A ROSE BY ANY OTHER NAME . . .
THE GENDER BASIS OF
SAME-SEX SEXUAL HARASSMENT

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I. INTRODUCTION

A. The Advent of Same-Sex Sexual Harassment

Even those not particularly enthusiastic about penalizing sex discrimination concede that sexual harassment is devoid of social utility and bloated
with inequities. As homosexual Americans leave the closet, many heterosexuals have declared "open season" on them. Consequently, a relatively new strain of employment sexual harassment has come to the fore, in which both harassers and victims are of the same sex—same-sex sexual harassment. As this mutated strain of sex discrimination spreads throughout the workplace, outcries from victims have kept apace. Aside from homophobia and ideology, another factor that enhances the resilience of same-sex sexual harassment issues is that they naturally comprehend and tightly interlace both legitimate and illegitimate factors. Moreover, by explicitly refusing to outlaw discrimination based on sexual orientation and by explicitly embracing sexual orientation as a legitimate basis for discrimination, Congress has become a part of the problem. Commingled

1. See, e.g., Richard A. Posner, An Economic Analysis of Sex Discrimination Laws, 56 U. CHI. L. REV. 1311, 1318 (1989) ("A straightforward case of exploitation, more clearly akin to theft or rape than to misogynistic refusal to accept women workers, is sexual harassment—conduct designed to elicit sexual favors from women against their will.").

2. See, e.g., Kenji Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 COLUM. L. REV. 1753, 1809-10 (1996) ("After relinquishing the protection of the closet, homosexuals are so threatened with prejudice that they need an alternative mechanism of protection. Many find this in numbers; that is, in insularity.") (footnote omitted); David H. Pollack, Comment, Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing," 46 U. MIAMI L. REV. 711, 715 (1992) (discussing the various implications of leaving the closet for homosexuals); Comment, Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution, 128 U. PA. L. REV. 193, 204-05 (1979) (indicating that there are individuals that have antagonistic feelings toward homosexuals); Joseph P. Shapiro et al., Straight Talk About Gays, U.S. NEWS & WORLD REP., July 5, 1993, at 42, 46 ("With 1,898 hate crimes against gays and lesbians reported in just five major cities last year, many homosexuals fear that coming out can result in injury or even death.").


4. Traditional sexual harassment occurs where members of the opposite sex harass one another.

5. For analytical purposes, the author equates sex and gender, while recognizing the contention that "sex" addresses biological traits but gender addresses the distant cultural garb with which society drape the genders. See, e.g., 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). This distinction seems, however, unnecessary to the argument that Title VII covers same-sex sexual harassment or that same-sex sexual harassment is gender-based.


legitimate and illegitimate factors together with legitimized sexual orientation help to confound Title VII’s jurisprudence and to fragment the federal judiciary, causing some courts to contort Title VII’s evidentiary standards and doctrine, to selectively apply them, or both. By triggering these analytical errors, same-sex sexual harassment claims highlight or magnify weaknesses in Title VII’s jurisprudence by exposing semantic riddles, doctrinal convolutions, non sequiturs, and analytical cul-de-sacs.

II. SCOPE OF THIS ARTICLE

This Article primarily examines two issues: (1) whether Title VII can properly accommodate same-sex sexual harassment claims and (2) if so, what adjustments in doctrinal or evidentiary paradigms are thereby implicated. In probing these issues, this Article: (1) examines the doctrinal integrity and rationales of federal appellate (and some district court) opinions that have rejected or accepted same-sex sexual harassment claims under Title VII; (2) examines the reasoning by which federal appellate courts defined or determined the gender-based component of same-sex sexual harassment; (3) examines the Supreme Court’s position on same-sex sexual harassment; (4) examines the nature of same-sex sexual harassment; and (5) suggests other approaches that enhanced the protection to victims of same-sex sexual harassment without unduly protecting sexual orientation.

This Article propounds a two-pronged theme. First, on its face and as interpreted, Title VII encompasses gender-based same-sex sexual harassment. Second, the Supreme Court’s unqualified adoption of the Equal Employment Opportunity Commission’s (EEOC) expansive definition of “sex” reflects little tolerance for gender-based discrimination. Therefore, even though Title VII does not cover sexual orientation, the proximity of sexual orientation to gender obliges tolerance for the former to fully protect the latter. Ultimately, the scope of protection for gender will positively inform that for sexual orientation.

III. ORGANIZATION OF THIS ARTICLE

This Article comprises twelve parts. Part IV adumbrates Title VII’s jurisprudential history. Part V examines the various approaches that the federal courts of appeal have taken when addressing same-sex sexual harassment issues. Part VI opens the analytical section of this article by examining Supreme Court opinions that—along with Oncale—offer guidance in same-sex sexual harassment claims. Part VII examines the gender basis of different types of same-sex sexual harassment. Part VIII discusses the sanctioning of nonsexual disparate treatment in same-sex sexual harassment claims. Part IX examines the role of but-for causality in sex discrimination as

9. See infra Part IX.
the foundation of same-sex sexual harassment. Part X offers some refinements to but-for analysis in same-sex sexual harassment disputes. Part XI discusses the role of sexual conduct in the sexual harassment stage of same-sex sexual harassment litigation. Finally, Part XII concludes and summarizes this Article.

IV. HISTORICAL SKETCH OF TITLE VII’S JURISPRUDENCE

In 1964, Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII) to remove, inter alia, sex discrimination essentially because it hampered productive efficiency and equity.

The United States Supreme Court divided Title VII jurisprudence into two general categories—disparate-treatment (intentional or direct discrimination), disparate-impact (unintentional or indirect discrimination), and bifurcated disparate-treatment litigation—into: pretextual and mixed-motive claims. McDonnell Douglas Corp. v. Green, as refined by Texas Department of Community Affairs v. Burdine and St. Mary’s Honor Center v. Hicks, fashioned a five-part evidentiary scheme for proving pretextual disparate treatment discrimination. Price Waterhouse v. Hopkins added mixed-motive claims to the disparate-treatment rubric. McDonnell v. Green required Title VII plaintiffs with pretextual claims to demonstrate that: (1) they were members of a protected group; (2) they applied for vacant positions in the companies in question; (3) they were qualified for those positions; (4) the employers rejected them; and (5) the employers continued to seek

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10. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994). Section 703(a)(1) of Title VII, provides in relevant part: "It shall be an unlawful employment practice for an employer—(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." Id. § 2000e-2(a)(1).

11. Frank v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) ("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin."). Legislative precursors to Title VII were silent about gender. See CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-17 (1985). In fact, opponents to Title VII belatedly introduced gender as another protected category in order to defeat the bill. Id. This tactic backfired, however, when Congress accepted gender as another protected category and enacted Title VII. Id. at 117, 218-29.


17. Id. at 241.
applications for those positions. 18 *Burdine* clarified the nature of defendants’ evidentiary burden in pretextual litigation, holding that once plaintiffs established prima facie cases of pretextual discrimination, then, to avoid adverse decisions, employers must articulate—rather than actually prove—a legitimate reason for having taken the adverse personnel decisions. 19 Thereafter, plaintiffs could ultimately demonstrate unlawful discrimination by proving that the articulated reasons for the discrimination were untrue and, hence, pretextual. 20

In 1993, *Hicks* altered the pretextual evidentiary terrain by holding that proof of mere falsity—pretext—did not warrant a directed verdict in the plaintiff’s favor. 21 To obtain a directed verdict, plaintiffs must not only prove falsity, but also link adverse personnel decisions to impermissible criteria like race, gender, or similar criteria. 22

*Price Waterhouse* established plaintiffs’ evidentiary burden in Title VII mixed-motive disputes. 23 Mixed-motive disputes arise when plaintiffs adduce direct evidence that impermissible reasons—like gender—motivated adverse personnel decisions, and employers show that legitimate, as distinguished from pretextual, reasons also influenced those decisions. 24 In mixed-motive disputes, employers may escape the yoke of affirmative relief by showing that they would have made the same adverse personnel decisions even absent the illegitimate reasons. 25

Finally, *Griggs v. Duke Power Co.* 26 established the disparate-impact theory of claim, which does not require plaintiffs to show intentional discrimination. To prove disparate impact, plaintiffs must show that, when making personnel decisions, employers used screening devices that excluded or otherwise burdened a disproportionate number of members in a protected group to which the plaintiff belongs. 27 Employers may then escape liability

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19. Texas Dep’ t of Community Affairs v. Burdine, 450 U.S. at 254-55.
20. Id. at 256.
22. Id. at 508-10.
23. See infra Part VI.B.2.
25. Section 706(g)(2)(B) of Title VII provides:
On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
(i) may grant declaratory relief, injunctive relief . . . , and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion . . . .
27. Id.
by proving—not merely articulating—that the screening devices were a "business necessity." That is, the devices were reasonably necessary to the normal operation of their businesses.28

In the quest to eliminate employment discrimination through Title VII, employees serve as private attorneys general.29 Title VII is both a shield and a sword in their hands; a shield against discriminatory personnel decisions and a sword to excise discriminatory animus. To some extent, the Civil Rights Act of 199130 hardened the shield and sharpened the sword.31

A. Sexual Harassment: A Subset of Sex Discrimination

_Meritor Savings Bank v. Vinson_32 declared that sexual harassment is a form of sex discrimination and, hence, is covered by Title VII.33 To support this conclusion, _Meritor_ pointed primarily to the following Title VII language: "'It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .'"34 _Meritor_ addressed traditional sexual harassment—between a male and female.35 The basic question in traditional sexual harassment, and traditional sex discrimination, disputes is whether the contested harassment occurred "because of" the victim's sex or gender (gender-based or has a gender basis).36

28. _Id._ (requiring the employer to _show_, not merely articulate, that "an employment practice which operates to exclude Negroes [is] related to job performance," lest the practice be prohibited); _see also_ MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.41, at 356 (1988) ("This burden is one of persuasion.").

29. _See, e.g.,_ McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 884 (1995) ("The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) ("[T]he great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as 'private attorneys general,' were awarded attorneys' fees in all but very unusual circumstances.") (emphasis added); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) ("[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.").


31. _See, e.g., id._ § 1981a(a)(1) (providing, with certain restrictions, that "the complaining party may recover compensatory and punitive damages").


33. _Id._ at 73.

34. _Id._ at 63 (quoting 42 U.S.C. § 2000e-2(a)(1)).

35. _Id._ at 59-60.

36. _See, e.g.,_ Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993). Justice Ginsburg, in her concurring opinion, stated that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." (Ginsburg, J., concurring) (emphasis added).
Meritor bifurcated sexual harassment into quid pro quo sexual harassment and hostile environment sexual harassment. Quid pro quo harassment directly links victims’ gender to their conditions of employment because employers explicitly offer either to improve or to maintain victims’ conditions of employment in exchange for their sexual favors. Conversely, environmental harassment lacks this explicit link either to employment benefits or to consequences. Although environmental harassment comprises intimidating sexual or nonsexual conduct, it does not, and is not intended to directly solicit sexual favors. In this sense, one might envision environmental harassment as being “in the air” or “airborne.” However, that de jure distinction arguably lacks a de facto difference. Every sexual request by employers carries an implied threat that is hardly lost on the victim. Thus, victims of environmental harassment have little reason to feel more secure in their employment than victims of quid pro quo sexual harassment. Moreover, both environmental and quid pro quo harassment have the same or similar psychological impact on victims—humiliation and degradation. And although a single instance of environmental harassment may or may not be actionable, the cumulative impact of relatively minor

38. See, e.g., Highlander v. K.F.C. Nat’l Management Co., 805 F.2d 644, 648 (6th Cir. 1986). The Highlander court held:

To prevail on a *quid pro quo* claim of sexual harassment, a plaintiff must assert and prove (1) that the employee was a member of a protected class; (2) that the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment complained of was based on sex; (4) that the employee’s submission to the unwelcome advances was an express or implied condition receiving job benefit, or that the employee’s refusal to submit to a supervisor’s sexual demands resulted in a tangible job detriment; and (5) the existence of respondeat superior liability.

39. Id. ("To constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones in every instance or that each incident be sufficiently severe to detrimentally affect a female employee.").
40. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (observing the difference between airborne sexism that can poison the working environment and sexism that directly affects and is aimed at the plaintiff in question).
41. Accordingly, Ellerth v. Burlington Industries observed: "The same actions that create a hostile environment may have overtones of *quid pro quo* demands, and a person suffering from *quid pro quo* harassment is also enduring a hostile environment." Ellerth v. Burlington Indus., 102 F.3d 848, 855 (7th Cir. 1996).
42. Id.
43. See, e.g., King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) ("Although a single act can be enough [to create a hostile environment], generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.").
episodes can not only become actionable but can also equal or eclipse that of quid pro quo sexual harassment.44

Sexual harassment can masquerade either as legitimate sexual behavior between males and females,45 or as legitimate or platonic behavior—like horseplay—between heterosexual or homosexual males.46 Federal courts have the unenviable task of disentangling the legitimate from the illegitimate—sanctioning the latter while discouraging frivolous claims and avoiding overhauling the work place. The result is a complex, motley jurisprudential tapestry.47

V. JUDICIAL APPROACHES TO SAME-SEX SEXUAL HARASSMENT

Presently, seven federal courts of appeal and the United States Supreme Court have, addressed Title VII’s coverage of same-sex sexual harassment claims.48 One circuit flatly refused to recognize same-sex sexual harassment as a legitimate claim under Title VII. Six appellate courts, either directly or indirectly, opted for coverage, but four burdened the plaintiffs’ prima facie cases by requiring the plaintiffs to prove at least one additional element purportedly to assure that the plaintiffs’ biological sex, as opposed to their sexual orientation or other legitimate factors actually caused the sexual harassment.49 Finally, the Supreme Court declared that Title VII covers same-sex

45. Posner, supra note 1, at 1318-19. Some might argue that even “normal” dating behavior is improper at work, because employees are there to produce and not to find mates. Nevertheless, the work day is aggressively eroding many Americans’ leisure time. See, e.g., ROSABETH M. KANTER, WHEN GIANTS LEARN TO DANCE: MASTERING THE CHANGES OF STRATEGY, MANAGEMENT AND CAREERS IN THE 1990S, at 268 (1989); JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 86-87 (1991). Moreover, many, if not most, Americans that do not find mates in either high school or college find them at work or at some work-related function. See generally MARGARET KENT & ROBERT FEINSCHREIBER, LOVE AT WORK: USING YOUR JOB TO FIND A MATE 1 (1988); see also Jodi Enda & Angie Cannon, Women’s Leaders Hail Packwood Saga as Milestone, DALLAS MORNING NEWS, Sept. 10, 1995, at 11A (“Where there are fewer and fewer community ties and fewer people going to church, more and more people find their friends, mates and dates in the workplace . . . . I believe women and men are engaged in an important discussion about how we relate to each other in the workplace.”) (quoting Patricia Ireland, President of the National Organization of Women); Greg Johnson, Harassment a Hot Topic Among S.D. Businesses, L.A. TIMES, Oct. 15, 1991, at 2A (“The issue of sexual harassment is further complicated by the fact that women now account for such a large percentage of the nation’s workforce and the fact that men and women increasingly are using the workplace to find mates . . . .”).
46. See, e.g., Torres v. National Precision Blanking, 943 F. Supp. 952, 961 (N.D. Ill. 1996) (lamenting that the task of separating “sexual from platonic harassment, [would force courts] to distinguish between locker room antics and sexual foreplay, an often highly subjective inquiry”).
47. See infra Parts X.
48. See infra Part V.A-D.
49. See infra Part V.A-C.
sexual harassment. In opting for coverage, most federal circuits adopted some combination of the following lines of reasoning: (1) Title VII’s language covers circumstances in which harassers and victims are the same gender; Meritor neither specifically excluded nor included claims of same-sex sexual harassment, but its language was sufficiently broad to cover both; the EEOC’s guidelines cover same-sex sexual harassment claims; and Title VII’s legislative history does not explicitly exclude these claims.

All the circuits that have addressed same-sex sexual harassment disputes have held that Title VII covers all sexual harassment claims that are based on a victim’s sex or gender. Thus, barring courts that flatly deny that sexual harassment claims state a claim under Title VII, the ultimate issue in same-sex sexual harassment disputes is whether the harassment is based on a victim’s gender. Under what circumstances, if any, may one deem same-sex sexual harassment to be gender-based? The only circuit that categorically denied Title VII coverage to same-sex sexual harassment claims concluded that Title VII simply does not contemplate intragender sexual harassment claims.

A. Circuits That Denied Title VII Coverage to Same-Sex Sexual Harassment Disputes

1. Fifth Circuit—Garcia v. Elf Atochem North America

In Garcia v. Elf Atochem North America, the Fifth Circuit upheld a district court’s decision granting the defendant’s motion for summary judgment against the plaintiff’s same-sex sexual harassment claim. The plaintiff, a heterosexual male, specifically claimed that a heterosexual male supervisor continually harassed him by approaching him from behind, reaching around

51. See, e.g., Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 751 (4th Cir.) (stating that same-sex sexual harassment claims are actionable under Title VII because "such a holding is required by the statutory language, understood in its historical context and as subsequently interpreted by the Supreme Court."); cert. denied, 117 S. Ct. 70 (1996).
52. See, e.g., Doe v. City of Belleville, 119 F.3d 563, 570 (7th Cir. 1997) (relying on the Supreme Court’s interpretation that Title VII is gender-neutral).
53. See, e.g., Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192 (1st Cir. 1990) (stating that the court would be guided but not bound by the EEOC guidelines).
54. See, e.g., Doe v. City of Belleville, 119 F.3d at 572-73 ("The words of Title VII suggest that anyone discriminated against ‘because of’ such individual’s sex may bring suit, regardless of his gender or that of his harasser.").
55. Id. at 571-72.
56. Of course, other policy-related issues abound. For example, to what extent, if any, can one justify looking past surface elements of sexual orientation to examine deeper elements of gender?
57. See Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994). These and related problems inform the analytical sections of this Article. See infra Parts VI-XI.
the plaintiff’s body, grabbing the plaintiff’s crotch, and moving in a sexually suggestive manner.\textsuperscript{59} Other employees had also complained of similar conduct by the supervisor.\textsuperscript{60} The company, however, interpreted the behavior as mere “horseplay.”\textsuperscript{61}

In upholding the grant of the defendant’s motion for summary judgment, the court concluded that the behavior to which the plaintiff was subjected, “\textit{could not . . . constitute sexual harassment within the purview of Title VII}.”\textsuperscript{62} The court attempted to support this conclusion by pointing to \textit{Giddens v. Shell Oil Co.},\textsuperscript{63} which held that “\textit{[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.}”\textsuperscript{64} In other words, according to \textit{Garcia}, same-sex sexual harassment claims are, by definition, devoid of gender discrimination; therefore, Title VII flatly excludes them, irrespective of the surrounding facts or circumstances.\textsuperscript{65}

2. \textit{Fifth Circuit—Oncale v. Sundowner Offshore Services, Inc.}\textsuperscript{66}

The most recent Fifth Circuit same-sex sexual harassment decision, \textit{Oncale v. Sundowner Offshore Services, Inc.}, was recently heard by the Supreme Court.\textsuperscript{67} A different panel of judges reluctantly adopted the holding in \textit{Garcia}. \textit{Oncale}’s rationale sheds some analytical light on \textit{Garcia}, which

\textsuperscript{59} \textit{Id.} at 448.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{Id.} at 452 (emphasis added). In addition, the court offered the following reason for supporting the defendant’s summary judgment motion:

\begin{quote}
Since the conduct complained of by Garcia took place in May of 1991, and the damages provisions of the Civil Rights Act of 1991 did not become effective until November 21, 1991, Garcia could only seek equitable relief. Yet, because Garcia continued to work for Seagraves Ozark in the same position with at least the same compensation, and because Locke no longer works for Seagraves Ozark, neither an award of back pay nor any other form of injunctive relief would be appropriate. Thus, any harm Garcia may have suffered as a result of Locke’s harassment is not redressable under Title VII. For this reason, Garcia’s claim fails and we will uphold the summary judgment.
\end{quote}

\textit{Id.} at 450.

\textsuperscript{63} \textit{Giddens v. Shell Oil Co.}, 12 F.3d 208 (5th Cir. 1993) (table), \textit{reprinted in 67 Fair Empl. Prac. Cas. (BNA)} 576.

\textsuperscript{64} \textit{Garcia v. Elf Atochem N. Am.}, 28 F.3d at 451-52 (quoting \textit{Giddens v. Shell Oil Co.}, 67 Fair Empl. Prac. Cases (BNA) 576, 576 (5th Cir. Dec. 6, 1993)).

\textsuperscript{65} \textit{See infra} Part VII for a discussion of the gender basis of various types of same-sex sexual harassment.


apparently did not garner full support even in the Fifth Circuit. In *Oncale*, Sundowner Offshore Services hired the plaintiff, a heterosexual male, to work on an offshore oil rig where he remained for approximately three months before he quit and sued the employer and two fellow male employees for continually harassing him.68

The plaintiff offered several specific examples to support his claim. On one occasion, two employees restrained the plaintiff while another employee allegedly laid his penis on the plaintiff’s neck.69 On another occasion, coworkers restrained the plaintiff while an employee placed his penis on the plaintiff’s arm.70 Also, two coworkers threatened to rape the plaintiff.71 Finally, the most violent incident occurred while the plaintiff was showering at work.72 There, a fellow employee restrained him while another employee forced a bar of soap into the plaintiff’s rectum.73 Shortly thereafter, the plaintiff resigned his position.74 While expressing misgivings about *Garcia*, the *Oncale* court, nevertheless, honored that decision.75 Apparently, the *Oncale* panel had no choice under the circumstances.76

Still, *Oncale* contrasted *Garcia*’s position with other precedent.77 For example, the court impliedly pointed to Supreme Court decisions that embraced language sufficiently broad to encompass same-sex sexual harassment claims.78 *Oncale* also noted that the EEOC forbids “all discrimination because of sex, whether it is discrimination against men or women.”79 Moreover, one could interpret Title VII to mean that “[t]he sex

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69. *Id.* at 118.
70. *Id.*
71. *Id.*
72. *Id.* at 118-19.
73. *Id.* at 119.
74. *Id.*
75. *Oncale* explained that in *Giddens* the Fifth Circuit rejected same-sex sexual harassment. *Id.* *Giddens* seems to have held that, “male-on-male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex.” *Id.* at 120 (emphasis added). *Garcia* subsequently elevated *Giddens* to a blanket exclusion of same-sex sexual harassment disputes, as a matter of law. *See id.*
76. The *Oncale* court stated: “This panel . . . cannot review the merits of Appellant’s [same-sex sexual harassment claim] on a clean slate. We are bound by our decision in *Garcia* . . . and must therefore affirm the district court.” *Id.* at 119 (citation omitted). The court then explained that appellate panels in the Fifth Circuit may not simply overturn other panel’s decisions absent “an intervening contrary or superseding decision by the Court en banc or the Supreme Court.” *Id.*
77. *See id.*
78. *Id.* (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).
79. *Id.*
of the harasser and victim is irrelevant."\textsuperscript{80} Thus, one could reasonably read \textit{Oncale} as suggesting that Title VII covers gender-based, same-sex sexual harassment or, at the very least, was willing to consider the matter anew, but for \textit{Garcia}.\textsuperscript{81} Finally, \textit{Oncale} observed that some district courts within the Fifth Circuit had rejected \textit{Garcia}'s holding as mere dictum.\textsuperscript{82}

a. \textbf{The Unjustified Impact of Goluszek v. H.P. Smith.}\textsuperscript{83} \textit{Garcia} cited \textit{Goluszek v. Smith},\textsuperscript{84} in support of its decision to bar same-sex sexual harassment claims under Title VII. Moreover, several other federal circuits and district courts have cited either \textit{Goluszek},\textsuperscript{85} \textit{Garcia},\textsuperscript{86} or both\textsuperscript{87} as precedent for excluding same-sex sexual harassment claims under Title VII.

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80. \textit{Id.} Recall that \textit{Garcia} simply barred all same-sex sexual harassment claims because they involved male-to-male or female-to-female harassment. See supra notes 58-65 and accompanying text.

Observe, also, that one does not specifically address whether Title VII covers same-sex sexual harassment claims by simply noting that Title VII protects male and female employees from gender-based sexual harassment. Courts that readily exclude same-sex sexual harassment claims would agree to that proposition, but only regarding traditional sexual harassment. As to traditional sexual harassment, these courts presume, absent evidence to the contrary, that the sexual harassment is because of the victim's sex, irrespective of the harasser's or victim's gender. See, e.g., Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 751-52 (4th Cir.) (stating that only the employee's sex is relevant to implicating Title VII because there are no gender restrictions for the harasser under Title VII), cert. denied, 117 S. Ct. 70 (1996). The issue of whether males and females are covered arises only where victims and harassers are of the same sex. Thus, the question is not whether Title VII equally protects males and females from sexual harassment because of their sex; clearly it does, but as the argument goes, only where victims and harassers are of different genders.


82. \textit{Id.}


84. \textit{Garcia} v. Elf Atochem N. Am., 28 F.3d 446, 452 (5th Cir. 1994).


87. See, e.g., Ashworth v. Roundup Co., 897 F. Supp. 489, 494 (W.D. Wash. 1995) ("Therefore, this Court accepts the reasoning of the district court in \textit{Goluszek}, the Fifth Circuit Court of Appeals in \textit{Garcia}, and that of the other district courts who have held that same-sex harassment is not actionable under Title VII, to be persuasive in this matter.").
On the other hand, several circuit and district courts have rejected the holdings and rationales of Garcia and Goluszek. Finally, other courts have neither clearly accepted nor rejected Garcia or Goluszek. Given the

88. See Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 751 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996). The Hopkins court stated that it did, not find persuasive the reasoning of the Fifth Circuit in Garcia and those district courts that have concluded categorically that same-gender sexual harassment can never be actionable under Title VII. In aligning [itself] with those courts that have observed that same-gender sexual harassment may be actionable under Title VII in appropriate circumstances, [this court concludes] that such a holding is required by the statutory language, understood in its historical context and as subsequently interpreted by the Supreme Court.

Id. at 751; see also Baskerville v. Culligan Int’l Co., 50 F.3d 428, 430 (7th Cir. 1995) (“Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases.”); Showalter v. Allison Reed Group, 767 F. Supp. 1205, 1211 (D.R.I. 1991) (“Title VII protects both males and females from harassment.”), aff’d on other grounds sub. nom. Photsomphone v. Allison Reed Group, 984 F.2d 4 (1st Cir. 1993). In McDonnell v. Cisneros, the court offered the following dicta:

[A] difference in sex is not a necessary condition of sexual activity and hence (most courts think) of sexual harassment. There is plenty of homosexual activity these days (perhaps all days); some . . . involves [supervisors] . . . extorting . . . sexual favors . . . , or other behaviors that when heterosexual expose employers to liability for sexual harassment . . . . And then there is the specter of the perfectly bisexual harasser . . . who by definition is indifferent to the sex of his victims and so engages in sexual harassment without discriminating on the basis of sex . . . .

We do not find this class of arguments compelling . . . . Such arguments interpret sex discrimination in too literal a fashion . . . . It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female.

McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996) (emphasis added) (citations omitted).

89. See, e.g., Sardinia v. Dellwood Foods, Inc., No. 94 Civ. 5458, 1995 WL 640502, at *5 (S.D.N.Y. Nov. 1, 1995) (criticizing Garcia and Goluszek soundly); EEOC v. Walden Book Co., 885 F. Supp. 1100, 1101 (M.D. Tenn. 1995) (holding that same-sex sexual harassment is actionable under Title VII where a homosexual supervisor is making sexual advances towards a subordinate of the same sex); Roe v. K-Mart Corp., No. CIV.A.2:93-2372 18AJ, 1995 WL 316783, at *2 (D.S.C. Mar. 28, 1995) (“[M]ale plaintiff’s claims are actionable under Title VII’s prohibition against unwanted sexual advances that create an offensive or hostile working environment or which form the basis for quid pro quo harassment and the plaintiff should be allowed to pursue his claim.”).

confusion and mischief in Goluszek's wake, a brief detour to examine that
decision is warranted, before continuing the examination of precedent in
other circuits.

b. Goluszek—The Power Imbalance Theory. Like Garcia, Goluszek
also involved alleged same-sex sexual harassment between heterosexual
males.91 In Goluszek, the plaintiff, a bachelor, was a highly sensitive, sheltered
soul who had always lived at home with his mother.92 The plaintiff’s
sensitivity was such that he blushed upon hearing sexual comments.93
Unfortunately, he worked in an environment where employees frequently,
explicitly, and crudely discussed sexual matters among themselves and often
physically and verbally teased the plaintiff about sex.94 In these clodhing,
uncouth surroundings, the plaintiff's sensitivity and naiveté became a
Pavlovian stimulus, eliciting salivations of abject vulgarisms from his
coworkers. Nor could he secure any solace from his supervisor, who advised
him to “get married and get some of that soft pink smelly stuff that’s
between the legs of a woman.”95 The plaintiff’s coworkers not only matched
the supervisor's verbal comments but also flirted with physical barbarity by:
(1) asking him “if he had gotten any 'pussy' or [if he] had [engaged in] oral
sex”;96 (2) showing “him pictures of nude women”;97 (3) telling “him they
would get him 'fucked’”;98 (4) accusing “him of being gay or bisexual”;99
and (5) poking “him in the buttocks with a stick.”100

Goluszek rejected the plaintiff's claim but erected no bar to same-sex
sexual harassment claims under Title VII, although the holding has had that
effect.101 In fact, Goluszek accepted the plaintiff's same-sex sexual har-

    have distinguished heterosexual same-sex sexual harassment from homosexual same-sex sexual
    (presuming that harassment is sex-based where: (1) aggressors are homosexual and victims
    heterosexual or (2) harassers are male and victims female—versusely, where both parties are
    the same sex, harassers' motives are obscure).
92. Id.
93. Id. at 1453-54.
94. Id. at 1453.
95. Id. at 1453.
96. Id. at 1454.
97. Id.
98. Id.
99. Id.
100. Id
    1996). The Tanner court stated,
    Although [some courts] cite Goluszek for the proposition that a same-sex
    sexual harassment claim is not actionable under Title VII, . . . Goluszek . . .
    did not so hold. Rather, the court, . . . imposed a requirement that plaintiff,
    in addition to proving that he personally was harassed because of his sex,
    prove that his work environment was anti-male and “treated males as
    inferior.”
assessment claim and admitted that his evidence satisfied the "because of sex" criterion,\(^\text{102}\) usually a major hurdle for plaintiffs in sexual harassment litigation. The court opined that the plaintiff,

\[
easily rebuts [the employer's] argument [that the harassment was not because of the plaintiff's sex]... by citing the [employer's] letter warning a male employee to lay off a female employee.... [T]he court considers it significant probative evidence of [the employer's] reacting differently to female complaints of sexual harassment than to male complaints.
\]

\[
... In fact, [the plaintiff] may have been "harassed" because he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace.\(^\text{103}\)
\]

In rejecting the plaintiff's claim, the court concluded that the outcome would have been no different even where male plaintiffs clearly established all traditional prima facie elements in a sexual harassment as distinguished from same-sex sexual harassment.\(^\text{104}\) To prevail on the latter claim, a male plaintiff must also show: (1) an imbalance of power in his work environment;\(^\text{105}\) (2) a systematic abuse of that imbalance against males in general;\(^\text{106}\) (3) his harassment arose from that systematic abuse;\(^\text{107}\) and (4) he unwillingly suffered the

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\(^{102}\) See Goluszek v. H.P. Smith, 697 F. Supp. at 1456; see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”) (alterations in original).


\(^{104}\) See Goluszek v. H.P. Smith, 697 F. Supp. at 1456.

\(^{105}\) Id.

\(^{106}\) Id. It is unclear whether male plaintiffs must show that women generally abused their power over men.

\(^{107}\) Id. Clearly, the power-abuse criterion constitutes a second causal standard in addition to “because of sex.” Also, some insist that because Title VII focuses on intergroup conflicts rather than individualized ones such as sexual harassment, Title VII is ill-equipped to address sexual harassment. See, e.g., Eleanor K. Bratton, The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment, 17 N.M. L. REV. 91, 106 (1987).
harassment.\textsuperscript{108} The court annexed numbers 1 through 3 to the traditional prima facie case for sexual harassment under Title VII.\textsuperscript{109}

Rather than granting a motion to dismiss, \textit{Goluszek} recognized same-sex sexual harassment as a proper claim under Title VII, extended the list of prima facie criteria only for male plaintiffs, and denied the plaintiff's claim for having failed to satisfy the additional criteria—not for having failed to state a cognizable claim under Title VII.\textsuperscript{110} Thus, the plaintiff did not lose because: (1) Title VII bars same-sex sexual harassment claims by males; (2) he failed to establish a gender basis for the harassing conduct;\textsuperscript{111} or (3) because he failed to establish a traditional prima facie element in a sexual harassment claim.\textsuperscript{112} He lost simply because he failed to satisfy the extra prima facie criteria.\textsuperscript{113} Nevertheless, in effect, \textit{Goluszek} is coextensive with the exclusionary position.

i. Goluszek's \textbf{Analytical Difficulties}. In support of its decision, \textit{Goluszek} offers a strained, superficial analysis.\textsuperscript{114} Specifically, the court reasoned:

\begin{quote}
\textup{An employer may be held liable on a hostile environment claim if five criteria are met. These are: (1) the plaintiff must be a member of a protected class, and (2) be subjected to unwelcomed verbal or physical conduct of a sexual nature; (3) the harassment complained of must be based on sex; (4) the harassment alleged "had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological [sic] well-being of the plaintiff"; and (5) there must be respondeat superior liability.}
\end{quote}


\textsuperscript{108} Goluszek v. H.P. Smith, 697 F. Supp. at 1456.
\textsuperscript{109} Cf. Dillon v. Frank, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992). The \textit{Dillon} court stated:

\begin{quote}
An employer may be held liable on a hostile environment claim if five criteria are met. These are: (1) the plaintiff must be a member of a protected class, and (2) be subjected to unwelcomed verbal or physical conduct of a sexual nature; (3) the harassment complained of must be based on sex; (4) the harassment alleged "had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological [sic] well-being of the plaintiff"; and (5) there must be respondeat superior liability.
\end{quote}


\textsuperscript{111} Indeed, \textit{Goluszek} conceded as much: The defendant "claims that Goluszek cannot prove that he was harassed because of his sex . . . . Goluszek easily rebuts that argument, however, by citing the 1972 letter warning a male employee to lay off a female employee." Goluszek v. H.P. Smith, 697 F. Supp. at 1456.

\textsuperscript{112} See \textit{supra} note 109 for a list of typical traditional prima facie elements in Title VII environmental harassment claims.

\textsuperscript{113} Goluszek v. H.P. Smith, 697 F. Supp. at 1456-57. Also, it is unclear whether women that file same-sex sexual harassment claims would ever need to adduce extra evidence to satisfy this heightened standard, if, in fact, courts rebuttably presume they work in antifemale—male-dominated—environments.

\textsuperscript{114} \textit{See id.}
The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group. The "sexual harassment" that is actionable under Title VII "is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." In effect, the offender is saying by words or actions that the victim is inferior because of the victim's sex. "Such severe harassment becomes discriminatory because it deprives the victim (usually female) of the right to participate in the workplace on equal footing with others similarly situated."  

Goluszek's reasoning is problematic in several respects. First, in terms of delineating which types of discrimination Congress sought to address under Title VII, the power-imbalance-abuse criterion brings precious little "light" to the "table," because power imbalances and accompanying abuses found and nourish all enduring discrimination. Indeed, power imbalances are preconditions of persistent discrimination. Few individuals or groups that wield a balance of power would long remain victims of discrimination.

115. Id. at 1456 (quoting Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1451 (1984); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986)) (emphasis added). Interestingly, the court extracted this rationale from a student's law review note that tangentially addressed Congress's intent when it added the sex amendment to 42 U.S.C. § 2000e-2(a)(1). Id. (citing Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1451-52 (1984)).

116. The key here is persistent harassment. Although this proposition does not preclude a subordinate's sexually harassing a supervisor, such a state of affairs is likely to be evanescent.

117. However flawed, Goluszek's "power imbalance" theory, unfortunately, is not without precedent. Although they did not embrace a global anti-white-male criterion, as in reverse discrimination cases, some courts require white male plaintiffs to establish an additional prima facie element. See, e.g., Rhoads v. Wal-Mart Stores, Inc., No. 95-1313, 1996 WL 194854, at *1 (10th Cir. Apr. 23, 1996) ("[W]hen the plaintiff is a member of 'an historically favored group,' he must, 'in lieu of showing that he belongs to a protected group, establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority.'") (quoting Notari v. Denver Water Dep't, 971 F.2d 585, 588-89 (10th Cir. 1992)); Bishopp v. District of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986). In Bishopp v. District of Columbia, the court stated:

A plaintiff's minority status by itself is sufficient in light of historical practice in the workplace toward such "socially disfavored group[s]," to give rise to an inference of discriminatory motivation. White males, who as a group historically have not been hindered in the workplace because of their race or sex, are required to offer other particularized evidence, apart from their race and sex, that suggests some reason why an employer might discriminate against them.

Bishopp v. District of Columbia, 788 F.2d at 786 (citations omitted); see also Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985); Groat v. Olympia Fields Ford
Second, while clearly rejecting the proposition that empowered males are likely to create antimalle environments for all other males, Goluszek fails even to adumbrate the conditions that might constitute an antimalle environment. Moreover, if Goluszek's view of same-sex sexual harassment were to prevail, then an antimalle environment would exist only where women wield the balance of power, a condition which would bar most, if not all, males from claiming same-sex sexual harassment.

Third, Goluszek suggests that sexual harassment cannot poison the work environment of any male employee unless that harassment occurs in an environment of systemic power abuses against male employees in general. If this is a requirement of the power-abuse rationale, then it requires too much. Where, for instance, does the rationale account for situations in which a female supervisor sexually harasses a male subordinate in an otherwise male-dominated environment? Nor would the power-abuse criterion contemplate a male supervisor sexually harassing a female subordinate in an otherwise female-dominated environment. Fortunately, nowhere in Title VII's jurisprudence are plaintiffs required to demonstrate institutional power discrepancies and abuses as prerequisites for lodging valid prima facie cases of disparate treatment, including environmental harassment claims—same-sex or otherwise.

Fourth, the power-abuse theory arguably works at cross purposes with the basic antidiscrimination policy, adopted by the Supreme Court. Specifically, the power-abuse criterion would seem to contravene Meritor, which


Goluszek embraces the same basic type of presumption involved in these cases. Goluszek presumes that males usually wield the power in the workplace; therefore, male plaintiffs, in same-sex sexual harassment disputes, must rebut that presumption by satisfying the power-abuse criterion. The cases above assume that most employers prefer members of the majority (white males) to members of the minority. Thus, white male plaintiffs must somehow rebut that presumption by showing their employers occupy such rarified space.


Finally, the Supreme Court has not explicitly addressed this matter, though some of its precedent suggest that it is disinclined to hold white male plaintiffs to a higher evidentiary burden under Title VII. See infra note 123 and accompanying text.

118. Other commentators have adopted the notion that same-sex sexual harassment is not discrimination because the victim and the harasser belong to the same group. See, e.g., Ellen Frankel Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 YALE L. & POL’Y REV. 333, 352 (1990). Paul defines discrimination as harming or otherwise denying a benefit to someone because that person belongs to a group that the discriminator despises. Id. Paul further argues that same-sex harassers neither despise the target group nor intend to harm its members because the harassers belong to this group and are sexually attracted to its members. Id.

defines Title VII's coverage in gender-neutral terms. Nor did the Supreme Court opine differently in *Harris v. Forklift Systems, Inc.*, which reiterated that gender-based conduct, rather than a power-abuse approach, is the cornerstone of valid sexual harassment claims. Neither *Meritor* nor *Harris* either explicitly or impliedly requires plaintiffs in traditional sexual harassment to shoulder an extra burden in the form of the antimal or power-abuse criterion. Why then must male plaintiffs bear such a burden in same-sex sexual harassment claims? Tolerating same-sex sexual harassment against males under Title VII does not advance the goal of eliminating sexual harassment; it preserves the notion that some types of sexual harassment are still acceptable, thereby setting the stage for those malignant seeds to germinate in other places at other times. Assuming that law can eliminate sex discrimination from the shop, it will not achieve that goal by unequal and biased calibrations of evidentiary burdens among different groups of victims. Since the harassment was indeed gender-based then, from a policy perspective, ignoring it further enforces it in the work place.

3. **Third Circuit—Drinkwater v. Union Carbide Corp.**

The plaintiff, in *Drinkwater v. Union Carbide Corp.* alleged injury because of the "oppressive and intolerable," environment created by her supervisor's relationship with another female coworker. In dicta, *Drinkwater* discussed the propriety of same-sex sexual harassment suits under Title VII: "'[S]ex,' when read in [the context of Title VII] logically could only refer to membership in a class delineated by gender. . . . The proscribed differentiation under Title VII, therefore, must be a distinction based on a person's sex, not on his or her sexual affiliations." *Drinkwater* then offered its perspective on the propriety of same-sex sexual harassment claims between males and its rationale for recognizing harassment claims in the first instance:

> [H]ostile environment cases depend on the underlying theory that "[w]omen's sexuality largely defines women as women in this society, so

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120. *Id.* at 66.
122. *Id.* at 21-22.
123. Moreover, various types of antimal environments may exist, presenting more problems for the *Goluszek* approach. The antimal criterion simply requires an environment that is hostile to males. One can easily imagine a situation where white males wield power over black males, or even the reverse. In each case, however, the environment would be hostile only to either black or white males. What is the result under Goluszek's approach, where a black male, in a white-male dominated environment, states a same-sex sexual harassment claim that satisfies the traditional prima facie criteria?
125. *Id.* at 861.
126. *Id.* at 860 (quoting DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 306-07 (2d Cir. 1986)) (emphasis added) (alterations in original).
violations of [women's sexuality] are abuses of women as women." "The relationship of sexuality to gender is the critical link in the argument that sexual harassment is sex discrimination." The theory posits that there is a sexual power asymmetry [sic] between men and women and that, because men's sexuality does not define men as men in this society, a man's hostile environment claim, although theoretically possible, will be much harder to plead and prove.127

This language suggests that Drinkwater adopts a slightly revised version of Goluszek's "power imbalance" rationale128 and thus suffers from the same weaknesses.129 Because Drinkwater does not distinguish between same-sex and traditional environmental sexual harassment claims, one might reasonably conclude that the power-imbalance theory applies equally to male plaintiffs in both instances. Bolstering this conclusion is the proposition that, at minimum, sexual harassment claims reflect a desire to assist women, who as a group, have less power over their lives than men. If, indeed, Drinkwater applies to both traditional and same-sex sexual harassment claims, then it is wider of the mark than Goluszek, because the few courts that have entertained males' traditional sexual harassment claims have not subjected them to a higher evidentiary standard.130

Predictably, Drinkwater raised more questions than it answered. For example, the court offered no guidance as to the operation of the asymmetrical power distribution between the sexes or whether that imbalance is constant in all work environments, and if not, the extent of and the reasons for variations therein. Nor did the court mention how lower courts might factor those variations into their assessments of a plaintiff's evidentiary burdens.

127. Id. at 861 n.15 (quoting CATHERINE MACKINNON, SEXUAL HARASSMENT 174, 151 (1979)) (emphasis added) (second alteration in original) (citations omitted). If we limit sexual harassment claims to women because their sexuality defines them, are we not preserving and promoting that view? If so, do we want to?


129. See supra notes 104-09 and accompanying text.

B. Circuits That Accepted Same-Sex Sexual Harassment Claims Without Additional Evidentiary Burdens

1. First Circuit

In Morgan v. Massachusetts General Hospital,\(^{131}\) a male employee alleged two instances of environmental same-sex sexual harassment. First, he claimed that a homosexual male coworker invited him to dance at a Christmas party and “started to pull on him and that, on another occasion, the coworker walked ‘towards [him] with his hand raised to the level of [the plaintiff’s] groin.”\(^{132}\) Although Morgan denied the plaintiff’s claim on other grounds, the court generally recognized same-sex sexual harassment under Title VII, specifically stating: “[T]here is a cause of action for sexual harassment under Title VII . . . [I]n [deciding] whether [the] . . . conduct [constituted] actionable sexual harassment, this Court will [look to the EEOC’s] guidelines . . . “\(^{133}\) Without further comment on the acceptability of same-sex sexual harassment claims under Title VII, the court rejected the plaintiff’s claim because the alleged harassment was insufficiently severe or pervasive to poison his working conditions.

The First Circuit clearly accepts same-sex sexual harassment claims under Title VII. Even though Morgan did not explicitly comment on the acceptability of these claims, the court accepted and decided the claim. Moreover, Morgan offered little discussion of the gender basis of either the plaintiff’s claim or of same-sex sexual harassment claims in general. Instead, the court focused on the required “hostile and abusive” impact that harassment must have on a plaintiff’s conditions of employment—the environmental nexus.\(^{134}\) This suggests that the court was not particularly concerned with the issue of gender-based conduct in same-sex sexual harassment claims. Again, by reaching the prima facie criteria, the court basically conceded Title VII coverage.\(^{135}\)

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132. Id. at 192. It is unclear whether the company sponsored the Christmas party. If so, that fact could establish or strengthen the nexus between the company and the harassment.
133. Id. Morgan then cited the following EEOC guidelines with apparent approval: “(a) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of reasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” Id. (citing 29 C.F.R. § 1604.11(a)).
134. See infra note 194.
135. See, e.g., Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 149 (2d Cir. 1993) (‘‘[H]arassment is harassment regardless of whether it is caused by a member of the same or opposite sex.’’) (emphasis added).
2. Eighth Circuit

In *Quick v. Donaldson Co.*, a heterosexual male plaintiff worked in an infantile environment where adult heterosexual male employees frequently engaged in "bagging"—male employees either feigned or actually grabbed, touched, or squeezed one another's testicles. Coworkers bagged the plaintiff numerous times. On one occasion, a coworker approached the plaintiff from behind, bear hugged him in order to lock the plaintiff's arms at his sides, lifted the plaintiff off the ground, and yelled to another employee, "bag him, bag him." Another time an employee squeezed the plaintiff's testicles so forcefully that he almost passed out and was left with a bruised and swollen groin. Coworkers also punched the plaintiff in the neck, called him "queer" and "pocket-lizard liker," and tormented him about being gay. Cumulatively, these antics drove the plaintiff into psychological therapy.

Although the district court barred same-sex sexual harassment claims under Title VII, the Eighth Circuit had little difficulty holding that same-sex sexual harassment disputes came within the ambit of Title VII. The appellate court viewed Title VII as extending "to all employees and . . . [prohibiting] disparate treatment of an individual, man or woman, based on that person's sex." In short, Title VII proscribed discrimination against "women because they are women and [against] men because they are men."  

137. *Id.* at 1374.
138. *Id.* For whatever reasons, no one bagged or attempted to bag female employees.
139. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* The district court offered several reasons for not finding the harassment to have been gender-based. First, Quick was a victim of "unnecessary juvenile behavior" rather than of "gender discrimination." *Quick v. Donaldson Co.*, 895 F. Supp. at 1296. Second, because Quick's work environment was not "antimale" or "predominantly female," he did not belong to "a disadvantaged or vulnerable group." *Id.* Third, female coworkers were not shown to have been treated differently. *Id.* That only Quick was punched in the neck merely underscores his unpopularity "with physically aggressive male co-workers." *Id.* Fourth, the harassment was not sexual in nature, since there was no evidence that harassers made sexual suggestions or otherwise displayed sexual interests in Quick. *Id.* Fifth, although bagging is more than mere horseplay, it is not purely sexually motivated either, since its only sexual component is a harasser's "nonsexual" aim at a victim's genitals. *Id.*
145. *Quick v. Donaldson Co.*, 90 F.3d at 1380.
146. *Id.* at 1378 (emphasis added) (citations omitted).
Quick then assessed the nature of the because-of-sex nexus and rejected the district court’s Goluszek-based decision,\textsuperscript{147} which stressed the plaintiff’s nonmembership in an antigay environment. The court opined, “Protection under Title VII is not limited to only disadvantaged or vulnerable groups. It extends to all employees . . .”\textsuperscript{148} The Quick court further suggested that “sex” encompasses “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”\textsuperscript{149} More importantly, given Title VII’s failure to delineate the perimeters of either unlawful or lawful conduct, Quick interpreted Title VII’s condemnatory sweep to reach beyond both explicitly sexual behavior and behavior with only explicitly “sexual overtones.”\textsuperscript{150} Included within these boundaries are “acts of physical aggression or violence and incidents of verbal abuse.”\textsuperscript{151}

Quick also rejected the district court’s arguable adoption of the Fourth Circuit’s homosexual criterion,\textsuperscript{152} which requires plaintiffs, in same-sex sexual harassment to link sexual harassment, to their gender by establishing that their harassers were sexually attracted to them.\textsuperscript{153} In Quick’s view: “A worker ‘need not be propositioned, touched offensively, or harassed by sexual innuendo’ in order to have been sexually harassed.”\textsuperscript{154} Additionally, “[i]ntimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. Moreover, physical aggression, violence, or verbal abuse may amount to sexual harassment.”\textsuperscript{155}

In fact, the court arguably discounted motive as a pivotal issue in same-sex sexual harassment: “The motive behind the discrimination is not at issue because ‘[a]n employer could never have a legitimate reason’ for creating or permitting a hostile work environment.”\textsuperscript{156} Ultimately, then harassment “of

\begin{itemize}
\item \textsuperscript{147} The district court relied on a cross-section of other rationales. For example, it noted that the harassers never expressed any sexual desire. Quick v. Donaldson Co., 895 F. Supp. at 1295. The focus on sexual desire seems to follow the Fourth Circuit’s rationale in Hopkins v. Baltimore Gas & Electric Co., 77 F.3d 745 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996).
\item \textsuperscript{148} Quick v. Donaldson Co., 90 F.3d at 1378.
\item \textsuperscript{149} Id. at 1377 (citing 29 C.F.R. § 1604.11(a)) (emphasis added).
\item \textsuperscript{150} Id. This broad reading of sexual harassment arguably relaxes the requirement for a direct link between harassing conduct and a victim’s maleness or femaleness.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id. See infra note 268 and accompanying text, discussing the homosexual criterion.
\item \textsuperscript{153} Quick v. Donaldson Co., 90 F.3d at 1378.
\item \textsuperscript{154} Id. at 1379 (quoting Burns v. McGregor Elec. Indus., 989 F.2d 959, 964 (8th Cir. 1983)) (emphasis added).
\item \textsuperscript{155} Id. (citing Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988)) (emphasis added). See infra Part VIII for a further discussion of this point.
\item \textsuperscript{156} Id. at 1378 (quoting Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994)) (emphasis added). Most courts overemphasize the role of motives in same-sex sexual harassment and also fail to probe deeply enough into harassers’ motives to discover a gender basis. Nevertheless, virtually reading motive out of same-sex sexual harassment litigation is also problematic. The “lifeline” between sexual harassment and Title
a genuine sexual nature"157 is actionable.158 Finally, the court observed that
the plaintiff need not show that female coworkers were treated differently.
"Evidence that members of one sex were the primary targets of the
harassment is sufficient to show that the conduct was gender based for
purposes of summary judgment."159 This statement, together with the court’s
apparent attempt to discount motive, suggests that proof of gender bias is
sufficient to state a claim of same-sex sexual harassment, but it is not
necessary to establish that claim. Perhaps with the exception of the Seventh
Circuit,160 Quick’s definition of “sex” arguably exceeds that of any circuit to
date, and therefore, is most likely to fulfill the antidiscriminatory policy
underlying Title VII as set forth in the Supreme Court’s precedent.161

3. Seventh Circuit

In Doe v. City of Belleville,162 the City of Belleville, Illinois, hired J. and
H. Doe, sixteen-year-old heterosexual twin brothers, for the summer.163 While
employed in the all-male workforce, J. and H. endured a continual flood of
sexual harassment from other substantially older heterosexual males.164 The
harassers dubbed J., the overweight brother, “fat boy” and H., who wore an
earring, “fag” or “queer.”165 Jeff Dawe, a hulking former marine, was the
worst offender and H., the most offended.166 Dawe subjected H. to the fol-

VII is sex discrimination and, hence gender-based conduct. Unless gender plays some role in
motivating sexually harassing conduct, the harassment is “legitimate” and any resulting
157. Quick v. Donaldson Co., 90 F.3d at 1376. Conversely, the district court found that
the underlying motive for the harassment was personal enmity or hooliganism; therefore, the
alleged harassment was not gender based. See Quick v. Donaldson Co., 895 F. Supp. 1288,
1297 (S.D. Iowa 1995).
158. Quick v. Donaldson Co., 90 F.3d at 1378-79.
159. Id. at 1378 (emphasis added); see also Hall v. Gus Constr. Co., 842 F.2d 1010,
1014 (8th Cir. 1988) (“Intimidation and hostility toward women because they are women can
obviously result from conduct other than explicit sexual advances.”).

Observe that, in focusing on the disparate treatment of males, the appellate court did
not pay much attention to whether female employees could be bagged. This arguably suggests
a willingness to relax the traditional perimeters of differential treatment. For example, Quick
suggests that women’s physiological incapability to be bagged does not preclude a finding
that bagged males were treated disparately. One might reasonably extend this notion of
physiologically incapability to include psychological incapability as well as physical
unavailability.
160. See infra Part V.B.3 discussing the Seventh Circuit’s definition of “sex” in Doe v.
City of Belleville, 119 F.3d 563 (7th Cir. 1997).
162. Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).
163. Id. at 566.
164. Id.
165. Id. at 567.
166. Id.
lowing conduct in the presence of other workers: (1) told him to return to San Francisco with the other "queers"; (2) asked H., "Are you a boy or a girl?" (3) repeatedly threatened to take H. "out to the woods" and "get [him] up the ass"; and (4) after another employee complained to Dawe that "His bitch" was in a foul mood, Dawe, who had been drinking, trapped H. against a wall and grabbed his testicles to determine his true gender.\textsuperscript{167} Unable to resist the "fun," the supervisor Stan Goodwin: (1) asked Dawe whether H. was "tight or loose," and "would he scream or what?" (2) suggested that Dawe probably had contracted a poison ivy rash from H. who suffered an outbreak on several parts of his body including his groin area, and (3) called H. a "queer" or "fag."\textsuperscript{168} Finally, after coworkers discovered that the plaintiffs planned to quit to escape the abuse, an employee threw a firecracker near them.\textsuperscript{169} The plaintiffs quit shortly thereafter and sued Belleville for sexual harassment under Title VII and under the Equal Protection Clause of the Fourteenth Amendment. They also sued for constructive discharge and retaliation.\textsuperscript{170}

The district court granted the defendant's motion for summary judgment on all three claims. With respect to the Title VII claim, the court opined that Title VII does not contemplate sexual harassment between heterosexual males because, under those circumstances, plaintiffs could not link the harassment to their gender, and thus, the "because of sex" nexus could not be satisfied.\textsuperscript{171} In the district court's view, H. was harassed because of his imputed homosexuality.\textsuperscript{172}

In a lengthy opinion, the Seventh Circuit Court of Appeals sustained the orders relating to constructive discharge and retaliation but reversed the order on the Title VII claim.\textsuperscript{173} \textit{Doe} delineated the Seventh Circuit's position on two major issues: (1) whether, as a matter of law, Title VII covers same-sex sexual harassment claims between males and (2) whether evidence of gender-based disparate treatment is necessary to establish but-for cause where harassing conduct is explicitly sexual.\textsuperscript{174}

The court concluded that Title VII covers same-sex sexual harassment claims as a matter of law and offered two basic reasons to support its decision. First, the facial breadth and clarity of Title VII's language militated against narrowly construing the coverage. In contrast to other courts that have read Title VII's language to unambiguously exclude same-sex sexual harassment

\begin{itemize}
\item \textsuperscript{167} Id. (alteration in original).
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Cf. Dillon v. Frank, No. 90-2290, 1992 WL 5436, at *7 (6th Cir. Jan. 15, 1992) (refusing to find gender-based sexual harassment where the plaintiff's "co-workers deprived him of a proper work environment because they believed him to be homosexual").
\item \textsuperscript{173} Doe v. City of Belleville, 119 F.3d at 566.
\item \textsuperscript{174} Id. at 569.
\end{itemize}
claims because it did not explicitly include them, the Seventh Circuit read Title VII to unambiguously cover sexual harassment claims that are not expressly excluded. Second, Doe noted that Meritor neither narrowly construed Title VII’s language nor otherwise limited the class of potential plaintiffs to either women or men and suggested that if Congress wished to limit the class of subjects it could have explicitly done so. While delineating Title VII’s coverage, Doe also examined and rejected Garcia’s rationale for categorically excluding male plaintiffs in same-sex sexual harassment disputes. In doing so, the court turned immediately to Goluszek, given Garcia’s reliance thereon.

Although Doe accepted the power imbalance theory as a proper basis for classifying sexual harassment of women by men as sex discrimination, the court rejected the power-abuse criterion as an additional prima facie element for plaintiffs in same-sex sexual harassment cases. The Seventh Circuit offered several reasons for this decision. In addition to the breadth of Title VII’s language and of Meritor’s interpretation thereof, Doe found Title VII’s legislative history too sparse to justify covering only male-to-female sexual harassment. Furthermore, as a general proposition, the court

175. See, e.g., Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098, 1101 (N.D. Ga. 1975) ("Whether or not the Congress should, by law, forbid discrimination based upon ‘affectional or sexual preference’ of an applicant, it is clear that the Congress has not done so.").

176. The language unambiguously permitted “anyone discriminated against ‘because of’ such individual’s sex [to] bring suit, regardless of his gender or that of his harasser.” Doe v. City of Belleville, 119 F.3d at 573 (emphasis added); see also Swage v. Inn Philadelphia & Creative Remodeling, Inc., No. 96-2380, 1996 WL 368316, at *2 (E.D. Pa. 1996) ("[T]here is nothing in the statute that suggests Congress intended Title VII’s protections to apply only to persons who are harassed by members of the opposite sex. There is no legislative history on the meaning of ‘sex discrimination.’") (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) ("It seems clear to the court that had Congress intended to prevent only heterosexual sexual harassment, it could have used the term ‘member of the opposite sex.’ This way Congress would have accounted for both male female harassment and the much less frequent female-male harassment. Therefore, Congress prohibited discrimination based on sex.").

177. Doe v. City of Belleville, 119 F.3d at 573.


179. Doe v. City of Belleville, 119 F.3d at 571-74. See supra note 84 and accompanying text for a discussion of Garcia’s reliance on Goluszek.


181. Doe v. City of Belleville, 119 F.3d at 572.

182. See infra Part VI.A.1.

183. Doe v. City of Belleville, 119 F.3d at 572-74. As to Congress’s intent about same-sex sexual harassment disputes, Belleville correctly concluded that Congress probably had no intent regarding these claims. Id.
cautioned against limiting the scope of legislation to the specific concerns that triggered it.\textsuperscript{184} Finally, \textit{Doe} concluded that Title VII focuses on individuals rather than classes like males and females.\textsuperscript{185}

As do most judicial opinions in same-sex sexual harassment cases, \textit{Doe} addressed the type of evidence that plaintiffs must adduce to establish gender-based but-for causality and offers two basic observations in that respect. First, actionable sexual harassment must be gender-based.\textsuperscript{186} Second, in identifying the types of evidence needed to show gender-based but-for causality, the court identified two basic types of harassing conduct: sexually ambiguous and sexually explicit. Sexually ambiguous conduct lacks content, involving, "explicit sexual overtones" or sexual innuendo and contact.\textsuperscript{187} This evidentiary deficiency leaves no basis for inferring a nexus between harassing conduct and a victim’s gender. The plaintiff may close this inferential gap with evidence of: (1) differential treatment or (2) "an animus to her own gender."\textsuperscript{188} Examples of sexually ambiguous conduct include: "mere profanity, 'shoptalk,' and other manifestations of 'general unpleasantness.'"\textsuperscript{189}

On the other hand, sexually explicit conduct contains sexual content that "\textit{in and of itself} demonstrates the nexus to . . . [a] plaintiff’s gender that Title VII requires."\textsuperscript{190} \textit{Doe}’s example of sexually explicit conduct is Dawe’s grabbing H.’s testicles.\textsuperscript{191} \textit{Doe} suggests that sexual explicitness, without more and as a matter of course, establishes a gender-based, but-for nexus. Furthermore, given its view of sexual explicitness, the \textit{Doe} court failed to understand "why . . . proof [of differential treatment] is needed when the harassment has explicit sexual overtones."\textsuperscript{192} The foregoing quotations suggest that sexually explicit conduct necessarily establishes a gender-based, but-for nexus and obviates the need for independent evidence of differential treatment.

Should evidence of differential treatment become necessary, however, \textit{Doe} explained how plaintiffs might satisfy that criterion without presenting independent evidence of how harassers treated the opposite gender. The

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.} at 574.

\textsuperscript{187} \textit{Id.} at 576.

\textsuperscript{188} \textit{Id.} The \textit{Doe} court stated, "The need for proof that the plaintiff was targeted for harassment because of his gender is evident in cases where the harassment is not explicitly sexual, . . . but is gender-based nevertheless." \textit{Id.} at 575. The court referred to harassment involving sexually ambiguous (or nonsexual) conduct as "gender harassment" to be distinguished from sexual harassment. \textit{Id.} (citing 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 46.01[3] (2d ed. 1995)).

\textsuperscript{189} \textit{Id.} (citing 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 46.01[3] (2d ed. 1995)).

\textsuperscript{190} \textit{Id.} at 576 (emphasis added). Also, the court will infer a but-for nexus "from the harassers’ evident belief that in wearing an earring, H. Doe did not conform to male standards." \textit{Id.} at 575.

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.} at 576.
court would simply infer differential treatment on the basis that women and men perceive sexually harassing conduct as women and men, respectively:

It would not seem to matter that the harasser might simultaneously be harassing a male co-worker with comparable epithets and comparable physical molestation. When a male employee’s testicles are grabbed, his torment might be comparable, but the point is that he experiences that harassment as a man, not just as a worker, and she as a woman. In each case, the victim’s gender not only supplies the lexicon of the harassment, it affects how he or she will experience that harassment; and in anything short of a truly unisex society, men’s and women’s experiences will be different. In that sense, each arguably is the victim of sex discrimination.193

Because Doe effectively eliminated the need for independent prima facie evidence of either but-for causality or even differential treatment in environmental harassment litigation, the environmental nexus194 became the threshold issue where harassing conduct is explicitly sexual. “The main issue in sexual harassment cases is not whether the employer harassed the employee on the basis of her gender, but whether the claimed harassment affected the terms, conditions, or privileges of the plaintiff’s employment, as Title VII uses those words.”195

Ultimately, then, in deciding same-sex sexual harassment disputes, Doe adopted an evidentiary paradigm that: (1) eliminates the need for independent proof of either a but-for nexus or differential treatment by automatically inferring those prima facie criteria from sexually explicit conduct and (2) shifts the threshold evidentiary focus to the environmental nexus.

a. **Inferring But-For Cause and Differential Treatment from Sexual Explicitness.** The basic difficulty here is that Doe’s paradigm implicitly views but-for cause and differential treatment as coterminous criteria and concludes that proof of explicit sexual content automatically establishes but-for cause and differential treatment. Before one examines the inferential potential of sexual content, a few basic observations about differential treatment and but-for causality are indicated.

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193. *Id.* at 578.

194. The environmental nexus links a victim’s work environment to sexual harassment. To establish this nexus, a victim must show that the harassment created a hostile working environment for her. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (“[A] plaintiff may establish a violation of Title VII by proving that discrimination *based on sex* has created a hostile or abusive work environment.”).

195. Doe v. City of Belleville, 119 F.3d at 576. Curiously, after suggesting that the environmental nexus was the central issue remaining, Doe apparently embraced language that suggested that the central issue involved establishing respondent superior liability: “[O]nce the plaintiff [in a case involving sexual advancement or insult] proves that harassment took place, the *most difficult legal question* typically will concern the responsibility of the employer for the harassment.” *Id.* (emphasis added).
Differential treatment and but-for cause are neither coextensive nor synonymous. Section 703(a)(1) of Title VII is offended when employers “discriminate against any individual . . . because of such individual’s . . . sex.”\textsuperscript{196} On its face, this section contains two distinct standards: “discriminate,” which addresses disparate or differential treatment and “because of,” which addresses but-for causality. To trigger Title VII’s protections, plaintiffs must satisfy both standards. Although Title VII does not expressly define discrimination,\textsuperscript{197} the legislative history offers some insight: “To discriminate is to make a distinction, to make a difference in treatment or favor . . . based on any . . . of the forbidden criteria: race, color, religion, sex, and national origin.”\textsuperscript{198} In other words, the question in differential treatment analysis is how a harasser actually treated a victim relative to members of the opposite sex. Or if a harasser lacked access to both genders, whether, if given the opportunity, the harasser would have treated members of the opposite sex differently. Nor is there any doubt that differential treatment is integral to sexual harassment.\textsuperscript{199} But-for analysis, on the other hand, traditionally examines whether a victim’s gender somehow caused the differential treatment.

A two-step inquiry is clearly indicated. Whether the treatment was discriminatory in the first instance, and if so, whether the treatment was also gender-based. That is, gender-mediated disparate treatment offends Title VII.

Still, \textit{Doe} is not entirely wide of the mark on this point. Although differential treatment and but-for cause are not coterminous, at least one type of


\textsuperscript{198} 110 CONG. REC. 7213 (1964) (interpretive memorandum of Sen. Clark and Sen. Case) (emphasis added).


Sexual harassment is illegal because and only because it is a form of gender discrimination under Title VII. Sexual harassment is a subset of gender discrimination. The concept of sexual harassment is an acknowledgment that when a male employer requires a woman to submit to him sexually for a promotion, or creates a sexually hostile environment, he is discriminating against her on the basis of her gender. Gender discrimination is the root; absent a base in gender discrimination, there can be no actionable sexual harassment. One can most certainly be the victim of gender discrimination without being a victim of sexual harassment; however, the reverse is not true. One cannot be the victim of actionable sexual harassment if one is not a victim of gender discrimination.

\textit{Id.}; see also Doe v. City of Belleville, 119 F.3d at 698 (Manion, J., concurring in part and dissenting in part) (“Merit made sexual harassment a subset of sex discrimination, \textit{i.e.}, sex discrimination is a general category of unlawful activity of which sexual harassment is a specific example.”); Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1010 (7th Cir. 1997) (referring to pregnancy discrimination and sexual harassment as subsets of sex discrimination).
explicit sexual content can infer both, but not invariably so. Instead, most sexually explicit content requires independent proof of differential treatment to establish but-for causality. Thus, to opine that explicit sexual content invariably establishes these criteria is to exaggerate its inferential force.

Sexual content is bifurcated into the gender specific and the gender neutral. Gender specific sexual conduct involves content that is strongly and almost uniquely linked to one gender, and therefore, wholly establishes differential treatment and but-for causality. Moreover, ceteris paribus, the higher the gender specificity of the sexual content, the less the conduct burdens the opposite gender. Calling a woman a “slut” (meaning promiscuous) is an example of gender specific conduct because “slut” carries an inextricable, distinct, and virtually unique feminine stigma. Thus, the term “slut” is linked to a woman’s gender. More importantly, that link is “but-for” in nature because a harasser is quite likely to call a woman a “slut” because she is a woman. Thus, but-for causality is established. Even if the workforce is all female, differential treatment is also established because, given the relatively slight impact of “slut” on males, a harasser is far less likely to use “slut” to harass them. Furthermore, the disproportionate burden, together with the improbability that “slut” would be used against males, leaves the resulting gender-based but-for link undiminished, regardless of whether a harasser refers to males as “sluts.”

The sexual content in gender neutral conduct lacks gender specificity, and therefore, is not inextricably linked to one gender, offends both genders equally, and infers neither differential treatment nor but-for causality, absent proof of differential treatment. Again, some examples should help make the point. Suppose that a harasser simultaneously massages the crotches of both a woman and a man. The sexual content is undeniable, but it lacks the indisputable feminine stigma of “slut.” A male who massages the crotches of both genders equally stigmatizes and humiliates them. If a man called a

200. Harassing conduct characterized by these types of sexual content is gender-specific and gender-neutral, respectively.

201. Calling a woman a “whore” is the kind of gender specific conduct that on its face reflects the prohibitive motive of harassing “women because they are women.” Doe v. City of Belleville, 119 F.3d at 591.

202. Our society seems to judge promiscuous males less harshly than promiscuous females.

203. Note that the focus here is on the harasser’s state of mind, attempting to determine whether the victim’s gender played a role in the harasser’s decision to burden her with the label.

204. See infra note Part X.C and accompanying text.

205. Some may take umbrage to this proposition on the basis that women are more defined by their sexuality than are men. See, e.g., Catharine A. Mackinnon, The Sexual Harassment of Working Women 4 (1979) (arguing that women’s sexuality largely defines women as women in this society, so violations of it are abuses of women as women). Katherine M. Franke, What’s Wrong with Sexual Harassment?, 49 STAN. L. REV. 691, 728 (1997) (“Under the anti-subordination view, sexual harassment is sex discrimination precisely because it replicates and perpetuates a sexual hierarchy in which men possess and maintain their power
woman and another man a “slut,” the woman suffers the brunt of the stigma and burden, an unlikely conclusion in the crotch-massaging hypothetical. Thus, these facts imply neither gender-based but-for causality nor differential treatment. Where, as here, both genders are subjected to the same gender-neutral conduct, a plaintiff must present independent evidence of differential treatment to establish either but-for causality or disparate treatment.

The same conclusion is obtained if Dawe had threatened to take a male and a female employee “out to the woods and get [both of them] up the ass.”206 The threat brims with sexual content but lacks gender specificity. Even where, as in Doe, Dawe threatened only a male with gender neutral conduct, neither but-for causality nor disparate treatment is thereby established. Without establishing—either hypothetically or concretely—how Dawe related to women, one simply cannot conclude either that the victim was threatened because of his sex or that he was subjected to disparate treatment.

Nevertheless, the need for and paucity of substantial gender specificity limits that level of logical force to gender-specific conduct which is less common than Doe suggests. When confronted with conduct that lacks sufficient gender specificity, Doe essentially switches the focus from the harasser’s state of mind when burdening the victim to the impact of the conduct on the victim as either a man or a woman. The difficulty with that approach, however, is that it effectively transplants environmental harassment cases from the disparate treatment model to the disparate impact model.207 Indeed, Doe expressly recognized that circumventing traditional proof of but-for causality is controversial:

Some cases can be read to suggest that even the explicitly sexual nature of the harassment is not enough to establish that the harassment was discriminatory for purposes of the Title VII. Sexual harassment traditionally has been explained as sex discrimination by pointing out that the harassed plaintiff is subjected to treatment that members of the other gender are not.208

Doe’s struggle to explain exactly how sexual explicitness invariably links harassing conduct to a victim’s gender without reference to differential treatment underscores the difficulties with this approach. For example, Doe explained:

[T]he explicitly sexual harassment of a female worker amounts to sex discrimination in violation of Title VII not simply because her harasser might

by virtue of their ability to define women in terms of their sexuality.”). Also, some may argue that, ceteris paribus, a male is less humiliated when a woman massages his crotch than the reverse.

206. See Doe v. City of Belleville, 119 F.3d at 577.
207. While this transplantation is not doomed to fail, it will require nurturing from the Supreme Court.
208. Doe v. City of Belleville, 119 F.3d at 577.
be heterosexual, and thus would not be sexually interested in a man, and not simply because a man might not encounter comparable harassment in the workplace, but because her employment is now conditioned upon her willingness to endure harassment that is inseparable from her gender.\textsuperscript{209}

When a harasser burdens a victim with "names, threats, and physical contact that are unmistakably gender-based, he ensures that the work environment becomes hostile to her as a woman—in other words, that the workplace is hostile to her "because of" her sex."\textsuperscript{210}

Unfortunately, this passage fails to explain how sexual explicitness, without more, establishes sex discrimination. Instead, the passage assumes the existence of what it seeks to explain—the but-for link between sexual explicitness and a victim's gender.\textsuperscript{211} For example, the foregoing quote first concludes that the explicitness of sexual conduct is "inseparable from [a woman's] gender" and then mentions behavior that is "unmistakably gender-based." Exactly how does explicitness or sexual content inextricably link harassing conduct to a victim's gender in the first instance? By assuming what it attempts to explain, this "tail-chasing" reasoning conceals the mechanisms through which explicitness overrides—and obviates the need even to consider—surrounding circumstances while assessing whether harassing conduct also constitutes sex discrimination.

Subsequently, \textit{Doe} again attempted to explain how the sexual explicitness of harassing conduct makes it sexually discriminatory:

When a male employee's testicles are grabbed, his torment might be comparable, but . . . he experiences that harassment as a man, not just as a worker, and she as a woman. In each case, the victim's gender not only supplies the lexicon of the harassment, it affects \textit{how he or she will experience} that harassment; and in anything short of a truly unisex society, men's and women's experiences will be different. \textit{In that sense, each arguably is the victim of sex discrimination.}\textsuperscript{212}

\textsuperscript{209} \textit{Id.} at 579 (emphasis added). I agree with \textit{Doe} to a point. Traditional proof of disparate treatment—that a harasser is actually burdened only by gender, is sufficient but unnecessary to establish but-for causality. One can refine but-for analysis to recognize finer gradations of disparate treatment. However, that observation does not embrace the proposition that sexually explicit conduct without something more establishes but-for causality.

\textsuperscript{210} \textit{Id.} at 578 (emphasis added).

\textsuperscript{211} Earlier, the court declared: "The need for proof that the plaintiff was targeted for harassment because of his gender is evident in cases where the harassment is not explicitly sexual . . . , but is gender-based nevertheless." \textit{Id.} at 575. Again, the logic of this statement is nonobvious. The existence of an observable gender basis would seem to obviate a need for further evidence that links a victim's gender to the harassing conduct.

\textsuperscript{212} \textit{Id.} at 578 (emphasis added).
Although this statement avoids the frailties of the former, it suffers from the proposition that the different ways in which males and females experience sexually explicit harassing conduct somehow establish differential treatment or discrimination.\textsuperscript{213} By focusing on disparate or adverse effects rather than disparate treatment, however, this passage also effectively couches environmental sexual harassment in a disparate-impact theory of claim.\\textsuperscript{214}

The court’s disparate impact approach to establishing but-for cause is at odds not only with Title VII’s sexual harassment jurisprudence but also with Title VII’s basic jurisprudence of discrimination. Presently, under Title VII, the disparate-impact theory of claim has nowhere replaced the disparate-treatment theory of claim, and hence, the requirement for plaintiffs to demonstrate but-for causality in the form of gender-based harassing conduct is undiminished.\textsuperscript{215}

Basically Doe’s approach unduly emphasizes the environmental nexus, at least suggesting that a victim’s perceptions of harassing conduct somehow either addresses the issue of but-for causality or supplants it.\textsuperscript{216} Although the environmental nexus is essential to a plaintiff’s prima facie case of environmental sexual harassment, it hardly looms larger than, nor replaces the need for a gender-based, but-for nexus. Indeed, the reverse is true. But-for analysis is the root of the sex discrimination theory of claim of which sexual harassment is merely a branch.\textsuperscript{217} Moreover, the pith of but-for analysis in sexual harassment is whether the harasser had the intent or motive\textsuperscript{218} to burden the victim because of the victim’s gender.\textsuperscript{219} Given this evidentiary structure, it is, at best, counterproductive to focus on the victim’s perspective to determine the harasser’s state of mind. Instead, the key is to determine whether the harasser burdened only one gender or, if both genders were burdened, were they burdened with different conduct? Finally, if both genders were burdened with the same conduct, the next determination is whether that conduct is more likely to exploit sensitivities peculiar to members of the victim’s gender.\textsuperscript{220}

\textsuperscript{213} Presumably, the court reasons that gender-based differences in socialization explain gender-based differences in perceptions of harassing conduct.


\textsuperscript{215} See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); see also infra Part VI.A.1.

\textsuperscript{216} For example, the Doe court also stated that “the premise of the hostile environment claim . . . is that the conditions of the plaintiff’s work environment have been altered in a way that made the environment hostile to him or her as a man or woman.” Doe v. City of Belleville, 119 F.3d at 578 (emphasis added).

\textsuperscript{217} See supra note 199.

\textsuperscript{218} The author recognizes that intent and motive are not synonymous but uses them synonymously here because such is the practice in Title VII jurisprudence.

\textsuperscript{219} Apparently, Doe is willing to ignore this point. The Doe court stated that “so long as the environment itself is hostile to the plaintiff because of her sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.” Doe v. City of Belleville, 119 F.3d at 578 (emphasis added).

\textsuperscript{220} To some extent, Doe’s approach overlaps the author’s, but substantial differences exist. For example, both approaches consider whether a victim’s gender supplied “the lexicon
b. *Seeds of the Disparate-Impact Theory of Claim in Environmental Harassment*. Although disparate treatment and motive have been the cornerstone of environmental sexual harassment, there is room to argue that environmental harassment can assume a disparate impact mode where the environmental nexus replaces motive in the disparate treatment model. For example, in *Meritor*, the Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." In addition, the Court declared "'Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.'"

On its face, this language suggests that environmental harassment claims are amenable to the *Griggs v. Duke Power Co.* model of disparate impact, an interpretation that is not without some persuasive force. Work environments charged with certain types of sexual content can disproportionately burden women, or men, thereby screening, or constructively discharging women from the workplace as effectively as any traditional screening device, such as height-weight standards. For example, plastering the walls of the workplace with pictures of nude women might very well constructively discharge substantially more female than male employees, irrespective of the state of mind of the employee that posted the photograph. In addition, the Supreme Court has favorably cited the EEOC’s regulations, which permit a finding of sexual harassment where the harassing conduct has, "the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment." The phrase "purpose or effect" suggests that motive and impact, associated with disparate impact, are acceptable doctrines for sexual harassment. In addition, *Harris v. Forklift Sys., Inc.* held that Title VII of the harassment" to be relevant. On the other hand, at the but-for stage of the analysis, the author's approach ignores issues of impact, all of which lie exclusively within the domain of the environmental nexus. Also, this approach focuses the factfinder on a harasser's state of mind, and hence, on intent or motive, thereby avoiding a back-door approach to a disparate-impact analysis based on either a victim’s perceptions of the impact of harassing conduct or the actual impact of such conduct. Finally, the author’s approach does not effectively elevate the environmental nexus to a position of unwarranted dominance in a prima facie case of environmental sexual harassment.

223. *Id* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)) (emphasis added).
contemplates only those cases of environmental harassment where plaintiffs subjectively and objectively demonstrate that their work environments were made pervasively and abusively hostile.\textsuperscript{228}

On the other hand, there is language in \textit{Meritor} and \textit{Harris}, suggesting that disparate treatment is the model of choice in environmental harassment litigation. For example, \textit{Meritor} held, "The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of \textit{disparate treatment} of men and women . . . .'"\textsuperscript{229} And Justice Ginsburg arguably supported that position by observing that: "The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."\textsuperscript{230} Nor have the appellate courts interpreted Supreme Court precedent as calling for the application of the disparate impact model to environmental harassment.\textsuperscript{231} In other words, the Court usually addresses the impact of harassing conduct only when addressing the environmental nexus.

Although it is critical to a prima facie case of hostile environment sexual harassment, the environmental nexus arguably plays a secondary role in sexual harassment jurisprudence—it links a victim’s terms and conditions of employment to the harassing conduct.\textsuperscript{232} In addition, the environmental nexus avoids (1) unnecessary judicial interference in and sanitation of the

\textsuperscript{228} \textit{Id.} at 21. Arguably, the threshold level of actionable impact occurs where "discriminatory conduct has unreasonably interfered with the plaintiff’s work performance." \textit{Id.} at 25 (Ginsburg, J., concurring). The \textit{Harris} Court also held:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.

Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

\textit{Id.} at 21-22.

\textsuperscript{229} \textit{Id.} at 21-22.


\textsuperscript{230} \textit{Harris v. Forklift Sys., Inc.}, 510 U.S. at 25 (Ginsburg, J., concurring) (emphasis added).

\textsuperscript{231} \textit{Dillon v. Frank}, No. 90-2290, 1992 WL 5436, at *7 (6th Cir. Jan. 15, 1992). The \textit{Dillon} court, commenting on the importance of but-for causality in sexual harassment stated, "[T]he essence of a \textit{disparate treatment} claim under Title VII is that an employee or applicant is intentionally singled out for adverse treatment on the basis of a prohibited criterion." \textit{Id.} (quoting Henson v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982)) (emphasis added) (alteration in original).

\textsuperscript{232} But one never reaches that nexus, unless but-for differentiation is established. Also, the environmental nexus indirectly links a hostile environment to a victim’s gender through the harassing conduct which usually links directly to gender.
working environment and (2) guards against frivolous claims, as well as claims of the ultra sensitive. 233

The environmental nexus and the but-for nexus are analytically distinct criteria, committed to wholly distinct purposes; whether harassing conduct impermissibly impacted a victim’s work environment is wholly distinct from whether the harasser burdened that victim, in the first instance, because of the victim’s gender.234 Both criteria are necessary to establish a prima facie case of environmental harassment, but neither is sufficient alone. Therefore, if the Supreme Court wishes to place environmental harassment under the disparate impact canopy, it must make clear its intent to do so.

4. Eleventh Circuit

The Eleventh Circuit, in Fredette v. BVP Management Assocs.,235 examined whether Title VII covers disputes where male homosexuals make explicit sexual advances towards other males. Here a maitre d’ subjected the plaintiff, a waiter, to both quid pro quo and environmental sexual harassment, by offering to exchange employment benefits for sexual favors and by making verbal and physical sexual advances toward the plaintiff, who repeatedly rejected them as unwelcomed.236 The district court granted the defendant’s motion for summary judgment, reasoning that the plaintiff had failed to establish a genuine issue of material fact regarding causation.237 On appeal, the defendant argued, inter alia, that Title VII simply does not contemplate same-sex sexual harassment claims.238 In rejecting this argument, the court

233. Observe that plaintiffs’ rights are not necessarily sacrificed by excluding behavior that, in single episodes, permissibly alters working conditions, because such behavior can have impermissible, and hence, sanctionable cumulative effects.

234. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. at 67. After discussing the but-for role of gender in determining whether sexual harassment is actionable, the Court observed: [N]ot all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII... For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.”


236. Id. at 1504. When the plaintiff rejected these offers, the harasser began abusing the plaintiff. Id. In addition, the harasser was rather notorious for propositioning male employees and had rewarded those that capitulated to his advances. Id.

237. Id.

238. Id.
observed that neither Title VII’s legislative history,\textsuperscript{239} nor its language,\textsuperscript{240} explicitly excluded claims in which the harasser and the victim were the same gender.\textsuperscript{241}

Turning to the causal issue, Fredette held that the harassment in question was gender-based and that homosexual male-to-male sexual harassment is generally no less gender-based than male-to-female sexual harassment because "[t]he reasonably inferred motives of the homosexual harasser are identical to those of the heterosexual harasser—i.e., the harasser makes advances towards the victim because the victim is a member of the gender the harasser prefers."\textsuperscript{242} The court stated that "the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex."\textsuperscript{243} The court also supported its position by citing a similar scenario that had the EEOC’s stamp of approval.\textsuperscript{244} Finally, Fredette opined that, by embracing claims of sex discrimination between males—reverse discrimination—the Supreme Court had tacitly embraced same-sex sexual harassment under Title VII.\textsuperscript{245} In other words, because sexual harassment is a form of sex discrimination and because the Supreme Court accepted reverse discrimination—specifically intra-gender sex discrimination—then, logically, the Court would accept intragender sexual harassment.

Fredette specifically limited its holding to disputes where homosexual males harass male victims, and the court offered little guidance as to how it would decide cases involving heterosexual-to-heterosexual sexual harassment. Yet it did not explicitly reject claims involving sexual harassment between heterosexual males. Ultimately, whether the Eleventh Circuit embraces or rejects such claims will turn on the circuit’s ability to discern the gender bases therein.

\textsuperscript{239} Id. at 1505. The Fredette court, looking to the legislative history, stated, "[W]e find nothing . . . that suggests an express legislative intent to exclude same-sex harassment claims from the purview of Title VII." Id.

\textsuperscript{240} Id. ("There is simply no suggestion in [Title VII’s] statutory terms that the cause of action is limited to opposite gender contexts.").

\textsuperscript{241} Id.

\textsuperscript{242} Id.

\textsuperscript{243} Id. (quoting the EEOC Compliance Manual (CCH) § 615.2(b)(3) (1987)). The court also stated that "the victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim’s sex (not on the victim’s sexual preference) and the harasser does not treat employees of the opposite sex the same way." Id. (quoting EEOC Compliance Manual (CCH) § 615.2(b)(3) (1987)). This statement is redundant, and hence, problematic. If one can determine that sexual harassment is gender-based without considering differential treatment along gender lines, then one need not consider how the harasser treated members of the opposite gender. Similarly, if a harasser sexually harasses only one gender, a gender bias is thereby established.

\textsuperscript{244} Id. at 1505-06.

\textsuperscript{245} Id. at 1506 (citing Johnson v. Transportation Agency, 480 U.S. 616 (1987)).
C. Circuits That Accepted Same-Sex Sexual Harassment Claims but Enhance the Evidentiary Burdens

1. Fourth Circuit

Thus far, the Fourth Circuit has certainly had its share of same-sex sexual harassment disputes. Hopkins v. Baltimore Gas & Electric Co. offers that circuit's most clear and detailed explanation of its position on same-sex sexual harassment. Before suing his employer, the plaintiff, a heterosexual male, endured approximately seven years of unwelcomed sexual conduct from his supervisor, Swadow, ostensibly another heterosexual male. During that period, Swadow (1) followed the plaintiff into the bathroom, pretended to lock the door, and commented, "Ah, alone at last" and approached the plaintiff, causing him to feel "very uncomfortable"; (2) intercepted mail from the plaintiff's fiancée—an employee of the same firm—and wrote "S.W.A.K., kiss, kiss," and "drew small hearts" on the mail; (3) altered a piece of company mail addressed to the plaintiff by "adding the word 'Alternative' in front of the company name 'Lifestyles';" (4) stood in the receiving line at the plaintiff's wedding and kissed him; (5) asked, "where is it" while peering through a magnifying glass that he held over the plaintiff's crotch; (6) brushed against the plaintiff and commented, "You only do that so you can touch me"; (7) entered a darkroom where the plaintiff and another employee were working, and as the employee was leaving the darkroom, asked the plaintiff, within hearing distance of the employee, "Was it as good for you as it was for me?"; (8) crammed himself behind the plaintiff in the cubicle of a single revolving door, where Swadow's body was pressed against the plaintiff's back; (9) repeatedly complimented the plaintiff's appearance, saying, "You look nice today," "You have a really pretty shirt on," or "You look so distinguished"; and (10) while discussing a photographic negative with the plaintiff, stated, "with a 'very peculiar' look on his face," that "orientation is subjective."

Hopkins rejected Garcia's categorical exclusion of same-sex sexual harassment disputes under Title VII, holding instead that Title VII covers these cases in "appropriate circumstances." In reaching that conclusion, the court observed that Meritor not only recognized sexual harassment as a

248. See id. at 751-52.
249. Id. at 747-48.
250. Id.
251. Id. at 751.
discrimination claim under Title VII but also referred to gender as a basis for sexual harassment. As a result, Hopkins concluded that Title VII contemplates both same-sex and traditional sexual harassment claims, in so far as both are “because of sex” as contemplated in 42 U.S.C. § 2000e-2(a)(1).

Having identified the issue of but-for causality as the primary concern, it remained for Hopkins to delineate the next thorny issue—the nature and dimensions of the but-for nexus. Hopkins tackled this task by: (1) broadly defining the scope of “sex” or gender and (2) generally describing the type of evidence that would bring a sexual harassment claim within the scope of these definitions, and thus, establish but-for causality. In defining “sex,” Hopkins drew upon Title VII’s language, legislative history, and judicial interpretations. In turning to the legislative history, the court concluded that to be a useful interpretative guidepost, “sex” required an “anchor.” Otherwise, abstract interpretations of “sex” could cause overregulation, which might involve condemning “discrimination based on human psychological and physiological characteristics or on sexual orientation. [as well as] . . . all workplace sexual behavior or words and deeds having sexual content. . . . [Even] . . . dirty jokes or sexually-based profanity spoken by a male supervisor to other male employees implicates the prohibition’s of Title VII.”

The anchor was Title VII’s legislative history, from which the court cited several passages and offered at least three conclusions regarding the scope of “sex.” First, “Title VII was [not] intended to regulate everything

252. Id. at 750 (observing that Meritor recognized that Title VII “‘evinces a congressional intent’ to strike at the ‘entire spectrum of disparate treatment of men and women’ in employment”) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).


256. Id.

257. See id. The Hopkins court was impressed that sex was added to Title VII to assist the “‘minority sex’ by ensuring that women receive ‘as high compensation for their work as do the majority sex.’” Id. at 749 (quoting 110 CONG. REC. 2577 (1964)) (emphasis added). “Congressman Celler opposed the amendment, arguing that the bill was already ‘all-embracing,’ covering ‘everybody in the United States’ including ‘white men and white women and all Americans.’” Id. (citing 110 CONG. REC. 2578 (1964)) (emphasis added). However, Congresswoman Griffiths insisted that “when a qualified white woman is denied a job because she is a woman, she has no recourse without the amendment.” Id. (citing 110 CONG. REC. 2579 (1964)) (emphasis added).

258. Id. With all due respect to the court, distilling Congress’s intent from Title VII’s sparse legislative history is dicey at best. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (observing that after the sex amendment was introduced in Congress, arguments against adding it were defeated and “[Title VII] quickly passed as amended, and we are left with
sexual[259] in the workplace." 260  Second, sex should be limited to its biological meaning of male or female. 261 In short, the court equated "sex" with biological gender not with sexual conduct. 262 Consequently, according to Hopkins, Title VII ignores sexual harassment based on a victim’s "sexual behavior . . . vulnerability, . . . 'believed prudery . . . shyness, vulnerability to sexually-focused speech or conduct' . . . [or] sexual orientation, whether homosexual, bisexual, or heterosexual." 263 Nor does a harasser's gender make a difference, once plaintiffs link harassment to their gender. 264

Having established the scope of "sex," Hopkins outlined the nature of the gender-based, or but-for causal, link that plaintiffs must establish between harassing conduct and a victim's gender to ensure that the "harassment [is]

little legislative history to guide us in interpreting the Act's prohibition against discrimination based on sex") (emphasis added).

259. Conversely, Meritor interpreted "sex" to include "sexual" which, on its face transcends the scope of biological sex. Meritor Sav. Bank v. Vinson, 477 U.S. at 65. Therefore, it hardly furthers analysis to observe that by adding "sex" to Title VII, Congress never intended to include "everything sexual." Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d at 749. Congress addressed a very narrow range of sex discrimination and probably never remotely considered any harassment "sexual" or otherwise, not to mention specific infractions pertaining to sexuality, sexual attraction, or sexual abuse. Consequently, the "everything sexual" argument merely begs the question exactly what conduct did Congress intend to prohibit.

A narrower, and yet reasonable, interpretation of this language is that Congress added "sex" to Title VII specifically to protect white women by insuring that they secure employment at competitive wages. Id. Two reasons support this proposition. First, on its face, the quoted language states as much. See 42 U.S.C. § 2000e (1994). Second, white women also needed protection against sex discrimination. See Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d at 749. The prohibition of race discrimination gave black women some indirect protection against sex discrimination. Employers that discriminated against black women because of their sex risked incurring liability for race discrimination, lest the employers could disentangle sex from race discrimination. In short, the "sex" amendment was, to some extent, redundant protection for black women. This is not to say, however, that black women, as women, could not benefit from protection against pure sex discrimination, but, given the protection against race discrimination and the virtual inextricability of race and sex discrimination, black women had some indirect protection against pure sex discrimination; white women had none.


261. Id. at 749 n.1.

262. Id. at 749 (equating sex and gender) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 239-41 (1989)). Note, however, that congressional discussion about the specific problem that triggered a piece of legislation does not necessarily create a negative inference that limits the scope of the statute to the seminal. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 680 (1983).


264. Id. at 752.
... not for some other reason." Hopkins began its but-for analysis by restricting the range of relevant causal evidence to a harasser’s motives. The court then declared that sexual attraction was the only relevant motive and that it would look to the nature of a harasser’s requests—sexual favors—to determine whether sexual attraction motivated the harassing conduct. According to the court, the request for sexual favors is “the principal way” to establish but-for cause in traditional sexual harassment disputes because the nature of a harasser’s requests readily reveal the pivotal or but-for role of a victim’s sex in the decision to harass. Therefore, to establish that sexual attraction motivated same-sex sexual harassment, plaintiffs must prove that harassers are homosexual—the homosexual criterion.

Under this approach, plaintiffs, in traditional sexual harassment disputes, need never adduce additional evidence that their gender motivated the harassing conduct. A decisionmaker can simply note the requests for sexual favors, infer that sexual attraction motivated them, and presume the harasser to be heterosexual. Thus, gender is presumed to be the but-for cause.

The likely presence or absence of homosexuality mediates the difference in these approaches. Hopkins seems to reason that, in same-sex sexual harassment litigation, the specter of sexual orientation—homosexuality—masks the role of a victim’s gender as a causal link. Thus, to remove that uncertainty, plaintiffs must satisfy the homosexual criterion, which, in Hopkins’s view, is apparently the only acceptable means of establishing but-for causality.

265. Id. (emphasis added). Unfortunately, Hopkins never addresses the extent to which gender may share the “limelight” with other legitimate factors without destroying the gender basis of harassing conduct and, hence, but-for causality.

266. Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d at 752. This evidentiary restriction is puzzling? By limiting the scope of motive-related evidence to sexual attraction, the court ignores the motive of intimidation, the other half of motive-related evidence in but-for analysis in Title VII sexual harassment litigation. See infra Part VIII.


268. Id.

269. Even after explicitly recognizing that same-sex sexual harassment “can have sexual content or innuendo and, indeed, may be offensive,” the court categorically rejected “the notion that when a man . . . uses sexually oriented gestures and language, or engages in sexually perverse activity to harass another man, Title VII automatically imposes liability.” Id. (emphasis added). That Title VII does not automatically impose liability under these circumstances is one matter; it is quite another initially to presume the absence of a gender basis, to require added evidence to rebut that presumption, and to ignore intimidating conduct as being gender-based.

270. Id. In imposing the homosexual criterion, Hopkins drew upon McWilliams v. Fairfax County Board of Supervisors, which offered the following rationale for imposing the homosexual criterion where harassers and victims are the same sex:

The (ordinarily different) sexes of the relevant actors always has been an essential element of either form [male or female harassers] of Title VII sexual harassment claims. If [courts were to entertain] same-sex situations where homosexuality of one or the other or both of the actors is involved,
On the other hand, Hopkins did not view sexual orientation—heterosexuality—in traditional sexual harassment disputes, as clouding the role of sex as a but-for cause in a decision to harass.\textsuperscript{271} Only the probability of homosexuality has that effect in environmental harassment claims.

Hopkins's analysis and conclusions are problematic for several reasons. The difficulty is not that the court flags sexual attraction or requests for sexual favors\textsuperscript{272} as a common motive in traditional sexual harassment disputes. The problem is that Hopkins: (1) failed to probe deeper into the motivations of harassers for evidence of a gender basis,\textsuperscript{273} and (2) failed even to mention any other criterion for determining but-for cause in male-to-male sexual harassment cases, thereby making sexual attraction the only but-for criterion.\textsuperscript{274} Even though Hopkins does not explicitly deny Title VII coverage to same-sex

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that added fact would seem equally essential to the statement and proof of such a claim. If not required to be alleged, a defendant could be \textit{blindsided by proof of conduct} merely suggestive of homosexuality between persons of the same sex who actually are heterosexuals.


\[\text{When a homosexual or bisexual male harasses another male, there is the presumption that the harasser does so because he is \textit{sexually attracted} to the male victim and would not treat a female in the same manner. The \textit{presumption} arises from the sexually oriented harassing conduct and is predicated upon the perceived need for \textit{sexual gratification}. Because of the demand by the harasser for sexual gratification, the victim is singled out because of his or her gender. Thus, there is discrimination based upon the victim's sex in violation of Title VII.}\]

\textit{Id.} (emphasis added).

\textsuperscript{271} Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d at 752.

\textsuperscript{272} If the foundational motive is sexual attraction, then the actual conduct itself must communicate a desire for sexual favors. "The principal way in which [the] burden [of proving because of sex] may be met is with proof that the harasser acted out of \textit{sexual attraction} to the employee." \textit{Id.} (emphasis added).

Nor does requests for sexual favors, without more, necessarily establish heterosexuality in traditional sexual harassment disputes, because the harasser could be bisexual. But one suspects that courts are more likely to associate bisexuality with homosexuals than with heterosexuals. Yet, there is less reason for this leap in logic than one might suspect. As suggested above, under Hopkins's but-for causal approach, the heterosexuality of the harasser and the gender-basis of the conduct derives from the harasser's requests for sexual favors from the victim and from being of the opposite sex. Yet both a male bisexual harasser and a male heterosexual harasser might very well request sexual favors from females to whom they were sexually attracted. Under these circumstances, the basis for a presumption of heterosexuality is no stronger than that for bisexuality.

\textsuperscript{273} \textit{See infra} Part X.B.

\textsuperscript{274} \textit{See infra} Part X.B.
sexual harassment claims, the exclusive focus on sexual attraction effectively shoves these claims to the edge of that precipice.\textsuperscript{275}

Two factors arguably triggered the Hopkins evidentiary approach, neither of which survives scrutiny. First, the court limited "sex" to its biological meaning,\textsuperscript{276} which led to the designation of sexual attraction as the only proxy for sex.\textsuperscript{277} Second, there is an apparent and undue concern about even incidentally protecting sexual orientation or homosexuality, no matter the cost of that approach.\textsuperscript{278}

The Hopkins court's approach contradicts the antidiscrimination policy, which would afford sexual orientation whatever incidental protection necessary to insure a full attack on all gender-based discrimination.\textsuperscript{279} Title VII's antidiscriminatory policy prescribes, inter alia, "stri[k]ing at the entire spectrum of disparate treatment of men and women' in employment"\textsuperscript{280} and "tolera[ting] no . . . discrimination subtle or otherwise."\textsuperscript{281} Hopkins's biological definition of "sex" together with the presence of sexual orientation or homosexuality effectively blind factfinders to the panorama of gender-related criteria in this species of sexual harassment.\textsuperscript{282} Also, when combined, these criteria create an almost conclusive presumption that heterosexual males either cannot or do not harass other males—heterosexual or homosexual—because of their gender. That is simply untenable.\textsuperscript{283} In fact, a but-for gender component often exists in same-sex sexual harassment between heterosexual males, even though the harasser lacks sexual desire for

\textsuperscript{275} See Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d at 752.

\textsuperscript{276} Id. at 751 ("[I]t is apparent from the historical record that Congress, in prohibiting sex discrimination, meant to prohibit discrimination only on the basis of the employee's status as a man or a woman.").

\textsuperscript{277} See supra note 266 and accompanying text.

\textsuperscript{278} This concern very well could have led, or at least influenced the court to limit "sex" to its biological realm. See infra Part VIII.A for a discussion of the hypocrisy of not protecting sexual orientation in same-sex sexual harassment.

\textsuperscript{279} To some extent, sexual orientation addresses whether one complies with sex role stereotypes. Insofar as lesbians behave like males and homosexual males behave like women, they violate sex role stereotypes for their genders. But, Price Waterhouse v. Hopkins stands for the proposition that Title VII prohibits sex discrimination based on plaintiffs' violations of sex role stereotypes. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989).


\textsuperscript{281} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (discussing racial discrimination).

\textsuperscript{282} Some factors are gender-based and some are not. For example, a strict biological perspective of sex overlooks how decisions to harass can be influenced by sex stereotypes, which are gender-based factors. On the other hand, considerations such as the victim's height, weight, and hair style may also influence harassment decisions; yet, these considerations are not gender based.

\textsuperscript{283} See infra Part VII.B.
the victim. Sexual attraction is a sufficient but unnecessary element for the existence of a gender basis. 284

Although it is the clearest and most thorough Fourth Circuit opinion on same-sex sexual harassment to date, Hopkins is not the latest opinion from that circuit. 285 Wrightson v. Pizza Hut of America, Inc. 286 holds that distinction and adopts the Hopkins position on coverage and proof. 287 In Wrightson, the plaintiff, a heterosexual male, worked with eight other males—five homosexuals and three heterosexuals. 288 Eventually, the homosexual coworkers began harassing the heterosexual males, including the plaintiff. 289 The homosexuals: (1) made unvarnished statements about homosexual lifestyles and sexual practices; (2) made sexual advances, indecent sexual remarks, and suggestions to the plaintiff; (3) stroked the plaintiff's hair; (4) rubbed the plaintiff's shoulders; (5) placed their genital areas against the plaintiff's buttocks; (6) stretched the plaintiff's waistband to look beneath his pants; and (7) suggested that he try the "golden enema" (anal sex). 290

284. See Doe v. City of Belleville, 119 F.3d 563, 585 (7th Cir. 1997). The Doe Court stated that "for a number of reasons, we do not agree that the viability of a same-sex harassment claim should be made to depend on the sexual orientation of the harasser." Id. But see Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir.) (insisting on sexual attraction as the principal way of establishing a gender basis in sexual harassment claims between males), cert. denied, 117 S. Ct. 70 (1996).

285. In fact, the concurrence explicitly declined to join Judge Niemeyer's explication of the nature and viability of same-sex sexual harassment disputes under Title VII. See Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d at 753 (Wilkenson and Hamilton, JJ., concurring in part). The concurrence stated, "The discussion [about] the actionability of same sex harassment... is quite unnecessary to the resolution of this case, and we do not concur in it." Id.


287. Id. at 142-44 (adopting the but-for test of Price-Waterhouse v. Hopkins, 490 U.S. 228 (1989); see also McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195-96 (4th Cir.) (stating that "because of sex" in Title VII does not mean because of "the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focused speech or conduct"), cert. denied, 117 S. Ct. 72 (1996).

McWilliams also opined that a claim for hostile environment does not lie under Title VII where the alleged victim and alleged harassers are heterosexuals of the same sex. However, the court expressly left open whether a sexual harassment claim would lie in a factual situation different from the one in that case. Id. at 1195 nn.4-5. In Mayo v. Kiwest Corp., the court stated that the plaintiff's claim of same-sex sexual harassment fails where the plaintiff and "all of his alleged harassers [are] indisputably males, and [the plaintiff makes] no claim that any was homosexual." Mayo v. Kiwest Corp., No. 95-2638, 1996 WL 460769, at *4 (4th Cir. Aug. 15, 1996). Further, "were Title VII to be interpreted to protect against same-sex sexual harassment, the fact of homosexuality (to include bisexuality) should be considered an element of the claim to be alleged and proved." Id. at *4 n.2.

288. Wrightson v. Pizza Hut of Am., Inc., 99 F.3d at 139.

289. Id.

290. Id. at 139-40.
Wrightson joined Hopkins in explicitly rejecting the Garcia rationale that Title VII does not intercept male-to-male sexual harassment.\textsuperscript{291} Title VII contemplates all sex discrimination, including same-sex sexual harassment, so long as it is because of a victim’s sex.\textsuperscript{292} Moreover, the same language\textsuperscript{293} persuaded the court that a harasser’s gender was relevant to the viability of sexual harassment claims under Title VII.\textsuperscript{294} Wrightson, like most other circuits, explicitly held that Title VII does not cover sexual orientation—sexual practices.\textsuperscript{295} The court drew upon Fourth Circuit precedent to ensure that sexual orientation would not become an incidental beneficiary of Title VII’s protection of gender.\textsuperscript{296} To this end, Wrightson held that gender can be a

\textsuperscript{291} Id. at 144. See supra notes 58-65 and accompanying text for a discussion of the Garcia rationale.

\textsuperscript{292} Id.

\textsuperscript{293} Id.

\textsuperscript{294} With respect to Title VII’s plain language, its scope, and further clogging of federal dockets, Wrightson observed:

[O]ur role as courts is limited to faithfully interpreting the statutes enacted by the Congress and signed into law by the President. And where Congress has unmistakably provided a cause of action, as it has through the plain language of Title VII, we are without authority in the guise of interpretation to deny that such exists, whatever the practical consequences.

\textit{Id.} (emphasis added).

\textsuperscript{295} Id. at 143. In this respect, the court cited the EEOC Compliance Manual, which states that victims and harassers may be of different sexes and that “the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex” and the sexual harassment must not be based on the victim’s sexual preference. \textit{Id.} at 142 (emphasis added). Elaborating on this point, Wrightson noted:

[A] male employer who discriminates only against his male employees and not against his female employees, and a female employer who discriminates against her female employees and not against her male employees, may be discriminating against his or her employees “because of” the employees’ sex, no less so than may be the employer (male or female) who discriminates only against his or her employees of the opposite sex. In all four instances, it is possible that the employees would not have been victims of the employer’s discrimination were it not for their sex.

\textit{Id.}

\textsuperscript{296} Id. at 143.

\textsuperscript{296} Id. at 141. See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996). In Wrightson, the majority specifically noted:

We first addressed the issue of same-sex sexual harassment only recently in McWilliams v. Fairfax County Board of Supervisors, [where] we held that no Title VII cause of action for “hostile work environment” sexual harassment lies when both the perpetrator and target of the harassment are heterosexuals of the same sex. In McWilliams, however, we expressly reserved the question of whether Title VII prohibits same-sex “hostile work environment” harassment where the perpetrator of the sexual harassment is homosexual.
but-for cause, in same-sex sexual harassment claims, only "where a homosexual [employer] ... discriminates against an employee of the same sex or permits such discrimination against an employee by homosexual employees of the same sex."297 Finally, the court noted that the Supreme Court clearly declared that sex need only be a factor, rather than the sole factor, in sex discrimination claims.298

Wrightson v. Pizza Hut of Am., Inc., 99 F.3d at 141 (quoting McWilliams v. Fairfax County Bd., 72 F.3d at 1195).

297. Wrightson v. Pizza Hut of Am., Inc., 99 F.3d at 143 (emphasis added). The dissent in Wrightson vigorously opposed even the recognition of same-sex sexual harassment claims under Title VII, contending that recognizing a heterosexual’s claim of sexual harassment by a homosexual extends the “because of sex language to include unmanageably broad protection of the sensibilities of workers ... in matters of sex.” Id. at 144 (Murphy, J., dissenting) (quoting McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d at 1196) (internal quotations omitted). Moreover, the dissent chided the majority for treating Title VII’s “sparse legislative history” as a judicial legislative license to confound legislative intent by artificially extending Title VII into areas that Congress never contemplated. Id. at 145. The dissent would have clung to the dictionary’s definition of “sex,” absent sufficient legislative history. Id. And the dictionary definition of “sex” is silent as to same-sex sexual activity between heterosexuals. Id. Finally, the dissent correctly observed that the paucity of Title VII’s legislative history suggests that Congress simply did not think about this problem, and that observation spawns arguments for and against inclusion of same-sex sexual harassment. Id. Under these circumstances, the dissent would have left the issue of coverage to Congress. Id.

The dissent triggers at least two responses. First, given ambiguous statutory language and sparse legislative history, Title VII’s underlying policies concerning the prohibition of sex discrimination should prevail. One of the chief purposes of policy is to afford guidance in such situations. Admittedly, when enacting Title VII, Congress was concerned about men discriminating against women at work. Congress, however, was also concerned about the generic consequences of sex, and race, discrimination at work—reduced productivity and workmanship, as well as the inequities of such conduct. See Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989).

Given this fact, same-sex sexual harassment deserves no special protection. One has no reason to assume that same-sex sexual harassment is somehow less inimical either to productivity or to workmanship. Nor would any fair-minded person envision same-sex sexual harassment as somehow more equitable than traditional sexual harassment. These undeniable and broad congressional purposes and concerns would seem to favor Title VII coverage of same-sex sexual harassment complaints.

Second, the name of the violation itself—sexual harassment—arguably helps to inform the scope of coverage. The dictionary definition of “sexual” is undeniably broader than that of “sex.” Sexual is defined as: “Of, relating to, involving, or characteristic of sex, sexuality, the sexes, or the sex organs and their functions.” AMERICAN HERITAGE DICTIONARY 1654 (3d ed. 1992). “Sex” is defined as: “The property or quality by which organisms are classified as female or male on the basis of their reproductive organs and functions.” Id. at 1653.

2. Sixth Circuit—Dillon v. Frank

In Dillon v. Frank, the plaintiff, a heterosexual male and Postal Service mail handler, alleged that his coworkers sexually harassed him because they suspected he was gay. In addition to calling the plaintiff “a fag,” coworkers: (1) said “Dillon sucks dicks” and “Dillon gives head”; (2) “turned off the bathroom lights when [the plaintiff] entered”; and (3) physically assaulted and injured [the plaintiff]. After three years of this harassment, Dillon resigned in accordance with his psychiatric counselor’s advice and shortly thereafter sued his employer for sexual harassment under Title VII.

Dillon offered essentially two arguments in support of his claim. First, although sexual attraction was not a motive, the harassment was nonetheless gender-based because the abuse related to sex and was inflicted upon him “solely because he was a man.” Second, Dillon bolstered this but-for cause argument by analogizing his situation to that of the female plaintiff in Price Waterhouse. Specifically, he insisted that—like Ms. Hopkins—he too was a victim of discrimination based on role stereotypes. That is, he and Ms. Hopkins had suffered discrimination for betraying their respective role stereotypes as a male and female; Ms. Hopkins was too masculine and Dillon too effeminate.

While admitting that the harassment was “sexual in nature,” the court rejected Dillon’s arguments as mere attempts to extend Title VII’s definition of “sex” to include harassment “because of anything relating to being male or female, sexual roles, or to sexual behavior.” First, the court declared that “sex” in Title VII did not cover discrimination based on sexual orientation. Instead, “sex” applied only to discrimination against women

300. Id. at *1.
301. Id.
302. Id. at *5.
303. Id. at *4. Price Waterhouse relaxed the but-for standard by not requiring plaintiffs to show that employers would have treated male employees differently. In this respect, Justice White observed, “The Court has made clear that ‘mixed-motives’ cases, such as the present one, are different from pretext cases such as McDonnell Douglas and Burdine. In pretext cases, the issue is whether either illegal or legal motives, but not both, were the ‘true’ motives behind the decision.” Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring).
305. Id. at *4 (emphasis added).
306. Id. Dillon cited the several cases that have denied Title VII coverage for homosexual harassment. See, e.g., Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) (“The term ‘sex’ has been limited to its plain, unambiguous and traditional meaning.”); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (holding that this prohibition does not encompass discrimination based on sexual orientation—such as homosexuality; rather, Congress by proscribing sex discrimination “intended only to guarantee equal job opportunities for males and females”); Barwood v. Continental Southeast-
because they are women and against men because they are men. To support this interpretation, Dillon noted that Congress had repeatedly declined to extend Title VII's coverage to include sexual orientation and had grouped "sex" with other "immutable" or "almost immutable" traits like race, national origin, or religion.

Next, Dillon offered several grounds for rejecting the plaintiff's comparison of his situation to that of the plaintiff in Price Waterhouse. First, the court pointed out that Price Waterhouse was not based on hostile environment, thereby flatly ignoring a glaring and substantial similarity between the facts in Price Waterhouse and Dillon—the plaintiffs' perceived violation of role stereotypes triggered the sex discrimination. Thus, for
purposes of analysis, the court’s distinction lacks a meaningful difference. In addition, the court pointed out that Dillon offered no evidence of stereotypical remarks as the plaintiff did in Price Waterhouse. Here again the court takes the wrong analytical path. Also, Dillon stressed that Ms. Hopkins was the victim of a “catch 22” but the plaintiff in the instant case was not. Yet, little, if any, of the Court’s opinion in Price Waterhouse turned on Ms. Hopkins’s catch 22 plight. Finally, in rejecting the stereotypes. See, e.g., Sandra Levitsky, 80 MINN. L. REV. 1013, 1040 (1996). Levitsky argues that:

Because employers reward men more frequently than women, “men have a stake in justifying and continuing the status quo.” Preserving gender distinctions goes hand in hand with preserving the rewards men derive from these distinctions. Sexual harassment acts in this context both as a penalty for departing from scripted gender norms and as a method of maintaining the gender hierarchy.

Id. (footnotes omitted). Another commentator adds:

The law has been a well-worn tool in the normalization and protection of the signs of sexual differences. By policing the boundaries of proper gender performance in the workplace and in the street, both civil and criminal laws have been invoked to punish gender outlaws, and thereby reinscribe masculinity as belonging to men and femininity as belonging to women.

Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. PA. L. REV. 1, 58 (1995); see also Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)) (emphasis added).

312. Stereotypical statements and gender-based conduct can, but need not, be mutually exclusive. The question is whether a gender basis resides in the harassers’ homosexual epithets that the plaintiff adduced. See, e.g., Doe v. Belleville, 119 F.3d at 593 n.27. The Belleville court noted the following:

There is, of course, a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand. Indeed, 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. Observations in this vein have led a number of scholars to conclude that anti-gay bias should, in fact, be understood as a form of sex discrimination.

. . . We merely take the opportunity to point out that it is not always possible to rigidly compartmentalize the types of bias that these types of epithets represent.

Id. (citations omitted).


314. Price Waterhouse v. Hopkins, 490 U.S. at 251. Price Waterhouse did not make “catch 22” an element of the plaintiff’s prima facie case or any other aspect of proof. Instead, the Court merely noted the catch 22 situation to show how unfair the workplace can be to women. Thus, the Court observed: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22:
plaintiff’s contentions that he was harassed because he was a man, Dillon noted that the plaintiff failed to show that the harassers "would have treated a similarly situated woman any differently." 315

Dillon focuses primarily on causation 316 but impliedly accepts same-sex sexual harassment as a valid Title VII claim. 317 In rejecting the plaintiff’s claim, the court did not hold that Title VII rejected all same-sex sexual harassment claims, only those that were not gender-based. As with many federal courts of appeal decisions that have not found a gender basis for harassing conduct in same-sex sexual harassment claims, Dillon employed an unnecessarily cramped and inflexible standard when assessing but-for causality. Nevertheless, Dillon leaves the door ajar for future same-sex sexual harassment claims.

D. Oncale v. Sundowner Offshore Services, Inc. 318—Supreme Court Precedent

On March 4, 1998, the Supreme Court decided Oncale v. Sundowner Offshore Services, Inc. The specific issue was whether Title VII encompasses same-sex sexual harassment claims. 319 In opting for coverage, the Court reversed the Fifth Circuit and offered an abbreviated albeit multifaceted justification, which essentially drew upon Supreme Court sexual harassment and sex discrimination decisions but, did add some new language. First, Oncale set forth a bifurcated response to the argument that Congress did not intend for Title VII to cover same-sex sexual harassment. After re-emphasizing the breadth of Title VII’s language, the Court noted that the complexities of human motivations contraindicate presuming as a matter of law that “[H]uman beings of one definable group will not discriminate against other members of that group.” 320 Moreover, “statutory prohibitions

out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.” Id. at 251. If catch 22 were a part of plaintiffs’ evidentiary burden, males never could establish a claim under Price Waterhouse.

315. Dillon v. Frank, 1992 WL 5436, at *9. Alternatively, one might ask whether the harassers would have subjected a suspected lesbian to the same quantum and kind of conduct to which they subjected Dillon. If not, the harassment was gender-based. See, e.g., Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1994) (finding that, although the supervisor was also abusive to men, his abuse of women was gender-based).

316. Specifically, the court focused its attention on whether sex, sexual orientation, or distaste for the plaintiff was the but-for cause of the harassment. Dillon v. Frank, 1992 WL 5436, at *9.

317. Id. In Yeary v. Goodwill Indus., for example, the Sixth Circuit held that where a homosexual male “propositions another male because of sexual attraction,” such harassment is because of the victim’s gender and is covered under Title VII. Yeary v. Goodwill Indus., 107 F.3d 443, 448 (6th Cir. 1997).


319. Id. at 1000.

320. Id. at 1001 (quoting Castaneda v. Partida, 430 U.S. 482, 488 (1977)). Although the Court rejected the application of the presumption as a matter of law, is the presumption
often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of laws rather than the principal concerns of our legislators by which we are governed.\textsuperscript{321}

Second, \textit{Oncale} detailed a three-part response to concerns that bringing same-sex sexual harassment under Title VII could create a statutory “general civility code for the American workplace.”\textsuperscript{322} \textit{Oncale} observed that regulating same-sex sexual harassment posed no greater threat to social or civil freedom than regulating traditional sexual harassment.\textsuperscript{323} Nevertheless, the Court suggested that it will shield socially acceptable behavior from Title VII’s sanctions by strictly construing both the “because of sex” or gender-based nexus and the environmental nexus.\textsuperscript{324} For example, \textit{Oncale} adumbrated Title VII’s reach by declaring that neither mere words of “sexual content or connotation”\textsuperscript{325} nor conduct “merely tinged with offensive sexual connotations”\textsuperscript{326} could generate an inference that harassing conduct was gender-based or because of a victim’s gender. In other words, veiled or subtle sexual conduct is inoffensive to Title VII.\textsuperscript{327} In distinguishing between legitimate and illegitimate behavior, “[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”\textsuperscript{328} Thus,

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{321} \textit{Id.} at 1002.
\item\textsuperscript{322} \textit{Id.}
\item\textsuperscript{323} \textit{Id.}
\item\textsuperscript{324} \textit{Id.}
\item\textsuperscript{325} There is indeed a tension here insofar as Title VII was intended to make the workplace more “civil” by excising uncivil behavior. Thus, Title VII is and was intended to be a civility code of sorts. The question is how deeply should Title VII “cut” in excising uncivil conduct from the workplace.
\item\textsuperscript{326} \textit{Id.} Tolerating sex-tinged harassing conduct is less threatening to socially acceptable conduct.
\item\textsuperscript{327} See, \textit{e.g.}, Baskerville v. Culligan Int’l Co., 50 F.3d 428, 430 (7th Cir. 1995) (distinguishing “sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures [from] occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers”) (citations omitted).
\item Examples of sex-tinged conduct include: (1) making a “grunting sound” like “um um um” when a woman wears a leather skirt or (2) complaining that your pillow was your only company in a hotel room and then looking “ostentatiously at [your] hand . . . to suggest masturbation.” \textit{Id.}
\item\textsuperscript{328} \textit{Oncale} v. Sundowner Offshore Servs., Inc., 118 S. Ct. at 1002 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). This passage suggests that so long as males and females are treated the same, there is no actionable sexual harassment. Matters are, however, hardly that simple.
\end{enumerate}
\end{footnotesize}
differential treatment remains a touchstone for sexual harassment as it has been for sex discrimination.329

One problem here is the ineptness of the “because of sex” criterion for assessing subtlety. If there were a prima facie criterion that permitted subtlety or blatancy to determine the legitimacy or acceptability of sexual conduct, “because of sex” is not it.330 Exactly how “because of sex” would address the subtlety of harassing conduct is entirely puzzling. Historically and logically that criterion has focused on discriminators’ motives for targeting victims rather than on the elusiveness or explicitness of the discriminatory conduct. With respect to motive, what difference could it possibly make, whether the conduct was “sugar coated” or “plain,” so long as the harassing message was effectively communicated?

1. Impact of the Gender-Based Nexus

With the foregoing limitations as a backdrop, the Court set forth three evidentiary standards that victims might use to establish a basis for inferring that their gender triggered the harassing conduct. The first evidentiary route permits victims to establish grounds for inferring this gender-based nexus by showing that they were subjected to “explicit or implicit proposals for sexual activity” and that the harasser was homosexual.331 From this evidence, fact finders may infer that harassers’ sexual desire—and hence, the victim’s gender—motivated the harassment. Here the Court endorsed the evidentiary approach of the Fourth Circuit in Hopkins.332 Unlike Hopkins, however, Oncale offered two other evidentiary avenues for inferring a gender-based nexus, thereby delegating sexual desire to the status of a sufficient rather than a necessary premise for generating inferences of a gender-based nexus. That the Supreme Court embraces the materiality of evidence beyond mere sexual desire suggests a recognition that sex transcends the biological realm. The biological definition of “sex” fettered the analysis of some federal courts like the Fourth Circuit.

The second evidentiary route recognizes an inference of a gender-based nexus in sexually heterogeneous workplaces if victims proffer, “direc-

329. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). The Price Waterhouse Court stated:
As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sexual stereotypes.”
330. The subtlety of sexually harassing conduct might conceivably impact assessment about the existence of the environmental nexus.
332. Id.; see also Price Waterhouse v. Hopkins, 490 U.S. at 258.
comparative evidence about how the alleged harasser treated members of both sexes in the mixed-sex workplace." In short, evidence of gender-based disparate treatment in sexually heterogeneous workplaces can infer that sexual harassment was "because of sex." However, it is unclear whether the conduct must be sexual in nature. If not, then the claim is more akin to sex discrimination than to sexual harassment. On the other hand, if Oncale intended to include both sexual and nonsexual behavior, then—despite incidentally conflating sexual harassment with sex discrimination—victims of same-sex sexual harassment would stand on equal ground with victims of traditional sexual harassment.

Under the third evidentiary route factfinders may infer a gender-based nexus where a harasser subjects her victims to "specific and derogatory terms" which reveal that she "is motivated by general hostility to the presence of women in the workplace." Again, Oncale does not specify whether the "specific and derogatory" terms must be sexual in nature. Presumably, this standard contemplates terms like "slut" or "whore" which innately burden women more than men. Nor is it clear whether the "specific and derogatory" standard is applicable in sexually heterogeneous, as well as sexually homogeneous workplaces. Since evidence of differential treatment can establish a foundation for a gender-based inference in a sexually heterogeneous environment, there would be no need for victims there to meet the higher "specific and derogatory terms" standard. Therefore, it would seem that the "specific and derogatory" standard would prove more useful for analyzing same-sex sexual harassment in sexually homogeneous work places.

Apparently, Oncale's own admonition about intergroups vulnerability did not prevent the Court from imposing a heavier evidentiary burden on victims of same-sex sexual harassment. In summary, the Court forecasted that it will narrowly construe "because of sex" to avoid converting Title VII into a "general civility code" that sanctions "acceptable" conduct, as well as conduct in the "twilight zone" of the permissible and impermissible.

2. Impact of the Environmental Nexus and the Reasonable Person Standard

In addition, Oncale relied on the hostile environment criterion—environmental nexus—and the reasonable person standard to protect some types of on-the-job behavior. The Court reaffirmed its position that the environmental nexus is satisfied only where sexually harassing behavior is "so objectively offensive as to alter the 'conditions' of the victim's

336. See supra notes 201-05 and accompanying text.
338. Id.
339. Id. at 1003.
employment.” The environmental nexus does not recognize conduct that merely rejects the “genuine but innocuous differences in the ways men and women routinely interact” with members of the same sex and of the opposite sex.” Moreover, the environmental nexus together with the reasonable person standard can shield “ordinary socializing” like “male-on-male horseplay or intersexual flirtation” or “simple teasing or roughhousing.” This shield results from obliging factfinders to evaluate “the objective severity of harassment . . . from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances’ [and] . . . the social context in which particular behavior occurs and is experienced by its target.”

The attempt to distinguish “ordinary socializing” from unconventional socializing typifies the herculean task of separating the “wheat” from the “chaff” in same-sex sexual harassment litigation. The roles of the determinants of conduct that constitute “ordinary socializing” are anything but clear. For instance, does the characterization “ordinary socializing” depend entirely on the environment in which the conduct occurs? Because there must be a floor beneath which no conduct is protected, the environment in which the conduct arises should not unduly influence the perimeters of “ordinary socializing.” Given the tension between the environmental nexus and the reasonable person standard, considerable vigilance is indicated when one applies a standard like “ordinary socializing” to the diverse situations that arise in same-sex sexual harassment litigation. “Ordinary socializing” in a lumber camp or some other “macho” environment is likely to differ substantially from “ordinary socializing” in a monastery. To what extent should the courts permit the vagaries of environment to mediate the definition of reasonableness and decency, especially under a socially remedial statute like Title VII?

Horseplay among males might very well present a concrete instance of “ordinary socializing” run amuck. Oncale seems to exempt at least some forms of horseplay as “ordinary socializing.” Recall, however, that in Quick, horseplay, in the form of bagging, assumed a distinctly sexual visage and was imposed on males ostensibly because they were males, since only males can be bagged. Bagging arguably constituted “ordinary socializing” in the Donaldson Company. Nevertheless, is it unreasonable for an employee of Donaldson to object to being bagged? In other words, to tolerate any and all “socializing” that might be “ordinary” in a particular environment is to risk sacrificing individual sensitivities up to and including those of a reasonable person under the same or similar circumstances. Quick

340. Id.
341. Id. (emphasis added).
342. Id.
343. Id. (citing Harris v. Forlift Sys., Inc., 510 U.S. 17, 23 (1993)).
344. Id.
345. Id.
347. See Quick v. Donaldson Co., 90 F.3d at 1379.
correctly viewed bagging as gender-based conduct that created a hostile environment for the plaintiff. Therefore, to the extent that bagging constituted “ordinary socializing,” Quick would not contort the reasonable person standard to subserve a social standard. Instead, Quick effectively employed Title VII as a “general civility code” and “cleaned up” the environment.

Finally, with respect to the environmental nexus, Oncale declared that standing alone, “words” or “physical acts” do not capture the “constellation of surrounding circumstances, expectations, and relationships” that underlie either sexual harassment or ordinary human interaction. At some point, however, either words or physical acts alone should satisfy the environmental nexus, irrespective of the surroundings. For example, placing one’s penis on the neck and arm of a physically restrained, unwilling person satisfies—or should satisfy—the environmental nexus, irrespective of any other surrounding circumstances, expectations, or relationships.

VI. TITLE VII’S COVERAGE OF SAME-SEX SEXUAL HARASSMENT

Oncale v. Sundowner Offshore Services, Inc. omitted several relevant issues concerning the scope of Title VII’s coverage of same-sex sexual harassment, which have plagued federal courts in same-sex sexual harassment litigation. For example, many federal courts struggle with the causation phase, attempting to determine whether a victim’s gender or sexual orientation triggered the sexual harassment. They frequently and erroneously find that sexual orientation is the but-for cause of the harassing behavior. Even courts that recognized same-sex sexual harassment claims sometimes deny them by limiting “sex” to its biological definition ostensibly to avoid incidentally protecting sexual orientation. To avoid this problem requires adjusting the but-for analytical paradigm to reflect the nature of same-sex sexual harassment, as well as increasing the definitional scope of “sex.” Also, some federal courts ignore the impact of role stereotypes when determining whether a victim’s gender motivated an episode of same-sex sexual harassment. Finally, when engaging in but-for analysis, federal courts often do not recognize the mixed-motive nature of same-sex sexual harassment. The remainder of this article will address these issues.

A. Scope of “Sex”

The issue here is whether courts should aggressively define “sex” and thereby risk protecting some harassment based on sexual orientation. Or whether they should narrowly define “sex” and risk tolerating some otherwise unlawful gender-based sexual harassment. Nothing in Title VII’s

349. See id. at 1002-03.
351. However, the Court properly ignored these issues, given the very narrow issue of coverage in Oncale. See id. at 1000.
legislative history directly addresses this issue. In all likelihood, Congress never gave the scope of “sex” serious thought. Congress was primarily concerned with assessing the scope and impact of race discrimination; “sex” was a last-minute inclusion.\(^{352}\) Had Congress contemplated the scope of “sex” regarding same-sex sexual harassment, it would have been constrained by the social views of the 60s regarding gay rights. Nor could any have foreseen the gay rights movement of the 80s and 90s. As a result, speculation about how Congress might have defined “sex” in the 60s usually illuminates ideology more than the intended scope of “sex.”

Therefore, the manifest and unavoidable task is to fathom the correct scope of “sex.” Rather than attempting to wring meaning from the dry, sparse verbiage of Title VII’s legislative history, it is more useful to discern and heed Title VII’s broad guidelines, purposes, and policies, which stand as monuments of Congress’s intent respecting that statute.\(^{353}\) Then supplement those legislative sentinels with Supreme Court precedent and EEOC expertise, and use them to discern: (1) the scope of “sex” and, hence, the viability of same-sex sexual harassment claims; (2) the nature and strength of the nexus in those claims; and (3) the propriety and wisdom of ignoring gender-based discrimination either to avoid protecting sexual orientation or to protect other dysfunctional, albeit legitimate, behavior like horseplay.

1. **Scope of “Sex”—Supreme Court Precedent**

   a. **Meritor Savings Bank v. Vinson.**\(^{354}\) The Supreme Court, in *Oncale,* never fully addressed the proper scope of “sex” in same-sex sexual harassment; nevertheless, a line of Supreme Court precedent helps to outline the Court’s probable path in this area of the law. *Meritor Savings Bank v. Vinson* is a case in point. *Meritor* did not address the scope of “sex,” but its language adumbrates these dimensions. In *Meritor* the defendant, a heterosexual male, abused and humiliated the plaintiff, a heterosexual female, and obtained sexual favors from her.\(^{355}\) During her four-year tenure with the bank, the plaintiff’s supervisor raped her, followed her to the bathroom, and

\(^{352}\) Recall that “sex” was an afterthought in Title VII. *See, e.g., Whalen & Whalen, supra* note 11, at 115-17.

\(^{353}\) *See, e.g., Barnes v. Castle,* 561 F.2d 983, 994 (D.C. Cir. 1977). The *Barnes* court stated that:

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

*Id.* (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).


\(^{355}\) *Id.* at 60. Some courts that reject same-sex sexual harassment distinguish between these types of conduct and deny Title VII coverage for heterosexual same-sex sexual harassment if the conduct in question is not a sexual advance or designed to elicit sexual favors.
fondled her before coworkers.\textsuperscript{356} Moreover, to preserve her job, she agreed to have sexual intercourse with her supervisor approximately fifty times during her tenure with the employer.\textsuperscript{357} Still, the plaintiff never welcomed the supervisor’s sexual advances.\textsuperscript{358}

Meritor indirectly addresses the proper scope of “sex” under Title VII. First, Meritor required that actionable harassing conduct must be sexual in nature.\textsuperscript{359} Then the Court poured content into that proposition, by endorsing the “entire spectrum” language, which \textit{Oncale}\textsuperscript{360} also endorsed: “The scope of [§ 2000e-2(a)(1)] is not confined to explicit discriminations [sic] based ‘solely’ on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of \textit{men and women} resulting from sex stereotypes.”\textsuperscript{361}

The preoccupation of some federal courts with tolerating same-sex sexual harassment that is even partly based on sexual orientation is directly at odds with this “entire spectrum” language. To fully implement the “entire spectrum” approach, federal courts must broadly define “sex” to exploit the positive relationship between “sex” and the likelihood of finding a but-for link between sexually harassing conduct and a victim’s gender. Furthermore, Meritor adopted the EEOC’s broad definition of sexual harassment, which includes, “[i]nclude sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature to condemn any harassing of a sexual nature, courts must venture beyond the strict biological definition of ‘sex.’”\textsuperscript{362}

b. General Electric Co. v. Gilbert\textsuperscript{363} and Newport News Shipbuilding & Dry Dock Co. v. EEOC\textsuperscript{364}: \textit{Impact of the Pregnancy Amendments on the Scope of “Sex.”} Read together, General Electric Co. v. Gilbert, Newport News Shipbuilding & Dry Dock Co. v. EEOC, and the Pregnancy Discrimination Act of 1978\textsuperscript{365} shed some light on the intended scope of “sex.” Although this line of cases and the Act focus on sex discrimination, their rationale and

\textsuperscript{356} Meritor Sav. Bank v. Vinson, 477 U.S. at 60.

\textsuperscript{357} Id.

\textsuperscript{358} Id. at 68 (stating that the question is whether the sexual advances were welcomed not “whether [the plaintiff’s] . . . actual participation in sexual intercourse was voluntary”).

\textsuperscript{359} Id. at 65-68.


\textsuperscript{362} Meritor Sav. Bank v. Vinson, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)).


policies fully apply to sexual harassment, since Meritor viewed sexual harassment as a subset of sex discrimination.366

Gilbert considered whether a company administered its medical insurance program in a manner that discriminated against female employees because of their gender.367 While including both male and female employees under all covered risks, the company excluded all pregnancy related disabilities, but included all uniquely male procedures like vasectomies.368 Because Congress did not specifically define “discrimination” in Title VII and because the Equal Protection Clause had a rich antidiscrimination jurisprudence,369 Gilbert drew heavily upon equal protection jurisprudence as announced in Geduldig v. Aiello.370

Ultimately, Gilbert held that the plaintiff was the victim of neither disparate-treatment, nor disparate-impact discrimination. Disparate-treatment was absent because the evidence did not reveal “‘that distinctions involving pregnancy [were] mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.” 9371 Disparate-impact was absent because “‘[t]here [was] no risk from which men [were] protected and women [were] not. Likewise, there [was] no risk from which women [were] protected and men [were] not.’” 372 According to Gilbert, the cost373 of covering pregnancy-related disabilities—and perhaps their voluntary nature374—rather than discriminatory animus, motivated and justified their exclusion.375

In lamenting the impact of General Electric’s medical screening device rather than the company’s motivation, Justice Steven’s dissent offered two poignant points. First, “the company . . . devised a policy that, but for pregnancy, offers protection for all risks, even those that are ‘unique to’ men or heavily male dominated.” 376 Second, Justice Stevens noted that, “it is the capacity to become pregnant which primarily differentiates the female from the male.”377

366. “Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” Meritor Sav. Bank v. Vinson, 477 U.S. at 64 (alterations in original). Meritor also adopted the EEOC’s definition of sexual harassment as a form of sex discrimination prohibited by Title VII. Id. at 65.


368. Id. at 153 (Brennan, J., dissenting).

369. Id. at 133.


372. Id. at 135 (quoting Geduldig v. Aiello, 417 U.S. at 496-97).

373. Id. at 130 (“[W]ith pregnancy-related disabilities excluded, the cost of the Plan to General Electric per female employee was at least as high as, if not substantially higher than, the cost per male employee.”).

374. Id. at 151 (“The Court argues that pregnancy is not comparable to other disabilities since it is a voluntary condition rather than a disease.”) (Brennan, J., dissenting).

375. Id. at 138-39.

376. Id. at 160 (Stevens, J., dissenting) (emphasis added).

377. Id. at 162.
The majority’s conclusions proved contrary to Congress’s intent. Approximately two years after Gilbert, Congress enacted the Pregnancy Discrimination Act, which essentially overruled Gilbert. The Pregnancy Act stated, in relevant part, “The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .” The global, sex-neutral language noted in Meritor and Harris was also evident in the floor debates. Later in Newport News, Justice Stevens cited that language: “Proponents of [the Civil Rights Act of 1964] stressed . . . that Congress had always intended to protect all individuals from sex discrimination in employment—including but not limited to pregnant women workers.” Also, other legislators concluded that, “The [Gilbert] Court has ignored the congressional intent in enacting Title VII . . . that intent was to protect all individuals from unjust employment discrimination, including pregnant workers.”

Regarding the scope of “sex” and the incidental coverage of sexual orientation, an intent to shield “all individuals” from sex discrimination reflects an intent to protect all individuals, irrespective of secondary considerations like sexual orientation. Furthermore, because sexual harassment is a recognized form of sex discrimination, an intent to shield “all individuals” from sex discrimination is, or should be, by definition, an intent to shield “all individuals” from sexual harassment.

Nor should one abandon this mandate at the but-for level of analysis. Ignoring gender-based conduct that surfaces in the presence of sexual orientation hardly implements either the letter or the spirit of this language. Indeed, the Pregnancy Discrimination Act did not stop with pregnancy as a

379. See id.
380. Id. (emphasis added).
383. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 681 (1983). This language seems consistent with the oft-repeated proposition that Title VII brooks no discrimination, subtle or otherwise. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (“[I]t is abundantly clear that Title VII tolerates no racial [or sex] discrimination, subtle or otherwise.”).
385. See supra note 199 and accompanying text.
386. Meritor specifically addresses the scope of Title VII in the guise of a heterosexual sexual harassment claim and never specifically addressed Title VII’s coverage of same-sex sexual harassment claims. Therefore, one might argue that Meritor intended to apply its liberal interpretation of Title VII’s coverage only to traditional sexual harassment. Also, one could make the same argument for the quoted language in Gilbert. Yet, both of those decisions were silent regarding the limitations of their language; that silence should redound to the employees’ benefit.
proxy for sex but continued along that continuum of proxies to include “any medical disability.” Congress, thus, manifested an “if in doubt, then include” mindset rather than the reverse. Congress’s overruling of Gilbert and the enactment of the Pregnancy Discrimination Act support the proposition that courts should broadly interpret “because of sex” to protect employees from harassment motivated by factors merely related to an employee’s sex because gender-based considerations reside in those factors. By affirmatively protecting pregnancy-related medical conditions, Congress manifested a clear intent to prohibit not just discrimination directly related to biology but discrimination once or even twice removed. Consequently, courts err by strictly limiting Title VII’s coverage to biological gender without carefully and explicitly considering the proximity of biological gender and sexual orientation. Failing to afford such consideration arguably suggests that gender-based factors and sexual orientation are mutually exclusive. They are not. One can hardly evaluate a person’s sexual orientation without considering that person’s biological gender and its impact on role stereotypes. The reversal of Gilbert and the passage of the Pregnancy Discrimination Act contraindicate a strict biological definition of sex.

B. The Mixed-Motive Paradigm and the Scope of “Sex”

This section builds upon the observation in Tietgen v. Brown’s Westminster Motors, Inc. that same-sex sexual harassment claims are really mixed-motive claims, a pivotal fact in determining causal strength in same-sex sexual harassment disputes. Hazen Paper Co. v. Biggins and Price Waterhouse v. Hopkins offer some guidance regarding the proper nexus for mixed-motive litigation, a theory of claim that includes same-sex sexual harassment disputes.

1. Biggins

Biggins offers guidance in this area because: (1) the Supreme Court draws upon Title VII jurisprudence when interpreting the Age Discrimination

388. See infra Part VII.
389. See infra Part VII.
391. Id. at 1502; see also Robert S. Whitman, Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII, 87 Mich. L. Rev. 863, 865 (1989). This commentator has argued that all disparate treatment under Title VII involves mixed-motives. Professor Whitman suggests that the mixed-motive paradigm is but a direct-evidence variant of the pretextual paradigm and the distinction between those theories of claim is one without a difference. Id.
394. See infra Part X.
in Employment Act of 1967 (ADEA)\textsuperscript{395} and (2) Biggins is a mixed-motive case under the ADEA.\textsuperscript{396} Consequently, Biggins illuminated the nature of the nexus regarding age, discriminatory animus, and stereotypes.\textsuperscript{397} To apply the Biggins rationale to same-sex sexual harassment, one needs merely to substitute gender for aged. Biggins observed, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears."\textsuperscript{398} Furthermore, "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."\textsuperscript{399} This language suggests that Title VII prohibits discriminatory decisions even if they are not entirely based on legitimate factors like sexual orientation, so long as an illegitimate factor like gender helped to trigger the discriminatory conduct. To this extent, Biggins echoed Price Waterhouse.\textsuperscript{400}

2. Price Waterhouse

In applying mixed-motive analysis to Title VII disputes, Price Waterhouse adopted the motivating factor test and held that employers need not specifically rely on biological gender to run afoul of Title VII.\textsuperscript{401} In other words, gender needs only to have been "a factor in the employment decision at the moment it was made."\textsuperscript{402} Furthermore, reliance on even "sex-based considerations" rather than a victim's biological sex suffices to trigger Title VII protection.\textsuperscript{403} When confronted with mixed-motive sex discrimination, Price Waterhouse drew upon policy and other considerations to assess causal strength and to assign defendants the burden of proving but-for causality.\textsuperscript{404} Price Waterhouse explicitly embraced the position that "because of sex" prohibits employers from making gender "a factor" in employment decisions, though they may consider non-gender-based, or

\textsuperscript{396.} Hazen Paper Co. v. Biggins, 507 U.S. at 610.
\textsuperscript{397.} Discriminatory animus and stereotypes are undoubtedly involved in same-sex sexual harassment claims. See infra note 323.
\textsuperscript{398.} Hazen Paper Co. v. Biggins, 507 U.S. at 611 (emphasis added).
\textsuperscript{399.} Id. at 610 (emphasis added).
\textsuperscript{401.} Id. at 244-45 (holding that plaintiffs establish prima facie cases of sex discrimination once they show "that gender played a motivating part in an employment decision.").
\textsuperscript{402.} Id. at 241 (emphasis added). The analogous "employment decisions" in same-sex sexual harassment disputes is the decision to sexually harass a plaintiff.
\textsuperscript{403.} Id. at 242 (emphasis added).
\textsuperscript{404.} See id. at 244.
legitimate, factors. This fundamental standard permeates Title VII mixed-motive jurisprudence. The mixed-motive paradigm and the motivating factor test are critical in the battle against same-sex sexual harassment.

Although few have explicitly recognized it, given their behavior, federal courts would be hard-pressed to deny that same-sex sexual harassment claims are not mixed-motive in nature. Federal courts effectively view causal factors, in same-sex sexual harassment claims, as either legitimate or illegitimate; yet, they ignore the evidentiary teachings of Biggins and Price Waterhouse. Every federal court that has decided a same-sex sexual harassment claim has essentially declared sexual orientation to be a legitimate factor and a victim’s gender to be an illegitimate factor. Other federal courts contrast the legitimacy of other activities like horseplay with the illegitimacy of gender.

The difficulty lies not in discerning the presence of legitimate and illegitimate factors in same-sex sexual harassment disputes but in how federal courts perceive and weigh these factors. Some federal courts emphasize sexual orientation to the exclusion of gender-based conduct, permitting any evidence of sexual orientation to obviate a search for underlying gender-based considerations. Other federal courts hastily discount gender-based harassing conduct between heterosexual males as mere horseplay tinged with sexual conduct rather than the reverse. These courts seem content to cease analysis after finding that the harassing conduct resembles or involves horseplay, without determining: (1) if gender plays any part in the decision to subject particular males to such derogatory, humiliating “horseplay” or (2) why the “horseplay” involves a particular kind of sexual conduct.

Moreover, other courts seem content to further burden the victim by ascribing the harassment to a superficial criteria like the plaintiff’s shyness, prudery.

405. Id. at 241-42. “[W]hile an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons.” Id. at 244.


407. See, e.g., Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996). (“Title VII does not afford a cause of action for discrimination based upon sexual orientation.”); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (“Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”).


409. See infra Part VIIIA for a further discussion of balancing sexual orientation, as a legitimate factor, against gender-based discrimination.


411. See, e.g., Wrightson v. Pizza Hut of Am., Inc., 99 F.3d at 140 (discussing the conduct of a harasser who rubbed his penis against the plaintiff’s buttocks).
vulnerability, etc.412 Given the multidimensional nature of same-sex sexual harassment, answers to these inquiries will not likely appear on the face of the conduct.

The courts mentioned above overlook the fact that instead of being discrete, legitimate and illegitimate factors form a conceptual Venn diagram with the illegitimate partially overlapping the legitimate.413 The diagram illustrates that same-sex sexual harassment may occur either solely because of: (1) gender-based or non-gender-based considerations or (2) some combination thereof. Thus, when a same-sex sexual harassment claim arises out of sex-tinged horseplay, sexual orientation, etc., one must carefully assess the presence of subsurface gender-based motives.414

Nonpivotal factors that, nevertheless, strongly influence, but do not unilaterally determine, outcomes, or decisions to discriminate, are invisible under the traditional “but for” lens.415 Yet in any workplace, the ease with which employers can weave unlawful motives into the tapestry of legitimate motives largely depends on the degree of causal fungibility between the lawful and the lawful—sexual orientation and sex. Likewise, the difficulty of excising unlawful motives from the tapestry is positively related to the functional, and to some extent conceptual, fungibility of the lawful and unlawful motives. In this setting, the absence of a sensitive, outcome-determinative measure of causality virtually obliges factfinders to forego influential facts and effectively relegates plaintiffs to find “but-for” needles in factual “hay stacks.”416

Under these circumstances, the “motivating factor” test is strongly indicated as a measure of the strength between gender and sexually harassing conduct. The “motivating factor” test acknowledges that other motives—like sexual orientation—may share the causal lime light with gender, without destroying the gender basis of a plaintiff’s prima facie case.417 “Because of” is not a congressional mandate to burden plaintiffs

412. See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996) (concluding that the plaintiff’s “prudery, or shyness, or other form of vulnerability to sexually-focused speech” triggered the harassment).

413. See supra Part VII.A-E for a discussion of the relationship between legitimate and illegitimate factors.

414. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 284 (1989) (“[S]ex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision.”) (Kennedy, J., dissenting); Doe v. City of Belleville, 119 F.3d 563, 575 (7th Cir. 1997) (examining the harassers’ views of sexual stereotypes as a motive for their behavior).


417. See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d at 1196 (examining the plaintiff’s personality as a trigger of sexual harassment).
with the entire weight of establishing a traditional but-for nexus.\textsuperscript{418} Instead, "because of" manifests Congress's intent simply to link unlawful discriminatory animus to the protected trait in question—a victim's gender.\textsuperscript{419} Indeed, under a canopy of policy-driven, social legislation like Title VII, invariably requiring plaintiffs to establish gender as a pivotal but-for factor in discriminatory decisions is counterintuitive, counterproductive, and hence, contraindicated. The antidiscriminatory policy, as well as the facts and circumstances surrounding a particular species of discrimination, should inform the strength of the causal nexus that plaintiffs must demonstrate.\textsuperscript{420}

\textit{Quick v. Donaldson Co.},\textsuperscript{421} offers a ready example of a mixed-motive, same-sex sexual harassment claim. Recall that the heterosexual male plaintiff, in \textit{Quick}, was subjected to a particularly puerile and cruel form of horseplay entitled bagging.\textsuperscript{422} In deciding to exclude bagging from Title VII's scope, the trial court stated:

To say "bagging" is merely horseplay is to trivialize its cruel and physical nature. Yet, to say "bagging" is purely a sexually motivated activity exaggerates the sexual component involved. The only thing sexual about "bagging" is that the aggressor aims his non-sexual aggression at genitails.

\textsuperscript{418} For purposes of mixed-motive litigation, the "motivating factor" tests rejects the traditional view that but-for causality involves showing the pivotal role of an illegitimate factor in discriminatory decisions. \textit{See}, \textit{e.g.}, DeGrace v. Rumsfeld, 614 F.2d 796, 805 (1st Cir. 1980). One issue before the court was whether a black employee's fear for his physical safety was a but-for consideration in his decision to stay away from work. \textit{Id.} at 803. In addressing the nature of but-for causality, the court rejected the district court's position that, in a pretextual, disparate-treatment case, but-for causality was satisfied by a showing that fear for his safety was "at least part of the reason for his absence." \textit{Id.} at 806. The court held that to establish but-for causality, the plaintiff must show that "fear [was] a determinative factor, not merely a reason which reinforces plaintiff's decision on another, non-legitimate, ground to stay away but which, by itself, is not operative." \textit{Id.}; see also Miller v. Cigna Corp. 47 F.3d 586, 588 (3d Cir. 1995) (holding that in a pretextual, disparate-treatment case, "the plaintiff's burden is to prove that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process").

\textsuperscript{419} \textit{See} Price Waterhouse v. Hopkins, 490 U.S. at 242 (observing that Title VII recognizes degrees of causality without the realm of the but-for standard).

\textsuperscript{420} In the wake of \textit{Price Waterhouse}, the courts have made direct evidence the portal to the mixed-motive cause of action. To obtain a mixed-motive instruction, plaintiffs must adduce direct evidence that gender motivated—was a factor in—the discriminatory decision in question. In any event, direct evidence of discrimination is hardly scarce in same-sex sexual harassment litigation. In fact, the very nature of same-sex sexual harassment usually generates direct evidence. Therefore, a requirement for direct evidence will not deter courts from applying the mixed-motive theory of claim to same-sex sexual harassment disputes. \textit{See}, \textit{e.g.}, Robert Brookins, \textit{Mixed Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric}, 59 ALBANY L. REV. 1, 84-89 (1995).


\textsuperscript{422} \textit{Quick v. Donaldson Co.}, 895 F. Supp at 1291-92.
“Bagging” did not happen because male ... co-workers were demanding sexual favors, were expressing sexual interest, or making sexual comments regarding Quick’s gender.\textsuperscript{423}

The court is correct in that bagging is not “purely” or “solely” motivated.\textsuperscript{424} To be actionable under Title VII, however, a decision to harass need not rest solely on gender-based factors.\textsuperscript{425} Indeed, bagging is an example of mixed-motive sexual harassment where a victim’s gender combines with horseplay. The defendants bagged the plaintiff in part because he was male. No male attempted to bag a female in the sense of grabbing her crotch.\textsuperscript{426} The court readily points out the “legitimate” elements in bagging such as the harassers’ “non-sexual aggression.”\textsuperscript{427} Then the court attempts to minimize the sexual component in bagging, while admitting, as it must, the existence of that component.\textsuperscript{428} Short of engaging in actual coitus, grabbing and manipulating another’s genitals is about as sexual as one can get. In addition, the gender component is crystallized where, as in Quick, tormentors bag only one gender.\textsuperscript{429} Finally, because bagging has a “sex” component, it satisfies the “because of” standard as interpreted by Price Waterhouse.

C. Role Stereotypes and the Scope of “Sex”

Violation of role stereotypes was the gist of the problem in Price Waterhouse, which prohibited personnel decisions based even in part on role stereotypes.\textsuperscript{430} In many same-sex sexual harassment disputes, employers sexually harass victims at least in part because the victims do not fit the stereotypical role for their gender.\textsuperscript{431} For instance, harassers have focused on

\textsuperscript{423} Id. at 1296 (emphasis added).
\textsuperscript{424} Id.
\textsuperscript{425} Reversing the district court, the Eighth Circuit reasoned, “Evidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was gender based for purposes of summary judgment.” Quick v. Donaldson 90 F.3d 1372, 1378 (8th Cir. 1996) (emphasis added). Thus, even if aggressors harass both genders, one might find gender-based harassment by determining whether the victim’s group was the primary target.
\textsuperscript{426} Moreover, it is not inconceivable that males would attempt to bag females because of a desire to mortify rather than to seduce them. Yet, most courts would find that such behavior violated Title VII, irrespective of the harasser’s sexual interest in the victim. See Hall v. Gus Constr. Co., 842 F.2d 1010, 1013 (8th Cir. 1988).
\textsuperscript{427} Quick v. Donaldson Co., 895 F. Supp. at 1296.
\textsuperscript{428} Id.
\textsuperscript{429} Id. at 1292 n.3.
\textsuperscript{431} See, e.g., Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988) (describing the plaintiff as “isolate,” never leaving his mother’s house, and “unsophisticated”). See also infra notes 455-58 and accompanying text.
males with effeminate behavioral patterns or with little worldly experience.  

Price Waterhouse extended Title VII’s coverage of sex discrimination, and hence, sexual harassment, to include discrimination based on sex role stereotypes. These stereotypes are part of the “sex-based considerations” that can trigger Title VII’s protection. If sexual harassment enjoys the same protection as sex discrimination—and Meritor suggests it does—then Price Waterhouse, and to some extent Meritor and Biggins, prohibit employers from sexually harassing males or females who violate role stereotypes. Otherwise, one is left with the distinct and troubling proposition that only women violate role stereotypes with impunity. The approach proposed in this article comports with Price Waterhouse’s concern about using sex role stereotypes as surrogates in discriminatory employment decisions.

VII. THE GENDER BASIS OF VARIOUS TYPES OF SAME-SEX SEXUAL HARASSMENT

While dissenting in a traditional sexual harassment case, in 1985, Judge Bork presciently observed, “If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines.” Time and the advent of same-sex

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432. See, e.g., Doe v. City of Belleville, 119 F.3d 563, 574-75 (7th Cir. 1997); see also Case, supra note 5, at 3-4. Case states:

The man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so.

... As to the requirement that employees conform their gender to their sex merely for the sake of such conformity—that women be feminine and men masculine—this is already outlawed by the plain language of Title VII as well as by the prohibitions on sex stereotyping outlined by the Supreme Court.


435. See supra Part VI.B.2.
436. See supra Part VI.A.1.
437. See supra section VI.B.1.
439. Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting). Judge Bork also observed:

It is “discrimination” if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But... Title VII does not prohibit sexual harassment by a “bisexual superior...” Thus, only the differentiating libido runs afoul of Title
sexual harassment disputes have vindicated Judge Bork’s observations. If doctrinal adjustments in 1985, that demand is unmitigated in the wake of same-sex sexual harassment and the concomitant judicial confusion were demanded. Effective adjustment of Title VII’s subsidiary doctrines, however, demands some understanding of the nature of same-sex sexual harassment and of course some familiarity with the limits, strengths, and weaknesses of Title VII’s discriminatory model. Consequently, by examining the gender-related characteristics of various types of same-sex sexual harassment, this Section lays the foundation for recommending doctrinal adjustments to Title VII.

A. Some Preliminary Thoughts

Previous parts in this Article have demonstrated that beneath clouds of confusion and homophobia, courts actually struggle with two basic issues in same-sex sexual harassment disputes: (1) whether gender played a role in decisions to sexually harass victims and (2) whether the harassing conduct is sexual in nature. In attempting to determine whether same-sex sexual harassment is gender-based, courts often become distracted by considerations of sexual orientation. Notwithstanding Meritor’s mandate, the lessons of Price Waterhouse, and other Title VII precedent, many federal decisions arguably suggest that a thinly-veiled desire not to protect sexual orientation fuels the lack of judicial tolerance for same-sex sexual harassment. Refusing to protect sexual orientation is one matter; refusing full protection to concomitant gender-based sexual harassment simply to avoid incidental protection of sexual orientation is another. Courts that adopt this stance have effectively reached one of two conclusions: (1) sexual orientation (sexual behavior or homosexuality) never can involve gender considerations or (2) gender considerations that are intermingled with sexual orientation are somehow unworthy of protection.

Moreover, there is the relatively wide-spread judicial view that sexual orientation, at least in the form of homosexuality, is voluntary or mutable.
That position is either true for both or true for neither. Few heterosexuals would—or honestly could—say that their sexual orientation is voluntary. The vast majority of heterosexuals are heterosexual because that is their natural inclination. At some point they became more attracted to members of the opposite sex, and they followed that path. Why not the same for homosexuals? Except for the insult, it would be laughable even to suggest—not to mention, ask or demand—that heterosexuals change their orientation. Failure of some courts to recognize that homosexuality can be as innate and as immutable as heterosexuality assists in relegating innumerable Americans to endure unlawful and despicable discrimination because of their sexual orientation.

B. Homosexual-Homosexual Sexual Harassment

Same-sex sexual harassment claims can arise in no fewer than six basic varieties. First, in homosexual-homosexual sexual harassment, both the harasser and victim are homosexual males or females. Although the author has found no case that has specifically held that such sexual harassment is because of sexual orientation rather than sex, for the sake of thoroughness, this type of same-sex sexual harassment will be discussed. The issue here is what roles do sexual orientation and gender play in decisions between homosexual males to sexually harass one another.

(emphasis added). But see Watkins v. United States Army, 837 F.2d 1428, 1446 (9th Cir. 1988) (“[W]e have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine. Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change.”). In addition, some empirical evidence suggests that homosexuality is immutable. See, e.g., A. Bell et al., Sexual Preference: Its Development in Men and Women 166-67, 190, 211, 222 (1981). Of course, unanimity is nonexistent anywhere on this matter. See, e.g., Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915, 937-46 (1989) (pointing out that some studies suggest that sexual orientation is formed in childhood while other studies depict homosexuality as immutable in some persons but mutable in others).

443. See Watkins v. United States Army, 837 F.2d 1428, 1446 (9th Cir. 1988). Scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. . . . [I]t seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex? It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment.

Id. (citations omitted).

444. Because the vast majority of same-sex sexual harassment litigation has involved males, this part focuses on male to male sexual harassment.
The short answer is that sexual orientation probably plays an equal role in both homosexual-homosexual and heterosexual-heterosexual mating. Whether homosexual-homosexual sexual harassment surfaces as sexual attraction or as intimidation, the victim's gender and sexual orientation are likely to be two distinct considerations in the harassment decision.

Cursory analysis reveals that a homosexual is no more likely to pursue a potential mate or target solely because of the target's sexual orientation than a heterosexual is likely to pursue a heterosexual woman solely because of her sexual orientation. Otherwise, the line between heterosexuality and homosexuality would substantially fade, if not vanish. If a homosexual male were driven solely by a potential mate's sexual orientation, then, by definition, he would be indifferent to the potential mate's sex. Whether the potential mate was male or female simply would not matter so long as the potential mate preferred the suitor. If this were true for homosexuals then why not for heterosexuals? In fact, it is true for neither.

Although neither gender nor sexual orientation alone affords suitors with all the information they need, both are necessary. Consider two scenarios: (1) a homosexual suitor that knows a target's sexual orientation and (2) a homosexual suitor that does not. In many instances, the suitor either knows the target's sexual orientation or has suspicions about it and acts on those suspicions. Clearly, knowledge of a target's sexual orientation provides partial incentives for both homosexual and heterosexual suitors to approach a target. Still, a precondition for that approach is that the target is of the "right" sex. No suitor makes sexual advances toward a target without considering the target's sex, whether or not the suitor is ignorant of the target's sexual orientation. On the other hand, suitors would squander their time by propositioning targets that are not attracted to the suitor's gender. Thus, both suitors' and targets' genders and sexual orientations are indispensable considerations in decisions to make sexual advances. Therefore, even if Title VII does not prohibit harassment based on sexual

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445. See supra note 274 and accompanying text.

446. See infra notes 540-47 and accompanying text.

447. This proposition is equally true with respect to male heterosexual sexual harassment. See infra Part VII.D.E.

448. Note that sex is inherent in the term sexual orientation. Sexual orientation refers to one's choice of sexual partners. Thus, sex—the biological act and choice of biological genders—is inextricably bound up with considerations of sexual orientation.


While sexual orientation or sexual preference may be a factor in sexual harassment, courts should be careful not to use it to muddy the waters of gender discrimination . . . . The fact that sexual preference may influence the sexual harassment should not be reason to diminish, let alone to invalidate, the fact that a supervisor discriminated against an employee because of the employee's sex.

Id. (emphasis added).
orientation, a target’s gender is sufficiently involved in any sexual advance among homosexuals to warrant Title VII coverage.

Nor does a suitor’s ignorance of a target’s sexual orientation or gender necessarily affect the conclusion in this analysis. Imagine a homosexual male suitor that decides to pursue a female transvestite, only to discover, that “he” is really a she. Unless the suitor has a bisexual bent, he will abandon the pursuit in utter surprise, if not consternation, irrespective of the transvestite’s sexual orientation. The suitor’s disappointment stems largely from his erroneous assessment of and reliance on the target’s apparent gender. In other words, the target’s sex was at the very least a motivating, if not pivotal, factor in the harasser’s decision to pursue “him.”

Now assume, in the foregoing scenario, that the suitor is wholly ignorant of the target’s sexual orientation but correctly assesses the target’s gender as male. The suitor’s disappointment is unabated and stems from the target’s sexual orientation. Thus, irrespective of the suitor’s ignorance of the target’s sexual orientation or gender, those factors are pivotal in the decision to make sexual advances because even, if unknown, they are subject to certain assumptions.

C. Homosexual-Heterosexual Same-Sex Sexual Harassment

Usually this type of sexual harassment involves behavior that either reflects or is presumed to reflect the harasser’s sexual attraction to the victim; consequently, courts have had little difficulty finding a gender basis for this conduct. Perhaps the clearest example occurs where homosexual harassers request sexual favors from heterosexuals of the same gender. In

450. See infra Part VIII for an argument that Title VII covers sexual orientation, insofar as heterosexuality is concerned.

451. The heterosexuality of the suitor does not affect the outcome.

452. See, e.g., Fredette v. BVP Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997) (finding actionable sexual harassment where a homosexual male maître d’ sexually propositioned a male waiter), cert. denied, 118 S. Ct. 1184 (1998); Yeary v. Goodwill Indus., 107 F.3d 443, 448 (6th Cir. 1997) (finding actionable same-sex sexual harassment where a male coworker asked another male employee for a date and continued to use sexual language, touch the employee, and proposition him); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 139 (4th Cir. 1996) (finding an actionable hostile work environment claim by heterosexual employee against homosexual supervisor). Nor is the author aware of any cases of homosexual-heterosexual harassment between males where the conduct was other than direct or indirect requests for sexual favors.

453. See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir.) (denying the plaintiff’s claim for having failed to allege that his harassers were homosexual, thereby affording the court no basis from which to presume that the harassment was based on sexual attraction, and hence, on the plaintiff’s gender), cert. denied, 117 S. Ct. 72 (1996).
fact, at least one circuit limited same-sex sexual harassment claims between males to this specific variety of same-sex sexual harassment claim.454

D. Heterosexual-Heterosexual Sexual Harassment

Given the definition of "heterosexual," one never can show that sexual attraction was the basis for sexual harassment between heterosexual males. Therefore, that particular index of a gender basis is unavailable to heterosexual plaintiffs that suffer same-sex sexual harassment from heterosexuals.

Absence of sexual attraction, however, does not necessarily mean the absence of a gender basis. Heterosexual males often harass other heterosexual males who somehow appear to have violated a sexual role stereotype. In McWilliams v. Fairfax County Bd. of Supervisors,455 for example, coworkers harassed the plaintiff in several ways, including rubbing the plaintiff's penis to an erection.456 The Fourth Circuit linked the harassment to the plaintiff's "known or believed prudence, or shyness, or . . . vulnerability to sexually-focused speech or conduct."457 But the court refused to look just beyond the "shell" of prudence, shyness, or vulnerability and to examine the more fundamental reason for the harassment. Shyness, prudery, or vulnerability to sexual matters is precisely the type of macho-deficient behavior that males display at their own risk, in some environments. Yet, McWilliams failed to consider the proposition that prudery in males violates a male role stereotype and that the harassment is, therefore, triggered by a perceived violation of this role stereotype.458 Even so, under Title VII, the Supreme Court has specifically condemned discrimination based on sex-role stereotypes.459 Irrespective of sexual attraction or role stereotypes, same-sex sexual harassment is—or should be—gender-based where harassers oppress or intimidate only those of their gender or subject male and female victims to

455. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996);
456. Id. at 1199 (Michael, J., dissenting); see also Polly v. Houston Lighting & Power Co., 803 F. Supp. 1, 4 (S.D. Tex. 1992) (finding that gender-based conduct did not exist where the harassers on several occasions called the plaintiff "'faggot,' a 'queer,' and a 'fat bucket of Channelview sh-t'""). The plaintiff further alleged that the harassers kissed him, showed him their genitalia, grabbed and squeezed his genitals, pinched his butt and chest, and forced a broom handle against his rectum. Id.
457. McWilliams v. Fairfax County Bd. of Supervisors, 77 F.3d at 1196 (emphasis added).
459. Id.
460. See infra Part X.A.
different types of harassing conduct that is keyed to certain gender-linked vulnerabilities.\textsuperscript{461}

E. Heterosexual-Homosexual Sexual Harassment

Here, the issue is whether gender may be a basis for harassing conduct when, for example, a heterosexual male harasses a homosexual male. Courts that focus exclusively on sexual attraction as an index for gender based same-sex sexual harassment disputes will deny Title VII coverage to this type of behavior.\textsuperscript{462} Absent clear evidence that a harasser is sexually attracted to a victim, these courts typically conclude that a victim's sexual orientation—homosexuality—founded the sexual harassment.

This approach suffers several drawbacks. First, even cursory inquiries should consider whether the harassing conduct emanated from: (1) a distaste for the victim solely because of his sexual orientation or (2) a distaste for the victim because of his sexual orientation in conjunction with either his gender or some gender-related trait, such as violation of a role stereotype. Unless it is clear beyond cavil that the victim's homosexuality or sexual orientation solely triggered the harassment decision, the second inquiry should be customary, given the unlikelihood that any one factor triggered the harassment.\textsuperscript{463} A desire to intimidate and ridicule mediates much of the harassment that homosexual—and heterosexual—males suffer at the hands of their heterosexual counterparts. The intimidation and ridicule are in turn based on a combination of a victim's gender and sexual orientation.\textsuperscript{464} The two are virtually inseparable, and the harasser should carry the burden of separating them if he can.\textsuperscript{465} Also, a victim's gender needs to be only a factor rather than a but-for factor in the harassment decision. Gender is a factor because the "package" that the harasser dislikes is male and homosexual—a male whose sexual

\textsuperscript{461} See infra Part X.A.

\textsuperscript{462} See, e.g., Hopkins v. Baltimore & Elec. Co., 77 F.3d 745 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996); see also Carreno v. Local Union, No. 89-4083-S, 1990 WL 159199, at *3 (D. Kan. 1990) (holding that heterosexual males harassed the plaintiff because of his sexual orientation and not his gender, attempting to support its conclusion by observing that all verbal insults related to the plaintiff's homosexuality).

\textsuperscript{463} See infra note 531 for Senator Case's views regarding the likelihood of a single factor prompting any human action.

\textsuperscript{464} If one rules out sexual attraction, then the harassment serves to intimidate and humiliate. See supra notes 201-05 and accompanying text for a discussion of why the same harassing behavior might not harass males and females equally. Sometimes the difference in effect of the same conduct might be slight, however. For example, most males and females would be equally outraged if one were to force a bar of soap into their rectums. See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 120 (5th Cir. 1996) (holding that although plaintiff had a bar of soap forced up his anus, it was not sexual harassment under Title VII because there is no recognized claim for same-sex harassment), rev'd, 118 S. Ct. 998 (1998).

\textsuperscript{465} See Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (requiring employers, in mixed-motive cases, to disentangle the legitimate from the illegitimate by showing that they would have made the same discriminatory decision absent gender considerations).
behavior somehow violates a role stereotype. Even where sexual orientation motivates same-sex sexual harassment, the victim’s gender is clearly relevant. Consequently, the notion that sexual orientation could not combine with either gender or a gender-related trait to precipitate harassing conduct seems untenable.

VIII. THE SIGNIFICANCE OF SANCTIONING NONSEXUAL DISPARATE TREATMENT IN SAME-SEX SEXUAL HARASSMENT

*Oncale* properly permitted victims of same-sex sexual harassment to obtain inferences of gender-based harassment where the harassing conduct reflects no sexual desire. In same-sex sexual harassment litigation, nonsexual gender-based disparate treatment can cover a spectrum of gradations ranging from gross to subtle. Although *Oncale* placed some types of disparate treatment within the bounds of Title VII, it is not clear whether the Court will subject all forms of this conduct to Title VII’s provisions.

Before *Oncale*, some federal courts rejected nonsexual disparate treatment as actionable same-sex sexual harassment but accepted this conduct as actionable traditional sexual harassment. Now, in light of *Oncale*, will federal courts accept nonsexual disparate treatment in same-sex sexual harassment to the same extent that they accepted this type of conduct in traditional sexual harassment cases? Or will they recognize only the more blatant forms of this conduct and ignore the subtler forms? Since *Oncale* exempted subtle sexual conduct from Title VII’s coverage, one has even less reason to expect the Supreme Court to recognize subtle nonsexual disparate treatment as unlawful same-sex sexual harassment. Nevertheless, all employee beneficiaries of Title VII should reasonably expect equal treatment thereunder. Also, homosexuality is more likely to be a factor in same-sex sexual harassment claims, while heterosexuality is the likely factor in traditional sexual harassment claims. Both homosexuality and heterosexuality, however, are sexual orientations. Therefore, de facto discrimination against homosexuality occurs where courts afford victims of traditional sexual harassment more protection from nonsexual disparate treatment than victims of same-sex harassment. Yet federal courts have repeatedly declared that Title VII does not recognize discrimination based on sexual orientation.

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467. *See id.*


This type of discrimination against plaintiffs with same-sex sexual harassment claims seems both erroneous and hypocritical.471 Both types of sexual harassment comprehend elements of sexual orientation and share the same dubious distinctions: (1) the absence of any redeeming social or economic value472 and (2) a negative impact on victims' work environments.473

Yet, before Oncale, when deciding same-sex sexual harassment disputes, some federal courts took extra steps to avoid even incidental protection of sexual orientation in the form of homosexuality. For example, they: (1) fabricated legislative history474 and (2) adopted the narrowest definition of foundational concepts like “sex,”475 which cramps the definition of conceptual and functional scopes of gender-based conduct.476 In traditional sexual harassment disputes, these courts voiced no concern about affording sexual orientation the same incidental protection that they stoutly resisted in same-sex sexual harassment disputes.477 It is difficult, indeed, to reconcile this apparent overwhelming desire to sacrifice sexual orientation in one arena with an utter lack of concern about sacrificing it in another.478

This starkly dissimilar treatment of the same factor under highly similar circumstances lays bare the streak of hypocrisy in the bald proposition that Title VII does not protect sexual orientation. In fact, Title VII indirectly protects heterosexuality. Therefore, the purported reluctance to protect sexual orientation strongly resembles a “fig leaf” that scarcely conceals a deeply seated bastion of prejudice and discrimination. A uniform condemnation of environmental sexual harassment, in light of Oncale, should precipitate very different manipulations of Title VII doctrine.

The specific discriminatory result of not recognizing nonsexual disparate treatment in same-sex sexual harassment is the toleration of intimidation and brutality against victims of same-sex sexual harassment. The intimidating disparate treatment can be either gender specific or gender

471. But see Miller v. Vesta, Inc., 946 F. Supp. 697, 712 (E.D. Wis. 1996) (“[H]eterosexuality, as a sexual orientation, is simply not a protected characteristic under Title VII.”).

472. See supra note 1 and accompanying text.

473. See supra note 1 and accompanying text.


475. See, e.g., EEOC v. Walden Book Co., 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) (limiting “sex” strictly to its biological realm by holding: “[T]he plain meaning of the phrase in Title VII prohibiting discrimination based on sex implies that it is unlawful to discriminate against women because they are women and against men because they are men.”).

476. Id.

477. See Hall v. Gus Constr. Co., 842 F.2d 1010, 1013-14 (8th Cir. 1988); see also infra note 480 and accompanying text.

478. See, e.g., Toni M. Massaro, Gay Rights, Thick and Thin, 49 Stan. L. Rev. 45, 45 (1996) (observing that judges “chilling responses to gay rights . . . cannot be explained by inexorable doctrinal logic, but instead arise from hostility toward homosexuality in particular, and ignorance about sexuality in general”).
neutral. Such intimidation is hardly tolerated in traditional sexual harassment. 479

Several cases follow that typify the judicial sensitivity to intimidation-based harassing conduct in traditional sexual harassment disputes. In Hall v. Gus Construction Co., 480 construction workers subjected female employees to a continual barrage of base, verbal insults, and mean-spirited, juvenile pranks many of which lacked any rational relationship to sexual desire. 481 Male workers called the plaintiff and other females "fucking flag girls," "Herpes," and "Blond Bitch." 482 They continually inquired whether the plaintiff "wanted to fuck" and asked the plaintiff and another female to participate in "oral sex." 483 Male employees "cornered" females and rubbed the women's thighs and breasts. 484 One male actually lifted the plaintiff off the ground and held her there while other men touched her. 485 The males: (1) "mooned" women employees; (2) flashed photographs of couples performing oral sex; (3) urinated in the plaintiff's water container; (4) refused to repair a truck that leaked carbon monoxide, where some women drove it as part of their job, even though the carbon monoxide caused drowsiness in both drivers and occupants; and (6) denied female employees transportation to the bathroom and then used survey equipment to observe the women "relieve themselves" in a ditch. 486 In rejecting the defendant's argument that the harassment lacked a gender basis, the court opined:

[P]redicate acts [that underlie] a sexual harassment claim need not be clearly sexual in nature... We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of an employee must... take the form of sexual advances or of other incidents with clearly sexual overtones.... Unequal treatment of an employee or group of employees that would not occur but for the sex of the employee... may... comprise an illegal condition of employment under Title VII.... Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances. 487

481. Id. at 1012.
482. Id.
483. Id.
484. Id.
485. Id.
486. Id.
487. Id. at 1014 (emphasis added) (citations omitted). Zabkowicz v. West Bend Co. offers another example of this highly outcome-determinative distinction. Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984). In Zabkowicz, the plaintiff endured a two-year withering attack involving brutally offensive language, drawings, and gestures. Id. at 782-73. Under no circumstances could the plaintiff's harasser or any reasonable person under the same or similar circumstances expect that such conduct would obtain sexual favors from the
Broadly read, *Hall* suggests that sexual attraction is not indispensable to the existence of gender-based harassing conduct. Instead, gender-based harassment can exist where harassers burden one gender with sexual conduct—abusive or nonabusive—nonsexual conduct, or some combination thereof. For example, refusing to repair the carbon monoxide leak is gender-based, nonsexual conduct imposed along gender lines because the truck was repaired after males began driving it. 488 Conversely, holding the plaintiff off the ground while other males touched her is abusive sexual conduct, which arguably could reflect some degree of sexual attraction but which is highly unlikely to elicit sexual favors and probably was not intended to. Finally, one has no reason to suppose that either nonsexual conduct or abusive sexual conduct that is "because of sex" in traditional sexual harassment cases either would not or should not be so classified in same-sex sexual harassment suits.

To some, the presence of some abusive sexual conduct in *Hall* might suggest that intimidating nonsexual conduct without more will not be found to be actionable in traditional sexual harassment claims, and hence, will not support the same-sex variety. In that respect, *Kopp v. Samaritan Health System, Inc.* 489 begins where *Hall* ends, indicating that, in traditional sexual harassment cases, wholly nonsexual hostile conduct, imposed upon males and females, suffices as gender-based unlawful sexual harassment.

*Kopp* involved a physician who harassed the plaintiff, a medical care specialist, several other female employees, and several male employees. He harassed the women by: (1) yelling and throwing his stethoscope at the plaintiff; (2) referring to another female employee as a "stupid bitch"; 490 (3) "[grabbing] . . . [the plaintiff] with both hands by the lapels of her scrub jacket, . . . her bra straps and her skin, . . . pulling her close[,] . . . [shouting] through gritted teeth[,] . . . [holding] onto her[,] [shaking] . . . her for approximately 30 seconds, then . . . [releasing] her and . . . [pushing] her

plaintiff. *Id.* at 784. Defendants argued that a personality clash, rather than the plaintiff's sex, caused the attack. *Id.* In response, the court stated:

[D]efendants' position misinterprets the requirement that a plaintiff show that she was harassed "because of" her sex. . . . [T]he plaintiff's colleagues resorted to coarse conduct of a sexual nature in regard to [the plaintiff]; the sexually offensive conduct and language used would have been almost irrelevant and would have failed entirely in its crude purpose had the plaintiff been a man. . . . [B]ut for her sex, the plaintiff would not have been subjected to the harassment she suffered.

*Id.* (emphasis added).

488. The author has mixed views on this point. First, one who burdens one gender with nonsexual conduct—like not repairing the carbon monoxide leak—does not engage in sexual harassment because the conduct is not sexual. The proper theory of claim is sex discrimination. On the other hand, if courts insist on labeling this conduct sexual harassment in traditional sexual harassment disputes, then they should recognize it in same-sex sexual harassment disputes.


490. *Id.* at 266.
back." After this incident, the plaintiff manifested physical and emotional disorders such as "insomnia, nightmares, headaches, loss of appetite, aggravation of a back problem, hyper vigilance, and exaggerated startle response," symptoms that recurred during or after the doctor’s presence. In addition to harassing the plaintiff, the doctor, on several occasions, called female employees vulgar names, shouted at them, threw objects at them, swore at them, shoved them, and even threatened one female employee with "charged defibrillator paddles."

This conduct is not only devoid of any hint of sexual attraction but also hardly calculated to obtain sexual favors. Nevertheless, according to the court, sufficient evidence existed to permit a reasonable jury to find "gender-based" harassment. In Kopp’s view, “[P]redicate acts which support a hostile-environment sexual-harassment claim need not be explicitly sexual in nature.

Because Kopp involves only nonsexual, hostile conduct, it more clearly delineates the perimeters of actionable harassing conduct relative to Hall. Yet, in deciding for the plaintiff, Kopp adopted essentially the same language as that in Hall, thereby reaffirming what Hall suggested—purely hostile conduct may be gender-based for sexual harassment purposes.

Finally, because the doctor harassed males and females, Kopp refined its analysis by distinguishing between the types of harassment to which males

491. Id.
492. Id. at 267.
493. Id. at 267-68.
494. See also Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497, 1503 (11th Cir. 1985). The court found gender-based sexual harassment where the plaintiff’s supervisor:

[T]old [her] to start up a production line, [and] later asked her why she did not tell him before she acted.

[He] yelled at her, sent her to do “a hundred different things in two seconds,” and “stayed on . . . [her] back constantly.”

... [The supervisor] talked to her like “[she] was about two years old and two inches high,” called her a “pimp for the office,” interrupted her break periods, and told her he was tired of doing her job.

... [The supervisor] “waved . . . [her] paycheck in everybody’s nose.

And the supervisor] denied [her] a promotion to foreman-supervisor that had been promised.

Id. at 1499 (alterations in original) (citations omitted). The trial court granted the defendant’s motion for summary judgment, reasoning, in part, that the plaintiff suffered no actionable sexual harassment under Title VII because the supervisor subjected her neither to sexual advances nor to other conduct of a sexual nature. Id. at 1499-500.

In ruling for the plaintiff, the Eleventh Circuit stated that sexual harassment “can be of at least two kinds: (1) a threatening, bellicose, demeaning, hostile or offensive conduct . . . because of the sex of the victim; or (2) ‘unwelcome sexual advances.’” Id. at 1503 (emphasis added).

496. Id. at 269 (emphasis added) (citations omitted).
and females were subjected. For example, the doctor burdened male employees less frequently and harshly than females, harassing female employees approximately ten times while harassing males only four times. Also, he touched and harmed female employees but only verbally assaulted males. That differential treatment along gender lines founded the gender-based, but-for nexus. Hall and Kopp are examples of how federal courts might rigorously implement Oncale’s decision to condemn nonsexual disparate treatment in same-sex sexual harassment litigation.

A. The Catch-22 of Protecting Homosexuality as a “Legitimate Factor”

Title VII does not sanction discrimination based on “legitimate” factors—any factors that do not discriminate on the basis of a protected criterion like gender. The universe of “legitimate” factors comprises two general groups, those that Title VII passively protects and those that it affirmatively protects. Passive protection usually means that courts simply ignore discrimination based on certain legitimate factors—big ears or big feet. In contrast, courts affirmatively protect other legitimate factors by balancing, sometimes aggressively, the right to discriminate because of these factors against plaintiffs’ right to freedom from employment discrimination. Affirmatively protected legitimate interests usually have a constitutional dimension or are necessary to and inherent in successful business operations. Examples of such interests include productive efficiency and workmanship, interests shared by society, employers, employees, and plaintiffs alike. In balancing these legitimate interests, courts burden, or should burden, them as much as needed to adequately protect the primary interests under Title VII, such as gender. Sexual orientation is a passively protected legitimate factor. Therefore, ceteris paribus, courts should not aggressively protect it at the expense of gender. Four circumstances place sexual orientation in a rather unique position, however, among passively protected legitimate factors. First, courts equate

497. See id.
498. Id.
499. Id.
500. Bibbs v. Block, 778 F.2d 1318, 1330 (8th Cir. 1985) (“The ‘because of’ language is crucial to employment discrimination suits brought under the statute and any adverse employment decision that is not arrived at ‘because of’ one of the protected criteria is not unlawful under the statute.”) (Ross, J., dissenting).

As far as Title VII is concerned, even otherwise unlawful activities are “legitimate” reasons for discriminating against members of protected groups. Thus, a supervisor may fire a female employee to keep her from discovering that he embezzled corporate funds.

501. Still, otherwise criteria may become illegitimate if they are used arbitrarily to screen out members of a protected group.

502. See Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989) (balancing the employer’s interests in efficiency and workmanship against the plaintiff’s interest in freedom from sex discrimination and ultimately denying the plaintiff any relief because the defendant demonstrated that it would have made the same discriminatory decision because of legitimate considerations).
sexual orientation with homosexuality. And many Americans despise homosexuality and homosexuals as socially valueless, deeply immoral, and inimical to traditional family values. Indeed, many in this country, probably would prosecute homosexuals rather than protect them. Therefore, the last outcome that many Americans desire is to protect homosexuality under Title VII or any other statute. Protection of sexual orientation effectively denies protection to homosexuality.\footnote{503} Second, homosexuality is inextricably intertwined with gender.\footnote{504} Third, in same-sex sexual harassment disputes, victims of discrimination that is somehow linked to homosexuality are effectively stigmatized, and consequently, lose their statutory right to freedom from gender-based sexual harassment.\footnote{505}

These circumstances create a kind of catch-22 for courts. Because they view homosexuality as devoid of social benefit, they seek to penalize it by broadly protecting sexual-orientation based discrimination, which they view as inextricably wedded to homosexuality. But gender and homosexuality are also tightly linked, and, consequently, efforts to passively protect sexual-orientation based discrimination also protects gender-based discrimination. This result is not unlike that which one would expect if gender were balanced against an affirmatively protected legitimate factor with substantial social benefit such as productive efficiency—discrimination based on the affirmatively protected legitimate factor is tolerated at the direct expense of gender. The difficulty is that while burdening gender for the sake of efficiency might arguably produce a bottom line social benefit, burdening gender to indulge homophobia produces no apparent social benefit. In fact, such burdens create a social detriment in as much as they increase the quantum of sexual harassment in employment.

IX. GENERIC DISCRIMINATION, SEX DISCRIMINATION, AND BUT-FOR CAUSALITY

This Part examines the basic structure and limitations of the generic discrimination model—generic discrimination—that founds Title VII as well as the traditional but-for test that refines generic discrimination. Also, this Part examines the need to refine the traditional but-for test in light of the major characteristics of same-sex sexual harassment claims. Finally, this Part suggests some refinements in but-for analysis that should assist plaintiffs and federal courts to negotiate the slippery, craggy, causal precipices in same-sex sexual harassment claims.

A. Nature of Generic Discrimination and Suggested Refinements

The generic discrimination paradigm is wholly distinction-based, contemplating only distinctions—disparate treatment or burdens—between

\footnote{503. But see Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (holding that the Colorado constitutional amendment treated homosexuals unequally as a class).}

\footnote{504. For a discussion of the gender basis of various types of homosexual-based harassment, see supra Part VII.}

\footnote{505. See supra notes 268-69 and accompanying text.}
similarly situated groups or individuals. At this relatively unrefined level, all distinctions are relevant, irrespective of their bases, such as "sex" or the underlying motives therefor, such as sexual favors. Because generic discrimination considers all distinctions as equal, however, it is inherently over-inclusive for Title VII's purposes.

To refine this paradigm, several screening mechanisms or filters have been added which increase sensitivity, enabling the model to target illegitimate discriminatory forces. The "because of sex" criterion screens for sex or gender-based factors. Another screen excludes discriminatory thoughts as a basis for actionable discrimination, recognizing only discrimination based on conduct, "subtle or otherwise." Gender-based conduct is, in other words, the only actionable behavior under Title VII. By requiring a link between a victim's sex and the conduct or burden to which a victim is subjected, the "sex" screen limits the scope of generic discrimination, winnowing the number of relevant distinctions from the virtually infinite to the gender-based.

Finally, the traditional but-for test is a causal screen that weeds out illegitimate, discriminatory conduct that is too weakly connected to a victim's gender. In other words, "sex" focuses generic discrimination on a

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506. "Discrimination" has been defined as: "The ability or power to see or make fine distinctions ..." AMERICAN HERITAGE DICTIONARY, supra note 299, at 532.

507. Senators Case and Clark's interpretive memorandum regarding the bill that later became Title VII stated:

To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

110 CONG. REC. 7213 (1964).

508. See 42 U.S.C. § 2000e(k) (1994). Other group-based traits include race, religion, and national origin. See supra note 11.

509. See 100 CONG. REC. 7254 (1964) (remarks of Sen. Case) ("The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences.") (emphasis added).

510. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973). "Conduct" in this case has a broad range that includes the active and the passive, as well as the subtle and the blatant. See id. at 793-96.

511. The "but-for test" is: "[U]sed in determining tort liability by applying the causative criterion as to whether the plaintiff would not have suffered the wrong 'but for' the action of the defendant. Today, largely discredited as a test because of the many modifications necessary in applying it." BLACK'S LAW DICTIONARY 200 (6th ed. 1990).

512. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282-84 (1976). The Court in McDonald declared that the "because of" language envisioned but-for causality: "The term pretext ... does not mean ... that the Title VII plaintiff must show that he would have been [burdened] ... solely on the basis of his race [and] ... no more is required to be shown
particular trait and the but-for test establishes the minimum level of strength that must exist between the victims’ sex and the burdensome conduct or discriminatory decision.\textsuperscript{513} Theoretically, the traditional but-for screen plus the “sex” screen should exclude all gender-based conduct that is not pivotally related to a decision to discriminate.\textsuperscript{514} Collectively, these screens reduce the likelihood of: (1) fostering frivolous lawsuits and (2) unintentionally sanctioning legitimate activities. Despite their value as selective criteria, both the but-for and “sex” screens are more prone to exploitation by same-sex sexual harassment claims than by traditional sexual harassment claims.

B. Nature of the But-For Test

The but-for test is almost certainly one of the “subsidiary doctrines” that Judge Bork had in mind when he forecasted doctrinal adjustments in Title VII as a quid pro quo for incorporating sexual harassment therein Title VII.\textsuperscript{515} Indeed, such changes are in the offing, given the challenge that same-sex sexual harassment claims have posed for but-for analysis.\textsuperscript{516}

The problem arises because salient characteristics of same-sex sexual harassment fit neatly into and exploit the structural fissures of but-for analysis. First, like most discrimination claims, same-sex sexual harassment often involves concurrent causes.\textsuperscript{517} Yet, as a linear causal standard, the traditional but-for test is capable of accurately discerning the role of only one causal factor in any given outcome.\textsuperscript{518} Consequently, the concurrence of causal

\begin{quote}
\textit{For purposes of this discussion, “traditional” but-for cause is distinguished from a “modified” version discussed below. See infra Part X.A.}
\end{quote}

\textsuperscript{513} Ideally, one should assess the strength of the link or influence between gender and the discriminatory decision. Obviously, that link is not always directly assessable. Therefore, the type of discriminatory conduct often becomes a proxy for assessing the extent to which gender influenced the decision to discriminate.

\textsuperscript{514} The difficulty is that considerations may substantially taint discriminatory decisions without pivotally influencing them.

\textsuperscript{515} See Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) (“If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines.”).

\textsuperscript{516} See, e.g., Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (responding to Judge Bork’s observation by concluding that “legal doctrines such as the burden of proof or causation . . . would require adjustments”) (emphasis added).

\textsuperscript{517} See supra note 413 and accompanying text.

\textsuperscript{518} See supra note 413 and accompanying text.
factors in a multi-linear environment exploits the monodimensionality of the but-for test, nudging it toward analytical impotence or indeterminacy.519 In other words, the efficacy of traditional but-for analysis in discerning whether a particular trait, such as gender, played a pivotal role in a discriminatory decision drops virtually to zero where two or more factors compete for the causal role in that decision.520

By importing traditional sexual harassment into the definition of sex discrimination, the Supreme Court visited even greater pressure on the but-for test.521 Traditional sexual harassment claims had something of a "Trojan horse" effect on Title VII's sex discrimination jurisprudence. For example, the claims introduced the riddle of the bisexual harasser into sex discrimination litigation, revealing a major loophole in but-for analysis.522 Subsequently, same-sex sexual harassment, with its commonplace visage, semantic conundrums,523 and exogenous emotional baggage pressed traditional but-for analysis beyond its structural limits.524

The commonplace visage or legitimate behavior that often veneers same-sex sexual harassment exacerbates the problem of separating lawful from unlawful conduct. Legitimate behavior among males, such as horseplay and joking, often resembles sexually harassing conduct, and thus, vigorously competes with unlawful harassing behavior for the causal limelight in same-sex sexual harassment litigation. This similarity confounds and ultimately skews but-for analysis by drawing attention to superficial, legitimate, non-

266 (5th ed. 1984) ("The event without millions of causes is simply inconceivable ....").

519. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989). (recognizing that causal overdetermination does not divest an outcome of causes merely because one cannot identify a cause whose absence would have precluded the outcome; to ascribe this result to causal overdetermination is effectively to assert that causation was simply "in the air" and outcomes that are causally overdetermined have to cause).

520. Notwithstanding these shortcomings, the traditional but-for test has served Title VII well in the struggle against traditional sex discrimination. Still, some species of sex discrimination have proved taxing. When confronting mixed-motive disputes, for example, the Supreme Court had to modify the but-for test because it did not satisfactorily disentangle or distinguish between sex discrimination from managerial prerogatives. See Price Waterhouse v. Hopkins, 490 U.S. at 244 (substituting the motivating-factor test for the traditional but-for test.).


522. See, e.g., Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."). See supra note 439 and accompanying text for a discussion of Judge Bork's statement. See infra Part X.A for more discussion of the bisexual harasser exception.

523. See supra Part VI.A for a discussion of the confusion surrounding the definition of "sex."

524. See infra Part X.A.
gender-based similarities and away from underlying, gender-based motives that actually cause the conduct.\textsuperscript{525} Thus, in same-sex sexual harassment cases involving males, some courts view harassing conduct that would be intolerable in traditional sexual harassment disputes as mere horseplay.\textsuperscript{526} Instead of recognizing the conduct as unlawful sexual harassment veneered with horseplay, they view the conduct as mere sex-tinged, non-gender-based horseplay.\textsuperscript{527} In their view, the legitimate conduct is based on permissible motives like personal enmity, hooliganism,\textsuperscript{528} or sexual orientation.\textsuperscript{529}

This focus is problematic for at least two reasons. First, to some extent, reasons like personal enmity probably permeate all but the most genteel sexual harassment.\textsuperscript{530} Second, even if personal enmity explains some portion of harassing conduct, one doubts that it is the sole explanation and if it is, what traits or characteristics in the victim caused it? Both Congress and the Supreme Court have recognized that in any given situation, human conduct is seldom amenable to a single motive.\textsuperscript{531}

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\textsuperscript{525} See Quick v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996).
\textsuperscript{526} Compare Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-20 (5th Cir. 1996) (holding that showing a bar of soap up a plaintiff's anus was not sexual conduct), rev'd, 118 S. Ct. 998 (1998), with Hall v. Gus Constr. Co., 842 F.2d 1010, 1014-15 (8th Cir. 1998) (holding that, inter alia, restraining a female plaintiff while other males touched her is gender-based conduct).
\textsuperscript{527} To appreciate the difference between the motives behind horseplay and sexual harassment, one must be sensitive enough to observe that horseplay usually lacks the punitive, gender-based edge of sexually harassing behavior. How often, for example, has mere horseplay involved showing a bar of soap up a plaintiff's rectum? In each case, the question should be whether the conduct is "sex-tinged" horseplay or gender-based conduct tinged with horseplay.
\textsuperscript{528} See Quick v. Donaldson Co., 90 F.3d at 1378.
\textsuperscript{530} See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (holding that in effect the unwelcomeness of sexually harassing conduct is the gravamen of sexual harassment claims).
\textsuperscript{531} See Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) ("Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations."). Senator Case during the Title VII debates stated, "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 Cong. Rec. 13,837-38 (1964). Also, with respect to the proposition that race should be the sole factor in a discriminatory decision, Senator Case noted that such a standard "would render [T]itle VII totally nugatory . . . [because] this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the [T]itle completely worthless." Id. at 13,837; see also Price Waterhouse v. Hopkins, 490 U.S. at 268 (O'Connor, J., concurring) ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one."). (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977)).
Another feature of same-sex sexual harassment disputes that enhances their subtlety and fluidity, and hence, hinders clear analysis, is that they sometimes involve harassers who burden only males in homogeneously male workforces. Under these conditions, one cannot demonstrate intergender disparate treatment—often a requirement in traditional but-for analysis—because only one gender literally is or can be harassed. Consequently, courts that focus too strongly on intergender disparate treatment will find no but-for cause, reasoning that because harassers either did not or could not harass the opposite gender, or but-for cause can not be shown.

A third contributor to causal problems in same-sex sexual harassment cases is the semantic debate surrounding “sex” that has caused some courts to restrict “sex” to its biological definition. The efficacy of the but-for test is positively related to the scope and definitiveness of the conceptual and functional boundaries of factors whose impacts it seeks to assess. In same-sex sexual harassment litigation, the narrow biological definition of “sex” informs and is positively related to the scope of “because of sex,” and hence, to the scope of actionable gender-based conduct under Title VII. The narrow biological definition of “sex” skews but-for analysis, causing it to overlook gender-based conduct, which, under a broader definition of “sex,” would have been recognized. Even undue equivocality about the scope of “sex” reduces the efficacy of but-for analysis. Ultimately, then, parsimonious definitions and hazy perimeters confound efforts to ascertain: (1) whether a victim’s “sex” actually influenced a particular discriminatory event and (2) the magnitude of any influence.

532. See infra Part X.A.
534. See id. at *4 (rejecting the plaintiff’s alleged invitation “to define ‘because of sex’ to mean ‘because of anything relating to being male or female, sexual roles, or to sexual behavior’”); see also Quick v. Donaldson Co., 895 F. Supp. 1288, 1293 n.5 (S.D. Iowa 1995) (citing lower court opinions that view “sex” as pertaining to gender). The court in Quick noted that:

The words “sex” and “sexual” create definitional problems because they can mean either “relating to gender” or “relating to sexual/reproductive behavior.” The two are not the same, but are certainly related and easily confused. Title VII only recognizes harassment based on the first meaning, although that frequently involves the second meaning. However, harassment which involves sexual behavior or has sexual behavior overtones (i.e., remarks, touching, display of pornographic pictures) but is not based on gender bias does not state a claim under Title VII.

Id. (quoting Vande venter v. Wabash Nat’l Corp., 887 F. Supp. 1178, 1181 (N.D. Ind. 1995)).
But see J.E.B. v. Alabama, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) (rejecting the gender-based definition of sex and reserving gender to describe one’s “cultural or attitudinal” rather than “physical characteristics”).

535. See Dillon v. Frank, 1992 WL 5436, at *7 (rejecting the plaintiff’s gender as a cause of the harassing conduct).
536. See Quick v. Donaldson Co., 895 F. Supp. at 1296 (recognizing that the plaintiff’s gender influenced the harassing conduct but rejecting gender as a but-for factor, because the
The emotional baggage that often accompanies same-sex sexual harassment is another problem. It arises because same-sex sexual harassment claims naturally elicit thoughts of homosexuals and homosexuality both of which are currently marginalized in our society. Intolerance for homosexuality helps to blur but-for and other analysis in same-sex sexual harassment cases. Arguably, this social intolerance often surfaces in judicial opinions as heightened sensitivity to sexual orientation—a surrogate for homosexuality—and as exaggerations of the role of sexual orientation as a competing causal factor. Even suspicions that sexual orientation played a part can divert judicial attention away from gender-based factors that would trigger findings of sex discrimination in traditional sexual harassment litigation. Intolerance so muddies the analytical waters that some federal courts appear willing to discount the but-for role of any gender-based factors that coexist with sexual orientation in same-sex sexual harassment disputes.

X. SUGGESTED REFINEMENTS TO TRADITIONAL BUT-FOR ANALYSIS IN SAME-SEX SEXUAL HARASSMENT DISPUTES

Sexual harassment comprises two major components—sex discrimination and sexual conduct. Because sexual harassment is a subset of sex discrimination, the former cannot exist absent the latter. Sex discrimination derives from gender-based conduct and is an entirely separate analytical

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537. As pointed out earlier, however, such claims have the unfortunate tendency to camouflage themselves as horseplay or like actions. See supra note 527 and accompanying text.

538. See, e.g., Dillon v. Frank, 1992 WL 5436, at *7 (recognizing that the plaintiff’s tormentors wrongly cast him as homosexual but still refused to recognize the gender component in the harassment).

539. See supra notes 524-25 and accompanying text.


While sexual orientation or sexual preference may be a factor in sexual harassment, courts should be careful not to use it to muddy the waters of gender discrimination. If a homosexual male is sexually harassed by his homosexual supervisor because the employee is male, then the employee has a cause of action. The fact that sexual preference may influence the sexual harassment should not be reason to diminish, let alone to invalidate, the fact that a supervisor discriminated against an employee because of the employee’s sex.

Id.

541. See supra note 199 and accompanying text.
stage relative to the stage that assesses the nature of the harassing conduct. Factfinders should ascertain whether there is actionable sex discrimination before assessing the sexual nature of the conduct. The remainder of this section suggests approaches for handling issues that arise in same-sex sexual harassment disputes during the sex-discrimination and sexual-conduct stages.

A. Gaps in the Differential-Treatment Approach to But-For Cause—Bisexual and Equal Opportunity Exceptions

Gender-based differential treatment lies at the heart of sex discrimination and, hence, of same-sex sexual harassment disputes. Regarding sexual harassment, the EEOC’s guidelines reflect this standard as well as any:

Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim’s sex (not on the victim’s sexual preference) and the harasser does not treat employees of the opposite sex the same way.

In same-sex sexual harassment litigation, the requirement for gender-based differential treatment has spawned two affirmative defenses—the bisexual and the equal opportunity harasser exceptions—that disguise gender-based differential treatment in superficial uniformity, and thereby, exploit the “blind spot” in but-for analysis. Some courts seem to view a bisexual’s sexual orientation as a basic fact from which to presume the nonexistence of gender-based differential treatment. They reason that, by definition, bisexuals are equally attracted to both genders, and thus, incapable of selecting any one gender as a target for harassment. In short, bisexuals are indifferent to gender. Consequently, even where a bisexual harasses only one gender, these courts apparently presume that no gender basis exists. A victim’s gender is,

542. See, e.g., Martin v. Norfolk S. Ry., 926 F. Supp. 1044, 1050 (N.D. Ala. 1996) (“To simply make all harassment with sexual overtones actionable without the existence of discrimination would be to read the word discrimination out of the statute.”) (emphasis added).
543. See supra note 353 and accompanying text for a discussion of the Court’s adoption of the EEOC standard that encompasses “conduct of a sexual nature.”
545. 2 EEOC COMPLIANCE MANUAL § 615.2(b)(3) (1996) (emphasis added).
546. The author has been unable to locate a case that involves a bisexual harasser. Cases mention this problem only in dicta.
in other words, irrelevant where the harasser is bisexual. On the other hand, some courts seem to reject this presumption and require bisexual harassers to demonstrate that they actually harassed both women and men.

Also, many courts create a loophole for equal opportunity harassers who may be either heterosexual or homosexual and who harass both males and females. Because they are not bisexual, equal opportunity harassers may not rely on their sexual orientation to raise a presumption or inference of non-gender-based differential treatment. Instead, they must adduce affirmative evidence of gender indifference by showing that they actually

547. See, e.g., McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996) ("[T]he . . . bisexual harasser . . . by definition is indifferent to the sex of his victims and so engages in sexual harassment without discriminating on the basis of sex."); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("Only by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike."); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (assuming apparently that a bisexual harasser would by definition harass males and females because bisexuals' sexual orientation establishes an indifference as to which gender they harass: "In the case of a bisexual superior, the insistence upon sexual favors would . . . apply to male and female employees alike.").

548. See, e.g., Ecklund v. Fuisz Tech., Ltd., 905 F. Supp. 335, 339 n.3 (E.D. Va. 1995) (suggesting that the court will consider the bisexual exception only where there are allegations that a bisexual defendant harassed male and female employees: "Although plaintiff alleges that Blake is bisexual, there are no allegations that Blake harassed any male employees . . . . If the plaintiff had alleged that Blake sexually harassed both male and female employees, there would be no 'disparate treatment' and therefore no actionable claim in this case . . . ."); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (denying defendant's motion to dismiss where bisexual defendant failed to allege that he also harassed male employees); Bundy v. Jackson, 641 F.2d at 942 n.7 ("Only by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike."). At least one court has interpreted this passage to mean, "only in the rare case when the supervisor harasses both sexes equally can there be no sex discrimination." Raney v. District of Columbia, 892 F. Supp. 283, 287 (D.D.C. 1995). But see Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1501 n.10 (E.D. Va. 1996) (reasoning that the bisexual exception is availal only where "one assumes that a bisexual chooses whom to solicit for sex according to some criteria other than gender. . . . Instead, it may be that a bisexual solicits a person for sex based on the person's gender, which gender the bisexual prefers at that moment"). For better or worse, this approach effectively collapses the equal opportunity harasser exception into the bisexual exception.

549. See, e.g., Hilding v. McDonnell Douglas Helicopter Co., No. Civ. 91-1079PHX RCB, 1992 WL 443421, at *5 (D. Ariz. June 9, 1992) (stating that where harassers burdened both male and female victims, there is no inference, and thus, no prima facie case of unlawful discrimination); Vinson v. Taylor, 753 F.2d 141, 145 n.7 (D.C. Cir. 1985) (en banc) (Bork, Scalia, and Starr, JJ., dissenting) (reasoning, "only the differentiating libido runs afoul of Title VII").
burdened both genders, and hence, did not engage in gender-based differential treatment.\textsuperscript{550}

Whether they derive from a presumption of gender indifference or from affirmative evidence that both males and females were harassed, the bisexual and equal opportunity exceptions give harassers a unique and untenable opportunity to escape liability for otherwise actionable sexual harassment; their gain is at the direct expense of their victims. Also, as a practical matter, where bisexuality is concerned there is the awkwardness of requiring defendants to establish—or plaintiffs to refute—sexual orientation.\textsuperscript{551}

Another situation in which gender-based differential treatment is invisible to traditional but-for analysis occurs where same-sex sexual harassment arises in a homogeneous, all-male or female workforce. Here, defendants can circumvent a finding of gender-based but-for cause by arguing that only one gender was available to be harassed, and therefore, plaintiffs cannot demonstrate gender-based differential treatment.\textsuperscript{552} This argument implies two preconditions to finding gender-based but-for causality: (1) that harassers must have access to both genders and (2) that harassers must burden only members of the plaintiff’s gender.

B. A Different Approach to the Bisexual and Equal Opportunity Exceptions

Although Judge Bork correctly concluded that the bisexual, and by implication the equal opportunity, exception\textsuperscript{553} would vanish if sex

\textsuperscript{550} But see Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (reasoning that equal opportunity harassers may not shield themselves from liability merely by harassing both genders, where the harassing conduct is distinguishable along gender lines).

\textsuperscript{551} See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1198 (4th Cir.) (Michael, J., dissenting) (stating that to require proof of sexual orientation “would shift from an examination of what happened to the plaintiff to a pursuit, surely to be complicated, far-ranging and elusive, of the ‘true’ sexual orientation of the harasser”), cert. denied, 117 S. Ct. 72 (1996).

\textsuperscript{552} See, e.g., Shermer v. Illinois Dep’t of Transp., 937 F. Supp. 781, 784 (C.D. Ill. 1996) (holding that the plaintiff in a homogeneously male environment could not establish but-for cause based on differential treatment between male and female employees).

\textsuperscript{553} Several commentators have addressed the bisexual exception. See, e.g., John J. Donahue, Advocacy Versus Analysis in Assessing Employment Discrimination Law, 44 STAN. L. REV. 1583, 1611 n.134 (1992) (“[I]t is not unthinkable to argue that each individual who is harassed is being treated badly because of gender.”) (citing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW (1992)); Cathleen Marie Mogan, Note, Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants from Having Their Cake and Eating It Too, 6 NOTRE DAME J.L. ETHICS & PUB’L POL’Y 543, 574 (1992) (contending that Title VII does not necessarily protect supervisors that subject employees to the same type of discriminatory treatment).

Moreover, a third approach may be on the horizon. See, e.g., Tietgen v. Brown’s Westminster Motors, Inc., 921 F. Supp. 1495, 1501 n.10 (E.D. Va. 1996). The Tietgen court observed that the “because of” language in Title VII fosters the bisexual exception, if “one
discrimination were no longer the cornerstone of sexual harassment, it is overkill to decouple sexual harassment from sex discrimination\(^{554}\) when sensitizing the but-for test to recognize facial uniformity would suffice.\(^{555}\) Specifically, one would fashion the analysis to determine whether harassers either would have or actually did use the same type of behavior to harass both genders,\(^{556}\) and if not, whether the harassing behavior tracks along gender lines, for example, whether the harassing behavior effectively or inherently exploits gender-based vulnerabilities.\(^{557}\)

assumes that a bisexual chooses whom to solicit for sex according to some criteria other than gender. Of course, this assumption may be false. Instead, it may be that a bisexual solicits a person for sex based on the person's gender, which gender the bisexual prefers at that moment. . . .\(^{554}\) Id.

554. This separation is likely to enhance the conceptual and doctrinal difficulties associated with resolving sexual harassment disputes.

555. Pragmatically, it is too late in the day to sever sexual harassment from sex discrimination; the Supreme Court has long approved this model. Congress has exhibited no disapproval with this judicially defined relationship. The most recent opportunity occurred during Congress's passage of the Civil Rights Act of 1991. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, 1071 (1991) (codified in scattered sections of 42 U.S.C.). The viable alternative, therefore, is to follow Judge Bork's advice by performing minor doctrinal surgery on the sex discrimination paradigm to accommodate the major structural peculiarities of same-sex sexual harassment. See Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting).

556. See Doe v. City of Belleville, 119 F.3d 563, 579-80 (7th Cir. 1997). The court adopted this approach and demonstrated its applicability in a hypothetical involving racial harassment where:

an abusive supervisor simultaneously [harasses] several subordinates of different racial and ethnic backgrounds, but in each instance choosing an epithet, symbol, or gesture that he surely knows will have a uniquely hurtful and intimidating impact upon its intended target . . . [painting] a swastika on the locker of a Jewish employee, . . . [threatening] a worker of Japanese ancestry with internment, . . . creating a work environment that is uniquely hostile to each victim because of his particular race, religion, or ethnicity.

Id.

Also, observe that liability may lie even where more than one harasser is involved. For example, one harasser might specialize in harassing males and another, females. In this case, liability would arguably arise under either of two claims: (1) viewed together the harassers burdened males and females, but one harasser burdened males with conduct that exploited male sensitivities, the other exploited female sensitivities or (2) viewed individually, one harasser burdened only females while the other harasser burdened only males. Therefore, viewed individually, the harasser's conduct is classic disparate treatment under traditional but-for analysis.

557. Id. at 577-78. For example, suppose that a harasser referred to a male as "needle dick." Suppose further that the same harasser called a female "flat chested." Clearly the harasser burdened both genders, but, equally clear, the harasser fashioned the conduct to exploit emotional fissures peculiar to each gender. Even if the harasser referred to both males and females as "needle dick," the epithet is gender-based insofar as it disproportionately burdens males. See supra notes 201-05 and accompanying text for further discussion of this approach.
This approach pierces the veneer of uniformity, either real or presumed, and permits but-for analysis to reach deeper-seated gender-based factors that caused the harassing conduct.\textsuperscript{558} Consequently, neither the harasser’s sexual orientation, the availability of the opposite gender for harassment, nor the actual harassment of both genders will necessarily defeat a finding of gender-based but-for causality.

\section*{C. Judicial Application of this Approach}

Several courts have partially or wholly embraced these refinements to the but-for test.\textsuperscript{559} In \textit{Steiner v. Showboat Operating Co.},\textsuperscript{560} for example, a supervisor, burdened both male and female employees with slightly different conduct keyed to differences in their gender.\textsuperscript{561} When referring to women, the supervisor often used “sexual epithets, offensive, explicit references to women’s bodies and sexual conduct.”\textsuperscript{562} Specifically, he called them “dumb fucking broads,” and “dumb ass women.”\textsuperscript{563} In contrast, he used names such as “assholes” when abusing men.\textsuperscript{564} Ignoring these variations in the abusive conduct, the district court found no but-for causality and, hence, no sexual discrimination or sexual harassment, ostensibly because both males and females were abused. Nonetheless, the appellate court recognized the difference in conduct\textsuperscript{565} for what it was—disparate treatment along gender.

\begin{footnotesize}
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\item[558] This approach also works where a harasser burdens each gender with identical conduct but with different intensities. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1994). For example, the harasser’s abuse of women might be directed at their gender, while the harasser’s abuse of men is not. \textit{Id.} The \textit{Steiner} court apparently would go a step further, noting in dicta: “Furthermore, even if [the harassing male supervisor] used sexual epithets \textit{equal in intensity and in an equally degrading manner against male [and female] employees}, he cannot thereby ‘cure’ his conduct toward women.” \textit{Id.} (emphasis added). The court noted that Precedent “unequivocally directs us to consider what is offensive and hostile to a reasonable woman. . . . [C]onduct that many men consider unobjectionable may offend many women.” \textit{Id.} (emphasis added) (internal quotations omitted).
\item[559] Indeed, the author has found no cases in which the bisexual exception has been explicitly used.
\item[560] Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994).
\item[561] \textit{Id.} at 1463-64.
\item[562] \textit{Id.} at 1463.
\item[563] \textit{Id.}.
\item[564] \textit{Id.} at 1464.
\item[565] The Supreme Court, in \textit{McDonald v. Santa Fe Trail Transportation Co.}, arguably endorsed this refined application of but-for causation. “[The employer] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is \textit{applied alike} to members of all races.” McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 (1976) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)) (emphasis added) (alterations in original). Arguably, if employers must apply a disciplinary criterion “alike” to all races, then, to avoid offending Title VII, persons that harass males and
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lines—and found that the differential treatment constituted but-for cause. Steiner, contained dicta suggesting that the difference in harassing conduct also might give male victims a valid same-sex sexual harassment claim against the employer.

Although Steiner failed to delineate the steps in its analysis, following those steps is straightforward. The gender-sensitive differential conduct aimed at female and male employees constituted but-for causation or discrimination because of sex. Having found but-for causality, Steiner then determined if the abusive conduct was sexual in nature. Manifestly, it was, and therefore, the conduct qualified as sex discrimination and sexual harassment.

Shermer v. Illinois Department of Transportation examines the nature of the but-for standard where the harasser faces a homogeneously male work force. There, a male supervisor harassed a male employee. The employer argued that "there is not, and cannot be, any evidence that female workers were treated differently." This argument implies at least two others: (1) that but-for causality is established only where a plaintiff shows that the defendant actually treated female employees differently and (2) that

566. Steiner v. Showboat Operating Co., 25 F.3d at 1464. Steiner observed: "It is one thing to call a woman worthless, and another to call her a worthless broad." Id. (internal quotations omitted); see also Tietgen v. Brown’s Westminster Motors, Inc., 921 F. Supp. 1495, 1501 (E.D. Va. 1996). Tietgen acknowledged, in dicta, the effect of the bisexual exception but only:

if one assumes that a bisexual chooses whom to solicit for sex according to some criteria other than gender. Of course, this assumption may be false.

Instead, it may be that a bisexual solicits a person for sex based on the person’s gender, which gender the bisexual prefers at that moment. Id. at 1501 n.10. (emphasis added); see also Ryczek v. Guest Serv., Inc., 877 F. Supp. 754, 761 n.6 (D.D.C. 1993) (opining that one could interpret Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) to exonerate bisexual harassers merely because of their bisexuality or to exonerate them only if evidence shows that they actually harassed both males and females); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (characterizing a male heterosexual harasser as “an ‘equal-opportunity’ harasser whose remarks were gender-driven”). The harasser burdened a wife and her husband by propositioning the wife and informing the husband that he—the harasser—would be a superior lover for the wife. Id. at 1335. In distinguishing the types of conduct to which the husband and wife were subjected, the court noted that the harasser never mentioned making love to the husband. Id. at 1337-38. Thus, the harasser could find no asylum in the bisexual exception. Id.


568. Id. Indeed, where the nature of abusive conduct differentiated along gender lines, both male and female employees could possibly suffer actionable sexual harassment. Id.; see also Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 149 (2d Cir. 1993) ("[H]arassment is harassment regardless of whether it is caused by a member of the same or opposite sex.”).


570. Id. at 782.
the all male work force rules out such a demonstration. Also, it is unclear whether “differently” means not subjecting female employees to any discriminatory conduct or subjecting them to different discriminating conduct. In either case, they would be treated “differently.” Plaintiff, on the other hand, maintained that an all male work force hardly prohibited linking discrimination to gender.571

The court sided with the defendant on this issue. First, Shermer acknowledged that, under these conditions, uncertainty obscured the nature of plaintiff’s evidentiary burden regarding the “because of sex” nexus.572 Then, regarding the impact of a homogeneous work force on proof of but-for cause, Shermer reasoned, “[B]ecause it was impossible for [the plaintiff] . . . to treat women differently because none were present, Plaintiff cannot prove that he was treated differently from women.”573 This conclusion implies that to establish but-for causality a plaintiff must show that the defendant had an opportunity to discriminate against similarly situated women but did not.

Shermer never specifically considered whether a plaintiff should be allowed to show that a defendant would have treated like situated women similarly or differently if he had the chance. When discussing the role of “sexual desire,” however, in but-for analysis, the court concluded that if the defendant discriminated against the plaintiff because he perceived the plaintiff as homosexual, it was possible that the defendant would not have subjected similarly situated female employees to the “same harassment.”574 This statement suggests that Shermer considered the prospective argument and adopted the defendant’s position.

Although Dillon v. Frank575 involves a slight factual twist as to the homogeneity of the workforce, it reveals how some courts handle but-for causality where they lack a similarly situated opposite gender. In Dillon, male and female coworkers harassed the plaintiff, a male heterosexual, because they thought he was homosexual.576 Because there were no known lesbian employees, the plaintiff lacked a similarly situated coworker with whom to compare his treatment.577 In discussing whether the plaintiff had satisfied the “because of sex” or but-for standard, the court observed that he failed to show “that a lesbian would have been accepted . . . [by the harassers], nor . . . [did he argue] that a woman known to engage in the disfavored sexual practices would have escaped abuse. Without such a showing, his claim to have

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571. Id.
572. Id. at 783. In support of this conclusion, the court observed that the following factors mitigate against showing that gender rather than some other factor caused the harassment: (1) the same-sex nature of the harassment and (2) the legitimacy of sexual orientation. Id. (citing Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996)).
573. Id. at 784.
574. Id.
576. Id. at *20.
577. Id. at *21.
been discriminated against because he is male cannot succeed."\textsuperscript{578} Thus, the court seemed receptive to a prospective or hypothetical but-for argument about how coworkers would have treated a lesbian employee. Such receptiveness could do much to resolve causal analysis in the sex discrimination stage.\textsuperscript{579}

XI. THE ROLE AND NATURE OF SEXUAL CONDUCT IN THE SEXUAL HARASSMENT STAGE

Although it informs the sex-discrimination stage, but-for analysis is wholly irrelevant to the sexual-harassment stage of same-sex sexual harassment disputes, where the sole issue is whether previously established gender-based conduct is sexual in nature—has sexual content.\textsuperscript{580} The EEOC guidelines provide in relevant part: "Unwelcome sexual advances, requests for sexual favors, and \textit{other verbal or physical conduct of a sexual nature} constitute sexual harassment when . . . such conduct has the \textit{purpose or effect} of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."\textsuperscript{581}

As with any phrase, "physical conduct of a sexual nature" is subject to either a broad or narrow interpretation based largely on its context. For example, one could use the more specific language—"sexual advances" and "sexual favors"—to support a narrow interpretation. Also, one could interpret "sexual advances" and "sexual favors" to limit the scope of "physical conduct of a sexual nature" to include only conduct that manifests a harasser's desire to have sexual relations with a victim.\textsuperscript{582} Or one could read "physical conduct of a sexual nature" to expand the scope of "sexual advances" and "sexual favors."

In fact, the Supreme Court has offered guidance in this respect by embracing expansive language that reflects Congress's intent for Title VII to encompass the "entire spectrum of disparate treatment" and not just conduct tethered to sexual desire or attraction.\textsuperscript{583} There is substantial tension between the breadth of this language and the proposition that a harasser's sexual desire for or attraction to a victim is a precondition to finding actionable sexual harassment. While a harasser's motives play a part in but-for analysis, there is little to indicate that motives have any, not to mention a solo role in the sexual harassment stage.

\textsuperscript{578} \textit{Id.}

\textsuperscript{579} Prohibiting conduct that exploits gender-specific vulnerabilities effectively recognizes the intended effect of sexual harassment and increases the risks of inculpation for harassers.

\textsuperscript{580} \textit{See} Equal Employment Opportunity Comm'n Guidelines, 29 C.F.R. \textsection 1604.11(a)(3) (1997). It is, of course, an open question as to the quantum or type of sexual content required to convert nonssexual conduct to sexual conduct.

\textsuperscript{581} \textit{Id.} \textsection 1604.11(a) (emphasis added).

\textsuperscript{582} In effect, this is what the Fourth Circuit did. \textit{See supra} Part V.C.1.

Elementary faithfulness to Oncale’s “entire spectrum” language requires an interpretation of sexual conduct that includes conduct reasonably associated with either coitus or sex related activity. That is, sexual conduct should include any conduct normally associated with sexual foreplay, intercourse, sexual joking, or flirting. Moreover, the surrounding circumstances and the manner in which one displays any type of behavior can import a sexual tinge. Thus, surrounding circumstances might convert either nonsexual or ambiguously sexual behavior to clear sexual behavior.

On the other hand, mere context cannot strip clear sexual conduct of its sexual content. When attempting to assess the nature of clear sexual conduct in same-sex sexual harassment disputes, some courts lose their way, becoming distracted by the specter of homosexuality, rather than concentrating on the nature of the conduct and its underlying motives. Suppose, for example, that a heterosexual male strokes and massages another homosexual male’s buttocks. 584 That the suitor and target lack any sexual desire for or attraction to one another hardly diminishes the crystalline sexual nature of this behavior. Similarly, a man that undulates his hips in a manner suggesting intercourse thereby engages in sexual conduct, irrespective of whether he undulates while facing a wall or while standing behind a woman or a man. The defining factor is the irrefutable and substantial sexual content of the behavior. Neither the context nor the sexual orientation of the aggressor or the target is likely to change the sexual nature of the conduct. The same conclusion applies where a heterosexual male manipulates the penis of another heterosexual male. 585 Medical circumstances aside, touching or manipulating another’s sex organ is nothing but sexual conduct. 586 If one would undoubtedly view the conduct as clearly sexual when it occurred between males and females, then the conduct is no less sexual when it surfaces out of context—between harassers and victims of the same sex. 587

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584. This, obviously, is quite different from the slap or pat on the buttocks customarily administered in team sports unless of course the conduct occurs in an “off limits” environment, like the team shower where everyone is naked.


586. Also, even under the most objectively clinical circumstances, a caregiver’s manipulation of body parts can acquire a distinct sexual character, depending on the caregiver’s manner of manipulation or even his expression. Imagine, for example, the different ways that a caregiver might manipulate a breast while searching for lumps. Imagine, also how a lustful look from the caregiver might sexually taint the most objectively clinical manipulations or probings.

587. Cf. Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 753-54 (4th Cir.) (holding that the supervisor’s conduct was sexually neutral, or at most ambiguous, where the supervisor bumped into the plaintiff, positioned a magnifying glass over the plaintiff’s crotch and asked where is it, stared at the plaintiff in the bathroom, kissed the plaintiff at the plaintiff’s wedding, forced himself into a darkroom with the plaintiff, and when leaving that room, asked the plaintiff was it as good for you as it was for me), cert. denied, 117 S. Ct. 70 (1996).
Legitimate factors—horseplay,\textsuperscript{588} joking,\textsuperscript{589} or enmity\textsuperscript{590}—can veil ambiguous sexual conduct, as can uncertainty generated from the heat of semantic disputes about the scope of "sexual", or "sex."\textsuperscript{591} Nevertheless, where conduct is sexually ambiguous, policy suggests resolving doubts in favor of finding the conduct to be sexual. As is the case with sexual harassment, horseplay and other juvenile behavior lack any redeeming value in the workplace. Further, given the "endeavor to eliminate, so far as possible, the last vestiges’ of discrimination in employment,"\textsuperscript{592} it makes no sense from a policy perspective to tolerate or to risk tolerating gender-based discrimination simply to insulate largely valueless conduct. While Congress never intended for Title VII to sterilize the workplace of all repugnant or even unpopular behavior,\textsuperscript{593} removing sexual harassment under these conditions converts Title VII into a sanitizing agent only where it is necessary to penalize counterproductive legitimate behavior that is fused to uniformly-condemned illegitimate behavior.\textsuperscript{594}

Meritor supports the foregoing proposition by filling Title VII’s vacuous legislative history regarding “because of sex” with a tolerant, elastic interpretation.\textsuperscript{595} Throughout the opinion, the Supreme Court strongly supported this comprehensive interpretation by repeatedly relying on the EEOC Guidelines,\textsuperscript{596} which implement the “entire spectrum” approach by bringing within Title VII’s condemnatory sweep all “verbal or physical conduct of a sexual nature.”\textsuperscript{597} Because the “entire spectrum” and “sexual nature” language explicitly covers the gamut of sexual conduct, the


\textsuperscript{589} Id. at 1501 ("[T]he allegedly harassing conduct [in same-sex sexual harassment] is often capable of being construed not only as actionable harassment, but also, and perhaps more familiarly, as mere locker room antics, joking, or horseplay.").

\textsuperscript{590} See Quick v. Donaldson Co., 895 F. Supp. 1288, 1297 (S.D. Iowa 1995) ("Plaintiff alleges non-discriminatory harassment by physically aggressive male co-workers, who harass the victim not based on his gender but because of personal enmity or hooliganism.").

\textsuperscript{591} These cases illustrate that some courts seem to ignore the sexual nature of conduct where any other legitimate explanation presents itself.


\textsuperscript{593} See, e.g., Baskerville v. Culligan Int’l Co., 50 F.3d 428, 431 (7th Cir. 1995) (discussing the fine line between the unpleasant and the repugnant and refusal to set aside a jury’s verdict where there is uncertainty as to which side of the line the defendant’s behavior falls).


\textsuperscript{595} See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986). Contrast the Court’s approach here to that of courts that adopt narrow interpretations of Title VII because it does not explicitly adopt broad definitions for its terms nor does it explicitly reject narrow definitions.

\textsuperscript{596} Id.

\textsuperscript{597} Id. (citing 29 C.F.R. § 1604.11(a)) (emphasis added).
interpretation of "conduct of a sexual nature" offered in this Article is not unreasonable. 598

XII. SUMMARY AND CONCLUSION

In addition to exposing latent ambiguities in Title VII's language and jurisprudence, same-sex sexual harassment disputes exist in a sea of stereotypes and semantic distinctions. Consequently, these disputes have confounded clear analysis, provided safe havens for homophobia, and cleaved the federal judiciary. And the Supreme Court's brief excursion into this quagmire offers precious little guidance. Nevertheless, the stresses that same-sex sexual harassment disputes visit upon Title VII's concepts, standards, and doctrines can also serve the basic purposes of Title VII by engendering analysis that substantially delineates Title VII's conceptual and doctrinal borders. Sober judicial and commentarial examination of same-sex sexual harassment issues can illuminate, define, and ultimately, remove much of the doctrinal and semantic litter that presently obfuscates clear analysis in both traditional and same-sex sexual harassment disputes. Eventually, the Supreme Court will have to grapple with these approaches.

Federal courts have resolved the linguistic and doctrinal ambiguities both for and against coverage. Courts have essentially denied coverage by: (1) viewing sexual orientation as an inherent component of same-sex sexual harassment; (2) interpreting "sex" in 42 U.S.C. § 2000e-3(a)(1), to exclude sexual orientation; or (3) sacrificing victims of same-sex sexual harassment to avoid indirectly penalizing sex discrimination that is even partly based on sexual orientation. Courts that have extended coverage have essentially taken the opposite view.

In fact, the Supreme Court already has set the stage for coverage of same-sex sexual harassment disputes. Thus far, the Court and the EEOC have woven a protective net for traditional sexual harassment claims that one can reasonably extend to include same-sex sexual harassment disputes. When interpreting § 2000e-3(a)(1), the Oncale Court laid the doctrinal and semantic groundwork to include same-sex sexual harassment under Title VII's protective umbrella. Congress nebulously defined the scope of Title VII's coverage of sex discrimination by using the phrase "because of sex," and the Supreme Court interpreted that phrase with sufficient breadth to encompass even behavior that is only partially driven by gender-based considerations, latent or patent. Moreover, judicial and congressional concerns about not protecting sexual orientation ring hollow, given Title VII's unabashed protection of heterosexuality.

Same-sex sexual harassment disputes offer the Supreme Court an opportunity to heighten Title VII's coverage and equality in the workplace. In addressing these disputes, the Court can use either the antidiscriminatory

598. Although it is not very likely, the Supreme Court could still restrict this broad language to traditional sexual harassment disputes, which were the subject of the complaint and exclude same-sex sexual harassment disputes as being too closely associated with sexual orientation.
policy or ideology as a guiding light in developing and interpreting Title VII's jurisprudence. The choice is relatively clear: Either bring some analytical light to bear on these issues or further immerse them in ideological heat and plunge Title VII and a growing number of victims deeper into the doctrinal abyss.