

# EVOLVING LAW IN SAME-SEX SEXUAL HARASSMENT AND SEXUAL ORIENTATION DISCRIMINATION

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## I. INTRODUCTION

The law of sexual harassment has evolved rapidly over the past two decades.<sup>1</sup> The evolution began in 1981 when the Equal Employment Opportunity Commission (“EEOC”) amended its *Guidelines on Discrimination Because of Sex* to add a section expressly dealing with sexual harassment and first using the term “sexual harassment.”<sup>2</sup> In 1983, the Supreme Court held that Title VII protected men as well as women from sex discrimination.<sup>3</sup> The Supreme Court in 1986 recognized a “hostile environment” as a form of sexual harassment cognizable under Title VII, in addition to quid pro quo harassment.<sup>4</sup> In 1991, Congress enacted the Civil Rights Act of 1991, which expanded existing remedies for sexual harassment to provide for the award of punitive damages and the right to a jury trial.<sup>5</sup> In 1992, the Supreme Court held that Title IX provides relief for sexually harassed students similar to the way Title VII provides relief for employees and

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1. See generally Francis Achampong, *The Evolution of Same-Sex Sexual Harassment Law: A Critical Examination of the Latest Developments in Workplace Sexual Harassment Litigation*, 73 ST. JOHN’S L. REV. 701 (1999) (discussing the development of same-sex harassment as a part of a rapidly evolving body of sexual harassment law).

2. See EEOC, GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, EEOC COMPL. MAN. (BNA) § 615.2 (1998) [hereinafter “EEOC GUIDELINES”]. See also *Guidelines on Discrimination Because of Sex*, 24 C.F.R. § 1604.1–04.11 (2004) (codifying the EEOC’s guidelines because of sex).

3. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

4. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66–67 (1986). See *infra* notes 20–24.

5. 42 U.S.C. § 1981a (2000). A victim of sexual harassment may recover compensatory damages (including damages for emotional pain, suffering, mental anguish, and loss of enjoyment of life) and punitive damages in cases where a private employer engaged in discrimination that was malicious or recklessly indifferent to the employee’s civil rights. *Id.* § 1981a(b)(1). Compensatory and punitive damages cannot exceed \$300,000 for employers with more than five hundred employees. *Id.* § 1981a(b)(3)(D). Punitive damages are not recoverable against the government. *Id.* § 1981a(b)(1).

that students can recover money damages under Title IX.<sup>6</sup> The evolution continued in 1993, when the Supreme Court held that a sexual harassment victim does not have to prove psychological damage to prevail on a Title VII claim.<sup>7</sup> In 1998, the Supreme Court issued four landmark decisions clarifying the contours of vicarious employer liability,<sup>8</sup> setting forth the standards by which schools will be assessed in the sexual harassment context,<sup>9</sup> and declaring that Title VII prohibits same-sex sexual harassment.<sup>10</sup>

## II. OVERVIEW OF THE LAW OF SEXUAL HARASSMENT

Sexual harassment is a form of discrimination prohibited in the workplace by Title VII<sup>11</sup> and at school by Title IX.<sup>12</sup> The EEOC has enforcement responsibility for Title VII<sup>13</sup> and the Office for Civil Rights (“OCR”) for Title IX.<sup>14</sup> Both agencies have defined sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person’s employment or participation in an educational program or activity, (2) submission to or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting that individual, or (3) such conduct creates an intimidating, hostile, or offensive environment that unreasonably interferes with a person’s ability to work or to participate in a school program or activity.<sup>15</sup>

### A. Title VII—The Employment Context

To constitute sexual harassment, the underlying conduct must be unwelcome to the victim, as well as objectively offensive to the public at large. Some courts

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6. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75–76 (1992) (concluding that Congress did not intend to limit remedies available in a suit brought under Title IX).

7. *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993) (holding that “Title VII comes into play before the harassing conduct leads to a nervous breakdown”)

8. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

9. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

10. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). For excellent discussions of the importance and impact of these decisions see Edward N. Stoner II & Catherine S. Ryan, *Burlington, Faragher, Oncale, and Beyond: Recent Developments in Title VII Jurisprudence*, 26 J.C. & U.L. 645 (2000) and William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J.C. & U.L. 615 (2000).

11. 42 U.S.C. §§ 2000e–2000e-4 (2000).

12. 20 U.S.C. §§ 1681–88 (2000).

13. 42 U.S.C. §§ 2000e–2000e-4 (2000).

14. 20 U.S.C. §§ 1681–88 (2000).

15. See EEOC GUIDELINES, *supra* note 2, § 615.2(a) (1998); OFFICE FOR CIVIL RIGHTS, FAQS—SEXUAL HARASSMENT, at [www.ed.gov/about/offices/list/ocr/qa-sexharass.html](http://www.ed.gov/about/offices/list/ocr/qa-sexharass.html) (last visited Oct. 20, 2004). Both Title VII and Title IX regulations prohibit retaliation against persons who file a charge of discrimination, who testify on behalf of a complaining party, or who oppose in any manner discriminatory treatment. Courts have found retaliation in same-sex sexual harassment cases. See, e.g., *Mota v. Univ. of Houston Health Science Ctr.*, 261 F.3d 512 (5th Cir. 2001) (upholding jury verdict on same-sex sexual harassment claim of dental school professor against his department chair); *Dandan v. Radisson Hotel Lisle*, No. 97 C 8342, 2000 WL 336528 (N.D. Ill., Mar. 28, 2000) (dismissing same-sex sexual harassment claim but permitting retaliation claim to go forward). The scope of this article excludes a further discussion of retaliation.

have recognized that men and women may experience the same conduct differently and have adopted a “reasonable woman” or “reasonable person of the same gender” standard.<sup>16</sup>

A victim’s seemingly “voluntary” submission to sexual advances has no bearing on a determination of “welcomeness.”<sup>17</sup> The fact that an employee or student may have willingly participated in the conduct on one occasion does not prevent him or her from charging that similar conduct is unwelcome when encountered at a later time.<sup>18</sup> Conduct is unwelcome if the victim did not request or invite it and regarded the conduct as undesirable or offensive. Unwelcomeness need not be expressed verbally.<sup>19</sup>

Actionable sexual harassment takes two different forms: quid pro quo and hostile environment.<sup>20</sup> Quid pro quo harassment is the most easily identified type of sexual harassment. It is a demand for sexual favors in exchange for a job benefit,<sup>21</sup> a grade, or participation in an educational activity.<sup>22</sup> Hostile work or school environment is the more pervasive type of sexual harassment. It occurs when verbal, nonverbal, or physical conduct of a sexual nature is severe, persistent, or pervasive enough to limit a person’s ability to work or benefit from an educational experience.<sup>23</sup> Factors to consider in determining whether the objectionable conduct constitutes cognizable sex discrimination are: frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or merely an offensive utterance; and whether it unreasonably interferes with an employee’s work performance or a student’s learning opportunities.<sup>24</sup>

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16. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a “reasonable woman” standard); *Yates v. Avco Corp.*, 819 F.2d 630, 636–37 (6th Cir. 1987) (using “reasonable person of the same sex” standard); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1296 (N.D. Cal. 1993) (applying a “reasonable victim” standard and referring to OCR’s use of this standard).

17. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986). The correct analysis is “whether [an employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” *Id.*

18. *Id.*

19. See *Chamberlin v. 101 Realty Inc.*, 915 F.2d 777, 784 (1st Cir. 1990) (ruling that a woman who removes her hand every time a supervisor attempts to touch it or who silently walks away from sexual comments has shown that such conduct is unwelcome).

20. The terms “quid pro quo” and “hostile environment” do not appear in the statutory text of Title VII. The terms appeared first in academic literature. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1978) (discussing the development of these terms).

21. See *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995) (noting that quid pro quo sexual harassment is established when complainant shows “that an individual ‘explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee’s acceptance of sexual conduct’”) (internal citations omitted).

22. See *Doe v. Univ. of Ill.*, 138 F.3d 653 (7th Cir. 1998) (noting definition of sexual harassment in educational context under Title IX is derived from Title VII precedent).

23. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (holding a plaintiff may recover for hostile environment sexual harassment if she or he shows unwelcome sexual conduct based on gender was “sufficiently severe or pervasive ‘to alter the conditions of . . . employment and create an abusive working environment’”).

24. See *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993). See also *Clark County Sch. Dist. v. Breedon*, 532 U.S. 268 (2001) (*per curiam*) (reiterating that sexual harassment is actionable under Title VII only when it is so severe or pervasive as to alter conditions of victim’s employment, and finding no reasonable person in instant case could have believed single incident at issue could

The Supreme Court's 1998 decisions on sexual harassment distinguished between harassment that results in a tangible employment action and harassment that creates a hostile work environment. This dichotomy determines whether the employer can raise an affirmative defense to vicarious liability.<sup>25</sup> An employer can be held vicariously liable for sexual harassment caused by a supervisor with immediate or successively higher authority over a victimized employee when a supervisor's harassment culminates in a *tangible employment action*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.<sup>26</sup> However, when *no tangible employment action* is taken, a defending employer may raise an affirmative defense to liability or damages if: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to avoid the harm otherwise.<sup>27</sup> Evidence of using reasonable care includes having a sexual harassment policy in place, following the policy in practice, and showing that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities to end the harassment.<sup>28</sup> No affirmative defense is available, however, when a supervisor's conduct results in a negative tangible employment action, such as discharge or demotion.<sup>29</sup>

#### B. Title IX—The Education Setting

Liability for sexual harassment can also arise in the school context. In *Gebser v. Lago Vista Independent School District*,<sup>30</sup> the Supreme Court ruled a school district may not be held liable for damages under Title IX for the sexual harassment of a student by one of the district's teachers unless an official of the school district with authority to institute corrective measures has actual notice of and is deliberately indifferent to the teacher's misconduct.<sup>31</sup> *Gebser* involved an eighth-grade student who joined a high school book discussion group led by a teacher who often made sexually suggestive comments to the students.<sup>32</sup> When Gebser entered high school, she was assigned to classes with this same teacher.<sup>33</sup> Eventually, the teacher initiated sexual contact with Gebser, and the two had sexual intercourse on a number of occasions over a period of several months. Although Gebser did not report the relationship to school officials, parents of two other students complained to the principal about the teacher's inappropriate comments in class.<sup>34</sup> The principal met with the teacher, who then apologized to

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have violated Title VII's standard).

25. See EEOC TECHNICAL ASSISTANCE PROGRAM, SEX DISCRIMINATION at 115, n.7 (2001).

26. *Meritor*, 477 U.S. at 63–64. See also *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (discussing the underpinnings of employer liability and the “tangible results” rule).

27. *Burlington Indus. v. Ellerth*, 524 U.S. 724, 745 (1998); *Faragher*, 524 U.S. at 807.

28. *Faragher*, 524 U.S. at 807–08.

29. *Burlington Indus.*, 524 U.S. at 744–45; *Faragher*, 524 U.S. at 808.

30. 524 U.S. 274 (1998).

31. *Id.* at 290.

32. *Id.* at 278.

33. *Id.*

34. *Id.*

the parents for his classroom comments.<sup>35</sup> The principal did not report the incidents to the superintendent.<sup>36</sup>

A few months later, a police officer discovered Gebser and the teacher having sexual intercourse in an automobile and arrested the teacher.<sup>37</sup> The school district then fired the teacher and revoked his teaching license.<sup>38</sup>

Gebser filed suit under Title IX and sought money damages.<sup>39</sup> The Supreme Court denied Gebser relief and refused to expand liability under Title IX to include the concepts of respondeat superior or constructive notice that apply in Title VII cases.<sup>40</sup> In denying Gebser's claim, the Court established a three-part standard for determining institutional liability for a teacher's sexual harassment of a student: (1) an official of the school district must have "actual knowledge" of the harassment; (2) this official must have authority to institute corrective measures to resolve the problem; and (3) this official must have failed to adequately respond to the harassment and to have acted with "deliberate indifference."<sup>41</sup>

In 1999, the Court extended the *Gebser* "deliberate indifference" standard to apply to peer sexual harassment in limited circumstances where: (1) the institution had "actual knowledge" of the harassment; (2) the institution acted with "deliberate indifference" to the conduct; (3) the institution had "substantial control" over the student harasser and the context of the harassment; and (4) the harassment was so "severe, pervasive, and objectively offensive" as to have deprived the victim of educational opportunities or services.<sup>42</sup>

### III. SAME-SEX SEXUAL HARASSMENT: THE *ONCALE* DECISION

The Supreme Court granted review of *Oncale v. Sundowner Offshore Services, Inc.*,<sup>43</sup> because courts were "hopelessly divided" in analyzing same-sex sexual harassment cases under Title VII.<sup>44</sup> The Fifth Circuit held same-sex sexual harassment claims were never actionable under Title VII.<sup>45</sup> The Seventh and Eighth Circuits, however, held gender-based sexual harassment in the workplace actionable, regardless of the harasser's sex, sexual orientation, or motivation.<sup>46</sup>

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 278–79.

40. See generally Jan Alan Neiger, *Actual Knowledge Under Gebser v. Lago Vista: Evidence of the Court's Deliberate Indifference or an Appropriate Response for Finding Liability?*, 26 J.C. & U.L. 1, 37–66 (1999) (discussing agency principles under *Gebser* and suggesting that they were properly resolved).

41. *Gebser*, 524 U.S. at 290–93.

42. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642–46 (1999).

43. 523 U.S. 75 (1998).

44. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.4 (4th Cir. 1996) (referring to lower federal courts as "hopelessly divided" on same-sex sexual harassment).

45. See, e.g., *Oncale*, 83 F.3d 118, 120 (5th Cir. 1996), *overruled*, 523 U.S. 75 (1998); *Garcia v. Elf Atochem North Am.*, 28 F.3d 446, 451–52 (5th Cir. 1994) (holding harassment by male supervisor against male subordinate does not state claim under Title VII even though harassment had sexual overtones).

46. See, e.g., *Doe v. City of Belleville*, 119 F.3d 563, 574 (7th Cir. 1997) (suggesting that workplace harassment sexual in context is always actionable regardless of harasser's sex, sexual orientation, or motivation), *vacated*, 523 U.S. 1001 (1998); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996) (accepting all same-sex sexual harassment cases, regardless of

The Fourth, Sixth, and Eleventh Circuits ruled yet another way: such claims were actionable only if the plaintiff could prove the harasser was homosexual and, presumably, motivated by sexual desire.<sup>47</sup> The Supreme Court quite accurately described the federal appellate court decisions in the application of Title VII to protect victims of same-sex sexual harassment as “a bewildering variety of stances.”<sup>48</sup>

In *Oncale*, the Supreme Court unanimously held Title VII’s prohibition against sexual harassment applies to harassment by a member of one sex against a member of the same sex.<sup>49</sup> Joseph Oncale worked as a roustabout on an oil rig in the Gulf of Mexico as part of an eight-man crew. Oncale sued his employer, alleging that sexual harassment by male co-workers and supervisors was so bad that he was forced to quit. Oncale alleged he was forcibly subjected to “sex-related, humiliating actions” and was physically assaulted and threatened with rape.<sup>50</sup> He also reported he was called names “suggesting homosexuality.”<sup>51</sup> He further alleged that his complaints to supervisors produced no remedial action. In fact, the company’s safety compliance clerk told Oncale that two of the crew had also picked on him. Oncale eventually quit, “asking that his pink slip reflect that ‘he voluntarily left due to sexual harassment and verbal abuse.’”<sup>52</sup> Oncale contended the pattern of harassment by his co-workers and supervisors amounted to employment discrimination because of his sex under Title VII.<sup>53</sup>

Relying on precedent in the Fifth Circuit, the district court granted summary judgment to the employer, reasoning that male plaintiffs could not sue under Title VII for harassment by male co-workers. On appeal, a panel of the Fifth Circuit concluded its precedent was binding and affirmed the district court’s decision in favor of the employer.<sup>54</sup>

In a unanimous six-page decision, the Supreme Court reversed the Fifth Circuit, ruling that “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant . . . are of the same sex.”<sup>55</sup> The Court first noted the broad purpose of Title VII is “to strike at the entire spectrum of disparate treatment of men and women in employment,”<sup>56</sup> and,

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motivation of harassment, as actionable).

47. See *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (delineating test where only requirement is that proposition be result of sexual attraction); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1505–06 (11th Cir. 1997) (holding Title VII claim is stated when homosexual male supervisor solicits sexual favors from male subordinate and conditions work benefits or detriments on receiving such favors); *Wrightson v. Pizza Hut Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (holding claim under Title VII for same-sex hostile work environment harassment may lie where perpetrator of sexual harassment is homosexual).

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

49. *Id.*

50. *Id.* at 77. The authors encourage readers to read the cases in this article themselves to obtain a complete and disturbing understanding of the appalling persecution many individuals have endured both at work and at school, since not all of the case summaries fully capture the crude, vulgar, and highly offensive language and graphic sexual descriptions of sexually harassing treatment plaintiffs have allegedly endured in numerous cases.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 79.

56. *Id.* at 78.

therefore, the law covered both men and women.<sup>57</sup> The Court opined that “[b]ecause of the many faces of human discrimination, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.”<sup>58</sup> While recognizing that “male-on-male” sexual harassment in the workplace was assuredly not the principal evil to which Title VII was directed, the Court concluded that no “justification” existed “for a categorical rule excluding same-sex harassment claims from coverage of Title VII.”<sup>59</sup> The critical issue, according to the Court, was “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>60</sup>

The Court found it reasonable for an inference of sexual harassment to be established in a same-sex situation “if there were credible evidence that the harasser was homosexual.”<sup>61</sup> At the same time, the Court made clear “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”<sup>62</sup> The Court delineated some “evidentiary route[s]” plaintiffs could use to establish same-sex harassment.<sup>63</sup> The query, the Court recognized, is whether the “offensive” conduct “constitute[s] ‘discrimin[ation] . . . because of . . . sex.’”<sup>64</sup> The *Oncale* Court elaborated:

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. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.<sup>65</sup>

At the same time, the Court emphasized that Title VII is not a “general civility code,”<sup>66</sup> explaining:

the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the “conditions” of the victim’s employment. . . .

. . . Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.<sup>67</sup>

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57. *Id.* (internal citations omitted).

58. *Id.* (internal citations omitted).

59. *Id.* at 79 (internal citations omitted).

60. *Id.* at 80 (internal citations omitted).

61. *Id.*

62. *Id.*

63. *Id.* at 81.

64. *Id.*

65. *Id.* at 80–81.

66. *Id.* at 81.

67. *Id.* at 82. The Supreme Court ultimately remanded the case to the district court for a

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 The Supreme Court's failure to set forth specific guidelines in *Oncale* for determining when same-sex harassing conduct exists "because of sex" has left lower courts somewhat adrift.<sup>68</sup> Lower courts have given both expansive and restrictive readings of the Court's decision.<sup>69</sup> Some courts have found gender-stereotyping harassment to exist in violation of Title VII or Title IX,<sup>70</sup> while others have not.<sup>71</sup> Some courts have found the three evidentiary methods of proof suggested in *Oncale* to be exclusive,<sup>72</sup> while others have found them to be examples only.<sup>73</sup> Some courts have found the evidence of harassment to be severe and pervasive,<sup>74</sup> while others have found similar conduct to be mere "horseplay."<sup>75</sup> Suffice it to say, the decisions form no consistent pattern of interpreting *Oncale*.

The *Oncale* court suggested a plaintiff in a same-sex sexual harassment case could create an inference of discrimination "because of sex" with at least three different types of proof: (1) evidence the harasser sexually desires the victim; (2) evidence the harasser is motivated by a general hostility to the presence of a particular sex in the workplace; and (3) direct comparative evidence of how the harasser treated members of both sexes in a mixed-sex workplace.<sup>76</sup> The following analysis of post-*Oncale* cases is organized along these evidentiary lines, while recognizing these methods of proof set forth by the Court were not intended to be the only methods of proof available to a plaintiff.<sup>77</sup>

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jury trial of *Oncale*'s claims. A week before the scheduled trial, the parties settled the suit for an undisclosed amount. *See Parties Settle Same-Sex Suit Just Short of Trial Before Federal Jury*, Daily Lab. Rep. (BNA) No. 209 at A-4 (Oct. 29, 1998).

68. *See* Matthew Fedor, *Can Price Waterhouse and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of Oncale Compels An Affirmative Answer*, 32 SETON HALL L. REV. 455, 468 (2002) ("Ironically, much like Justice Scalia's characterization of pre-*Oncale* lower court interpretations of same-sex sexual harassment claims, post-*Oncale* courts have taken a 'bewildering variety of stances' in evaluating same-sex sexual harassment claims involving gender stereotyping.")

69. For a good discussion of the Court's efforts to simplify Title VII, including its decision in *Oncale*, see Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557 (2001).

70. Since *Oncale* and *Gebser*, several circuits have asked the question as one of first impression: Is same-sex harassment actionable under Title IX? Although finding the plaintiff did not sufficiently plead that the discrimination she alleged was "because of sex", which is the *sine qua non* of a Title IX sexual harassment case, the First Circuit in *Frazier v. Fairhaven School Comm.*, 276 F.3d 52 (1st Cir. 2002), held that "a hostile environment claim based upon same-sex harassment is cognizable under Title IX." *Id.* at 66. In so doing, the court relied upon the reasoning of *Oncale*, ("We believe that the reasoning of *Oncale* is fully transferable to Title IX cases."), and of two other circuits that had addressed the issue. *Id.* (citing with approval *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219-20 (5th Cir. 1998); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 468 (8th Cir. 1996)).

71. *See, e.g.*, *Dandan v. Radisson Hotel Lisle*, No. 97-C-8342, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000).

72. *See, e.g.*, *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714-15 (E.D. Tex. 2000).

73. *See, e.g.*, *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999).

74. *See id.* at 1011 (commenting that "[t]he conduct described here goes far beyond the casual obscenity").

75. *English v. Pohanka of Chantilly, Inc.*, 190 F. Supp. 2d 833, 846 (E.D. Va. 2002) (pronouncing conduct of alleged harasser to be simply "teasing and horseplay, rather than harassment because of sexual attraction").

76. *See Oncale*, 523 U.S. at 80-81.

77. *See, e.g.*, *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999)



### 1. Overview

The *Oncale* court noted an inference of discrimination on the basis of sex can arise if there is credible evidence the harasser is homosexual:<sup>78</sup>

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposal of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.<sup>79</sup>

Commentators have described this type of situation as a “desire case,” one in which the same-sex harasser desires the victim and creates an unreasonably offensive work environment by unrelenting, unwelcome sexual advances.<sup>80</sup> However, the sexual desire approach has caused confusion for courts. The cases also highlight the hurdles faced by plaintiffs in establishing through “credible evidence that the harasser is homosexual” and motivated by sexual desire.<sup>81</sup>

### 2. Case Law

A few court decisions are highlighted below that exemplify how courts are

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(explaining that “we discern nothing in the Supreme Court’s decision indicating that the examples it provided were meant to be exhaustive rather than instructive.”). In *Bibby v. Phila. Coca Cola Bottling Co.*, the Third Circuit found:

[T]here are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex. . . . Based 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.

260 F.3d 257, 264 (3d Cir. 2001). *But see* *Mims v. Carrier Corp.* 88 F. Supp. 2d 706, 714–15 (E.D. Tex. 2000) (indicating the three evidentiary routes in *Oncale* are exhaustive).

78. *See Oncale*, 523 U.S. at 80–81.

79. *Id.* at 80.

80. *See* B. J. Chisholm, *The (Back) Door of Oncale v. Sundowner Offshore Services, Inc.: “Outing” Heterosexuality as a Gender-Based Stereotype*, 10 LAW & SEX. 239, 259 (2001) (stating courts seem to be most comfortable with sexual harassment claims when complained of conduct is “desire based”); Marianne C. DelPo, *The Thin Line Between Love and Hate: Same-Sex Hostile-Environment Sexual Harassment*, 40 SANTA CLARA L. REV. 1, 17 (1999) (dividing hostile environment claims into two types: “desire” claims and “hatred” claims). Several commentators have criticized the *Oncale* Court’s adoption of desire as a proper evidentiary test. *See, e.g.*, Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 743 (1997) (citing psychologist who concluded “men engage in offensive sexual conduct in the workplace primarily as a way to exercise or express power, not desire,” and arguing sexual conduct by and between males in the workplace not expressing desire, is, nonetheless, “because of sex”); Nicholas Hua, *Same-Sex Sexual Harassment Under Title VII: The Line of Demarcation Between Sex and Sexual Orientation Discrimination*, 43 SANTA CLARA L. REV. 249, 252 (2002) (contending “same-sex sexual harassment cannot be resolved by requiring victims to prove causation through the harasser’s sexual desire for the plaintiff . . . [because] [s]exual desire is grounded in remnants of traditional opposite-sex sexual harassment”).

81. *Oncale*, 523 U.S. at 80. This section of the article necessarily highlights only a few of the decisions containing extensive discussion of the desire analysis.

struggling to apply the type of evidence required to establish the *Oncale* desire approach. In the end, the plaintiff's desire cases will often be precluded from recovery unless they are able to prove to some extent the homosexuality of their harasser and, in some jurisdictions, that the harasser's conduct constitutes sexual propositioning.

In *Shepherd v. Slater Steels Corporation*,<sup>82</sup> the Seventh Circuit ruled in a desire case that physical encounters by the harasser provided enough credible evidence the harasser might be gay to survive a summary judgment motion.<sup>83</sup> Lincoln Shepherd had worked for Slater for approximately two years when he was assigned to a new position within the company and a new supervisor, Edward Jemison, with whom he worked alone.<sup>84</sup> Shepherd said the harassment by his supervisor began when Jemison told him that he was a "handsome young man" and then began to repeatedly expose himself four or five times a week to Shepherd.<sup>85</sup> The offensive conduct rapidly escalated.<sup>86</sup> Shepherd subsequently complained of the incident to his wife, to a co-worker, and to his department manager, who in turn reported it to a human resources employee, who confronted Jemison, the alleged harasser.<sup>87</sup> The conduct did not improve.<sup>88</sup> In fact, it progressively became worse. Shepherd continued to complain without effect.<sup>89</sup>

Shepherd filed a sexual harassment charge with the EEOC.<sup>90</sup> Shortly thereafter, Shepherd and Jemison got into a physical altercation which resulted in both having to seek medical treatment.<sup>91</sup> The company decided to terminate both men.<sup>92</sup> The union offered both men a work-arrangement agreement to keep their jobs.<sup>93</sup> Jemison signed the agreement and was still employed by Slater at the time of this suit.<sup>94</sup> Shepherd refused to sign the agreement and was discharged.<sup>95</sup>

Shepherd sued his employer on a number of claims, including sexual harassment under Title VII.<sup>96</sup> The district court granted summary judgment for Slater, finding that Shepherd failed to demonstrate any harassment he suffered was based on his gender.<sup>97</sup> The court emphasized that evidence existed in the record Jemison had engaged in sexual conduct in front of female, as well as male workers.<sup>98</sup>

On appeal, the Seventh Circuit reversed the lower court.<sup>99</sup> It stated only one

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82. 168 F.3d 998 (7th Cir. 1999).

83. *Id.* at 1010.

84. *Id.* at 1000.

85. *Id.* at 1001–02.

86. *Id.* at 1001 (describing several instances where Jemison was "playing with himself" in front of a distressed Shepherd).

87. *Id.* at 1001.

88. *Id.* at 1001–02.

89. *Id.*

90. *Id.* at 1002.

91. *Id.*

92. *Id.* at 1003.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1012.

question existed after *Oncale* that it needed to answer: “Can one reasonably infer 200] the evidence SAME-SEX TITLE VII HARASSMENT THAT Shepherd describes as discrimination ‘because of’ his sex?”<sup>100</sup> The court noted the Supreme Court’s “focus [in *Oncale*] was on what the plaintiff must ultimately prove rather than the methods of doing so.”<sup>101</sup> The employer argued Jemison’s conduct was not same-sex harassment.<sup>102</sup> Rather, the supervisor’s behavior “‘read like the immature conduct of a crude teenager designed to accomplish a sick juvenile purpose’ . . . ‘not conduct Title VII was intended to address.’”<sup>103</sup> The court disagreed, finding sufficient evidence from which a jury could infer Jemison’s harassment of Shepherd was “borne of sexual attraction,”<sup>104</sup> including some “graphic encounters between the two men.”<sup>105</sup>

The court observed that the conduct in the record went “far beyond casual obscenity,”<sup>106</sup> and that a jury could “reasonably conclude from the relentlessly sexual tenor of the harassment that Shepherd was harassed because he is a man.”<sup>107</sup>

Although none of these incidents necessarily proves that Jemison is gay, the connotations of sexual interest in Shepherd certainly suggest that Jemison might be sexually oriented towards members of the same sex. That possibility in turn leaves ample room for the inference that Jemison harassed Shepherd because Shepherd is a man.<sup>108</sup>

At the same time, the court observed a jury could “infer . . . that Jemison’s harassment was bisexual and therefore beyond the reach of Title VII. . . .”<sup>109</sup> The court remanded the case for trial on Shepherd’s claim of sex discrimination.<sup>110</sup>

Even though the male plaintiff in *Fry v. Holmes Freightlines, Inc.*<sup>111</sup> failed to offer definite proof his harasser was homosexual, the court found that not to be fatal to his “desire” case: “If the conduct directed at Fry allows the inference that Fry was harassed because he is a man, then those acts constitute ‘credible evidence that the harasser is homosexual.’”<sup>112</sup> Fry worked as a dock worker and then a full-time janitor for Holmes Freightlines.<sup>113</sup> Four of Fry’s co-workers taunted him with graphic insinuations of his homosexuality, called him “Sally,” and physically touched him in an offensive manner.<sup>114</sup> Fry repeatedly complained to management, but no action was taken.<sup>115</sup> He eventually sued.

The company argued the conduct of its employees was simply acts of “juvenile

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100. *Id.* at 1008–09.

101. *Id.* at 1009.

102. *Id.*

103. *Id.* at 1010.

104. *Id.* at 1009.

105. *Id.*

106. *Id.* at 1011.

107. *Id.*

108. *Id.* at 1010 (internal citations omitted).

109. *Id.* at 1011. *See also* *La Day v. Catalyst Technology, Inc.*, 302 F.3d 474, 480 n.6 (5th Cir. 2002) (“The difficult question of the status of bisexual harassers was not addressed in *Oncale*.”).

110. *Shepard*, 168 F.3d at 1009.

111. 72 F. Supp. 2d 1074 (W.D. Mo. 1999).

112. *Id.* at 1079.

113. *Id.* 1076.

114. *Id.* at 1077.

115. *Id.*

provocation” or “school yard taunts” that were “unrelated to sexual interest in Fry on the part of the harassers.”<sup>116</sup> The company further contended that Fry had to prove his harassers were homosexual to establish he was discriminated against because of his sex.<sup>117</sup> The court rejected the company’s arguments, noting that Fry did not have to prove “his harassers are homosexual or investigate their sexual history to establish that he was discriminated against because he is a man.”<sup>118</sup> The court found that a genuine issue existed for the jury about whether the conduct of the co-workers was visited upon Fry because he is a man: “The persistent sexual propositions, epithets, and offensive touchings engaged in by Fry’s co-workers suggest that one or all of them may be oriented toward members of the same sex.”<sup>119</sup> Therefore, the court denied summary judgment to the employer.<sup>120</sup>

The Fifth Circuit seemingly established a more stringent evidentiary rule in *La Day v. Catalyst Technology, Inc.*,<sup>121</sup> holding that a plaintiff in a same-sex sexual harassment case must not only prove the conduct was motivated by sexual desire, but must also establish that the harasser is homosexual.<sup>122</sup> Patrick La Day, a reactor technician, alleged that his supervisor, Willie Craft, “made obnoxious comments about La Day’s sexuality, inappropriately touched a private part of La Day’s body, and spat tobacco juice on him.”<sup>123</sup> Ultimately, La Day resigned and claimed he was experiencing a number of health problems related to the alleged sexual harassment.<sup>124</sup>

La Day sued his employer in Louisiana state court for sexual harassment under Title VII and a number of state claims.<sup>125</sup> The employer removed the case to federal court.<sup>126</sup> The federal district court granted summary judgment for the employer on the Title VII claim.<sup>127</sup>

The Fifth Circuit reversed the lower court’s Title VII ruling. It found La Day had raised fact questions for a jury about whether Craft, the supervisor, was homosexual.<sup>128</sup> In remanding the case, the court criticized the *Oncale* court (which had reversed the Fifth Circuit) for failing to provide lower courts guidance as to what conduct constitutes “credible evidence” the harasser is homosexual.<sup>129</sup> The court, framing the question as one of “first impression” for the Fifth Circuit, asked: “What kind of proof constitutes ‘credible evidence that the harasser was homosexual?’”<sup>130</sup>

After reviewing a number of other court decisions, including the Seventh Circuit’s decision in *Shepherd*, the court concluded it was “not possible . . . to specify all the possible ways in which a plaintiff might prove that an alleged

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116. *Id.* at 1078.

117. *Id.*

118. *Id.* at 1078–79.

119. *Id.*

120. *Id.* at 1079.

121. 302 F.3d 474 (5th Cir. 2002).

122. *Id.* at 480 n.5.

123. *Id.* at 476.

124. *Id.* at 477.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 476.

129. *Id.* at 478.

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

harasser acted out of homosexual interest.”<sup>131</sup> The court held that evidence the harasser “intended to advance some type of sexual contact with the plaintiff rather than merely to humiliate him for reasons unrelated to sexual interest” and “proof that the alleged harasser made same-sex sexual advances to others, especially to other employees,” constituted credible evidence the harasser may be homosexual.<sup>132</sup> In remanding the case, the court found Craft’s conduct towards La Day supported the inference that Craft was gay and acted out of sexual desire, including evidence Craft poked plaintiff’s anus and was jealous of plaintiff’s girlfriend.<sup>133</sup>

Current “desire cases” reflect the confusion of courts in determining what credible evidence is required to establish same-sex sexual harassment claims. The post-*Oncale* cases involving the desire evidentiary approach are very fact specific, like most sexual harassment cases, so that teasing out circuit court approaches at this early stage must be undertaken with caution. Nevertheless, a snapshot of judicial approaches to desire cases at this juncture is possible. As noted, the Fifth Circuit in *La Day* requires a plaintiff to prove the homosexuality of the harasser and the existence of a sexual proposition.<sup>134</sup> Similarly, the Eighth Circuit seems to require evidence that the harasser is a homosexual and is motivated by sexual desire.<sup>135</sup> Like the Fifth and Eighth Circuits, the Fourth Circuit appears to require plaintiffs to offer credible evidence not only that harassers are homosexual, but also evidence of “earnest sexual solicitation by a harasser” to “support an inference that the harassment was because of the plaintiff’s sex.”<sup>136</sup> The Seventh Circuit

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131. *Id.* at 480.

132. *Id.*

133. *Id.*

134. See Matthew Caligur, *Department: Keeping Up With . . . Same Sex Harassment Case: La Day v. Catalyst Technology*, 40 HOUSTON LAW. 44, 45 (2003) (“The *La Day* decision is significant because it confirms that the plaintiff in a same-sex sexual harassment case must prove the alleged harasser is homosexual, a requirement not imposed on plaintiffs in opposite-sex sexual harassment cases.”). Other courts have followed the *La Day* court’s stringent evidentiary approach. In *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274, 1280–84 (D. Utah 2003), the district court, following *La Day*, ruled that in a workplace, which was described as a “lesbian factory,” a harasser’s conduct—“specifically her attempts to pinch [the victim’s] breasts on two occasions”—constituted “mere humiliation.” The court noted that the Tenth Circuit had “yet had occasion to answer the question of what evidence of homosexuality is required under *Oncale*.” *Id.* at 1279. The plaintiff failed to establish that the harasser was homosexual and that the harasser was motivated by sexual desire. *Id.* at 1283. But see *Nguyen v. Buchart-Horn, Inc.*, No. Civ.A. 02-1998, 2003 WL 21674461, at \*3 (E.D. La. July 15, 2003) (“[T]his court does not read the *Oncale* opinion as restrictively as the *La Day* court does. Specifically, this court finds that the Supreme Court did not foreclose the possibility of same-sex harassment where the harasser is not homosexual.”).

135. *McCown v. St. John’s Health System*, 349 F.3d 540, 543 (8th Cir. 2003) (ruling in same-sex sexual harassment desire case that lower court properly granted employer’s summary judgment motion because “no evidence in the record [existed] to demonstrate that [the harasser] was homosexual and motivated by sexual desire toward [the victim]”).

136. *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255 (4th Cir. 2001). In *Lack*, the court granted the employer’s motion for summary judgment, finding that the vulgar comments addressed to the victim could not “reasonably be construed as an ‘earnest sexual solicitation’” because [the harasser] “neither proposed sex nor initiated it.” *Id.* at 261. The court categorized the “sexual desire” approach in *Oncale* as the “earnest sexual solicitation theory.” *Id.* In *English v. Pohanka of Chantilly, Inc.*, the court, following *Lack*, referred to the desire evidentiary approach as “earnest solicitation.” 190 F. Supp. 2d 833, 845–46 (E.D. Va. 2002). The district court held summary judgment appropriate where plaintiff’s only proof of harasser’s homosexuality was victim’s subjective belief that the [harasser] was gay and no evidence existed that the harasser

allows the harasser's homosexuality to be established when the sexual conduct might reflect that a harasser is sexually oriented towards members of the same sex," even if none of the incidents "necessarily" proves the homosexuality of the harasser.<sup>137</sup> The D.C. Circuit evidentiary hurdle appears more stringent than the Seventh Circuit, requiring "actual homosexual desire."<sup>138</sup> The Sixth Circuit, in fractured opinions of the same panel, is conflicted about how to meet the desire evidentiary route identified by *Oncale*.<sup>139</sup> The Third Circuit seems to assume that a harasser must be homosexual for a same-sex harassment suit to move forward.<sup>140</sup>

Nevertheless, some light is shed on the types of evidence courts will and will not accept as credible when plaintiffs seek to establish same-sex sexual harassment claims using the desire approach. First, victims' subjective belief that harassers are homosexual—without more—does not meet their evidentiary burden.<sup>141</sup> Second, if victims seek to rely on the desire evidentiary route, they need to assert their belief of the homosexuality of their harassers in their pleadings.<sup>142</sup> Third, victims asserting same-sex sexual harassment under the desire approach must believe that they were harassed because the harasser sexually desired them.<sup>143</sup>

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propositioned him. *Id.*

137. *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1010 (7th Cir. 1999).

138. *See Davis v. Coastal Int'l Security*, 275 F.3d 1119, 1123 (D.C. Cir. 2002).

139. *See EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498 (6th Cir. 2001). In a same-sex sexual harassment decision, the majority opined, "When the harasser is a homosexual . . . the conclusion that the harassment was gender based is defensible." *Id.* at 522 n.6. At the same time, the court argued that it was not "implying the harasser has to be a homosexual." *Id.* A dissenting judge contended, however, that the "majority, despite its denial . . . implies that *Oncale* limits the actionability of Title VII same-sex harassment claims to situations where the 'harasser was a homosexual.'" *Id.* at 506 (Gilman, J., dissenting). *See also King v. Super Serv.*, 68 Fed. Appx. 659, 663 (6th Cir. 2003) ("Sexual desire is a convincing, but not a necessary, element in showing discrimination because of sex.").

140. *Bibby v. Phila. Coca Cola Co.*, 260 F.3d 257, 262 (3d Cir. 2001) (holding that "same-sex harassment can be seen as discrimination because of sex . . . where there is evidence the harasser sexually desires the victim"). The same-sex sexual harassment claim in *Bibby* failed, in part, because "no allegations [existed] that his alleged harassers were motivated by sexual desire." *Id.* at 264.

141. *See, e.g., English*, 190 F. Supp. 2d 833, 846 (ruling that the victim "cannot rely on his subjective belief that [the harasser] was gay to meet his evidentiary burden"); *Moran v. Fashion Inst. of Tech.*, No. 00 CIV. 01275, 2002 WL 31288272, at \*5 (S.D.N.Y. Oct. 7, 2002) (noting that the Second Circuit "has not addressed the type of proof needed to prove a harasser acted out of homosexuality," but finding conduct toward same-sex employee was not motivated by sexual desire because plaintiff introduced nothing "other than his own belief" about his alleged harasser's homosexuality); *Budenz v. Sprint Spectrum*, 230 F. Supp. 2d 1261, 1273–74 (D. Kan. 2002) (ruling no credible evidence existed that alleged harasser was homosexual or that his conduct was motivated by sexual desire, only "speculative suppositions").

142. *See, e.g., English*, 190 F. Supp. 2d at 846 (granting employer's motion for summary judgment, and observing that plaintiff failed to mention that the harasser was gay in his EEOC complaint).

143. *See, e.g., Davis v. Coastal Int'l Security, Inc.*, 275 F.3d 1119, 1123 (upholding district court's granting of employer's summary judgment motion in desire case because the plaintiff stated in his deposition "I don't know if [the harassers] were asking me to have sexual relations with them"); *McCown v. St. John's Health Sys.*, 349 F.3d 540, 542 (8th Cir. 2003) (observing that the victim stated that his boss was trying to "irritate" him because "that's just how [the boss] was"); *Collins v. TRL, Inc.*, 263 F. Supp. 2d 913, 920 (M.D. Penn. 2003) (finding alleged harasser did not act out of sexual desire because plaintiff "himself, when asked, could not say that the actions were motivated by a desire to have sex with him"); *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274, 1284 (D. Utah 2003) (finding that evidence failed to show harasser had a "sexual interest" in victim because victim testified that she did not think the harasser wanted to

In the end, the judicial approach to “desire cases” lends itself to some “perverse results,”<sup>144</sup> including the “desire-based harassment only” rule in which gay harassers became target defendants of Title VII, whereas non-gay men can harass gender nonconforming men with impunity.<sup>145</sup>

B. Evidence harasser is motivated by hostility to specific gender: “hatred cases”

The *Oncale* court did not limit same-sex sexual harassment to “desire cases” only. It also suggested that an inference of discrimination could arise “if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear the harasser is motivated by general hostility to the presence of women in the workplace.”<sup>146</sup> In this type of situation, referred to as a “hatred case,” the harasser inflicts humiliating, degrading treatment of a sexual nature on the victim because the harasser resents or disdains the victim—either individually or as part of a group. Included in this analysis are cases in which the victim is harassed because the victim does not display stereotypical characteristics of his or her gender, or because of his or her perceived or acknowledged sexual orientation.

1. Evidence victim harassed for failure to display stereotypical characteristics of gender

a. *The Price Waterhouse Decision*

Although not a cause of action per se, sex stereotyping is a form of sex discrimination that can occur in the context of disparate treatment or sexual harassment. There are situations in which a harasser targets for discriminatory treatment men or women who look or act in a way that the harasser believes is appropriate only for members of the opposite sex. This practice is known as “sex stereotyping” and was recognized by the Supreme Court as a form of sex discrimination in the workplace in *Price Waterhouse v. Hopkins*,<sup>147</sup> and in

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have a “sexual relationship with her, but rather used sexual overtures as a way of ‘aggravating’ or ‘upsetting her’”). *But see* *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1010 (7th Cir. 1999) (reasoning that the factfinder after trial, not the court on summary judgment, should make the determination on the harasser’s behavior). Accordingly, one court found that although the record “is nearly devoid of any evidence suggesting [the harasser] is a homosexual . . . [the court] motivated by an abundance of caution” declined to grant the employer’s summary judgment motion. *Mann v. Lima*, 290 F. Supp. 2d 190, 195 (D.R.I. 2003).

144. David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1766 (2002). Schwartz argues that “a sexual-desire-based understanding of harassment would tend to allow heterosexual males to sue gay harassers, but not the other way around.” *Id.* He contends that “there is a gay-bashing quality to a legal doctrine that seems to call for a ‘homosexual’ villain.” *Id.* at 1735. *See also* Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. OF WOMEN & L. 67, 118, n.288 (2000) (noting that an argument that suggests same-sex harassment is based upon sexual desire “has been said to only encourage anti-gay prejudice” because it depicts gay people as sexual harassers).

145. Schwartz, *supra* note 144, at 1763.

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

147. 490 U.S. 228 (1989). As early as the 1980s, the Court criticized legislation based on gender stereotypes. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), and *United States v. Virginia*, 518 U.S. 515 (1996), the Court struck down policies based on

educational institutions by the OCR.<sup>148</sup>

208 In *Price Waterhouse v. Hopkins*, Ms. Hopkins had never having been denied partnership in an accounting firm, in part because she was considered “macho” and in need of “a course in charm school.”<sup>149</sup> Hopkins was advised that she could improve her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>150</sup> Hopkins alleged that she had been the victim of sex stereotyping.<sup>151</sup> The Supreme Court agreed and decided in favor of Ms. Hopkins.<sup>152</sup>

Justice Brennan, writing for the plurality in finding the conduct of Price Waterhouse to be unlawful sex discrimination, said:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender . . . .

. . . .

. . . [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.”<sup>153</sup>

According to the *Price Waterhouse* court, if an employer discriminates against a member of one gender for exhibiting a particular characteristic (such as aggressiveness) that it would find acceptable in the other gender, that employer has discriminated “because of sex.”<sup>154</sup>

#### *b. Extension of Price Waterhouse theory in the workplace*

Even after the *Price Waterhouse* decision in 1989, however, lower federal courts were reluctant to recognize Title VII claims of male employees who claimed their employers discriminated against them for their failure to conform to male gender stereotypes.<sup>155</sup> The early post-*Price Waterhouse* courts often viewed a

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stereotypes about what type of work and roles males and females should perform.

148. OCR, SEXUAL HARASSMENT GUIDANCE, *supra* note 15, at 6, 12 (clarifying that gender-based harassment is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit from an educational program).

149. *Price Waterhouse*, 490 U.S. at 235.

150. *Id.*

151. *Id.* at 228.

152. *Id.* at 258.

153. *Id.* at 250–51. See generally Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107 (1991) (assessing the case’s impact on Title VII disparate treatment cases).

154. *Price Waterhouse*, 490 U.S. at 250–51. The central holding of *Price Waterhouse* was that an employer could avoid liability for sex discrimination under Title VII if it could show that it would have made the same decision in the absence of an unlawful motive. Congress superseded this holding in 1991 with an amendment to the Civil Rights Act to provide that once a plaintiff proves that discrimination based on a protected category was at least one motivating factor in the decision, liability is established. *Id.* at 240. The Court’s statements regarding gender stereotyping as sex discrimination were not affected by the amendments. For an in-depth discussion of gender nonconformity discrimination, see Varona & Monks, *supra* note 144, at 67.

155. See, e.g., *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, \*\* 9–10 (6th Cir. Jan 15, 1992) (holding “sex stereotyping” language of *Price Waterhouse* insufficient to sustain male employee’s hostile work environment claim).



male's effeminate behavior simply "as a marker for homosexual orientation."<sup>156</sup> Commentators argued that this logic was simply flawed because "not all homosexual men are stereo-typically feminine, and not all heterosexual men are stereo-typically masculine."<sup>157</sup> They also argued that since the *Price Waterhouse* court wrote its opinion in gender-neutral language, the reasoning should apply to both men and women who exhibit gender nonconforming characteristics.<sup>158</sup>

The initial reluctance of federal courts to protect male victims of gender stereotype discrimination began to subside in 1997 with the decision of the Seventh Circuit in *Doe v. City of Belleville*.<sup>159</sup> This case involved two sixteen-year-old brothers who were subjected to unrelenting abuse by male co-workers during summer employment with the City. The boys were constantly called "fag," "queer," and "bitch."<sup>160</sup> One of the boys was ridiculed for wearing an earring and asked "Are you a boy or a girl?"<sup>161</sup> The boys were accused of having sex with each other.<sup>162</sup> Quoting *Price Waterhouse*, the Seventh Circuit said "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."<sup>163</sup> Extending the gender stereotype theory of discrimination, the Seventh Circuit said: "The Supreme Court's decision in *Price Waterhouse v. Hopkins* makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."<sup>164</sup> Although the Supreme Court later vacated the judgment<sup>165</sup> and remanded the case for further consideration in light of *Oncale*, courts have held that the gender stereotype holding of *City of Belleville* was not disturbed.<sup>166</sup>

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156. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 2 (1995).

157. Jonathan A. Hardage, *Nichols v. Azteca Restaurant Enterprises, Inc. and the Legacy of Price Waterhouse v. Hopkins: Does Title VII Prohibit 'Effeminacy' Discrimination?* 54 ALA. L. REV. 193, 206 (2002) (quoting *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).

158. See Case, *supra* note 156, at 33 (arguing that no basis exists for limiting *Price Waterhouse*'s application to women); Fedor, *supra* note 68, at 481 ("Since *Price Waterhouse* was written in gender-neutral language, its reasoning applies to both sexes.").

159. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998). For a good discussion of *City of Belleville* and the subsiding resistance to extend gender stereotype protection to male victims of sexual harassment, see Hardage, *supra* note 157, at 206–17.

160. 119 F.3d at 567.

161. *Id.*

162. *Id.*

163. *Id.* at 581.

164. *Id.* at 580. The Seventh Circuit recently reiterated its recognition of the *Price Waterhouse* gender stereotyping discrimination claim recently in *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1064 (7th Cir. 2003), denying relief to the plaintiff because the conduct complained of "does not fall within a sexual stereotyping claim cognizable under Title VII."

165. See *City of Belleville v. Doe*, 523 U.S. 1001 (1998) (disagreeing with the Seventh Circuit's suggestion that workplace harassment that is sexual in content is always actionable regardless of the harasser's sex, sexual orientation, or motivation).

166. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 (3d Cir. 2001) ("Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question."). *City of Belleville* was settled before it was decided on remand. *Id.* at 263 n.5. Other courts, however, have interpreted the Supreme Court's decision to

c. *Post-Oncale Gender Stereotyping Cases*

210. In 1999, the First Circuit addressed a *Price Waterhouse* gender stereotype discrimination theory raised by the plaintiff in *Higgins v. New Balance Athletic Shoe, Inc.*<sup>167</sup> Higgins produced evidence his co-workers mocked his effeminate characteristics by using high-pitched voices and making stereotypically feminine gestures.<sup>168</sup> Although the court spoke out strongly against the deplorable treatment Higgins received from his supervisor and co-workers because of his homosexuality, the court denied him relief because he did not plead or prove that he was harassed because of stereotyped standards of masculinity.<sup>169</sup> In an important footnote, however, the court expressed its view that the *Price Waterhouse* gender stereotype theory extends to effeminate men: “[J]ust 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.”<sup>170</sup>

The Second Circuit took its turn addressing the issue in *Simonton v. Runyon*,<sup>171</sup> another post-*Oncale* case with facts similar to those in *Higgins*. The plaintiff, a postal worker for twelve years, sued the Postmaster General and the U.S. Postal Service, alleging under Title VII that he suffered harassment on the job because of his sexual orientation. The harassment included numerous sexually explicit verbal assaults, the posting of notes on a bathroom wall with Simonton’s name and the names of celebrities who had died of AIDS, and the placing of pornographic pictures in his work area, which the court described as “appalling persecution.”<sup>172</sup> Nevertheless, the district court dismissed the case for failure to state a claim, stating that Title VII does not prohibit sexual orientation discrimination.<sup>173</sup>

Like the plaintiff in *Higgins*, Simonton asserted for the first time on appeal a *Price Waterhouse* argument of gender stereotyping.<sup>174</sup> Although the Second Circuit refused to address the merits of this argument because he failed to raise it in the lower court, the court suggested that it would be open to such an argument in the future:

The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination

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vacate *City of Belleville* as an endorsement of a restrictive view of “sex,” thus precluding same-sex plaintiffs from proving discrimination through evidence of gender stereotyping. *See, e.g., Klein v. McGowan*, 36 F. Supp. 2d 885, 889–90 (D. Minn.), *aff’d*, 198 F.3d 705, 709 (8th Cir. 1999).

167. 194 F.3d 252 (1st Cir. 1999).

168. *Id.* at 259.

169. *Id.* at 261.

170. *Id.* at 261 n.4 (internal citations omitted).

171. 232 F.3d 33 (2d Cir. 2000).

172. *Id.* at 35.

173. *Id.* at 34.

174. *Id.* at 37–38.

based upon sexual stereotypes.<sup>175</sup>

2004 THE FOLLOWING YEAR THE THIRD CIRCUIT DECIDED *BIBBY V. PHILADELPHIA COCA-COLA BOTTLING CO.*,<sup>176</sup> IN WHICH IT RECOGNIZED THAT TITLE VII PROTECTS MALE VICTIMS OF GENDER STEREOTYPE DISCRIMINATION.<sup>177</sup> *Bibby* INVOLVED YET ANOTHER APPEAL FROM A SUMMARY JUDGMENT DECISION IN FAVOR OF THE EMPLOYER IN A SAME-SEX SEXUAL HARASSMENT CASE.<sup>178</sup> TWICE ASSAULTED ON THE JOB BY A CO-WORKER WHO REPEATEDLY YELLED AT BIBBY, “[E]VERYBODY KNOWS YOU’RE GAY AS A THREE DOLLAR BILL,” “EVERYBODY KNOWS YOU’RE A FAGGOT,” AND YOU ARE A “SISSY,” BIBBY FILED A COMPLAINT WITH HIS UNION AND THE COMPANY.<sup>179</sup> HE FURTHER CLAIMED THAT GRAFFITI BEARING HIS NAME WAS WRITTEN IN THE BATHROOMS AND ALLOWED TO REMAIN THERE.<sup>180</sup> BASED ON THESE FACTS, THE DISTRICT COURT GRANTED SUMMARY JUDGMENT FOR THE DEFENDANT, FINDING THAT BIBBY WAS HARASSED BECAUSE OF HIS SEXUAL ORIENTATION AND NOT BECAUSE OF HIS SEX.<sup>181</sup>

ON APPEAL, THE THIRD CIRCUIT DISCUSSED SEVERAL WAYS IN WHICH A PLAINTIFF MIGHT ESTABLISH A SAME-SEX SEXUAL HARASSMENT CLAIM UNDER TITLE VII: “THE HARASSER WAS MOTIVATED BY SEXUAL DESIRE, THE HARASSER WAS EXPRESSING A GENERAL HOSTILITY TO THE PRESENCE OF ONE SEX IN THE WORKPLACE, OR THE HARASSER WAS SEEKING TO PUNISH THE VICTIM FOR NONCOMPLIANCE WITH GENDER STEREOTYPES.”<sup>182</sup> THE COURT CONCLUDED THAT BIBBY’S CLAIM FAILED IN ALL RESPECTS:

HE DID NOT CLAIM HE WAS HARASSED BECAUSE HE FAILED TO COMPLY WITH SOCIETAL STEREOTYPES OF HOW MEN OUGHT TO APPEAR OR BEHAVE OR THAT AS A MAN HE WAS TREATED DIFFERENTLY THAN FEMALE CO-WORKERS. HIS CLAIM WAS, PURE AND SIMPLE, THAT HE WAS DISCRIMINATED AGAINST BECAUSE OF HIS SEXUAL ORIENTATION.<sup>183</sup>

WHILE RECOGNIZING THE *Price Waterhouse* GENDER STEREOTYPE THEORY OF ESTABLISHING SAME-SEX SEXUAL HARASSMENT (WHICH WOULD HAVE PROTECTED BIBBY FROM DISCRIMINATION), BIBBY CLAIMED ONLY THAT HIS SUPERVISORS AND CO-WORKERS HARASSED HIM FOR BEING HOMOSEXUAL (WHICH IS NOT ACTIONABLE UNDER TITLE VII).<sup>184</sup>

IN 2001, MALE PLAINTIFFS IN THE NINTH CIRCUIT, UTILIZING THE PLAINTIFF’S STEREOTYPING DISCRIMINATION ARGUMENTS FROM *Price Waterhouse* AND FACTS ADEQUATE TO SUPPORT SUCH ARGUMENTS, WERE FINALLY SUCCESSFUL IN CONVINCING THE COURT THAT GENDER DISCRIMINATION BASED ON A FAILURE TO CONFORM TO GENDER NORMS IS COGNIZABLE UNDER TITLE VII.<sup>185</sup> THE NINTH CIRCUIT HELD IN *Nichols v. Azteca Restaurant Enterprises*,<sup>186</sup> THAT A MAN, WHO WAS VERBALLY HARASSED BY COWORKERS AND A

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175. *Id.* at 38.

176. 260 F.3d 257 (3d Cir. 2001).

177. *Id.* at 263–64.

178. *Id.* at 259.

179. *Id.* at 259–60.

180. *Id.* at 260.

181. *Id.*

182. *Id.* at 264.

183. *Id.*

184. *Id.*

185. The Ninth Circuit had suggested in dicta in *Schwenk v. Hartford* that Title VII encompasses instances in which the perpetrator’s actions stem from the fact he believed the victim was a man who failed to act like one. 204 F.3d 1187, 1202 (9th Cir. 2000).

186. 256 F.3d 864 (9th Cir. 2001). For an excellent comment on this case, see Hardage, *supra* note 157, at 193 (noting one of the more recent developments in Title VII jurisprudence has been the willingness of some federal courts to accept claims by male employees, alleging discrimination for failure to conform to male gender stereotypes, i.e., “effeminacy”

supervisor because his effeminate behavior did not meet their views of a male stereotype, referred to and harassed under Title VII.<sup>187</sup> Antonio Sanchez was a host and food server at restaurants operated by Azteca.<sup>188</sup> During his four years of employment with the company, he endured “a relentless campaign” of verbal abuse by some male coworkers and one of his supervisors.<sup>189</sup> They mocked Sanchez for walking and carrying his tray like a woman, referred to him as “she” and “her,” called him sexually derogatory names, derided him for not having sexual intercourse with a waitress who was his friend, and taunted him for having feminine mannerisms.<sup>190</sup>

The court found that the systematic abuse directed at Sanchez reflected a belief by his harassers that he did not act as a man should act. Relying on the *Price Waterhouse* rule barring discrimination on the basis of sex stereotypes, the Ninth Circuit said: “That rule squarely applies to preclude the harassment here.”<sup>191</sup> In reaching its holding, the *Nichols* court declared its earlier decision in *DeSantis v. Pacific Telephone & Telegraph Co.*,<sup>192</sup> no longer good law.<sup>193</sup>

To summarize the current status of *Price Waterhouse* gender stereotyping discrimination holdings in the federal circuits, the First, Second, Third, Seventh, and Ninth Circuits have all recognized that male employees can satisfy Title VII’s “because of sex” requirement by showing their employers discriminated against them for failing to conform to male gender stereotypes.<sup>194</sup> The Fifth Circuit has not yet recognized the abrogation of *Smith v. Liberty Mutual Ins. Co.*, in which it held that effeminacy discrimination was not actionable under Title VII.<sup>195</sup> Therefore, for the present time *Smith*’s prohibition of effeminacy discrimination is still good law in the Fifth and Eleventh Circuits.<sup>196</sup> To date, only the Ninth Circuit in *Nichols* has both recognized the gender stereotyping theory and found in favor of a plaintiff asserting that theory.<sup>197</sup>

While a few lower courts have both recognized the gender stereotyping theory

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discrimination).

187. *Nichols*, 256 F.3d at 875.

188. *Id.* at 870.

189. *Id.* at 870.

190. *Id.*

191. *Id.* at 874–75. One commentator has written: “The lesson of *Nichols* seems to be that a victim of sexual orientation discrimination can obtain relief under Title VII merely by (1) pointing out specific instances of sex stereotyping in the course of discrimination, and (2) citing *Price Waterhouse*.” Matthew Clark, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After Rene v. MGM Grand Hotel*, 51 UCLA L. Rev. 313, 325 (2003).

192. 608 F.2d 327 (9th Cir. 1979).

193. *Nichols*, 256 F.3d at 875. In *DeSantis*, the Ninth Circuit had declared effeminacy discrimination not within the purview of Title VII. 608 F.2d at 332.

194. One commentator has discussed the cases as establishing an “emerging consensus among the federal courts” that discrimination against effeminate men on the basis of their effeminacy—not their sexual orientation—cannot be tolerated in light of *Price Waterhouse*. See Hardage, *supra* note 157 at 219.

195. 569 F.2d 325, 327 (5th Cir. 1978).

196. See Hardage, *supra* note 157, at 218 (arguing that *Smith* rests upon “shaky analytical ground”).

197. See Fedor, *supra* note 68, at 474 (“To date, the only post-*Oncale* court that has both accepted the argument that harassment based on gender stereotypes is harassment ‘because of sex’ and upheld the plaintiff’s Title VII claim is the Ninth Circuit.”)

and found a plaintiff to have properly pled and proved the theory,<sup>198</sup> most have found the plaintiff to have either failed to plead a sex-stereotyping claim<sup>199</sup> or failed to prove his case.<sup>200</sup> These cases provide a valuable lesson for attorneys who represent male homosexual victims of discrimination, instructing them not to make their client's sexual orientation an issue in a Title VII case. Rather, attention should be focused on showing the employer discriminated against the employee for failing to conform to stereotypical views about how a man should dress, speak, or act.<sup>201</sup> Failure to raise a gender stereotyping argument at the district court level precludes such an argument on appeal.<sup>202</sup>

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198. See, e.g., *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641, at \*13 (W.D.N.Y. Sept. 30, 2004) (holding that “non-conformance with gender stereotypes is a viable theory of sex discrimination (either same-sex or between sexes) under Title VII”); *Centola v. Potter*, 183 F. Supp. 2d 403, 411 (D. Mass. 2002) (denying summary judgment to defendant and finding plaintiff carried his burden of proving co-workers and supervisors discriminated against him by using impermissible sexual stereotypes against him); *Jones v. Pac. Rail Servs.*, No. 00 C 5776, 2001 WL 127645 (N.D. Ill. Feb. 14, 2001) (holding male plaintiff stated claim for sexual harassment where he alleged defendant employer failed to take corrective action in response to his complaints of harassment by male co-worker because plaintiff failed to conform to male gender stereotypes).

199. As noted, several courts have considered the sex-stereotyping theory but held that the plaintiff waived it by not invoking the theory in the court below. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1070 (9th Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 37–38 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259–60 (1st Cir. 1999).

200. See, e.g., *Vickers v. Fairfield Med. Ctr.*, No. 2:03-CV-858 (S.D. Ohio May 5, 2004) (rejecting hospital police officer's argument that bias based on his real or perceived homosexuality was actionable under Title VII as discrimination based on non-conformity with gender norms or stereotypes) cited in *Price Waterhouse, Sex Stereotyping, and Gender Non-Conformity Bias*, U.S. Law Week (BNA) 73 USLW 2211, at n.15 (Oct. 19, 2004); *Kay v. Independence Blue Cross*, No. CIV. A. 02-3157, 2003 WL 21197289, at \*5 (E.D. Pa. May 16, 2003) (acknowledging plaintiff may base his claim on theory that actions of co-workers constitute gender stereotyping, but finding conduct in question occurred too infrequently to establish Title VII violation); *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 217–18 (S.D.N.Y. 2003) (finding plaintiff's claims “fundamentally rooted” in sexual orientation and not on sexual stereotyping and finding the “fragmentary evidence” insufficient to establish intentional discrimination); *Bianchi v. Phila.*, 183 F. Supp. 2d 726, 734–38 (E.D. Pa. 2002) (recognizing *Price Waterhouse* “gender stereotype” theory as valid method of proving discrimination because of sex, but granting summary judgment in favor of defendant employer because plaintiff failed to present evidence “he deviated from an ideal of manliness”); *Oiler v. Winn-Dixie La., Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541, at \*5 (E.D. La. Sept. 16, 2002) (finding this not a situation where plaintiff failed to conform to gender stereotype as in *Price Waterhouse*, but rather one where plaintiff took on the identity of a woman for stress relief and to express his gender identity); *Hamm v. Weyauwega Milk Prods., Inc.*, 199 F. Supp. 2d 878, 888–97 (E.D. Wis. 2002), *aff'd*, 332 F.3d 1058 (7th Cir. 2003) (recognizing “a plaintiff can prove same-sex sexual harassment by establishing that the harassment was based upon perceived non-conformance with gender-based stereotypes,” but granting summary judgment for defendant because male plaintiff failed to present sufficient evidence he was harassed “because of sex”).

201. See *Hardage*, *supra* note 157, at 220–21. See also, *Fedor*, *supra* note 68, at 486 (reminding attorney drafting a complaint based on gender stereotyping to allege the plaintiff was discriminated against “because of sex” and was harassed because he did not conform to his harasser's view of appropriate gender stereotypes).

202. See Kristin M. Bovalino, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1133 (2003) (discussing cases in which effeminate male plaintiffs have brought both successful and unsuccessful claims of sex discrimination).

*d. Extension of Price Waterhouse theory in the school*

214. JOURNAL OF COLLEGE AND UNIVERSITY LAW [Vol. 31, No. 1  
A tragic example of same-sex sexual harassment arising from sex stereotyping in the school setting was addressed in *Montgomery v. Independent School District No. 709*.<sup>203</sup> In that case, a male student, Jesse Montgomery, claimed he was harassed by other students almost daily from kindergarten through the tenth grade because he did not meet their stereotyped expectations of masculinity and because they perceived him as gay.<sup>204</sup> He was taunted with names such as “faggot,” “princess,” “fairy,” “Jessica,” “femme boy,” “queer,” and “pansy.”<sup>205</sup> He was super-glued to his seat, punched and kicked on the playground, tripped or knocked down during hockey drills, and pelted with trash on the school bus and in art class.<sup>206</sup> On one occasion, another student threw Jesse to the ground and pretended to sodomize him while others looked on and laughed.<sup>207</sup>

Jesse sued, contending the school district failed to protect him from sexual harassment both because of his gender (sex stereotyping) and his perceived sexual orientation.<sup>208</sup> The court dismissed his Title IX claims based on sexual orientation or perceived sexual orientation.<sup>209</sup> But, applying Title VII precedents to his Title IX claim, the court held that Jesse had pled sufficient facts to support a claim of harassment based on the perception that he did not fit his peers’ stereotyped expectations of masculinity, a claim that is cognizable under Title IX.<sup>210</sup> The court noted that Jesse specifically alleged that some of the students called him “Jessica,” a girl’s name, indicating their belief he exhibited feminine characteristics.<sup>211</sup> The court also found important the fact that plaintiff’s peers began harassing him as early as kindergarten, when he had no solidified sexual preference or even understood what it meant to be homosexual or heterosexual.<sup>212</sup> “It is much more plausible,” the court said, “that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.”<sup>213</sup>

2. Victim harassed because of sexual orientation

While several lower courts have extended Title VII and Title IX protections against same-sex sexual harassment on the basis of sex stereotyping, only a few have extended protection on the basis of sexual orientation.<sup>214</sup> The Supreme

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203. 109 F. Supp. 2d 1081 (D. Minn. 2000). The equal protection aspects of this case are discussed *supra* notes 386–392 and accompanying text.

204. *Id.* at 1090.

205. *Id.* at 1084.

206. *Id.*

207. *Id.* at 1084–85.

208. *Id.* at 1083.

209. *Id.* at 1090.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 538 U.S. 922, 1063 (2003). While finding the plaintiff’s facts insufficient to withstand summary judgment, the district court in *Nguyen v. Buchart-Horn, Inc.* stated that “[t]here is nothing in *Oncale* to prevent a plaintiff from claiming same-sex harassment where the harassment is motivated by hostility based on the victim’s sexual orientation.” No. Civ. A. 02-1998, 2003 WL 21674461. at \*3 (E.D. La. July 15, 2003).

## a. Title VII—The Workplace

Both EEOC and OCR guidelines explicitly state that Title VII does not cover charges of discrimination based on sexual orientation.<sup>216</sup> Congress has also declined to amend Title VII to provide protection against discrimination in the workplace to gays and lesbians.<sup>217</sup>

As the Seventh Circuit aptly noted in *Hamm v. Weyauwega Milk Products, Inc.*,<sup>218</sup> it is difficult to distinguish “between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII).”<sup>219</sup> This is especially true in cases alleging discrimination based on a “perception” of sexual orientation because of a plaintiff’s nonconformance with sexual stereotypes. Quoting *Doe v. City of Belleville*,<sup>220</sup> the *Hamm* court stated: “A homophobic epithet like ‘fag’ for example, may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation . . . [I]t is not always possible to rigidly compartmentalize the types of bias that these types of epithets represent.”<sup>221</sup>

Recently, the Ninth Circuit in *Rene v. MGM Grand Hotel, Inc.*,<sup>222</sup> addressed the case of an openly gay waiter who claimed that he was subjected to severe, pervasive and unwelcome physical conduct of a sexual nature in the workplace and that the motivation for that discrimination was his sexual orientation.<sup>223</sup> Medina Rene worked as a butler at the MGM Grand Hotel in Las Vegas on a floor reserved for high-profile, wealthy guests.<sup>224</sup> All employees assigned to the floor were male.<sup>225</sup> Rene’s supervisor and several of his co-workers subjected him over the course of a two-year period to a panoply of crude, demeaning, and sexually

215. See *Nguyen*, 2003 WL 21674461, at \*3.

216. See EEOC GUIDELINES, *supra* note 2, at 615.2(b)(3) (July 1998); OCR, SEXUAL HARASSMENT GUIDANCE (Mar. 13, 1997), at <http://www.ed.gov/about/offices/list/ocr/docs/sexhar00.html>.

217. The earliest effort to expand federal protections for gays and lesbians under Title VII occurred in 1975, when a bill sought to amend Title VII by including “affectional or sexual preference” as a protected class. H.R. 166, 94<sup>th</sup> Cong. 11 (1975) (defining “affectional or sexual preference” as “having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment”). See also *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (explaining that Congress, on many occasions, has rejected “bills that would have extended Title VII’s protection to people based on their sexual preferences”).

218. 332 F.3d 1058 (7th Cir. 2003).

219. *Id.* at 1065 n.5. While agreeing with the result in this case, Judge Posner commented in a concurring opinion that “the case law has gone off the tracks in the matter of ‘sex stereotyping.’” *Id.* at 1066 (Posner, J., concurring).

220. 119 F.3d 563 (7th Cir. 1997).

221. *Hamm*, 332 F.3d at 1065, n.5. (quoting *City of Belleville*, 119 F.3d at 593).

222. 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003). For a thorough discussion of this case, see Justine D. Parker, *Rene v. MGM Grand: A Step Toward Title VII Protection Against Discrimination Based on Sexual Orientation?*, 36 CONN. L. REV. 275 (2003).

223. *MGM Grand*, 305 F.3d at 1065.

224. *Id.* at 1064.

225. *Id.*

oriented activities on a daily basis.<sup>226</sup> The harassers' conduct included whistling and blowing kisses at Rene, leading him in a "swear party," telling crude jokes, and giving him sexually oriented "joke" gifts, and forcing Rene to look at pictures of naked men having sex while his co-workers looked on and laughed.<sup>227</sup> On more times than Rene said he could count, the harassment involved offensive physical conduct of a sexual nature.<sup>228</sup> When asked what he believed was the motivation behind his co-workers' harassing treatment of him, Rene replied that the "behavior occurred because he is gay."<sup>229</sup>

Rene sued MGM Grand, alleging sexual harassment in violation of Title VII.<sup>230</sup> MGM moved for summary judgment, arguing that Rene's claims were based on sexual orientation discrimination and not sex discrimination, and that Title VII, therefore, provided him no relief.<sup>231</sup> The district court agreed and granted MGM Grand's motion.<sup>232</sup> Rene appealed to the Ninth Circuit, where a divided three-judge panel affirmed the district court.<sup>233</sup> The Ninth Circuit voted to rehear Rene's case en banc,<sup>234</sup> however, and reversed.<sup>235</sup>

The court held that sexual orientation neither provides nor precludes a sex discrimination action.<sup>236</sup> "We would hold," the court said, "that an employee's sexual orientation is irrelevant for purposes of Title VII."<sup>237</sup> The court likewise found it irrelevant that the harasser might be motivated by hostility based on sexual orientation.<sup>238</sup> "It is enough that the harasser have (sic) engaged in severe or pervasive unwelcome physical conduct of a sexual nature."<sup>239</sup>

Though the Ninth Circuit held that the plaintiff could go forward with his Title VII claim, its opinion was splintered and rested on two distinct rationales. Five of the eleven judges held that male-on-male harassment of a sexual nature is actionable even when motivated by sexual orientation bias as opposed to "because of sex."<sup>240</sup> The five judges said sexual orientation is simply irrelevant as long as the offensive conduct has a sexual component.<sup>241</sup> The remainder of the seven-judge majority did not accept the "motivated by sexual orientation" concept, but based their concurrence on viewing the case as one of actionable gender stereotyping.<sup>242</sup>

Reaction to *Rene* and to the fact the Supreme Court denied certiorari has been

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226. *Id.*

227. *Id.*

228. *Id.* Rene testified at deposition that he was caressed and hugged and touched by his co-workers like they would a woman. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. 243 F.3d 1206, 1207 (9th Cir. 2001).

234. 255 F.3d 1069 (9th Cir. 2001).

235. 305 F.3d at 1064.

236. *Id.* at 1063.

237. *Id.*

238. *Id.*

239. *Id.* at 1064.

240. *Id.* at 1068.

241. *Id.*

242. *Id.*



as splintered as the opinion of the Ninth Circuit.<sup>243</sup>

2008] Rejected the “perceived sexual orientation” claim of the plaintiff, the district court in *Dandan v. Radisson Hotel Lisle*,<sup>244</sup> denied relief to Edward Dandan, a bartender, who was consistently subjected to vulgar and offensive comments by his co-employees and supervisor, Rick Zoellner, such as “fruitcake, fagboy, and Tinkerbell,” and to criticism of his speech for being feminine.<sup>245</sup> Zoellner’s daily insults intensified from name-calling to graphic insults, such as “didn’t your boyfriend do you last night?” and “I hate you because you are a faggot.”<sup>246</sup> Dandan told Zoellner to stop his verbal insults, but to no avail.<sup>247</sup> He complained to the food and beverage director and to the director of human resources, who conducted an investigation and gave Zoellner a written warning.<sup>248</sup> The insults stopped, only to be resumed by members of the kitchen staff.<sup>249</sup> Dandan complained again to the human resources director and to the head chef, who disciplined the kitchen staff for the insults to Dandan.<sup>250</sup> The insults stopped. Shortly thereafter, the restaurant manager suspended Dandan for two weeks for failing to follow a request not to chew gum.<sup>251</sup> The normal suspension for such an infraction was two to three days.<sup>252</sup> Dandan filed a charge of discrimination with the EEOC and ultimately sued.<sup>253</sup>

Dandan argued that the harassing treatment he received was because he did “not match-up to his co-workers’ expectations of what a man should be or how he should live his life.”<sup>254</sup> Nonetheless, the court characterized his claim as one for discrimination based on “perceived” sexual orientation<sup>255</sup> (not sex stereotyping), which it held had no precedential underpinning and was not protected by Title VII.<sup>256</sup> The court found irrelevant Dandan’s argument that none of his co-workers

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243. See *Employment Law—Title VII—Sex Discrimination—Ninth Circuit Extends Title VII Protection to Employee Alleging Discrimination Based on Sexual Orientation—Rene v. MGM Grand Hotel, Inc.*, 116 HARV. L. REV. 1889, 1889 (2002) (“Though the court held that the plaintiff could go forward with his Title VII claim, its confused and conflicting rationales are emblematic of the limitations in current Title VII jurisprudence and suggest that gay plaintiffs have not yet beaten the odds against them in winning legal redress for discrimination.”); Clark, *supra* note 191, at 315 (commenting that the court’s opinion and rationale are “so narrow that they provide gay men and women with only limited protection against workplace discrimination. . . .”). *But cf.*, Andrew Brownstein, *Title VII Protects Gay Workers From Sexual Harassment, Ninth Circuit Finds*, TRIAL, Jan. 2003 at 76 (declaring *Rene* a “ruling that advances legal protections for gays and lesbians . . . and is a landmark victory for gay-rights advocates. . .”).

244. No. 97 C 8342, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000).

245. *Id.* at \*1.

246. *Id.*

247. *Id.* at \*2

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at \*\*2–3.

253. *Id.* at \*3.

254. *Id.* at \*4.

255. *Id.* (finding that “the only reasonable inference is that the derogatory and bigoted comments inflicted upon Dandan were due to his co-workers’ perception of his sexual orientation.”).

256. *Id.* The *Dandan* court cited with approval *Shermer v. Illinois Dept. of Transp.*, 937 F. Supp. 781, 785 (C.D. Ill. 1996), in which the court concluded that discrimination based on sexual

actually knew his sexual orientation.<sup>257</sup>

Likewise, in *Price Waterhouse v. Hopkins*, the Supreme Court rejected a “perceived” sexual orientation claim, and denied the plaintiff’s plea.<sup>259</sup> Josh Klein, a technician in the county sheriff’s office, was told by his supervisor, “If I ever find out you’re queer, I’ll fire you.”<sup>260</sup> Co-workers called him a “homo,” made fun of the car he drove, and installed a bell over his work space and rang it to upset him.<sup>261</sup> Klein maintained he was entitled to relief under Title VII because he had suffered discrimination based on the “sexual aspect of [his] personality.”<sup>262</sup> The court found plaintiff’s claim to be based on the perception he was a homosexual and stated: “It is well settled that Title VII does not recognize a cause of action for discrimination based on sexual orientation.”<sup>263</sup>

Also declining to grant plaintiff relief, the court in *Mims v. Carrier Corporation*<sup>264</sup> said: “Neither sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act.”<sup>265</sup> The plaintiff, Quentin Mims, worked as a press operator with Carrier Air Conditioning.<sup>266</sup> He alleged that two co-workers made offensive and unwelcome sexual comments and gestures toward him, and that they suggested he was engaging in homosexual conduct with another male co-worker.<sup>267</sup> Mims reported the offensive behavior to his supervisors. However, despite his complaints, the harassing conduct continued unabated. Mims contended that although he is not homosexual, he was harassed and treated as a homosexual.<sup>268</sup>

The court specifically found Mims did not prove his case through any of the methods suggested by the Supreme Court in *Oncale* (sexual desire, general hostility, comparative evidence).<sup>269</sup> Mims testified his harassers were not, to his knowledge, homosexual and they had never expressed any sexual interest in him.<sup>270</sup> He likewise testified the defendant company did not, as a general rule, discriminate against men and there was not a general hostility toward men at Carrier.<sup>271</sup> Finally, Mims testified the individual defendants treated both men and women equally and made homosexual jokes in front of mixed company, as well as specifically to women.<sup>272</sup> Rejecting all of Mims’ arguments and evidence, the

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orientation, real or *perceived*, is not actionable under Title VII.

257. *Dandan*, 2000 WL 336528 at \*4.

258. 36 F. Supp. 2d 885 (D. Minn. 1999), *aff’d*, 198 F.3d 705 (8th Cir. 1999).

259. 36 F. Supp. 2d at 889–90.

260. *Id.* at 887.

261. *Id.*

262. *Id.* at 889.

263. *Id.* Neither the *Dandan* nor the *Klein* court discussed *Price Waterhouse*, although arguably the conduct in both cases was a violation of Title VII as gender stereotyping. Neither court appeared able to draw a distinction between the effeminate behavior of the plaintiffs and their sexual orientation.

264. 88 F. Supp. 2d 706 (E.D. Tex. 2000).

265. *Id.* at 714.

266. *Id.* at 709.

267. *Id.* at 710.

268. *Id.* at 712.

269. *Id.* at 714–15.

270. *Id.* at 715.

271. *Id.*

272. *Id.*

court noted that no one touched Mims in any way or propositioned him for sex.<sup>273</sup> While the off-color teasing and joking of the harassers was in bad taste, the court stated, “Title VII is not a guardian of taste.”<sup>274</sup>

*b. Title IX—The Schools*

Plaintiffs bringing suit under Title IX on the basis of their perceived homosexuality have a far better chance of success than those seeking relief under Title VII. OCR counsels that “if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian.”<sup>275</sup>

Granting relief under Title IX, the court in *Ray v. Antioch Unified School District*<sup>276</sup> addressed the complaint of Daniel Ray, an eighth grade student. Ray claimed fellow students’ repeated harassment and attacks against him were based on their perception he was homosexual; the defendant school district showed deliberate indifference to his complaints; and the harassment was so severe, pervasive, and objectively offensive as to deprive him of access to educational opportunities provided by the school, all in violation of Title IX.<sup>277</sup>

At the time, Daniel’s mother was in the process of gender transformation.<sup>278</sup> During January and February 1999, Jonathan Carr and other students at Antioch Middle School repeatedly threatened, insulted, taunted, and abused Daniel during the school day based on their perception he was homosexual, and on the status and physical appearance of his mother.<sup>279</sup> In late February, Jonathon assaulted Daniel on his way home from school, causing him to suffer a concussion, hearing impairment in one ear, and severe permanent headaches and psychological injury.<sup>280</sup> Daniel repeatedly reported the harassing behavior to school officials, who were aware of the widespread general perception that Daniel was a homosexual.<sup>281</sup>

The court found Daniel was targeted by his classmates due to his perceived sexual status as a homosexual and was harassed based on those perceptions.<sup>282</sup> The court found no material difference between a female student being subject to unwelcome sexual comments and advances due to her harasser’s perception of her as a sexual object and the instance in which a male student is insulted and abused due to his harasser’s perception that he is homosexual and, therefore, a subject of prey.<sup>283</sup> “In both instances, the conduct is a heinous response to the harasser’s perception of the victim’s sexuality, and is not distinguishable to this Court.”<sup>284</sup>

Some courts have gone out of their way to avoid dismissing a claim based on

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273. *Id.* at 716.

274. *Id.*

275. OCR, SEXUAL HARASSMENT GUIDANCE, at <http://www.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (last visited October 20, 2004).

276. 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

277. *Id.* at 1167–68.

278. *Id.* at 1167.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 1170.

283. *Id.*

284. *Id.*

sexual orientation if the court believes the claim would otherwise be valid. For example, in *Schmedding v. Trane and Univ. of North Dakota*, the Eighth Circuit allowed the plaintiff to amend his complaint to delete the phrase “perceived sexual preference” and replace it with “sex” so he would have a cognizable Title VII claim.<sup>286</sup> The district court had dismissed Schmedding’s allegations of harassment because it found them to be premised on a sexual orientation claim.<sup>287</sup> However, the Eighth Circuit found that even though Schmedding’s complaint included allegations that he was subjected to taunts of being homosexual, such allegations did not necessarily transform his complaint “from one alleging harassment based on sex to one alleging harassment based on sexual orientation.”<sup>288</sup>

### 3. Comparative evidence that men and women were treated differently

In *Oncale*, the Supreme Court held that where sexual banter and indiscriminate sexual touching are directed at both genders, the conduct is not actionable.<sup>289</sup> Thus, in several post-*Oncale* cases, employers have tried to escape liability for same-sex sexual harassment by showing the alleged harasser targeted men and women equally, thereby raising an “equal opportunity harasser” defense.<sup>290</sup> At least six federal circuits have accepted in principle the equal-opportunity defense, reasoning men and women exposed to the same offensive environment do not suffer discrimination based on sex.<sup>291</sup>

For example, the Fourth Circuit in *Lack v. Wal-Mart Stores, Inc.*<sup>292</sup> reversed a jury verdict for the plaintiff because the court found sufficient evidence the supervisor’s vulgar and offensive conduct was obnoxious to both male and female employees.<sup>293</sup> The Seventh Circuit, in *Holman v. Indiana*,<sup>294</sup> dismissed the complaint of a married couple who claimed they were both sexually harassed by the same supervisor at the Indiana Department of Transportation.<sup>295</sup> Finding the plaintiffs could not show one gender was subjected to a working environment different from the other, the court said:

Both before and after *Oncale*, we have noted that because Title VII is premised on eliminating *discrimination*, inappropriate conduct that is

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285. 187 F.3d 862 (8th Cir. 1999).

286. *Id.* at 865.

287. *Id.* at 864–65. Schmedding alleged in his complaint that he was patted on the buttocks, asked to perform sexual acts, given derogatory notes referring to his anatomy, called names such as “homo,” and subjected to exhibitions of graphic sexual behavior such as unbuttoning of clothing and imitations of sexual acts. *Id.* at 865.

288. *Id.* at 865.

289. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–82 (1998).

290. See Shylah Miles, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 631 (2001) (arguing courts should reject equal-opportunity harasser defense since it allows harassers who target both males and females to escape liability, thereby frustrating purpose of Title VII).

291. See, e.g., *Brennan v. Metro. Opera Ass’n, Inc.*, 192 F.3d 310, 319 (2d Cir. 1999); *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 965 (8th Cir. 1999); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1011 (7th Cir. 1999); *Butler v. Yslete Indep. Sch. Dist.*, 161 F.3d 263, 270 (5th Cir. 1998); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

292. 240 F.3d 255 (4th Cir. 2001).

293. *Id.* at 261–62.

294. 211 F.3d 399 (7th Cir.).

295. *Id.* 400–01.

inflicted on both sexes, or is inflicted regardless of sex, is outside the  
2004] statute's ambit. *See* *Williams v. Harassment*, 221  
'bisexual' harasser, then, because such a person is not treating one sex  
better (or worse) than the other; he is treating both sexes the same  
(albeit badly).<sup>296</sup>

However, the Ninth Circuit and a district court in the Tenth Circuit have  
rejected the equal-opportunity harasser defense. In *Steiner v. Showboat Operating  
Company*,<sup>297</sup> the Ninth Circuit stated in dicta that evidence of an equal-opportunity  
harasser would not bar sexual harassment claims against that harasser by both men  
and women.<sup>298</sup> Barbara Steiner alleged her supervisor spoke to her in a threatening  
and derogatory fashion using sexually explicit and offensive terms.<sup>299</sup> The  
employer argued the supervisor harassed everyone and, therefore, was not  
harassing Steiner based on her sex.<sup>300</sup> The court acknowledged the supervisor was  
abusive to both men and women.<sup>301</sup> Nevertheless, the court distinguished the  
supervisor's treatment of Steiner from his treatment of male employees, finding his  
offensive conduct toward women was clearly related to their gender, while his  
conduct toward men was not.<sup>302</sup> The court's reasoning denied the equal-  
opportunity harasser defense and suggested it would allow both men and women to  
lodge successful claims of sexual harassment against the same harasser.<sup>303</sup>

Similarly, the district court in *Chiapuzio v. BLT Operating Corp.*,<sup>304</sup> analyzed  
the "because of sex" requirement and denied the equal-opportunity harasser  
defense.<sup>305</sup> Dale and Carla Chiapuzio, a married couple, complained their  
supervisor continuously subjected them to sexually abusive remarks.<sup>306</sup>  
Specifically, he commented that Dale could not satisfy his wife sexually and that  
he, the supervisor, could do a better job.<sup>307</sup> When speaking to Carla, the supervisor  
made sexually explicit advances.<sup>308</sup> The employer argued since the supervisor  
harassed both men and women, he could not have discriminated against the  
Chiapuzios because of either's sex.<sup>309</sup>

The court determined both plaintiffs were harassed because of their sex.<sup>310</sup> The  
supervisor attempted to demean and harass Dale because he was male due to  
remarks regarding his sexual prowess.<sup>311</sup> Such remarks would not have created the  
same effect had he been a woman.<sup>312</sup> The supervisor propositioned Carla because

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296. *Id.* at 403.

297. 25 F.3d 1459 (9th Cir. 1994).

298. *Id.* at 1464.

299. *Id.* at 1461–62.

300. *Id.* at 1463.

301. *Id.*

302. *Id.* at 1463–64.

303. *Id.* at 1463–65.

304. 826 F. Supp. 1334 (D. Wyo. 1993).

305. *Id.* at 1337–38.

306. *Id.*

307. *Id.* at 1335.

308. *Id.*

309. *Id.* at 1336.

310. *Id.* at 1338.

311. *Id.*

312. *Id.*

she was a woman.<sup>313</sup> The key to the court's analysis was not whether the perpetrator harassed only members of one gender, but whether gender was a significant factor in each allegation of harassment.<sup>314</sup>

#### V. ALTERNATIVE CAUSES OF ACTION FOR SAME-SEX SEXUAL HARASSMENT

The failure of current federal discrimination laws to recognize sexual orientation—perceived or actual—as “because of sex” in same-sex sexual harassment claims brought under Titles VII and IX creates hurdles that often cannot be cleared by plaintiffs. Courts have urged Congress to take action to prohibit discrimination based on sexual orientation, but to no avail.<sup>315</sup> As noted earlier, Congress has specifically declined to extend Title VII protections to individuals discriminated against based on their sexual orientation or perceived sexual orientation.<sup>316</sup> Recent efforts to enact the Employment Non-Discrimination Act (“ENDA”) have also failed in Congress.<sup>317</sup>

At the same time, the number of same-sex sexual harassment claims being filed appears to be on the rise.<sup>318</sup> Same-sex sexual harassment suits are capturing the headlines—often with big settlements and jury awards.<sup>319</sup> Given courts somewhat

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313. *Id.* at 1335.

314. *Id.*

315. For example, a district court in Maine stated:

In determining along with numerous other jurisdictions that Title VII does not provide a remedy for discrimination based on sexual orientation, the Court does not in any way condone this serious and pervasive activity in the American workplace. The intolerable working conditions set forth in the cases denying relief under Title VII for rampant discrimination based on sexual orientation call for immediate remedial response by Congress.

*Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66, 76 n.10 (D. Me. 1998). *See also* *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (“Harassment on the basis of sexual orientation has no place in our society. . . . Congress has not yet seen fit, however, to provide protection against such harassment.”).

316. *See supra* note 217.

317. Legislation designed to expressly prohibit employment discrimination on the basis of sexual orientation was first introduced in the 103rd Congress in 1994 and has been introduced in each session thereafter. In the 104th Congress, the Employment Non-Discrimination Act missed passage in the Senate by one vote. Employment Non-Discrimination Act (“ENDA”) of 1994, S. 2238, 103d Cong. (2d Sess. 1994). Current versions of ENDA are pending, H.R. 2692, was introduced July 31, 2001, and S. 1284 was introduced July 31, 2001. ENDA does not amend Title VII. Rather, it is a stand alone bill, which would prohibit discrimination based on sexual orientation or perceived sexual orientation, homosexual or heterosexual, in the employment context only. Jeremy S. Barber, *Comment: Re-Orienting Sexual Harassment: Why Federal Legislation is Needed to Cure Same-Sex Sexual Harassment Law*, 52 AM. U. L. REV. 493, 532 (2002) (arguing that passage of ENDA will not only “erase the confusion and inconsistency that currently exists in the lower courts’ interpretation of Title VII regarding sexual orientation, but it will also provide the only solution that is both plausible and beneficial to gay and lesbian workers”).

318. The EEOC does not track cases involving same-sex workplace harassment at this time. EEOC data reflects, however, that the number of claims being filed by men has increased. *See* Robert Marquant, *Is Same-Sex Harassment Illegal*, 91 THE CHRISTIAN SCIENCE MONITOR 1 (1997) (“The agency does not track male-on-male sexual violence as a category; but a spokesman says the overall increase certainly reflects more male-only claims.”). In fiscal year 1992, 9.1% of sexual harassment charges were filed by men, compared to 14.9% in fiscal year 2002. EEOC, SEXUAL HARASSMENT CHARGES, at <http://www.eeoc.gov/stats/harass.html> (last visited October 20, 2004).

319. *See, e.g.*, Tammy Joyner, *Same-Sex Harassment Suit a First for Atlanta*, ATLANTA J.–

haphazard approach to recognizing same-sex sexual harassment cases under Titles VII and IX, plaintiffs have sought to supplement their claims under other laws, such as torts, state and municipal anti-discrimination statutes, and contractual claims.

#### A. Intentional Torts

In the absence of federal law protections, employees often rely on intentional torts to address same-sex harassment and sexual orientation claims against both employers and co-workers.<sup>320</sup> “[A]lthough a tort approach to sexual harassment has been given short shrift by most serious scholars, practitioners have aggressively sought in recent years to use tort law to remedy workplace sexual harassment.”<sup>321</sup> Victims have employed a variety of torts to remedy same-sex sexual harassment, including intentional infliction of emotional distress (“IIED”), assault and battery, and invasion of privacy. Such efforts have met with mixed results because, in part, the elements of such torts are difficult to satisfy. Nevertheless, given the confusion of the courts in responding to some same-sex sexual harassment claims under Titles VII and IX, additional remedies for victims

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CONST., June 28, 2003, at F1 (noting that an “Oregon forest products company recently settled a same-sex case with the EEOC for \$200,000”); Gretchen Schuldt, *Burlington Firm to Pay \$180,000 in Harassment Suit*, MILWAUKEE J. SENTINEL, Feb. 17, 2001, at 2D (reporting that Saint-Goblain Containers settled same-sex sexual harassment suit for \$180,000); Susan Decker, *Kraft, EEOC Settle Lawsuit Alleging Same-Sex Harassment*, CHI. SUN-TIMES, June 14, 2003, at 29 (suit settled for “substantial amounts”); Reed Abelson, *Men, Increasingly, Are the Ones Claiming Sex Harassment by Men*, N.Y. TIMES, June 10, 2001, at § 1 (reporting that same-sex harassment case against major Colorado dealership by ten former car salesmen was settled for \$500,000, and that a jury awarded \$7.3 million in 1999 in another same-sex sexual harassment case by a shoe salesman against Dillard’s Department Store); Laura Billings, *Worker Won Sex-Harassment Case, But He Doesn’t Feel Victorious*, ST. PAUL PIONEER PRESS, Aug. 1, 1999, at A1 (judge awarded \$1.75 million to dock worker’s same-sex sexual harassment suit against Yellow Freight); Scott Carlson, *Same-Sex Harassment Case Settled; Minnesota Meatpacker Agrees to Pay \$1.9 Million*, ST. PAUL PIONEER PRESS, Aug. 12, 1999, at D1 (Long Prairie Packing Company settled same-sex sexual harassment lawsuit for \$1.9 million.); Stacy Downs, *Officers, Shawnee Settle Claim, Rare Same-Sex Harassment Case Involves \$250,000*, KAN. CITY STAR, Mar. 12, 1999, at A1 (three male detectives settled suit against male supervisor for \$250,000); EEOC, Press Release, ‘Babies R Us’ to Pay \$205,000, Implement Training Due to Same-Sex Harassment of Male Employee (Jan. 15, 2003), at <http://www.eeoc.gov/press/1-15-03.html> (last visited October 21, 2004). See also L.M. Sixel, *Same-Sex Cases Changing the Law*, HOUS. CHRON., June 30, 2000, at C1 (quoting lawyer saying, “judgments on same-sex harassment cases are higher than opposite-sex judgments”). But see Richard F. Storrow, *Same-Sex Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 726 (1998) (“Juries do not award higher damages in same-sex cases.”)

320. 1 L. LARSON, EMPLOYMENT DISCRIMINATION § 41.67(b), at 8–148 (1984). See also Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 60 (1999) (arguing that tort claims allow for a legal remedy “for the many workers who experience severe harassment on the job, but who would be hard pressed to assert that their harassment was ‘because of sex’” under Title VII); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 352–53 (1992) (explaining how tort law can remedy allegedly sexual harassing behavior). Some commentators argue, in fact, that Title VII coverage of sexual harassment claims is not necessary because tort actions provide more appropriate remedies. See, e.g., Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 359–63 (1990); Susan Perissinotto Woodhouse, *Same-Gender Sexual Harassment: Is It Sex Discrimination Under Title VII?*, 36 SANTA CLARA L. REV. 1147, 1181–84 (1996). The authors do not embrace that view, but rather point out that lawyers should be aware of additional or alternative claims to bring when representing the victims of same-sex sexual harassment.

321. Ehrenreich, *supra* note 321, at n.155.

may be available by bringing tort actions.

224 Intentional Infliction of Emotional Distress, which is sometimes referred to as the “tort of outrage,” is the tort claim most frequently raised in sexual harassment cases, including those involving same-sex harassment.<sup>322</sup> The standards to establish IIED are quite difficult: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . .”<sup>323</sup> Accordingly, the conduct that a plaintiff is required to prove is far beyond that required to establish a prima facie case of sexual harassment under Titles VII and IX, neither of which require intent.<sup>324</sup> Still, some courts have found the harassing conduct so outrageous as to find in favor of the plaintiff.<sup>325</sup>

Other tort claims that can provide possible additional routes for recovery for same-sex sexual harassment are assault and battery. “[T]he intent which is an essential element of the action for battery is the intent to make contact, not to do

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322. Larson, *supra* note 319, § 41.67(b), at 8–148. See, e.g., *Kanzler v. Renner*, 937 P.2d 1337, 1341–42 (Wyo. 1997) (“We are in accord with numerous jurisdictions which have determined that inappropriate sexual conduct in the workplace can, upon sufficient evidence, give rise to a claim of intentional infliction of emotional distress.”); *Grimm v. U.S. West Communications*, 644 N.W.2d 8, 16–17 (Iowa 2002) (rejecting employer’s argument that IIED claim is preempted by state civil rights law, which does not prohibit discrimination against sexual orientation); *Ford v. Revlon*, 734 P.2d 580, 585–87 (Ariz. 1987) (holding that defendant’s conduct of sexual harassment and failure to respond to employee complaints of sexual harassment constituted IIED).

323. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

324. See Stuart H. Bompey, *Legal and Strategic Considerations in Defending Sexual Harassment Claims*, 463 PLI/LIT 285, 341 (1993) (observing that “‘garden variety’ sexual harassment will not automatically give rise to a claim for intentional infliction of emotional distress”). See, e.g., *Dillard Department Stores v. Gonzales*, 72 S.W.3d 398, 406 (Tex. App. 2002) (ruling that IIED claim failed in same-sex sexual harassment because harasser’s behavior failed to rise to “that high level of atrociousness required”); *Miner v. Mid-America Door Company*, 68 P.3d 212, 224 (Okla. Civ. App. 2002) (ruling that sexual harassing conduct was not found to be “beyond all possible bounds of decency in the setting in which it occurred”); *La Day v. Catalyst Tech.*, 302 F.3d 474, 484 (5th Cir. 2002) (rejecting plaintiff’s IIED claim under Louisiana law because no evidence existed that severe emotional distress was “certain or substantially certain”); *Bowersox v. P.H. Glatfelter Co.*, 677 F. Supp. 307, 311 (M.D. Pa. 1988) (holding that sexually explicit remarks and display of sexually explicit materials were not sufficiently “extreme and outrageous” to support claim for IIED).

325. See, e.g., *Hampel v. Food Ingredients Specialties*, 729 N.E.2d 726 (Ohio 2000) (reinstating jury verdict that same-sex sexual harassment not only violated state antidiscrimination statute, but also constituted IIED); *Brewer v. Hillard*, 15 S.W.3d 1, 7 (Ky. App. 1999) (holding that male victim of same-sex sexual harassment stated claim for IIED because he was “subjected to frequent incidents of lewd name calling coupled with multiple unsolicited and unwanted requests for homosexual sex”); *Kovatch v. California Cas. Mgmt. Co.*, 65 Cal. App. 4th 1256 (Cal. Ct. App. 1998) (holding that sexual orientation harassment may satisfy outrageous behavior prong of IIED claim); *Forbes v. Merrill Lynch*, 957 F. Supp. 450, 456 (S.D.N.Y. 1997) (IIED claim available where supervisor engaged in harassing behavior of employee after he revealed that he had AIDS); *Ford v. Revlon*, 734 P.2d 580, 585 (Ariz. 1987) (ruling that sexual harassment constituted IIED in part because it was outrageous for the employer to “[drag] the matter out for months and [leave the plaintiff] without redress”); *Retherford v. AT&T Communications*, 844 P.2d 949, 978 (Utah 1992) (finding sexual harassment in the workplace “undoubtedly an intentional infliction of emotional distress”); *Kanzler v. Renner*, 937 P.2d 1337, 1342 (Wyo. 1997) (ruling that sexual harassment includes broader range of conduct than is prohibited under Title VII and finding “outrageousness” to include such criteria as abuse of power, a pattern of harassment, and unwelcome touching).



injury.”<sup>326</sup> Assault is similar, but no physical contact is required, simply “imminent apprehension.”<sup>327</sup> Some courts have found that allegedly sexually harassing conduct to constitute assault or battery.<sup>328</sup>

Yet a third tort that is sometimes claimed in sexual harassment cases is invasion of privacy (or intrusion), which is defined as the intentional intrusion “physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person.”<sup>329</sup> Several courts have ruled that sexually harassing conduct may constitute invasion of privacy.<sup>330</sup>

The remedies available to plaintiffs in same-sex sexual harassment actions under tort laws, however, can be limited. First, in at least half the states, workers’ compensation laws provide the exclusive remedy for state tort claims asserted by plaintiffs in the employment context, and workers’ compensation statutory schemes preclude compensatory and punitive damages.<sup>331</sup> Workers’ compensation laws do not preempt Titles VII or IX. Second, the doctrine of respondeat superior precludes many employee claims against employers, since sexual harassment is rarely considered within a harasser’s scope of employment.<sup>332</sup> Accordingly, most

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326. *Lambertson v. United States*, 528 F.2d 441, 444 (2d Cir. 1976).

327. RESTATEMENT (SECOND) OF TORTS § 21 (1965).

328. See, e.g., *Ford v. Revlon, Inc.*, 734 P.2d 580, 582 (Ariz. 1987) (ruling that grabbing and touching plaintiff constituted battery); *Davis v. United States Steel Corp.*, 779 F.2d 209 (4th Cir. 1985) (allowing claim of assault and battery where supervisor touched employee’s buttocks without her consent); *Hart v. Nat’l Mortgage & Land Co.*, 235 Cal. Rptr. 68 (Ct. App. 1987) (allowing assault and battery claims where employee complained about same-sex sexual harassment by his supervisor and employer failed to take action); *Newsome v. Cooper-Wiss, Inc.*, 347 S.E.2d 619 (Ga. Ct. App. 1986) (allowing claim for assault and battery where employee complained of unwanted touching and rubbing by her supervisor).

329. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

330. See, e.g., *Harrison v. Eddy Potash, Inc.* 112 F.3d 1437, 1439 (10th Cir. 1997) (allowing battery tort to address sexual harassment in the workplace); *Rogers v. Loews L’Enfant Plaza Hotel*, 526 F. Supp. 523, 528 (D. D.C. 1981) (holding that calls and visits to employee’s home by supervisor, even when not overtly sexual, constituted persistent and unwelcome conduct); *Phillips v. Smalley Maint. Servs.*, 435 So.2d 705, at 711 (Ala. 1983) (finding that supervisor’s questions to employee about her sex life and frequent sexual demands constituted intrusion).

331. Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1368–80 (1993) (observing that states are evenly split on whether workers’ compensation laws bar tort recovery, and that employers have avoided tort claims raised by sexual harassment claims by asserting workers’ compensation claims because of significantly less liability); Steven G. Biddle & Mary Jo Foster, *Workers’ Compensation: When is Workers’ Compensation the Exclusive Remedy in Sexual Harassment Cases?*, 33 ARIZ. ATT’Y, 25 Dec. 1996, at 25, 26 (reviewing how states have treated sexual harassment actions under workers’ compensation schemes, and noting that in most jurisdictions “courts have applied the ‘intentional/accidental analysis’ . . . That is, courts will refuse to bar a civil action when the employer knew or should have known that the harassing conduct was occurring.”). See, e.g., *Lui v. Intercontinental Hotels Corp.*, 634 F. Supp. 684, 688 (D. Haw. 1986) (ruling that workers’ compensation statute covers worker’s alleged sexual assault and battery claims). See generally 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 (1993) (arguing that tort claims play an important role because they offer some advantages that statutory claims do not).

332. See, e.g., *Miner v. Mid-America Door Co.*, 68 P.3d 212, 222–23 (Okla. App. 2002) (rejecting victim’s sexual harassment claim and noting that generally it is not within the scope of employment to “commit an assault upon a third person”) (quoting *Rodebush v. Okla. Nursing Homes, Ltd.*, 867 P.2d 1241, 1245 (Okla. 1993)); *Harley v. McCoach*, 928 F. Supp. 533, 542 (E.D. Pa. 1996) (opining that “conduct in the employment context almost never gives rise to recovery” under intentional infliction of emotional distress); Joanna Stromberg, *Student*

tort actions are brought against individuals, not “deep-pocketed” businesses, educational institutions or local government entities.<sup>333</sup> At the same time, tort actions generally allow for unlimited punitive and compensatory damages, while compensatory and punitive damages are capped under Title VII.<sup>334</sup>

## B. State and Local Antidiscrimination Laws

Plaintiffs not only bring tort actions, but sometimes seek remedies to same-sex sexual harassment under state and local antidiscrimination laws. Presently, thirteen states and the District of Columbia have laws that specifically prohibit discrimination based on sexual orientation in the public and private sectors.<sup>335</sup> A person who commits sexual harassment based on the real or perceived sexual orientation of the victim may also be liable under state hate crime statutes, which are crimes committed by individuals based on victims’ race, ethnicity, religion, sexual orientation, or gender.<sup>336</sup> In 2000, 106 cities also prohibited discrimination

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*Scholarship: Sexual Harassment: Discrimination or Tort?*, 12 UCLA WOMEN’S L.J. 317, 341–45 (2003) (reviewing workers’ compensation law as precluding many tort actions against employers for sexual harassment in the workplace). *But see* *Bennett v. Furr’s Cafeterias, Inc.*, 549 F. Supp. 887, 890 (D. Colo. 1982) (ruling that employee’s sexual harassment by supervisor did not result from risks inherent in her employment and, therefore, her claims were not barred by the state workers’ compensation law).

333. *See* Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES MAGAZINE, Oct. 13, 2002, at 52, 95 (noting that the objection of victims to bringing tort actions in same-sex sexual harassment cases is that “there would be less money to be won, since victims would often be going after the individuals who tormented them rather than after deep-pocketed companies that employ them”).

334. RESTATEMENT (SECOND) OF TORTS §§ 905–08 (1965). *See supra* note 5 (discussing recovery under federal law).

335. California, CAL. GOV’T CODE § 12920 (West Supp. 2004); Connecticut, CONN. GEN. STAT. ANN. § 46a-81c–81m (2004); District of Columbia, D.C. CODE § 2-1402.11 (2001); Hawaii, HAW. REV. STAT. § 368-1 (2004); Massachusetts, MASS. ANN. LAWS ch. 151B, §§ 3–4 (West 2004); Minnesota, MINN. STAT. ANN. § 363.01–03 (West 2004); New Hampshire, N.H. REV. STAT. ANN. § 354-A:6 (2003); New Jersey, N.J. STAT. ANN. §§ 10:5-1–49 (West 2002); New Mexico, N.M. STAT. ANN. §§ 28-1-2, -7, -9 (Michie Supp. 2003); Rhode Island, R.I. GEN. LAWS § 28-5-3 (2003); Vermont, VT. STAT. ANN. tit. 21, § 495 (2003), VT. STAT. ANN. tit. 8, § 10403 (2003); Wisconsin, WIS. STAT. ANN. § 111.31 (2002). *See Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1625 (May 1996) (observing that “one of the quiet labor law revolutions of the 1990s [is] the passage of statewide antidiscrimination statutes that protect gays and lesbians in private employment”). *See, e.g.,* *Zalewski v. Overlook Hosp.*, 692 A.2d 131 (N.J. Super. Ct. Law Div. 1996) (ruling that state antidiscrimination law prohibits discrimination based on employee’s actual or perceived sexual orientation in same-sex sexual harassment case); *Murray v. Oceanside Unified Sch. Dist.*, 95 Cal. Rptr. 2d 28 (Cal. Ct. App. 2000) (recognizing under Cal. Gov. Code § 12940(h)(1) that sexual orientation harassment is actionable). *See generally* HUMAN RIGHTS CAMPAIGN, *Gay, Lesbian, Bisexual and Transgender Workplace Issues* at [http://www.hrc.org/Template.cfm?Section=Workplace\\_Discrimination&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=52&ContentID=22945](http://www.hrc.org/Template.cfm?Section=Workplace_Discrimination&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=52&ContentID=22945) (last visited October 20, 2004) (discussing remedies, or the lack thereof, for discrimination against gays, lesbians, bisexuals and transgender Americans).

336. As of July 2003, eight states and the District of Columbia had hate or bias crime laws based on sexual orientation: California, D.C., Hawaii, New Mexico, Minnesota, Missouri, Pennsylvania, and Vermont. *See generally* HUMAN RIGHTS CAMPAIGN, STATEWIDE HATE CRIMES LAWS, at [http://www.hrc.org/Template.cfm?Section>Your\\_Community&Template/ContentManagement/ContentDisplay.cfm&ContentID/19445](http://www.hrc.org/Template.cfm?Section>Your_Community&Template/ContentManagement/ContentDisplay.cfm&ContentID/19445) (last visited October 21, 2004). *See, e.g.,* *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043, 1049–50 (N.D. Ill. 1998) (ruling that state law claim for civil damages under the Illinois Hate Crimes Act, which prohibits hate crimes based on “sexual orientation” when the defendant commits “assault” and “battery,” is not preempted by the state human rights act, but can provide an “independent legal basis” for

based on sexual orientation in private employment.<sup>337</sup> However, state antidiscrimination laws that do not specifically prohibit sexual orientation pose the same challenges to homosexual plaintiffs bringing same-sex sexual harassment claims under Title VII, since most state courts interpret their general state civil rights law relying on Title VII jurisprudence.<sup>338</sup> Moreover, remedies vary depending on the state: Remedies available under Title VII—punitive and compensatory damages, albeit capped, and attorneys’ fees—“may or may not be available under state antidiscrimination laws.”<sup>339</sup>

### C. Contractual Claims

Lastly, policies that prohibit sexual orientation discrimination and sexual harassment in personnel manuals or collective bargaining agreements that create enforceable contracts under state law may provide a basis for contract or promissory estoppel claims in same-sex sexual harassment suits.<sup>340</sup>

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legal action); *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1289–90 (9th Cir. 2001), *cert. dismissed*, 537 U.S. 1098 (2003) (reasoning that state hate crime law imposes civil liability for sexual harassment and is not limited to “extreme, criminal acts of violence”). See also Kathryn Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN’S L. REV. 315, 318–19 (noting that some states “consider crimes motivated by the victim’s sexual orientation as crimes of hate” and observing that “[w]hen gender-motivated crimes are prosecuted as hate crimes, they generally include claims of sexual harassment and battery”). In 2000, the Department of Justice reported that 1,517 out of 8,152 hate crimes reported were committed with a bias against sexual orientation. Press Release, U.S. Dep’t of Justice, Crime in the United States, 2000 (Oct. 22, 2001), available at <http://www.fbi.gov/pressrel/pressrel01/cius2000.htm>.

337. WAYNE VAN DER MEIDE, LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES 83–84 (2000), available at <http://www.ngltf.org/downloads/leqe99.pdf>.

338. “State courts have, for the most part, looked to federal statute and precedent for guidance in determining the actionability of same-sex harassment claims under their similarly worded antidiscrimination statutes, while federal courts generally have analyzed pendent state law claims for sexual harassment under Title VII principles and precedent.” Norma Rotunno, Annotation, *Same-Sex Sexual Harassment Under State Antidiscrimination Laws*, 73 A.L.R.5th 1 at § 2a (1999). See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66 (D. Me. 1998) (interpreting Maine Human Rights Act, which does not prohibit sexual orientation discrimination, to exclude claims for sexual harassment claim based on sexual orientation); *Barbour v. Dep’t of Soc. Servs.*, 497 N.W.2d 216 (Mich. Ct. App. 1993) (ruling that state antidiscrimination law did not apply to harassment arising from sexually related comments about an employee’s perceived or actual sexual orientation); *Fiecke v. Ascension Place*, No. C7-96-1791, 1997 WL 147441 (Minn. Ct. App. Apr. 1, 1997) (affirming dismissal of employee’s same-sex sexual harassment claim because the conduct of which she complained related to her sexual orientation, and noting that plaintiff had stated a claim for sexual orientation discrimination, which was not yet a part of the Minnesota Human Rights Act, although the act was later amended to include sexual orientation discrimination); *Linville v. Sears, Roebuck & Co.*, 335 F.3d 822 (8th Cir. 2003) (holding that because plaintiff’s Title VII claim for same-sex sexual harassment failed, so did the claim under the Minnesota antidiscrimination law).

339. Rotunno, *supra* note 338, § 2b. See also Andrea Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U. L. REV. 777, 785 n.36 (1983) (observing that the right to recover reasonable attorney’s fees varies under state antidiscrimination statutes). See, e.g., *Ky. Dept. of Corr. v. McCullough*, 123 S.W.3d 130 (Ky. 2003) (ruling that punitive damages are not available under Kentucky Civil Rights Act). Accordingly, one commentator recommended that plaintiffs who bring same-sex sexual harassment claims “avoid any emphasis on their sexual orientation in the presentation of their case, but instead . . . emphasize the sexual nature of the conduct itself and how it affected the particular plaintiff’s ability to perform his or her job.” Rotunno, *supra* note 338, § 2b.

340. See BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW

In the end, then, plaintiffs may explore supplemental causes of action to mitigate the jurisdictional inconsistency of courts in dealing with same-sex sexual harassment suits under Titles VII and IX.

## VI. ISSUES RELATED TO CONSTITUTIONAL CHALLENGES TO SAME-SEX SEXUAL HARASSMENT: EQUAL PROTECTION AND SOVEREIGN IMMUNITY

### A. Equal Protection

In addition to federal statutory protection under Title VII, Title IX, and state law challenges, public employees and public school students subjected to same-sex sexual harassment may find protection under the Equal Protection Clause of the Fourteenth Amendment, since some courts have recognized such harassment as a form of discrimination based on sex.<sup>341</sup> They may also bring similar constitutional challenges in states that have state equal protection clauses.<sup>342</sup> Likewise, they may use 42 U.S.C. § 1983 to bring suit against employees of state and local governments.<sup>343</sup>

#### 1. Public Employees

A district court in White Plains, New York, in *Lovell v. Comsewogue School District*,<sup>344</sup> refused to dismiss a teacher's claims that her employing school district

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366 n.35, 377 (1996 & Supp. 2002) (noting that “[a] few jurisdictions have credited arguments that employment harassment policies constitute contractual promises to employees”). *Cf.*, *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200 (D. Conn. 2000) (rejecting employer's motion for summary judgment and finding genuine issues of fact to exist that professor was discharged due to his sexual orientation in contravention of the faculty handbook's antidiscrimination provision, which was an enforceable contract under state law); *Durham Life Ins. v. Evans*, No. CIV.A.94-0801, 1994 WL 447406, at \*2-3 (E.D. Pa. Aug. 19, 1994) (allowing employee's claim for breach of contract and breach of collective bargaining agreement in sexual harassment suit to proceed), *aff'd*, 39 F.3d 1169 (3d Cir. 1994); *Gruver v. Ezon Prods., Inc.*, 763 F. Supp. 772 (M.D. Pa. 1991) (holding that to establish contractual violation, employee must establish that harassment policy in personnel manual induced her employment); *Joachim v. AT&T Info. Sys.*, 793 F.2d 113, 114 (5th Cir. 1986) (finding that lower court properly granted summary judgment on discharge claim arising under employer's handbook, which forbade discrimination on the basis of sexual preference, because handbook did not form contract). *But see* *Blaise-Williams v. Sumitomo Bank*, 592 N.Y.S.2d 41, 42 (N.Y. App. Div. 1993) (ruling that general antidiscrimination statement in handbook too vague to be enforceable). Sometimes courts find that intentional torts arise out of breaches of contract in sexual harassment suits. *See, e.g.*, *Ford v. Revlon*, 734 P.2d 580, 587 (Ariz. 1987) (holding that “the tort of intentional or reckless conduct was based in part on the violation of the policies and procedures concerning employee complaints adopted by [the employer] and which amounted to an implied contract between [the employer] and its employees”).

341. *See, e.g.*, *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002) (involving a public school teacher); *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp.2d 869 (N.D. Ohio 2003) (involving a public school student).

342. *See* Robin Cheryl Miller, *Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct*, 96 A.L.R. 5th 391 (2002-04).

343. 42 U.S.C. § 1983 (2000); *see, e.g.*, *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”).

344. 214 F. Supp. 2d 319 (E.D. N.Y. 2002).

and principal violated her right to equal protection by failing to take reasonable measures to prevent students from harassing her because of her homosexuality.<sup>345</sup> Joan Lovell, an art teacher at Comsewogue High School for twenty-seven years, is a lesbian.<sup>346</sup> Three female students in her art class lodged a sexual harassment complaint against her.<sup>347</sup> Even though the principal found the claims to be frivolous and dismissed them, he failed to discipline the students.<sup>348</sup> They then began to harass Lovell, calling her a “dyke”, calling her “disgusting” in the cafeteria, and pointing and whispering about her in the school hallways.<sup>349</sup> Two of the students began to hug each other when they saw her walking down the hall. Lovell complained to the principal, but he failed to take any remedial action.<sup>350</sup> Lovell sued.<sup>351</sup> The school district moved to dismiss, arguing that Lovell failed to state a claim under the Equal Protection Clause and that the principal was shielded by qualified immunity.<sup>352</sup>

Addressing the school district’s challenge to Lovell’s equal protection claim, the court found she had met both prongs of a prima facie case.<sup>353</sup> She claimed she was treated differently than were similarly situated teachers with respect to the school’s handling of the students’ false sexual harassment complaints against her.<sup>354</sup> She also claimed the school district failed to address her complaints in the same manner they handled complaints of harassment based on race.<sup>355</sup> For example, Lovell alleged that when a black teacher had a racial epithet written on her blackboard, the school called in the Police Bias Unit and held numerous faculty meetings concerning the incident.<sup>356</sup> On the other hand, when students harassed Lovell due to her sexual orientation, including calling her a “dyke,” nothing was done.<sup>357</sup> The court found the use of disparaging remarks based on sexual orientation sufficiently similar to the use of racial epithets and held that Lovell stated an equal protection claim.<sup>358</sup>

The court then turned to the school district’s argument that the allegedly discriminatory conduct (taunting Lovell because she was a lesbian) was not based on an “impermissible consideration.”<sup>359</sup> The court rejected this argument, noting not only that sexual harassment is actionable under § 1983 but also that harassment based on sexual orientation is a basis for an equal protection claim.<sup>360</sup>

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345. *Id.* at 323.

346. *Id.* at 321.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. The court noted: “An equal protection claim has two essential elements: (1) the plaintiff was treated differently than others similarly situated, and (2) the differential treatment was motivated by an intent to discriminate on the basis of impermissible considerations, such as race.” *Id.* at 321–22.

354. *Id.* at 322.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 323.

359. *Id.*

360. *Id.* (citing *Emblen IV v. The Port Authority of New York/New Jersey*, No. 00 Civ. 8877, 2002 WL 498634 (S.D.N.Y. March 29, 2002); *Quinn v. Nassau County Police Dep’t*, 53 F.

Accordingly, the court held that Lovell's claim that she was discriminated against based on her sexual orientation was actionable under the Equal Protection Clause.<sup>361</sup>

## 2. Public School Students

In a groundbreaking decision, the Seventh Circuit in *Nabozny v. Podlesny*<sup>362</sup> held, while using only the rational basis test, that no rational basis existed for school officials permitting one student to assault another based on the victim's sexual orientation.<sup>363</sup> Jamie Nabozny sued various school officials under § 1983 for anti-gay harassment he suffered from his peers.<sup>364</sup> Beginning in the seventh grade, Nabozny's classmates regularly called him "faggot," and struck and spat on him.<sup>365</sup> On one occasion in class, two students pushed him to the ground and acted out a mock rape on him while twenty students looked on and laughed.<sup>366</sup> Nabozny escaped and ran to Principal Podlesny's office and appealed for help.<sup>367</sup> She responded "boys will be boys" and told Nabozny that he was "going to be so openly gay," he should "expect" such behavior from his fellow students.<sup>368</sup> She did not discipline the students involved in this incident.<sup>369</sup>

Numerous incidents followed during Nabozny's seventh, eighth, and ninth grade years.<sup>370</sup> Nabozny was assaulted and urinated upon in the school restroom.<sup>371</sup> Nabozny's parents met with Principal Podlesny, who promised relief, but did not provide it.<sup>372</sup> Nabozny twice attempted suicide during his eighth and ninth grade years.<sup>373</sup> The harassment continued into the tenth grade. Students on the school bus regularly called Nabozny a "fag" and "queer" and threw steel nuts and bolts at him.<sup>374</sup> The most violent attack occurred one morning while Nabozny was sitting in the school hall waiting for the library to open.<sup>375</sup> Eight boys approached him and one student kicked him for five to ten minutes while the others looked on and laughed.<sup>376</sup> When the incident was reported to the assistant principal, he allegedly laughed and told Nabozny he "deserved such treatment because he is gay."<sup>377</sup> Nabozny withdrew from school in the eleventh grade.<sup>378</sup>

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Supp. 2d 347, 356–57 (E.D.N.Y. 1999); *Tester v. City of New York*, No. 95 Civ. 7972, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997)).

361. *Lovell*, 214 F. Supp. 2d at 323.

362. 92 F.3d 446 (7th Cir. 1996).

363. *Id.* at 458.

364. *Id.* at 449.

365. *Id.* at 451.

366. *Id.*

367. *Id.*

368. *Id.* at 451.

369. *Id.*

370. *Id.* at 451-52.

371. *Id.* at 452.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

He subsequently sued the school district and several school officials.<sup>379</sup> The Seventh Circuit affirmed the district court's grant of summary judgment on all the defendants and reinstated Nabozny's § 1983 claims based on a violation of his equal protection rights.<sup>380</sup> Applying the rational relationship test, the court concluded: "[W]e are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one."<sup>381</sup> In its opinion, the court noted that at the time of the conduct in question, Wisconsin law protected students from discrimination on the basis of sexual orientation<sup>382</sup> and the school district had a policy prohibiting discrimination against students on the basis of gender or sexual orientation.<sup>383</sup> The court stressed, however, that the fact the conduct in question was illegal under the statute and district policy neither adds to, nor subtracts from, the conduct's constitutional permissibility.<sup>384</sup> The equal protection analysis would have been the same in the absence of either. The court said although many schools have anti-harassment policies, an existing policy is not required for a potential plaintiff to establish that the actions of a school official are unconstitutional.<sup>385</sup>

A Minnesota district court presented an interesting analysis of an equal protection claim raised in the school setting. In *Montgomery v. Independent School District*,<sup>386</sup> a student brought suit against a school district under both Title IX and the Equal Protection Clause. The defendant argued that plaintiff's equal protection claim should be dismissed because persons "with a particular sexual orientation or perceived sexual orientation do not constitute a definable, constitutionally protected class."<sup>387</sup> The court disagreed, saying: "In so arguing, defendant fundamentally misapplies the most basic principles of constitutional law."<sup>388</sup> The court pointed out that "the Fourteenth Amendment protects all persons, whether they can prove membership in a specially protected class or not."<sup>389</sup> Membership in a particular class of persons is not irrelevant to a determination of whether a constitutional violation has occurred. It simply determines the standard under which the conduct at issue must be scrutinized. With an identified suspect class, such as race, alienage, or national origin, courts will apply the most exact scrutiny. When addressing discrimination based on homosexuality, the Eighth Circuit has held that the matter is subject only to rational basis review.<sup>390</sup>

Applying rational review, the court still found the defendant responded to

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379. *Id.* at 453.

380. *Id.*

381. *Id.* at 458.

382. *Id.* at 453 (citing Wis. Stat. Ann § 118.13(1) (West 1999)).

383. *Id.*

384. *Id.* at 457 n.11.

385. *Id.* For an excellent discussion of this case and a well-presented argument that school officials who do nothing to stop peer harassment based on sexual orientation violate students' rights under the Equal Protection Clause and could be personally liable under Section 1983, see Jeffrey I. Bedell, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829 (2003).

386. 109 F. Supp. 2d 1081 (D. Minn. 2000). *See supra* pp. 123–24 (for an earlier discussion of this case).

387. *Id.* at 1088.

388. *Id.*

389. *Id.*

390. *Id.* (citing *Richenberg v. Perry*, 97 F.3d 256, 260–61 (8th Cir. 1996)).

Montgomery's complaints differently than to those of other students because of his sexual orientation or perceived sexual orientation.<sup>391</sup> The court could find a rational basis for the school district's permitting students to assault plaintiff on this basis and denied defendant's motion for judgment on the pleadings against plaintiff's equal protection claim on the ground he is not a member of a protected class.<sup>392</sup>

The most recently reported case in this area involved Matthew Schroeder, who claimed he was the victim of pervasive verbal and physical harassment by his middle school peers because of his outspoken defense of gay rights.<sup>393</sup> He contended his views led students, teachers, and administrators to perceive him as gay.<sup>394</sup> As a result, classmates singled him out for name-calling, kicking, beatings, offensive gesturing, physical threats, and violence.<sup>395</sup> Even though Schroeder reported the harassment on several occasions, school administrators and teachers failed to take any action to enforce the school's anti-harassment policies and prevent further harassment.<sup>396</sup> Finally Schroeder sued, bringing both Title IX and Equal Protection Clause claims against the school board, high school principal, and assistant principal for showing deliberate indifference to the verbal and physical harassment he suffered.<sup>397</sup>

The Ohio district court, in addressing Schroeder's equal protection claim, declared that individuals who are discriminated against because they are homosexual or perceived to be homosexual are members of an identifiable protected class.<sup>398</sup> For Schroeder to survive the defendants' summary judgment motion,<sup>399</sup> the court said he must show either that the defendants intentionally discriminated against him or acted with deliberate indifference to his plight.<sup>400</sup> Schroeder provided evidence that he and his mother repeatedly reported the harassment to the administrators and, despite this knowledge, neither the principal nor the assistant principal took any meaningful action to protect Schroeder or to discipline the perpetrators.<sup>401</sup> Schroeder argued the principal and assistant principal were deliberately indifferent to the harassment he suffered because they perceived him to be homosexual and were motivated by an animus against homosexuals.<sup>402</sup> Denying summary judgment to the administrators, the court held

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391. *Montgomery*, 109 F. Supp. 2d at 1084.

392. *Id.* at 1089.

393. *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003). The Title IX claims in this case were discussed on pages 879–81.

394. *Id.* at 871.

395. Beginning in the fifth grade, peers began calling Matthew “queer” and kicking him. *Id.* at 871. When he was in the seventh grade, he told the principal about escalated name-calling. *Id.* Allegedly, the principal asked Matthew which of his brothers was gay, and said: “So you are a fag, too?” *Id.* He then told Matthew he should learn to like girls, go out for the football team, and keep his mouth shut about gay rights. *Id.* In the seventh grade, two older pupils beat Matthew in the bathroom and “slammed his head in a urinal and chipped his . . . [tooth] on the urinal.” *Id.* Another student allegedly called him “a little faggy queero” and said “you’re a little bitch. I’m going to kill you.” *Id.* at 872.

396. *Id.*

397. *Id.* at 872.

398. *Id.* at 874.

399. *Id.*

400. *Id.*

401. *Id.* at 872–73.

402. *Id.* at 875.



that the jury could find they “manifested homophobic animus, resulting in deliberate indifference on the part of plaintiff’s supervisors about how and why he was being treated as he was.”<sup>403</sup>

## B. Eleventh Amendment Sovereign Immunity

The Eleventh Circuit in *Downing v. Board of Trustees of the University of Alabama* addressed the question of whether Congress exceeded its authority when it passed Title VII by creating rights that the Equal Protection Clause does not embrace.<sup>404</sup> In *Downing*, a former employee in the campus police department of the University of Alabama at Birmingham sought equitable relief and damages against the University’s Board of Trustees under Title VII.<sup>405</sup> Downing claimed that his immediate supervisor in the department sexually harassed him at work and that, when he complained of the harassment, the Chief of Police not only failed to take corrective action, but fired Downing.<sup>406</sup> The Board claimed sovereign immunity under the Eleventh Amendment and moved to dismiss, contending that when Congress amended Title VII to bring state and local governments within its ambit, it exceeded its authority under section 5 of the Fourteenth Amendment to abrogate state sovereign immunity.<sup>407</sup> Relying on its earlier decision in *Cross v. State of Alabama*,<sup>408</sup> the court found the elements of a sexual harassment claim under Title VII and the Equal Protection Clause to be identical.<sup>409</sup> Given that the elements are identical, Title VII did not create a new constitutional right but simply enforced a right already recognized under the Fourteenth Amendment.<sup>410</sup>

The Board next argued that reliance on *Cross* was misplaced because the harasser there was male and the victims were female, whereas both the alleged perpetrator and the victim in *Downing* were male.<sup>411</sup> The Board contended such difference was material and that the Equal Protection Clause does not protect a state employee from same-sex discrimination.<sup>412</sup> The court soundly rejected this argument, relying on the Supreme Court’s opinion in *Oncale* and its own decision in *Cross*: “[W]e discern no principled basis for holding that the Equal Protection Clause is implicated in a case of opposite-sex discrimination but not in a case of same-sex discrimination.”<sup>413</sup> The court affirmed the district court’s denial of Eleventh Amendment immunity with respect to Downing’s Title VII claim.<sup>414</sup>

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403. *Id.*

404. 321 F.3d 1017 (11th Cir. 2003) (This opinion was withdrawn on January 5, 2004.).

405. *Id.* at 1020–21.

406. *Id.* at 1019–20.

407. *Id.* at 1920. Section 5 of the Fourteenth Amendment empowers Congress to enforce rights guaranteed by the Amendment; it does not authorize Congress to create new constitutional rights. *Id.*

408. 49 F.3d 1490, 1507–08 (11th Cir. 1995) (holding elements of a sexual harassment claim under Title VII and the Equal Protection Clause are identical).

409. *Downing*, 321 F. 3d at 1022.

410. *Id.* at 1023 (nothing that “both the aim of Title VII, as well as the method for proving violations of Title VII, are the same as those of the Equal Protection Clause.”) (citing *Nanda v. Bd. of Trustees of Univ. of Ill.*, 303 F.3d 817, 829–30 (7th Cir. 2002)).

411. *Downing*, 321 F.3d at 1023.

412. *Id.*

413. *Id.* at 1024.

414. *Id.* Later in the same year, the Eleventh Circuit in *Snider v. Jefferson State Comm. Coll.*, 344 F.3d 1325 (11th Cir. 2003), affirmed a district court’s dismissal of a same-sex sexual

## VII. CONCLUSION

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No doubt exists that a seismic shift has occurred in judicial treatment of and sensitivity to gay and lesbian legal rights. The 2003 Supreme Court ruling in *Lawrence v. Texas*,<sup>415</sup> which struck down state laws that criminalize sodomy as unconstitutional under the Due Process Clause of the Fourteenth Amendment, signaled yet another chink in the armor.<sup>416</sup> The *Lawrence* Court observed: “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an *invitation to subject homosexual persons to discrimination both in the public and in the private spheres.*”<sup>417</sup> Similar shifts are occurring in state

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harassment suit brought by male security officers at a public community college on the grounds of qualified immunity. *Id.* at 1330. The guards alleged that they and other male employees were the victims of same-sex sexual harassment committed by their supervisor, the Chief of Security at the college. *Id.* at 1327. They contended the president and the dean of business operations knew or should have known about the chief’s conduct, had a duty to prevent the conduct, and failed to stop the conduct in violation of plaintiffs’ equal protection rights. *Id.* The district court assumed, for purposes of evaluating the qualified immunity defense, that the plaintiffs stated a recognizable constitutional claim. *Id.* The district court concluded, however, that at the time of the alleged violations (1983–98), the law was not well-settled that same-sex harassment violated the Equal Protection Clause and that the defendants were entitled to qualified immunity. *Id.* On appeal, the Eleventh Circuit said that its 1997 decision in *Fredette v. BVP Mgmt. Assocs.* and the Supreme Court’s 1998 decision in *Oncale*, made clear that a same-sex sexual harassment claim was actionable under Title VII against a private employer, it was not clear that such a claim clearly violated a federal constitutional right. *Id.* at 1328 (citing *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997)); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). The court said this question of law was not clearly settled in the Eleventh Circuit until the court’s decision in *Downing*, long after the events at Jefferson State Community College. *Id.* at 1330.

415. 539 U.S. 558 (2003).

416. *Id.* at 558.

417. *Id.* at 575 (emphasis added). Justice O’Connor, who concurred in the decision to strike down the Texas statute on equal protection grounds, repeated that same passage of the majority. *Id.* at 575 (O’Connor, J., concurring). In his angry dissent in *Lawrence*, Justice Scalia attacked these broad assertions, noting “that proposals to ban such discrimination” under Title VII have repeatedly been rejected by Congress.” *Id.* at 603 (Scalia, J., dissenting).

While *Lawrence* does not directly affect the judicial analysis of same-sex sexual harassment, the justices’ rhetoric allows the Court to enter “into the national debate about the status of homosexuality in a manner that stresses the positive value of nondiscrimination,” which impacts the legal landscape in which same-sex sexual harassment exists. Robert C. Post, *The Supreme Court, 2002 Term: Foreward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96–97, 101, 104–105 (2003). See also Nailah A. Jaffree, *Halfway Out of the Closet: Oncale’s Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799, 818 (2002) (“As many critics have noted, any protection for homosexuals granted by the Supreme Court will be of limited significance as long as *Bowers v. Hardwick* remains good law” because “[t]he case can be read as explicitly condoning differential treatment of homosexuals, and hence, discrimination based upon sexual orientation.”) (internal citations omitted). And, of course, not all victims of same-sex sexual harassment are necessarily homosexual. At the same time, courts appear to be interpreting and have already chosen to interpret *Lawrence* narrowly. See, e.g., *Lofton v. Sec’y of the Dept. of Children & Family Servs.*, 358 F.3d 804, 815 (11th Cir. 2004) (reasoning that *Lawrence* failed to establish a “fundamental right to private sexual intimacy” subject to strict scrutiny and, therefore, upholding as constitutional Florida statute that prohibits adoption by “practicing homosexuals”); David L. Hudson, Jr., *Court Won’t Tie Lawrence to Gay Adoption Law*, 3 ABA J. EREPORT 1 (2004), WL 3 No. 5 A.B.A. J. REP. 1. See also *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004) (ruling that *Lawrence* was factually and legally distinguishable, because it involved adults and a due process challenge, thereby upholding constitutionality of state statute that outlawed criminal sodomy with minor on equal protection grounds); *Standhardt v. Superior Ct. ex. rel. Maricopa*, 77 P.3d 451

At the same time, the judicial revisiting of homosexuality in our culture has generated a backlash. President Bush has called for a federal constitutional amendment to counter judges who have defined marriage to include same sex couples.<sup>419</sup> Such legal and political developments do not directly affect the treatment by courts of same-sex sexual harassment, but provide further context within which to consider these claims.

In the end, during the Court's post-*Oncale* efforts to resolve the treatment of same-sex discrimination under Title VII, the Court has created myriad new legal confusions that are being played out in a highly politicized environment.<sup>420</sup> Some courts suggest that a harasser must be homosexual for a plaintiff to establish that a harasser "desired" him or her. But why should homosexual harassers be treated differently than heterosexual harassers under Title VII jurisprudence? The current state of the law highlights the exclusion of sexual orientation under Title VII: If victims of same-sex harassment are gay or lesbian, and their pleadings reflect that information, they tend to be excluded from the protections afforded by Title VII. As Deborah Zalesne, law professor at the City University of New York, has opined: "Basically, if your *harasser* is gay, you stand a good chance of winning a same-sex harassment case. If *you* are gay, you lose."<sup>421</sup> Another ironic twist: By allowing victims of same-sex sexual harassment to provide evidence establishing disparate treatment of the sexes, the Court seemingly encourages the use of the "equal-opportunity harasser" defense, where harassers will not be held responsible for their conduct if they bully men and women, not just those of the same gender. And how does one draw the line between gender stereotyping, which is recognized by some courts as a form of same-sex sexual harassment, while other courts, when viewing similar evidence, view the case as sexual orientation discrimination, which falls outside the ambit of Title VII? *Oncale* has spawned these and many other legal conundrums.

The law of sexual harassment has evolved over the past twenty years. The Court's *Oncale* decision answered affirmatively a central question—does Title VII protect against same-sex harassment? However, the Court's reasoning,

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(Ariz. Ct. App. 2003) (applying rational basis analysis and holding Arizona ban on same-sex marriage does not infringe federal state due process, equal protection, or privacy guarantees).

418. In *Goodridge v. Dep't of Public Health*, the Massachusetts Supreme Court ruled that same-sex couples may marry under the state constitution's equal protection and due process clauses. 798 N.E.2d 941 (Mass. 2003). In so ruling, the court rejected the argument by some amici that "prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral." *Id.* at 967. The majority responded, in part, that the state had a "strong affirmative policy of preventing discrimination on the basis of sexual orientation" in numerous spheres, including state laws addressing employment discrimination and hate crimes. *Id.*

However, numerous courts have rejected challenges by same-sex couples to state marriage laws. See, e.g., *Dean v. Dist. of Columbia*, 653 A.2d 307, 333 (D.C. 1995) (ruling that same-sex marriage is not a fundamental right under the due process clause); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287–88 (N.Y. Sup. Ct. 1996) (ruling that state prohibition against same-sex marriages does not violate due process or equal protection clauses).

419. Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage*, WASHINGTON POST, Feb. 25, 2004, at A1; *Bush's Remarks on Marriage Amendment*, N.Y. TIMES, Feb. 25, 2004, at A18.

420. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

421. Talbot, *supra* note 333, at 57.

specifically the evidentiary routes it delineated, has created for lower courts only new questions that in the end will require the Court to answer. *Opale* applies to same-sex sexual harassment claims. Meanwhile, unfortunately, the very real harms being suffered by victims of same-sex sexual harassment will continue to be treated haphazardly by the courts.