

NLGLA WRITING COMPETITION

The (Back)door of *Oncale v. Sundowner Offshore Services, Inc.*: “Outing” Heterosexuality as a Gender-Based Stereotype

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*For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.*¹

I. INTRODUCTION

A company refuses to hire gay men or lesbians. A gay man working in this company makes every effort not to reveal his sexual orientation. However, coworkers suspect that he is gay. Anonymous threatening graffiti appears on the men's room walls. His car is vandalized. Employees sexually assault him. He finally complains to his supervisor that he is being harassed because of his sexual orientation. He is fired. He has no legal recourse in federal antidiscrimination law.²

Now imagine a woman employed as a construction worker. Her male coworkers ridicule her for doing "men's work." The men spread rumors about her lesbianism, tell sexual jokes about her, and physically intimidate her. Can she sue for sexual harassment? Under the current state of federal discrimination law, this can not be answered without asking a multitude of additional questions, each of which may lead to a different result. What if this woman is the only female employee at the power plant? What if coworkers suspect that this woman is a lesbian? What if this woman is a lesbian? What if this woman has had one lesbian relationship but now considers herself heterosexual? What if this woman is biologically a man? What if none of the woman's colleagues think she is a lesbian but label her as such in an attempt to demean her?

For at least twenty years, federal antidiscrimination law has been settled on the outcome of the first scenario.³ Courts have consistently held that Title VII of the Civil Rights Act of 1972 does not prohibit private employers from discriminating on the basis of sexual orientation.⁴ The second scenario is more complicated. The emergence of sexual harassment as a type of prohibited sex-based discrimination, the difficulty of determining how and if sexual orientation is linked to an

1. AUDRE LORDE, *SISTER OUTSIDER* 112 (1984).

2. *See DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (holding that discrimination on the basis of sexual orientation is not actionable under Title VII); *see also Sarff v. Continental Express*, 894 F. Supp. 1076, 1081 (S.D. Tex. 1995) (finding that claims of retaliation for sexual orientation harassment are not actionable).

3. *See, e.g., Williamson v. A. G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *DeSantis*, 608 F.2d at 327 ("Title VII's prohibition of 'sex' discrimination . . . should not be judicially extended to include sexual preferences such as homosexuality.").

4. *See, e.g., id.; Valdes v. Lumbermen's Mutual Casualty Co.*, 507 F. Supp. 10 (S.D. Fla. 1980).

individual's sex, and the question of what constitutes sex weigh heavily on any analysis.

The Supreme Court, in its brief and unanimous opinion in *Oncale v. Sundowner Offshore Services, Inc.*,⁵ definitively acknowledged that Title VII protects employees against same-sex sexual harassment.⁶ However, subsequent lower court rulings have demonstrated that the courts' understanding of when the Title VII prohibition against discrimination "because of . . . sex" extends to instances of same-sex harassment is frequently thwarted by attempts to avoid rulings that would recognize discrimination on the basis of sexual orientation.⁷ The result has been that while *Oncale* provides useful precedent for employees claiming to have been harassed by a gay or lesbian supervisor, it is less helpful where the victim of the harassment is, or is perceived to be, gay or lesbian. In the latter case, courts frequently stumble upon the question of whether the employee was harassed because of her orientation or because of her sex. However, a few lower courts have recognized that harassment based on the perceived sexual orientation of an employee is discrimination based on gender stereotypes and thus actionable.⁸ Post-*Oncale* cases demonstrate that the courts have yet to figure out how to address the reality accentuated by these two lines of cases, namely, that heterosexuality is a sex-based stereotype.⁹

Ironically, *Oncale*, by providing so little guidance to the lower courts as to how to understand where sex-based stereotypes end and sexual orientation stereotypes begin, may provide an opening of Title VII to actions for discrimination on the basis of sexual orientation.¹⁰ The courts have resisted this difficult question on the stalwart ground of congressional intent. Yet, it is evident that mere reiteration of Congress' intent to keep sexual orientation outside the protections of Title VII has not solved the task of the lower courts. Likewise, *Oncale*'s charge to pinpoint the motivating factor for discrimination and neatly fit the discriminatory conduct into the "sex" box of the statutory language has

5. 523 U.S. 75 (1998).

6. This Article uses the term "same-sex sexual harassment" to denote behavior by an individual, which falls within the legal understanding of sexual harassment, that is directed at a plaintiff of the same gender. The term does not imply anything about the parties' sexual orientation.

7. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

8. See, e.g., *Samborskii v. West Valley Nuclear Servs. Co.*, No. 99-CV-0213E(M), 1999 WL 1293351 (W.D.N.Y. 1999).

9. See, e.g., *Merritt v. Delaware River Port Auth.*, 76 Empl. Prac. Dec. 46, 116 (E.D. Pa. 1999).

10. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 232 (1999). Eskridge notes that the *Oncale* decision may reopen the question of whether harassment based on sexual orientation is actionable for "some lower federal courts." *Id.*

not been so easily fulfilled. If *Oncale*'s failure to tackle the question of what role sexual orientation plays in sex-based discrimination claims has opened a door, where does that door lead? This Article focuses on *Oncale* as an opening in private workplace discrimination law that may provide gay, lesbian, bisexual, transsexual, and transgendered employees¹¹ with some recourse for the harassment and discrimination that they face. By focusing on a case that concerns sexual harassment, I do not mean to suggest that GLBT employees do not face other forms of discrimination in the workplace. This Article, rather, seeks simply to explore the space created by the *Oncale* decision. It argues that post-*Oncale* sexual harassment claims may provide an opening for GLBT employees' claims of harassment and other discrimination. However, the expansion of Title VII should not come from a backdoor entry of sexual orientation linked to "sex." Such an entry is problematic because it reaches a limited range of discriminatory conduct and it perpetuates the "employment closet" by silencing employees, discouraging plaintiffs from naming their experience as the product of homophobia. Full protection for GLBT employees in the private workplace must come from congressional action.

I write this Article from the presumption that workplace discrimination laws *should* offer protection for individuals who experience harassment and discrimination because of their sexual orientation or their perceived sexual orientation. Thus, this Article traces successes and failures of legal theories advanced by GLBT employees in an attempt to identify the potential scope of Title VII.

Part I of this Article briefly reviews existing protections for lesbians and gays in the workplace. Part II discusses the ways in which courts and legal scholars have attempted to outline the parameters of "sex" as a statutorily identified basis of actionable discrimination. Part III reviews the jurisprudential landscape prior to the Supreme Court's ruling in *Oncale*, and Part IV examines the *Oncale* decision and subsequent lower court rulings implementing the standards articulated in *Oncale*. Part V proposes that heterosexuality is a gender-based stereotype and, therefore, discrimination on the basis of sexual orientation should be actionable under Title VII. In particular, Part V describes the difficulty that courts have had in distinguishing between sexual orientation and projections or

11. I am ambivalent about what term to use to be both inclusive and avoid the awkwardness of continuously listing these "identities." "Gay" is adequate because it subsumes gay, lesbian, bisexual, transsexual, and transgendered experiences under one heading. Perhaps the most apt term is "gender non-conformist," but it may be too weighty. I will use "GLBT" to refer to gender non-conformists, in particular, those who identify themselves as homosexual men, lesbians, bisexuals, transgendered persons and transsexuals.

perceptions of an individual's sex or gender. Lastly, Part VI discusses the implications of judicially expanding Title VII to reach discrimination on the basis of sexual orientation and surveys alternative means of providing lesbians, gays, bisexuals, and transsexual and transgendered persons protection in the workplace.

II. CURRENT PROTECTIONS AVAILABLE FOR GLBT EMPLOYEES

The need for statutory protection of GLBT employees in the private sector is obvious. The newspapers are replete with horrifying stories of discrimination faced by GLBTs in their places of employment. A prize-winning high school biology teacher continues a five-year public fight against workplace harassment experienced because she is a lesbian.¹² Ty'ger Dacosta, a gay man, was threatened and harassed by colleagues at Wal-Mart and was told by management that he would just "have to deal with it."¹³ Debbie Aukema, a lesbian employee of a chain grocery store in Colorado, experienced malicious gossip, ridicule, harassment, humiliation, graffiti, vandalism to her car, physical threats, and assaults during her employment period.¹⁴ Although she repeatedly complained to management, nothing was done to protect her or stop the harassment.¹⁵ She explained: "I've been through intolerable and inexcusable harassment at a company whose management seems indifferent to harassment of people who are non-heterosexual."¹⁶

While little statistical information demonstrating the pervasive-ness of discrimination against GLBT employees in the American workplace exists, studies of the problem in other countries are illustrative. In the United Kingdom, for example, close to half of 2000 gay employees surveyed reported that they had been harassed at work on account of their sexuality.¹⁷ A study of lesbian employees in New Zealand found that fifty-three percent of respondents reported discrimination or harassment based on their sexuality during their working history, with thirty-five percent reporting such discrimination and harassment in the

12. See Anne Krueger, *Teacher Asks State Appellate Court to Reinstate "Harassed Lesbian" Suit*, SAN DIEGO UNION & TRIB., Mar. 14, 2000, at B2.

13. William McQuillen, *Wal-Mart Sued for \$5 Million Over Alleged Harassment of Gay Worker*, ORANGE COUNTY (CAL.) REG., July 20, 1999, at C03.

14. See Erin Emery, *Grocer Sued in Sexual Taunting Lesbian Employee Blames City Market*, DENV. POST, Feb. 11, 2000, at B05.

15. See *id.*

16. *Id.*

17. See Toni Lester, *Protecting the Gender Nonconformist from the Gender Police—Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court's Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 89, 91 (1999) (citing *Equality for Lesbians and Gay Men in the Workplace*, 74 EQUAL OPPORTUNITIES REV. 1, 20-21 (1997)).

preceding five years.¹⁸ Thirteen percent of lesbian employees also reported that the harassment and discrimination they faced came from *all* of their immediate coworkers.¹⁹ Types of discrimination described included harassing and threatening phone calls, obscene letters, harassment by clients, property damage, insubordination, assault, and termination of employment.²⁰ A December 1999 report by the Australian Centre for Lesbian and Gay Research indicated that forty-one percent of the gay and lesbian employee respondents believed that they were terminated because of their sexual orientation.²¹ This report also suggested that thirty-one percent of harassment experienced by GLBT employees stems from “inappropriate jokes.”²²

Leading U.S. companies legally and intentionally discriminate against gays.²³ For example, the Cracker Barrel restaurant chain issued a memo saying that it would not employ individuals “whose sexual preference failed to demonstrate normal heterosexual values.”²⁴ This memo resulted in the firing of twelve employees at the self-identified “family restaurant.”²⁵ In other companies, employees are tortured and harassed until they “choose” to leave. Employees at Carter Fitzgerald, a prestigious Los Angeles securities trading firm, subjected a gay colleague to persistent harassment, vandalism, “pranks,” and assaults, including an incident where a supervisor urinated on him, before he left.²⁶ A survey of Fortune 500 corporations revealed that only 135 have written sexual orientation nondiscrimination policies.²⁷

Union and employment contracts may offer some protection for GLBT employees. If a company has a nondiscrimination policy, GLBT employees seeking legal recourse may be able to construe the policy as being part of the employment contract and, therefore, enforceable.

18. Nicole L. Asquith, *Sexuality at Work: A Study of Lesbians' Workplace Experiences*, 24 N.Z. J. INDUS. REL. 1 (1999).

19. *See id.*

20. *See id.*

21. *See* Paul Robinson, *Lesbians and Gays Ridiculed at Work*, ABIX, Dec. 3, 1999, at 8.

22. *Id.*

23. *See* Steve Hall, *HBO Show Examines Bias Against Gay Workers*, INDIANAPOLIS STAR, Jan. 5, 1999, at E01.

24. *Id.* The nonprofit organization, Wall Street Project, enlisted the support of New York City pension fund officials who held Cracker Barrel shares and called a change in Cracker Barrel policies at the annual shareholding meetings. While the resolution did not pass, it received fifteen percent of the vote. OUT IN THE WORKPLACE: THE PLEASURES AND PERILS OF COMING OUT ON THE JOB 194-95 (Richard A. Rasi & Lourdes Rodriguez-Nogues eds., 1995).

25. Hall, *supra* note 23.

26. *Id.*

27. *See* OUT IN THE WORKPLACE, *supra* note 24, at 195. Companies with nondiscrimination policies tend to have adopted such policies since 1990, are based in the Northeast or the West, and concentrate in diversified service, financial, or high-tech fields. *Id.*

However, unions may not seek terms and conditions necessary to protect GLBT rights. For example, eighty-one percent of trade unions surveyed in a New Zealand study indicated that they do not consider or perceive a need for specific services for lesbian employees. Although unions have traditionally been unreceptive to GLBT employees' concerns, union contracts often include antidiscrimination policies, which may be extended to prohibit discrimination on the basis of sexual orientation.²⁸

Discrimination does not only occur through harassment of GLBT employees and discriminatory hiring policies. Studies have shown that, while the wage gap between men and women in the United States persists, a wage gap between gay/bisexual and straight employees within each sex exists also.²⁹ Thus, where heterosexual men earn \$28,312 per year, homosexual and bisexual men earn an average of \$26,321; heterosexual women earn \$18,341 annually, while their homosexual and bisexual counterparts receive \$15,056.³⁰ Regression analysis shows that only the wage differential between men's wages may be characterized as solely dependent on sexual orientation.³¹ However, this may simply reflect circumstances where lesbian employees "are mainly penalized for their sex and only secondarily for their sexual orientation."³² The New Zealand survey of lesbian employees also found that lesbians were twice as likely as members of the general population to be employed full-time at a small nongovernmental or community organization with less than fifty employees.³³ This contributed to the fact that most of the survey's respondents were earning considerably less than the average wage, despite high levels of formal education.³⁴

Title VII has been consistently held not to apply to discrimination against an individual that is based on her sexual orientation. No Supreme Court opinion has addressed the question of whether discrimination on the basis of sexual orientation is actionable under Title VII.³⁵ *Oncale*, which dealt with same-sex sexual harassment might have

28. See Asquith, *supra* note 18.

29. See ESKRIDGE, *supra* note 10, at 234.

30. See *id.*

31. See *id.*

32. *Id.*

33. Asquith, *supra* note 18.

34. See *id.* Asquith, however, notes that lesbians employed at higher-earning positions may have had fewer instances of discrimination or harassment, or may be closeted and did therefore not participate in the study. *Id.*

35. Compare the lack of U.S. Supreme Court precedent to recent rulings in Canada. Canada's Supreme Court ruled that the state has a constitutional responsibility not to reinforce traditional prejudices. In *Vriend v. Alberta*, it found that a provincial human rights act that failed to include sexual orientation as a basis for nondiscrimination was inconsistent with the Canadian Charter. [1998] 1 S.C.R. 493 (Can.). The court ordered that sexual orientation be included as the

commented on this, but did not. However, numerous courts have found that Congress did not intend Title VII's protections to extend to GLBT employees.³⁶ Such findings are based on a "plain language" interpretation of the statute, which explicitly proscribes discrimination on the basis of religion, sex, race, and national origin.³⁷ Sexual orientation is missing. This has led courts to find that any type of discrimination motivated by an employee's sexual orientation is not a violation of Title VII.³⁸

In response to the lack of protection at the federal level, states and towns have passed local statutes that seek to ban discrimination on the basis of sexual orientation. According to a report released by the Policy Institute of the National Gay and Lesbian Task Force in January 2000, more than 100 million Americans now live in regions with antidiscrimination laws that include sexual orientation as an actionable ground.³⁹ Only eleven states and the District of Columbia provide protection for employees who experience workplace discrimination on account of their (real or perceived) sexual orientation.⁴⁰

Public employees have slightly more protection than their private counterparts. Thirty-six counties and 141 cities have ordinances protecting public employees against discrimination on the basis of sexual orientation.⁴¹ Furthermore, gay and lesbian federal employees may have Constitutional grounds to claim that the lack of workplace protection from discrimination constitutes a violation of the equal protection clause. The recent Supreme Court ruling in *Romer v. Evans*⁴² applied a rational basis test to strike down a Colorado constitutional amendment that sought to provide homosexuals with less protection than heterosexuals.⁴³

constitutional remedy. *Id.* Ontario's Human Rights Commission recently issued a new sexual orientation policy that defines actionable harassment as including "homophobic epithets, comments ridiculing individuals because of their sexual orientation or same-sex partnership status, or singling out an individual for humiliating or demeaning 'teasing' or jokes." Antonella Artuso, *Gay Rights No Joke: Commission Clarifies Same-Sex Stand*, OTTAWA SUN, Feb. 26, 2000, at 17.

36. See *infra* Part III.

37. See, e.g., *DeSantis*, 608 F.2d at 327; *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714 (E.D. Tex. Mar. 24, 2000).

38. See *Bibby v. Phil. Coca Cola Bottling Co.*, 85 F. Supp. 2d 509, 511 (E.D. Pa. 2000); *Klein v. McGowan*, 36 F. Supp. 2d 885, 889 (D. Minn. 1999); *Higgins v. New Balance Athletic Shoe*, 21 F. Supp. 2d 66, 73 (D. Me. 1998) *aff'd in part and vacated in part*, 194 F.3d 252 (1st Cir. 1999).

39. National Gay and Lesbian Task Force, *Press Release: Nondiscrimination Laws Now Cover 100 Million Americans, New Report Finds*, Jan. 3, 2000.

40. Hall, *supra* note 23; Emery, *supra* note 14.

41. National Gay and Lesbian Task Force, *supra* note 39.

42. 517 U.S. 620 (1996).

43. *Id.* at 631-35.

In *Romer*, the Colorado amendment at issue would have preempted local ordinances prohibiting sexual orientation discrimination.⁴⁴ The state claimed that such ordinances constituted “special rights” that Coloradoans chose not to extend to GLBTs.⁴⁵ The Supreme Court found that the protections at issue were ones “taken for granted by most people either because they already have them or they do not need them.”⁴⁶ However, public employers who include sexual orientation in their antidiscrimination policies may be vulnerable to constitutional challenges.⁴⁷

The *Romer* ruling nevertheless opens avenues of protection that are currently unavailable to private sector employees. In a recent case involving a homosexual police officer, the District Court for the Eastern District of New York found that the hostile work environment that the officer experienced violated the Equal Protection Clause.⁴⁸ The court found that the condoned harassment of homosexuals “was motivated by an invidious, irrational fear and prejudice toward homosexuals” and furthered no legitimate state interest.⁴⁹ One scholar, however, has suggested that the Supreme Court’s decision in *Romer* has generally failed to prompt courts to look at employment discrimination of gays and lesbians in a different light.⁵⁰

Surveys of gay and lesbian employees in other countries and news reports from around the United States suggest that discrimination against GLBT employees is widespread in this country. The piecemeal protection available in individual states and counties and, possibly, to governmental employees does not adequately safeguard the right of GLBT employees to be free of discrimination and harassment.

III. DEFINITIONS OF SEX AND THE ROLE OF SEXUAL HARASSMENT

Title VII provides that “[i]t shall be unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

44. *Id.* at 624.

45. *Id.* at 626.

46. *Id.* at 631.

47. *See* *Saxe v. State College Area Sch. Dist.*, 77 F. Supp. 2d 621 (M.D. Pa. 1999) (holding that where plaintiffs alleged that antiharassment policy chilled free speech rights of school community members opposed to homosexuality and the court found that the policy was tailored to only reach conduct and not speech).

48. *See* *Quinn v. Nassau County Police Dep’t*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (holding that the Fourteenth Amendment may extend to protect individuals in public employment from invidious and irrational discrimination based on sexual orientation).

49. *Id.* at 357.

50. *See* Robert D. Dodson, *Homosexual Discrimination and Gender: Was Romer v. Evans Really a Victory for Gay Rights?*, 35 CAL. W.L. REV. 271, 272 (1999).

because of such individual's . . . sex."⁵¹ This language begs the question—what constitutes discrimination “because of . . . sex”?

As early as the 1970s, the Court criticized legislation based on gender stereotypes. In *Frontiero v. Richardson*,⁵² Justice Brennan critiqued the use of societal “notions” of women and the “gross, stereotyped distinctions between the sexes.”⁵³ Later, in *Mississippi University of Women v. Hogan*⁵⁴ and *United States v. Virginia*,⁵⁵ the Court struck down policies that were based on stereotypes about what type of work and roles males and females could perform. In *Price Waterhouse v. Hopkins*,⁵⁶ the Court recognized that the failure to promote Ann Hopkins, the female plaintiff, because she was “macho,” “overcompensated for being a woman,” and was “somewhat masculine” constituted discrimination on the basis of sex.⁵⁷

Recent opinions from lower federal courts evidence the judiciary’s confusion of “gender” with “sex” and an attempt to distinguish gender and sex from sexual orientation. In one case, where a male harasser inserted his finger into the gay male plaintiff’s rectum and bragged about it to other employees, the court found that the conduct was not actionable under Title VII.⁵⁸ “[T]he term ‘sex,’” the court reasoned, “connotes ‘gender’ not sexual preference.”⁵⁹ Similarly, another district court, in rejecting a claim based on sexual orientation, found that: “the other categories afforded protection under Title VII refer to a person’s status as a member of a particular race, color, religion or nationality. ‘Sex,’ when read in this context, logically could only refer to members in a class delineated by gender, rather than sexual activity regardless of gender.”⁶⁰ The court does not clarify what it means by “sexual activity regardless of gender,” and the facts of the case, which involved harassment of a gay man by male coworkers, do not involve explicitly sexual conduct.⁶¹ Nevertheless, the court clearly considers gender and sex to be equivalent, thus, failing to understand gender as encompassing societal norms and stereotypes. Another recent opinion by a district court suggested that

51. 42 U.S.C. § 2000e-2(a) (1994).

52. 411 U.S. 677 (1973).

53. *Id.* at 685.

54. 458 U.S. 718 (1982).

55. 518 U.S. 515 (1996).

56. 490 U.S. 228 (1989).

57. *Id.* at 235.

58. *See Torres v. Nat’l Precision Blanking*, 943 F. Supp. 952, 953 (N.D. Ill. 1996).

59. *Id.* at 954-55.

60. *Bibby*, 85 F. Supp. 2d at 516 (quoting *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986)).

61. *Id.* at 511 (noting that the harassers’ comments included statements to the plaintiff such as “everyone knows you’re a faggot” and “everyone knows you take it up the ass”).

“[t]here is no arguable legal basis for contending that perceived sexual preference merits protection merely because it concerns sex. The clear meaning of ‘sex’ under Title VII is not ‘intercourse,’ but ‘gender’”⁶² While courts may not view sexual orientation as part of “sex,” they use the terms “sex” and “gender” interchangeably.

Many scholars have argued for a more comprehensive definition of gender and a deeper understanding of the impact of sex-based stereotypes on societal perceptions of sexuality and identity. For example, L. Camille Hebert calls on the EEOC to define sexual harassment as a subset of gender harassment.⁶³ Vicki Schultz argues that the desire-based nature of most harassment claims ignores the effects of harassment that seeks to portray women as incompetent and to confine women to traditional sex roles.⁶⁴ Katherine Franke suggests that sexual harassment is gender-based because it “perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men.”⁶⁵ Linda Epstein, in an attempt to synthesize the thoughts of leading theorists, proposes a definition of gender norm enforcement as “harassment, either sexual or sex-based in nature, [which] employs negative descriptive or normative gender stereotypes of what women are or should be.”⁶⁶ However, such analyses are, at least in part, based on assumptions that particular characteristics correspond to a biological sex and are valued accordingly.⁶⁷ While perhaps an inaccurate assumption, the process of identification of norms with biological sex is acted out daily in the private workplace.

The scholarship in the field of sexual harassment demonstrates that, while there is considerable debate about how gender norms operate in our society, they *do* operate. Expectations and assumptions are placed on an individual on the basis of her or his perceived *biological* sex, on the basis of the person’s perceived genitalia.⁶⁸ The array of social norms that

62. *Dandan v. Radisson Hotel Lisle*, No. 97-C-8342, 2000 WL 336528, at *6 (N.D. Ill. 2000).

63. See L. Camille Hebert, *Sexual Harassment Is Gender Harassment*, 43 U. KAN. L. REV. 565, 606-07 (1995).

64. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 (1998).

65. Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997).

66. Linda Epstein, *What Is a Gender Norm and Why Should We Care? Implementing a New Theory in Sexual Harassment Law*, 51 STAN. L. REV. 161, 163 (1998).

67. See e. christi cunningham, *Preserving Normal Heterosexual Male Fantasy: The “Severe or Pervasive” Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199, 223 (1999).

68. This is not to say that other expectations and assumptions are not also imposed; they are imposed on the basis of sexual orientation, race, class, religion, appearance, ethnicity, and other characteristics. I also do not assume that biological sex is constant but, rather, work from

accompany this identified biological sex range from preconceptions as to how a person should dress, to the kind of employment s/he should pursue, to the type of relationships s/he should enter. Scholars describe how these norms are then “enforced,” “policed,” and “imposed.”⁶⁹ By viewing sexual orientation as an enforced gender norm, this Article need not enter the debate as to whether sexual orientation is culturally or biologically “created.”⁷⁰ Rather, the Article is concerned, as is discrimination law, with the motivation for harassment or discrimination. People of a certain biological sex are *supposed* to desire those of the “opposite” sex. The cases of gay and lesbian employees who are harassed, ridiculed, and assaulted in the workplace demonstrate that both men and women who fail to conform to the traditional heterosexual mold may be targeted by coworkers.

The Supreme Court’s recognition of sexual harassment as a form of sex-based discrimination was hailed as a major victory by advocates of employee rights and feminists. Scholars such as Catherine MacKinnon were instrumental in drawing the link between (men’s) harassing behavior and tangible effects for (female) employees.⁷¹ Sexual harassment was identified as a tool for policing gender norms.⁷² Carolyn Grose explains:

The hostile work environment doctrine grew out of the theory that it was discrimination against women to create a highly sexualized work atmosphere because such an atmosphere creates terms and conditions of employment that are different for men and women. This theory differs from the traditional theory of gender discrimination. Saying that all women can’t be plumbers because they are women is discrimination against all women. Sexual harassment involves the sexual characteristics of the particular person being harassed; it is discrimination against a particular woman by a man (or men) who focuses on her as a sexual being rather than as an employee.⁷³

Katherine Franke also notes that modern courts reviewing sexual harassment claims involving unwelcome sexual conduct by a man targeted at a woman engage in cursory analysis, if any, of whether this

the presumption that biological sex is *perceived* to be constant and that social gender norms are attached to this perceived constant.

69. See Cunningham, *supra* note 67, at 225 (defining “sex discrimination as the imposition of (sex) fantasy”).

70. See, e.g., *id.* at 225; see also Francisco Valdes, *GLBTs, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 87 n.241 (1995).

71. See Schultz, *supra* note 64, at 1755.

72. See *id.*

73. Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375, 389 (1995).

conduct constitutes a form of discrimination based on sex.⁷⁴ Courts' failure to examine the sex-based nature of "traditional" sexual harassment, i.e., that of women by male harassers, is based on a presumed norm of heterosexuality. Professor e. christi cunningham notes the ironic effect of *Oncale*'s language, which urges courts to avoid mistaking "ordinary socializing in the workplace—such as male-on-male horseplay or *intersexual* flirtation—for discriminatory 'conditions of employment.'"⁷⁵ As cunningham states, "In the course of prohibiting same-sex sexual harassment under the statute, the Court revealed what it was preserving—ordinary heterosexuality."⁷⁶ While courts and legal scholars have identified sex roles as gender enforced norms, the emergence of sexual harassment as an actionable form of sex-based discrimination has effectively encouraged courts to presume, and use, (heterosexual) gender norms.

IV. THE PRE-*ONCALE* LANDSCAPE

In order to understand the potential impact of the *Oncale v. Sundowner Offshore Services, Inc.*⁷⁷ decision, it is necessary to analyze the way in which early decisions interpreted Title VII to bar GLBT employees from receiving any statutory protection. This section first reviews early cases brought by gay and lesbian employees on theories of disparate treatment and impact. Courts curtailed almost all legal theories proffered by GLBT employees on the principle that "bootstrapping" of sexual orientation claims should be prohibited. The second part of this section describes the legal avenues opened by the Supreme Court's recognition of sexual harassment as a form of sex-based discrimination. As an increasing number of sexual harassment claims were brought by gay male employees against male coworkers and supervisors, courts were forced to question whether this was actionable discrimination, setting the scene for the *Oncale* decision.

A. *Early Disparate Impact and Treatment Claims By Gays and Lesbians*

The 1979 case of *DeSantis v. Pacific Telephone & Telegraph*⁷⁸ shut the door to a vast array of legal theories advanced by gay and lesbian employees under Title VII. In *DeSantis*, the Ninth Circuit Court of

74. See Franke, *supra* note 65, at 692-94.

75. cunningham, *supra* note 67, at 217 (quoting *Oncale*, 523 U.S. at 81).

76. *Id.*

77. 523 U.S. 75 (1998).

78. 608 F.2d 327 (9th Cir. 1979).

Appeals consolidated several claims.⁷⁹ A male teacher who was fired because he wore an earring to work claimed discrimination on the basis of his sexual orientation; gay men alleged that they were not hired by Pacific Telephone & Telegraph (PT&T) when management realized that they were homosexual, and former gay male employees claimed that they were forced to quit their jobs; and lesbians at PT&T who had been fired in accordance with the company's policy of refusing to employ homosexuals alleged discrimination on the basis of sexual orientation by both the company and the union, which had failed to represent them.⁸⁰ The Court of Appeals started from the premise that Title VII does not prohibit discrimination on the basis of sexual orientation.⁸¹ Congressional intent was to reach "traditional notions of 'sex.'"⁸² Therefore, the court's conclusion that "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" is not surprising.⁸³

What is surprising in the *DeSantis* opinion is that the court was able to summarily reject all other arguments made by the plaintiffs as simple "bootstrap device[s] [that] would frustrate congressional objectives."⁸⁴ In addition to claiming that employment discrimination on the basis of sexual orientation was prohibited as discrimination "because of . . . sex," plaintiffs asserted four theories: they argued that such discrimination was actionable through a sex-plus theory; that the employment policy interfered with employees' rights of association; that the discrimination was actionable because it was based on a gender-based stereotype of masculinity; and that the PT&T policies had a disproportionate impact on gay men.⁸⁵

The *DeSantis* court focused exclusively on the plaintiffs' same-sex relationships to dismiss claims that the policy interfered with their freedom of association.⁸⁶ Plaintiffs noted that the EEOC had found race discrimination where employers had discriminated against individuals on the basis of their acquaintances' race.⁸⁷ The court, however, distinguished the PT&T policy by finding that it only discriminated against the gender of one particular homosexual acquaintance and did

79. *See id.* at 328-29.

80. *See id.*

81. *See id.* at 329.

82. *Id.*

83. *Id.* at 333-34.

84. *Id.* at 330-31.

85. *Id.* at 330-33.

86. *Id.* at 331.

87. *See id.*

not discriminate against employees on the basis of the gender of their friends.⁸⁸ This reasoning seems disingenuous at best, but the court bolstered its logic with an underlying presumption that Title VII was not intended to apply to gays and lesbians, and therefore, all potential claims by GLBT employees should be barred.⁸⁹ Plaintiffs' claim that discrimination on the basis of an effeminate disposition was actionable fell easily as the court grouped the claim with prior, unsuccessful attempts to include discrimination on account of homosexuality and transsexuality as sex-based forms of discrimination.⁹⁰ Other courts followed the reasoning utilized in *DeSantis* to find that Title VII is not violated by an employer's refusal to hire a male applicant because he is effeminate or because "he" is transsexual.⁹¹ These courts, as the courts in *DeSantis*, cited legislative history for the proposition that Congress "by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females."⁹²

The male *DeSantis* plaintiffs, in arguing against PT&T's policy of discrimination, sought to employ the sex-plus theory outlined by *Phillips v. Martin Marietta Corp.*⁹³ They suggested that "if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners."⁹⁴ However, the court rejected this as an effort to "'bootstrap' Title VII protection for homosexuals" and noted that PT&T used the same criteria for both men and women.⁹⁵ If an employee of either sex has a same-sex partner, she or he will be fired.⁹⁶ Thus, any sex-plus theory, in order to be successful, would need to compare discrimination faced by gay men and lesbians.

Courts' reluctance to recognize claims brought by a distinct class of men or women provided GLBT employees with incentives to advance theories of disproportionate impact that would compare employers' treatment of gay men and lesbians. Thus, the *DeSantis* plaintiffs argued that the PT&T policy was applied more frequently against men than women and that it had a disproportionate impact on men because gay men were easier to identify.⁹⁷ The court, predictably, found that, if

88. *See id.*

89. *See id.*

90. *See id.* at 331-32.

91. *See Ulane v. Eastern Airlines*, 742 F.2d 1081, 1084 (7th Cir. 1984); *see also Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325, 325-27 (5th Cir. 1978).

92. *DeSantis*, 608 F.2d at 329.

93. *See id.* at 331 (discussing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)).

94. *Id.*

95. *Id.*

96. *See id.*

97. *See id.* at 330.

Congress did not intend to protect homosexuals, it would be imprudent to “employ the disproportionate impact decisions as an artifice to ‘bootstrap’ Title VII protection for homosexuals under the guise of protecting men generally.”⁹⁸

Courts have continued to pit lesbian and gay employees against one another. In 1980, a Florida district court heard arguments from a female employee who complained that a company policy against employing homosexuals had not been applied uniformly and was used against her only because she was female.⁹⁹ While the court did not dismiss her claim on summary judgment, it held that the woman would need to show that the policy was applied against women and not against men and that she was not, in fact, a lesbian.¹⁰⁰ The employee alleged that the employer “discriminates not against all females but against the subclass of females who appear to have a sexual preference for other females. Discrimination against a subclass of either sex, denominated ‘sex-plus’ discrimination, has been held, in limited instances, to constitute sex discrimination cognizable under Title VII.”¹⁰¹ However, the court explained that such a “sex-plus” claim is only available when the plaintiff can show that similarly situated members of the opposite sex are treated differently.¹⁰² For example, a policy that treats married women differently than married men or that discriminates against women with young children but not men with children, is a violation of Title VII.¹⁰³ The court referred to a Fifth Circuit case, which held that the “sex-plus” theory was unavailable to men who were required to keep their hair short:

[A] line must be drawn between distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the manner in which an employer exercises his judgment as to the way to operate a business. Hair length is not immutable and in the situation of employer vis à vis employee enjoys no constitutional protection. If the employee objects to the grooming code, he has the right to reject it by looking elsewhere for employment, or alternatively *he may choose to subordinate his preference* by accepting the code along with the job.¹⁰⁴

98. *Id.*

99. *See* Valdes v. Lumbermen’s Mutual Casualty Co., 507 F. Supp. 10 (S.D. Fla. 1980).

100. *See id.* at 13.

101. *Id.* at 11-12.

102. *See id.* at 13.

103. *See, e.g.,* Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971); *see also* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

104. *Valdes*, 507 F. Supp. at 12 (quoting *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975)) (emphasis added).

While the court left open the possibility that “lesbian mannerisms” might constitute a fundamental right or immutable characteristic, the court warned the plaintiff that this theory is only available to her if she can show that the policy against homosexuals was not applied uniformly to men and women.¹⁰⁵

Title VII has been interpreted by the courts to bar almost any claim of discrimination on the basis of sexual orientation. Disparate impact and sex-plus theories may be available to GLBT plaintiffs, but are likely to result in “comparisons” of discrimination, as courts will look to whether gay men and lesbians were “equally” discriminated against. This is hardly a suitable remedy for the workplace discrimination experienced by GLBT employees.

B. *Same-Sex Sexual Harassment Claims*

Prior to the *Oncale* ruling, there was disagreement among the lower courts as to whether a plaintiff could bring a sexual harassment suit for harassment by a person of the same sex. Some courts ruled that such a suit was absolutely not actionable under the statute.¹⁰⁶ Other courts suggested that same-sex sexual harassment would only be actionable if the harasser was homosexual.¹⁰⁷ In *McWilliams v. Fairfax County Board of Supervisors*,¹⁰⁸ a pre-*Oncale* ruling, the Fourth Circuit held that harassment among heterosexuals of the same sex could not give rise to a Title VII sexual harassment claim.¹⁰⁹ However, the court explicitly left the door open for a “same-sex discrimination claim where either the victim or the oppressor or both, are homosexual or bisexual.”¹¹⁰ In a subsequent decision, the Fourth Circuit reviewed a sexual harassment claim brought by a heterosexual male; the court explicitly stated that “a claim may lie under Title VII for same-sex hostile work environment sexual harassment where, as here, the individual charged with discrimination is homosexual.”¹¹¹ A pre-*Oncale* D.C. Circuit decision opined that a cause of action for sexual harassment could exist under Title VII where a “subordinate of either gender” was harassed by a “homosexual superior of the same gender.”¹¹² The variety in lower courts’ interpretations provided fertile grounds for a Supreme Court

105. *Id.* at 12-13.

106. *See, e.g.,* *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994).

107. *See, e.g.,* *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

108. 72 F.3d 1191 (4th Cir. 1996).

109. *See id.* at 1195-96.

110. *Id.* at 1195 n.4.

111. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 144 (4th Cir. 1996).

112. *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

ruling on the question of whether same-sex sexual harassment was actionable under Title VII.

V. *ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.* AND LOWER COURTS' IMPLEMENTATION OF THE *ONCALE* MANDATE

The effect of the Supreme Court's ruling in *Oncale* is best understood by examining the issues and facts before the Court and assaying the guidelines provided in the Court's brief opinion. This section first reviews the Supreme Court's decision and then discusses ways in which lower courts have interpreted and used the three evidentiary routes outlined in the opinion.

A. *The Supreme Court Decision in Oncale v. Sundowner Offshore Services, Inc.*

It is important to start this discussion with the facts of *Oncale v. Sundowner Offshore Services, Inc.*, despite Scalia's characterization of them as "irrelevant to the legal point [the Court] must decide. . . ."¹¹³ The facts illustrate what the Court's analysis *failed* to address. The plaintiff, Joseph Oncale, was working on board an oil platform with several other men.¹¹⁴ He alleged that he was restrained by coworkers while his supervisor put his penis on his neck.¹¹⁵ He was threatened with rape by his coworkers.¹¹⁶ After a coworker held him so that his supervisor could force soap up his anus, he quit.¹¹⁷ The district court dismissed Oncale's claim on the ground that same-sex sexual harassment was not actionable under Title VII, and the Fifth Circuit affirmed. The Supreme Court ultimately reversed the Fifth Circuit, holding that same-sex harassment is actionable, and remanded the case.

Many gay and lesbian organizations viewed the *Oncale* decision as one that could either be a major setback or a monumental victory for GLBT employees. The harassment experienced by Oncale was similar to that faced by many gay employees, and the case provided the potential groundwork for recognizing claims brought by employees for harassment based on their perceived sexual orientation. Preeminent scholars in the field of sexual harassment joined forces with organizations such as Lambda Legal Defense and Education Fund and

113. 523 U.S. at 76-77.

114. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118 (5th Cir. 1996).

115. See *id.*

116. See *id.*

117. See *id.* at 18-19.

the American Civil Liberties Union to prepare amicus briefs to the Court.¹¹⁸

The opinion, authored by Justice Scalia, clearly holds that same-sex sexual harassment may be actionable under Title VII.¹¹⁹ The opinion further outlines three possible types of proof that a same-sex sexual harassment plaintiff might proffer in order to demonstrate that the harassment was “because of . . . sex.”¹²⁰ The first method that the court discusses applies to conduct involving sexual proposals or activity.¹²¹ The Court notes that “[c]ourts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.”¹²² The Court then states that this same “chain of inference” might apply to same-sex harassment, “if there were credible evidence that the harasser was homosexual.”¹²³ However, the Court reasons, all harassment need not be sexual, and describes two additional types of proof available. A plaintiff might also show that the harasser is motivated by a “general hostility” toward members of her own sex.¹²⁴ Lastly, a plaintiff in a mixed-sex workplace could offer “direct comparative evidence” about the harasser’s treatment of both sexes.¹²⁵

The Court emphasized that “[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex.’”¹²⁶ Lest lower courts misinterpret the impact and import of the opinion, the Court noted that it did not intend for Title VII to be “a general civility code” for the American workplace.¹²⁷ The Court suggests that an inquiry into the severity of harassment will allow courts to distinguish “ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’”¹²⁸ Finally, the Court concluded, “[c]ommon sense, and

118. See, e.g., Amicus Brief of Lambda Legal Defense and Education Fund et al., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568).

119. See *Oncale*, 523 U.S. at 79.

120. *Id.* at 80-81.

121. See *id.* at 80.

122. *Id.*

123. *Id.*

124. *Id.*

125. See *id.* at 80-81.

126. *Id.* at 81.

127. *Id.*

128. *Id.*

an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in [Oncale's] position would find severely hostile or abusive."¹²⁹ Justice Thomas' concurrence again underlined the plaintiff's burden to "plead and ultimately prove" that the discrimination was sex-based.¹³⁰

B. Lower Courts' Attempts to Implement Oncale

The Supreme Court decision in *Oncale* was hailed as a victory for employees and "for all Americans, gay or straight, male or female."¹³¹ Civil rights lawyers anxiously awaited the results of the remanded case, which the parties eventually settled. *Oncale* has had a wide-reaching impact on modern sexual harassment litigation, but not necessarily in the way anticipated. Lower courts have cited extensively to *Oncale* in a broad range of sexual harassment cases. Most commonly, *Oncale* is cited for the proposition that not all conduct with sexual connotations need be harassing and that courts need not enforce Title VII as a general civility code. "Defense lawyers are using [the *Oncale* decision] to our benefit," said a lawyer representing employers from Boca Raton, Florida.¹³² Indeed, *Oncale* is often used to rule against employees, minimizing the claims advanced by victims of harassment as "innocuous differences in the ways men and women routinely interact."¹³³

The consequences of creating formalistic proofs for same-sex sexual harassment that are practically unobtainable for GLBT Title VII plaintiffs has been evident in the lower courts. In *Simonton v. Runyon*,¹³⁴ a New York district court held that *Oncale*'s failure to address questions of sexual orientation implied that earlier precedents barring claims based on sexual orientation were left untouched by the Supreme Court's decision.¹³⁵ "Notably, the Supreme Court never mentioned the issue of whether same-sex harassment encompassed harassment based, not upon the plaintiff's sex, but upon his or her sexual orientation."¹³⁶ The *Simonton* plaintiff, a former postal service worker, had been subjected to "ridicule, harassment and disparate treatment based upon his sexual

129. *Id.* at 82.

130. *Id.*

131. *Sex Ruling Now Hurts Lawsuits*, BATON ROUGE ADVOC., Aug. 3, 1999, at 7C (quoting ACLU representative).

132. *Id.*

133. 523 U.S. at 81.

134. 50 F. Supp. 2d 159 (E.D.N.Y. 1999), *aff'd* 232 F.3d 33 (2d Cir. 2000).

135. *See id.* at 162.

136. *Id.*

orientation.”¹³⁷ However, he was unable to provide any of the kinds of proof recommended by *Oncale*. Therefore, the court found that the harassment was based on his status as a homosexual and not because of sex.¹³⁸

When lower courts use *Oncale* in cases involving same-sex sexual harassment, they rely on the three types of proof outlined by Justice Scalia. This section describes the ways in which these proofs often provide the bases for dismissing plaintiffs’ claims, especially when employees claim to have been discriminated against because they were gay or perceived as gay.¹³⁹ The “chain of inference” suggested by Scalia’s first type of proof means that employees are likely to be successful in bringing claims against homosexual supervisors. The mandate that courts examine whether members of one sex were exposed to disadvantageous work conditions, to which members of the other sex were not, is tied to the two remaining types of proof. By requiring evidence of general animosity toward, or disparate treatment of, all members of one sex, the *Oncale* decision reinforces the conceptualization of biological sex as monolithic. Failure to show that the entire group (similarly biologically sexed individuals) was affected in the same way as the plaintiff is fatal to her claim.

1. The Desire-Based “Chain of Inference”

Courts seem to be most comfortable with sexual harassment claims when the complained of conduct is sexual, or desire-based.¹⁴⁰ Thus, many courts have seized on *Oncale*’s description of the chain of inferences that may be drawn where there is “sexual attraction.”¹⁴¹ A gay man’s sexual harassment of a man would be sex-based because the gay man is presumably attracted to (all) men. Similarly, the “reverse” scenario, where a straight woman harasses a lesbian woman, would not be sex-based because, again, presumably, the straight woman is not generally attracted to other women. As one court explained the underlying theory of this evidentiary route:

[T]he act of sexual harassment itself creates an inference that the harasser harbors a sexually discriminatory animus towards the plaintiff. When a person “sexually harasses” another, i.e., makes comments or advances of an erotic or sexual nature, we infer that “the harasser [is making] advances towards the victim because the victim is a member of the gender the

137. *Id.* at 160.

138. *Id.* at 162-63.

139. See *Sex Ruling Now Hurts Lawsuits*, *supra* note 131.

140. See Schultz, *supra* note 64, at 1703-09.

141. See, e.g., *Fry v. Holmes Freight Lines, Inc.*, 72 F. Supp. 2d 1074 (W.D. Mo. 1999).

harasser prefers.” . . . Unless there is evidence to the contrary, therefore, we also infer that the harasser treats members of the “non-preferred” gender differently—and thus that the harasser harbors an impermissible discriminatory animus towards persons of the preferred gender.¹⁴²

Where the harassment is sexual in nature, but is targeted at an employee perceived as GLBT, courts are likely to find that the harassment was based on sexual orientation and not on sex. Thus, where a male employee was kicked and thrown, and coworkers yelled at him that “[e]veryone knows you’re a faggot” and “[e]veryone knows you take it up the ass,” along with other verbal epithets and graffiti referring to his sexuality, the harassment was not based on sex.¹⁴³ In *Retterer v. Whirlpool Corp.*,¹⁴⁴ a district court held that a plaintiff who alleged that his two supervisors had restrained and tickled him on the stomach and chest had only “set forth evidence relating to his sexual orientation,” and had failed to show that the harassment was because of sex.¹⁴⁵ However, where a lesbian employee unfairly reprimanded a former girlfriend who was also a coworker, a court inferred a discriminatory *animus* based on sex because both parties were lesbians.¹⁴⁶

Sympathetic courts may engage in legal gymnastics in attempts to allow plaintiffs to satisfy this form of proof, at least at the pleading stage. For example, in *Fry v. Holmes Freight Lines, Inc.*,¹⁴⁷ the plaintiff alleged that he was called “Sally” by his male coworkers and was constantly denigrated due to his coworkers’ perceptions that he was gay.¹⁴⁸ They would make rude gestures at him and push him.¹⁴⁹ The court held that this conduct alone did not create an inference that the harassment was sex-based.¹⁵⁰ The court reasoned that, if the harassers were gay, the harassment could be found to be sex-based.¹⁵¹ Unfortunately, there was no evidence on the record to suggest that the plaintiff’s tormentors were gay.¹⁵² Nevertheless, the court suggested that the nature of the conduct of the alleged harassers might be sufficient to create an inference that they

142. *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1246 (11th Cir. 1998) (quoting *Fredette v. BFP Mgmt. Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997)).

143. *Bibby v. Philadelphia Coca Cola Bottling Co.*, 85 F. Supp. 2d 509, 511 (E.D. Pa. 2000).

144. No. 9-98-55, 1999 WL 254412 (Ohio App. 3 Dist. 1999).

145. *Id.* at *2.

146. *See Llampallas*, 163 F.3d at 1247.

147. 72 F. Supp. 2d 1074 (W.D. Miss. 1999).

148. *Id.* at 1077.

149. *See id.* at 1076.

150. *See id.* at 1078.

151. *See id.*

152. *See id.*

were homosexual and that, therefore, the harassment was sex-based.¹⁵³ Under similar circumstances, in *Merritt v. Delaware River Port Authority*,¹⁵⁴ a plaintiff survived summary judgment when he was able to demonstrate the existence of a genuine issue of material fact as to whether the harasser was homosexual; this created the inference that the harassment he experienced was sex-based.¹⁵⁵

Nevertheless, the courts have been adamant in following *Oncale*'s warning that simply because conduct is sexual in nature, it is not necessarily sex-based. Thus, sexual content or connotations of statements and conduct, even if vulgar and offensive, will not alone raise a question of fact as to the existence of sex-based same-sex sexual harassment.¹⁵⁶ Therefore, "sexual" language used to harass gay males or lesbians in the workplace does not create an inference that the harassment is sex-based.¹⁵⁷

Carolyn Grose, a scholar writing on same-sex sexual harassment before the *Oncale* ruling, predicted that such a ruling would only reach harassment by homosexuals.¹⁵⁸ She argued that allowing plaintiffs to bring actions for same-sex sexual harassment without recognizing discrimination on the basis of sexual orientation as actionable would "perpetuate an atmosphere of homophobia in the workplace, while providing no protection for the victims of such an atmosphere."¹⁵⁹ Scholars writing since *Oncale* have noted that sexual harassment charges brought against gays and lesbians are marked by homophobia.¹⁶⁰ Homophobic reactions to openly gay or lesbian employees are common and openly gay and lesbian employees recount the need to be constantly vigilant to not make coworkers uncomfortable.¹⁶¹

An evidentiary route that makes the harasser's sexual orientation relevant has far-reaching consequences. GLBT employees are at a greater risk of being charged with same-sex sexual harassment than their heterosexual counterparts. Furthermore, employers may employ this theory of same-sex sexual harassment as a license to investigate employees' sexual orientation. In *Nance v. M.D. Health Plan*,¹⁶² the

153. *See id.*

154. 76 Empl. Prac. Dec. 4 (E.D. Pa. 1999).

155. *See id.* at 116.

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

157. *Id.*

158. *See Grose, supra* note 73, at 385-86.

159. *Id.*

160. *See Lester, supra* note 17, at 96, 113.

161. *See Grose, supra* note 73, at 375-76. *See generally* OUT IN THE WORKPLACE, *supra* note 24.

162. 47 F. Supp. 2d 276 (D. Conn. 1999).

employer's questioning of a man charged with sexual harassment of another male employee conveyed to his coworkers a belief that he was homosexual.¹⁶³ The court found that this questioning might constitute extreme and outrageous conduct, remarking that:

Many homosexuals take great care to conceal their sexual orientation from those with whom they work for fear of humiliation or actual physical risk if their homosexuality is disclosed. An employer's questioning that signals to others its belief that the subject employee is a homosexual in reckless disregard of a foreseeable, unsavory response by those persons thus informed, could constitute outrageous conduct.¹⁶⁴

By creating a presumption that same-sex sexual harassment is sex-based when the harasser is homosexual, courts promote investigations that may have severe psychological and economic consequences for the employee being scrutinized.

2. The Biological Essentialist Evidentiary Options

Scalia's opinion in *Oncale*, by outlining types of proof that plaintiffs might submit in support of a same-sex sexual harassment claim, represents a severe setback in reconceptualizing gender. The desire-based option, as discussed above, is problematic because it invites heterosexist reactions from employers and courts. The two other options presented by Scalia, that plaintiffs provide direct comparative evidence of disparate treatment of sexes in a mixed workplace or show that the harasser had a nonsexual animus toward members of one sex, conceive of gender as monolithic and cemented in biology.

Lower courts have interpreted the Court's warning against expanding Title VII into a general civility code as a mandate to be strict in interpreting whether same-sex harassment is truly "because of sex." However, by failing to directly address the question of what constitutes "sex," *Oncale* forces lower courts to look at its examples of disparate treatment as a basis for understanding "sex." *Oncale* essentially leaves plaintiffs with the choice of a desire-based proof, which is successful when the harasser is GLBT, or proof that would require a showing that other employees of the same biological sex as the harassed person were similarly treated. Such a standard, which cuts off a showing of individualized harassment, has rarely, if ever, been employed in a case of opposite-sex harassment. By requiring GLBT plaintiffs to compare their treatment with that of other employees of the same biological sex, but who may not be perceived as GLBT, the Court makes it almost impossible

163. *See id.* at 277.

164. *Id.* at 279.

for an employee to show that her harassers were reacting to her projection of her “sex,” or what, in other contexts, has been termed gender-based stereotypes. As discussed in Part II, the Court has often recognized the impermissibility of other sex-based stereotypes, such as the stereotype of women as homemakers, feminine, and weak. An employee who is perceived as gay or lesbian should not have to demonstrate that other members of the same biological sex who are not perceived as such are treated similarly.

Some lower courts have taken the inquiry into biological essentialism to extremes. In *Bibby v. Coca Cola Philadelphia Bottling Co.*,¹⁶⁵ the court resorted to the New Shorter Oxford English Dictionary for a definition of “sex.”¹⁶⁶ While noting that the dictionary included definitions that focused on sexual activity and consciousness of sex, the district court found that Congress had intended Title VII to apply to biological distinctions. Citing a Sixth Circuit case, *Bibby* noted that the word sex was placed “along with either immutable characteristics (race, color, national origin) and a characteristic so deeply rooted for most that it is almost immutable (religion).”¹⁶⁷ However, discrimination is concerned with the action and conduct of the harasser or the offender, not with those of the victim. Thus, it seems odd to advocate an “immutable” standard for the victim, rather than to focus on the offender’s perceptions or reactions to particular characteristics of the plaintiff.

This biological essentialism also defeats claims that GLBT plaintiffs may bring on “sex plus” theories on the premise that a harasser reacted to the plaintiff’s projection of her or his gender. If the plaintiff can not show that other women, or other men, were similarly treated by the harasser, there is no inference that the harassment was sex-based. As such, if the plaintiff is nonheterosexual, courts will assume that the harassment was based on sexual orientation and consequently not actionable.

This monolithic, biologically based conception of the “sexes” lends itself to an “equal opportunity harasser” loophole. If a supervisor harasses women that works for him, but also harasses a male employee—perhaps because he perceives the employee as too effeminate—neither the female or male employees will be able to show that they were harassed “because of” their sex. While it may be the case that the supervisor does not like effeminate manners, and thus treated the women and the male employee in similar ways, a biology-based

165. 85 F. Supp. 2d 509 (E.D. Pa. 2000).

166. *Id.* at 515.

167. *Id.* at 516 (citing *Dillon v. Frank*, 952 F.2d 403, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. 1992)).

approach bars Title VII from reaching this conduct. A district court, in a case where a supervisor had asked for sexual favors from both a male and female employee, held that the harassment was not sex-based because neither plaintiff was subjected to disadvantageous terms or conditions of employment to which members of the other sex were not exposed.¹⁶⁸

Same-sex sexual harassment plaintiffs who are employed in workplaces that are predominantly male or predominantly female face additional problems in proving that their harassment was sex-based. In one case, where a male supervisor was accused of harassing a male employee in an all-male environment, the defense argued that it was impossible to show that the plaintiff had been discriminated against on the basis of sex because he could not show that he was treated differently from women.¹⁶⁹ *Oncala's* categorical grouping of employees of the same (biological) sex fails to reach discriminatory enforcement of gender norms. The underlying assumption of biological essentialism evident in courts' reasoning currently serves as a license to harassers.

VI. RECOGNIZING HETEROSEXUALITY AS A GENDER-BASED NORM

By prohibiting sexual harassment, Title VII prohibits discrimination on the basis of (hetero)sexuality. The fact that courts do not interpret Title VII as prohibiting discrimination based on nonheterosexuality means that courts must ultimately engage in an investigation of sexuality. Most often, sexuality is presumed. For example, in a recent case involving "traditional" sexual harassment, harassment by a man of a woman, there was no discussion of whether the conduct was sex-based.¹⁷⁰ One of the comments complained of was the male employee's statement to the plaintiff that she had "lost [her] cherry."¹⁷¹ This remark was likely based on the plaintiff's perceived heterosexuality. However, the court did not question whether the discrimination was based on the employee's sexual orientation and not her sex. By failing to recognize their use of heterosexuality as a gender norm, courts embark on futile attempts to distinguish gender-motivated discrimination from that based on sexual orientation. This section describes why this endeavor is problematic and how courts have used heterosexuality as a gender-based norm in their analysis of claims by GLBT employees. Finally, the section outlines several recommendations for lawyers seeking to bring

168. See *Holman v. Indiana*, 24 F. Supp. 2d 909 (N.D. Ind. 1998).

169. See *Shermer v. Ill. Dep't of Transp.*, 937 F. Supp. 781, 782 (C.D. Ill. 1996).

170. *Burnett v. Tyco Corp.*, 203 F.3d 980 (6th Cir. 2000).

171. *Id.* at 981.

Title VII claims on behalf of GLBT employees charging discrimination on account of their sexual orientation.

A. *Judicial Line-Drawing—Where Gender Ends and Sexual Orientation Begins After Oncale*

Courts engage in “line-drawing” between gender and sexual orientation primarily in instances of same-sex sexual harassment and, most often, when the complaining party is gay or lesbian. In her article “What’s Wrong With Sexual Harassment?,” Katherine Franke notes that courts reviewing sexual harassment claims involving unwelcome sexual conduct engage in cursory analysis, if any, of whether this conduct constitutes a form of discrimination based on sex.¹⁷² *Oncale* is precedential in that its first recommended type of evidentiary support explicitly *makes sexual orientation relevant* for same-sex sexual harassment claims.

Homosexuality becomes the visible sexual orientation and heterosexuality the invisible. In *Johnson v. Community Nursing Services*,¹⁷³ a district court grappled with the tension between recognizing homosexuality and the need to presume heterosexuality.¹⁷⁴ In *Johnson*, a female employee brought a sexual harassment claim against her lesbian supervisor.¹⁷⁵ The plaintiff had previously been romantically involved with a woman, a fact known to her supervisor. However, the plaintiff claimed that “this sexual orientation was new for [her],” and subsequently entered a heterosexual relationship.¹⁷⁶ The plaintiff claimed that her supervisor, who was openly lesbian, attempted to initiate sexual relations by sharing a glass of wine, calling her “sexy” and telling her to get something from a male employee by “using her seductive ways.”¹⁷⁷ When the supervisor learned that the plaintiff was dating a man, she stopped being supportive and became irritable, often yelled at the plaintiff, and scolded her for being a poor planner.¹⁷⁸ The plaintiff’s complaint alleged that the supervisor’s harassment was based on sexual orientation: she claimed that she was “sexually harassed [by the defendant] due to my sexual preference and lifestyle choice which was ultimately different from hers.”¹⁷⁹ However, the court failed to

172. See Franke, *supra* note 65, at 692-94, 718.

173. 985 F. Supp. 1321 (D. Utah 1997).

174. See *id.*

175. See *id.* at 1323.

176. *Id.*

177. *Id.* at 1323-24.

178. See *id.* at 1324.

179. *Id.* at 1325.

question whether this was discrimination based on sexual orientation, and, therefore, presumably not on sex. While the supervisor's conduct was not targeted at male employees and not aimed at all female employees, but only "certain" ones, the court engaged in no discussion of the line between sexual orientation and sex.¹⁸⁰ Rather, it simply found that the "sexual comments" would allow a conclusion that "the abuse was predicated upon plaintiff's gender."¹⁸¹

When courts have proof that a harassed individual is (presumably) heterosexual, they tend to ignore the possibility that discrimination might be based on perceived sexual orientation. In a case involving a claim brought by a married woman in the military, a district court found that comments concerning the woman's lesbianism were likely sex-based.¹⁸² The conduct complained of included remarks that people were worried about the woman's sexual orientation and an instance where a male colleague said, "[D]on't rub up against me. You're not going to come out of the closet that way."¹⁸³ Heterosexual marriage acts as a shield and the court avoids the question of whether the harassment was based on the plaintiff's perceived sexual orientation. This case also suggests that, in cases involving male harassment of women, courts presume a male harasser's heterosexual desire, regardless of the sexual orientation of the woman. This presumption may sufficiently color the woman's claim as sex-based discrimination, allowing it to escape the fatal label of discrimination on the basis of sexual orientation.

Women often bring hostile work environment claims that include instances where they are called lesbians. Thus, in one instance, evidence "gender-based hostility" included suggestions that a woman was a lesbian because of her interest in outside sports.¹⁸⁴ Similarly, in a case where the male harasser made comments about a woman's physical anatomy and called her a lesbian and licked his lips suggestively, the conduct was described as gender-based, with no inquiry into whether it may have been based on the woman's sexual orientation.¹⁸⁵

In contrast to cases involving women who are perceived as, or simply called, lesbian by male coworkers, cases involving men regarded as gay by other men in the workplace are most often dismissed as claims of sexual orientation discrimination. In *Dandan v. Radisson Hotel*

180. *Id.*

181. *Id.* at 1326.

182. *See* Wible v. Widnall, No. 97-2142-JWL, 1998 WL 259892, at *5 (D. Kan. 1998).

183. *Id.* at *1.

184. *Jessen v. Babbitt*, 202 F.3d 282, No. 98-8069, 1999 WL 1246915, at *3 (10th Cir. 1999).

185. *See* *Matthews v. City of Gulfport*, 72 F. Supp. 2d 1328 (M.D. Fla. 1999).

Lisle,¹⁸⁶ the court found that the plaintiff's claim that he was discriminated against for not being masculine did not sufficiently allege sex-based discrimination.¹⁸⁷ The plaintiff was called "fruitcake," "fagboy," and "Tinkerbell."¹⁸⁸ He was also the object of graphic insults such as "didn't your boyfriend do you last night" and "shove [a vacuum cleaner hose] up your ass," and was criticized for feminine speech patterns and mannerisms.¹⁸⁹ The plaintiff's sexual orientation was not known to his coworkers.¹⁹⁰ The court, however, found this to be irrelevant to its holding that the alleged conduct was based on the employee's sexual orientation and not his sex.¹⁹¹ Finding no precedent for the theory that "because [the plaintiff] does not match-up to his coworkers' expectations of what a man should be or how he should live his life, their comments are directly attributable to his sex," the court dismissed the claim.¹⁹² Similarly, in a case where a male employee alleged "that, though he is not homosexual, he was harassed and treated as a homosexual," a court found that the harassment was not based on sex.¹⁹³ However, the fact that the plaintiff clearly demonstrated that he was not, in fact, gay, motivated the court to be cautious. Diligently applying the standards set out by *Oncale*, the court found that the plaintiff had testified that his harassers were not "homosexual and had never expressed any sexual interest in him," did not exhibit general hostility toward men and made homosexual jokes in front of men and women.¹⁹⁴

Oncale has opened the door for courts to consider parties' sexual orientation. Courts' singular examination of homosexuality is, however, troubling. In a pre-*Oncale* decision, a district court considered whether the fact that same-sex harassment is perpetrated by a homosexual should be a cognizable circumstance in determining whether there was a hostile employment environment.¹⁹⁵ The court differed from the *Oncale* decision's rationale, and concluded that to consider such a circumstance would impermissibly confer Title VII protections based partially upon the plaintiff's status as a heterosexual.¹⁹⁶ As Title VII does not protect

186. No. 97 C8342, 2000 WL 336528 (N.D. Ill. 2000).

187. *Id.*

188. *Id.* at *1.

189. *Id.*

190. *Id.* at *4.

191. *Id.*

192. *Id.*

193. *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 712 (E.D. Tex. 2000).

194. *Id.* at 715.

195. *See Miller v. Vesta*, 946 F. Supp. 697, 711-12 (E.D. Wis. 1996).

196. *See id.* at 712.

employees based upon their sexual orientation, plaintiffs should not be able to rely on the relative sexual orientations of the harasser and victim to argue that the conduct was sex-based.¹⁹⁷ As the cases discussed in this section have demonstrated, by considering sexual orientation at all, sexual orientation-based protections must also be introduced into Title VII.

B. Identifying Courts' Use of "Compulsory Heterosexuality" as a Sex-Based Stereotype

Heterosexuality is, itself, a gender-based stereotype. In other words, sexuality is part of an individual's gender. Gender stereotypes encompass sex-based norms that society expects to see reflected in individual's behavior, choice of work, dress and personal ways of interaction. While scholars have commented that courts are unable to understand the difference between biological sex and gender, they also acknowledge the Supreme Court's recognition of the impact of gender-based stereotypes.¹⁹⁸ Adrienne Rich describes "compulsory heterosexuality" as society's insistence that everyone be heterosexual, a "profound falseness" that distorts the lives of all women.¹⁹⁹ "What distinguishes the straight from the gay woman is not behavior so much as desire and status: the lesbian's desire for other women challenges the orthodoxy of compulsory heterosexuality."²⁰⁰ Heterosexuality is imposed on both men and women, but mandates policing of different norms for each "sex."

Some courts have been hostile to plaintiffs, whom the courts sense are attempting to "backdoor" a sexual orientation claim through a sex-based harassment claim. However, the plaintiff's lawyer—and the law—is concerned with the discriminatory motivation of the harasser. Thus, by arguing that discrimination on the basis of sexual orientation should be treated as discrimination on the basis of sex, I do not argue that sexual orientation, sex and gender are necessarily identical. Rather, I suggest that discrimination faced by GLBT individuals in the workplace stems, in part, from conceptions of the harasser of what a particular "sex" should be, how the "sex" should act, talk, walk.

A few courts have recognized that perceptions of sexual orientation are tied to gender norms. In *Samborskii v. West Valley Nuclear Services*,

197. *See id.*

198. *See supra* Part II.

199. ADRIENNE RICH, COMPULSORY HETEROSEXUALITY AND LESBIAN EXISTENCE, IN BLOOD, BREAD, AND POETRY: SELECTED PROSE, 1979-1985, at 23-75 (1986).

200. ESKRIDGE, *supra* note 10, at 237.

Co.,²⁰¹ a female plaintiff survived summary judgment when she alleged that her employer had encouraged rumors of her purported lesbianism in the workplace.²⁰² She claimed that she was subjected to ridicule by male coworkers because her femininity was displayed in a way that did not meet the male employee's expectations of how women are to appear and behave and that, therefore, the discrimination was sex-based.²⁰³

Plaintiffs have been able to use "sex-plus" theories of discrimination to reach questions of policed gender-norms. In *Higgins v. New Balance Athletic Shoe, Inc.*,²⁰⁴ the First Circuit Court of Appeals reviewed a case where a gay man alleged sexual harassment when he was mistreated by many of his fellow workers.²⁰⁵ They had called him vulgar and derogatory names, made obscene remarks about his imagined sexual activities, mocked him (e.g., by using high-pitched voices or gesturing in stereotypically feminine ways), assaulted him numerous times, and regularly threatened to kill him.²⁰⁶ The plaintiff claimed that he was discriminated against because he was a man with specific characteristics which caused others to perceive him as gay.²⁰⁷ He argued that this "sex-plus" theory was supported by *Phillips v. Martin Marietta*.²⁰⁸ The *Higgins* court found that this argument was unsupported by facts on the record and, therefore, did not review it.²⁰⁹ However, a recent decision suggests that this may be a viable theory.²¹⁰

In order for the "logic" of compulsory heterosexuality to work, courts must be able to discern the "sex" of the harassed and the harasser. When this is impossible, the veil is lifted, if only slightly. A recent district court case from Florida highlights the difficulty of determining whether conduct was gender-based or based on sexual orientation when the monolith of biological sex crumbles.²¹¹ The plaintiff was a preoperative transsexual who had been undergoing hormone treatments to diminish male sex characteristics and emphasize the female.²¹² He

201. No. 99-CV-0213E(m), 1999 WL 1293351 (W.D.N.Y. 1999).

202. *Id.*

203. *Id.* at *3.

204. 194 F.3d 252 (1st Cir. 1999).

205. *See id.* at 256.

206. *See id.* at 257.

207. *See id.* at 259.

208. *See id.*

209. *See id.* at 259-60.

210. *See Nasim v. Loeber Motors, Inc.*, No. 98 C 4433, 1999 WL 1101801, at *1 (N.D. Ill. 1999) (noting the "perceptive" opinion in *Higgins*, which suggests a means for bringing a claim for harassment on the basis of sexual orientation.)

211. *See Cox v. Denny's, Inc.*, No. 98-1085-CIV-J-16B, 1999 WL 1317785 (M.D. Fla. 1999).

212. *See id.* at *1.

lived his life as a woman and, while working at Denny's, was harassed by a male coworker, who groped her/his crotch to determine if s/he was biologically male.²¹³ The coworker stated "I gonna get me some of that," and would brush against the plaintiff in a "non-sexual manner and called her/him derogatory names such as 'fag,' 'punk bitch,' 'whore bitch,' and 'freak mother fucker.'"²¹⁴ Denny's attempted to argue that the harassment was based on transsexuality, not sex.²¹⁵ Citing *Oncale*, the court concluded that, with same-sex harassment, the question is whether the harassment occurred "because of an individual's sex as male or female," and suggested that claims brought on the basis of a plaintiff's "sex" would be actionable from a transsexual.²¹⁶ "[T]aking [the plaintiff's] allegations that [the defendant] made an implicit proposal of sexual activity to him as true, an inference can be made that the alleged harassment was motivated by [the plaintiff's] sex."²¹⁷ The court, however, left unanswered what "sex" it would consider the plaintiff to be, while foreshadowing that this question would be essential for determining whether the harassment is actionable.

Some courts have allowed plaintiffs to demonstrate a cause of action for sex-based sexual harassment that involves others' perception of their sexual orientation. These courts have generally recognized that the employees' projection of their sex, or their coworkers' perception and reaction to how they conformed to a (presumed heterosexual) sex role, constitute grounds for finding that the harassment was sex-based. In *Schmedding v. Tnemec Co.*,²¹⁸ the Eighth Circuit went a step beyond this recognition that perceptions of, and reactions to, sexuality are linked to a person's biological sex.²¹⁹ The court forgave a pleading "mistake," wherein the plaintiff had pled that the harassment he experienced was because of his "perceived sexual preference."²²⁰ The employee had been subject to harassment by other male employees and one female employee.²²¹ They patted him on the buttocks, asked him to perform sexual acts, sent him derogatory notes referring to parts of his anatomy, and was regularly called him a "homo" and "jerk off."²²² The court found that the fact that some of the harassment alleged included taunts of

213. *See id.*

214. *Id.*

215. *See id.* at *2.

216. *Id.*

217. *Id.*

218. 187 F.3d 862 (8th Cir. 1999).

219. *See id.*

220. *Id.* at 865.

221. *See id.* at 863.

222. *Id.* at 865.

being homosexual was not sufficient to transform the complaint from one alleging harassment based on sex to one alleging harassment based on sexual orientation.²²³ This would seem to be a legal fiction, at best, as the plaintiff was obviously being harassed by his coworkers because he was perceived as gay. However, Schmedding claimed that the harassment involved rumors that “falsely labeled him as a homosexual in an effort to debase his masculinity, not that he was harassed because he *is* homosexual or *perceived* as a homosexual.”²²⁴ Although the plaintiff’s pleadings were sufficient to withstand summary judgment, the court emphasized that the plaintiff would bear the burden of demonstrating that the harassment was because he was *male*, and not because of his sexual orientation.²²⁵

Because Schmedding claimed that he was not in fact homosexual, he did not stumble on the problem of attempting to separate harassment based on his sex and on his sexuality. Because the court was forced to deal with “perceived homosexuality,” the taunting was seen as an attempt to debase Schmedding’s masculinity.²²⁶ The claim of heterosexuality gives Schmedding a defense against the charge that this is really sexual orientation harassment. Query what the outcome would have been had Schmedding been gay; would the fact that he was gay foreclose the possibility that the harassment was targeted to debase his masculinity? The fact that a similar claim and similar allegations in *Simonton v. Runyon*²²⁷ were found to be non-actionable suggests that either courts will attribute teasing to one’s sexual orientation if the employee is GLBT, or that courts do not consider it possible to debase a gay man’s masculinity—equally disturbing conclusions. Courts’ slow recognition that their analysis of same-sex sexual harassment claims requires them to look at sexual orientation has cracked the monolith of biological essentialism. Difficulties in naming plaintiff’s sex or sexual orientation have allowed some courts to reach discrimination based on gender norms.

C. Recommendations for Creative Lawyering

Oncale’s list of evidentiary means of proof is not exclusive. *Spearman v. Ford Motor Co.*, a recent case in the Northern District of Illinois, goes far in advocating that courts need not be bound to the three

223. See *id.*

224. *Id.*

225. See *id.*

226. *Courts Struggle with Sexual Harassment Against Homosexuals*, N.Y.L.J., Nov. 28, 1999, at 1, col. 1.

227. 50 F. Supp. 2d 159 (E.D.N.Y. 1999), *aff’d*, 232 F.3d 33 (2d Cir. 2000).

types of proof offered by the *Oncale* decision.²²⁸ The court noted that the Seventh Circuit had held that the examples given by the *Oncale* decision were not an exhaustive list.²²⁹ Thus, the court held that the reasoning of a pre-*Oncale* decision of the circuit, *Doe v. City of Belleville*,²³⁰ which outlined two additional ways of demonstrating that same-sex harassment was because of sex, was still good law.²³¹ *Doe* had been vacated and remanded by the Supreme Court when the Court granted certiorari in *Oncale*. *Doe* suggested that sexual harassment may be inferred from the sexual character of the harassment itself, such as the use of sexual propositions or sexual derogatory language.²³² Since the harassment has explicit sexual overtones, no additional proof that the harassment was “because of” sex is necessary.

A second possible form of proof described by *Doe* comes into play when the harassment is not overtly sexual, but “is focused on a particular gender or a particular individual’s projection of his or her gender.”²³³ The analysis thus centers on whether “plaintiff’s employment has now become conditioned upon [his or] her willingness to endure harassment that is inseparable from [his or her] gender.”²³⁴ In *Doe*, the Seventh Circuit found that the plaintiff’s showing that he had been targeted for harassment because of the way in which he projected his gender was sufficient proof of sex-based harassment. “[A] man who is harassed . . . because . . . he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex.”²³⁵ The *Spearman* court further noted that the sexual orientation of the harasser is irrelevant, as the relevant question is whether the individual was “singled out” because of her sex.²³⁶

The discussion in this section and the preceding one demonstrate that lawyers promoting rights for GLBT employees should highlight the limits of *Oncale*. Lawyers should emphasize to courts the ongoing use of heterosexuality as a gender-based norm. By “outing” the presumption of heterosexuality, it may be possible to demonstrate to courts that sexual orientation is already present in Title VII jurisprudence. Lastly, and perhaps most importantly, lawyers should argue for a presumption that

228. See *Spearman v. Ford Motor Co.*, No. 98 C 0452, 1999 WL 754568, at *5 (N.D. Ill. 1999), *aff’d*, 231 F.3d 1080 (7th Cir. 2000).

229. *Id.* at *6 (referring to *Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999)).

230. 119 F.3d 563 (7th Cir. 1997), *judgment vacated and remanded*, 523 U.S. 1001 (1998).

231. See *id.* at 566.

232. See 119 F.3d at 576.

233. *Spearman*, 1999 WL 754568, at *5 (emphasis added).

234. *Doe*, 119 F.3d at 579.

235. *Id.* at 581.

236. *Spearman*, 1999 WL 754568, at *5 n.3.

harassment against GLBT employees is gender harassment, a form of disparate treatment sex discrimination because its effect is to enforce the boundaries of acceptable conduct and demeanor in the workplace on the basis of employees' (presumed) biological sex.²³⁷

VII. TITLE VII AND DISCRIMINATION ON THE BASIS OF HETEROSEXUAL GENDER NORMS

If courts are willing and able to recognize harassment of GLBT employees as enforcement of gender norms, discrimination on the basis of sexual orientation should be actionable under Title VII as sex-based. This section explores the consequences and advisability of asking courts to implement this radical change in interpretation and statutory coverage before turning to a discussion of the possibility for legislative action.

Carolyn Grose, writing prior to the *Oncale* decision, criticized scholars who sought to expand Title VII to same-sex sexual harassment.²³⁸ She predicted that, were same-sex sexual harassment to be included as a cause of action, the statute would work to promote homophobia, and would not serve the interests of GLBT employees.²³⁹ As Part IV discusses, Grose was right in many respects in foretelling that a same-sex harassment action would be easier to bring against a homosexual employee than against a heterosexual one. However, in light of the *Oncale* decision, should plaintiffs attempt to seek protection against antigay and antilesbian harassment through "sex-based" theories? Grose argued that until Title VII is changed to provide full protection for GLBT employees, "any attempt to use Title VII to regulate same-sex sexual harassment will intensify the privileging of one kind of same-sex interaction over another: straight subordinates will be protected from gay supervisors, while gay subordinates will not be protected from straight supervisors."²⁴⁰

Some courts, nevertheless, have grasped the illogic of distinguishing between sex-based discrimination and discrimination based on sexual stereotypes about one's orientation. If this is the case, one must ask whether this new understanding of sex-based stereotypes may provide a basis for judicial reform of Title VII. Courts may be willing to broaden their interpretation of the statute if there is some basis for such a move in the legislative history. However, the understanding of "sex" as a basis for a Title VII cause of action is not enlightened by the

237. See Lester, *supra* note 17, at 118.

238. Grose, *supra* note 73, at 392.

239. *Id.* at 393.

240. *Id.* at 378.

statute's legislative history, as the addition of "sex" was made in an attempt to thwart the legislation's passage.²⁴¹ Perhaps one could argue that the statute was intended to reach broad forms of discrimination and to eliminate reliance on stereotypes in the workplace. Even so, would this provide sufficient bases for courts to reinterpret Title VII to protect gays and lesbians?

Real change must reach the broader question of discrimination against gays and lesbians in the workplace. Not only are courts unlikely to "go this far," but a larger conceptual problem remains. The simplistic "based on . . ." logic of the statute results in harmful categorization of injured parties. The search to identify the "triggering" characteristic of discrimination both ignores the reality that several factors are often at play in workplace discrimination and gives additional power to the courts to apply their own stereotypes in figuring out which of several potential factors is at play. This is best illustrated by the courts' divergence of opinions on similar facts—was the harassment sex-based or based on sexual orientation? On the other hand, to urge the courts to ignore any differences between sex and sexual orientation would be to close the door to causes of action that are clearly based more on a person's sexuality than their biological sex. To take a page from authors who write from a perspective of "racial realism,"²⁴² it is important to be conscious of the fact that, by giving courts the choice to prioritize traits and to "define" the harassed employee, the choices made will inevitably reflect the dominant ideal of the white, heterosexual man.

Since 1978, GLBT rights advocates have annually introduced a bill to amend Title VII by adding sexual orientation as a prohibited category of discrimination.²⁴³ However, the bill has, to date, been unsuccessful.²⁴⁴ New legislation, the Employment Non-Discrimination Act (ENDA), was introduced to the 103d Congress in 1994. It has been introduced in each subsequent Congress, most recently in the first Session of the 106th Congress.²⁴⁵ ENDA would prohibit public and private employers, employment agencies and labor unions from using an individual's sexual orientation as the basis for employment decisions, such as hiring, firing, promotion, or compensation. While the Act provides for similar

241. See Cunningham, *supra* note 67, at 256 ("Opponents of the bill added the word 'sex' as a strategy for derailing the legislation."); see also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1283-84 (1991) (contending that the prohibition on sex discrimination in private employment was added as an absurd joke in an attempt to defeat the proposed prohibition on racial discrimination).

242. See Derrick Bell, *Racial Realism*, 25 CONN. L. REV. 363 (1992).

243. See OUT IN THE WORKPLACE, *supra* note 24, at 191.

244. See *id.*

245. See H.R. 2355 (June 24, 1999); S. 1276 (June 24, 1999).

procedures and remedies as those of Title VII, it has serious limitations. It would not allow disparate impact claims, and would not allow the Equal Employment Opportunity Commission (EEOC) to collect statistics on sexual orientation or compel employers to collect such statistics. Transsexuals and transvestite orientations are excluded from ENDA's protections.²⁴⁶

In debates on ENDA, opponents charged that the Act must be rejected in order to avoid a "litigation bonanza."²⁴⁷ Ironically, in the discussions of this alleged flood of claims, the debate also recognized the prevalence of discrimination: "A lot of individuals and a lot of firms would be sued based on sexual orientation claims if this bill becomes law."²⁴⁸ William Eskridge, Jr. reviews the numbers of decisions brought under the D.C. Human Rights Act, passed in 1977, and reaches the conclusion that sexual orientation claims do not make up a large number of filed claims, and do not have a higher rate of dismissal than other discrimination claims.²⁴⁹

Eskridge suggests that "[t]he main reason antidiscrimination laws generate so few complaints is that gay employees are not 'out' in the workplace."²⁵⁰ Antidiscrimination laws might make GLBT employees more comfortable about coming out in their places of employment, a possibility that makes "even moderate homophobes nervous."²⁵¹ GLBT rights activists are faced with the task of convincing straight people that the laws will reach the most outrageous types of discrimination and harassment, but will not "disrupt" the workplace by encouraging more gays and lesbians to be open about their sexual orientation. Furthermore, lesbians are often faced with the need of "non-disclosure of sexuality in the workplace (whether to reduce the possibility of discrimination and harassment, or for issues of privacy) [which] often results in both implicit silencing (passing or non-disclosure of sexuality) and explicit silencing by keeping quiet about discrimination and harassment in the workplace."²⁵² Federal legislation might provide space for closeted

246. See ESKRIDGE, *supra* note 10, at 237.

247. 142 CONG. REC. S9992 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch).

248. *Id.* at S9997 (statement of Sen. Nickles).

249. See ESKRIDGE, *supra* note 10, at 234-36. However, the Court of Appeals for the Sixth Circuit held that the additional cost of adjudicating claims of discrimination based on sexual orientation was sufficient reason to uphold a charter amendment which removed homosexuals, gays, lesbians and bisexuals from the protection of a municipal antidiscrimination ordinance and precluded restoring them to protected status. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300 (6th Cir. 1997).

250. ESKRIDGE, *supra* note 10, at 236.

251. *Id.*

252. Asquith, *supra* note 18; see also *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969 (5th Cir. 1999) (holding teacher barred from asserting sexual harassment claims where she had

employees to be open in their workplaces in a way that piecemeal local antidiscrimination statutes have not.

VIII. CONCLUSION

Oncale has opened a door—but not one that offers any permanent freedom for lesbians and gays. The door is perhaps more of a window into the illogic of the Court’s analysis of the interplay of sex, gender and sexuality. GLBT employees who have been harassed and discriminated against must be concerned with the present and should use this confusion to their advantage. *Oncale*’s recognition of same-sex sexual harassment and lower courts’ presumption of heterosexuality has unmistakably inserted sexual orientation into Title VII. By “outing” the gender-based norms operating in courts’ reasoning, plaintiffs may be successful in tying workplace harassment to courts’ understanding of gender stereotypes. However, the space opened by *Oncale* is little more than a temporary hole in the wall of refusal to protect the GLBT employees’ rights. Civil rights activists should push Congress to pass broad legislation to prohibit discrimination on the basis of sexual orientation, removing the power to define “sex” from the courts.

kept silent past the statute of limitations out of fear that the offensive comments at issue suggested that she was a lesbian).