*, the court expressly limited its holding to very narrow circumstances.[55] Critical to the court's holding that Wrightson had a valid Title VII claim was the allegation of discrimination " 'because of his sex' " and the allegation that only male employees faced such discrimination.[56] The court carefully distinguished Wrightson's allegations from circumstances that would not give rise to a valid Title VII claim.[57] Specifically, the court stated that a plaintiff in Wrightson's position could not go forward with his claim if: (1) Pizza Hut's homosexual employees harassed young men and women alike; (2) "Wrightson was harassed simply because he was heterosexual"; or (3) "the offensive conduct was the product solely of . . . perversion."[58]

Accordingly, the court dismissed Pizza Hut's contention that Wrightson's harassment claim was based on his sexual orientation rather than his sex.[59] The court agreed that Title VII does not offer a cause of action for discrimination based on sexual orientation, but it stated that Wrightson had specifically alleged discrimination because of his sex, and for the purposes of Rule 12(b)(6), the court had to assume that the allegation was true.[60] Moreover, the court explained, "even had Wrightson alleged that he was discriminated against both because he was heterosexual and because he was male, he would still state a claim under Rule 12(b)(6)."[61] That is, his sex did not have to be the sole cause of the harassment.[62] Finally, upon contemplating the policy considerations of its decision, the court felt compelled to follow the plain language of the statute while acknowledging the possibility that the decision could increase litigation.[63]

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54. *Wrightson*, 99 F.3d at 143.
55. *See id.* at 141.
56. *Id.* at 143.
57. *See id.*
58. *Id.*
59. *See id.*
60. *See id.* For a discussion of claims for sexual orientation harassment under Title VII, see *infra* note 96 and accompanying text.
61. *Wrightson*, 99 F.3d at 144.
62. *See id.*; *see also supra* note 51 (describing the meaning of "because of sex").
63. *See Wrightson*, 99 F.3d at 144.

Judge Murnaghan dissented.[64] He asserted that Wrightson had a number of state claims against Howard and Pizza Hut management, including "assault, assault and battery, and intentional infliction of emotional distress."[65] Therefore, although he agreed with the majority that Howard and Pizza Hut should be held liable to Wrightson, he disagreed that the liability lay within Title VII.[66] Judge Murnaghan reasoned that the majority interpreted Title VII's "because of sex" language too broadly,[67] and noted that Title VII was enacted to create workplace equality for men and women.[68] He also argued that the scant legislative history did not grant the judiciary the authority to add new claims, such as a heterosexual male suing a homosexual male for harassment; rather, Judge Murnaghan felt that by pointing out that Congress had not given adequate guidance, the courts could alert Congress to the need to address whether such claims exist under Title VII.[69]

In addition, Judge Murnaghan stated that, because of fairness concerns, Wrightson's claim was precluded by the *McWilliams* decision, which held that Title VII does not prohibit sexual harassment of a heterosexual by another heterosexual of the same sex.[70] He concluded that "[t]o hold Title VII applicable to heterosexual/homosexual but not to heterosexual/heterosexual conduct produces a result more discriminatory than a ruling . . . that same sex discrimination is not covered by Title VII."[71] While acknowledging that the law ought to protect homosexual and

64. *See id.* (Murnaghan, J., dissenting).

65. *Id.* (Murnaghan, J., dissenting); *see also infra* note 335-37 and accompanying text (describing potential state claims for sexual harassment).

66. *See Wrightson*, 99 F.3d at 144 (Murnaghan, J., dissenting). Judge Murnaghan stated that " '[e]very example of offensive and tasteless workplace conduct does not provide the basis of a cause of action under Title VII.' " *Id.* (Murnaghan, J., dissenting) (quoting Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 755 (4th Cir.) (Wilkinson, C.J., concurring in part), *cert. denied*, 117 S. Ct. 70 (1996)).

67. *See id.* (Murnaghan, J., dissenting).

68. *See id.* at 145 (Murnaghan, J., dissenting).

69. *See id.* (Murnaghan, J., dissenting). Judge Murnaghan was particularly concerned that Congress never contemplated such use of Title VII; therefore, he argued that Congress should be the first to determine its validity. *See id.* (Murnaghan, J., dissenting); *see also infra* notes 324-29 and accompanying text (discussing the legislative and judicial roles in determining the viability of same-sex sexual harassment under Title VII).

70. *See Wrightson*, 99 F.3d at 145 (Murnaghan, J., dissenting) (citing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996)).

71. *Id.* (Murnaghan, J., dissenting); *see also infra* notes 271-84 and accompanying text (discussing the potential discriminatory effects of only allowing homosexual-on-heterosexual same-sex sexual harassment).

heterosexual workers from lewd and repulsive comments and actions by same-sex co-workers and management, Judge Murnaghan asserted that Title VII was not intended to be that law.[72]

The issue Judge Murnaghan described—whether Title VII was intended to cover same-sex sexual harassment—has been the subject of significant controversy in the courts and in legal academia.[73] Some courts have considered cases of heterosexual-on-heterosexual harassment,[74] while others have confronted instances of homosexual-on-heterosexual harassment.[75] Moreover, some have considered quid pro quo harassment,[76] while others have looked only at hostile work environment claims.[77] To understand how these courts have approached this controversial issue, one must examine the statute and its history.

The statute at issue, Title VII, provides in pertinent part:

> It shall be an unlawful employment practice for an employer—

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72. *See Wrightson*, 99 F.3d at 145-46 (Murnaghan, J., dissenting) (citing *McWilliams*, 72 F.3d at 1196).

73. *See infra* notes 145-241 and accompanying text (describing how the circuit courts have ruled). *Compare* E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 80-81 (1997) (arguing that same-sex sexual harassment should not be actionable under Title VII largely because of its disparate impact on homosexuals), *and* Susan Perissinotto Woodhouse, *Same-Gender Sexual Harassment: Is It Sex Discrimination Under Title VII?*, 36 SANTA CLARA L. REV. 1147, 1185 (1996) (concluding that Title VII should not cover same-sex sexual harassment because the courts have been unable to find a clear standard to apply to the situation), *with* Regina L. Stone-Harris, *Same-Sex Harassment—The Next Step in the Evolution of Sexual Harassment Law Under Title VII*, 28 ST. MARY'S L.J. 269, 272-73 (1996) (asserting that same-sex sexual harassment should be recognized by the courts and offering suggestions on how to do so), *and* Amy Shahan, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Sexual Harassment*, 48 BAYLOR L. REV. 507, 524-27 (1996) (concluding that Title VII should provide a cause of action for same-sex sexual harassment).

74. *See, e.g.*, Quick v. Donaldson Co., 90 F.3d 1372, 1379 (8th Cir. 1996) (recognizing a cause of action for heterosexual-on-heterosexual same-sex sexual harassment); *see also infra* notes 161-81 (discussing *Quick*).

75. *See, e.g.*, Fredette v. BVP Management Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997) (recognizing a cause of action for homosexual-on-heterosexual same-sex sexual harassment); Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997) (same); *see also infra* notes 145-60 and accompanying text (discussing *Yeary* and *Fredette*).

76. A type of sexual harassment, quid pro quo harassment occurs when an employee is required to submit to sexual harassment as a condition of receiving job benefits. *See infra* note 116 and accompanying text.

77. *Compare Yeary*, 107 F.3d at 445 (concerning hostile work environment), *and Quick*, 90 F.3d at 1374 (concerning hostile work environment), *with Fredette*, 112 F.3d at 1510 (concerning both hostile work environment and quid pro quo harassment).

> (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
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> (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.[78]

The Supreme Court has stated that the goal of Title VII is to provide a broad range of protection from discrimination in employment.[79] Unfortunately, the legislative history offers little insight into the definition of "sex" and how it should be interpreted.[80] Congress's main purpose in enacting Title VII was the prevention of racial discrimination,[81] and "sex" was added in a floor amendment in the House of Representatives the day before the bill was approved, without any hearing or debate.[82]

Why "sex" was added to the bill at the last minute remains puzzling. According to one theory, it was added to protect white

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78. 42 U.S.C. § 2000e-2(a) (1994).

79. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64-66 (1986).

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

81. *See* 110 CONG. REC. 2581 (1964) (comments of Rep. Green of Oregon) ("Whether we want to admit it or not, the main purpose of this legislation today is to try to help end the discrimination that has been practiced against Negroes.").

82. The amendment was offered by Representative Howard Smith, a principal opponent of the bill. *See* 110 CONG. REC. 2577 (1964) (comments of Rep. Smith of Virginia). Representative Smith proposed the addition of "sex" in order to "do some good for the minority sex." *Id.* (comments of Rep. Smith). Representative Celler opposed it because it covered all persons, men and women alike. *See id.* at 2578 (comments of Rep. Celler of New York). Representative Celler believed that an amendment adopting blanket language requiring total equality would create social upheaval. *See id.* at 2577 (comments of Rep. Celler). However, it passed, in the view of Representative Griffiths, so that a qualified white woman denied a job would have some recourse if her job was taken by an African-American. *See id.* at 2579 (comments of Rep. Griffiths of Michigan); *see also* Renee Levay, *Employment Law*—Equal Employment Opportunity Commission v. Walden Book Co.: *Does/Should Title VII Apply to Same-Gender Sexual Harassment?* 26 U. MEM. L. REV. 1601, 1603 (1996) (citing 110 CONG. REC. 2581 (1964) (comments of Rep. Green of Oregon)) (suggesting that the word "sex" may have been added as a political maneuver to confuse the issue and thus defeat the bill).

women's jobs from the African-American women who would gain from the racial provisions of Title VII.[83] Another theory contends that it was added by southern congressmen to prevent any civil rights bill from being passed.[84] Regardless of what happened, however, the bill passed with "sex" included, but without any clear expression of congressional intent; thus, the provision opened the door to massive litigation as the courts attempted to develop a doctrine of sex discrimination on their own.[85]

Generally, the courts have interpreted sex narrowly, equating it with gender.[86] This interpretation follows the EEOC's description of the intent of Congress in Title VII that "sex" refer to "a person's gender, an immutable characteristic with which a person is born."[87] However, a more comprehensive definition may better serve the purposes of the statute.[88] For example, I. Bennett Capers has proposed that sex is primarily biological and physical, while gender includes "characteristics traditionally labelled [sic] 'masculine' and 'feminine' and is a function of socialization, having social, cultural, and psychological components."[89] Thus, sex does not equal gender. Capers asserts that equating sex with gender and keeping the two

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83. *See* Levay, *supra* note 82, at 1603 n.10.

84. *See id.* at 1603-04 (discussing this history); Shahan, *supra* note 73, at 510 (asserting that "sex" was added to divide the initial supporters of the bill).

85. At the time the amendment passed, *The New Republic* called it "a mischievous joke perpetrated on the floor of the House of Representatives." *Sex and Nonsense*, NEW REPUBLIC, Sept. 4, 1965, at 10, 10; *see also* I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1168 n.44 (1991) (discussing the *New Republic* article). Years later, a judge, recognizing the same inauspicious origin of the law, commented that the "sex" amendment had been a "joke." *See* Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986).

86. *See, e.g.*, DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 306-07 (2d Cir. 1986) ("The proscribed differentiation under Title VII, therefore, must be a distinction based on a person's sex, not on his or her sexual affiliations."); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (declining to extend sex to include transsexuality); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (declining to extend sex to include homosexuality); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977) ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning.").

87. EEOC Dec. No. 76-75, EEOC Dec. (CCH) ¶ 6495, at 4266 (Mar. 2, 1976). The EEOC, the agency charged with the enforcement of Title VII, may offer guidelines to inform the court, but the court is not bound to follow them. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (" 'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

88. *See* Capers, *supra* note 85, at 1170.

89. *Id.* at 1160.

sex/genders, male and female, directly opposite one another are essential to the heterosexist paradigm.[90] Several feminist theorists who question heterosexism also work to deconstruct the sex/gender link.[91] They conclude that gender is a social construction and, as such, exists on a continuum containing a number of male and female genders, some even overlapping.[92] Capers argues that one of the problems with equating sex and gender is that the continuum is ignored and that only feminine women and masculine men, that is, the two sexes, are considered to be genders.[93] This equation, he concludes, perpetuates heterosexism.[94]

Nevertheless, a narrow concept of sex and the concurrent acceptance of heterosexism, as opposed to the potentially broader reading, have influenced the courts' interpretations of sexual harassment under Title VII in a number of ways.[95] For example, courts clearly have not recognized a cause of action for sexual orientation harassment under Title VII.[96] This suggests that these courts view gender only as sex and not as sexuality or sexual practices.

However, the courts have read "sex" broadly in another sense, concluding that Title VII provides protection for men as well as

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90. *See id.* "Heterosexism ... refers to institutionalized valorization of heterosexual activity." *Id.* at 1159. Capers argues that heterosexism constricts both men and women by forcing them into strict gender roles. *See id.* at 1162.

91. *See id.* at 1160-61 (discussing the work of Simone de Beauvoir and Judith P. Butler). *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) (developing a theory of sexed, gendered, and sexual identity as performative instead of essential in nature); SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley ed. & trans., Alfred A. Knopf, Inc. 1952) (1949) (arguing that gender is acquired).

92. *See* Capers, *supra* note 85, at 1161.

93. *See id.* at 1162.

94. *See id.*

95. *See generally infra* notes 271-82 and accompanying text (discussing how a heterosexist bias has affected and could continue to affect sexual harassment law).

96. *See, e.g.*, Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (holding that "Title VII does not prohibit discrimination against homosexuals"); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (holding that in Title VII, "sex" should not be judicially extended to include homosexuality); *see also* Capers, *supra* note 85, at 1168-69 (stating that courts have interpreted "sex" in a traditional manner). Moreover, Congress has not amended the statute to prohibit discrimination based on sexual orientation. *See generally* Marie Elena Peluso, Note, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533 (1993) (arguing that Congress should amend Title VII to protect homosexuals from sex discrimination). For a discussion of the tension between not allowing a Title VII sexual orientation claim and allowing a same-sex sexual harassment claim, see *infra* notes 285-96 and accompanying text.

women.[97] The Supreme Court has found that Title VII "evinces a congressional intent ' "to strike at the entire spectrum of disparate treatment of *men and women*" ' in employment."[98] With both sexes protected by the statute, the key issue involved in *Wrightson* is whether the victim and the harasser must be of different sexes in order for there to be a Title VII claim.[99]

The plain language of Title VII does not specifically address sexual harassment, only sexual discrimination.[100] Catharine MacKinnon, a feminist legal theorist, argued that sexual harassment is a form of sexual discrimination.[101] She described sexual harassment as "situations of persistent verbal suggestion, unwanted physical contact, straightforward proposition, and coerced intercourse... [including] [i]nsult, pressure, or intimidation having gender as its basis or referent."[102] The judiciary followed her lead,[103] ultimately resulting in the Supreme Court's creation of a Title VII sexual harassment claim. The Court stated that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[104]

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97. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (holding that Congress intended to prohibit sexual harassment against men and women); Newport News Shipbldg. & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983) (holding that Title VII was violated by an insurance plan that provided less extensive pregnancy benefits to married male employees than to married female employees).

98. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))) (emphasis added). The Court noted in *Meritor* that sexual harassment in return for the privilege of employment is demeaning to both men and women. *See id.* at 66-67 (citing Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

99. *See infra* notes 120-241 and accompanying text (detailing the circuits' same-sex sexual harassment cases and their lack of consensus).

100. *See* 42 U.S.C. § 2000e-2(a)(1) (1994) (making it unlawful "otherwise to discriminate... because of such individual's... sex").

101. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 27 (1979); *see also* Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375, 379-80 (1995) (relying on Professor MacKinnon in order to argue that Title VII should allow a broader range of claims based on sexual harassment).

102. MACKINNON, *supra* note 101, at 237.

103. At least two federal district courts applied Professor MacKinnon's theories prior to use of the theories by the Supreme Court. *See, e.g.*, Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172, 1196 (D. Del. 1983) (citing Professor MacKinnon and stating that sexual harassment is a well-recognized cause of action under Title VII); Stewart v. Thomas, 538 F. Supp. 891, 897 (D.D.C. 1982) (citing Professor MacKinnon while discussing the importance of tort claims in sex discrimination claims).

104. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (alteration in original)

Professor MacKinnon, whose arguments have influenced the judiciary in the creation of the sexual harassment claim,[105] bases her overall theory on a simple observation: "the power of men over women in society."[106] But she has divided her theory into two parts, the " 'differences' approach" and the " 'inequality' approach."[107] Under the differences theory, women as a gender group are treated differently because they are women.[108] Under the inequality theory, sexual harassment works to perpetuate "a badge of female servitude," as it objectifies and degrades women.[109] Encompassing both approaches, sexual harassment may be defined as " 'the exploitation of a powerful position to impose the sexual demands or pressures on an unwilling but less powerful person.' "[110] Given that the sexual harassment claim was based on this male-female power imbalance, it is an open question whether it can be extrapolated to encompass male-male or female-female sexual harassment claims

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(holding that sexual harassment is actionable under Title VII). Professor MacKinnon was an attorney on the brief for petitioner Mechelle Vinson, who claimed she had been sexually harassed by her supervisor. *See id.* at 58, 60.

105. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 818 (1991) (describing Professor MacKinnon's influence); Grose, *supra* note 101, at 379 (discussing Professor MacKinnon's sexual harassment as sex discrimination theory as "one of the most significant contributions made by feminist jurisprudence to mainstream legal thought"); Spitko, *supra* note 73, at 64 ("Professor Cathrine [sic] MacKinnon sets forth what are perhaps the most influential arguments for bringing sexual harassment within the meaning of the 'sex' discrimination prohibition in Title VII."). *But see* Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's* Toward a Feminist Theory of the State, 100 YALE L.J. 2247, 2248 (1991) (reviewing CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989), and criticizing Professor MacKinnon for basing her theory on the characterization of feminine sexual difference as victimization only). *See generally* Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352 (1988) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED], and explaining the controversy surrounding Professor MacKinnon's theories).

106. MACKINNON, FEMINISM UNMODIFIED, *supra* note 105, at 5.

107. *See* MACKINNON, *supra* note 101, at 4. *See generally* Spitko, *supra* note 73, at 64-67 (describing these theories and their relation to issues involved in same-sex sexual harassment).

108. *See* MACKINNON, *supra* note 101, at 6 (concluding that women are forced to endure sexual harassment, while men are not).

109. *Id.* at 189.

110. Woodhouse, *supra* note 73, at 1153 (quoting Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984)); *see also* MACKINNON, *supra* note 101, at 1 ("Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power.").

under Title VII.[111]

Also important to the original concept of sexual harassment is that it is a "group injury."[112] In other words, women suffer because women as a group lack power, and men perpetrate female suffering because men as a group have power.[113] Once again, whether this reasoning can be used in same-sex sexual harassment cases is open to debate.[114]

With this background of feminist legal theory and legislative whim, sexual harassment has evolved in the judicial system into two categories: quid pro quo and hostile work environment.[115] Quid pro quo harassment "requires the employee to have submitted to harassment as a condition of receiving job benefits or of retaining employment."[116] The United States Supreme Court has defined a hostile work environment as

> "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature[,]" ... whether or not it is directly related to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably ... creating an intimidating, hostile, or offensive work environment."[117]

The requirements for claims based on hostile work environment are similar to those for a claim based on quid pro quo harassment, except that in hostile work environment cases, instead of having to show that

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111. *See infra* notes 247-70 and accompanying text (discussing Professor MacKinnon's and other legal theorists' views as to whether a same-sex sexual harassment claim should lie under Title VII).

112. *See* Woodhouse, *supra* note 73, at 1153-54.

113. *See id.* at 1153.

114. *See infra* notes 260-70 and accompanying text.

115. *See* Shahan, *supra* note 73, at 511. Both categories may apply in the same case. *See* Trish K. Murphy, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125, 1127 (1995).

116. Shahan, *supra* note 73, at 511. Elements of the quid pro quo claim are:

> (1) the employee is a member of a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the receipt of employment benefit or a tangible job detriment expressly or impliedly depended on the acceptance or rejection of the harassment by the employee; and (5) the existence of respondeat superior liability.

Murphy, *supra* note 115, at 1128; *see also* Henson v. City of Dundee, 682 F.2d 897, 909-10 (11th Cir. 1982) (describing the quid pro quo claim and its elements).

117. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a) (1985)). In *Meritor*, a female employee alleged that a male supervisor suggested they have sexual relations, "fondled her in front of other employees," and forcibly raped her. *Id.* at 60.

employment was dependent on sexual favors, the plaintiff/victim must show that the harassment was severe enough to alter the conditions of employment.[118] Courts addressing same-sex sexual harassment have considered both types of claims.[119]

The Fourth Circuit considered same-sex hostile work environment sexual harassment claims on two occasions prior to *Wrightson.* First, in *McWilliams v. Fairfax County Board of Supervisors,*[120] the court considered the plight of Mark McWilliams, an automotive mechanic with cognitive and emotional disabilities who was subjected to verbal and physical assaults with sexual overtones by his male co-workers.[121] The court affirmed summary judgment for Fairfax County and held that a hostile work environment claim under Title VII "does not lie where both the alleged harassers and the victim are heterosexuals of the same sex."[122] The court based its decision on the statutory language, " 'because of the [claimant's] sex.' "[123] The court reasoned:

> As a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here ... is considered to be "because of the [target's] 'sex.' " Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed [sic] speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity.... But not specifically "because of" the victim's sex.[124]

Expanding Title VII to such same-sex heterosexual claims, the court reasoned, would extend the statute "to unmanageably broad

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118. This element replaces the quid pro quo requirement that employment was received in return for sexual favors. *See* Murphy, *supra* note 115, at 1128-29 (describing in detail requirements for a hostile work environment claim); Woodhouse, *supra* note 73, at 1154-57 (same).

119. *See supra* note 77 (citing cases that discuss hostile work environment and quid pro quo same-sex sexual harassment claims).

120. 72 F.3d 1191 (4th Cir.), *cert. denied,* 117 S. Ct. 72 (1996).

121. *See id.* at 1193-94. Co-workers teased McWilliams about his sexual activities and, on one occasion, placed a condom in his food. *See id.* at 1193. At one point, they tied him down and placed a finger in his mouth to simulate oral sex, and they fondled him on another occasion. *See id.* The atmosphere of this all-male work environment was sexual, with several off-color cartoons and Playboy centerfolds on the wall and radios tuned to sexually explicit talk shows. *See id.*

122. *Id.* at 1195. No claim was made that the harassers or McWilliams were homosexual. *See id.*

123. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)) (alteration in original).

124. *Id.* at 1195-96 (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)) (alterations in original).

protection of the sensibilities of workers simply 'in matters of sex.' "[125] The court commented that while one may argue that there should be such a law, "Title VII is not that law."[126]

However, the court noted that its reading of Title VII should not be interpreted as overly restrictive. "[The] holding does not ... purport to rule out claims of discrimination by adverse employment decisions ... involving only same-sex heterosexual actors .... Nor, most significantly, does it purport to reach any form of same-sex discrimination claim where either victim or oppressor, or both, are homosexual or bisexual...."[127] The court explained that if Title VII was interpreted to allow same-sex sexual harassment claims when homosexuality was involved, "the fact of homosexuality ... should be considered an essential element of the claim, to be alleged and proved."[128]

In dissent, Judge Michael took an opposite view, arguing that while sexual orientation may be relevant, it should not be a required element of a same-sex sexual harassment claim.[129] He stated that proof of sexual orientation would complicate Title VII, which, he said, "is implicated whenever a person physically abuses a co-worker for sexual satisfaction or propositions or pressures a co-worker out of sexual interest or desire," regardless of the sexual orientation of either.[130] Nevertheless, while the majority did not rule on the homosexual same-sex sexual harassment issue, it held that same-sex heterosexual-on-heterosexual hostile workplace harassment claims would not lie under Title VII.[131]

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125. *Id.* at 1196.

126. *Id.*

127. *Id.* at 1195 n.4. The court also noted that the Supreme Court had yet to address the issue and that the lower federal courts were "hopelessly divided." *Id.* (citing Quick v. Donaldson Co., 895 F. Supp. 1288, 1294 (S.D. Iowa 1995) (surveying the conflicting decisions on the issue)).

128. *Id.* at 1195 n.5.

129. *See id.* at 1198 (Michael, J., dissenting).

130. *Id.* (Michael, J., dissenting).

131. *See id.* at 1195. The Fourth Circuit reaffirmed this position in *Mayo v. Kiwest Corp.*, No. 95-2638, 1996 WL 460769, at *4 (4th Cir. Aug. 15, 1996) (per curiam). In *Mayo*, a male employee alleged that his supervisor, Flanagan, also a male, verbally and physically sexually assaulted him, creating a hostile work environment. *See id.* at *1. The harassment included vulgar comments, as well as suggestions of oral sex and comments that the other employees believed that Mayo was homosexual. *See id.* Flanagan allegedly kissed Mayo on the cheek, fondled his genitals and poked his anal area with a wooden dowel. *See id.* The Fourth Circuit affirmed the district court's dismissal for failure to state a claim under Title VII. *See id.* at *3. The court followed *McWilliams*, *see id.* at *3-*4, concluding that no cause of action under Title VII would lie because "both Mayo and Flanagan were indisputably males and Mayo makes no claim that either was homosexual

Just two months later, the Fourth Circuit decided *Hopkins v. Baltimore Gas & Electric Co.*,[132] another same-sex sexual harassment case. A male photographic technician, George E. Hopkins, Jr., alleged that his supervisor, Ira Swadow, had subjected him to discriminatory sexual harassment that created a hostile work environment in violation of Title VII.[133] The court did not decide whether Hopkins's same-sex sexual harassment claim was actionable under Title VII, but instead held that Hopkins had failed to demonstrate "that Swadow's alleged harassment was sufficiently severe or pervasive to create an objectively hostile or abusive work environment and [that] the harassment was directed at him because of his sex."[134] Even though a discussion of the actionability of Title VII same-sex sexual harassment was unnecessary for the *Hopkins* decision, Judge Niemeyer spoke directly to the issue as he wrote for the court.[135] In a part of the decision in which the rest of the court did not concur, he discussed the EEOC's position that the sexes of both the harasser and the victim are irrelevant in determining whether Title VII has been violated.[136] After briefly describing a number of decisions on similar issues of same-sex sexual harassment, Judge Niemeyer "conclude[d] that sexual harassment of a male employee, whether by another male or by a female, may be actionable under Title VII if the basis for the harassment is because the employee is a man,"[137] but that the "employee's sexual behavior, prudery, or vulnerability" would not form the basis of a Title VII claim.[138] He acknowledged that a claim of same-sex sexual harassment would be

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or bisexual." *Id.* at *4.

132. 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

133. *See id.* at 747. Hopkins alleged in part that Swadow had made a number of sexually suggestive comments. *See id.* at 747-48.

134. *Id.* at 753. In particular, the court found that the incidents were too far apart in time, that Swadow's acts were ambiguous, that a number of the incidents occurred in the presence of a group, and that only in Hopkins's subjective view were Swadow's acts directed toward Hopkins alone. *See id.* at 753-54.

135. *See id.* at 748-52. Chief Judge Wilkinson and Judge Hamilton expressed reservations about Judge Niemeyer's decision to write on the issue. *See id.* at 755 (Wilkinson, C.J., concurring in part). Instead, they followed the reasoning in *McWilliams*. *See id.* (Wilkinson, C.J., concurring in part) (citing *McWilliams*, 72 F.3d at 1195); *see also supra* notes 120-31 and accompanying text (discussing *McWilliams*). Moreover, they concluded that "[i]f Title VII is to be extended to cover a whole new generation of same sex harassment claims, it is far better that it be accomplished by legislative action than by judicial fiat." *Hopkins*, 77 F.3d at 755 (Wilkinson, C.J., concurring in part).

136. *See Hopkins*, 77 F.3d at 750 (discussing EEOC Compl. Man. (BNA) § 615.2(b)(3) (Nov. 10, 1980)).

137. *Id.* at 752.

138. *Id.* at 751-52; *see also McWilliams*, 72 F.3d at 1196 (declaring that prohibition of discrimination based on "sex" in Title VII does not cover prudishness or sexual behavior).

difficult to prove because there is a general presumption that when a man harasses another man (or a woman harasses another woman), it is not because of his (or her) sex.[139] However, Judge Niemeyer continued, if the harassed employee can prove that the harasser acted out of sexual attraction, most likely with some kind of homosexual intent, then this evidence could be used to show that the action was directed at him because he was male.[140] In such cases, he concluded, but only in those cases, a Title VII action may exist.[141]

Thus, prior to *Wrightson*, the Fourth Circuit had not recognized a same-sex sexual harassment claim under Title VII for a hostile work environment based on heterosexual-male-on-heterosexual-male harassment.[142] But the Fourth Circuit had suggested on two occasions that homosexual-male-on-heterosexual-male harassment might be actionable under Title VII.[143] Ultimately, in *Wrightson*, the court took the next step and found a cause of action for same-sex sexual harassment for a hostile work environment under Title VII when the perpetrator is homosexual.[144]

Since *Wrightson*, three other circuit courts have held that allegations of same-sex sexual harassment based on a hostile work environment are actionable under Title VII in certain circumstances. In *Yeary v. Goodwill Industries-Knoxville*,[145] the Sixth Circuit allowed

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139. *See Hopkins*, 77 F.3d at 752. Judge Niemeyer explained that the opposite presumption would exist if a man harassed a woman or a woman harassed a man. *See id.*

140. *See id.* Judge Niemeyer described evidence of homosexuality as principal evidence of sexual harassment, but not the only suitable evidence. *See id.*; *see also McWilliams*, 72 F.3d at 1195 n.5 (discussing the consequences of requiring or not requiring homosexuality as an element of a same-sex sexual harassment claim).

141. *See Hopkins*, 77 F.3d at 752-53.

142. *See McWilliams*, 72 F.3d at 1196. *McWilliams* and *Hopkins* are the only cases on same-sex sexual harassment in the Fourth Circuit prior to *Wrightson*; therefore, they provide a summary of the circuit's history on the subject.

143. *See id.* at 1195 n.4 ("We therefore specifically reserve decision on the general question whether, when all the actors involved in a Title VII claim of sex-discrimination (in any of its forms) are of the same sex, the homosexuality of any may make the claim nevertheless cognizable as one of 'discrimination because of [the victim's] sex.' "). In *Hopkins*, Judge Niemeyer, writing only for himself, reasoned that a same-sex sexual harassment claim would be viable if the plaintiff could prove that the harasser acted with homosexual intent. *See Hopkins*, 77 F.3d at 752 ("[A] male employee who undertakes to prove sexual harassment directed at him by another male may use evidence of the harasser's homosexuality to demonstrate that the action was directed at him because he is a man." (citing *McWilliams*, 72 F.3d at 1195 n.5)).

144. *See Wrightson*, 99 F.3d at 141.

145. 107 F.3d 443 (6th Cir. 1997). *Yeary* was the Sixth Circuit's first direct discussion of same-sex sexual harassment. *See id.* at 446; *see also* Fleenor v. Hewitt Soap Co., 81 F.3d 48, 49-50 (6th Cir.) (finding no cause of action for a same-sex sexual harassment claim because of the plaintiff's failure to assert that his employer knew or should have

a same-sex sexual harassment claim when the plaintiff alleged that the harassment occurred due to sex. In a situation similar to *Wrightson*, Yeary, a male employee, alleged that a male homosexual co-worker had harassed him at work.[146] Yeary complained to management, was terminated, and subsequently filed an action for same-sex sexual harassment under Title VII.[147] The court determined that "this case is about as traditional as they come, albeit with a twist. It is about an employee making sexual propositions to and physically assaulting a coworker because, it appears, he finds that coworker sexually attractive."[148] The court reasoned that in order to state a claim for these acts under Title VII, like any other claim under Title VII, the plaintiff must allege that he or she was harassed " 'because of . . . sex.' "[149] The court found that Yeary had stated such a claim.[150] "He claims that because he is a male, he was subjected to objectionable treatment to which women employees . . . were not subjected. . . . If true, this creates an institutional disadvantage for Yeary in working at Goodwill, simply by virtue of the fact that he is a man."[151]

The Sixth Circuit declined to limit its holding to situations where the harasser is homosexual, stating instead that "all that is necessary for us to observe is that when a male sexually propositions another male *because of sexual attraction*, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male—that is, 'because of . . . sex.' "[152] Thus, the Sixth Circuit has introduced the because-of-sex standard for same-sex sexual harassment but has yet to define its parameters.

In *Fredette v. BVP Management Associates*,[153] the Eleventh Circuit, much like the Fourth Circuit in *Wrightson*, held that the sexual harassment of a male employee by a homosexual male supervisor is actionable under Title VII.[154] Robert Fredette, a waiter,

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known about the harassment, not because both the victim and the perpetrator were male), *cert. denied*, 117 S. Ct. 170, *and reh'g denied*, 117 S. Ct. 598 (1996).

146. *See Yeary*, 107 F.3d at 443-44. Yeary alleged that the homosexual co-worker asked him for a date, spoke to him suggestively, and touched him in a sexual manner. *See id.*

147. *See id.* at 444.

148. *Id.* at 447-48. The court made the point that the allegations would certainly be actionable if the victim and the perpetrator had been of different sexes. *See id.* at 448.

149. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)).

150. *See id.*

151. *Id.*

152. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)).

153. 112 F.3d 1503 (11th Cir. 1997).

154. *See id.* at 1510.

alleged that he had experienced both quid pro quo and hostile work environment sexual harassment due to the sexual propositions of his manager, Dana Sunshine, a homosexual male.[155] The court limited its discussion to the homosexual-on-heterosexual fact pattern and determined that Title VII did not require the perpetrator and the victim to be opposite genders and further that " 'because of such individual's . . . sex' " could apply when a homosexual male harassed a heterosexual male.[156] Interestingly, the court recognized the Fourth Circuit's sharp distinction between a homosexual perpetrator as in *Wrightson* and a heterosexual perpetrator as in *McWilliams*.[157] After doing so, the Eleventh Circuit declined to draw such a distinction because it was unnecessary to decide the case, but the court did state that the Fourth Circuit's homosexual/heterosexual distinction was "easily perceived."[158] Furthermore, in stating its reasoning behind allowing the Title VII action, the court rejected the "power" notion of sexual harassment by finding that an allegation of an environment dominated by the opposite gender was unnecessary to state the claim.[159] The court also carefully distinguished its holding from one that would allow an action based on sexual orientation.[160] Thus, the Eleventh Circuit reached conclusions very similar to those reached by the Fourth Circuit in *Wrightson*.

In *Quick v. Donaldson Co.*,[161] the Eighth Circuit applied Title VII to same-sex sexual harassment even more broadly than the Sixth, Fourth, and Eleventh Circuits by holding that Phil Quick, a heterosexual male, had a cause of action under Title VII for sexual harassment perpetrated by his heterosexual male co-workers.[162] The harassment of Quick included "bagging,"[163] physical assault, and

155. *See id.* at 1504. Fredette presented evidence that when he refused Sunshine's advances, Sunshine retaliated against him in "work-related ways." *See id.*

156. *Id.* at 1504-06 (quoting 42 U.S.C. § 2000(e)-2(a)(1)). The court analogized a homosexual male's motives toward another male to a heterosexual male's motives toward a woman. *See id.* at 1505-06. *But see infra* notes 297-308 and accompanying text (discussing why focusing on the perpetrator's motives may be misguided).

157. *See Fredette*, 112 F.3d at 1506-07.

158. *Id.*

159. *See id.* at 1509; *see also infra* notes 247-64 and accompanying text (discussing the "power" notion of sexual harassment).

160. *See Fredette*, 112 F.3d at 1510.

161. 90 F.3d 1372 (8th Cir. 1996).

162. *See id.* at 1379. This differs from the Fourth Circuit's conclusion that only homosexual-on-heterosexual claims of same-sex sexual harassment are viable under Title VII. *See supra* notes 38-63 and accompanying text (discussing *Wrightson*'s majority opinion).

163. Bagging typically involves an action aimed at a man's groin. *See Quick*, 90 F.3d at

verbal harassment, particularly "taunting about being homosexual."[164] The court below granted summary judgment to Quick's employer on the Title VII claim, concluding that "Title VII protects a male employee from discriminatory sexual harassment only where he can show an anti-male or predominantly female environment making males a disadvantaged or vulnerable group."[165]

The Eighth Circuit reversed, holding that Quick satisfied the five requirements necessary to state a cause of action for hostile work environment under Title VII: " ' "(1) [he] belongs to a protected group; (2) [he] was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) [the employer] knew or should have known of the harassment and failed to take proper remedial action." ' "[166] First, the court decided that Quick satisfied the initial factor by being a man, and thus a member of a protected group.[167] Second, it noted that Congress had intentionally left the scope of sexual harassment broad and that Quick's allegations constituted unwelcome sexual harassment.[168] Third, the court stated that harassment is "based upon sex" only if " 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' "[169] Here, this factor was met because only men were subjected to the bagging and other harassment.[170] Fourth, the court interpreted Title VII as covering discrimination that is " ' "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

1379. Quick defined bagging as the "grabbing and squeezing of another person's testicles." *Id.* A supervisor described bagging as common at Quick's workplace. *See id.*

164. *Id.* On one occasion, a co-worker held Quick down while another worker squeezed his left testicle, resulting in swelling and bruising. *See id.* at 1375.

165. *Id.* at 1375-76.

166. *Id.* at 1377 (quoting Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (quoting Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992))).

167. *See id.* Under Title VII, both men and women are protected groups for the purpose of sex discrimination. *See id.* The court rejected the district court's contention that Title VII is limited to disadvantaged or vulnerable groups. *See id.* at 1378.

168. *See id.* at 1377. The court stated that whether the harassment is unwelcome is a question for the trier of fact, based largely on the plaintiff's conduct. *See id.* at 1378. Further, to show that the harassment was sexual, the plaintiff does not have to show sexual innuendo; instead, all the facts should be considered "in the totality of the circumstances." *Id.* at 1379.

169. *Id.* at 1378 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

170. In this case, there was evidence that the women at the place of employment had not had their genitals grabbed; that is, they had not been subjected to the female equivalent of "bagging." *See id.* at 1376, 1379.

working environment." ' "[171] The court added that the nature of the environment must be determined from the entire record.[172] The court stated that on this issue, Quick had presented enough details to create a question for the jury.[173] Finally, the court held that Quick's allegations were also sufficient to satisfy the fifth element: that the employer knew or should have known of the harassment.[174]

In dissent, Judge Nangle, relying on *McWilliams*, argued that heterosexual-on-heterosexual harassment should not create a cause of action under Title VII.[175] He believed that the majority's opinion improperly enlarged "Title VII to cover any form of harassment experienced in the workplace."[176] While he admitted that Quick maintained that the bagging was widespread, whereas McWilliams had argued that he was a particular target of the harassment, Judge Nangle concluded that the two situations were similar because Quick appeared to have been singled out for harassment as well.[177] According to Judge Nangle, in order for Quick to show that he was subjected to a hostile work environment, the harassment would need to have been so pervasive as to actually alter the conditions of employment.[178]

Finally, Judge Nangle cautioned the majority against using previous Eighth Circuit Title VII cases to decide same-sex cases. The earlier cases all involved men harassing women; Judge Nangle argued that the inferences were different.[179] He concluded:

> [I]n the traditional situation [of a man harassing a woman], "[t]he causal link between the supervisor's conduct and the victim's harassment is the victim's gender.... In a same-gender sexual harassment case, however, conduct of a sexual or gender-oriented nature can not be presumed to be discriminatory.... When the alleged offender and the

171. *Id.* at 1378 (quoting *Harris*, 510 U.S. at 21 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986))).

172. *See id.*

173. *See id.* at 1379.

174. *See id.*

175. *See id.* at 1380 (Nangle, J., dissenting) (citing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996)).

176. *Id.* (Nangle, J., dissenting).

177. *See id.* at 1380-81 (Nangle, J., dissenting). Because a hostile work environment claim "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,' " a claimant must show a hostile environment, not just an isolated incident. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

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

179. *See id.* (Nangle, J., dissenting).

> alleged victim share the same gender, similar sexually suggestive words and acts can take on a whole other meaning."[180]

For example, he stated, if actions similar to bagging were done to females by males, there would be an inference of sexual harassment, but if done by a heterosexual male to another heterosexual male, there is only an inference of vulgarity.[181]

Thus, in addition to the Fourth Circuit, three other circuits have allowed an action for same-sex sexual harassment. However, the cases differ from *Wrightson* in important ways. In *Yeary*, for example, the Sixth Circuit held that a cause of action exists for same-sex sexual harassment under Title VII as long as the harassment occurs due to sex.[182] While the Sixth Circuit in *Yeary* considered a male-homosexual-on-male-heterosexual case, it declined to conclude, as did the Fourth Circuit in *Wrightson*, that a same-sex sexual harassment claim could only exist when the harasser was homosexual.[183] Similarly, in *Fredette*, the Eleventh Circuit "perceived" the Fourth Circuit's distinction between homosexual and heterosexual perpetrators and held that a victim harassed by a homosexual could state a claim under Title VII but did not explicitly follow the Fourth Circuit's homosexual/heterosexual distinction.[184] Meanwhile, the Eighth Circuit expressly expanded same-sex sexual harassment to include heterosexual-on-heterosexual claims.[185] Thus, the Fourth Circuit's *Wrightson* decision requiring a homosexual perpetrator is narrower than the Eighth Circuit's decision, which allows the victim of a heterosexual perpetrator to state a claim.

While the aforementioned circuits have shown a willingness to find some federal cause of action for same-sex sexual harassment, at least one circuit has refused to recognize any same-sex sexual harassment claims under Title VII.[186] In *Garcia v. Elf Atochem North*

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180. *Id.* (Nangle, J., dissenting) (alterations in original) (quoting Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1382-83 (C.D. Cal. 1995)).

181. *See id.* (Nangle, J., dissenting). Judge Nangle did not consider what the inference would be if one of the men had been homosexual. Presumably then, there would once again have been an inference of sexual harassment.

182. *See* Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997).

183. *See id.* ("It is not necessary for this court to decide today whether same-sex sexual harassment can be actionable *only* when the harasser is a homosexual . . . .").

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

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

186. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 120 (5th Cir.) (holding that no same-sex sexual harassment occurred when heterosexual man was threatened and assaulted by two other men), *reh'g and suggestion for reh'g en banc denied*, 95 F.3d 56 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997); Garcia v. Elf

America,[187] the Fifth Circuit considered allegations by Freddy Garcia, a heterosexual male, that his plant foreman, Rayford Locke, had sexually harassed him by grabbing his groin and making sexual motions behind him.[188] Garcia complained to the union steward, and Locke was reprimanded by the employer.[189] Garcia subsequently filed a complaint under Title VII.[190] The district court granted summary judgment to Garcia's employer and Locke; the Fifth Circuit affirmed, finding that Garcia was not entitled to redress under Title VII.[191] Judge Garwood, writing for the court, explained the basis for the decision by stating that " '[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.' "[192]

Two years later, the Fifth Circuit revisited same-sex sexual harassment under Title VII in *Oncale v. Sundowner Offshore Services, Inc.*[193] Joseph Oncale alleged a series of severe incidents of sexual harassment by his male supervisor and two male co-workers while they were working for Sundowner on an offshore rig.[194] Due to the harassment, Oncale quit his job and filed suit, alleging both

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Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that no sexual harassment occurred when male employees were harassed by male supervisor).

187. 28 F.3d 446 (5th Cir. 1994).

188. *See id.* at 448.

189. *See id.*

190. *See id.* at 449.

191. *See id.* at 449-50.

192. *Id.* at 451-52 (quoting Giddens v. Shell Oil Co., 67 Fair Empl. Prac. Cas. (BNA) 576, 576 (Dec. 6, 1993)). First, the court found that Garcia could seek only equitable relief under Title VII because the alleged violations had occurred before the damages portion of Title VII became effective. *See id.* at 450. Because Garcia had continued to work for the company and Locke had left, the court also held that neither back pay nor injunctive relief was appropriate. *See id.* Moreover, the court found that Garcia failed to establish a prima facie case against any of the defendants. *See id.* It concluded that no same-sex sexual harassment claim could lie under Title VII. *See id.* at 451-52. Because of its ruling on the lack of relief available to Garcia, the court did not have to reach the issue of same-sex sexual harassment. In *Oncale*, however, the Fifth Circuit considered the conclusion in *Garcia*—that no same-sex sexual harassment claim lies under Title VII—to be binding. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 119 (5th Cir.), *reh'g and suggestion for reh'g en banc denied*, 95 F.3d 56 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997); *see also infra* notes 193-202 and accompanying text (discussing *Oncale*).

193. 83 F.3d 118 (5th Cir.), *reh'g and suggestion for reh'g en banc denied*, 95 F.3d 56 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997).

194. *See id.* at 118-19. Oncale alleged that two co-workers held him down while a supervisor placed his penis on Oncale's neck; that co-workers threatened him with homosexual rape; and that one co-worker forced a bar of soap into his anus as another one restrained him while he was taking a shower on Sundowner's premises. *See id.*

hostile work environment and quid pro quo sexual harassment.[195] Relying on *Garcia*, the district court granted summary judgment to Sundowner, the defendant.[196]

In affirming the district court's decision in *Oncale*, the Fifth Circuit determined that *Garcia*'s bar on all male-on-male same-sex sexual harassment claims under Title VII was binding precedent.[197] Yet the Fifth Circuit appeared to find some merit in Oncale's claim and in the amicus curiae brief filed on his behalf by the EEOC.[198] The court recognized that under one reading of the statute, "so long as the plaintiff proves that the harassment is because of the victim's sex, the sex of the harasser and victim is irrelevant."[199] However, the court concluded that it was compelled to reject this line of reasoning because of *Garcia*.[200] In December 1996, the Supreme Court asked the United States Department of Justice to submit a brief on the subject of same-sex sexual harassment to aid the Court in its certiorari decision in *Oncale*.[201] Subsequently, on June 9, 1997, the Supreme Court granted certiorari.[202] Supreme Court resolution of *Oncale* will help to clarify the applicability of Title VII in same-sex sexual harassment situations.

Other circuit courts that have not squarely addressed the issue of same-sex sexual harassment under Title VII have, nevertheless, suggested their positions in dicta. The First Circuit ruled that a male heterosexual who alleged that a male homosexual co-worker made sexual advances toward him did have a cause of action for sexual harassment under Title VII.[203] However, the court concluded that the plaintiff had failed to show that the co-worker's harassment was "sufficiently severe [or] adequately pervasive to amount to the type of conduct deemed to be actionable under Title VII."[204]

One judge in the Second Circuit has suggested that the court might consider a same-sex sexual harassment claim under Title VII.[205]

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195. *See id.* at 119.

196. *See id.* (citing *Garcia*, 28 F.3d at 451-52).

197. *See id.* at 119-20 (citing *Garcia*, 28 F.3d at 451-52).

198. *See id.* at 119.

199. *Id.*

200. *See id.*

201. *See* Oncale v. Sundowner Offshore Servs., Inc., 117 S. Ct. 607, 607 (1996) (inviting the Solicitor General to submit a brief expressing the views of the United States).

202. 117 S. Ct. 2430 (1997).

203. *See* Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192 (1st Cir. 1990).

204. *Id.* Thus, the court never had to rule conclusively on the issue of same-sex sexual harassment, but instead it looked at the sufficiency of the claim generally. *See id.*

205. *See* Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993) (Van

Judge Van Graafeiland took issue with the misconception that only sexual harassment of women constituted disparate treatment because of sex.[206] He concluded that "harassment is harassment regardless of whether it is caused by a member of the same or opposite sex."[207] Thus, he opened the door to a possible same-sex sexual harassment claim.

The Seventh Circuit has also strongly suggested that a same-sex sexual harassment claim can be made under Title VII. In *Baskerville v. Culligan International Co.*,[208] Judge Posner, writing for the court, discussed the behavior that Title VII was intended to deter.[209] He explained: "Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases."[210] Similarly, in *McDonnell v. Cisneros*,[211] Judge Posner, again writing for the court, observed that "[a]nalysis [of Title VII] is complicated by the fact that a difference in sex is not a necessary condition of sexual activity and hence (most courts think) of sexual harassment."[212] In particular, the court discussed the possibility that with homosexual and bisexual harassers, harassment could still occur on the basis of sex.[213]

The Ninth Circuit has also suggested the possibility of a same-sex sexual harassment claim under Title VII.[214] In *Steiner v. Showboat Operating Co.*,[215] the court considered a Title VII suit by a woman who claimed sexual harassment by her male supervisor.[216]

Graafeiland, J., concurring).

206. *See id.* (Van Graafeiland, J., concurring).

207. *Id.* (Van Graafeiland, J., concurring).

208. 50 F.3d 428 (7th Cir. 1995).

209. *See id.* at 430-32.

210. *Id.* at 430. *Baskerville* concerned a female employee allegedly being harassed by a male supervisor. *See id.*

211. 84 F.3d 256 (7th Cir. 1996).

212. *Id.* at 260.

213. *See id.* In *McDonnell*, both a male and female worker claimed Title VII was violated when their employer accused them of improper sexual relations and conducted an investigation that resulted in new rumors about lurid sexual activity on their part. *See id.* at 257-58. The court ruled that Title VII did not apply. *See id.* at 257-59.

214. *See* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (declining to find that both male and female employees cannot have a claim against a male supervisor); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1507-08, 1515-16 (9th Cir. 1989) (finding an employer liable for sexual harassment of a female employee by both female and male supervisors).

215. 25 F.3d 1459 (9th Cir. 1994).

216. *See id.* at 1462.

The evidence revealed that the supervisor harassed both men and women.[217] While this harassment did not diminish the plaintiff's claim, the court asserted that "we do not rule out the possibility that both men and women working at [the place of employment] have viable claims against [the male supervisor] for sexual harassment."[218] Another case, *EEOC v. Hacienda Hotel*,[219] involved harassment of a female by both men and women supervisors.[220] While the court did not specifically address the same-sex issue, it found the employer liable for sexual harassment by both.[221]

The District of Columbia Circuit has focused on homosexuality as the key to same-sex sexual harassment under Title VII.[222] In *Barnes v. Costle*,[223] the court noted in dicta that Title VII would be implicated whether the claimed harassment was by a heterosexual male against a heterosexual female, by a heterosexual female against a heterosexual male, or "upon a subordinate of either gender by a homosexual superior of the same gender."[224] But the court distinguished the case of a bisexual superior harasser because in such instances "the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."[225] That is, if a bisexual harasses both men and women, neither the men nor the women can claim they were harassed specifically "because of sex," because the other sex was also harassed. Thus, someone who harasses both sexes, such as a bisexual harasser, has been dubbed an "equal opportunity harasser."[226]

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217. *See id.*

218. *Id.* at 1464. However, the Ninth Circuit has held that Title VII's prohibition on sex discrimination cannot be extended to sexual preference discrimination, that is, discrimination against homosexuals. *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979).

219. 881 F.2d 1504 (9th Cir. 1989).

220. *See id.* at 1507.

221. *See id.* at 1515-16.

222. *See* Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (noting that regardless of the sex of the harassing supervisor, the issue is whether the harassment would have occurred if the employee had been of a different sex).

223. 561 F.2d 983 (D.C. Cir. 1977).

224. *Id.* at 990 n.55.

225. *Id.* Thus, harassment by a homosexual would be gender discrimination only if the homosexual targeted persons of only one sex.

226. Sandra Levitsky, Note, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1026-27 (1996). This issue further complicates the same-sex sexual harassment debate and is beyond the scope of this Note. *See generally id.* (explaining the inadequacies of the but-for test for bisexual harassers specifically and for same-sex sexual harassment more generally, and suggesting a move to a gender-dominance paradigm).

Overall, these cases demonstrate that the circuit courts have approached the issue of same-sex sexual harassment from a number of perspectives and with varying degrees of certainty, creating considerable confusion in the process. While the courts have considered a number of issues in determining whether a same-sex sexual harassment claim will lie under Title VII, the confusion apparently centers around the meaning of "because of sex" in Title VII.[227] In *Wrightson*, the Fourth Circuit described "because of sex" as "but for sex," and concluded that only a homosexual could harass a heterosexual of the same sex but for sex, but that two heterosexuals of the same sex could not harass one another but for sex.[228] In *Yeary*, the Sixth Circuit relied on Title VII's "because of sex" language as well but did not interpret it as "but for sex."[229] Instead, the court left the language intact and concluded that a homosexual could harass a heterosexual due to sex;[230] however, it did not resolve the issue of whether two heterosexuals could harass one another due to sex. Taking a different approach, the Eleventh Circuit, in *Fredette*, used the language "because of sex" as well and then used hypotheticals to define its meaning: (1) a heterosexual male harassing a female is "because of sex"; and (2) a homosexual male harassing a male is "because of sex."[231] However, the Eleventh Circuit concluded that the heterosexual male harassing a male hypothetical was "a more difficult question, both in terms of common experience and law," and thus, the court did not decide whether that harassment was also "because of sex."[232] Attempting to answer this same difficult question, the Eighth Circuit defined "because of sex" as "based on sex"; harassment is "based on sex" when " 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' "[233] That court allowed a cause of action in a case involving the alleged harassment

227. *See generally* Christopher W. Deering, *Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because of" Sex*, 27 CUMB. L. REV. 231, 256-65 (1997) (explaining the different "because-of-sex" approaches by courts in considering same-sex sexual harassment).

228. *See Wrightson*, 99 F.3d at 142 (discussing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195-96 (4th Cir. 1996)).

229. *See* Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997) (referring to 42 U.S.C. § 2000e-2(a)(1) (1994)).

230. *See id.*

231. *See* Fredette v. BVP Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997).

232. *Id.* at 1507.

233. Quick v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

of a heterosexual male by another heterosexual male.[234] On the other end of the spectrum, the Fifth Circuit has found that Title VII does not prohibit same-sex sexual harassment because Title VII deals only with gender discrimination.[235] Thus, for the Fifth Circuit, "because of sex" apparently cannot be found in any same-sex situation.[236]

Because the other circuit courts have yet to rule explicitly on the issue of same-sex sexual harassment, it is difficult to discern and categorize their reasoning. The First Circuit and the District of Columbia Circuit have suggested that harassment of a heterosexual by a homosexual of the same sex can raise a Title VII cause of action.[237] Meanwhile, the Seventh Circuit has expressly stated that "because of sex" would include harassment of heterosexuals by homosexuals and bisexuals.[238] The Second and Ninth Circuits, however, have not differentiated between homosexuals and heterosexuals in their statements concerning same-sex sexual harassment. A judge in the Second Circuit simply observed that harassment may be caused by members of the same sex,[239] and the Ninth Circuit, without discussion on the issue, has not ruled out same-sex sexual harassment claims that do not include allegations of homosexuality.[240]

In summary, some circuit courts have considered the harasser's sexual orientation to be important to the same-sex sexual harassment issue, while others have not. The *Wrightson* decision signifies that the harasser's sexual orientation is critical to the Fourth Circuit.[241] By emphasizing the harasser's sexual orientation, the court has added greatly to the judicial discourse on same-sex sexual harassment.

Perhaps some of the confusion among the circuits on same-sex sexual harassment is due to the language of Title VII itself. When statutory language is plain, the courts must enforce the statute according to its terms.[242] Unfortunately, the "sex" language in Title

234. *See id.* at 1374.

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

236. *See infra* notes 266-84 and accompanying text (discussing the interaction of gender and sexual orientation in sexual harassment claims).

237. *See* Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192 (1st Cir. 1990); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

238. *See* McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1995).

239. *See* Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring).

240. *See* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989).

241. *See Wrightson*, 99 F.3d at 141.

242. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917).

VII, coupled with its sparse legislative history, offers little if any guidance.[243] In *Wrightson*, the Fourth Circuit determined that the perpetrator and victim of the harassment may be of either sex, and may in fact, be the same sex.[244] The Fourth Circuit does have support from other courts for this conclusion.[245] In fact, one commentator has argued that "[n]othing in the statute's plain language, its legislative history, or the U.S. Supreme Court's interpretation indicates that Title VII's coverage of sexual harassment is restricted to situations where the victim and the harasser are members of different genders."[246]

Just as the confusion may be partially attributed to the language of the statute, the solution may lie in the history of the claim itself. The origin and development of sexual harassment is richer than the plain language of the statute and its legislative history.[247] While the *Wrightson* court did not consider this basic history of sexual harassment directly, that history can still be used to illuminate the theoretical viability of the same-sex sexual harassment claim under Title VII as announced by *Wrightson*. According to the power theory of sexual harassment, "sexual harassment stems from the imbalance of power between men and women in society."[248] Thus, sexual

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243. *See supra* notes 80-85 and accompanying text. At least one commentator has recognized this lack of legislative history as a source of the conflict in the federal courts over same-sex sexual harassment. *See* Levay, *supra* note 82, at 1613 ("The conflicting positions are likely due, in part, to the shortage of legislative history available to guide the courts.").

244. *See Wrightson*, 99 F.3d at 142.

245. *See* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (arguing that one may not discriminate against a man or woman solely because of gender); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995) (stating that Title VII does not require that the perpetrator and the victim of sexual harassment be of different genders); McCoy v. Johnson Controls World Serv., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (same); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (same).

246. Murphy, *supra* note 115, at 1137.

247. *See supra* notes 101-14 and accompanying text (discussing the influence of Catharine MacKinnon and her theories of sexual harassment).

248. Woodhouse, *supra* note 73, at 1153. Professor Katherine T. Bartlett, one reviewer of Catharine MacKinnon's power theory, has summarized it in this way:

> Her theory is this: men have power over everything of value in society, even the power to decide what has value and what does not. Men use this power systemically to shape and define the social beings we call men and women in ways which enhance the power of men and keep women subordinate to men. How men have constructed the relationship between men and women in turn shapes and constructs society as a whole such that each of its constitutive parts—its law, its institutions, the private relationships it fosters—is organized hierarchically by sex.

Katherine T. Bartlett, *Review of MacKinnon's Feminism: Power on Whose Terms?*, 75

harassment is the use of this power " 'to impose ... the sexual demands or pressures on an unwilling but less powerful person.' "[249] In same-sex sexual harassment, when the harasser and the victim are of the same sex, the power imbalance apparently no longer stems from the power imbalance between men and women.[250]

The question then becomes whether this lack of male-female power imbalance should be fatal to a same-sex sexual harassment claim.[251] For the Fourth Circuit, it apparently was not. By allowing a same-sex sexual harassment claim, the Fourth Circuit rejected this single-faceted interpretation of the power theory justification for the viability of a claim.[252] There are several arguments to support the Fourth Circuit's apparent conclusion that the power theory is not necessarily single-faceted. One argument asserts that "males, as well as females, can claim that they are victims of the stereotypical roles impressed upon them by a society that has historically repressed women."[253] Thus, males as well as females can claim that their

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CAL. L. REV. 1559, 1559 (1987) (reviewing MACKINNON, FEMINISM UNMODIFIED, *supra* note 105).

249. Woodhouse, *supra* note 73, at 1153 (quoting Note, *supra* note 110, at 1451).

250. *See* Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). In *Goluszek*, the court stated that the sexual harassment that is actionable under Title VII " 'is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.' " *Id.* (quoting Note, *supra* note 110, at 1451-52). The court found that no claim existed because the male plaintiff did not work in an environment that treated men as inferior and thus was not harassed "because of sex." *See id. See generally* Grose, *supra* note 101, at 383 (describing more fully the *Goluzsek* opinion and its relation to the power theory).

251. In *Goluszek*, the court found the power issue to be very important as the court determined that Congress had enacted Title VII because Congress was concerned with "an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group." *Goluszek*, 697 F. Supp. at 1456. In the case of a male harassed in a male-dominated environment, no imbalance of power exists; thus, there is no Title VII action. *See id.*

252. E. Gary Spitko asserts that the split between courts that find a cause of action for same-sex sexual harassment and those that do not can be directly connected to Professor MacKinnon's theories. *See* Spitko, *supra* note 73, at 66. Spitko argues that courts using a "but for" test have followed Professor MacKinnon's differences theory because they find that the victim is treated *differently* but for his or her sex. *See id. Wrightson* is an example of this reasoning. On the other hand, the courts that have not found a cause of action for same-sex sexual harassment have followed Professor MacKinnon's inequality theory, reasoning that same-sex sexual harassment "does not degrade the victim on the basis of his or her sex." *Id.* at 66-67.

253. Woodhouse, *supra* note 73, at 1169. "[M]en 'are forced always to maintain an aura of invincibility and machismo; to shoulder responsibility for dependent women and children; to be enslaved to economic necessity for most of their adult lives; and to die early for their efforts.' " *Id.* (quoting Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 348 (1990)).

harassment stems from the male-female power imbalance.[254]

Another argument is based upon the recognition that the courts, in setting out the requirements of a sexual harassment claim, have never required a claim to state that a dominant group discriminated against a disempowered one.[255] Therefore, the power theory may be relevant only as historical fact and not as legal necessity. In parallel support of this hypothesis, the Supreme Court has ruled that it is immaterial whether the discrimination is against majorities or minorities in cases concerning religion and race.[256] If this were untrue, men and whites could not win discrimination cases, when in fact they do.[257] Furthermore, courts do not require social disempowerment as an element of sexual harassment.[258]

Finally, an argument can be made that power continues to play a role in same-sex sexual harassment. While, as discussed above, the power relationship may be practically unnecessary to prove a Title VII claim, it does tie the same-sex sexual harassment issue to its feminist roots and the original theoretical arguments for sexual harassment. One commentator has argued that in the same-sex sexual harassment context, "[t]he only power involved may be that of sheer force or manipulation," but that such power should be

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254. *See id.*

255. *See* Murphy, *supra* note 115, at 1140-42.

256. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71-72 (1977) (holding, in a case involving discrimination on the basis of religion, that Title VII prohibits discrimination against both minorities and majorities); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding, in a race discrimination case, that by enacting Title VII, Congress intended to prohibit discriminatory preferences for any group, majority or minority).

257. *See* Murphy, *supra* note 115, at 1140-41. In fact, Professor Ruth Colker has argued that men and whites actually have an easier burden in discrimination suits than their less empowered counterparts. *See* Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195, 197-98 (1995). In the area of race, for example, Professor Colker notes that "[c]omparing discrimination cases brought by minorities and reverse discrimination cases brought by non-minorities reveals that courts are exceedingly strict with determination of causation in the former, but quite generous with determination of causation in the latter." *Id.* at 217. Similarly, in the area of sexual harassment, she concludes that women with heterosexualized claims have the best chance of winning. *See id.* at 205.

258. *See* Murphy, *supra* note 115, at 1141. For example, in the Fourth Circuit, hostile work environment sexual harassment can be shown by proving: "(1) that [an employee] was harassed 'because of' his 'sex'; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer." *Wrightson*, 99 F.3d at 142.

adequate for a Title VII claim based on an imbalance of power.[259] More importantly, feminist writers themselves have recognized that power imbalances can exist beyond male dominance. For example, Professor MacKinnon noted that "[a] woman who is fired because of her refusal to submit to a lesbian supervisor is just as fired—and her firing is just as related to her gender—as if the perpetrator were a man."[260] That is, "women who have assumed traditional male power roles behave like men."[261] Thus, for Professor MacKinnon, it appears that a same-sex sexual harassment claim would be viable even under the power theory.[262]

However, not all legal theorists are as willing to see the power theory as multi-faceted in order to support same-sex sexual harassment. One theory is that power imbalances between men and women are intrinsically different from other power imbalances in the workplace.[263] Carolyn Grose argues even more strongly that if women "insist that 'harassment' of women by women on the job is a form of gender discrimination because the women harassers have assumed positions of male superiority, we serve only to entrench our subordination and deny any alternative reality we might experience free from our relationships with men."[264]

Because the *Wrightson* court found a claim for same-sex sexual harassment, it presumably either followed the reasoning that power is not a necessary part of the sexual harassment theory or merely concluded that a power imbalance did indeed exist in the case.[265] As in Professor MacKinnon's woman-on-woman example, courts faced with man-on-man harassment could argue that the male harassers place the male victim in the position of the female and thus create a

259. Shahan, *supra* note 73, at 527.

260. MACKINNON, *supra* note 101, at 206.

261. Grose, *supra* note 101, at 384. Grose, however, argues that Professor MacKinnon's theory leaves out the lesbian experience and thus fails to recognize that in a workplace (or relationship) with no men, the power dynamics between women would be much different. *See id.* at 384-85.

262. Professor MacKinnon clearly asserted this viewpoint when E. Gary Spitko requested her opinion on his article. *See* Spitko, *supra* note 73, at 72 n.79. She responded that same-sex sexual harassment is harassment on the basis of sex. *See id.* For her criticism of his theory, see *id.*

263. *See* Woodhouse, *supra* note 73, at 1168 ("Persons of the same gender usually do not suffer from the same imbalance of power that is present between males and females.").

264. Grose, *supra* note 101, at 385.

265. The court did not discuss this issue, but its decision to allow the claim will certainly be interpreted to have some implications for the role of power in sexual harassment cases.

power imbalance. Or the courts could assert that the power stems from the ability to manipulate the employment environment and that alone it is adequate to state a claim.

Besides the power theory of sexual harassment, the concept that sexual harassment is a group injury,[266] with women traditionally being the injured group, must also be overcome in the case of same-sex sexual harassment, either because women are not the injured group (men-on-men) or because women are both the injured group and the perpetrator of the injury (women-on-women).[267] However, while theoretically based on a premise of group injury, Title VII focuses on the individual bringing the claim.[268] Moreover, the Supreme Court has stated that discrimination does not have to be directed at an entire group, but rather at the individual.[269] Therefore, the group injury theory is not likely to be fatal to finding a same-sex sexual harassment claim under Title VII.

Thus, while it is debatable whether *Wrightson* adhered to Professor MacKinnon's original theory of sexual harassment, it would appear that any deviations from the theory would be unlikely to preclude a same-sex sexual harassment claim under Title VII. That is, the development of sexual harassment doctrine in the courts can permit the expansion of the theoretical underpinnings of sexual harassment to include same-sex sexual harassment.[270]

The *Wrightson* decision, however, does produce some controversy. *Wrightson*'s conclusion that the existence of a same-sex

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266. *See supra* notes 112-14 and accompanying text (discussing the salience of group injury to sexual harassment).

267. *See* Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (ruling against a man who claimed discrimination in a male-dominated working environment).

268. *See* 42 U.S.C. § 2000e-2(a)(1) (1994); *see also supra* notes 78-85 and accompanying text (discussing the statutory requirements).

269. *See* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (finding the statute's focus on the individual to be "unambiguous"); Murphy, *supra* note 115, at 1142-44 (noting that the Court has stated that it cannot be presumed as a matter of law that an individual of one group will not discriminate against members of that same group).

270. *See, e.g.*, Susan Silberman Blasi, *The Adjudication of Same-Sex Sexual Harassment Claims Under Title VII*, 12 LAB. LAW. 291, 293 (1996) (arguing that same-sex sexual harassment should be recognized because it is discrimination based on sex); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 761 (1997) (starting with Professor MacKinnon's anti-subordination principles and expanding them to encompass same-sex sexual harassment under Title VII because social subordination touches both men and women); Shahan, *supra* note 73, at 527 ("Courts should continually strive to fulfill the purposes of Title VII and hold persons liable for sexual harassment regardless of whether the victim is of the opposite sex or of the same sex and regardless of the person's sexual orientation.").

sexual harassment claim is dependent on the sexual orientation of the perpetrator creates problems for homosexuals seeking remedies under Title VII. Since the statute does not prohibit harassment because of sexual orientation,[271] people may not sue if they were harassed because of their heterosexuality or homosexuality. Furthermore, *Wrightson* provides support for a Title VII same-sex sexual harassment claim only when the harasser is homosexual and the victim is heterosexual.[272] Thus, the Fourth Circuit has placed homosexuals and lesbians in a precarious situation. They have no claim for harassment based on their sexual orientation, but they can be liable for sexually harassing a heterosexual. In contrast, under *Wrightson*, a heterosexual could not be found liable for the same-sex sexual harassment of another heterosexual or homosexual. As a result,

> [p]laintiffs who are gay or appear to be gay will lose because the court will view their harassment as "based on sexual orientation" and therefore not covered by Title VII. Plaintiffs who are straight or appear to be straight will win because the court will view their harassment as "based on gender" and therefore covered by Title VII.[273]

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271. *See supra* note 96 and accompanying text.

272. The court does not expressly state that the victim must be heterosexual, but in *Wrightson* the victim was heterosexual. *See Wrightson*, 99 F.3d at 139. The Fourth Circuit held in *McWilliams* that no Title VII cause of action exists to redress heterosexual-on-heterosexual harassment. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir.) (rejecting a claim of harassment by a heterosexual on a heterosexual of the same sex), *cert. denied*, 117 S. Ct. 72 (1996); *see also supra* notes 120-31 and accompanying text (discussing *McWilliams*).

273. Grose, *supra* note 101, at 388; *see also* Colker, *supra* note 257, at 206-07 (asserting that existing case law allows recovery only for heterosexuals who are harassed homosexually, but not for homosexuals harassed by the same methods, even with the same words).

Indeed, the only way to rationalize the *Wrightson* court's reasoning without using the split logic that Grose has highlighted may be to consider the Fourth Circuit as having adopted a "because of sexual orientation" test for same-sex sexual harassment under Title VII—at least "because of the harasser's sexual orientation." However, such a test could clearly produce some difficulties. First, one can easily imagine cases in which the sexual orientations of the parties would be difficult to determine. Next, both heterosexual-on-heterosexual and homosexual-on-homosexual harassment would go unrecognized because in those cases the sexual orientation of both the perpetrator and the victim would be the same. Finally, in order to adhere completely to a "because of sexual orientation" test, it seems that the Fourth Circuit would have to recognize a cause of action for heterosexual-on-homosexual harassment. If the court were ever presented with such a case and declined to recognize a cause of action, its split logic—with all its inequities—would be dramatically revealed. Therefore, by conditioning its recognition of same-sex sexual harassment on the sexual orientation of the harasser, the Fourth Circuit may have created new issues that it will have to confront in future decisions.

The possible result of the type of decision in *Wrightson* is "perpetuat[ion of] an atmosphere of homophobia in the workplace, while providing no protection for the victims of such an atmosphere."[274] In fact, Carolyn Grose argues that in same-sex sexual harassment cases when a heterosexual acts sexually toward another heterosexual, courts reason that no sexual harassment occurred, only that " 'boys will be boys' "; but when a homosexual acts sexually toward a heterosexual, then courts conclude that sexual harassment has occurred.[275] "In order to be eligible for protection, then," she states, "plaintiffs and harassers must conform to the legal system's idea of 'normal' sexuality and sexual interaction: heterosexuality."[276]

This result should not be surprising because courts have consistently dealt with the issue of sex and gender in a different way than they have dealt with sexual orientation.[277] Professor Ruth Colker has asserted that sexual harassment doctrine "has narrowed to include only heterosexualized claims."[278] According to I. Bennett Capers, this apparent heterosexist bias in Title VII is troubling because it reinforces the problem of male dominance in society.[279] He has explained that "a male dominated society objects to male homosexuality because it is threatened by fragmentations in the male

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274. Grose, *supra* note 101, at 385-86.

275. *Id.* at 390-92; *see also* Pamela J. Papish, *Homosexual Harassment or Heterosexual Horseplay? The False Dichotomy of Same-Sex Sexual Harassment Law*, 28 COLUM. HUM. RTS. L. REV. 201, 220 (1996) (noting that male-on-male harassment committed by heterosexual males is trivialized as horseplay, while similar conduct by homosexual males is considered sexual harassment).

276. Grose, *supra* note 101, at 393. Grose contends that the need to conform to heterosexuality in order to get Title VII protection is just one example of the domestication of homosexuals. *See id.* at 394-95 (listing examples). Domestication occurs "when the values of the dominant, legal, society become 'so internalized that they are considered to be common sense.' " *Id.* at 394 (quoting Ruthann Robson, *Incendiary Categories: Lesbians/Violence/Law*, 2 TEX. J. WOMEN & L. 1, 30 (1993)). Other examples include marriage, domestic violence, and child custody preferences. *See id.* at 394-96.

277. *See id.* at 378. *See generally Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (surveying the rights that gay men and lesbians are not afforded).

278. Colker, *supra* note 257, at 199. Bisexual harassers create additional problems and complexities. *See supra* notes 211-26 and accompanying text (describing cases both allowing and disallowing bisexual liability under Title VII); *see also* Levitsky, *supra* note 226, at 1027-30 (discussing the loophole for bisexuals suggested in *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977), and the general inadequacies of Title VII sexual harassment standards).

279. *See* Capers, *supra* note 85, at 1163-67. Heterosexism reinforces sexism by penalizing those who do not conform to the bipolar gender system and rewarding those who do, and it subordinates women through the male-dominated hierarchical society. *See id.* at 1162-63.

role that could lead to less male dominance, less male power."[280] Similarly, lesbianism threatens male-dominated society by asserting that a woman's sexuality does not exist only for men.[281] Along these lines, Carolyn Grose concludes that if the state regulates same-sex sexual harassment, then the state's power to delimit legitimate sex is strengthened.[282] The court's ability to define legitimate and illegitimate kinds of sex could be the result of regulation based on a *Wrightson* paradigm.

Besides these dangers, the *Wrightson* decision also has the potential to produce practical problems for homosexual workers. In the Fourth Circuit, there is no federal law proscribing discrimination based on sexual orientation, and only homosexuals may be liable for same-sex sexual harassment. E. Gary Spitko argues that "the incongruence ... provides a powerful financial incentive to employers to discriminate against gay men and lesbians."[283] Specifically,

> [a]lthough federal law would not protect gay men and lesbians from such employment discrimination based on their sexual orientation, their potential employers would face an increased likelihood of liability for alleged same-sex sexual harassment, relative to the likelihood of liability for an allegation of comparable mixed-sex sexual harassment. Thus, the employer would be prudent, all other factors being equal, to refuse to employ gay people—an option that remains legal under federal law.[284]

Thus, the *Wrightson* decision to base actionability on sexual orientation is not without troublesome consequences.

There are at least two possible solutions to this problem. The more radical of the two solutions would deny same-sex sexual harassment claims under Title VII until passage of a statute "that provides protection for lesbians and gay men because they are lesbians and gay men, not because they have been harassed by lesbians and gay men."[285] As long as Title VII does not prohibit discrimination based on sexual orientation but does prohibit same-sex sexual harassment, homosexuals and lesbians are

280. *Id.* at 1165.
281. *See id.*
282. *See* Grose, *supra* note 101, at 397.
283. Spitko, *supra* note 73, at 73.
284. *Id.* at 73-74.
285. Grose, *supra* note 101, at 397.

disadvantaged.[286] If no same-sex sexual harassment claims were allowed, then homosexuals and lesbians would be in no worse a position than heterosexuals as far as Title VII was concerned: homosexuals could not sue if they were harassed because they are homosexual, and heterosexuals could not sue if they were harassed by a homosexual of the same sex. Once a federal law was passed to prohibit harassment based on one's sexual orientation, then an action for same-sex sexual harassment under Title VII could be considered more seriously.[287] At that point, homosexuals would approach "equal footing" with heterosexuals as the heterosexist bias in current Title VII jurisprudence already protects heterosexuality.[288]

The other potential solution, in opposition to *Wrightson*, would allow courts to consider same-sex sexual harassment without considering the sexual orientation of either the harasser or the victim.[289] This approach would remove the intrusive and complicated need to prove sexual orientation in court.[290] Moreover, it would reinforce the power theory of sexual harassment by recognizing that "victimization is not always motivated by attraction; harassment frequently involves issues of power and control on the part of the harasser."[291]

The first position, that no same-sex sexual harassment claims should be recognized until a statute proscribing harassment because of sexual orientation is passed, would come full circle if such a statute was actually passed. However, a more feasible alternative might be to create a neutral law under which both heterosexuals and homosexuals could face same-sex sexual harassment charges. Such a law would at least eliminate the problem generated by the *Wrightson* court—that only homosexuals are subject to liability for same-sex

286. *See* Spitko, *supra* note 73, at 80 ("[I]ncreased exposure to liability, coupled with de jure immunity for the employer who refuses to employ a gay person, provides a powerful incentive to the employer, all other factors being equal, to prefer to employ the non-gay candidate over the gay candidate.").

287. *See id.* at 78 (noting that sexual orientation discrimination fits easily under the but-for test of sexual discrimination because but for his sex, a gay man would not be discriminated against for having a romantic interest in another man).

288. More specifically, the "reasonable person" used in sexual harassment claims reflects the community's standards and ideals and thus, often "is ideally suited for subordinating sexual minorities who do not conform to the majority's norms." *Id.* at 82.

289. *See* Murphy, *supra* note 115, at 1147; *see also* Colker, *supra* note 257, at 204 ("If sexual advances are gender-based because they are intended to demean and objectify the victim, then whether the source of the attraction is heterosexuality or homosexuality should be irrelevant.").

290. *See* Murphy, *supra* note 115, at 1147.

291. *Id.*

sexual harassment. Even this solution, however, has critics, and some commentators question whether the heterosexist bias is so strongly embedded in Title VII jurisprudence that homosexuals would be the only ones facing same-sex sexual harassment litigation, regardless of the law's apparent neutrality.[292]

As long as there are no statutes protecting homosexuals from harassment,[293] then courts appear to be faced with the choice of (1) creating a *Wrightson* remedy that limits the potential harassers to homosexuals and thus potentially perpetuates homophobia;[294] (2) denying any same-sex sexual harassment coverage, which may allow harassment to continue in the workplace;[295] or (3) finding a focus other than sexual orientation on which to determine the viability of same-sex sexual harassment claims.[296]

As courts like the Fourth Circuit explore how to determine the viability of same-sex sexual harassment claims under Title VII, they should determine whether same-sex sexual harassment is really discrimination. This inquiry is key because if same-sex sexual harassment is not discrimination, then Title VII should not cover it.[297] The debate may rest on whether the injury is based on group injury or individual injury.[298] Under the group theory, "discrimination can be defined as 'harming someone or denying someone a benefit because that person is a member of a group that the discriminator despises.' "[299] This definition does not work with same-sex sexual harassment because the harasser, being part of the same group as the victim, would be unlikely to want to harm its members.[300] The sheer

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292. *See, e.g.*, Grose, *supra* note 101, at 396-97. Grose asks, "[a]s long as Title VII does not prohibit discrimination on the basis of sexual orientation, why should we trust the legal system to apply Title VII to same-sex sexual harassment in anything but a discriminatory and heterosexist way?" *Id.* at 397. Under this solution, moreover, Spitko's assertion that employers will hire heterosexuals over homosexuals due to potential sexual harassment claims would still be valid because of the unavailability of an action for discrimination on the basis of sexual orientation and because of the persistence of the heterosexist bias that punishes those not conforming to heterosexuality. *See* Spitko, *supra* note 73, at 73-74.

293. *See* Stone-Harris, *supra* note 73, at 315-24 (urging the legislature to adopt the proposed Employment Non-Discrimination Act, which would prohibit discrimination on the basis of sexual orientation).

294. *See supra* notes 274-76 and accompanying text.

295. *See infra* note 334 and accompanying text.

296. *See infra* notes 303-10 and accompanying text.

297. *See* Woodhouse, *supra* note 73, at 1171.

298. *See supra* notes 266-69 and accompanying text.

299. Woodhouse, *supra* note 73, at 1171 (quoting Paul, *supra* note 253, at 352).

300. *See id.* Of course, the assertion that members of the same group would not harm one another would not be true for the homosexual-on-heterosexual harassment because

lewdness and excessive sexual behavior of the fact patterns that the courts have faced, however, make this conclusion questionable.[301] That is, according to the victims' allegations in the same-sex sexual harassment cases presented thus far, the harassers have appeared to intend to harm, both physically and emotionally, members of their own sex.[302] At the very least, this is how the victims interpreted the actions and were affected by them.

By inquiring into the motives of the harasser and not the impressions of the victim, the courts may be refusing to recognize that "[t]here is no reason to believe that the severity of sexual harassment is diminished because the victim and perpetrator are of the same gender."[303] This realization has led some commentators to conclude that analysis of such discrimination under Title VII should focus on the treatment of the victim, not the motivation behind the treatment.[304] As one commentator suggested, "[f]ederal judges should ... reduce the heightened scrutiny they now place on the causation element of a sexual harassment claim and pay closer attention to the actual conduct, and its effect on victims of harassment ...."[305] This would eliminate the need for a judge to differentiate between "but for," "because of," and "based on" in Title VII cases.[306] Simply put, "[i]f the conduct was discriminatory and unwelcome, and if it fulfills all the elements of a prima facie sexual harassment case, it falls within the purview of Title VII."[307] This focus realizes that "[u]nwelcome sexual advances, ridicule, intimidation, and other harassing acts are no less injurious and degrading to someone of the harasser's same gender than they are to

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they would be members of two distinct groups. *See id.*

301. *See, e.g.*, Quick v. Donaldson Co., 90 F.3d 1372, 1374 (8th Cir. 1996) (describing incidents in which an employee's testicles were grabbed and squeezed by other employees); Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-19 (5th Cir.) (involving an employee who endured threats of homosexual rape from co-workers and a bar of soap forced into his anus), *reh'g and suggestion for reh'g en banc denied*, 95 F.3d 56 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193-94 (4th Cir.) (stating that male co-workers tied down McWilliams and placed a finger in his mouth to simulate oral sex and fondled him on another occasion), *cert. denied*, 117 S. Ct. 72 (1996).

302. *See, e.g.*, *Quick*, 90 F.3d at 1374; *Oncale*, 83 F.3d at 118-19; *McWilliams*, 72 F.3d at 1193-94; *see also supra* notes 121, 162-64, 194 and accompanying text (discussing the facts of those cases in detail).

303. Levay, *supra* note 82, at 1632.

304. *See id.*; Murphy, *supra* note 115, at 1145-47; Papish, *supra* note 275, at 233-34.

305. Papish, *supra* note 275, at 233.

306. *See supra* notes 227-40 and accompanying text (discussing how the circuit courts have considered these causation terms).

307. Murphy, *supra* note 115, at 1145.

an individual of the opposite gender."[308] Sexual orientation could perhaps have a role in this paradigm as well, but it would not be an element of the cause of action, as *Wrightson* has mandated.[309] Instead, sexual orientation could be used to show how the perpetrator acted or to show the effect of the harassment on the victim. On the other hand, one commentator has suggested that sexual orientation could be completely irrelevant if courts focused only on the conduct and the victim's reactions to it.[310]

A number of other commentators have offered suggestions on how to handle the same-sex sexual harassment issue, but none thus far has found that only homosexuals should be liable, as *Wrightson* did. Some commentators have proposed expanding the meaning of sex and sexual harassment in order to facilitate a fairer adjudication of same-sex sexual harassment. For example, Regina L. Stone-Harris has proposed adopting a broader definition of "sex," along with "focusing on the alleged misconduct before applying the 'but for' test."[311] Stone-Harris suggests that sex should mean "sex-related."[312] Along the same lines, Samuel Marcosson argues that sexual-orientation discrimination should be actionable under Title VII, and he states that harassment that is of a sexual nature, but not sex-based, should also be actionable.[313]

While some commentators offer solutions involving expansion of the definition of sexual harassment, at least one commentator has concluded that no same-sex sexual harassment actions should lie under Title VII because the court has used the action in a manner that discriminates against homosexuals.[314] In his article, E. Gary Spitko accuses the courts of defining "sex" in a heterosexist and homophobic manner.[315] He maintains that homosexuals, both perpetrators and victims, are held to a different standard than heterosexuals in sexual harassment cases.[316] First, homosexuals are

308. *Id.* at 1146.

309. *See* Papish, *supra* note 275, at 233 (relying on Judge Michael's dissent in *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1198 (4th Cir.) (Michael, J., dissenting), *cert. denied*, 117 S. Ct. 72 (1996), as appropriately characterizing the place of sexual orientation in the Title VII cases).

310. *See* Murphy, *supra* note 115, at 1147.

311. Stone-Harris, *supra* note 73, at 311.

312. *See id.* at 312.

313. *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 23-25 (1992).

314. *See* Spitko, *supra* note 73, at 96.

315. *See id.* at 79-80.

316. *See id.* at 81-89.

subjected to the ubiquitous "reasonable person" standard, which does not account for their sexual orientation.[317] Second, he asserts that homosexuals involved in same-sex sexual harassment will be further harmed by society's heterosexism because society condones and values actions by heterosexuals while condemning the same actions "when engaged in by a gay person."[318] While Spitko did not consider *Wrightson*, his arguments are bolstered by the court's decision. That is, the Fourth Circuit, by naming homosexuals as the only potential tortfeasors in a Title VII same-sex sexual harassment claim, may be doing outright what Spitko believes most courts have done behind closed doors: revealing a preference for heterosexuality and heterosexism.[319] In fact, Judge Murnaghan, the dissenting judge in *Wrightson*, called the Fourth Circuit's decision to hold homosexuals and not heterosexuals liable for same-sex sexual harassment "more discriminatory" than finding no cause of action at all.[320]

As the Supreme Court considers the *Oncale* case, it will attempt to resolve the same-sex sexual harassment dilemma under Title VII and perhaps decide which result is more discriminatory—no cause of action, or a cause of action against only homosexuals.[321] At this point, the circuit courts are in a state of confusion and the law is certainly in need of guidance.[322] The Supreme Court's consideration of the *Oncale* case, however, may not provide that guidance. As the Eleventh Circuit recognized in *Fredette*, the Fifth Circuit's same-sex sexual harassment decisions in *Garcia* and later in *Oncale* do not provide a great deal of reasoning. The Eleventh Circuit concluded

317. *See id.* at 82-84 (analogizing the need for a reasonable homosexual standard to the need for a reasonable woman standard in sexual harassment cases).

318. *Id.* at 85. Spitko uses the example of a 1995 broadcast of the "Jenny Jones" television talk-show that resulted in murder. *See id.* at 86. The show, featuring secret admirers, included a homosexual man, Scott Amedure, who "revealed his attraction" for his neighbor, Jonathan Schmitz. *Id.* A few days later, Schmitz murdered Amedure because of the incident on the show. *See id.* Spitko notes that the press coverage focused almost entirely on the partial blame of the television show for humiliating Schmitz, while Amedure's death was hardly discussed. *See id.* at 87-88. Spitko concludes that " '[t]he sole reason that everyone is discussing Schmitz's "humiliation" with such ease is that homophobia is so common in this country as to be considered normal.' " *Id.* at 88 (quoting Robin Kane, *Perspectives on Homophobia; Hate, Not Humiliation, Is at Fault*, L.A. TIMES, Mar. 16, 1995, at B7). Spitko questions whether "a jury would excuse" a murder in response to a heterosexual advance. *See id.* at 89. He is convinced the answer is no. *See id.*

319. *See id.* at 79-80.

320. *Wrightson*, 99 F.3d at 145 (Murnaghan, J., dissenting).

321. *See supra* notes 201-02 and accompanying text.

322. *See supra* notes 143-241 and accompanying text.

that "[t]he *Garcia* holding was the last of several independent and alternative holdings and was accompanied by no reasoning whatsoever. *Oncale* also provided no rationale to support the holding . . . ."[323] Thus, how the Supreme Court will approach the case and how it will approach same-sex sexual harassment generally are difficult to predict. Moreover, whether the judiciary can properly accept this policy-making role is uncertain. As one court stated, " '[A] court must be wary where meaning is sought to be derived from other than specific language, lest what professes to be mere rendering becomes creation.' "[324] Making policy is the role of elected representatives, and " ' "it is their privilege to act wisely or unwisely or not to act at all." ' "[325] With Title VII, both the statutory language and legislative history give the courts little guidance.[326] Furthermore, legislators may be in a better position to create a broad, comprehensive solution that could serve the needs of more groups rather than adjudicating claims one by one.[327]

While the legislature may be in a better position to act, there is a pressing and immediate need for uniformity. Currently, whether a person has a viable claim for same-sex sexual harassment under Title VII depends on where that person files a claim.[328] The Supreme Court has taken a large step by granting certiorari in the *Oncale* case and is poised to take an even greater one when it issues its decision.[329] Perhaps it will answer some of the same-sex sexual harassment questions, or at least encourage Congress to do so. Meanwhile, the circuit courts will continue to decide cases in a piecemeal fashion.

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323. Fredette v. BVP Management Assocs., 112 F.3d 1503, 1508 (11th Cir. 1997).

324. Levay, *supra* note 82, at 1628-29 (quoting *In re* Shear, 139 F. Supp. 217, 221 (N.D. Cal. 1956)).

325. *Id.* (quoting *In re* Shear, 139 F. Supp. at 221, 223 (quoting Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 253 (1946))).

326. *See supra* notes 80-85 and accompanying text.

327. *See Same Sex Harassment*, WASH. POST, Oct. 9, 1996, at A18 ("[L]egislators can best sort out the distinctions between same-sex harassment that involves jokes about sex . . . from assaultive same-sex harassment inflicted specifically because of the victim's gender and that should be punished as such.").

328. *See supra* notes 120-241 and accompanying text (detailing the complex and confusing circuit opinions).

329. *See supra* notes 201-02 and accompanying text. In light of the Court's recent decision to strike down Colorado's Amendment 2—a measure that prohibited the enactment of any law that would protect homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships—as violative of the Equal Protection Clause of the Fourteenth Amendment, *see* Romer v. Evans, 116 S. Ct. 1620, 1622 (1996), the Court may be prepared to approach the sexual orientation issues involved in same-sex sexual harassment. For a recent analysis of *Romer*, see William M. Wilson, Note, Romer v. Evans: *"Terminal Silliness," or Enlightened Jurisprudence?*, 75 N.C. L. REV. 1891 (1997).

Overall, the Fourth Circuit has taken a distinctive stand by limiting Wrightson's claim for same-sex sexual harassment to situations in which a homosexual is the harasser, and in this case, when the target is a heterosexual of the same sex.[330] While *Wrightson*'s recognition of this limited subset of same-sex sexual harassment claims can benefit victims by recognizing a cause of action for their harassment, it has troubling implications for homosexuals.[331] Following *Wrightson*, the clear conclusion is that only homosexuals can be found liable for same-sex sexual harassment.[332] Under Title VII, more generally, homosexuals have no cause of action if they are harassed because of their sexual orientation.[333] They lose twice. Unfortunately, there is no easy solution to this problem.

If the courts determine that same-sex sexual harassment differs too fundamentally from sexual harassment theory or that using same-sex sexual harassment will be too detrimental to homosexuals, then they may rule that no same-sex sexual harassment claims will lie under Title VII. This would result in a denial of civil rights, a denial of a Title VII remedy, and a potential for the continuation of wrongs in the workplace.[334] A number of tort remedies would still exist for the victims,[335] but because "there is no reason to believe that the severity of sexual harassment is diminished because the victim and perpetrator are of the same gender, and there are no valid interests to be protected by allowing sexual harassment to continue in the workplace,"[336] limiting Title VII may not be the best answer.[337] Ellen

330. *See supra* notes 38-63 and accompanying text (explaining the *Wrightson* majority's reasoning).

331. *See supra* notes 271-84 and accompanying text.

332. *See Wrightson*, 99 F.3d at 141.

333. *See supra* notes 96, 271-84 and accompanying text.

334. *See* Murphy, *supra* note 115, at 1126.

335. *See* Ruth C. Vance, *Workers' Compensation and Sexual Harassment in the Workplace: A Remedy for Employees, or a Shield for Employers?*, 11 HOFSTRA LAB. L.J. 141, 150-51 (1993) (noting that the causes of action for sexual harassment besides Title VII include the torts of negligent hiring, negligent retention, intentional infliction of emotional distress, assault, battery, invasion of privacy, intentional interference with a contract, and fraud and deceit); Woodhouse, *supra* note 73, at 1181-84 (discussing use of intentional infliction of emotional distress, other types of tort remedies, and damages otherwise available); *see also Wrightson*, 99 F.3d at 144 (Murnaghan, J., dissenting) ("State causes of action for assault, assault and battery, and intentional infliction of emotional distress readily come to mind.").

336. Levay, *supra* note 82, at 1632.

337. The tort claims available to victims of sexual harassment have significant limitations. First, the majority of the torts are brought against employers based on agency theories and thus the harasser's tortious act must be committed within the scope of

Frankel Paul offers a guide to the courts and the legislature when she writes, "[t]he law is supposed to look to acts, whether criminal or tortious, to determine culpability and not to the individual characteristics of the perpetrators: that is precisely what is meant by the rule of law."[338]

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employment. *See* Vance, *supra* note 335, at 151. Second, an action for intentional infliction of emotional distress requires the plaintiff victim to demonstrate that the defendant engaged in extreme behavior beyond what is necessary for a prima facie case of sexual harassment under Title VII. *See* Spitko, *supra* note 73, at 58. Finally, in approximately half of the states, workers' compensation statutes are the exclusive remedy for sexual harassment. *See id.* at 59. Liability under workers' compensation laws is usually significantly less than under Title VII, and workers' compensation does not allow recovery for punitive or fully compensatory damages. *See id.*

338. Paul, *supra* note 253, at 351.