"BECAUSE OF . . . SEX": RETHINKING THE PROTECTIONS AFFORDED UNDER TITLE VII IN THE POST-*ONCALE* WORLD

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When the Supreme Court decided *Oncale v. Sundowner Offshore Services, Inc.*,[1] it opened the door to much more than suits involving same-sex sexual harassment. In holding that Title VII's prohibition of discrimination "because of . . . sex"[2] protects men and women from same-sex sexual harassment,[3] the Supreme Court's opinion in *Oncale* has brought about a fundamental reassessment by the federal courts as to what qualifies as sexual harassment under Title VII. This re-conceptualization of the protections afforded by Title VII mainly has taken place in cases brought by men alleging same-sex sexual harassment.[4] However, its impact is reshaping traditional sexual harassment law as well.[5]

Until the Supreme Court's decision in *Oncale*, sexual harassment law in the United States slowly had developed to protect individuals, in most cases women, from sex-based discrimination in the workplace. What started out as a law narrowly applied to prohibit women from being shut out of certain segments of the workforce because of their sex soon grew to prevent women from being subjected to sexual advances in order to keep their jobs, receive promotions, or obtain raises.[6] Then, in 1986, in *Meritor*

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[1] 523 U.S. 75 (1998).

[2] Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2000).

[3] *Oncale*, 523 U.S. at 79.

[4] *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 568, 572 (6th Cir. 2004); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 869 (9th Cir. 2001); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 259, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35–36 (2d Cir. 2000); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 703 (7th Cir. 2000).

[5] *See, e.g.*, Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 332–33 (4th Cir. 2003) (en banc) (citing *Oncale* in male-on-female harassment context); Penry v. Fed. Home Loan Bank of Topeka, 155 F.3d 1257, 1261 (10th Cir. 1998) (citing *Oncale* for the proposition that conduct need not be overtly sexual to constitute harassment based on sex).

[6] *See* Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) (defining the issue as "whether the retaliatory actions of a male supervisor, taken because a female employee

Savings Bank, FSB v. Vinson, the Supreme Court interpreted Title VII to prohibit the creation of a hostile working environment "because of . . . sex."[7] Three years later in *Price Waterhouse v. Hopkins*, the Supreme Court struck at employment discrimination directed at women for failing to comply with gender-based stereotypes of femininity.[8]

declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII"). This form of sexual harassment is often referred to as "quid pro quo sexual harassment." BLACK'S LAW DICTIONARY 1379 (7th ed. 1999).

[7] 477 U.S. 57, 66 (1986). Six years earlier, the Equal Employment Opportunity Commission (EEOC) had issued a guideline prohibiting hostile environment sexual harassment. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2004). The guideline stated that:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

[8] 490 U.S. 228, 250–51 (1989). There is tremendous debate among commentators as to the relationship between the concepts of sex and gender in sexual harassment jurisprudence. Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 495 (2001) (cataloguing the views of various scholars on this issue); *see, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) ("[S]ex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles."); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 21–22 (1995) (defining sex as "the physical attributes of bodies, and specifically the external genitalia of those bodies," and characterizing gender as "the personal appearance, personality attributes, and socio-sexual roles that society understands to be 'masculine' or 'feminine'"); Deborah Zalesne, *When Men Harass Men: Is It Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 396 (1998) (arguing for a broader definition of the concept of sex to include the "interrelated factors [of] chromosomes, genitalia, secondary sex characteristics, gender traits, and sexuality"). By gender, I mean the socially constructed concept that categorizes and ultimately stereotypes women and men on the basis of the perceived differences between the sexes. *See* JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY 42–43 (rev. ed. 1999). Similarly, the courts have struggled in interpreting the scope of the meaning of the word "sex" in Title VII. Some courts define sex in the narrowest of terms as a biological distinction. *See, e.g.*, *Hamner*, 224 F.3d at 704 ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation."). Other courts have looked to a more holistic definition of sex to include gender identity. *See, e.g.*, *Nichols*, 256 F.3d at 874–75 (holding that the harassment that the plaintiff experienced because "he did not conform to . . . gender-based stereotypes" constituted discrimination "because of . . . sex" under Title VII). The Supreme Court often has used the terms sex and gender interchangeably. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) (quoting the "because of . . . sex" language of Title VII but later referring to the prohibited conduct as "because of . . . gender"); *Hopkins*, 490 U.S. at 239 (characterizing Title VII as "Congress' intent to forbid employers to take gender into account in making employment decisions"). However, the Court has not engaged in a thorough

The employment discrimination construct created by the Supreme Court and the lower federal courts drew on not only the language of Title VII's prohibition of discrimination "because of . . . sex," but it also incorporated a societal understanding of the challenges facing women in the workplace, especially in traditionally male-dominated professions.[9]

While prior to *Oncale* the Supreme Court had recognized that Title VII prohibited discrimination in the terms and conditions of employment against men as well as women,[10] it had not addressed whether men could bring claims of hostile environment sexual harassment. Furthermore, since most cases conformed to the traditionally challenged type of discrimination or harassment—a woman seeking relief from a male supervisor or co-worker—during the early development of sexual harassment law, the courts rarely

analysis as to the distinctions between the two concepts. The Court seems to use the word "gender" as a synonym for "sex," without recognition of the broader meaning of the word "gender" as used in the academic literature. Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 100 (2004).

[9] *See* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 769 (1997) [hereinafter *What's Wrong with Sexual Harassment?*]. Katherine M. Franke has observed:

> In more traditional cases, where a woman alleges that she has been sexually harassed by a man, a lower quantum of proof is sufficient to trigger an inference of sex discrimination because larger cultural norms of women as sex objects and men as sex subjects have been reproduced in the offending conduct.

Id.; *see also* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 9 (1979). As several commentators have recognized, the traditional employment discrimination construct also drew on the assumption that men who sexually harassed women were motivated in some instances by heterosexual desire. Therefore, in cases of same-sex sexual harassment, courts have had to confront this underlying presumption. *See* Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101, 120 (2004); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 680–81 (1998). Storrow argues that the presumption of heterosexuality in opposite-sex sexual harassment cases alleviated the need for courts to evaluate the causation prong of those claims. *Id.* at 680. While I agree that courts have operated under an assumption of heterosexuality in traditional sexual harassment cases, I believe that much more is at play than the sexual desire-dominance paradigm. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1689 (1998) (criticizing the sexual desire-dominance paradigm). Courts not only assumed the heterosexuality of the harasser and his would-be victim, they brought to bear on their disposition of any given claim an understanding of the traditional power structure at play within the workplace. This short-circuiting of the causation analysis in traditional cases has come back to haunt courts in cases of same-sex sexual harassment. And the realization of this historical lack of causation analysis has opened the door to questioning what it means to be discriminated against "because of . . . sex" in both traditional sexual harassment cases as well as same-sex sexual harassment cases.

[10] Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669, 682 (1983) ("Male as well as female employees are protected against discrimination.").

were challenged to apply the traditionally developed employment discrimination construct in other contexts. And then came same-sex sexual harassment cases and *Oncale* to expose the muddy doctrinal waters.

In recognizing a cause of action for same-sex sexual harassment, the Supreme Court in *Oncale* acknowledged the viability of applying sexual harassment jurisprudence beyond the traditional employment discrimination construct in which it was developed.[11] However, in doing so the Supreme Court created a tremendous challenge for the lower federal courts and failed to provide them with guidance as to the contours of this new cause of action. Furthermore, the *Oncale* opinion—while finding that same-sex sexual harassment can qualify as discrimination "because of . . . sex"—did little to articulate the meaning of the "because of . . . sex" requirement. Moreover, its dicta seemed to signal a more constrained interpretation of "because of . . . sex" than the Court had espoused in its previous sexual harassment jurisprudence.

Therefore, one must ask whether the *Oncale* Court not only expanded the scope of Title VII to permit claims of same-sex sexual harassment, but concomitantly contracted its interpretation of "because of . . . sex" to limit the ability of all victims of sexual harassment to seek redress under Title VII. Or, alternatively, did the Supreme Court set forth a more conservative application of traditional sexual harassment law to cases of same-sex sexual harassment, many of which involve allegations of gender stereotyping against men who are perceived to be homosexual or who otherwise fail to conform to societal notions of masculinity? I argue that in its attempt to fit the proverbial square peg into a round hole—that is, to apply the framework created by the traditional employment discrimination construct developed in the context of male-on-female sexual harassment to cases mainly brought by men against other men alleging gender stereotyping—the Supreme Court's *Oncale* opinion, whether consciously or not, has articulated a new, more constrained interpretive paradigm for analyzing the "because of . . . sex" language in Title VII.

Oncale and its progeny demonstrate that the assumptions underlying the traditional employment discrimination construct can no longer be relied upon to conceptualize the full panoply of sexual

[11] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (recognizing that Congress may not have necessarily enacted Title VII to combat same-sex sexual harassment, but allowing Title VII to nonetheless prohibit such harassment).

harassment and discrimination actionable under Title VII. Scholars and the federal courts must theorize the "because of . . . sex" requirement anew in order to meet the challenge created by the Supreme Court's opinion in *Oncale*.

This Article seeks to explore the current doctrinal framework for addressing sexual harassment claims in the post-*Oncale* world and to offer ways in which to theorize the "because of . . . sex" requirement. In Part I, I will briefly set forth the development of the traditional employment discrimination construct in the context of male-on-female discrimination and harassment by analyzing the Supreme Court's sexual harassment jurisprudence. Part II will analyze the Supreme Court's opinion in *Oncale* and will highlight the potential impact of that opinion to the traditional construct. Part III will then discuss the decisions of the lower federal courts post-*Oncale* and analyze how they have struggled to harmonize the traditional employment discrimination construct with the language of the Supreme Court in *Oncale*. Part IV offers a conceptual analysis of the "because of . . . sex" requirement post-*Oncale*.

I. TITLE VII AND THE ARTICULATION OF THE TRADITIONAL EMPLOYMENT DISCRIMINATION CONSTRUCT

A. "because of . . . sex": The First Time Around

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[12] As the Supreme Court recognized in *Meritor*, the word "sex" was added to Title VII on the floor of the House of Representatives.[13] This addition was proposed by Representative Howard Smith of Virginia as a means of preventing the enactment of Title VII.[14] After little debate on the

[12] Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a)(1) (2000).

[13] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986).

[14] *See* 110 CONG. REC. 2577 (1964); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–16 (1985); Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay:" Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After* Oncale, 11 YALE J.L. & FEMINISM 155, 162 n.23 (1999); Ronald Turner, *The Unenvisaged Case, Interpretive Progression, and the Justiciability of Title VII*

amendment, it passed 168-133 and became law with the passage of Title VII.[15] Therefore, "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"[16] More than forty years after its enactment, the federal courts continue to struggle with the meaning of this proscription.

As Katherine Franke explains, "[t]he fact that sexual harassment is a sexually discriminatory wrong is not a legal conclusion necessarily revealed in the text of Title VII."[17] The Supreme Court in *Meritor* extended the protections afforded under Title VII to cases involving hostile environment sexual harassment, reasoning that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[18] While the Court in *Meritor* specifically noted the lack of legislative history to guide it in its interpretation of the "because of . . . sex" language of Title VII, it did not attempt to untangle the meaning of that phrase.[19] Nor did the Court attempt to theorize why the wrong of sexual harassment violated the prohibition against discrimination "because of . . . sex."

The Court cited two bases to support its conclusion in *Meritor* that Title VII protected the plaintiff from hostile environment sexual harassment. First, the Court pointed to the text of Title VII, and explained, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[20] Second, the Court relied upon the Guidelines issued by the EEOC in 1980 that prohibited sexual harassment as unlawful sex discrimination under Title VII.[21]

In support of its conclusion that hostile environment sexual harassment constituted actionable sex discrimination under Title VII, the Court cited to the Eleventh Circuit's opinion in *Henson v.*

Same-Sex Sexual Harassment Claims, 7 DUKE J. GENDER L. & POL'Y 57, 57 (2000).

[15] *See* Turner, *supra* note 14, at 58.

[16] *Meritor*, 477 U.S. at 64.

[17] *What's Wrong with Sexual Harassment?*, *supra* note 9, at 702.

[18] 477 U.S. at 64 (second alteration in original).

[19] *See id.* at 63–64.

[20] *Id.* at 64 (internal quotation marks omitted) (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

[21] The Guidelines defined sexual harassment to include "such conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* at 65 (citing 29 C.F.R. § 1604.11(a)(3) (1985)).

City of Dundee.[22] In *Henson*, the Eleventh Circuit held that "under certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job detriment."[23] The Supreme Court in *Meritor* relied upon the Eleventh Circuit's conceptualization of the wrong of sexual harassment, quoting *Henson* for the proposition that:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[24]

A review of the contours of *Meritor* reveals that the current difficulty in analyzing and theorizing the "because of . . . sex" requirement of Title VII can, in part, be attributed to the failure of the Supreme Court to create a doctrinal underpinning for the hostile environment sexual harassment cause of action at its inception. While the Court clearly identified sexual harassment as a wrong covered by the remedial provisions of Title VII, it did not articulate a framework for that wrong. Rather, in analogizing to the wrong of racial harassment, the Court explained that "[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited."[25]

Three years after its decision in *Meritor*, the Supreme Court again attempted to navigate the thicket of Title VII in *Price Waterhouse v. Hopkins*.[26] Ann Hopkins alleged that she was denied partnership in the accounting firm of Price Waterhouse because she failed to conform to stereotypical notions of femininity.[27] In its most detailed

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[22] *Id.* at 66–67 (quoting from and citing to Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

[23] *Henson*, 682 F.2d at 901.

[24] *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 902).

[25] *Id.* at 66.

[26] 490 U.S. 228 (1989). Unfortunately, the Court in *Hopkins* failed to speak in a clear voice. Justice Brennan wrote on behalf of four Justices, Justices O'Connor and White each wrote opinions concurring in the judgment, and Justice Kennedy authored a dissenting opinion on behalf of three Justices. *Id.* at 228 (majority opinion), 258 (White, J., concurring), 261 (O'Connor, J., concurring), 279 (Kennedy, J., dissenting).

[27] *Id.* at 231–32, 235. The Court stated: "In the specific context of sex stereotyping, an

analysis of the "because of . . . sex" language of Title VII up to that point, the Supreme Court in *Hopkins* explained that "[w]e take these words to mean that gender must be irrelevant to employment decisions. To construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does Price Waterhouse, is to misunderstand them."[28] The Court recognized that "the words 'because of' do not mean '*solely* because of.'"[29] However, while the Court explained what "because of" did not mean, it did not fully address what the phrase did mean.

The *Hopkins* Court also explained why the sex stereotyping experienced by Hopkins qualified as discrimination "because of . . . sex" under Title VII. The Court reasoned that

> [a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[30]

In the wake of *Oncale*, many plaintiffs in same-sex sexual harassment cases have turned to the sex stereotyping language of *Hopkins* for refuge, arguing that Title VII provides a cause of action for hostile environment sex stereotyping.[31]

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employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.

[28] *Id.* at 240. While this analysis of the "because of . . . sex" requirement helped to theorize the wrong of gender/sex stereotyping in a traditional sex discrimination case, it of course did not address how this doctrine would apply in the sexual harassment context.

[29] *Id.* at 241.

[30] *Id.* at 251 (internal quotation marks omitted) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). However, the Court recognized that just because an individual faced sexually stereotypical remarks in the workplace did not inexorably mean that "gender played a part in a particular employment decision." *Id.* The Court found that in order for a plaintiff successfully to prove a sex discrimination claim, she (or he) must establish "that the employer actually relied on her gender in making its decision." *Id.* Subsequent to the Court's decision in *Hopkins*, Congress amended Title VII with the Civil Rights Act of 1991 to, among other things, overrule the affirmative defense created by the Court. 137 CONG. REC. 30,640, 30,664 (1991); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994). The amendment provides in relevant part that "an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2000)).

[31] *See, e.g.*, Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003); Nichols v. Azteca Rest.

B. The Traditional Employment Discrimination Construct

In 1986, when the Supreme Court decided *Meritor*, it did not have Joseph Oncale and same-sex sexual harassment in mind. Of course, three years earlier the Court had held that the prohibition against discrimination "because of . . . sex" applied to men as well as women.[32] And as Justice Scalia recognized in *Oncale*, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[33] Ever the textualist, Justice Scalia's unanimous decision in *Oncale* remained closely moored to the text of Title VII.[34] Yet *Oncale* stands in sharp contrast to the jurisprudence of the Supreme Court in the sexual harassment arena, which relied upon the traditional employment discrimination construct.

A review of the Supreme Court cases in the sexual harassment area is startling in what the cases do not discuss, but what is still readily apparent.[35] While the pre-*Oncale* cases cite to the "because . . . of sex" language of Title VII, they do not dwell on the causal requirement created by this phrase.[36] It is almost as if the meaning of "because of . . . sex" is implicit in *Meritor* because of the factual background of that case.[37] Mechelle Vinson was a woman, her supervisor Sidney Taylor was a man, they were both heterosexual and therefore, the implication is that he was targeting her because of her sex. He was her supervisor and vice president of

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Enters., 256 F.3d 864, 874 (9th Cir. 2001).

[32] Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669, 682 (1983).

[33] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

[34] *See, e.g.*, *id.* at 81 ("Whatever 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.'" (alterations in original)).

[35] In a rare discussion of the often implicit, yet unstated traditional employment discrimination construct, the Third Circuit in *Andrews v. City of Philadelphia* explained that

> [t]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature.

895 F.2d 1469, 1482 n.3 (3d Cir. 1990).

[36] *See, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 751–52 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

[37] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60 (1986) (enumerating the repeated instances of a male superior's patently inappropriate sexual behavior toward a female subordinate).

the bank, as well as manager of one of the branch offices.[38] She began as a teller at the bank.[39] Vinson testified that her supervisor, Taylor, sexually propositioned her and that she agreed to have sex with him because she feared losing her job if she did not acquiesce.[40] She also testified that Taylor fondled her in front of other employees and forcibly raped her on several occasions.[41]

Vinson's case has all of the hallmarks of the traditional employment discrimination construct and beyond.[42] The power imbalance between Vinson and her harasser is evident. She encountered unwelcome sexual advances, as well as abject violence. The Supreme Court did not discuss the causal requirement of Title VII; it did not seem to think it necessary. It was almost as if, in the spirit of Justice Potter Stewart, the Court "kn[e]w it when [it saw] it"—only this time, the "it" was harassment "because of . . . sex."[43]

Similarly, the case of Teresa Harris closely tracks the traditional employment discrimination paradigm.[44] Harris, a manager at Forklift Systems, Inc., alleged that the president of the company, Charles Hardy, sexually harassed her.[45] In the presence of other employees, Hardy told Harris "[y]ou're a woman, what do you know" and "[w]e need a man as the rental manager."[46] He also suggested that he and Harris "go to the Holiday Inn to negotiate [Harris'] raise."[47] Hardy humiliated Harris in front of other employees, asking her if she had promised a male customer sex in return for

[38] *Id.* at 59.

[39] *Id.*

[40] *Id.* at 60.

[41] *Id.*

[42] In *Harris v. Forklift Systems, Inc.*, the Supreme Court characterized the conduct at issue in *Meritor* as "appalling" and "present[ing] some especially egregious examples of harassment." 510 U.S. 17, 22 (1993). The Court noted, however, that "[t]hey do not mark the boundary of what is actionable." *Id.*

[43] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart, in explaining that he could not intelligibly define the types of materials that constituted hard-core pornography, stated "[b]ut I know it when I see it." *Id.* In some ways, *Oncale* sanctions just such an approach:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998).

[44] *See Harris*, 510 U.S. at 19.

[45] *Id.*

[46] *Id.*

[47] *Id.* (alteration in original).

making a deal.[48] He also subjected Harris and other women to demeaning tasks, such as removing coins from his front pants pocket and throwing objects on the ground to see the women bend down to pick them up.[49]

In *Harris*, the Supreme Court was focused on whether the individual Title VII claimant must show objective or subjective harm in order to establish a hostile work environment.[50] The Court cited to the "because of . . . sex" requirement, but then breezed right by it in order to reach the issue on which it had granted certiorari.[51] This, of course, was because the facts underlying Teresa Harris' claim spoke for themselves. As in *Meritor*, Harris was at a power disadvantage to the president of the company.[52] She (along with other female employees) was treated as a sexual object.[53] As the comments "[w]e need a man as the rental manager" and "[y]ou're a woman, what do you know" illustrate, Harris was marginalized as a woman in a predominately male workforce.[54] In suggesting that only a man could do her job, Hardy questioned her competence as an employee.[55] Hardy painted Harris as a woman who needed to use her sexuality with a customer in order to close the deal.[56] He also sought to take advantage of his position of power over Harris by requesting sexual favors in exchange for a raise.[57]

The Title IX case of *Franklin v. Gwinnett County Public Schools* also illustrates the implicit, yet often unstated, traditional employment discrimination construct at work.[58] Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[59] While the "on the basis of sex"

[48] *Id.*
[49] *Id.*
[50] *Id.* at 21–22.
[51] *Id.* at 21.
[52] *Id.* at 19.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] 503 U.S. 60, 63–64 (1992) (recounting a male physical education teacher's repeated sexual pressures on a tenth grade female student).
[59] Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (codified at 20 U.S.C. § 1681(a) (2000)). Although Title IX does not specifically provide for a private right of action, the Supreme Court has found that Title IX created a right enforceable by private litigants. Cannon v. Univ. of Chi., 441 U.S. 677, 705–06 (1979) ("The award of

language of Title IX does not exactly track the "because of . . . sex" requirement of Title VII, the two are sufficiently similar to illustrate the construct as well as the void in causation analysis.

Christine Franklin was a high school student at North Gwinnett High School.[60] During her sophomore and junior years, Andrew Hill, a sports coach and teacher employed by the district, subjected Franklin to questioning about her sexual experiences and queried whether she would consider having sex with an older man.[61] Hill called Franklin at home to convince her to see him.[62] Most disturbingly, and similar to *Meritor*, Hill "subjected [Franklin] to coercive intercourse."[63]

As in *Harris*, the Court in *Franklin* turned to the question on which it granted certiorari: whether Title IX provided a private damages remedy to Franklin against the school district.[64] Citing to the language of *Meritor* that "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex,'" the Court reasoned that the same rule should apply to the relationship of teacher and student.[65] However, as in both *Meritor* and *Harris*, the traditional employment discrimination construct short-circuited the need for a causation analysis. The relationship between a female high-school student and a male teacher is a paradigmatic example of a power imbalance. Hill asked Franklin sexually charged questions and propositioned her. And he subjected Franklin to a horrific demonstration of her powerlessness by forcibly kissing her and coercing her to have sex.

These three Supreme Court cases, in some ways, prove too much. They are extremely stark examples of how the traditional employment discrimination construct upended the need for a causal analysis. All of the hallmarks of traditional male-on-female sexual harassment cases are present in these cases, and then some. The facts of the cases scream off the page as sex discrimination (as well as criminal conduct in *Meritor* and *Franklin*). No wonder the Supreme Court did not tarry long over causation.

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individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.").

[60] *Franklin*, 503 U.S. at 63.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 62–63.

[65] *Id.* at 75 (alteration in original) (internal quotation marks omitted) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

While these three cases were heralded at the time as breakthroughs in the area of sexual harassment, in many ways the jurisprudence of sexual harassment was not well-served by the egregious facts present in *Meritor*, *Franklin*, and to a slightly lesser extent, *Harris*. Most of the world is not usually black or white, but some shade of gray. And against this very stark backdrop, the case of Joseph Oncale was much grayer than any sexual harassment case to reach the Supreme Court up to that point.

II. *ONCALE*

Joseph Oncale worked as a roustabout on an eight-man crew for Sundowner Offshore Services, Inc. ("Sundowner") on an oil platform in the Gulf of Mexico.[66] He was physically assaulted in a sexual manner and threatened with rape by his supervisor, John Lyons, and two co-workers, Danny Pippen and Brandon Johnson.[67] After his complaints to management failed to remedy the situation, Oncale quit.[68] He brought suit under Title VII in the United States District Court for the Eastern District of Louisiana against Sundowner, Pippen, Lyons, and Johnson.[69] The district court granted summary judgment to the defendants,[70] and the Fifth Circuit affirmed.[71] Both courts relied on an earlier Fifth Circuit

[66] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998).

[67] In the Fifth Circuit's opinion in *Oncale v. Sundowner Offshore Services, Inc.*, the court stated:

> Oncale alleges that the harassment included Pippen and Johnson restraining him while Lyons placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale's anus while Pippen restrained Oncale as he was showering on Sundowner premises.

83 F.3d 118, 118–19 (5th Cir. 1996).

[68] *Oncale*, 523 U.S. at 77.

[69] Oncale v. Sundowner Offshore Servs., Inc., 67 Fair Empl. Prac. Cas. (BNA) 769, 769 (E.D. La. 1995). The court granted summary judgment in favor of all the defendants, finding that co-workers Pippen and Johnson could not be considered Oncale's employer under Title VII, and therefore they could not be held personally liable. *Id.* As to Lyons, the court held that harassment by a male supervisor directed toward a male subordinate does not state a Title VII claim. *Id.* Whether individual supervisors can be held liable under Title VII is an open question which has not been decided by the Supreme Court and has divided the circuits. *See, e.g.*, Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1078 (3d Cir. 1996) ("Congress did not intend to hold individual employees liable under Title VII."); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451 (5th Cir. 1994) (citing to Title VII's definition of an employer as "'a person engaged in an industry affecting commerce . . . *and any agent of such a person*'" and explaining in a parenthetical that the Fifth Circuit has construed this phrase liberally "to include immediate supervisors [who] 'participate[] in the decision-making process that forms the basis of the discrimination.'" (first alteration in original)).

[70] *Oncale*, 67 Fair Empl. Prac. Cas. (BNA) at 770.

[71] *Oncale*, 83 F.3d at 121.

case, *Garcia v. Elf Atochem North America*, which found that same-sex sexual harassment claims were not cognizable under Title VII.[72]

In reversing the Fifth Circuit and finding that Oncale could assert a claim of same-sex sexual harassment, Justice Scalia, writing for a unanimous Court, relied on the statutory language of Title VII which prohibits discrimination "because of . . . sex."[73] The Court recognized that nothing in that language suggests any limitation to individuals propounding claims of opposite-sex harassment.[74] The Court further explained that merely because language in the workplace is tinged with "sexual content or connotations" does not automatically mean that such conduct is actionable under Title VII.[75]

Oncale instructs that "'[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"[76] Accordingly, the Court suggested several methods by which an individual could prove a claim of same-sex sexual harassment.[77]

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[72] 28 F.3d at 451–52.

[73] *See Oncale*, 523 U.S. at 79–80; *see also* 42 U.S.C. § 2000e-2(a)(1) (2000).

[74] *Oncale*, 523 U.S. at 79–80. The Court acknowledged that its holding that Title VII prohibits sexual harassment "must extend to sexual harassment of any kind that meets the statutory requirements." *Id.* at 80.

[75] *Id.*

[76] *Id.* (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

[77] *Id.* at 80–81. Several courts have interpreted the evidentiary routes for establishing same-sex sexual harassment set out in *Oncale* to be illustrative rather than exhaustive. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) ("[T]here are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex . . . . [O]ther ways in which to prove that harassment occurred because of sex may be available."); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("[W]e discern nothing in the Supreme Court's [*Oncale*] decision indicating that the examples it provided were meant to be exhaustive rather than instructive."); Equal Employment Opportunity Comm'n v. Grief Bros. Corp., No. 02-CV-468S, 2004 WL 2202641, at *12 (W.D.N.Y. Sept. 30, 2004) ("[N]othing in *Oncale* suggests that the three identified avenues of proof are the *only* theories under which same-sex harassment claims may be brought."); English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, 843 & n.8 (E.D. Va. 2002) (reciting the three evidentiary avenues set forth by the Supreme Court in *Oncale* and stating that "[t]his does not mean to suggest that the foregoing are the only means available to a plaintiff to prove that same-sex harassment was because of sex"); *see also* James v. Platte River Steel Co., No. 03-1536, 2004 WL 2378778, at *3 (10th Cir. Oct. 25, 2004) ("As other circuits have recognized, we also note that there is 'nothing in the Supreme Court's decision [in *Oncale*] indicating that the examples it provided were meant to be exhaustive rather than instructive.'" (alteration in original) (quoting *Shepherd*, 168 F.3d at 1009)); Schmedding v. Tnemec Co., 187 F.3d 862, 865 n.4 (8th Cir. 1999) (rejecting defendants' argument that one of the three evidentiary methods set forth in *Oncale* must adequately be alleged in order to survive a motion to dismiss and stating that "[w]hile *Oncale* does recite these three methods of proving sexual harassment, it refers to them as examples of 'evidentiary routes' a plaintiff might 'choose[] to follow' in establishing his case" (second

The first example offered by the Supreme Court, that of a homosexual harasser, attempts to adopt wholesale the traditional employment discrimination construct of male-on-female sexualized harassment and to fit it within the confines of same-sex sexual harassment. The Court stated:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.[78]

In order to use this avenue of proof, the Court recognized, the claimant would be required to introduce "credible evidence that the harasser was homosexual."[79]

The second evidentiary method of proof offered by the Supreme Court as an avenue to state a claim of same-sex sexual harassment explains that "[a] trier of fact might reasonably find such discrimination . . . if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[80] The third suggestion offered by the Supreme

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alteration in original) (quoting *Oncale*, 523 U.S. at 81)).

[78] *Oncale*, 523 U.S. at 80. As explained above, many commentators have shown how this example unveils the unstated assumption of heterosexuality at play in most traditional sexual harassment cases. *See supra* note 9.

[79] *Oncale*, 523 U.S. at 80. Post-*Oncale*, courts have attempted to determine what constitutes "credible evidence that the harasser was homosexual." For example, the Fifth Circuit has stated:

> [T]wo types of evidence . . . are likely to be especially 'credible' proof that the harasser may be a homosexual.
>
> The first is evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff rather than merely to humiliate him for reasons unrelated to sexual interest. The second is proof that the alleged harasser made same-sex sexual advances to others, especially to other employees.

La Day v. Catalyst Tech., Inc., 302 F.3d 474, 480 (5th Cir. 2002); *see also* Jones v. Potter, 301 F. Supp. 2d 1, 8 (D.D.C. 2004) (stating that a supervisor's "act of rubbing his penis against the plaintiff's buttocks could be viewed by a fact-finder as objectively explicit sexual activity"); Dick v. Phone Directories Co., 265 F. Supp. 2d 1274, 1280–81 (D. Utah 2003) (applying the test set forth by the Fifth Circuit in *La Day* and concluding that the evidence failed to support plaintiff's assertion that her harassing female co-worker was homosexual because "Ms. Dick viewed Ms. Hinkle's actions as a means to 'aggravate,' 'upset,' or 'make uncomfortable,' not as a way to initiate actual sexual contact with Ms. Dick").

[80] *Oncale*, 523 U.S. at 80. This type of sexual harassment claim, which questions the competence of women in the workplace, is common in the opposite-sex sexual harassment arena. Schultz, *supra* note 9, at 1687. It seems unlikely, although certainly possible, that this method of proof will be a fruitful one in same-sex sexual harassment cases, since the individual would be in essence questioning his or her own presence in the workforce as well.

Court as a means by which a plaintiff could prove a claim of same-sex sexual harassment is by offering "comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[81] Both the second and third method rely to a certain degree on gender essentialism. That is, they suggest that a court must look beyond the specific context of the alleged harassment in a given case and determine how men and women in general are treated in the particular workplace. This is in contrast to a traditional male-on-female case of sexual harassment where a court would look to the relationship between two employees and infer that the actions of the individual male reflected certain gendered assumptions about the role of women in the workplace generally, involved sexual advances, or targeted specific women with sexualized language and/or conduct.[82]

After offering these three avenues of proof, the Court reemphasized 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.'"[83] However, the Court failed to delve into the meaning of this statutory proscription.[84] Nor did it address whether Oncale himself had stated a valid claim of same-sex sexual harassment under any of the approaches offered by the Court. Rather, the Court reversed

[81] *Oncale*, 523 U.S. at 80–81.

[82] *See* Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) ("In determining whether an employee has been discriminated against 'because of *such individual's* . . . sex,' the courts have consistently emphasized that the ultimate issue is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace." (omission in original) (citation omitted)). *But see* Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000) ("Title VII does not cover the 'equal opportunity' . . . harasser, then, because such a person . . . is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).").

[83] *Oncale*, 523 U.S. at 81 (alterations in original). As if the fidelity of the Court's opinion to the statutory language needed further emphasis, Justice Thomas concurred in the Court's opinion, stating that "I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'" *Id.* at 82 (Thomas, J., concurring) (omission in original).

[84] *See* Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1258 (1998) ("*Oncale* is in many respects an enigma. In an effort to give a conclusive answer to a case that, by all appearances, he would have preferred not to have had to consider, Justice Scalia skirted the 'what,' the 'how' and the 'why' of sexual harassment." (footnote omitted)); Axam & Zalesne, *supra* note 14, at 159–60 ("[I]n recognizing a cause of action for same-sex sexual harassment, the Court offered little guidance regarding the distinction between mere 'locker room antics' or heterosexual 'horseplay' and the types of sex-based degradation and intimidation that constitute actionable discrimination 'because of' the target's 'sex' within the meaning of Title VII." (footnotes omitted)).

the decision of the Fifth Circuit and remanded the case.[85] As a result, the lower court jurisprudence after *Oncale* has continued to "take[] a bewildering variety of stances."[86]

III. *ONCALE*, SEX, AND GENDER STEREOTYPING: "BECAUSE OF . . . SEX" IN TRANSITION

The Supreme Court's decision in *Oncale* has brought with it increased scrutiny to the "because of . . . sex" requirement of Title VII in sexual harassment cases. While many prior decisions of both the Supreme Court and the lower federal courts almost took causation for granted,[87] the cramped language of *Oncale* made many courts stand up and take notice. This reassessment of hostile environment sexual harassment jurisprudence naturally began in cases that did not reproduce the traditional employment discrimination paradigm. But its impact is now being felt in traditional male-on-female sexual harassment cases as well.

As Kathryn Abrams noted, the Supreme Court in *Oncale* "has opened the gates" to same-sex sexual harassment cases, but "it has made little effort to define the terrain that lies inside."[88] In the wake of *Oncale*, the lower federal courts have attempted to fill the jurisprudential vacuum and articulate the contours of a same-sex sexual harassment cause of action.

A. Same-Sex Cases

Post-*Oncale*, the lower federal courts uniformly have decided that the language of Title VII does not protect gay and lesbian individuals from discrimination based on sexual orientation.[89]

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[85] *Oncale*, 523 U.S. at 82.

[86] *Id.* at 79.

[87] *See supra* Part I.B.

[88] Abrams, *supra* note 84, at 1260.

[89] Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("It is clear, however, that Title VII does not prohibit discrimination based on sexual orientation."); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."); Spearman v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000) (stating that Title VII "does not prohibit harassment . . . of one's homosexuality"); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000) ("[H]arassment based solely upon a person's sexual preference or orientation . . . is not an unlawful employment practice under Title VII."); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) ("[W]e regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."); *see also* Williamson v.

However, many courts have broadened the protections afforded under Title VII to encompass a gender stereotyping form of hostile environment created by same-sex sexual harassment.[90] These cases have attempted to meld the constrained interpretive paradigm created by *Oncale* with the broader and more inclusive language of *Hopkins*.[91] Or, as the District Court of Massachusetts characterized

A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals.").

[90] Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (stating that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination [under Title VII]" and reversing the district court's dismissal of plaintiff's complaint); *Bibby*, 260 F.3d at 264 (reinforcing that a plaintiff can demonstrate discrimination "because of . . . sex" where he or she can prove that "the harasser was acting to punish the victim's non-compliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001) (abrogating prior holdings in light of *Price Waterhouse* to hold that same sex harassment can create a hostile work environment under Title VII); *Simonton*, 232 F.3d at 37–38 (recognizing the possibility of stating a claim for "sexual stereotyping" for "failure to conform to gender norms," but declining to reach the issue since plaintiff had failed to adequately plead such a claim before the district court); *Higgins*, 194 F.3d at 259, 261 n.4 ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." (citation omitted)); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999) (reversing district court's dismissal of plaintiff's same-sex sexual harassment claim and holding that such claims are cognizable under Title VII); Equal Employment Opportunity Comm'n v. Grief Bros. Corp., No. 02-CV-468S, 2004 WL 2202641, at *15 (W.D.N.Y. Sept. 30, 2004) ("This Court finds that nonconformance with gender stereotypes is a viable theory of sex discrimination (either same-sex or between sexes) under Title VII."); Fischer v. City of Portland, No. CV 02-1728, 2004 WL 2203276, at *11 (D. Or. Sept. 27, 2004) ("[G]ender stereotyping, whether by the same sex or opposite sex, constitutes actionable harassment under Title VII."); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) ("Viewing the evidence in the light most favorable to plaintiff, a jury could find that [the female defendant] repeatedly harassed (and ultimately discharged) [the female plaintiff] because [the female plaintiff] did not conform to [the female defendant's] stereotype of how a woman ought to behave."); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (stating that harassment based on a stereotype that a male should date females rather than other males may be sufficient to maintain a Title VII action).

[91] The cases also powerfully illustrate the continuum of claimants alleging same-sex sexual harassment. Some of the plaintiffs are homosexual and initially brought causes of action under Title VII on the basis of sexual orientation. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc) (holding that same sex harassment claim was cognizable despite plaintiff's claim that the harassment was based on sexual orientation); *Bibby*, 260 F.3d at 259–61; *Hamner*, 224 F.3d at 704. However, many of those plaintiffs also alleged that they were subjected to a hostile work environment on the basis of their perceived sexual orientation, or for their failure to live up to their co-workers' and supervisors' gendered perceptions of masculinity (and for female lesbian plaintiffs, femininity). When this argument began to carry the day, homosexual plaintiffs often shifted the focus of their claims toward the gender stereotyping aspect and away from the issue of sexual orientation. *See, e.g.*, Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1059, 1062 (7th Cir. 2003) (affirming district court's grant of summary judgment to defendant employer and rejecting plaintiff's gender stereotyping argument because "his litany of complaints about the actions of his coworkers inescapably relate to either Hamm's coworkers' disapproval of his work

it in *Centola v. Potter*: "Just as Ann Hopkins was vilified for not being 'feminine' enough, Centola was vilified for not being more 'manly.'"[92] However, is it really that simple? Does *Oncale* plus *Hopkins* equal a cause of action for same-sex sexual harassment on the basis of gender stereotyping? And how does the lack of the traditional employment discrimination construct in same-sex cases impact the ability of plaintiffs to assert this cause of action?[93]

The additive approach of *Hopkins* plus *Oncale* equals a cause of action was adopted by the Ninth Circuit in *Nichols v. Azteca Restaurant Enterprises*.[94] In that case, Antonio Sanchez, a host and server at defendant restaurant, alleged that he was targeted in the workplace for his failure to conform to gendered notions of

performance or their perceptions of Hamm's sexual orientation"); *Rene*, 305 F.3d at 1068 (reversing the district court's grant of summary judgment against homosexual plaintiff alleging same-sex sexual harassment). And then there is the class of cases where an individual plaintiff (in some cases heterosexual and in other cases the record does not address the issue of sexual orientation) alleges that they were repeatedly demeaned in the workplace for not conforming to societal notions of what is masculine or what is feminine. *See, e.g.*, *Nichols*, 256 F.3d at 874 ("[Plaintiff] asserts that the verbal abuse at issue was based upon the perception that he is effeminate and, therefore, occurred because of sex."); *Schmedding*, 187 F.3d at 865 (clarifying that plaintiff alleged that he was harassed because of sex when he was "falsely labeled . . . as homosexual in an effort to debase his masculinity"). But as the United States District Court in Massachusetts recognized in *Centola*: "[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear." 183 F. Supp. 2d at 408; *see also* Hamm v. Weyauwega Milk Prods., Inc., 199 F. Supp. 2d 878, 890 (E.D. Wis. 2002) ("[T]he line between discrimination on the basis of sex and discrimination on the basis of actual or perceived sexual orientation is not always a clear one."), *aff'd*, 332 F.3d 1058 (7th Cir. 2003). This is because of the increasing focus in same-sex sexual harassment cases brought by lesbian and gay plaintiffs on the sex stereotyping aspect of the claim and the decreasing emphasis on sexual orientation. However, the Second Circuit explained in *Simonton* that the recognition of a claim for sex stereotyping "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." 232 F.3d at 38.

[92] 183 F. Supp. 2d at 410.

[93] The development of a sex stereotyping cause of action in same-sex sexual harassment cases is an attempt to recreate the traditional gender hierarchy in an all-male setting. It is more difficult because there is an absence of the traditional, although often unstated, assumptions about unequal power between men and women in the workplace.

[94] 256 F.3d at 869 (reversing the judgment of the district court that male plaintiff's same-sex sexual harassment claim was not actionable under Title VII because the gender stereotyping he faced did not qualify as discrimination "because of . . . sex" under Title VII). One year later, a fractured majority of the en banc Ninth Circuit reversed a district court's grant of a defendant's motion for summary judgment as to another plaintiff's same-sex sexual harassment claim. *Rene*, 305 F.3d at 1068. The lead opinion, authored by Judge William Fletcher, held that the same-sex sexual harassment at issue was actionable as "'physical conduct of a sexual nature' [that was] sufficiently severe or pervasive" so as to constitute discrimination "because of . . . sex." *Id.* at 1067–68. In a concurring opinion, Judge Pregerson, joined by Judges Trott and Berzon, found the case to be "actionable gender stereotyping harassment" whose facts were "indistinguishable from the conduct found actionable in *Nichols*." *Id.* at 1068 (Pregerson, J., concurring).

masculinity.[95] His co-workers and one of his supervisors attacked him for carrying his tray "like a woman" and often referred to him with feminine pronouns like "she" or "her."[96] Sanchez was derided by his co-workers as a "faggot" and as a "fucking female whore."[97] He also was criticized for not having sex with a female waitress with whom he was friendly.[98] The Ninth Circuit held that because the verbal abuse that Sanchez faced "was closely linked to gender," he could make out a claim under *Hopkins*.[99] The court characterized *Hopkins* as setting out "a rule that bars discrimination on the basis of sex stereotypes," and concluded that such a rule applied to prohibit the gender-based harassment experienced by Sanchez.[100] However, in holding that Sanchez could maintain a cause of action alleging gender stereotyping, the Ninth Circuit did not wrestle with the "because of . . . sex" requirement. It assumed that if Sanchez could satisfy the requirements for establishing sex stereotyping under *Hopkins*, he could therefore prove discrimination "because of . . . sex" under Title VII.[101]

The Ninth Circuit in *Nichols* is not the only court to attempt to adopt the *Hopkins* sex stereotyping analysis wholesale into the same-sex sexual harassment context. In a same-sex sexual harassment case brought by a lesbian woman involving her female supervisor, the district court in *Heller v. Columbia Edgewater Country Club* found that viewing the evidence in the light most favorable to plaintiff, a jury could find that her supervisor harassed her "because Heller did not conform to Cagle's stereotype of how a woman ought to behave."[102] The court reasoned that:

> If an employer subjected a heterosexual employee to the sort of abuse allegedly endured by Heller—including numerous unwanted offensive comments regarding her sex life—the evidence would be sufficient to state a claim for violation of Title VII. The result should not differ simply because the victim of the harassment is homosexual.[103]

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[95] *Nichols*, 256 F.3d at 874.
[96] *Id.* at 870.
[97] *Id.*
[98] *Id.* at 874.
[99] *Id.* at 874–75.
[100] *Id.*
[101] *Id.* at 875.
[102] 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).
[103] *Id.* at 1222–23; *see also* Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (stating in a case involving a transsexual that, after *Price Waterhouse v. Hopkins*, "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act

The court seemed to decide that it was inequitable to deny the protections of Title VII to Elizabeth Heller just because Heller was a lesbian and another woman harassed her.[104] However, the district court in *Heller* attempted to address the "because of . . . sex" requirement more fully than the Ninth Circuit in *Nichols*:

> One way (but certainly not the only means) of satisfying [the] requirement [of Title VII that discrimination be "because of . . . sex"] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that Cagle would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender.[105]

This analysis appears to be another way of stating that Heller did not conform to gendered notions of how women ought to behave. In fact, the district court also found that the plaintiff could state a cause of action for sexual harassment under the reasoning of the Ninth Circuit in *Nichols* in applying *Hopkins* to same-sex sexual harassment cases.[106]

What seemed almost intuitive to the Ninth Circuit in *Nichols* and to the United States District Court for the District of Oregon in *Heller*—that the assumptions present in the traditional employment discrimination construct should not simply evaporate in a same-sex sexual harassment case—has not carried the day in other circuits and district courts. Many other courts have rejected such a broad reading of *Oncale* and the "because of . . . sex" requirement in same-

femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex").

[104] *Heller*, 195 F. Supp. 2d at 1222 ("Nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone. . . . Sexual harassment actionable under Title VII is not limited to harassment by members of the opposite sex . . . .").

[105] *Id.* at 1223 (citation and footnote omitted). In the appended footnote the district court further reasoned:

> It is no answer that Cagle did not harass *all* women but only lesbian women. Certainly a man could not escape liability by arguing that he didn't sexually harass all women, but only those women he considered attractive. Nor is it a defense that Cagle also harassed gay men. Otherwise, a bisexual manager would be immune from liability so long as he demanded sexual favors from men and women alike, and pornographic pictures could be displayed on the office bulletin board so long as they were available for viewing by men and women equally.

Id. at 1223 n.10. *But see* Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000) ("Title VII does not cover the 'equal opportunity' or 'bisexual' harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).").

[106] *See Heller*, 195 F. Supp. 2d at 1223–24.

sex sexual harassment cases. These courts looked at the facts of the same-sex cases before them and had difficulty applying the traditional employment discrimination construct beyond the context in which it was developed. With the inference implicit in the traditional employment discrimination paradigm no longer available to do the causal heavy lifting, the "because of . . . sex" requirement began to loom large as a major obstacle to success for plaintiffs alleging same-sex sexual harassment.[107]

The Seventh Circuit, in *Hamm v. Weyauwega Milk Products, Inc.*, affirmed the district court's grant of summary judgment to a defendant in a same-sex sexual harassment case, holding that "[e]ven drawing all reasonable inferences in Hamm's favor, his litany of complaints about the actions of his coworkers inescapably relate to either Hamm's coworkers' disapproval of his work performance or their perceptions of Hamm's sexual orientation."[108] Hamm, who worked at a factory in an all-male environment, had "alleged that he was called a 'faggot,' 'bisexual,' and 'girl scout.'"[109] Hamm's co-workers gossiped that he was involved in a homosexual relationship with another employee at the plant. One co-worker warned "[other workers] not to bend over in front of [Hamm]" and testified at his deposition that he told Hamm "not to be sizing me up."[110]

Hamm attempted to make the type of allegations that were successful in *Nichols*: he alleged that his co-workers discriminated against him because he did not fit certain sex stereotypes.[111] The Seventh Circuit, citing to *Hopkins*, stated that "[i]n order to evaluate Hamm's claim, [it] must 'consider any sexually explicit language or stereotypical statements within the context of all of the evidence of harassment in the case [to] determine whether the

[107] *See, e.g.*, Dick v. Phone Directories Co., 265 F. Supp. 2d 1274, 1277 (D. Utah 2003) ("As *Oncale* and cases following *Oncale* have pointed out, inferences that are available when a person of one sex uses sexually explicit language or gestures toward a person of the opposite sex are not necessarily available when both persons are of the same sex."); Raum v. Laidlaw, Ltd., No. 97-CV-111 (FJS), 1998 WL 357325, at *2 (N.D.N.Y. July 1, 1998) ("The Supreme Court recently held [in *Oncale*] that same sex discrimination is a cognizable claim under Title VII, but the plaintiff has the heavy burden of establishing that the 'conduct in issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination . . . because of sex.'" (quoting Oncale v. Sundower Offshore Servs., Inc., 523 U.S. 75, 81 (1998))).

[108] 332 F.3d 1058, 1062 (7th Cir. 2003). In characterizing the plaintiff's case, the Seventh Circuit stated that it was being asked "to navigate the tricky legal waters of male-on-male sex harassment." *Id.*

[109] *Id.* at 1060.

[110] *Id.*

[111] *Id.* at 1062.

evidence . . . create[d] a reasonable inference that the plaintiff was discriminated against because of his sex.'"[112]

This approach, while looking to evidence of gender stereotyping, does not go as far as *Nichols*, which almost adopts a freestanding cause of action for same-sex sexual stereotyping harassment.[113] After reviewing the evidence, the court concluded that the statements by Hamm's co-workers constituted speculation about his sexual orientation, rather than gender stereotyping that questioned his masculinity.[114] Therefore, the harassment Hamm experienced did not qualify as discrimination "because of . . . sex" and, accordingly, fell outside the ambit of Title VII.[115]

In *Hamm*, Judge Posner wrote a concurring opinion arguing that the extension of the gender stereotyping language of *Price Waterhouse* in cases such as *Nichols* goes beyond the intent of Title VII.[116] Judge Posner explained that the evidence of sex stereotyping in *Hopkins* was used to show that Hopkins was being discriminated against "because of . . . sex."[117] However, Judge Posner maintained, and convincingly so, that

> there is a difference that subsequent cases have ignored between, on the one hand, using evidence of the plaintiff's failure to wear nail polish (or, if the plaintiff is a man, his using nail polish) to show that her sex played a role in the adverse employment action of which she complains, and, on the other hand, creating a subtype of sexual discrimination called "sex stereotyping."[118]

In essence, Judge Posner questioned the decision of the Ninth Circuit in *Nichols* for creating a new sex stereotyping cause of

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[112] *Id.* (third alteration in original) (quoting Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000)).

[113] The Seventh Circuit took a similar approach in *Spearman v. Ford Motor Co.* 231 F.3d 1080 (7th Cir. 2000). The court in *Spearman* found that the plaintiff's co-workers had harassed him not because of his sex, but because of their perception that he was homosexual. *Id.* at 1085. In contrast, in addressing a same-sex sexual harassment claim brought by a homosexual male, the district court in *Equal Employment Opportunity Commission v. Grief Brothers Corp.* rejected defendant's argument that the complainant was harassed because of sexual orientation rather than because of sex, and specifically noted that "[the complainant employee's] harassers did not know that he was a homosexual, nor did they believe that he was." No. 02-CV-468S, 2004 WL 2202641, at *10 (W.D.N.Y. Sept. 30, 2004).

[114] *Hamm*, 332 F.3d at 1063.

[115] *Id.* at 1063–64.

[116] *See id.* at 1066–67 (Posner, J., concurring).

[117] *Id.* at 1068.

[118] *Id.* at 1067. In other words, Judge Posner argues, "'[s]ex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes, as in the *Hopkins* case, be evidence of sex discrimination." *Id.* at 1068.

action as a means of avoiding the difficult work of determining whether an allegation of same-sex sexual harassment satisfies the "because of . . . sex" requirement of Title VII. According to Judge Posner, merely because an individual was subjected to sex stereotyping does not mean that he or she suffered discrimination "because of . . . sex," whether via a tangible job detriment or through a hostile environment.[119] Rather, a plaintiff could use any sex stereotyping he or she faced as evidence in order to create an inference of sexual harassment or sex discrimination.[120]

Several other courts of appeals have confronted the "because of . . . sex" requirement of Title VII in the same-sex sexual harassment context in cases not involving allegations of sex stereotyping.[121] These courts had to confront head on how a same-sex plaintiff can prove discrimination "because . . . of sex" under *Oncale*. The Fourth Circuit, the Sixth Circuit, and the District of Columbia Circuit all came to one answer: not easily.[122]

The Sixth Circuit in *Equal Employment Opportunity Commission v. Harbert-Yeargin, Inc.* reversed a jury verdict in favor of a same-sex claimant, finding that he could not establish that he was discriminated against "because of . . . sex."[123] Joseph Carlton had alleged that his supervisor had touched him in a sexually inappropriate manner on several occasions.[124] In an opinion styled

[119] *Id.* at 1067.

[120] This is in contrast to the approach taken by the Ninth Circuit in *Nichols*, which in effect assumed that the gender stereotyping a plaintiff faced qualified as sexual harassment that was actionable under Title VII. 256 F.3d 864, 869 (2001).

[121] *See, e.g.*, Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1121–22 (D.C. Cir. 2002) (finding that a Title VII claim involved no more than employees engaged in a "workplace grudge match"); Equal Employment Opportunity Comm'n v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 (6th Cir. 2001) (Guy, J., concurring in part and dissenting in part) (reversing jury verdict in favor of one plaintiff in a same-sex sexual harassment case because "[w]hat went on . . . was gross, vulgar, male horseplay in a male workplace[:] . . . the classic example of men behaving badly"); Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 256–57 (4th Cir. 2001) (reversing jury verdict in same-sex sexual harassment case brought under state law analogue to Title VII and granting judgment as a matter of law to Wal-Mart because plaintiff failed to establish "that the offending conduct was based on his gender").

[122] *Davis*, 275 F.3d at 1123 (indicating that a plaintiff in a same-sex harassment action faces "serious obstacles" in proving the "because of . . . sex" element); *Harbert-Yeargin, Inc.*, 266 F.3d at 522 (Guy, J., concurring in part and dissenting in part) (cautioning that "[s]ame-sex sexual harassment cases of this nature present a slippery slope"); *Lack*, 240 F.3d at 260 (recognizing that the same-sex sexual harassment plaintiff is faced with "an especially formidable obstacle" in proving causation); *see also* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262 (3d Cir. 2001) ("The question of how to prove that same-sex harassment is because of sex is not an easy one to answer.").

[123] 266 F.3d at 519 & n.1, 522 (Guy, J., concurring in part and dissenting in part) (constituting the majority of the court with respect to Carlton's claim).

[124] *Id.* at 501 (majority opinion).

as a concurring opinion, which was the majority opinion as to Carlton's claim, the court confronted the use of inference in the traditional employment discrimination construct. The Sixth Circuit stated:

> When Title VII was amended to encompass discrimination predicated on sex, the primary focus was on protecting women in the workplace from male supervisors and coworkers treating them differently because of their gender. If the word "gender" had been used instead of "sex," some of the confusion that exists today probably would have never developed.[125]

Yet the court did not define the terms sex and gender. Nor did it explain how to apply the "because of . . . sex" requirement in the same-sex context. Intuitively, what seemed to the Sixth Circuit as no more than an unfortunate episode of male-on-male sexual horseplay gone too far certainly was not discrimination "because of . . . sex." While the court conceded that Carlton's environment might have been sexually hostile, it rejected the possibility that he was discriminated against "because of . . . sex," since there was no element of "gender discrimination."[126] Raising the specter of the slippery slope, the Sixth Circuit queried, "what's next—towel snapping in the locker room?"[127]

The question of causation also took center stage in both the District of Columbia Circuit's decision in *Davis v. Coastal International Security, Inc.*[128] and the Fourth Circuit's opinion in *Lack v. Wal-Mart Stores, Inc.*[129] In *Davis*, Wallace Davis, a security guard at the Environmental Protection Agency, brought a same-sex sexual harassment case alleging that his co-workers made various lewd and obscene comments and gestures to him in the workplace.[130] The District of Columbia Circuit affirmed the decision of the district court granting summary judgment to the defendants, finding that Davis could not satisfy the "because of . . . sex" requirement of Title

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[125] *Id.* at 519–20 (Guy, J., concurring in part and dissenting in part).

[126] *Id.* at 520 ("It does not follow . . . that every 'sexually' hostile work environment will ground a Title VII claim. In fact, if the environment is just sexually hostile without an element of gender discrimination, it is not actionable."). Presumably, if the case was brought by Josephina Carlton, and she had been subjected to the type of sexual behavior inflicted on Joseph Carlton, the Sixth Circuit would not have gone searching for an element of gender discrimination above and beyond the sexualized conduct.

[127] *Id.* at 522.

[128] 275 F.3d 1119 (D.C. Cir. 2002).

[129] 240 F.3d 255 (4th Cir. 2001).

[130] *Davis*, 275 F.3d at 1121.

VII.[131] Citing to *Oncale*, the court found the causal requirement to be a "serious obstacle[]" in same-sex sexual harassment cases.[132] The court rejected plaintiff's contention that his co-workers' actions amounted to sexual propositions.[133] The court also dismissed the plaintiff's argument that, because his harassers treated *him* differently than women, the harassers treated *men in general* differently than women: "To succeed on this theory, however, Davis must produce 'direct comparative evidence about how the alleged harasser treated *members* of both sexes in a mixed-sex workplace.'"[134] Interestingly, the court felt the need to include the caveat that "[n]or does anything we say here preclude female plaintiffs subjected to comments and gestures like those at issue in this case from bringing Title VII sexual harassment suits."[135] This comment suggests that there are really two different causal requirements in Title VII: one for cases brought under the traditional paradigm, and another for same-sex cases.

In *Lack*—a case involving the West Virginia analogue to Title VII—the Fourth Circuit reversed a jury verdict in favor of the plaintiff, Christopher Lack, because he "failed to establish that the offending conduct was based on his gender."[136] Lack maintained that his supervisor, James Bragg, made vulgar sexual comments to Lack on several occasions and grabbed his own crotch in front of Lack, proclaiming that it was Lack's "Christmas present."[137] In analyzing Lack's claim, the court stated that "the causation element poses an especially formidable obstacle in same-sex harassment cases."[138] Citing extensively to *Oncale*, the Fourth Circuit found that Lack could not show that the boorish and offensive behavior of his supervisor created a claim cognizable under Title VII.[139] The

[131] *Id.*

[132] *Id.* at 1123.

[133] *Id.*

[134] *Id.* at 1124 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998)).

[135] *Id.* at 1126.

[136] Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 256–57 (4th Cir. 2001). The jury had returned a verdict in Lack's favor and awarded him $80,000 in damages. *Id.* at 257.

[137] *Id.* at 258. Bragg accused Lack of having sex with the cashiers, called him by female names, and referred to Lack's sexual body parts in front of customers. Bragg also repeatedly used sexually explicit language. The Fourth Circuit referred to Bragg as "a supervisor with an unabashed taste for lewd humor." *Id.*

[138] *Id.* at 260.

[139] *Id.* at 260–62. The Fourth Circuit also indicated that there is some authority supporting the "earnest sexual solicitation" theory—that "an earnest sexual solicitation by a harasser will support an inference that the harassment was because of the plaintiff's sex." *Id.* at 261. However, it declined to reach the issue because Lack failed to produce evidence that

court held that Lack had failed to produce "plausible evidence that such comments were animated by Bragg's hostility to Lack as a man."[140] The Fourth Circuit also pointed to complaints by women in the workplace about the actions of Lack's supervisor, which led it to conclude "that Bragg was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike."[141]

As these same-sex cases illustrate, shorn of the traditional employment discrimination paradigm, the "because of . . . sex" requirement has become an almost insurmountable obstacle to same-sex claimants.[142] Unless courts have applied the sex stereotyping analysis of *Hopkins* as a means of creating a gender stereotyping hostile environment claim, same-sex claimants have had little success post-*Oncale*.

B. The Causal Crisis and Traditional Opposite-Sex Cases

What began as the expansion of Title VII to permit a cause of action for same-sex sexual harassment in *Oncale* ironically has led to increased scrutiny of the "because of . . . sex" requirement in traditional opposite-sex hostile environment sexual harassment cases. While several courts of appeals have struggled with applying the dictates of *Oncale* in male-on-female sexual harassment cases, none have done so more openly than the en banc Fourth Circuit in *Ocheltree v. Scollon Productions, Inc.*[143] Lisa Ocheltree was employed as the only woman in the defendant's production shop.[144] She worked alongside ten or eleven men who continuously spoke of their sexual exploits in graphic terms and used a female mannequin

his supervisor's behavior qualified as an "earnest sexual solicitation." *Id.* at 261–62.

[140] *Id.* at 261.

[141] *Id.* at 262.

[142] The one notable exception is the case of the homosexual harasser. *See, e.g.*, La Day v. Catalyst Tech., Inc., 302 F.3d 474, 481 (5th Cir. 2002) ("[I]f the evidence is viewed in the light most favorable to La Day, it is reasonable to conclude that Craft's touching of La Day's anus, and his earlier expressed jealousy toward La Day's girlfriend, constituted 'explicit or implicit proposals of sexual activity.'" (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998))); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("There is evidence in the record suggesting that Jemison's harassment of Shepherd was borne of sexual attraction."). *But see* Kreamer v. Henry's Marine, No. Civ.A. 03-3139, 2004 WL 2297459, at *7 (E.D. La. Oct. 7, 2004) ("Plaintiff cannot rely on his subjective belief alone that [his male co-worker who repeatedly grabbed him in the area of his crotch] was gay to meet his evidentiary burden."). That the first avenue of proof set out by *Oncale* thus far has been the most successful (other than the gender stereotyping analysis) is not surprising because the homosexual harasser cases almost identically reproduce the dynamics of traditional sexual harassment cases, with the only exception being the identity of the victim.

[143] 335 F.3d 325 (4th Cir. 2003) (en banc).

[144] *Id.* at 328.

in front of her to demonstrate sexual techniques.[145] A jury awarded Ocheltree $7,280 in compensatory damages and $400,000 in punitive damages (which was reduced to $42,720 due to Title VII's sliding cap based on the number of employees).[146] The district court denied defendant's motion for judgment as a matter of law, but a divided panel of the Fourth Circuit reversed, finding that defendant was, in fact, entitled to judgment as a matter of law.[147] Judge Williams wrote the majority panel opinion and Judge Michael wrote a dissent.[148] However, after the Fourth Circuit vacated the panel opinion and heard the case en banc, the roles were reversed; Judge Michael wrote for the majority, while Judge Williams penned a strongly-worded dissent.[149]

In his en banc majority decision, Judge Michael found that the evidence supported the jury's verdict as to Ocheltree's hostile environment sexual harassment claim because

> [a] reasonable jury could find that much of the sex-laden and sexist talk and conduct in the production shop was aimed at Ocheltree because of her sex—specifically, that the men behaved as they did to make her uncomfortable and self-conscious as the only woman in the workplace.[150]

Interestingly, Judge Michael then commented that "[m]uch of the conduct, a jury could find, was particularly offensive to women and was intended to provoke Ocheltree's reaction as a woman."[151] Judge Michael further noted that the jury could have reasonably found that Ocheltree's male co-workers engaged in their lewd behavior "largely because they enjoyed watching and laughing at the reactions of the only woman in the shop."[152] While the en banc majority recognized that a few of the men in the shop had complained about the offensive work environment, it emphasized that "[n]o man was driven from the room because of the conduct, as was Ocheltree on occasion."[153] Therefore, the en banc majority

[145] *Id.* at 328–29.

[146] *Id.* at 330.

[147] Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 353 (4th Cir. 2002), *vacated*, 335 F.3d 325 (4th Cir. 2003) (en banc).

[148] *See id.* at 353, 366.

[149] *See Ocheltree*, 335 F.3d at 327, 337.

[150] *Id.* at 332.

[151] *Id.*

[152] *Id.*

[153] *Id.* The Second Circuit recently addressed whether a similar work environment could support a female plaintiff's hostile environment sexual harassment claim. *See* Petrosino v. Bell Atl., 385 F.3d 210, 222 (2d Cir. 2004). In *Petrosino*, the court stated:

> The comments and graphics that permeated Petrosino's work environment may have

affirmed the decision of the district court as to Ocheltree's claim for compensatory damages, but reversed as to the jury's award of punitive damages because the court found that there was no evidence in the record indicating that the defendant "knew, either directly or by imputation, that it might have been acting in violation of Ocheltree's 'federally protected rights.'"[154]

In a sharply worded dissent,[155] whose reasoning was adopted by two other members of the court,[156] Judge Williams argued that "the majority's opinion reflects a fundamental misconception of the meaning of 'discriminat[ion] . . . because of . . . sex.'"[157] Relying upon the fact that all of the employees in defendant's shop were exposed to the lewd and vulgar behavior and that most of the conduct was not specifically directed at Ocheltree, Judge Williams emphasized that "there is no suggestion that Ocheltree was subjected to any different treatment than that to which the other workers in the production shop were subjected."[158] Judge Williams further noted that three of Ocheltree's male colleagues had complained about the work environment.[159]

Judge Williams then took her analysis one step further, arguing that not only was defendant insulated from a Title VII claim because Ocheltree was not specifically targeted as the only woman in defendant's shop, but that the lewd and sexually explicit "comments do not portray women in any negative or demeaning light. The sexual behavior described by the male co-workers is not

> sexually ridiculed both men and women, but there is an important, though not surprising, distinction. The conduct at issue sexually ridiculed some men, but it also frequently touted the sexual exploits of others. In short, the insults were directed at certain men, not men as a group. By contrast, the depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women as a group were available for sexual exploitation by men.

Id.

[154] *Ocheltree*, 335 F.3d at 336.

[155] Judge Williams' opinion was styled as dissenting in part and concurring in the judgment in part. Judge Williams dissented as to the en banc majority's decision regarding compensatory damages, but concurred in the majority's reversal of the punitive damages award. *Id.* at 344 (Williams, J., dissenting in part and concurring in the judgment in part).

[156] Judge Niemeyer agreed with the reasoning of the dissent, but concurred in the judgment of the en banc majority. *Id.* at 336–37 (Niemeyer, J., concurring) ("[W]hile I firmly concur in the dissenting opinion's interpretation of Title VII, my review of the facts in the peculiar circumstances of this case leads me to conclude that the jury's verdict on liability should be affirmed."). Judge Widener joined without reservation in Judge Williams' opinion. *See id.* at 327.

[157] *Id.* at 337 (Williams, J., dissenting in part and concurring in the judgment in part) (alterations in original).

[158] *Id.* at 339.

[159] *Id.*

by definition passive or subservient."[160] In fact, Judge Williams maintained that there was nothing discriminatory about the sexually-charged work environment and that "[a]s women have sought and achieved sexual equality in this society, and as moral beliefs and taboos about oral sex have broken down, it seems illogical to assert that comments about consensual sex between adults necessarily imply male dominance or power."[161] Finally, Judge Williams turned her discussion of sexual equality into an argument that the en banc majority actually was providing Ocheltree with special treatment, contending that "[g]iven the absence of a sufficient basis for concluding that this vulgar talk and behavior constituted gender-animated discriminatory treatment, the analysis and result crafted by the majority creates a rule requiring that women be given preferential accommodation in the workplace beyond non-discrimination."[162]

The opinions of both the en banc majority and the dissent in *Ocheltree* raise troubling questions about the future of hostile environment sexual harassment law. First and foremost, the en banc majority failed adequately to theorize the "because of . . . sex" requirement and did not fully explain why the conduct that Lisa Ocheltree faced qualified as discrimination "because of . . . sex" in violation of Title VII. While the en banc majority certainly cited to incidents where Ocheltree was targeted by her male co-workers with sexually demeaning behavior, such as demonstrating sexual acts on a mannequin as she walked by, it failed to explain how the work environment was more than just sexually-charged.[163] The

[160] *Id.* at 342.

[161] *Id.*

[162] *Id.* at 342 n.6.

[163] The en banc majority cited to testimony of one of Ocheltree's co-workers that when Ocheltree would walk by certain male co-workers, they would do something sexual with the mannequin in front of her. *Id.* at 328 (majority opinion). In fact, once two male co-workers waited by the mannequin until Ocheltree arrived at work so that she would arrive to see that "[o]ne was pinching the mannequin's nipples, and the other was on his knees simulating oral sex on the mannequin." *Id.* On another occasion, a male co-worker sang a lewd song to Ocheltree, containing the words, "[c]ome to me, oh, baby come to me, your breath smells like c[o]m[e] to me." *Id.* (second and third alterations in original). Another time, one of Ocheltree's male co-workers brought a book containing pictures of men with pierced genitalia to her work station and opened it to a centerfold photograph showing a man's pierced crotch area. *Id.* Of course, these incidents elicited strong reactions from Ocheltree and laughter from at least some of her male co-workers. *Id.* at 329. While the en banc majority cited to these incidents, it failed to explain why these incidents (combined with the sexually-charged work atmosphere) illustrated that Lisa Ocheltree was targeted because she was a woman. In addition, it failed to respond to Judge Williams' charge that the en banc majority's opinion somehow provided women with preferential treatment under Title VII.

testimony in the record clearly illustrated that some of Ocheltree's male co-workers attempted to demean Ocheltree as a woman.[164] Some of her male co-workers' actions were animated by a desire to see how Ocheltree would react to their antics.[165] On one occasion, two of Ocheltree's male co-workers "were positioned at the mannequin when Ocheltree arrived at work" so that they could simulate sex acts in front of her.[166] By suggesting that the conduct in Ocheltree's workplace was merely more offensive to women, rather than targeted at Ocheltree as a woman because she was a woman, the en banc Fourth Circuit failed to fully conceptualize the wrong of sexual harassment.[167] The en banc majority's suggestion that the same conduct could be more offensive to women also left its opinion open to the dissent's charge of special treatment.[168] Finally, Judge Williams' suggestion that the work environment at Scollon was somehow the result of the sexual revolution combined with the women's movement, rather than the conscious actions of some of the men in the defendant's workforce to target Lisa Ocheltree as the only woman in the shop,[169] is troubling. The facts of *Ocheltree* illustrate that the behavior of the plaintiff's co-workers constituted more than just the guys going a little too far in speaking of their sexual exploits. At least some of their behavior—simulating sex acts on a mannequin, showing her pictures of male genitalia, and singing a sexually explicit song to her—was animated by a desire to shame and demean Lisa Ocheltree.[170] Judge Williams' opinion fails to recognize this, and consequently does not attempt to theorize or conceptualize the meaning of the "because of . . . sex" requirement of Title VII.

The Second Circuit also analyzed the "because of . . . sex" requirement of Title VII post-*Oncale*—although in factual

[164] *See id.* at 328–29.

[165] *See id.*

[166] *Id.* at 328.

[167] The Second Circuit in *Petrosino v. Bell Atlantic* more fully theorized the wrong of sexual harassment in a similar work setting. *See* 385 F.3d 210, 222 (2d Cir. 2004). The court recognized that, while certain men were ridiculed, the sexually demeaning comments and visual images of women "communicated the message that women *as a group* were available for sexual exploitation by men." *Id.* (emphasis added).

[168] In a male-on-male sexual harassment case, the District of Columbia Circuit makes the same suggestion. *See* Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1126 (D.C. Cir. 2002) ("Nor does anything we say here preclude female plaintiffs subjected to comments and gestures like those at issue in this case from bringing Title VII sexual harassment suits.").

[169] *See Ocheltree*, 335 F.3d at 342 (Williams, J., dissenting in part and concurring in the judgment in part).

[170] *See id.* at 328 (majority opinion).

circumstances clearly distinct from *Ocheltree*—in *Brown v. Henderson*.[171] Madeline Brown, a letter carrier for the United States Postal Service, brought a hostile environment sexual harassment case alleging that her co-workers had engaged in a campaign to insult her.[172]

In both her complaint to the Postal Service's Equal Employment Opportunity office and during her deposition after she filed suit, Brown principally pointed to two bases for the harassment that she faced. First, Brown explained that she was being targeted because of a hotly contested union election during which she was ousted as shop steward after eighteen years.[173] Second, she cited to the constant barrage of comments from co-workers speculating that she was having an affair with one of her male co-workers.[174] The district court granted summary judgment to the defendant, finding that Brown failed to show that a genuine issue of material fact existed as to whether she was harassed because of her sex.[175] While affirming the district court's opinion, the Second Circuit took the opportunity to address a similar issue to that faced by the Fourth Circuit in *Ocheltree*—when both a man and a woman in the workplace experience harassment, when is the harassment faced by the woman "because of . . . sex"?

In a unanimous panel opinion written by Judge Calabresi, the Second Circuit explained that while courts often look to evidence of how men and women are treated as a group in a given workplace, the focus of a court's attention in any Title VII action should be on whether the individual plaintiff suffered discrimination because of sex.[176] "In other words," the Second Circuit reminded, "what matters in the end is not how the employer treated *other* employees, if any, of a different sex, but how the employer *would have* treated *the plaintiff* had she been of a different sex."[177]

Judge Calabresi certainly recognized that "in the absence of evidence suggesting that a plaintiff's sex was relevant, the fact that both male and female employees are treated similarly, if badly, does give rise to the inference that their mistreatment shared a common

[171] 257 F.3d 246 (2d Cir. 2001).
[172] *Id.* at 249.
[173] *Id.* at 249, 250–51.
[174] *Id.* at 249–50.
[175] *Id.* at 251.
[176] *Id.* at 253 ("[T]he application of discriminatory policies to individuals cannot be justified by their even-handed effects on women and men as classes or in the aggregate. . . . [I]t is discriminatory treatment of a given individual that matters.").
[177] *Id.* at 253–54.

cause that was unrelated to their sex."[178] However, he cautioned that "the inquiry into whether ill treatment was actually sex-based discrimination cannot be short-circuited by the mere fact that both men and women are involved."[179] A court must look closely at the facts and circumstances of a given case,

> [f]or it may be the case that a co-worker or supervisor treats both men and women badly, but women worse. Or, . . . a woman might be abused in ways that cannot be explained without reference to her sex, notwithstanding the fact that a man received treatment at least as harsh, though for other—non-sexual—reasons.[180]

The nuanced approach offered by Judge Calabresi is one of the most thoughtful attempts post-*Oncale* by the courts of appeals to grapple with the "because of . . . sex" requirement.

Since the Supreme Court's decision in *Oncale*, the courts of appeals also have taken a variety of approaches in determining what harassing conduct will qualify as discrimination "because of . . . sex" under Title VII, often relying upon the context of the harassment to help determine how to address a given claim. At one end of the continuum are the cases involving explicit proposals of sexual activity. The *Oncale* Court explained that, in these types of cases, juries have found the inference of discrimination easy to draw. In *Bales v. Wal-Mart Stores, Inc.*, the Eighth Circuit affirmed the jury's verdict in favor of Bales on her hostile environment sexual harassment claim.[181] In rejecting Wal-Mart's argument that the discrimination was not based on sex as "verg[ing] on the frivolous," the Eighth Circuit explained that a reasonable jury could have found that the harassment the plaintiff faced when her supervisor repeatedly made sexual comments and proposed sexual activity was because of her sex.[182] The Eighth Circuit further explained that "[t]he record speaks for itself, and to contend that Vallejo's behavior was not based on sex is disingenuous. No one, not even Wal-Mart, suggests for a moment that Vallejo would have engaged a male co-worker in the conversations in which he engaged Bales . . . ."[183]

In a case not involving explicit proposals of sexual activity, the Tenth Circuit took a more measured approach. The Tenth Circuit,

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[178] *Id.* at 254.
[179] *Id.*
[180] *Id.* (citations omitted).
[181] 143 F.3d 1103, 1105 (8th Cir. 1998).
[182] *Id.* at 1109.
[183] *Id.*

in *Penry v. Federal Home Loan Bank of Topeka*, affirmed the district court's grant of summary judgment to the defendant in a hostile environment sexual harassment claim, finding that the harassment was not "sufficiently severe or pervasive" to be actionable under Title VII.[184] However, the Tenth Circuit rejected the district court's failure to examine the totality of the circumstances in analyzing the alleged incidents of sexual harassment.[185] In discussing the "because of . . . sex" requirement, the Tenth Circuit explained that "[c]onduct that is overtly sexual may be presumed to be because of the victim's gender; however, actionable conduct is not limited to behavior motivated by sexual desire."[186] Thus, the Tenth Circuit did not look solely to the overtly sexual conduct to determine whether any adverse treatment suffered by the plaintiffs qualified as sexual harassment. The court explained that "[e]ven where the motive behind the alleged conduct was not the plaintiff's gender, the court may still consider that conduct relevant when evaluating whether ambiguous conduct was in fact gender-motivated or whether gender-motivated conduct was so severe and pervasive as to create Title VII liability."[187] Even though the plaintiffs' supervisor may have been just as likely to take a male colleague on a business trip to Hooters or make sexually suggestive comments to both men and women, the Tenth Circuit explained that "we cannot, with straight faces, say that Waggoner's trips to Hooters had nothing to do with gender."[188] In the end, however, the Tenth Circuit concluded that the behavior of plaintiffs' supervisor was "motivated by poor taste and a lack of professionalism rather than by the plaintiffs' gender."[189]

While the Tenth Circuit in *Penry* sought to take a middle course, looking to the totality of the circumstances to determine whether any given conduct was "because of . . . sex," the court did little to

[184] 155 F.3d 1257, 1263 (10th Cir. 1998).

[185] *Id.* at 1262.

[186] *Id.* at 1261.

[187] *Id.* at 1263; *see also* Raniola v. Bratton, 243 F.3d 610, 621–23 (2d Cir. 2001) (reversing district court's grant of judgment as a matter of law to defendant as to plaintiff's hostile environment sexual harassment claim and finding that, given the sex-based comments that she faced, including references to being a "cunt" in the official police ledger and on a flyer posted in the precinct, "a factfinder could reasonably infer that the other adverse treatment described by Raniola was suffered on account of sex"). *But see* Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 584–86 (11th Cir. 2000) (examining individual instances of alleged harassment in isolation despite an acknowledgement that a court must consider all such behavior collectively).

[188] *Penry*, 155 F.3d at 1263.

[189] *Id.*

analyze the "because of . . . sex" requirement. The Tenth Circuit acknowledged that the plaintiffs' supervisor's trip to Hooters may have had something to do with "gender," but it did not explain how this conduct qualified as discrimination "because of . . . sex." It is almost as if the conduct spoke for itself and the court could infer that the actions taken by the supervisor were in part because the plaintiffs were women. As with many cases both pre- and post-*Oncale*, the assumptions underlying the traditional employment discrimination construct still play a crucial role in male-on-female sexual harassment cases.

IV. "BECAUSE OF . . . SEX": THEORIZING CAUSATION ANEW

As a review of jurisprudence in this area illustrates, there is a consensus about the "because of . . . sex" requirement, and that consensus is that no court truly knows what it means. However, the Supreme Court and Congress have provided some guidance from which scholars and the courts can attempt to discern the meaning of Title VII's prohibition of discrimination "because of . . . sex." The Supreme Court in *Price Waterhouse v. Hopkins* recognized that "the words 'because of' do not mean '*solely* because of.'"[190] In overruling the affirmative defense created by the Supreme Court in *Hopkins*, the Civil Rights Act of 1991 set forth that "an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice."[191] And, in a non-precedential opinion in *Kissell v. American Federation of State, County & Municipal Employees, District Council 84*, the Third Circuit ventured even further beyond this limitation, stating that "Title VII jurisprudence does not require a plaintiff's sex to be the sole motivation or even the primary motivation for the harassment."[192] Rather, "sex" need only play some role in the offending conduct.[193] Yet what does the word "sex" mean as used in Title VII?

The federal courts also have provided a bewildering variety of answers to what Congress meant by the word "sex." On one end of

[190] 490 U.S. 228, 241 (1989) (plurality opinion); *see also* Miller v. Cigna Corp., 47 F.3d 586, 593–94 (3d Cir. 1995).

[191] 42 U.S.C. § 2000e-2(m) (2000). The "motivating factor" language is a rejection of the strict requirement of but-for causation.

[192] 90 F. App'x 620, 622 (3d Cir. 2004) (not precedential).

[193] *See id.*

the spectrum is the narrowest view of sex as referring to an individual's anatomical and biological characteristics. For example, the Seventh Circuit in *Hamner v. St. Vincent Hospital & Health Care Center* found that "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation."[194] On the other end of the spectrum is a more inclusive view of sex as the socially constructed expectations infused in the concept of sex, often referred to as gender norms. The Ninth Circuit's opinion in *Nichols v. Azteca Restaurant Enterprises, Inc.*, holding that the gender-based harassment that a plaintiff experienced qualified as discrimination "because of . . . sex" under Title VII,[195] illustrates this broader take on the meaning of the word sex.

In a recent opinion, the Sixth Circuit in *Smith v. City of Salem* found that the Supreme Court in *Hopkins* rejected the narrow view of sex as biological male and female and embraced a definition of sex that encompasses the concept of gender stereotyping as a wrong prohibited by Title VII.[196] However, the Sixth Circuit and the many other courts that have relied upon *Hopkins* in adopting a more inclusive gender stereotyping analysis have not addressed the tension between the more inclusive language of *Hopkins* and the cramped mechanistic approach taken by the Court in *Oncale*.[197]

Many scholars have attempted to fill the doctrinal void in the wake of the *Oncale* Court's Delphic analysis of the "because of . . . sex" language of Title VII. In one article, Hilary Axam and Deborah Zalesne all but advocate that courts should ignore *Oncale*, and "instead undertake a rigorous, principled analysis of the conduct before them in light of the extensive jurisprudence and scholarship elucidating concepts of sex and sex-based causation in other contexts."[198] In another scholarly piece, David Schwartz advocates

[194] 224 F.3d 701, 704 (7th Cir. 2000) (quoting Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984)).

[195] 256 F.3d 864, 874–75 (9th Cir. 2001) (allowing the plaintiff to recover on a sex stereotype sexual harassment claim).

[196] Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) ("By holding that Title VII protected a woman who failed to conform to social expectations . . . the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination . . . .").

[197] The *Oncale* opinion certainly was written very narrowly. Also, it nowhere references the Court's prior opinion in *Hopkins*, nor does it mention gender stereotyping as a viable means of proving same-sex sexual harassment.

[198] Axam & Zalesne, *supra* note 14, at 242–43 ("[I]n adjudicating questions of sex-based causation, the courts should resist the impulse to revert to the constrained conceptions of sex introduced in the earlier same-sex sexual harassment jurisprudence and perpetuated *sub*

for a revival of the "sex per se" rule, an evidentiary shortcut which automatically creates the presumption that sexual conduct in the workplace constitutes discrimination "because of . . . sex."[199] However, *Oncale* specifically rejects the notion that merely because the words used to harass contain "sexual content or connotations," such conduct automatically qualifies as discrimination "because of . . . sex."[200] Neither of these articles confronts *Oncale* head on. Nor do they attempt to place *Oncale* in the larger framework of sexual harassment jurisprudence.

Oncale exposed the lack of a well-developed causal framework in traditional sexual harassment cases. Yet in observing that "[c]ourts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations,"[201] the *Oncale* court continued to rely on the causal short-circuiting which has gotten courts into trouble in the first place. In *Oncale*, the Supreme Court endorsed the continued application of the traditional employment discrimination construct but only in cases that fit within the confines created by that construct.[202] In other words, the Court in *Oncale* endorsed two different approaches to determine whether an individual has been discriminated against on the basis of sex—one to be used in traditional male-on-female cases that conform to societal expectations of the primary purpose of Title VII, and another to be applied to all cases falling outside of that rubric, whether they be male-on-male, female-on-female, or female-on-male harassment. While the statutory language of Title VII lends no support to this double standard, and the very premise underlying *Oncale* is that men are protected under Title VII from hostile

silentio in *Oncale* . . . .").

[199] David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1705 (2002). As Schwartz recognizes, the development of sexual harassment law has relied in part on certain unstated assumptions. Schwartz argues that a sex per se rule—a rule that "sexual conduct in the workplace, *if* . . . *sufficiently severe or pervasive*, is discrimination because of sex"—was developed by courts. *Id.* While courts may have based their jurisprudential causation shortcut in part upon an assumption that unwelcome sexualized conduct in the workplace perpetrated by a man against a woman is discrimination "because of . . . sex," I believe much more was at play. The courts were relying upon not only the nature of the conduct, but upon larger understandings of the power imbalance in society that is often mirrored in the workplace. The reason why sexualized conduct in the workplace by men against women constitutes discrimination "because of . . . sex" is because it reinforces the traditional hierarchy within the workplace power structure, men on top and women on the bottom.

[200] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

[201] *Id.*

[202] *Id.* (noting that traditional inferences apply both in male-female harassment and in same-sex harassment where the harasser is homosexual).

environment sexual harassment perpetuated by other men,[203] the Court's continuing reliance upon the inferences that can be drawn from the traditional employment discrimination construct compel this conclusion.

However, the inferences available under the traditional employment discrimination construct do not apply when a woman is doing the harassing, or as in *Oncale*, to situations where men are harassing other men. In those situations, the unstated assumptions about the power structure can no longer carry the day. Once the inferences that can be drawn from those underlying assumptions vanish, *Oncale* teaches us, we must find some other method, beyond the traditional employment discrimination construct, of proving causation. As the discussion above of non-traditional cases decided post-*Oncale* illustrates, plaintiffs in those cases have a difficult mountain to climb under the three evidentiary avenues set out in *Oncale*.[204] Only by going beyond the three approaches laid out in *Oncale* and embracing a gender stereotyping harassment cause of action have courts widened the scope of Title VII in same-sex cases. While several circuits have exhibited a willingness to adopt a gender stereotyping mode of analysis in same-sex sexual harassment cases, as illustrated above, the courts of appeals have adopted a widely divergent set of views in this area. And ultimately as Judge Posner powerfully argues in his concurrence to the Seventh Circuit's opinion in *Hamm v. Weyauwega Milk Products, Inc.*, "'[s]ex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes, as in the *Hopkins* case, be evidence of sex discrimination."[205]

Therefore, the "because of . . . sex" inquiry should focus on whether the sex of the individual was a motivating factor in the discrimination or harassment. The analysis should not be different merely because a complainant alleges that he or she was subjected to stereotyping because of a failure to conform to the societal expectations of his or her gender. But given the dictates of *Oncale*, the inferences that continue to be available to individuals operating within the traditional employment discrimination construct will do much of the causal work, while non-traditional claimants will have more difficulty proving their claims.

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[203] *See id.* at 79–80.

[204] *See supra* Part III. As explained above, the one exception is the homosexual harasser context, which attempts to incorporate the traditional employment discrimination construct into the same-sex harassment area wholesale. *See supra* note 142 and accompanying text.

[205] 332 F.3d 1058, 1068 (7th Cir. 2003) (Posner, J., concurring).

V. CONCLUSION

In deciding that Title VII protects against same-sex sexual harassment, the Supreme Court in *Oncale* answered one question but exposed the many questions still left unanswered. In the rush to fill the jurisprudential vacuum, the lower federal courts have provided a bewildering variety of answers. Yet none of the opinions by the federal courts post-*Oncale* fully answer the most important question: What does it mean to discriminate "because of . . . sex"? The causal crisis in Title VII brought to the fore by the Supreme Court's opinion in *Oncale* has led both courts and commentators to search for the doctrinal shortcut—the magic bullet—which will eviscerate the need to do the hard work of theorizing and conceptualizing the wrong of both same-sex and opposite-sex sexual harassment. A few courts have latched on to the *Hopkins* plus *Oncale* equals sex stereotyping harassment. Other courts have had difficulty envisioning how a same-sex claimant, who does not allege that his harassment was the product of homosexual desire, can establish discrimination "because of . . . sex." Until Congress acts or the Supreme Court attempts to analyze the "because of . . . sex" language of Title VII more fully, the federal courts likely will continue to issue widely divergent pronouncements on what constitutes discrimination "because of . . . sex."