

2014

I Don't Know the Question, But Sex Is Definitely the Answer: The Over-simplification of Same-sex Sexual Harassment since *Oncale v. Sundowner Offshore Services, Inc.*

Kaitrin Vohs

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Vohs, Kaitrin (2014) "I Don't Know the Question, But Sex Is Definitely the Answer: The Over-simplification of Same-sex Sexual Harassment since *Oncale v. Sundowner Offshore Services, Inc.*," *William Mitchell Law Review*: Vol. 40: Iss. 4, Article 12.
Available at: <http://open.mitchellhamline.edu/wmlr/vol40/iss4/12>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**“I DON’T KNOW THE QUESTION, BUT SEX IS
DEFINITELY THE ANSWER”¹: THE OVER-
SIMPLIFICATION OF SAME-SEX SEXUAL HARASSMENT
SINCE *ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.***

Kaitrin Vohs[†]

I. INTRODUCTION.....	1612
II. BRINGING A CLAIM UNDER TITLE VII.....	1613
III. HISTORY OF TITLE VII.....	1615
A. <i>Inclusion of Sex Discrimination</i>	1615
B. <i>Inclusion of Sexual Harassment Based on Hostile Work Environment</i>	1616
C. <i>Inclusion of Same-Sex Sexual Harassment</i>	1618
IV. EMERGING CIRCUIT SPLIT.....	1621
A. <i>Narrow Reading of Oncale</i>	1621
B. <i>Broad Readings of Oncale</i>	1623
C. <i>Ambiguous Readings of Oncale</i>	1624
V. ARGUMENT.....	1626
A. <i>Looking to the Oncale Decision for Direction</i>	1627
B. <i>What Constitutes Behavior “Because of Sex?”</i>	1628
C. <i>Sexual Desire Often Is Not the True Motive Behind Same- Sex Sexual Harassment</i>	1630
D. <i>Difficulties with Proving the Aggressor’s Sexual Desire or Orientation</i>	1634
E. <i>Examples of Clear Sex Discrimination Where Adherence to a Rigid Evidentiary Formula Causes the Claim to Fail.</i>	1637
F. <i>Recommendations</i>	1642
VI. CONCLUSION.....	1645

1. This quotation has been attributed to Woody Allen. LEON RAPPOPORT, PUNCHLINES: THE CASE FOR RACIAL, ETHNIC, AND GENDER HUMOR 101 (2005).

[†] JD Candidate, William Mitchell College of Law, 2015; BA Political Science, University of Iowa, 2011. I would like to thank Professor Deborah Schmedemann for her invaluable guidance in employment law. Additionally, I would like to thank my friends and family, with special thanks to those who regularly lend their ears to my spirited arguments against perceived injustices in the law.

I. INTRODUCTION

On March 8, 2012, the Sixth Circuit Court of Appeals held that despite the extreme verbal and sexual harassment Harold Wasek encountered while working on an oil rig in 2008, he could not bring a Title VII sex discrimination claim against his employer, because he could not prove his aggressor was homosexual.²

The Sixth Circuit's opinion in *Wasek v. Arrow Energy Services, Inc.* in many ways represents the growing confusion surrounding same-sex sexual harassment claims since the U.S. Supreme Court addressed the issue in the 1998 case *Oncale v. Sundowner Offshore Services, Inc.*³ In *Oncale*, the Court held that nothing in Title VII of the Civil Rights Act of 1964 bars a claim of same-sex sexual harassment, so long as the discrimination occurred because of the victim's sex.⁴ This "because of sex" requirement means that the victim must be "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁵ In *Oncale*, the Court laid out three evidentiary routes for proving that same-sex sexual harassment had occurred.⁶ Subsequently, the Sixth Circuit in *Wasek* interpreted these evidentiary routes as exhaustive.⁷ This meant that the harassment alleged by Wasek had to fall into one of the three categories, or it would not be actionable under Title VII.⁸

Wasek solidified a growing circuit split between the courts on how to interpret the evidentiary routes laid out in *Oncale*.⁹ In many ways, courts oversimplify same-sex sexual harassment claims by over-emphasizing certain theories of sexual harassment and under-emphasizing other theories of harassment. This over-simplification is especially evident when courts treat the evidentiary routes from *Oncale* as exhaustive, rather than merely illustrative.¹⁰

2. *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 468 (6th Cir. 2012).

3. 523 U.S. 75 (1998).

4. *Id.* at 79.

5. *Id.* at 80.

6. *Id.* at 80–81.

7. *See Wasek*, 682 F.3d at 467–68.

8. *Id.*

9. *See infra* Part IV.

10. *See infra* Part IV.

This comment first examines the requirements for bringing a claim under Title VII of the Civil Rights Act of 1964.¹¹ The comment then looks to the history of Title VII for guidance on interpretation of the statute.¹² The development of sexual harassment as part of Title VII sex discrimination is then examined, as well as the development of same-sex sexual harassment before and after the Supreme Court's decision in *Oncale*.¹³ Next, the comment presents the growing circuit split among the courts.¹⁴

This comment argues that interpreting the evidentiary routes from *Oncale* as exhaustive oversimplifies the complicated dilemma of same-sex sexual harassment in the workplace. The comment looks to the *Oncale* decision itself for guidance on how to interpret both the evidentiary routes and the "because of sex" requirement for Title VII discrimination cases.¹⁵ The comment additionally argues that interpreting the examples as a rigid formula places too much emphasis on sexual desire and not enough emphasis on other motivations behind same-sex sexual harassment.¹⁶ Furthermore, the emphasis on sexual desire leads courts to improperly use sexual orientation to determine whether conduct occurred "because of sex."¹⁷ This comment provides some examples of situations that may not be covered under the three evidentiary routes but clearly constitute sexual harassment under Title VII.¹⁸ Finally, the author advocates for system-wide changes that reflect the complexities of sexual harassment.¹⁹ These changes will allow plaintiffs to bring same-sex sexual harassment claims despite the fact that their harassment cases may fall outside of the traditional categories of sexual harassment.

II. BRINGING A CLAIM UNDER TITLE VII

According to Title VII of the Civil Rights Act of 1964, it is illegal for an employer to "discriminate against any individual with

-
11. See *infra* Part II.
 12. See *infra* Part III.
 13. See *infra* Part III.
 14. See *infra* Part IV.
 15. See *infra* Part V.A–B.
 16. See *infra* Part V.C.
 17. See *infra* Part V.D.
 18. See *infra* Part V.E.
 19. See *infra* Part V.F.

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."²⁰ An employer can be held liable for sexual harassment under Title VII when submission to sexual harassment is required as a term of employment, when submission to or rejection of an instance of sexual harassment is used to make employment decisions, or when the sexual harassment has created an abusive or hostile work environment.²¹

Although not expressly mentioned in Title VII, sexual discrimination can include claims of sexual harassment, such as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."²² What differentiates sexual harassment from other forms of discrimination, which tend to be rooted in prejudice or hatred, is that sexual harassment may also be motivated by sexual desire or attraction.²³

Critical to the sexual harassment analysis is the requirement that the discrimination occurred *because of sex*. This means the individual on the receiving end of the harassment must prove that he or she faced "disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed."²⁴

Furthermore, an employee may bring a sexual harassment claim based on sexual discrimination that has created a hostile or abusive working environment.²⁵ To bring a hostile work environment claim, one must prove not only that the harassment occurred because of sex, but also that the harassment was

20. 42 U.S.C. § 2000e-2(a)(1) (2006).

21. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2013).

22. *Id.*

23. See Marianne C. DelPo, *The Thin Line Between Love and Hate: Same Sex Hostile Environment Sexual Harassment*, 40 SANTA CLARA L. REV. 1, 2 (1999) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 75 (1998)) ("Illegal sexual harassment may occur . . . regardless of whether the harasser is motivated by desire or hatred.").

24. *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

25. Jeanne-Marie Bates, *Feminist Methodology: Influencing Hostile Environment Sexual Harassment Claims*, 15 WOMEN'S RTS. L. REP. 143, 145-46 (1994).

unwelcome, adequately pervasive or severe, and that there exists some basis for imputing liability to an employer.²⁶

III. HISTORY OF TITLE VII

A. *Inclusion of Sex Discrimination*

Enacted in 1964, Title VII was originally designed to eliminate employment barriers for minorities.²⁷ The legislative intent behind adding an amendment for discrimination based on sex is unclear.²⁸ Opposition to the Civil Rights Act primarily came from two different groups: conservatives who believed federal intervention into the private sphere was inappropriate, and Southern supporters of the “region’s segregated racial patterns.”²⁹

Proponents of the bill were thus skeptical when Democratic Representative Howard Smith of Virginia, a longtime critic of the civil rights movement, proposed amending the Act to include discrimination on the basis of sex.³⁰ Certain proponents of the Civil Rights Act, such as chief sponsor of the Equal Pay Act of 1963, Edith Green, believed that discrimination against black Americans was more severe than discrimination against women.³¹ Furthermore, they believed that Smith’s actual motive behind introducing the sex discrimination amendment was to defeat the bill.³² For example, scholars note how the debate surrounding the amendment initially included little more than sarcastic remarks.³³ At that time, the desire to protect women from harsh work

26. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 903–04 (11th Cir. 1982).

27. See 3 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, *STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* § 6:1 (2012).

28. See AUGUST B. COCHRAN III, *SEXUAL HARASSMENT AND THE LAW: THE MECHELLE VINSON CASE* 19–21 (2004).

29. *Id.* at 19.

30. *Id.* at 19–20.

31. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972*, at 136 (1990).

32. See *id.*; see also COCHRAN, *supra* note 28, at 20.

33. See, e.g., GRAHAM, *supra* note 31 (Howard Smith stated, “This bill is so imperfect . . . what harm will this little amendment do?”).

environments was thought to justify treating men and women differently in the workplace.³⁴

To the surprise of skeptics, however, Representative Smith had been a long-time supporter of women's rights.³⁵ Smith's true intentions in introducing the amendment may be irrelevant, however, because many female legislators who legitimately supported the amendment took an active role in the debate after Smith's introduction.³⁶ With the support of those female Congress members and other women's rights groups, the amendment was passed by the House, along with the rest of the Civil Rights Act of 1964, with the final vote totaling 290 to 130.³⁷

Because of the uncertainty surrounding the involved motives, legal scholars have experienced difficulties determining the legislative intent of the sex discrimination aspects of Title VII, which, in combination with the ambiguity of the plain meaning of the statute,³⁸ may explain why various courts have interpreted the statute differently.³⁹

B. Inclusion of Sexual Harassment Based on Hostile Work Environment

Sexual harassment is not expressly mentioned in Title VII of the Civil Rights Act of 1964.⁴⁰ In fact, the term was not coined until 1974 during a consciousness-raising event organized by Lin Farley at Cornell University.⁴¹ However, over the years, the Equal

34. See COCHRAN, *supra* note 28, at 19–20.

35. GRAHAM, *supra* note 31, at 136 (noting Smith's support of the Equal Rights Amendment and his political ties to the National Women's Party). The National Women's Party was a largely white, middle-class organization, which may explain Smith's support. See COCHRAN, *supra* note 28, at 21.

36. COCHRAN, *supra* note 28, at 20. Martha Griffiths, a female representative from Michigan, pointed out the danger of not including the amendment when she said, "You are going to have white men in one bracket, you are going to try to take colored men and colored women and give them equal employment rights, and down at the bottom of the list is going to be a white woman with no rights at all." GRAHAM, *supra* note 31, at 137.

37. COCHRAN, *supra* note 28, at 21.

38. See *infra* Part V.B.

39. See 3 BODENSTEINER & LEVINSON, *supra* note 27, § 6:1.

40. See 42 U.S.C. § 2000e-2(a)(1) (2006).

41. Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 8 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

Employment Opportunity Commission (EEOC) began to recognize sex discrimination as encompassing sexual harassment.⁴² This shift was largely influenced by a book published in 1979 by legal scholar Catharine MacKinnon entitled *Sexual Harassment of Working Women*.⁴³ According to MacKinnon, sexual harassment “undercuts women’s potential for social equality in two interpenetrated ways: by using her employment position to coerce her sexually, while using her sexual position to coerce her economically.”⁴⁴ To MacKinnon, sexual harassment was thus sexual discrimination because it was used as a tool for maintaining male power and privilege over women.⁴⁵

*Barnes v. Train*⁴⁶ is considered to be the first sexual harassment case brought in federal court.⁴⁷ The plaintiff, Ms. Barnes, claimed her employer engaged in sexual discrimination when she was reassigned and her former position was abolished after she refused to engage in sexual relations with her boss.⁴⁸ The district court held that what happened to Ms. Barnes did not fall under Title VII due to the fact that the alleged retaliation from her employer occurred “not because she was a woman, but because she refused to engage in a sexual affair with her supervisor.”⁴⁹ The district court therefore granted summary judgment in favor of Barnes’ employers.⁵⁰

Barnes filed an appeal to the D.C. Circuit Court of Appeals.⁵¹ The court of appeals reversed the district court, holding that Barnes was in fact discriminated against based on her gender and that “[b]ut for her womanhood . . . her participation in sexual activity would never have been solicited.”⁵²

42. See 52 AM. JUR. PROOF OF FACTS 3D *Proof of Employer Liability for Sexual Harassment Claims Under Title VII of the Civil Rights Act of 1964* § 2 (1999).

43. COCHRAN, *supra* note 28, at 49.

44. CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE FOR SEX DISCRIMINATION* 7 (1979).

45. COCHRAN, *supra* note 28, at 49.

46. No. 1828-73, 1974 U.S. Dist. LEXIS 7212 (D.D.C. Aug. 9, 1974).

47. COCHRAN, *supra* note 28, at 51.

48. *Barnes*, 1974 U.S. Dist. LEXIS 7212, at *1.

49. *Id.* at *3.

50. *Id.* at *5.

51. *Barnes v. Costle*, 561 F.2d 983, 984 (D.C. Cir. 1977).

52. *Id.* at 990.

Nearly a decade later, in 1986, the Supreme Court ruled in the landmark case *Meritor Savings Bank, FSB v. Vinson*⁵³ for the first time that an employee can bring a sex discrimination case under Title VII for sexual harassment that created a hostile work environment.⁵⁴ The Court rejected the petitioner's argument that Congress intended Title VII to apply only to "tangible" or "economic" discrimination and concluded that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."⁵⁵

C. Inclusion of Same-Sex Sexual Harassment

Although Congress' initial purpose in enacting Title VII was to protect women,⁵⁶ the Supreme Court, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, stated that the protection against discrimination provided by Title VII extends to male as well as female employees.⁵⁷ Since *Newport* expanded the definition of who is protected under Title VII, a circuit split began to develop over whether Title VII also extends to same-sex sexual harassment.⁵⁸

53. 477 U.S. 57 (1986).

54. *Id.* at 66.

55. *Id.* at 64 (internal quotation marks omitted).

56. *La Riviere v. EEOC*, 682 F.2d 1275, 1278 (9th Cir. 1982) (citing *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)); *see also* *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974); *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971) ("[I]t is evident that this prohibition, along with other statutes such as the Equal Pay Act of 1963 . . . was enacted primarily to protect women against discrimination in the marketplace and to open employment opportunities for women in occupations that had traditionally been closed to them.").

57. 462 U.S. 669, 682 (1983).

58. Certain circuits held that same-sex sexual harassment was never actionable, some held that same-sex sexual harassment was always actionable, and some held that same-sex harassment was only actionable if the harasser was homosexual. *Compare* *Giddens v. Shell Oil Co.*, No. 92-8533, 1993 WL 529956, at *1 (5th Cir. Dec. 6, 1993) (holding that harassment by a male supervisor against a male subordinate could never amount to a claim under Title VII), *with* *Doe ex rel Doe v. City of Belleville, Ill.*, 119 F.3d 563, 573 (7th Cir. 1997) (holding Congress' language makes it clear "that anyone sexually harassed can pursue a claim under Title VII, no matter what her gender or that of her harasser"), *and* *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir. 1996) (holding that heterosexual-on-heterosexual sexual harassment could never qualify as

The Supreme Court resolved this circuit split in 1998 in *Oncale v. Sundowner Offshore Services, Inc.*⁵⁹ The petitioner, Joseph Oncale, worked for respondent Sundowner Offshore Services on an oil platform in the Gulf of Mexico. While working on the platform, Oncale was subject to sex-related humiliation and physical assault of a sexual nature.⁶⁰ Additionally, he was threatened with rape by his male coworkers.⁶¹ Oncale eventually quit his job due to the harassment and filed a Title VII complaint with the United States District Court for the Eastern District of Louisiana.⁶² Both the district court and the Fifth Circuit held that no cause of action existed for male-on-male sexual harassment.⁶³

The Supreme Court, in a unanimous decision with only one concurrence by Justice Thomas, held that nothing in the language of the statute or the Court's precedents prohibited claims based on same-sex discrimination.⁶⁴ However, the Court stated, "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."⁶⁵ Thus, the Court made clear that Title VII discrimination must have occurred because of the victim's sex.

Furthermore, the Court in *Oncale* held that although sexual desire *may* provide a motive for sexual harassment, sexual desire is not a necessary motive to support a claim of sex discrimination.⁶⁶ Justice Scalia then listed three examples in which same-sex sexual harassment would be actionable under Title VII. The first situation is the one described above, where an employee or supervisor makes a sexual pass at a coworker based on sexual desire.⁶⁷ The second situation occurs when a harasser is motivated by general hostility toward the presence of a certain gender in the workplace.⁶⁸ For

discrimination under Title VII because it was not motivated by the "the victim's sex").

59. 523 U.S. 75 (1998).

60. *Id.* at 77.

61. *Id.*

62. *See id.*

63. *Id.*

64. *Id.* at 79.

65. *Id.* at 80.

66. *Id.*

67. *Id.*

68. *Id.*

example, a woman may discriminate against a female coworker based on a belief that women do not belong in that area of work.⁶⁹ Finally, the third example occurs when an employee is treated differently from employees of the opposite gender in a mixed-gender workplace.⁷⁰

The Court additionally emphasized that courts must judge each case based on a consideration of “all the circumstances” surrounding the case.⁷¹ For example, if conduct is “not severe or pervasive enough to create an objectively hostile or abusive work environment,” the conduct is “beyond Title VII’s purview.”⁷² After the Supreme Court decided *Oncale*, a number of same-sex sexual harassment cases arose which presented new questions for courts to consider.⁷³

69. *Bibby v. Phila. Coca Cola Bottling Co.* posits an additional example of a male doctor who believes that men should not be employed as nurses and who therefore may harass a coworker who is a male nurse. 260 F.3d 257, 262 (3d Cir. 2001).

70. *Oncale*, 523 U.S. at 80–81.

71. *Id.* at 81 (“In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.”); see also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, FACT SHEET: SEXUAL HARASSMENT 1 (Dec. 14, 2009), available at <http://www.eeoc.gov/eeoc/publications/upload/fs-sex.pdf> (stating that allegations must be determined on a case-by-case basis).

72. *Oncale*, 523 U.S. at 81.

73. In addition, *Oncale* opened the door to some high-profile settlements. Larry Keller, *Same-Sex Harassment Not Always About Sex*, HUMAN RESOURCE EXECUTIVE ONLINE (Oct. 21, 2013), <http://www.hreonline.com/HRE/view/story.jhtml?id=534356256>. For example, in August 1999, the EEOC settled a lawsuit against Long Prairie Packing Company, a meat packing plant in Long Prairie, Minnesota, for \$1.9 million. In 2000, the EEOC settled a lawsuit against one of Colorado’s top auto dealerships, Burt Chevrolet and LGC Management, for \$500,000. Joseph H. Mitchell, the attorney responsible for prosecuting the Colorado case, stated, “If such blatant discriminatory action was directed toward female workers, there would be no disagreement over whether it was sexual harassment. But because it happened to men, management was initially indifferent to the situation.” Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Settles Same-Sex Harassment Suit for a Half Million Dollars Against Major Colorado Auto Dealership (Aug. 4, 2000), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-4-00.cfm>.

IV. EMERGING CIRCUIT SPLIT

Although *Oncale* resolved some questions regarding same-sex sexual harassment, the Court's opinion caused a further circuit split over whether the three examples of same-sex harassment provided by the Court constitute an exhaustive list.⁷⁴

A. *Narrow Reading of Oncale*

At least one circuit court has held that the list provided in *Oncale* is exhaustive.⁷⁵ In this interpretation, a plaintiff must allege that the harasser was either motivated by a homosexual sexual desire, was acting with a general hostility toward the victim's sex, or was treating men and women differently in the workplace.⁷⁶ If the harassment does not fit into one of these categories, then the Title VII claim is dismissed.⁷⁷

In *Wasek v. Arrow Energy Services, Inc.*, Harold Wasek worked on an oil rig with an all-male crew.⁷⁸ One of his fellow crew members, Paul Ottobre, started harassing Wasek by sexually touching him⁷⁹ and making sexual comments toward him.⁸⁰ Wasek, frustrated that no one would intervene on his behalf, left the oil rig.⁸¹ Wasek then

74. The Sixth Circuit has explicitly ruled that the three examples listed in *Oncale* are exhaustive, while other circuits have ruled that the list from *Oncale* is nonexhaustive. Additionally, some circuits have recognized the circuit split but have declined to rule on the matter. Compare *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463 (6th Cir. 2012) (holding that the *Oncale* list is exhaustive), with *Bibby*, 260 F.3d at 264 (3d Cir. 2001) (holding that the *Oncale* list is nonexhaustive), and *Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999) (same), and *James v. Platte River Steel Co.*, 113 F. App'x 864 (10th Cir. 2004) (same), and *Barrows v. Seneca Foods Corp.*, 512 F. App'x 115 (2d Cir. 2013) (declining to answer whether the evidentiary routes were exhaustive).

75. See *Wasek*, 682 F.3d 467–68.

76. *Id.*; see also *Oncale*, 523 U.S. at 80.

77. *Wasek*, 682 F.3d at 468.

78. *Id.* at 465.

79. Ottobre grabbed his buttocks and poked his rear on multiple occasions with a hammer handle and a long sucker rod. *Id.*

80. Ottobre told Wasek he had a “pretty mouth,” “pretty lips,” and “you know you like it sweetheart.” *Id.* Ottobre also called Wasek and left him a voicemail on one occasion, stating, “I miss holding you. I miss spooning with you. I love you. Please call me back.” *Id.* at 466.

81. *Id.*

brought a Title VII sexual harassment claim against Arrow Energy.⁸² The district court granted summary judgment in favor of Arrow Energy, and Wasek appealed to the Sixth Circuit.⁸³

The Sixth Circuit emphasized that although same-sex sexual harassment is just as actionable as different-sex sexual harassment, “Title VII is not ‘a general civility code for the American workplace.’”⁸⁴ The court cautioned that unless there exists an additional element of discrimination, mere bullying is not actionable under Title VII.⁸⁵

The Sixth Circuit then analyzed the conduct of Ottobre under the three situations provided in *Oncale*.⁸⁶ Because only men worked at the oil rig, the court ruled that the last two categories (general hostility towards men and comparative treatment between opposite sexes in a mixed-sex workplace) could not apply to this case.⁸⁷ This left only the first category available to Wasek—sexual harassment based on sexual desire.⁸⁸ The court stated that “in order to infer discrimination, Wasek must demonstrate that Ottobre was homosexual.”⁸⁹

Oncale requires “credible evidence” of a harasser’s sexual orientation.⁹⁰ The only evidence in the record concerning Ottobre’s sexual orientation was a statement from Wasek in his deposition.⁹¹ Wasek stated in the deposition that he thought Ottobre was “a little strange” and “possibly bisexual.”⁹² The court ruled that a single speculative statement was insufficient to infer a person’s sexual orientation, and because Wasek was unable to prove that Ottobre was gay or bisexual, the court dismissed the claim.⁹³

82. *Id.* at 467.

83. *Id.*

84. *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

85. *Id.*

86. *Id.* at 467–68.

87. *Id.* at 468.

88. *Id.*

89. *Id.*

90. *Id.* (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

91. *Id.*

92. *Id.*

93. *Id.*

B. Broad Readings of Oncale

Unlike *Wasek*, some circuits have addressed the issue and decided that the list from *Oncale* is merely illustrative and therefore nonexhaustive. For example, the Seventh Circuit, in *Shepherd v. Slater Steels Corp.*, stated “we discern nothing in the Supreme Court’s decision indicating that the examples it provided were meant to be exhaustive rather than instructive.”⁹⁴ The Third and Tenth Circuits came to similar conclusions.⁹⁵

In *EEOC v. Boh Brothers Construction Co.*, the Fifth Circuit addressed a case where a male construction worker was subjected to sexually vulgar language on a construction site by a male coworker.⁹⁶ In this case, the plaintiff argued that he was harassed because he did not conform to the male stereotype.⁹⁷ The plaintiff argued that his use of “Wet Ones” instead of toilet paper was perceived as not conforming to masculine gender norms, which led to his harassment.⁹⁸ The court held that the plaintiff’s use of “Wet Ones” was insufficient to constitute nonconformance to a male stereotype,⁹⁹ but did not answer whether nonconformance to gender stereotypes, a theory outside the three situations enumerated in *Oncale*, was a viable theory of Title VII discrimination.¹⁰⁰

94. 168 F.3d 998, 1009 (7th Cir. 1999).

95. See *James v. Platte River Steel Co.*, 113 F. App’x 864, 867 (10th Cir. 2004) (noting that the plaintiff was not limited by the evidentiary routes as laid out in *Oncale*, but ultimately concluding that the plaintiff failed to show he was harassed “due to the fact that he failed to conform to gender stereotypes”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (denying the plaintiff Title VII relief because he could not prove his discrimination occurred because of sex, but noting that “[b]ased on the facts of a particular case and the creativity of the parties, other ways in which to prove that harassment occurred because of sex may be available”).

96. 689 F.3d 458, 459 (5th Cir. 2012), *rev’d en banc*, 731 F.3d 444 (5th Cir. 2013).

97. *Id.* at 461.

98. *Id.* at 462.

99. *Id.*

100. *Id.* (“Because there is insufficient evidence in this case to support the asserted sex stereotyping theory of same-sex harassment asserted by the EEOC, we need not decide whether such a theory is cognizable in this circuit.”).

However, the Fifth Circuit granted rehearing en banc and came to another decision on September 27, 2013.¹⁰¹ In the second opinion, the Fifth Circuit expressly ruled that a plaintiff can bring a same-sex sexual harassment claim for harassment on the basis of gender stereotyping.¹⁰² Furthermore, this time around, the Fifth Circuit decided to rule on the question of the exclusivity of the evidentiary routes from *Oncale* and held that the evidentiary routes are “illustrative, not exhaustive, in nature.”¹⁰³

Other circuits have also accepted the sex-stereotype theory of same-sex discrimination. For example, in *Nichols v. Azteca Restaurant Enterprises*, the Ninth Circuit allowed a male employee to bring a Title VII claim against his employer after he claimed male coworkers verbally harassed him for being too effeminate.¹⁰⁴ Without mentioning the three scenarios listed in *Oncale*, the court stated that verbal abuse based upon perceptions of gender nonconformity equate to discrimination because of sex, making such claims actionable under Title VII.¹⁰⁵

C. Ambiguous Readings of *Oncale*

Some courts have addressed the growing circuit split but have declined to rule on the issue. For example, the Second Circuit, in *Barrows v. Seneca Foods Corp.*, ruled that the aggressor treated women better than men under the third category of direct comparative evidence, concerning how members of both sexes are treated in a mixed-gender workplace.¹⁰⁶ In a footnote to the case, the court stated that:

We have not definitively resolved whether these three categories from *Oncale* were meant to establish an

101. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013) (en banc).

102. *Id.* at 454. The Court relied on the holding in *Oncale* as well as the Supreme Court’s holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), holding that different-sex gender-stereotyping was an actionable claim under Title VII. The Fifth Circuit stated that “nothing in *Oncale* overturns or otherwise upsets the Court’s holding in *Price Waterhouse*,” and the ability to bring a claim based on gender stereotypes extends to same-sex harassment. *Boh Bros. Constr. Co.*, 731 F.3d at 456.

103. *Boh Bros. Constr. Co.*, 731 F.3d at 455.

104. 256 F.3d 864, 869 (9th Cir. 2001).

105. *Id.* at 874.

106. 512 F. App’x 115, 117 (2d Cir. 2013).

exclusive list or merely provide representative examples. Although we note that the Supreme Court explicitly used the phrase “for example” when discussing these potential “evidentiary route[s],” we need not resolve the issue because reversal is warranted under one of the three *Oncale* categories.¹⁰⁷

Furthermore, many courts do not apply their holdings in a consistent manner. On rehearing en banc in *Boh Brothers Construction Co.*, the Fifth Circuit noted that “[e]very circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive, in nature.”¹⁰⁸ While it is true that many courts have expressly noted the nonexhaustive nature of the *Oncale* list, a growing trend has emerged in which courts acknowledge the list as nonexhaustive but then treat the list as exhaustive in practice.¹⁰⁹

Boh Brothers gives the example of *Pedroza v. Cintas Corp. No. 2*¹¹⁰ as a case in which the Eighth Circuit expressly accepted the *Oncale* list as nonexhaustive.¹¹¹ Indeed, the Eighth Circuit stated that “the Supreme Court set forth a *non-exhaustive list* that included three possible evidentiary routes same-sex harassment plaintiffs *may* follow to show that harassment was based on sex.”¹¹² The ambiguity

107. *Id.* at 117 n.3 (citation omitted).

108. *Boh Bros. Constr. Co.*, 731 F.3d at 455.

109. *See, e.g., id.* at 455 n.6.

[W]e note that the Sixth Circuit acknowledged the availability of an evidentiary route not articulated in *Oncale* in 2006. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763–65 (6th Cir. 2006). In a subsequent case, the Sixth Circuit noted that *Oncale* offered “guidance” regarding the manner in which a plaintiff can prove same-sex harassment. *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 467–68 (6th Cir. 2012). Although the court arguably treated the *Oncale* categories as if they were exclusive in *Wasek*, it did not expressly consider the issue because the plaintiff’s claim fell into *Oncale*’s first category.

Id.

110. 397 F.3d 1063 (8th Cir. 2005).

111. *Boh Bros. Constr. Co.*, 731 F.3d at 455 n.6.

112. *Pedroza*, 397 F.3d at 1068 (emphasis added). The court additionally interpreted the first category more broadly than other courts, noting that the requirement is that the harasser acted out of sexual desire, not that the harasser was homosexual. *Id.* at 1069 n.2 (“We disagree with . . . the inferences that may flow from the facts that [the female harasser] had children and had been in a long-term relationship with a man. These facts tend to prove only that [the

arises because, despite that holding, the Eighth Circuit continued to use the *Oncale* list as a checklist for determining whether the conduct occurred “because of sex.”¹¹³

The inconsistent application of the *Oncale* decision, in combination with the complicated nature of gender dynamics in the workplace, has caused a major gap to develop in same-sex sexual harassment, leaving legitimate victims of sexual harassment unable to bring Title VII claims.

V. ARGUMENT

In *Oncale*, the Supreme Court stated that “[t]he critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹¹⁴ Limiting same-sex Title VII claims to the three situations enumerated in *Oncale* was not the intention of the Supreme Court.¹¹⁵ Furthermore, a rigid view of Title VII claims is incompatible with both the history of Title VII and society’s growing understanding of gender dynamics in the workplace.¹¹⁶ Courts should thus divorce their ties to inflexible theories of sexual harassment and should view both the “because of sex” requirement and the evidentiary routes from *Oncale* broadly.

harasser] was not strictly homosexual. They do not preclude a jury from finding that [the harasser] was motivated by some degree of homosexual desire . . .”).

113. See, e.g., *Smith v. Hy-Vee, Inc.*, 622 F.3d 904, 907–08 (8th Cir. 2010). The court in *Smith* held that there was no evidence that the aggressor was particularly attracted to the sexual harassment victim. *Id.* at 908. Similarly, the court rejected the last two evidentiary routes because it ruled that the aggressor treated both male and female employees “in the same vulgar and inappropriate way.” *Id.* The court thus concluded that the plaintiff had not proved discrimination on the basis of sex and upheld the district court’s grant of summary judgment. *Id.*; see also *McCown v. St. John’s Health Sys., Inc.*, 349 F.3d 540, 543–44 (8th Cir. 2003) (denying a same-sex sexual harassment claim because the inappropriate conduct did not fit into one of the *Oncale* categories).

114. 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

115. See *infra* Part V.A.

116. See *supra* Part III.

A. *Looking to the Oncale Decision for Direction*

It is not difficult to see why many courts have struggled with interpreting the *Oncale* decision. On one hand, the Supreme Court, through Justice Scalia's opinion, provided clarity to lower courts as it opened the door for a broader view of sex discrimination claims by holding that individuals can bring same-sex sexual harassment claims under Title VII.¹¹⁷ On the other hand, as this article later notes, the opinion also left certain crucial interpretive questions unanswered.¹¹⁸

The *Oncale* decision, however, provides some guidance on the proper interpretation of Title VII. Justice Scalia emphasized how the kind of discrimination prohibited by Title VII includes "sexual harassment of any kind that meets the statutory requirements."¹¹⁹ Thus, the true test of whether conduct qualifies as sexual discrimination is found in the statute itself. Rather than asking whether the conduct in question is analogous to any of the evidentiary routes listed in *Oncale*, courts should instead look to Title VII and ask whether conduct occurred because of the victim's sex.¹²⁰ The Seventh Circuit emphasized this point in *Shepherd v. Slater Steels Corp.*¹²¹ In *Shepherd*, the court stated, "The Court's focus [in *Oncale*] was on what the plaintiff must ultimately prove rather

117. *Oncale*, 523 U.S. at 79.

118. *See infra* Part V.B.

119. *Oncale*, 523 U.S. at 80. The statute states:

It shall be an unlawful employment practice for an employer—

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

(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.

42 U.S.C. § 2000e-2(a) (2006) (emphasis added). The relevant requirement listed in the statute is that the harassment occurred "because of such individual's . . . sex." *Id.*

120. Confusion over the interpretation of *Oncale*, however, arises from the fact that the Court in *Oncale* provides little guidance on what Congress meant when it determined that discrimination must be "because of sex." *See infra* Part V.B.

121. 168 F.3d 998 (7th Cir. 1999).

than the methods of doing so.”¹²² What the plaintiff must prove is whether the discrimination occurred because of sex. The examples listed in *Oncale* are simply *methods* of proving that conduct occurred because of sex.¹²³

Furthermore, Justice Scalia explicitly refers to the three evidentiary routes as examples.¹²⁴ This particular choice of words signals the Court’s intention that the situations given were meant to be illustrative. If the Court had intended to give a rigid formula for determining whether conduct was sex discrimination, it could have made that intention clear by stating that there are *only* three methods of proving same-sex sexual harassment.

Additionally, the Court stated how “[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”¹²⁵ The Court here acknowledged how complicated sexual harassment cases can be. It therefore seems unlikely that the Court would then prescribe a fairly simple three-part test for conclusively deciding whether conduct constitutes same-sex sexual harassment.

B. *What Constitutes Behavior “Because of Sex?”*

Part of the reason courts have taken such varied approaches after *Oncale* is that *Oncale* did little to clarify what kind of conduct actually *is* actionable under Title VII. Justice Scalia confirmed that “[w]hatever evidentiary route the plaintiff chooses to follow,

122. *Id.* at 1009.

123. To emphasize this point, the *Shepherd* court noted that discrimination should not be determined by a rigid formula. *Id.* (citing *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311–13 (1996); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

124. *Oncale*, 523 U.S. at 80 (“[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, *for example*, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.” (emphasis added)); *see also* *Barrows v. Seneca Foods Corp.*, 512 F. App’x 115, 117 n.3 (2d Cir. 2013) (declining to comment on whether the evidentiary routes in *Oncale* are exhaustive, but taking note of the Court’s explicit use of the phrase “for example”).

125. *Oncale*, 523 U.S. at 81–82.

he or she must always prove that the conduct . . . constituted ‘discrimina[tion] . . . because of . . . sex.’”¹²⁶ Yet, neither Title VII nor *Oncale* defines “sex.”¹²⁷

According to Merriam-Webster, “sex” is first defined as “either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp[ecially] on the basis of their reproductive organs and structures.”¹²⁸ Under this definition, the “because of sex” requirement is satisfied when a person is discriminated against because he or she is biologically male or female.¹²⁹

Merriam-Webster also defines “sex” as “sexually motivated phenomena or behavior” or “genitalia.”¹³⁰ Under these definitions, “because of sex” would encompass all behavior motivated by sexual desire.¹³¹

Current dictionaries typically do not, however, define “sex” as including cultural, psychological, or behavioral traits, as these are now known as constituting “gender” rather than sex.¹³² However, in 1961, three years before Title VII was passed, Merriam-Webster included “[t]he sphere of behavior dominated by the relations between male and female” as an additional definition of “sex.”¹³³

126. *Id.* at 81.

127. With no definition and with little legislative history surrounding Title VII, “the jurisprudence defining the parameters of a cause of action under Title VII has evolved with little legislative guidance on the question of when the challenged conduct occurs ‘because of’ a person’s ‘sex.’” Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay”: Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 *YALE J.L. & FEMINISM* 155, 162 (1999).

128. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1140 (11th ed. 2003).

129. William N. Eskridge, Jr., *Theories of Harassment “Because of Sex,”* in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 41, at 155, 157.

130. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 128, at 1140.

131. Eskridge, Jr., *supra* note 129, at 157.

132. Compare MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 128, at 520 (“Gender”), and THE NEW AMERICAN OXFORD DICTIONARY 700 (2nd ed. 2005) (same), with MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 128 (“Sex”), and THE NEW AMERICAN OXFORD DICTIONARY, *supra*, at 1553 (same). See generally FOWLER’S MODERN ENGLISH USAGE (3d. ed. 2004) (“Since the 1960s this secondary sense [of sex] has come into much more frequent use, especially among feminists, with the intention ‘of emphasizing the social and cultural, as opposed to the biological, distinctions between the sexes.’”).

133. Eskridge, J.R., *supra* note 129.

Indeed, courts have regularly recognized gender-based discrimination as actionable under Title VII.¹³⁴

C. Sexual Desire Often Is Not the True Motive Behind Same-Sex Sexual Harassment

If the three evidentiary routes enumerated in *Oncale* are thought of as exhaustive, cases may arise, such as *Wasek*, in which the only way to prove sexual harassment is through proof of the aggressor's sexual desire or homosexuality.¹³⁵ Viewing sexual harassment only in terms of sexual desire, however, vastly simplifies the power and gender dynamics that often exist behind the acts of sexual harassment. In fact, Justice Scalia said as much in the *Oncale* opinion.¹³⁶

Some of the most common forms of opposite-sex sexual harassment are not motivated by sexual desire, but rather are forms of gender-based harassment "designed to maintain work . . . as bastions of masculine competence and authority."¹³⁷ The EEOC

134. See *Axam & Zalesne*, *supra* note 127, at 164–65 (“[T]he courts, implicitly recognizing that a person's gender is integrally related [to] that person's sex as it is perceived by others, have characterized such gender-based conduct as sex-based conduct within the purview of Title VII.”); see also, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that discrimination based on the plaintiff's lack of femininity was actionable).

135. See *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 468 (6th Cir. 2012) (“Wasek's evidence can only fit into the first of these three routes. No evidence exists that Ottobre was motivated by a general hostility towards men. And the oil rig was not a mixed-sex workplace, so there is no possibility of comparative evidence. Thus, in order to infer discrimination, Wasek must demonstrate that Ottobre was homosexual.”).

136. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (“[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”).

137. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998). According to Schultz,

The forms of such harassment are wide-ranging. They include characterizing the work as appropriate for men only; denigrating women's performance or ability to master the job; providing patronizing forms of help in performing the job; withholding the training, information, or opportunity to learn to do the job well; engaging in deliberate work sabotage; providing sexist evaluations of women's performance or denying them deserved promotions; isolating women from the social networks that confer a sense of belonging; denying women the perks or privileges that are required for success;

compliance manuals and guidelines confirm that “sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is ‘sufficiently patterned or pervasive’ and directed at employees because of their sex.”¹³⁸

The Supreme Court expressed this understanding for opposite-sex sexual harassment in *Harris v. Forklift Systems, Inc.*, a case in which the plaintiff, Teresa Harris, was verbally insulted because of her gender and targeted through sexual innuendo jokes.¹³⁹ The president of Forklift Systems often made derogatory comments toward Harris, including, “You’re a woman, what do you know” and “We need a man as the rental manager.”¹⁴⁰

Harris presented a different spin on the traditional view of sexual harassment as “economically leveraged sexual coercion.”¹⁴¹ This case was not about sexual desire. In fact, it was about the opposite of sexual desire.¹⁴² In these kinds of cases, men are not

assigning women sex-stereotyped service tasks that lie outside their job descriptions (such as cleaning or serving coffee); engaging in taunting, pranks, and other forms of hazing designed to remind women that they are different and out of place; and physically assaulting or threatening to assault the women who dare to fight back. Of course, making a woman the object of sexual attention can also work to undermine her image and self-confidence as a capable worker. Yet, much of the time, harassment assumes a form that has little or nothing to do with sexuality but everything to do with gender.

Id.

138. *Id.* at 1732 n.246 (citing EEOC Compl. Man. (CCH) § 615.6, ¶ 3105, at 3217 (Jan. 1982); *EEOC Policy Guidance on Current Issues of Sexual Harassment*, Daily Lab. Rep. (BNA) No. 60, at E-1 (Mar. 28, 1990)).

139. 510 U.S. 17, 19 (1993).

140. *Id.*

141. Siegel, *supra* note 41, at 22; see also *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (“We have never held that sexual harassment . . . must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. . . . Rather, we hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.”), *abrogated on other grounds* by *Stevens v. Dep’t of Treasury*, 500 U.S. 1 (1991).

142. See David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1721 (2002) (stating that in *Harris*, “the harassers’ motivation was to humiliate a woman co-worker” and there was no

using their power to coerce women sexually; rather, they are using “sexualized and nonsexualized conduct to communicate to women their outsider status in the workplace.”¹⁴³

For example, courts have held that certain gender-based and sexist epithets constitute sex-based discrimination under Title VII.¹⁴⁴ Additionally, physical aggression, violence, and verbal abuse without sexual overtones may constitute harassment based on sex.¹⁴⁵

Some scholars believe that this communication of outsider status translates equally to same-sex sexual harassment. For example, Reva B. Siegel expressed the following interpretation of *Oncale*:

Suppose the men harassing Oncale are straight. The male-male harassment in *Oncale* could well be assimilated to the male-female harassment in *Harris*. On this view, Oncale’s harassers would be deploying sexualized conduct to gender-mark work roles, even though no women are on the scene—in some important sense *to ensure that no women ever appear on the scene*.¹⁴⁶

The more society learns about the hierarchical structure of the workplace, the more society has realized that sexual harassment, or sexual abuse in general, is not about sex but instead about power.¹⁴⁷

evidence that the harasser acted out of sexual desire for the plaintiff).

143. Siegel, *supra* note 41, at 22.

144. See, e.g., *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000 (10th Cir. 1996) (holding that the words “curb side cunt” “bitch” and “floor whore” were sufficient to constitute Title VII harassment); *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1012, 1014–15 (8th Cir. 1988) (holding that the words “fucking flag girls,” “cavern cunt,” and “blond bitch,” in combination with other forms of harassment, was severe and pervasive enough to constitute Title VII sex discrimination); *Hellebusch v. City of Wentzville*, No. 4:95CV1533 JCH, 1996 U.S. Dist. LEXIS 20828, at *5–6, *18 (E.D. Mo. Nov. 21, 1996) (plaintiff called “fucking bitch,” “fucking cunt,” and “fucking whore”).

145. See *Axam & Zalesne*, *supra* note 127, at 188 (citing *Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996) (holding that a district court was incorrect for concluding that harassment could not be gender-based if motivated by enmity or hooliganism)).

146. Siegel, *supra* note 41, at 25.

147. Brief of National Organization on Male Sexual Victimization, Inc. et al. as Amici Curiae in Support of Petitioner at 9, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568), 1997 WL 471814 (citing MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* 35 (1997)) (drawing attention to a collection of studies that show how the hierarchies of all-

In an amicus brief for the *Oncale* case, Catherine MacKinnon noted that “[m]en are most often raped by other men when there are no women around: in prisons, in confined and isolated work sites, in men’s schools and colleges, in the military, in athletics, in fraternities.”¹⁴⁸ These men are still victimized because of their sex, because they are being made to feel inferior as men.¹⁴⁹ As MacKinnon makes clear, this diminishment of masculinity “cannot be done to a woman. What he loses, he loses through gender, as a man.”¹⁵⁰

For MacKinnon and other legal scholars who follow this line of reasoning, the sexual act itself is enough to constitute sex-based discrimination.¹⁵¹ The logic behind this argument is that the act of sexual harassment is an act which asserts male dominance; it thus does not matter whether the actor was male or female—all that matters is that the act asserted sexual dominance.¹⁵² This argument looks to the *effect* of the rape or sexual harassment, not the *motive*.¹⁵³

One can look to the *Wasek* case as an example of a situation where sexual acts were used to enforce power dynamics. In that case, the aggressor, Ottobre, used sexualized language and actions toward Wasek.¹⁵⁴ The abuse escalated after Wasek struggled with heavy equipment.¹⁵⁵ Furthermore, Ottobre was enabled to continue the abuse through the encouragement of other men in Arrow Energy’s male-dominated workplace, including Wasek’s supervisor,

male environments often lead to sexual abuse, motivated by competition, violence as a rite of passage, and more).

148. *Id.*

149. *Id.*

150. *Id.* at 10.

151. *Id.* at 4 (“Other legal requisites being met, if acts are sexual and hurt one sex, they are sex-based, regardless of the gender and sexual orientation of the parties.”).

152. Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 600 (2013).

153. *Id.* (citing SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15, 105 (1975)) (“Whatever the motive, the effect of rape is to maintain male supremacy, just as lynching maintained white supremacy. Sexual harassment is not stripped of its meaning as an act of male supremacy when the harassers are of the same sex, just as lynching would not escape its historical connotation as a technology of racial supremacy if it were done by and to people of the same race.”).

154. *See supra* Part IV.A.

155. *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 465 (6th Cir. 2012).

Pat Tripp, who laughed at Wasek instead of intervening.¹⁵⁶ In fact, Tripp told Wasek he would be punished if he reported the abuse to the director of operations.¹⁵⁷ Instead of attempting to put an end to the abuse, Tripp told Wasek to stop whining.¹⁵⁸ Additionally, Wasek was encouraged to solve the problem by using physical violence against Ottobre.¹⁵⁹

One could argue that what happened in *Wasek* was a systematic imposition of power against someone who was viewed as weaker than the other men on the job. *Because Wasek was a man*, he was expected to take the abuse and to stop whining. *Because he was a man*, he was encouraged to fight back with violence if he had a problem with the abuse. One could thus argue that even though sexual desire did not motivate Wasek's harassment, Wasek was still harassed because of his sex.

D. Difficulties with Proving the Aggressor's Sexual Desire or Orientation

Unlike same-sex sexual harassment, when a harasser and his or her victim are of opposite sexes,

there is a reasonable inference that the harasser is acting because of the victim's sex. . . . Thus, when a heterosexual man makes implicit or explicit proposals of sexual activity to a woman coworker or subordinate, it is easy to conclude or at least infer that the behavior is motivated by her sex.¹⁶⁰

This inference is *not necessarily* presumed in cases of same-sex sexual harassment, however.¹⁶¹ It is sometimes difficult, if not impossible,

156. *Id.*

157. *Id.* When Wasek did report the abuse to the director of operations, the Michigan director of operations responded by asking Wasek, "Why don't you just kick [Ottobre's] ass?" *Id.* at 466.

158. *Id.* at 465. The Pennsylvania director of operations also "chastise[d] Wasek for 'whining.'" *Id.* at 466.

159. *Id.*

160. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262 (3d Cir. 2001) (citation omitted) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)); *see also* *Axam & Zalesne*, *supra* note 127, at 164 ("[I]n the opposite-sex context, courts have readily inferred the requisite sex-based causal nexus from the nature of the harassment itself when the harassment invokes gender-based stereotypes or entails sexualized interactions that reinforce and perpetuate gender hierarchies.").

161. *Bibby*, 260 F.3d at 262.

to determine what precisely motivates sexual harassment.¹⁶² Yet, as *Wasek* has made clear, in situations where the workplace is not mixed-gender, whether or not a Title VII claim survives can depend solely on the aggressor's sexual desire.¹⁶³

Many courts have used a harasser's sexual orientation to prove that he or she acted out of sexual desire.¹⁶⁴ In fact, as *Wasek* displayed, plaintiffs are sometimes "precluded from recovery unless they are able to prove to some extent the homosexuality of their harasser."¹⁶⁵ The tendency to equate sexual desire with sexual orientation may stem directly from Scalia's opinion in *Oncale*. Scalia states that sexual desire could be inferred "if there were credible

162. For example, Professor of Law Katherine M. Franke is critical of a Title VII analysis that requires proof that "but for" the victim's gender, the offender would not have engaged in the harassment. She states:

[O]ne of the great strengths of Title VII generally, and sexual harassment jurisprudence specifically, is that it applies to conduct that has either the purpose or the *effect* of discriminating on the basis of sex. Over time, Title VII has proven to be an effective weapon in combating social attitudes about the relative interests and abilities of men and women that are not necessarily grounded in animus so much as outmoded myths and stereotypes. Thus a male boss who interjects sexual comments and behavior into his working relationship with a female colleague may be guilty of sexual harassment whether he naively meant to flatter or invidiously hoped to "get off" on her presence in the workplace.

Katherine M. Franke, *What's Wrong with Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 41, at 169, 173.

163. *Wasek*, 682 F.3d at 468; *see also* *Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1068 (8th Cir. 2005).

164. *See Oncale*, 523 U.S. at 80; *Wasek*, 682 F.3d at 468; *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 188 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 162 (2012); *Love v. Motiva Enters.*, 349 F. App'x 900, 903 (5th Cir. 2009); *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 480 (5th Cir. 2002). Katherine M. Franke notes the problem with the view that a harasser would not have engaged in the harassment "but for" the sex of the victim. She states,

[I]n these cases "but for" causation collapses into sexual orientation. Under this view, a harasser only sexually harasses members of the class of people that he or she sexually desires. As such, "because of sex," primarily means "because of the harasser's sexual orientation," and only secondarily means "because of the victim's sex."

Franke, *supra* note 162, at 173–74.

165. Mary Ann Connell & Donna Euben, *Evolving Law in Same-Sex Sexual Harassment and Sexual Orientation Discrimination*, 31 J.C. & U.L. 193, 202 (2004).

evidence that the harasser was homosexual.”¹⁶⁶ However, a primarily heterosexual male aggressor may find himself attracted to a male employee for the first time and act according to that sexual desire. In this case, there would be no evidence of the aggressor’s homosexuality besides the act committed against his coworker.¹⁶⁷ Therefore, using a person’s sexual orientation may not be an accurate indicator of whether an aggressor acted according to sexual desire.¹⁶⁸

The Eighth Circuit noted this potential problem in *Pedroza v. Cintas Corp. No. 2*.¹⁶⁹ In *Pedroza*, a female employee, Terri Pedroza, was subject to harassment from one of her female coworkers, Pam Straw.¹⁷⁰ The workplace seemed to be exclusively female, and

166. *Oncale*, 523 U.S. at 80.

167. Arguably, it may be more difficult to prove the sexual orientation of an individual who identifies as LGBT than a person who does not identify as LGBT. This is because, historically, LGBT individuals have been encouraged to hide their sexual preferences due to lack of acceptance in the workplace. See BOB POWERS & ALAN ELLIS, A MANAGER’S GUIDE TO SEXUAL ORIENTATION IN THE WORKPLACE 5 (1995).

When negative messages or signals are sent, many employees feel forced to hide their sexual identity. . . .

. . . .

Whenever a manager or coworker tells a homophobic, racist, or sexist joke, the message is sent that it is not okay to be yourself. Every time we exclude sexual minorities, we reinforce the message that sexual minorities are not welcome. Often this is done inadvertently—for example, in training classes where role plays contain references only to opposite sex couples or in invitations to office parties in which husbands and wives are encouraged to attend but no attempt is made to include same-sex partners. Although seemingly subtle, these acts reinforce the message that one needs to hide simply to survive.

Id. Therefore, an individual who must prove his or her aggressor’s homosexual orientation may face evidentiary obstacles that are not faced in different-sex sexual harassment, because sexual minorities have often been encouraged by their coworkers and society at large to hide their sexual preferences.

168. See Franke, *supra* note 162, at 174 (“[A]s a logical matter, this reasoning works only in a world populated exclusively by Kinsey Ones and Kinsey Sixes, that is, people who are exclusively heterosexual or exclusively homosexual in their attractions, desires, and sexual behavior.”).

169. 397 F.3d 1063 (8th Cir. 2005).

170. *Id.* at 1066. Straw allegedly attempted to grab Pedroza’s hand, asked Pedroza, “You want me to kiss you, honey?” and then attempted to kiss Pedroza on the mouth. *Id.* Straw told Pedroza she did not have a husband and that “I want you, honey.” *Id.* She also rubbed her buttocks several times in an attempt to get

Pedroza did not argue that Straw was generally hostile toward other women in the workplace.¹⁷¹ Thus, the court concluded that the only remaining question was whether Straw's behavior was motivated by sexual desire.¹⁷² The court noted that Straw had five children from a former marriage and that she lived with a long-term boyfriend.¹⁷³ However, the court also stated that evidence of Straw's children and her boyfriend only tended to show "that Straw was not strictly homosexual"¹⁷⁴ and the evidence does "not preclude a jury from finding that Straw was motivated by some degree of homosexual desire towards Pedroza."¹⁷⁵

Another unfortunate result of improperly emphasizing sexual orientation is that it makes it much easier to bring a Title VII claim against a homosexual coworker.¹⁷⁶ For example, a situation in which an openly gay employee grabs a coworker's genitals is much more likely to result in a successful Title VII claim than a situation in which a non-openly gay or straight employee grabs a coworker's genitals. Both situations concern the same kind of conduct, and a victim would likely respond the same way to either situation; however, the claim against the homosexual coworker has a greater chance of surviving a court's scrutiny.

E. Examples of Clear Sex Discrimination Where Adherence to a Rigid Evidentiary Formula Causes the Claim to Fail.

One of the main problems with interpreting the *Oncale* list as exhaustive is that the three categories do not cover every instance that sexual harassment occurred because of the victim's sex.

The most common example that courts are beginning to recognize is where an individual is harassed by his or her coworkers

Pedroza's attention. *Id.*

171. *Id.* at 1068–69.

172. *Id.* at 1069.

173. *Id.*

174. *Id.* at 1069 at n.2.

175. *Id.* *But see* Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 468 (6th Cir. 2012) (holding that Wasek's suspicion that his aggressor was "a little strange, possibly bisexual" was insufficient to establish the first *Oncale* category of harassment motivated by sexual desire).

176. Connell & Euben, *supra* note 165, at 208 ("[G]ay harassers became target defendants of Title VII, whereas non-gay men can harass gender nonconforming men with impunity.") (quoting Schwartz, *supra* note 142, at 1763).

for failing to conform to stereotypical gender roles.¹⁷⁷ This was the situation in *EEOC v. Boh Brothers Construction Co.*¹⁷⁸ An increasing number of courts are beginning to recognize that this kind of harassment is actionable under Title VII due to the fact that the harassment occurs because of the victim's sex.¹⁷⁹ One could argue

177. In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, Ann Hopkins, who worked at Price Waterhouse's Office of Government Services in Washington, D.C., was proposed for partnership. *Id.* at 233. However, some of the partners had doubts about her performance because she was a woman. *Id.* at 235. She was described by certain partners as being too "macho" and that she was "overcompensate[ing] for being a woman." *Id.* Additionally, her use of profanity was criticized "because it's a lady using foul language." *Id.* Hopkins was told that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* Hopkins was neither denied nor offered a partnership; however, she was held for reconsideration the following year. *Id.* at 233. When the partners refused to reconsider her the following year, Hopkins brought a Title VII claim. *Id.* at 231–32. The Supreme Court ruled that if an employer acts on the basis of a belief that a woman either should or should not be aggressive, then the employer has acted on the basis of gender. *Id.* at 250. The Court stated, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" *Id.* at 251. *Higgins v. New Balance Athletic Shoe, Inc.* was an early case that confirmed that the rule from *Price Waterhouse* also applied to man-on-man gender-stereotyping. 194 F.3d 252, 261 n.4 (1st Cir. 1999).

Oncala confirms that the standards of liability under Title VII, as they have been refined and explicated over time, apply to same-sex plaintiffs just as they do to opposite-sex plaintiffs. In other words, just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.

Id. (citations omitted).

178. 731 F.3d 444 (5th Cir. 2013); *see supra* Part IV.B.

179. *See Boh Bros. Constr. Co.*, 731 F.3d at 454 ("[N]umerous courts, including ours, have recognized that a plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes."); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination."); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041 (8th Cir. 2010) (holding that a reasonable fact finder could find that the plaintiff faced discrimination on the basis of sex when she failed to meet employment requirements that she be "pretty" and have the "Midwestern girl look"); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 46–47 (1st Cir. 2009) (holding

that *Wasek* fell into this category based on the harassment *Wasek* faced for not asserting himself as a dominant male.¹⁸⁰

Another example that is not necessarily covered in the evidentiary routes laid out in *Oncale* is harassment based on a coworker's appearance. For example, *Schmitz v. ING Securities, Futures & Options, Inc.*¹⁸¹ presented the opposite of what is considered a typical sexual harassment case. Instead of a supervisor harassing an employee because of sexual desire, the male supervisor in this case harassed Schmitz based on a "criticism of Schmitz for what he viewed as *her* flaunting of inappropriately sexy dress and sexy demeanor."¹⁸² The supervisor never offered sexual propositions, never asked Schmitz for a date, and never indicated any kind of sexual interest in her.¹⁸³ Instead, Schmitz's supervisor complained that her attire undermined office productivity because "'any hot-blooded male' in the office could be aroused."¹⁸⁴ He also told her that "he would never let his wife leave the house dressed as

that a jury could reasonably conclude that sex-based discrimination occurred when a female employer denied a female employee a promotion based on a belief that the employee would prioritize being a caregiver to her four young children over her job); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that verbal abuse based on the perception that a male employee was effeminate could constitute discrimination "because of sex"); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir. 2001) ("[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.").

180. See *supra* Part V.B. *Wasek* worked on an all-male oil rig. As the National Organization on Male Sexual Victimization, Inc. argues in its amicus brief for the *Oncale* case, "all-male environments are frequently characterized by extreme hierarchy well-documented to breed sexual abuse of men by men." Brief for National Organization on Male Sexual Victimization, Inc. et al., *supra* note 147, at 9. Males thus often harass other males who are viewed as less powerful. One could argue that in this case, *Ottobre* harassed *Wasek* because he viewed him as weak, and because he viewed him as "less" of a man. The author argues that this amounts to harassment based on *Ottobre's* belief that *Wasek* did not conform to a stereotypically aggressive and dominant male gender role.

181. 10 F. Supp. 2d 982 (N.D. Ill. 1998), *aff'd*, No. 98-3007, 1999 WL 528024 (7th Cir. July 20, 1999).

182. *Id.* at 986.

183. *Schmitz v. ING Sec., Futures & Options, Inc.*, No. 98-3007, 1999 WL 528024, at *1 (7th Cir. July 20, 1999).

184. *Id.*

Schmitz was.”¹⁸⁵ Although the Seventh Circuit denied Schmitz’s sexual harassment claim,¹⁸⁶ the Supreme Court allowed a similar case to succeed in *Harris v. Forklift Systems, Inc.*¹⁸⁷ In *Harris*, the harasser made comments encouraging women employees to dress to expose their breasts and made other sexual innuendos about the way the plaintiff dressed.¹⁸⁸ Although these cases involved male criticism of a female coworker, it is easy to imagine a situation in which a woman harasses another woman based on the second woman’s appearance or clothing choices.¹⁸⁹ Like the assertions of male dominance common in all-male workplaces, female-on-female harassment may occur because of a perceived threat of power.¹⁹⁰

185. *Id.*

186. *Id.* at *3. The court ruled that the conduct in this case was not severe enough to amount to harassment. However, this case proves that even different-sex sexual harassment claims can improperly rely on sexual desire. The court stated that “Schmitz fails to satisfy the first prong because she cannot show that she was subjected to sexual advances or requests for sexual favors.” *Id.* However, there are certainly other methods of proving sexual harassment other than sexual desire. See Franke, *supra* note 162, at 175–76 (“Tragically, the Court’s reasoning [in *Oncale*] has reinforced the lower courts’ inclination to make sex matter too much and for the wrong reasons.”).

187. 510 U.S. 17 (1993). Arguably, the conduct in *Harris* was more severe than the conduct in *Schmitz*; yet the plaintiff in the *Harris* case was also subjected to sexual innuendos based on her dress. *Id.* at 19.

188. Brief for Petitioner at 5, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 302216.

189. Dr. Peggy Drexler argues that female comments on appearance and dress have become routine in some workplaces, despite the fact that this behavior “would be seen more obviously as harassment when coming from a man.” Peggy Drexler, *The Tyranny of the Queen Bee*, WALL ST. J., Mar. 2, 2013, at C1, available at LEXIS.

190. See *id.* (“Some women—especially in industries that remain male-dominated—assume that their perches may be pulled from beneath them at any given moment Made to second-guess themselves, they try to ensure their own dominance by keeping others, especially women, down.”). The Workplace Bullying Institute, an organization based out of the state of Washington, conducted a survey in 2010 on workplace bullying. The results of the 2010 survey show that although bullying is done primarily by men, eighty percent of female bullies target other women in the office. That number marks an increase of nine percent from when the study was last conducted in 2007. In general, the results of the study show that in thirty-four percent of workplace bullying incidents, the bully is male and the target is male. In thirty-percent of those incidents, the bully is female and the target is female. Thus, female-on-female bullying is a growing issue in the workplace. *Gender & Workplace Bullying: 2010 WBI Survey*, WORKPLACE

However, harassment based on appearance will not always fit into one of the three *Oncale* categories.¹⁹¹

Furthermore, the *Oncale* categories do not necessarily include situations in which there is sexual action, but no motive of sexual desire; yet this kind of harassment is regularly regarded as sexual harassment when perpetrated by a member of the opposite sex.¹⁹² For example, in *Little v. Windermere Relocation, Inc.*, the Ninth Circuit held that “[r]ape is unquestionably among the most severe forms of sexual harassment. . . . Being raped is, at minimum, an act of discrimination based on sex.”¹⁹³ The *Oncale* categories look to the motive behind the sexual harassment rather than the harassment itself, meaning an instance of sexual assault that was not motivated

BULLYING INST. (2010), http://www.workplacebullying.org/multi/pdf/gender_2010_wbi.pdf. Although Justice Scalia made clear in *Oncale* that general workplace bullying does not constitute sexual harassment for purposes of a Title VII claim, 523 U.S. 75, 81 (1998), often bullying and sexual harassment overlap. What is perceived as bullying may actually be sexual harassment. See Axam & Zalesne, *supra* note 127; *infra* Part V.F. It is therefore reasonable to assume that some of those reported instances of workplace bullying actually constituted male-on-male or female-on-female sexual harassment. Same-sex sexual harassment thus may be more common than people realize.

191. The facts of each case must determine the proper analysis, but the author argues that this situation will not always fit into either of the categories. This kind of harassment does not necessarily reflect a general hostility toward women in the workplace. This theory appears even less likely if one accepts Dr. Peggy Drexler’s theory that women sometimes bully other women out of a sense of competition. See Drexler, *supra* note 189. If a woman harasses another woman based on a belief that she is more qualified for a position or promotion or other workplace benefit, she obviously believes that women are qualified for that workplace benefit. Finally, as with other cases examined in this note, the third category often hinges on whether comparative evidence is available. In a female-dominated workplace, comparative evidence may be difficult, if not impossible, to obtain.

192. For example, in *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), the court ruled that physical sexual assault automatically constituted harassment under Title VII. See also 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 5:42 n.20 (2013) (“The most extreme form of offensive physical, sexual conduct—rape—clearly violates Title VII.”).

193. 265 F.3d 903, 912 (9th Cir. 2001), *opinion amended and superseded on denial of reh’g*, 301 F.3d 958 (9th Cir. 2002); see also Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995) (“Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee’s sex.”).

by any of the three enumerated evidentiary routes would not be actionable under Title VII.¹⁹⁴

While it may be true that not every instance of vulgarity in a workplace amounts to actionable sexual harassment, the complex gender dynamics and power structures in a typical office allow discrimination on the basis of sex to manifest itself in several different ways. This is precisely why the three evidentiary routes in *Oncale* cannot be interpreted as exhaustive, and this is why *Oncale* emphasized that a court should consider “all the circumstances” surrounding a same-sex Title VII claim.¹⁹⁵

F. Recommendations

In *EEOC v. Boh Bros. Construction Co.*,¹⁹⁶ Judge Grady Jolly, in his dissenting opinion, expressed his concern over proving more abstract theories of sexual harassment.¹⁹⁷ This concern may be legitimate, because, for example, proving that an aggressor was sexually interested in a harassed employee may be easier than proving that he or she acted to maintain power hierarchies in the workplace.¹⁹⁸ This is especially true because an aggressor might not

194. See, e.g., *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 465 (6th Cir. 2012) (denying the plaintiff’s claim of sexual harassment despite the fact that he was prodded in the rear by a hammer and a long sucker rod); *Smith v. Hy-Vee, Inc.*, 622 F.3d 904, 905 (8th Cir. 2010) (denying the plaintiff’s claim despite the fact that the plaintiff was repeatedly groped by the aggressor).

195. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

196. 731 F.3d 444 (5th Cir. 2013).

197. See *id.* at 471 (Jolly, J., dissenting)

But regardless of whether there are other methods for making this determination, the EEOC proffered no basis for inferring discriminatory intent based upon Woods’s sex—subjective or objective. Rather, it moves quickly from asserting that other evidentiary paths are available to a conclusion that, because Wolfe targeted certain words and acts at Woods, Wolfe’s mal intent to sexually discriminate against Woods was proved. This line of reasoning completely abdicates the burden prescribed to plaintiffs in same-sex sexual discrimination cases by the Supreme Court in *Oncale*—which is not simply to assert the basis for the inference of harassment based upon sex, but to further prove the truth of that assertion.

Id.

198. See *Clarke*, *supra* note 152, at 536 (“Although the Supreme Court held that ‘harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex,’ in practice, it has been difficult for

consciously recognize that he or she is attempting to maintain gender dynamics.

However, there are methods for proving these more abstract theories of sexual harassment. For example, an attorney could have used the negative reactions of Wasek's supervisors¹⁹⁹ and the increased harassment that Wasek experienced after he struggled with some heavy equipment²⁰⁰ to argue that Wasek was harassed for not conforming to a dominant and aggressive male stereotype. Courts need to have an open mind when accepting this evidence, but attorneys and organizations like the EEOC also need to think outside of the *Oncale* box. Additionally, human resource representatives and sexual harassment investigators need to be aware of these potential theories of sexual harassment so that they can gather the right evidence and conduct witness interviews effectively.

Another ever-present concern in sexual harassment law is that broadening the definition of "because of sex" will lead to a flood of frivolous Title VII cases.²⁰¹ After all, at the time of the *Oncale* decision, sexual harassment was the fastest growing area of employment discrimination.²⁰² It is worth noting, however, that the number of sexual harassment claims filed has actually decreased in recent years.²⁰³

Additionally, limiting the number of sexual harassment claims by narrowly defining "because of sex" excludes many instances of legitimate sexual harassment.²⁰⁴ As noted above, "because of sex"

plaintiffs to establish causation based on any other theory." (citations omitted)).

199. See *Wasek*, 682 F.3d at 467.

200. *Id.* at 465.

201. For example, in *Oncale*, Justice Scalia noted that Title VII is not "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

202. Schultz, *supra* note 137, at 1686 n.6 (citing Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily; New Laws Boost Hopes for Monetary Awards*, WASH. POST, May 12, 1997, at A1, available at 1997 WLNR 7183487) (noting the increase in sexual harassment complaints from 6127 complaints in 1990 to 15,342 complaints in 1996).

203. The number of sexual harassment claims filed with the EEOC and state and local Fair Employment Practices agencies in the United States declined from 15,889 in fiscal year 1997 to 11,364 in fiscal year 2011. *Sexual Harassment Charges, EEOC & FEPA's Combined: FY 1997-FY 2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Jan. 16, 2014).

204. See *Axam & Zalesne*, *supra* note 127, at 176 ("Accordingly, it is apparent

could mean conduct motivated by sexual desire,²⁰⁵ animosity toward a person's biological sex,²⁰⁶ animosity toward a person's gender,²⁰⁷ or simply conduct that is inherently sexual.²⁰⁸ This broad meaning cannot be encompassed by the three *Oncale* evidentiary routes.

Rather than limiting the abstract category of "because of sex" through an exhaustive interpretation of the *Oncale* list of evidentiary routes, courts should place limitations on cases based on the requirements that harassment be severe, pervasive, and unwelcome, and that there exists some basis for imputing liability to an employer.²⁰⁹ In *Oncale*, for example, Justice Scalia notes how courts need to draw distinctions between discriminatory employment conditions and "ordinary socializing in the workplace."²¹⁰ It is worth noting, however, that although courts should place limits on conduct that is not sufficiently severe, a narrow view of the severe and pervasive requirement may also have dangerous results.

Justice Scalia's emphasis on horseplay in the *Oncale* context seems questionable given the egregious behavior that took place in that case. This is due to the fact that *Oncale* did not involve "mild insults, distasteful jokes, or sporadic incidents of questionable offensiveness," but instead involved a "relentless pattern of explicit threats of rape, culminating in physical assaults in which multiple harassers restrained Oncale, forced him into contact with another man's penis, and subjected him to forcible anal penetration with a foreign object amidst threats of anal rape." The danger of Scalia's statement in this context is that it has caused courts to mischaracterize legitimate same-sex sexual harassment as "mere horseplay."²¹¹ In *Wasek*, where the plaintiff was subjected to sexually

that the cases analyzing sexual harassment directed at women have not adhered to a rigid, simplistic conception of 'sex' in assessing whether the conduct could be characterized as conduct that occurred 'because of' the plaintiff's 'sex' within the meaning of Title VII.").

205. See *supra* Part V.B.

206. See *supra* Part V.B.

207. See *supra* Part V.B.

208. See *supra* Part V.C.

209. Bates, *supra* note 25, at 146–47.

210. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

211. See *Axam & Zalesne*, *supra* note 127, at 224 ("Numerous other same-sex sexual harassment cases have involved closely analogous examples of physical sexual assault and forcible simulations of oral or anal sodomy that were perpetrated by one or more harassers as part of a pattern of incessant verbal and

assaultive conduct similar to the conduct in *Oncale*,²¹² the court noted how “the conduct of jerks, bullies, and persecutors is simply not actionable under Title VII unless they are acting because of the victim’s gender.”²¹³

Thus, while the requirements for sexual harassment should be used to limit frivolous cases, viewing any category too narrowly could exclude legitimate sex-based discrimination.

VI. CONCLUSION

The complicated nature of gender discrimination and the relatively short history of sexual harassment claims have led to judicial inconsistency. Courts have been especially inconsistent with same-sex sexual harassment claims because on one hand, they have felt increasing pressure from society to expand the definition of sexual harassment,²¹⁴ and on the other hand, they have felt the need to narrow the definition to keep certain “trivial” claims out of the court system.²¹⁵ However, when judges confine themselves to narrow definitions of sexual harassment, certain individuals are unjustly precluded from bringing Title VII claims. Yet gender discrimination is too complicated for such narrow definitions. If society truly wants to eradicate workplace discrimination, our justice system needs to adequately address the complexities of the power hierarchies of the office environment.

physical abuse that would not be not easily confused with ‘ordinary socializing’ or ‘horseplay.’”).

212. In *Wasek*, the plaintiff was poked in the rear with a hammer and a long sucker rod. *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 465 (6th Cir. 2012).

213. *Id.* at 467.

214. For example, at the time this article was written, Congress was debating passage of the Employment Non-Discrimination Act (ENDA), which would prohibit employment discrimination “based on sexual orientation and gender identity.” Support for increasing who is covered under sexual harassment claims can be inferred from the advocates for these new protections. See Sylvia Ann Hewlett, *ENDA Vote Is Just the Beginning*, HUFFINGTON POST (July 18, 2013 4:09 PM), http://www.huffingtonpost.com/sylvia-ann-hewlett/enda-vote-is-just-the-beginning_b_3613199.html.

215. See *supra* Part V.F.