Same-Sex Sexual Harassment after Oncale: Meeting the Because of ...Sex Requirement

Clare Diefenbach
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Meeting the “Because of... Sex” Requirement

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In 1998, the Supreme Court established in Oncale v. Sundowner Offshore Services, Inc. that Title VII’s protection against sexual harassment in the workplace applied not only to opposite-sex cases, but also to cases in which the harasser and harassee were of the same sex.1 Beyond this determination, however, the Court offered very little guidance as to how courts were to infer same-sex sex discrimination. How much evidence would be necessary to demonstrate that the harassment was “because of... sex,” a requirement for Title VII actions?2 Would it be sufficient to show that the harassment was sexual in nature? Would discrimination based on a plaintiff’s sexual orientation constitute discrimination “because of... sex?” The Oncale opinion presented three examples of “evidentiary routes” through which a court might find sex discrimination, but the application of these “routes” was not entirely clear, nor was it clear to what extent courts could go beyond them in determining sex discrimination.

This paper will examine the way in which courts have interpreted the Oncale decision, and more specifically, the way in which courts have applied the “because of... sex” requirement from Title VII.3 It is the first work to provide a

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2. 42 U.S.C. § 2000e-2 (2000). Title VII states that “It 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 race, color, religion, sex, or national origin” (emphasis added). Id.
3. Two types of sexual harassment have been recognized as forms of sex discrimination: quid pro quo sexual harassment, and sexual harassment that creates a hostile workplace environment. See Marianne C. DelPo, The Thin Line Between Love and Hate: Same-Sex
comprehensive analysis of same-sex sexual harassment case law by looking at every relevant federal case dating from the Oncale decision in 1998 through 2006. The cases have been organized into categories based on their method of meeting the "because of . . . sex" requirement, and representative cases from each category are discussed in detail. Part I of this paper will discuss the reactions of academics and practitioners to Oncale, including their interpretations of the decision. As mentioned, the Oncale Court provided a few illustrations of the types of evidence that would warrant an inference of sexual harassment between parties of the same sex. First, the Court stated that one might infer sex discrimination if "there were credible evidence that the harasser was homosexual." Second, the Court explained that "sexual desire" on the part of the harasser was not necessary, for "[a] trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." Finally, "[a] same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." The way in which courts have applied these three "evidentiary routes" will be discussed in Part II. Although most courts have maintained that they are not limited to these examples in finding same-sex harassment, they have for the most part adhered to these categories in making their decisions.

Part III of this paper will examine cases in which plaintiffs were harassed due to their supposed sexual orientation. Courts have generally concluded that
harassment based on sexual orientation is not prohibited under Title VII; yet, at the same time, most courts have recognized that a plaintiff is entitled to relief if the harassment is based on his or her perceived failure to conform to gender stereotypes. This theory was not explicitly stated in the Oncale opinion, but derives from an earlier Supreme Court decision, Price Waterhouse v. Hopkins, in which the Court found that evidence of gender stereotyping in an opposite-sex sex discrimination case created a viable cause of action under Title VII. Part III will discuss the conceptual difficulty courts have faced in distinguishing cases in which the harassment is based on the plaintiff’s sexual orientation from those in which it is based on failure to conform to gender stereotypes.

PART I: INTERPRETATIONS OF ONCALE

After Oncale was decided, nearly every commentator—both scholar and practitioner—seemed to agree that the Supreme Court’s opinion had done very little to clarify exactly how the “because of . . . sex” requirement from Title VII could be met in same-sex sexual harassment cases. The holding of the case did not address the question, simply finding that “sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.” In its discussion, the Court gave the three examples of “evidentiary routes” that would allow an inference of sex discrimination, but provided little else. Kathryn Abrams wrote that “Oncale is in many respects an enigma,” for “Justice Scalia skirted the ‘what,’ the ‘how’ and the ‘why’ of sexual harassment” and “provided only a few hints as to how decisionmaking in these cases should occur.” Another observer similarly concluded that “[o]ther than ruling that same-sex harassment is actionable, the Supreme Court did not address how a plaintiff might prove that

10. See infra text accompanying notes 250-56.
11. See infra text accompanying notes 283-362.
12. See infra text accompanying notes 283-86.
13. See, e.g., Mary Coombs, Title VII and Homosexual Harassment After Oncale: Was it a Victory?, 6 DUKE J. GENDER L. & POL’Y 113, 114 (1999) (“Oncale, however, did not settle the question of what evidence would establish that same-sex harassment was ‘because of sex.”’); DelPo, supra note 3, at 8 (“Oncale itself offers little insight into how to apply Title VII’s ‘because of . . . sex’ requirement”); L. Camille Hebert, Sexual Harassment as Discrimination “Because of . . . Sex”: Have We Come Full Circle?, 27 OHIO N.U. L. REV. 439, 449 (2001); David S. Schwartz, When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law, 150 U. PA. L. REV. 1697, 1728 (2002); Richard F. Storrow, Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct, 47 AM. U. L. REV. 677, 695 (1998); Michael Subit, Because of Sex But Not Sexual: Does Oncale Broaden the Definition of Harassment or Narrow It?, LEGAL TIMES, March 9, 1998, at 29 (stating that the Oncale opinion “gives very little guidance”); Ronald Turner, The Unenvisaged Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims, 7 DUKE J. GENDER L. & POL’Y 57, 74 (2000) (describing the Oncale decision as “a minimalist opinion that left significant issues undecided”).
15. See id. at 80-81.
the harassment constituted discrimination because of sex.'  

Commentators thus predictably disagreed over the implications of the opinion, although there were some threads of consensus. Regarding the three evidentiary routes, one wrote that the Supreme Court "gave no indication" that it considered same-sex harassment plaintiffs to be limited by the three evidentiary routes provided, a viewpoint that was adopted by most courts. The critical issue was that the behavior constitute discrimination 'because of... sex.' Another scholar agreed that the "textualist" opinion stressed the need to prove causation, to prove that the harassment was "because of... sex," since the Court's use of this phrase was "perhaps only two or three repetitions short of obsessive." More perplexing to scholars was how the three evidentiary routes fit together, and in particular, how courts might find sex discrimination where there was no evidence that the harasser was gay or lesbian. One commentator viewed Oncale as "eliminat[ing]... the notion that sexual harassment was necessarily about sexual activity," while another concluded that under Oncale, "the [harassing] conduct itself must be of a sexual nature." According to one writer, although the Oncale decision claimed that same-sex sex discrimination may be based on motives other than sexual desire, such as gender-related animus, the language of the opinion renders it in practice very difficult for plaintiffs to prevail under alternative theories. The opinion "identifies sexual advances as the core concept in harassment law; it characterizes harassment cases as ‘typically’ involving such conduct,” and, moreover, warns against the creation of a “‘general civility code.'" The result is that in “animus” cases such as Oncale itself, courts may simply conclude that the harassment was either “too innocuous to be actionable” or was in reality motivated by hostility towards

18. Hebert, supra note 13, at 449; see also Coombs, supra note 13, at 119 (“[The Court] gave some examples of ways in which one could prove discrimination, but made clear that these are only examples.”).
19. See supra note 8 and accompanying text.
20. See Hebert, supra note 13, at 449; see also Schwartz, supra note 13, at 1730 (“the requirement of particular concern to the Oncale Court was that the harassment be ‘because of... sex.’”).
21. Schwartz, supra note 13, at 1736. In a similar vein, a Legal Times article viewed Oncale as "based on a very literal reading" of Title VII. See Subit, supra note 13.
23. DelPo, supra note 3, at 7. See also Robert Brookins, A Rose by Any Other Name... The Gender Basis of Same-sex Sexual Harassment, 46 DRAKE L. REV. 441, 494 (stating that it was unclear from the Oncale opinion whether or not harassment that was not based on sexual desire needed to be sexual in content to qualify as sex discrimination).
25. Id. at 137-38 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998)).
26. In Oncale, the plaintiff alleged that he had been "forcibly subjected to sex-related, humiliating actions" by several coworkers, including physical assault and threats of rape. See Oncale, 523 U.S. at 77.
the plaintiff as an individual, rather than hostility towards the plaintiff's sex. 27  

Another scholar agreed that it will be difficult for plaintiffs in "'hatred' hostile-environment" cases to prevail, since courts struggle with the notion that a person could be hostile towards his or her own gender. 28

The *Oncale* opinion, according to one scholar, "contain[ed] a remarkable call for contextualization." 29 The Court had stated that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" and that such an inquiry "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." 30 This language was interpreted as suggesting a potential for "group-based specificity." 31 A plaintiff's attorney, on the other hand, viewed *Oncale*'s emphasis on the importance of context as a possible hindrance, rather than an advantage to a plaintiff's case: "I can anticipate the defense now arguing, 'It's a rough place to work anyway' . . . I'm a little concerned." 32 The potential of the language regarding "context" to either benefit or burden plaintiffs was noted by another commentator, who asserted that the *Oncale* decision seemed likely to "muddle" sex discrimination jurisprudence, as it "invites trial and appellate courts to conceive any particular course of conduct as sex discrimination or not at their discretion." The result is that "*Oncale* either expands or limits Title VII's reach depending on how individual courts interpret what qualifies as sex discrimination." 33

Several scholars also drew meaning from the *Oncale* Court's decision to vacate and remand another same-sex harassment case with similar facts to *Oncale*: *Doe v. City of Belleville*. 34 In *City of Belleville*, the plaintiff brothers claimed that they had been sexually harassed by coworkers for their supposed homosexuality. 35 The coworkers directed their conduct towards one brother in particular, taunting him for wearing an earring, calling him "queer," and even threatening him with rape. 36 In denying the employer summary judgment, the court in *City of Belleville* stated that the plaintiffs could demonstrate harassment "because of . . . sex" under two different theories: first, that the harassment had "explicit sexual overtones," and second, that the plaintiffs had been harassed for failing to conform to gender stereotypes. 37

In *Oncale*, the Court characterized *City of Belleville* as "suggest[ing] that workplace harassment that is sexual in content is always actionable, regardless of

27. See Anderson, supra note 24, at 138.
28. See DelPo, supra note 3, at 21; see also Chambers, supra note 22, at 575.
30. *Oncale*, 523 U.S. at 81 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).
33. Chambers, supra note 22, at 574.
34. 119 F.3d 563 (7th Cir. 1997), vacated, 523 U.S. 75 (1998).
35. Id. at 566-67.
36. Id.
37. Id. at 576, 580.
SAME-SEX SEXUAL HARASSMENT

As a result, the prevailing interpretation by commentators was that it was the first theory of City of Belleville to which the Court objected—the notion that sexually explicit harassment was, in itself, actionable. One commentator found further support for this interpretation in the Court’s statement that “[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.” In his view, the Court in vacating City of Belleville was trying to avoid allowing Title VII to become “a general civility code for the American workplace.”

Some commentators, on the other hand, regarded the Court’s decision to vacate and remand City of Belleville as a rejection of that case’s second evidentiary theory: gender stereotyping. According to one view, “the Court [in Oncale] went out of its way to avoid endorsing a theory of harassment on account of gender nonconformity.” Indeed, the sex-stereotyping argument was advocated to the court in several amicus briefs, yet the Court never refers to it in its opinion. Moreover, there is not a single citation to Price Waterhouse in the Oncale opinion, a “disturbing” omission. One scholar surmised that the plaintiff in Oncale would have lost on remand, since he would not have been able to match up his factual situation to any of the three evidentiary routes.

Most commentators disagreed with this interpretation, however. Referring to victims of sex stereotyping, one author declared that “the [Oncale] opinion throws the door open to an entirely new—and heretofore almost entirely marginalized—group of claimants,” while another insisted that “discrimination on the basis of gender norms and gender roles unquestionably constitutes sex discrimination.”

Some commentators argued that, since the Oncale Court left

39. See Coombs, supra note 13, at 120; Hebert, supra note 13, at 454; Subit, supra note 13; Schwartz, supra note 13, at 1787-88. Schwartz noted, however, that although the Oncale court appeared to object to City of Belleville’s “sex per se” rule, the opinion did not preclude lower courts from adopting it. See Schwartz, supra note 13, at 1787-88.
40. See Schwartz, supra note 13, at 1702 (citing Oncale, 523 U.S. at 80).
41. See Schwartz, supra note 13, at 1738 (citing Oncale, 523 U.S. at 80).
42. See Storrow, supra note 13, at 715; Schwartz, supra note 13, at 1702, 1742.
43. Schwartz, supra note 13, at 1702. Schwartz, incidentally, is a member of both groups, reading Oncale as rejecting both of the theories from City of Belleville. See id.
44. See id. at 1742.
45. See id. at 1743; see also Turner, supra note 13, at 83 (stating that the sex-stereotyping theory was “not advanced” by the Oncale Court). Turner agreed, however, that this theory could be developed based on Price Waterhouse. Id. at 84.
46. See Schwartz, supra note 13, at 1734-35. For a short description of the facts in Oncale see supra note 26. The plaintiff’s briefs for the remand also show that he was not planning to argue any additional evidentiary route, such as the sex-stereotyping theory. Schwartz, supra, note 13, at 1734. We cannot know how the case might have actually played out, however, since it ultimately settled. See Catharine J. Lancot, The Plain Meaning of Oncale, 7 WM. & MARY BILL RTS. J. 913, 922 (1999).
47. See Abrams, supra note 16, at 1259.
room for additional “evidentiary routes” and did not overrule Price Waterhouse, a same-sex plaintiff alleging discrimination based on sex stereotyping would have a valid cause of action. In addition, because the facts in Oncale suggested that that plaintif suffered harassment based on gender stereotyping, and the Supreme Court emphasized the importance of “considering all the [plaintiff’s] circumstances,” one could read the Supreme Court’s opinion as supporting the use of gender stereotyping as an evidentiary theory. Even if it did not, another scholar maintained that the Oncale opinion should be read for its “face value,” rather than for what readers might speculate were the thoughts in Justice Scalia’s mind as he wrote it. It may be that the Court was reluctant to address the issue of sex stereotyping, but “nothing in the language of the opinion would preclude” a plaintiff from asserting a claim under this theory.

More generally, the Oncale decision also sparked debate over the role of summary judgment in same-sex harassment cases. Some commentators interpreted the Supreme Court’s emphasis on “common sense” standards, and the taking into account of “a constellation of surrounding circumstances, expectations, and relationships,” as an indication that the cases would need to be resolved by juries. Another, however, pointed out that in discussing the use of the reasonable person and common sense standards, the Supreme Court referred to both juries and courts. In his view, “[t]he Supreme Court’s reference to ‘courts’ can fairly be read as an admonition to district judges to use summary judgment in appropriate cases to weed out claims that ‘a reasonable person’ could not find ‘severely hostile or abusive.’”

**PART II: THE THREE ONCALE EVIDENTIARY ROUTES AS APPLIED BY COURTS**

This part examines the ways in which courts have applied the three evidentiary routes from Oncale. First, I address the route relating to whether or not the harasser is homosexual, and discuss the amount of evidence courts have required in determining that the harassment amounts to sexual solicitation. Next,

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49. See Hebert, supra note 13, at 450-51.
51. Lancot, supra note 46, at 941.
52. Id. at 930.
53. See id. at 917.
54. See Michel Lee, Last Term’s Employment Decisions Have Shaken up the Status Quo, N.Y.L.J., Sept. 28, 1998, at 1 (“the Court seems to place the harassment determination squarely in the province of the jury”); see also Dominic Bencivenga, Same-Sex Harassment: Ruling Puts Work Environment Under Scrutiny, N.Y.L.J., Mar. 12, 1998, at 5 (interviewing an attorney who predicts that the “standard of common sense is going to leave the door wide open for a judge to determine the jury should decide what is common sense”).
56. Id.
I discuss the other two *Oncale* evidentiary routes, one involving comparative evidence of the way in which members of each sex are treated, and the other involving hostility towards a specific gender. Finally, I examine the limited ways courts have gone beyond these routes to find discrimination "because of... sex."

**A. Is the harasser homosexual?**

As mentioned in the introduction, the Supreme Court in *Oncale* suggested that one way a plaintiff could demonstrate sexual harassment was by presenting evidence that the harasser was homosexual. The Court explained that:

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. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.57

This "evidentiary route" has been the most commonly used of the three in the federal cases following *Oncale*.58 In many of the cases, since the plaintiff works in a single-sex environment and has been singled out for harassment, the evidentiary routes involving comparative evidence and gender hostility do not apply.59 Thus, the plaintiff in same-sex harassment cases typically must show that the harasser's sexually-tinged remarks were not simply examples of workplace "horseplay" directed towards plaintiff without any underlying sexual desire, but were actual sexual solicitations. As this section will show, courts have differed as to the amount of evidence needed to show that the harasser is gay or lesbian in order for the plaintiff to defeat a summary judgment motion.

**Sufficient evidence of homosexuality**

Plaintiffs may overcome summary judgment if the court concludes that

57. *Oncale v. Sundowner Offshore Servs.*, Inc., 523 U.S. 75, 80 (1998). In introducing the second evidentiary route (relating to gender hostility), the Court then states: "[b]ut harassing conduct need not be motivated by *sexual desire* to support an inference of discrimination on the basis of sex." *Id.* (emphasis added) Perhaps because of this reference to sexual desire, some courts have focused on finding evidence of sexual desire in the harasser's conduct rather than on finding evidence that the harasser is homosexual. *See, e.g.*, *infra* text accompanying note 75.

58. Out of the 105 cases read for this paper, 40 utilized the first evidentiary route. Twenty-five applied the comparative evidence route, and four applied the gender hostility route. *See* Appendix. (Note that some cases applied more than one evidentiary route, while others either did not use any specific route or discussed sex-stereotyping or sexual orientation. *See infra* Part II.D; Part III.)

59. *See infra* notes 60-104 and accompanying text.
there is sufficient evidence of the harasser's homosexuality. In the easier cases, the plaintiff is able to demonstrate that the harasser has more or less directly requested sexual contact. For example, in *Cromer-Kendall v. District of Columbia*, the court found sufficient evidence of sexual advances where the alleged harasser had exposed herself to the plaintiff at the plaintiff's home, stated that she "wanted" the plaintiff, and fondled the plaintiff's breast at work while at the same time asking her to "think about it." In addition, the plaintiff had brought forth statements from another female coworker who alleged that she and other female coworkers had also been sexually harassed by the same person.

In the more difficult—and more common—cases, the court struggles to determine whether there is enough evidence that there is actual sexual desire behind the harasser's behavior, rather than merely an attempt to humiliate the plaintiff. In *Shepherd v. Slater Steels Co.*, the plaintiff claimed that his harasser had frequently exposed himself to the plaintiff, masturbated in front of the plaintiff, offered him money, and on one occasion threatened sexual assault. The court found that there was enough evidence from this set of facts to suggest that the coworker's harassment "was borne of sexual attraction."

Although none of these incidents necessarily proves that [the coworker] is gay . . . the connotations of sexual interest in [the plaintiff] certainly suggest that [the coworker] might be sexually oriented toward members of the same sex. That possibility in turn leaves ample room for the inference that [the coworker] harassed [the plaintiff] because [the plaintiff] is a man.

The court also acknowledged that one could instead interpret the coworker's acts as efforts to aggravate or embarrass the plaintiff, but "[t]his is a task for the factfinder after trial, not for the court on summary judgment."

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61. *Id.* at 56 n.5. For cases with similar fact patterns and conclusions, *see also* *Bailey v. Runyon*, 167 F.3d 466, 467, 469 (8th Cir. 1999) (holding that there was sufficient evidence for the jury to find sexual harassment where the coworker had allegedly asked plaintiff several times to have a sexual relationship with him, grabbed plaintiff in the crotch, and requested oral sex); *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1238, 1247 (11th Cir. 1998) ("because of . . . sex' test met in this quid pro quo sexual harassment case where harasser and plaintiff had been in a long-term lesbian relationship and the harasser had not sexually harassed anyone else at their workplace).
62. It should be noted that, although the courts in these cases are often trying to distinguish sexual advances from mere "horseplay" or attempts to humiliate, the latter categories of behavior could still be conduct that occurs "because of" the plaintiff's sex. Here, the courts are simply using this terminology to distinguish between harassment that does or does not fit under the first evidentiary route, relating to the harasser's sexual orientation. As is discussed in the next section, however, horseplay would be unlikely to be considered sex discrimination, since it would probably not meet the requirement that the harassment be "severe and pervasive." *See infra* text accompanying notes 196-202; 245-49.
63. 168 F.3d 998, 1001 (7th Cir. 1999).
64. *Id.* at 1009.
65. *Id.* at 1010.
66. *Id.* at 1010. The court goes on to say that "when the context of the harassment leaves room
Similarly, in *La Day v. Catalyst Technology, Inc.*, the court found that there was sufficient evidence to overcome summary judgment where the coworker had fondled the plaintiff and stated that he was jealous of the plaintiff’s girlfriend. According to the court, there were two types of evidence that offered “‘credible’ proof” of a harasser’s homosexuality: evidence that the harasser “intended to have some kind of sexual contact with the plaintiff rather than merely to humiliate him,” and evidence that the harasser also made sexual advances to other members of the same sex. Here, in addition to the evidence of sexualized conduct directed at the plaintiff, there was evidence that other men who worked for the defendant claimed to have been subjected to the same coworker’s “sexual overtures.” Like the court in *Shepherd*, the *La Day* court acknowledged that it was possible that the coworker was merely trying to embarrass the plaintiff. The court pointed out, however, that on a motion for summary judgment, it views the evidence in the light most favorable to the plaintiff, and under this standard, there was sufficient evidence to conclude that the harasser was gay and was making sexual advances towards the plaintiff.

In a fourth case, *Dick v. Phone Directories Co.*, the female plaintiff described the alleged sexual harassment as “a working environment permeated by sexually explicit banter, insults, lewd jokes, gestures, games, and devices.” Most of the activity cited by the plaintiff was not directed at her in particular, but rather involved her mostly-female coworkers engaging in behavior such as making sexual gestures at each other, simulating sexual acts with a pillow, playing “vulgar rap music,” and using sexually explicit language. A few instances involved the plaintiff more directly: she claimed that one coworker tried to pinch her breasts and had once showed her a sex toy while they were out shopping during lunch.

In determining whether or not the harassment constituted discrimination “because of... sex,” the court asserted that “Oncale’s first evidentiary route... hinges on whether the harasser’s conduct is motivated by sexual desire.” In the court’s view, although the described conduct could be viewed as an attempt to humiliate the plaintiff, particularly since she had stated herself that she was not

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67. 302 F.3d 474, 480 (5th Cir. 2002).
68. Id. at 480.
69. Id. at 480-81.
70. Id.
71. Id.
72. 397 F.3d 1256, 1260 (10th Cir. 2005) (citing Dick v. Phone Directories Co., 265 F. Supp. 2d 1274, 1275 (D. Utah 2003)).
73. Id. at 1261.
74. Id. The plaintiff also claimed that her coworkers called her by the nicknames “Ivanna Dick” and “Granny Dick.” Id.
75. Id. at 1264.
well-liked by her coworkers, the evidence that the plaintiff's coworkers engaged in sexual conduct with each other while at work was enough to allow a jury to infer that the conduct directed towards the plaintiff was motivated by sexual desire.\footnote{Id. at 1266. Other cases finding that there was sufficient evidence that the harasser was homosexual to survive summary judgment include Martin v. Schwan's Sales Enters., Inc., No. 98-6534, 1999 U.S. App. LEXIS 31975, at *2, *7 (6th Cir. Nov. 24, 1999) (supervisor repeatedly touched plaintiffs’ "private areas," requested oral sex, and made other "offensive comments"); Vaughn v. St. Tammany Parish Sch. Bd., No. 04-1633, 2006 U.S. Dist. LEXIS 45278, at *7-8 (E.D. La. July 5, 2006) (coworkers allegedly complimented plaintiff's appearance, attempted to kiss plaintiff, and offered to perform sexual acts for plaintiff); Thomas v. Willie G's Post Oak, Inc., No. H-04-4479, 2006 U.S. Dist. LEXIS 29906, at *20-21 (S.D. Tex. Apr. 25, 2006) (evidence that coworker repeatedly tried to touch plaintiff's buttocks and invited plaintiff to leave a bar with him was sufficient to show an "implicit proposal of sexual activity"); Peraita v. Don Hattan Chevrolet, Inc., No. 04-1197-WEB, 2005 U.S. Dist. LEXIS 38565, at *51-52 (D. Kan. Dec. 20, 2005) (coworker's conduct led plaintiff to believe his invitations for sexual activity were earnest, and the conduct was directed only towards the plaintiff); Warmkessel v. E. Penn Mfg. Co., No. 03-CV-02941, 2005 U.S. Dist. LEXIS 15048, at *9-10, *16 (E.D. Pa. July 28, 2005) (supervisor repeatedly touched plaintiff's buttocks and groin, looked under the stall while plaintiff used the bathroom, and crept up behind plaintiff, thrusting his hips against plaintiff's backside to simulate a sexual act); Tainsky v. Clarins USA, Inc., 363 F. Supp. 2d 578, 582-83 (S.D.N.Y. 2005) (supervisor tried to kiss plaintiff on the mouth, touched her shoulder, breasts, and inner thigh, and invited plaintiff over to her house, stating "we will be alone"); Jones v. Potter, 301 F. Supp. 2d 1, 4-5, 8 (D.D.C. 2004) (coworker asked to see a picture of plaintiff, invited plaintiff to stay at his house if he were ever snowed in, grabbed plaintiff from behind and simulated a sexual act, and admitted that he had had "prior intimate sexual contact" with men); Mann v. Lima, 290 F. Supp. 2d 190, 191-92, 195 (D.R.I. 2003) (plaintiff "narrowly escapes" summary judgment where female coworker complimented her clothing and jewelry, ran her fingers through plaintiff's hair, attempted to hug plaintiff, and stated to her mother that she was a lesbian); Cox v. Denny's Inc., No. 98-1085-CIV-J-16B, 1999 U.S. Dist. LEXIS 23333, at *1-2, *6-7 (M.D. Fla. Dec. 22, 1999) (coworker allegedly groped plaintiff's groin and, when plaintiff stated he was not interested in a sexual relationship, the coworker insulted plaintiff with sexually-explicit language) Merritt v. Del. River Port Auth., No. CIV.A.98-3313, 1999 U.S. Dist. LEXIS 5896, at *10, *20-21 (E.D. Pa. Apr. 20, 1999) (coworker repeatedly exposed himself to plaintiff, touched plaintiff's genitals, masturbated in front of plaintiff while calling out plaintiff's name, made lewd comments, and on one occasion rammed plaintiff's anus with a broom handle); Janowicz v. Martin, No. CIV.97-336-M, 1999 U.S. Dist. LEXIS 21192, at *4-5, *14 (D.N.H. Feb. 5, 1999) (coworker asked plaintiff to dinner several times, grabbed plaintiff's genitals, and massaged plaintiff's neck while suggesting that plaintiff could "go a long way in the Department" with the coworker's help). See also Holmes v. Freight Lines, Inc., 72 F. Supp. 2d 1074 (W.D. Mo. 1999), discussed infra note 232 and Garcia v. Lewis, No. 05Civ.1153, 2005 U.S. Dist. LEXIS 11955, at *3-4, *22 (S.D.N.Y. June 16, 2005) (employer's motion to dismiss denied where plaintiff alleged that her coworker frequently touched her, called her names of endearment, stated she wanted to "get her hands on" plaintiff, and invited plaintiff to spend the night at her home).}

Mere workplace "horseplay" or expressions of animosity

In other cases, however, courts have found that there is insufficient evidence that sexually-charged conduct is indicative of the harasser's homosexuality, and that the conduct instead suggests mere "horseplay" or animosity towards the plaintiff. In \textit{Davis v. Coastal International Security, Inc.},
the plaintiff alleged that after he had disciplined two of his male coworkers, they began a "retaliatory campaign" against him that included slashing his tires and accosting him with lewd gestures and comments.\textsuperscript{77} Specifically, the plaintiff claimed that the coworkers would repeatedly grab themselves in the crotch and make kissing noises and references to oral sex.\textsuperscript{78} The court found that this was not sufficient evidence of sexual harassment to overcome summary judgment.\textsuperscript{79} The plaintiff argued that his coworkers' conduct constituted sexual propositions, but in the court's view, "[n]o reasonable jury could believe this," since by the plaintiff's own testimony, the coworkers held a grudge against him, and his only basis for suspecting that the coworkers were gay was the harassment he had experienced.\textsuperscript{80} The court went on to explain that \textit{Oncale} mandated that they consider the "surrounding circumstances," and not simply the comments themselves, in determining whether "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination because of sex.'"\textsuperscript{81} Obscene gestures and comments, the court explained, are "commonplace in certain circles," and more often than not, are nothing more than "expressions of animosity and juvenile provocation."\textsuperscript{82} There was no evidence that the harassment in this case was any different.\textsuperscript{83}

\textit{Davis} involved a scenario in which coworkers had demonstrated reasons for having a personal animosity towards the plaintiff, but courts have also refused to find sexual harassment where the reason for the mistreatment is unclear and the persecution is more severe. In \textit{Kraemer v. Henry's Marine}, the plaintiff alleged that a shipmate repeatedly grabbed the plaintiff's crotch and made sexually suggestive comments.\textsuperscript{84} On one occasion, the plaintiff awoke in his bed on the ship where they both worked to find his harasser standing nearby and staring at him.\textsuperscript{85} According to the allegations, the coworker also tormented the plaintiff in non-sexual ways, such as hindering the plaintiff in his duties at work, and in one instance burning the plaintiff's wrist with a lighter.\textsuperscript{86} As in \textit{Davis}, the court found that there was not enough evidence that the harasser was homosexual for the plaintiff to overcome the summary judgment motion. Instead, the court believed the record "reveal[ed] an intent of [the harasser] to

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\textsuperscript{77} 275 F.3d 1119, 1121 (D.C. Cir. 2002).
\textsuperscript{78} \textit{Id}.
\textsuperscript{79} \textit{Id.} at 1126.
\textsuperscript{80} \textit{Id.} at 1123.
\textsuperscript{81} \textit{Id.} (citing \textit{Oncale} v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998)). In emphasizing the importance of "surrounding circumstances," the court in \textit{Oncale} is actually referring to the requirement that the harassment be "severe and pervasive," not that it be "because of . . . sex." \textit{See infra} text accompanying notes 196-202.
\textsuperscript{82} \textit{Id.} at 1124.
\textsuperscript{83} \textit{Id}.
\textsuperscript{84} \textit{See} No.CIV.A.03-3139, 2004 U.S. Dist. LEXIS 20677, at *4-10 (E.D. La. Oct. 7, 2004).
\textsuperscript{85} \textit{Id.} at *9.
\textsuperscript{86} \textit{Id.} at *6-8.
\end{flushleft}
humiliate plaintiff for reasons unrelated to a sexual interest.\textsuperscript{87} The court cited testimony from other workers at the plaintiff's place of employment stating that the coworker was known to be "a loud-mouth type, prone to profanity and horseplay,"\textsuperscript{88} and pointed out that the plaintiff failed to present any evidence of his harasser's sexual orientation aside from the latter's treatment of the plaintiff.\textsuperscript{89} The plaintiff argued that the instance in which the coworker entered his bedroom demonstrated an intent to have sexual contact, but in the court's view, this one example was not enough to overcome his employer's motion for summary judgment, particularly where the coworker had not said anything to the plaintiff or attempted to touch him.\textsuperscript{90}

In another case,\textit{English v. Pohanka of Chantilly, Inc.}, the plaintiff alleged that he had been subject to frequent sexually suggestive comments from a coworker, as well as at least one instance in which the coworker pressed his crotch against the plaintiff's shoulder.\textsuperscript{91} In evaluating whether this evidence permitted an inference that the coworker was motivated by sexual desire, the court emphasized the importance of context, as stated in \textit{Oncale}.\textsuperscript{92} Since the coworker was known for his irritating and vulgar comments, and the other male workers in the plaintiff's office tended to encourage horseplay, the court found it was unreasonable to view the conduct towards the plaintiff as sexual harassment.\textsuperscript{93} Citing \textit{Davis}, the court explained that even seemingly explicit language is often merely indicative of "animosity or juvenile provocation."\textsuperscript{94} Moreover, the court reasoned, the comments were made in front of other coworkers, were not followed by serious proposals for sex, and the plaintiff failed to offer any other evidence that his harasser might be homosexual.\textsuperscript{95}

The court in \textit{Pedroza v. Cintas Corp.} utilized a similar line of reasoning, although here the alleged harassment occurred between two females.\textsuperscript{96} In this case, the plaintiff claimed that her coworker repeatedly attempted to kiss her and made sexual gestures and comments.\textsuperscript{97} The plaintiff contended that the court should infer from this evidence that her coworker sexually desired her, but the court again found that the evidence pointed instead to the conclusion that the coworker was merely using "vulgar and boorish" language in order to

\textsuperscript{87} \textit{Id.} at *19.
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id.} at *22-23.
\textsuperscript{90} \textit{Id.} at *22.
\textsuperscript{91} 190 F. Supp. 2d 833, 837 (E.D. Va. 2002). According to the plaintiff, the coworker's lewd comments included inviting plaintiff to go on a walk so they could "'smoke the peace pipes . . . you know, the bones.'" \textit{Id.} at 838.
\textsuperscript{92} \textit{Id.} at 844.
\textsuperscript{93} \textit{Id.} at 844-845.
\textsuperscript{94} \textit{Id.} at 845 (citing \textit{Davis v. International Costal Security, Inc.}, 275 F.3d 1119, 1124 (D.C. Cir. 2002)).
\textsuperscript{95} \textit{Id.} at 845-46.
\textsuperscript{96} 397 F.3d 1063, 1066 (8th Cir. 2005).
\textsuperscript{97} \textit{Id.} at 1066.
“antagonize” the plaintiff. The plaintiff argued that the court should not analogize her case to those cases involving harassment between males, “because such bawdy, ‘locker room’ behavior is not as commonplace among females, [and] a reasonable jury could more readily infer actual sexual desire . . .” The court disagreed, however, stating that it did not “find it appropriate” to establish dual standards under Title VII, and even if such standards should be established, the plaintiff had offered “nothing but her own unsupported opinions” as to the way in which females behave in the workplace.

In addition, there are a few cases—mainly involving female plaintiffs—in which the courts decided that the alleged harasser was merely acting friendly towards the plaintiff—thus, there was no animosity or “horseplay,” but also no sexual desire. In Noto v. Regions Bank, for instance, the plaintiff alleged that she had been hugged, kissed, and told “I love you” several times by her female supervisor. The plaintiff also stated that her supervisor told her that she had

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98. Id. at 1069.
99. Id. at 1070.
100. Id. Other cases finding that there was insufficient evidence of the harasser’s homosexuality to survive summary judgment include James v. Platte River Steel Co., 113 F. App’x. 864, 865, 867 (10th Cir. 2004) (coworker jumped on plaintiff’s back, grabbed plaintiff’s crotch, and made “‘obscene and vulgar statements with sexual connotations’” to plaintiff); King v. Super Serv., Inc., 68 F. App’x. 659, 663 (6th Cir. 2003) (depublished) (coworkers made explicit comments to plaintiff, suggesting plaintiff was homosexual; court stated there was no evidence these coworkers ever engaged in homosexual conduct); McCown v. St. John’s Health Sys., Inc., 349 F.3d 540, 541-42, 543 (8th Cir. 2003) (coworker repeatedly grabbed plaintiff by chest, waist, or buttocks, simulated sexual intercourse with plaintiff, attempted to penetrate plaintiff’s anus with various objects, but plaintiff admitted that he believed the coworker was trying to irritate him); Cole v. Kone Elevators, Inc., No. CV-05-1969-PHX-FJM, 2006 U.S. Dist. LEXIS 83053, at *2-4 (D. Ariz. Nov. 14, 2006) (coworker taunted plaintiff with comments insinuating plaintiff was homosexual; plaintiff alleges these jokes were “‘homosexual flirtations’”); Beseau v. Fire Dist. No. 1, No. 05-2162, 2006 U.S. Dist. LEXIS 69447, at *2-8, *10-12 (D. Kan. Sept. 26, 2006) (coworker allegedly made repeated sexually suggestive comments to plaintiff and often touched plaintiff’s back and shoulder); Miller v. Kellogg USA, Inc., No. 8:04CV500, 2006 U.S. Dist. LEXIS 31012, at *4, 6, 16 (D. Neb. May 11, 2006) (coworker simulated sexual intercourse with plaintiff and displayed explicit graffiti involving the plaintiff, but plaintiff and witnesses referred to the conduct as “horseplay”); Lavack v. Owen’s World Wide Enter. Network, Inc., 409 F. Supp. 2d 848, 851-52, 854-55 (E.D. Mich. 2005) (coworker slapped plaintiff’s genitals and made sexually suggestive comments; court persuaded by coworker’s marital status and lack of history of homosexuality); Collins v. TRL, Inc., 263 F. Supp. 2d 913, 916, 920 (M.D. Pa. 2003) (coworker asked plaintiff if he were homosexual, repeatedly grabbed for plaintiff’s genitals, and commented that plaintiff should “‘put them lips where they belong,’” but other coworkers stated that such behavior was typical at their workplace, and plaintiff admitted he did not know if harasser was homosexual); Weston v. Pa. Dep’t of Corr., No. CIV.A.98-3899, 2001 U.S. Dist. LEXIS 19185, at *6, *35-36 (E.D. Pa. Nov. 20, 2001) (female coworker touched male plaintiff’s backside and buttocks in front of other coworkers, causing coworkers thereafter to subject plaintiff to sexual comments and jokes); Jones v. Pac. Rail Servs., No. 00C5776, 2001 U.S. Dist. LEXIS 16663, at *2-3, *5 (N.D. Ill. Oct. 10, 2001) (coworker commented that plaintiff “‘liked dick’” and made jokes about plaintiff’s sexual orientation); Pavao v. Ocean Ships, Inc., No. C-97-4059-VRW, 1998 U.S. Dist. LEXIS 20431, at *3-4, *6-7 (N.D. Cal. Dec. 30, 1998) (coworker made comments suggesting oral sex to plaintiff, referred to plaintiff and other coworkers as “‘girls,’” and occasionally touched plaintiff’s shoulders, arms, and neck).
101. 84 F. App’x. 399, 400 (5th Cir. 2003) (depublished).
gay friends. The court maintained, however, that this behavior “must be placed into context”: the supervisor had apparently hugged, kissed, and said “I love you” to other employees at the office, both male and female, and there was nothing to suggest that the conduct was motivated by sexual desire. The court also found no evidence that the plaintiff herself believed that her supervisor was sexually propositioning her, nor was there any other support for the notion that the supervisor was a lesbian.

**When is evidence sufficient to establish a harasser’s homosexuality?**

As these few sample cases illustrate, it is difficult to derive principles from the case law dictating when a plaintiff will or will not be able to provide enough evidence under the first evidentiary route—whether or not the harasser is homosexual—to survive summary judgment. First, courts have differed in their formulations of this route. The court in *Shepherd*, for example, focused on whether or not there was sufficient evidence that the harasser was attracted to members of his own sex, while the court in *Dick* centered its analysis on whether or not the harasser’s conduct was motivated by sexual desire.

Courts have also differed in the types of evidence that they will find to be sufficient to show that the harassment was based on sex. The result in *Dick* suggests that where the plaintiff can offer outside evidence that the harasser is

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102. Id.
103. Id. at 402.
104. Id. For cases with similar fact patterns and conclusions, see Soliman v. Deutsche Bank AG, No. 03 Civ. 104 (CBM), 2004 U.S. Dist. LEXIS 9087, at *32-33 (S.D.N.Y. May 19, 2004) (insufficient evidence to establish that supervisor was making sexual innuendoes though he frequently invited plaintiff to social events, including at gay bars, sat close to him, and suggested plaintiff might get a promotion if they became better friends); Reissner v. Rochester Gas & Elec. Co., No. 02-CV-6535-CJS, 2004 U.S. Dist. LEXIS 8019, at *4-6, *27-28 (W.D.N.Y. April 22, 2004) (no evidence of alleged harasser’s homosexuality where she allegedly touched plaintiff’s leg, stared at her breasts, stood close to her, called plaintiff “hon,” and questioned plaintiff about her sex life); Smith v. County of Humboldt, 240 F. Supp. 2d 1109, 1113, 1117 (N.D. Cal. 2003) (insufficient evidence of alleged harasser’s sexual desire where the latter had pushed the plaintiff’s head, hit her on the cheeks, hit her shoulder to get her attention, attempted to sit with her at lunch, and taken a seat vacated by the plaintiff); Moran v. Fashion Inst. of Tech., No. CIV.1275, 2002 U.S. Dist. LEXIS 19387, at *3-5, *17 (S.D.N.Y. Oct. 27, 2002) (insufficient evidence of desire where coworker allegedly complimented plaintiff’s appearance, touched his shoulder while speaking to him, stared at plaintiff, shared private thoughts, stated he could arrange a better position for plaintiff, and other coworkers teased plaintiff that the alleged harasser had “the hots” for plaintiff); Budenz v. Sprint Spectrum, L.P., 230 F. Supp. 2d 1261, 1274 (D. Kan. 2002) (insufficient evidence of sexual desire in this quid pro quo case where co-worker repeatedly massaged plaintiff’s shoulders and mentioned having friends with “alternative lifestyles”); West v. Mt. Sinai Med. Ctr., No. CIV.A.6191, 2002 U.S. Dist. LEXIS 6123, at *4-5 (S.D.N.Y. Apr. 8, 2002) (insufficient evidence of sexual desire where supervisor offered to buy the plaintiff yogurt and take her to the theater, allowed the plaintiff to eat at her desk when other employees were not allowed to do so, sometimes sat close by the plaintiff, and seemed to dislike it when the plaintiff spoke to a particular male coworker).
105. See supra text accompanying notes 64-65.
106. Dick v. Phone Directories, Co., 397 F.3d 1256, 1264 (10th Cir. 2005).
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gay or lesbian, the plaintiff may prevail even on scant evidence of sex discrimination directed towards him or her. For the cases in which no such outside evidence exists, however, and the court focuses instead on the nature of the harassment, the cases are often inconsistent, even within circuits. *Kraemer*, for instance, was a district court case from the Fifth Circuit, and thus bound to follow the precedent of *La Day* a Fifth Circuit Court of Appeals case. The *La Day* court stated that one form of ""credible’ proof that the harasser may be a homosexual . . . is evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff rather than merely to humiliate him . . .""108 Yet, in *La Day*, a single incident of the coworker touching the plaintiff’s backside was enough to support an inference of homosexuality, even though the court acknowledged that the jury might also interpret this behavior as an attempt to embarrass the plaintiff.109 In *Kraemer*, however, the incidents of crotch-grabbing, sexually suggestive comments, and of the coworker entering the plaintiff’s bedroom in the middle of the night were not enough.110 The *Kraemer* court reasoned that its facts could be distinguished from *La Day*’s, because taken as a whole, the defendant’s attempt to burn the plaintiff with a lighter and the evidence of the coworker interfering with the plaintiff’s work demonstrate an intent to bully the plaintiff, not to have sexual contact with him.111 It seems, however, that one could just as easily surmise that, since the non-sexual bullying behavior began only after the coworker had grabbed the plaintiff’s genitalia several times while they were alone,112 the coworker was angry his advances had been refused. This is, indeed, how the *La Day* court explained an incident of non-sexual harassment by the offending coworker.113

Similarly, it seems that the coworker’s attempts in *English* to get the plaintiff alone, coupled with his sexual remarks, could easily be viewed under *Oncale* as sufficient evidence of homosexuality to survive summary judgment. The court explained that sexually explicit remarks are often simply juvenile provocation,114 but if this is a question of material fact, it should be the jury and not the court who decides.115 In some ways, this conflict of views about what

107. See supra text accompanying notes 72-76.
108. *La Day* v. Catalyst Tech., 302 F.3d 474, 480 (5th Cir. 2002).
109. See supra text accompanying note 71.
110. See supra text accompanying notes 84-90.
112. Id. at *5-6.
113. See *La Day*, 302 F.3d at 480. Another difference between these two cases was that in *La Day*, there was evidence that other employees had received the same treatment from the alleged harasser. Id. at 477. The *La Day* court did not find this dispositive, however, and plaintiffs have lost on similar facts in other cases. See, e.g., *Collins* v. TRL, 263 F. Supp. 2d 913, 916, 920 (M.D. Pa. 2003) (plaintiff was not allowed past summary judgment, despite evidence that the alleged harasser had directed his behavior towards other male coworkers in addition to plaintiff).
115. Both the *Shepard* court and the *La Day* court argued for a similar proposition. See text
constitutes a jury question recalls the debate amongst commentators, discussed in Part I, over whether the Oncale opinion meant to place these decisions in the hands of courts or juries. Yet, even proponents of a stronger role for courts acknowledge that summary judgment should be granted for the defendant only where no reasonable juror could find for the plaintiff.

B. Is one sex treated more favorably than the other sex?

This section will describe cases that have turned on the evidentiary route from Oncale by which the plaintiff offers “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.” As this section will show, courts have differed in their interpretation of this phrase. Some have required evidence of differential treatment towards multiple members of each sex before the plaintiff could get past summary judgment, while others have required only that the plaintiff show that he or she was treated differently. Courts have found for the defendant if there was evidence that both sexes have been harassed—the so-called “equal opportunity harasser defense”—but many courts have allowed the plaintiff to proceed to trial if he or she could show that the sexes were harassed differently.

In Davis v. Coastal International Security, Inc. in addition to arguing that his coworkers sexually propositioned him, as examined in Part II.A., the plaintiff also argued his claim under the comparative evidence route. He claimed that because his harassers directed their conduct towards him but not towards any females at their workplace, they had discriminated based on sex. The court disagreed, however, asserting that this route from Oncale involved “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace,” not simply one member. The plaintiff in Davis had shown only that he was treated differently than women were treated, not that men as a group were treated differently than women. The court added

accompanying notes 66, 71.

116. See supra text accompanying notes 53-56.
117. See Sellier, supra note 55, at I.
119. See infra text accompanying notes 147-48.
120. See infra text accompanying notes 155-68.
121. 275 F.3d 1119, 1124 (D.C. Cir. 2002).
122. Id.
123. Id. (citing Oncale, 523 U.S. at 80-81) (emphasis added by the D.C. Circuit).
124. Id. at 1124. The court in Budenz v. Sprint Spectrum, L.P., reached a similar conclusion. 230 F. Supp. 2d 1261, 1274 (D. Kan. 2002). As in Davis, the plaintiff in Budenz argued that while he was harassed, women at his workplace were left alone. Id. Since his male coworkers were also not harassed, however, the court concluded that the plaintiff showed only that he was singled out for harassment, undermining the claim that the harassment was based on sex. Id. See also Baughman v. Battered Women, Inc., No. 05-6051, 2006 U.S. App. LEXIS 31722, at *9-15, *20-21 (6th Cir. Dec. 20, 2006) (female harasser allegedly engaged in sexual conduct at work and frequently made explicit comments and gestures; court finds no
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that in demonstrating the way in which he had been singled out for harassment, the plaintiff had further weakened his claim, for it substantiated the idea that he was targeted for his own behavior rather than for his sex.\textsuperscript{125} Similarly, in \textit{Sisco v. Fabrication Technologies, Inc.}, the court stated that the plaintiff’s admission that he was treated worse by the alleged harasser than other males at his workplace defeated his claim that men as a group were treated differently than women.\textsuperscript{126}

Plaintiffs alleging same-sex harassment under the comparative evidence theory have also failed where they could not show that members of the opposite sex were sufficiently similarly situated for the purposes of comparison. For example, in \textit{Collins v. TRL, Inc.}, the court denied the plaintiff’s claim where he could show only that women worked for his company, but not that they worked in his same position, during his shift, or even in his particular shop.\textsuperscript{127} Similarly, in \textit{McCown v. St. John’s Health System, Inc.}, the plaintiff provided evidence that there were women at his workplace, but the record indicated that his alleged harasser supervised only men, and there was no evidence depicting the harasser’s interactions with female coworkers.\textsuperscript{128}

Plaintiffs have been able to prevail, however, where they can show that they work in a mixed-sex workplace, and that only workers of their sex are subject to the harassment. In \textit{Chavez v. Thomas & Betts Co.}, the plaintiff alleged that one of her female superiors at work had frequently commented about the plaintiff’s body and sex life in front of male coworkers in order to embarrass her.\textsuperscript{129} The coworker, according to the plaintiff, had also on two occasions pulled open the plaintiff’s clothes to expose her undergarments.\textsuperscript{130} Two of the plaintiff’s other female coworkers testified that the superior “regularly directed sexually charged, humiliating, and hostile comments towards women in the workplace,” including referring to women as “bitches.”\textsuperscript{131} The coworkers stated that the alleged harasser was much friendlier to her male coworkers.\textsuperscript{132} The court reasoned that, since the alleged harasser did not direct her conduct towards her male coworkers, a reasonable jury could find she harassed the plaintiff because of her sex.\textsuperscript{133}

\hspace{1cm}\textsuperscript{125} Davis, 275 F.3d at 1124.
\textsuperscript{126} 350 F. Supp. 2d 932, 939 (D. Wyo. 2004).
\textsuperscript{128} McCown v. St. John’s Health Sys., Inc., 349 F.3d 540, 543-44 (8th Cir. 2003). For a short description of the facts of this case, see \textit{supra} note 100.
\textsuperscript{129} 396 F.3d 1088, 1094 (10th Cir. 2005).
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 1097.
Similarly, in *Winters v. Florida Department of Corrections*, the court found that the plaintiff had provided sufficient evidence of sex discrimination where the coworker's "inappropriate touching" was reserved for other males. In addition to fondling the plaintiff, there was evidence that the coworker had fondled other male coworkers, two of whom filed formal complaints. The plaintiff admitted that he was unsure if his coworker had homosexual tendencies, or was simply trying to pressure plaintiff into leaving his job, thereby calling into question the idea that his coworker was motivated by sexual desire. Since the coworker's sexual touching was directed only at men, however, the court found that there was enough evidence for a reasonable jury to conclude that the plaintiff would not have been fondled if he were not male.

In some cases, plaintiffs have gotten past summary judgment even if the evidence showed that the harassment was not directed generally at members of their sex, but rather was directed singularly at them. For instance, in *Bray v. City of Chicago*, the plaintiff police officer alleged that she had been sexually harassed by one of her female superiors. According to the plaintiff, her superior repeatedly suggested that the plaintiff prostitute herself, encouraged the plaintiff to become a dominatrix, and made several other lewd comments. In refusing to grant summary judgment to the employer, the court explained that "[i]t does not appear from the record that [the coworker] tried to get male officers to solicit sex for money." Since the plaintiff was treated differently by her superior officer than were employees of the opposite sex, the court found that her claim could withstand summary judgment under the comparative evidence theory.

In addition, in *Leake v. Ryan's Family Steakhouse*, the plaintiff alleged that his manager had sexually harassed him by, among other things, touching plaintiff's buttocks and genitals, making sexual remarks, and, on one occasion, pushing the plaintiff into a bathroom, groping him, and saying: "[c]ome on, let's do this here." The record indicated that the manager abused both male and female employees, but that his conduct towards the plaintiff was "more severe

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134. 203 F. Supp. 2d 1305, 1308, 1310 (M.D. Fla. 2001). The plaintiff, who worked in a kitchen at a correctional facility, alleged that his coworker would often rub his hand across plaintiff's buttocks, and on one occasion touched plaintiff's genitals. *Id.* at 1308-09.

135. *Id.* at 1309.

136. *Id.*

137. *See id.* at 1310.

138. *Id.* The court did not specifically refer to any of the evidentiary routes from *Oncale* in reaching its decision, but the language of the opinion implies that it was based on a comparison of the way in which men and women were treated by the alleged harasser. *See id.*


140. *Id.* at *7-8

141. *Id.* at *13-14.

142. *Id.* at *14.

143. 5 F. App'x 228, 230 (4th Cir. 2001) (depubished).
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and more overtly sexual."\textsuperscript{144} The court stated that in order for the plaintiff to prevail, it was not necessary for him to show that other males were similarly mistreated.\textsuperscript{145} Rather, the evidence that the manager's behavior towards the plaintiff involved "sexual suggestions and contact with [plaintiff]'s genitals"\textsuperscript{7} was enough for a reasonable juror to determine that the manager's conduct was based on the plaintiff's sex.\textsuperscript{146}

The \textit{Leake} and \textit{Bray} cases thus differ from \textit{Davis} and \textit{Sisco} in that evidence that the plaintiff was singled out for harassment did not defeat his or her claim under the comparative evidence route.\textsuperscript{147} In \textit{Davis} and \textit{Sisco}, on the other hand, the court emphasized that the plaintiff would have to show that multiple members of his sex were treated differently from women, not simply that he was treated differently.\textsuperscript{148} This theory is an overly narrow reading of \textit{Oncale}. First, contrary to the \textit{Davis} court's assertion, the phrase "members of both sexes" from the \textit{Oncale} opinion does not necessarily mean that there must be evidence about more than one person of each sex. Justice Scalia's pluralization of the word "member" could also suggest that the plaintiff must be able to compare himself or herself with at least one member of the opposite sex. Moreover, the latter interpretation is more in line with the \textit{Oncale} opinion's overall message. \textit{Oncale} held that Title VII applies equally to same-sex harassment cases and opposite-sex harassment cases,\textsuperscript{149} and in an opposite-sex harassment case, it is no defense that the harasser singled out only one woman for his conduct.\textsuperscript{150} A court may find that a harasser discriminated based on the victim's sex, even if he does not harass other members of the victim's gender, particularly where the harassment is sexual in nature.\textsuperscript{151} If the evidence suggests instead that the harasser was motivated by something other than sex, such as a personal grudge against the plaintiff—as in the \textit{Davis} case—this might defeat the plaintiff's claim. However, \textit{Oncale} should not be interpreted to mean that there must always be evidence of treatment towards multiple members of each sex in order for a plaintiff to proceed under the comparative evidence theory.

The cases in this section also suggest the way in which the comparative evidence route is closely linked to the two other evidentiary routes (showing evidence of homosexuality or of hostility toward one's gender). Presumably, one

\begin{itemize}
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{Id.} at 231.
  \item \textsuperscript{146} \textit{Id.}
  \item \textsuperscript{147} \textit{See supra} text accompanying notes, 139-46.
  \item \textsuperscript{148} \textit{See supra} text accompanying notes 123-26.
  \item \textsuperscript{149} \textit{See supra} text accompanying note 1.
  \item \textsuperscript{150} \textit{See, e.g.,} Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 747-48, 754 (1998) (the "because . . . of sex" test was met where a supervisor harassed a female employee, even though there was apparently no evidence that he had also harassed other female employees).
  \item \textsuperscript{151} \textit{See DelPo, supra} note 3, at 17-18. ("While harassment motivated by individualized hatred may not seem clearly sexual, claims have been held actionable where a male mistreats a female out of such individualized hatred and where the content of the harassment is related to the victim's gender or is of a sexual nature.").
\end{itemize}
has a motive in harassing members of one sex but not the other sex. In *Winters*, for example, the plaintiff had acknowledged that he was unsure if his harasser was gay, but the evidence used to meet the comparative treatment test—that the coworker fondled male, but not female, employees—also suggested sexual desire. In *Leake*, the link was even more apparent: the plaintiff had brought his claim under the comparative evidence route, but the court seemed to rely on the sexual nature of the manager’s conduct in its reasoning. In *Bray* and *Chavez*, the evidence of differential treatment may have indicated the female harassers’ hostility towards other women in the workplace.

**Equal opportunity harassers**

As is implicit in many of these cases, courts have recognized that employers may raise as a defense to claims of same-sex sexual harassment evidence that the perpetrator was an “equal opportunity harasser,” meaning that he or she subjected both sexes to the harassment. This defense was articulated in *Holman v. Indiana.* *Holman* involved a couple, husband and wife, who alleged that they had each been sexually harassed by their male supervisor. In denying their claims, the court stated that “because Title VII is premised on eliminating discrimination, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute’s ambit.” By sexually harassing both the husband and the wife, the supervisor was not discriminating, but rather treating the sexes in the same way. For support, the court cited the

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152. See supra text accompanying notes 134-38.
153. See supra text accompanying notes 143-46.
154. See supra text accompanying notes 129-33, 139-42. As an additional category, courts have found, in two cases involving motions to dismiss for failure to state a claim, that plaintiffs may base a same-sex sexual discrimination claim on the jealousy of a same-sex coworker. In *Caban v. Caribbean Transportation Servs.*, 279 F. Supp. 2d 107, 109 (D.P.R. 2003), the plaintiff claimed that she had received special attention from a male coworker, causing a female coworker to become jealous. According to the plaintiff, the female coworker responded by “belitt[ing], denigrat[ing], over-work[ing], and constantly harass[ing] [plaintiff] with vicious remarks...” *Id.* In its analysis, the court did not explain whether or not it was utilizing a particular evidentiary route from the *Oncale* case, but it stated that to establish her claim, the plaintiff must show that “female employees were the prime target of [the alleged harasser’s] jealousy and harassment because males were not the preferred gender of attraction to [the male coworker], thus making women employees the only ones subject to the disadvantageous treatment.” *Id.* at 110. The court, referring to a case with similar facts, then suggested that the plaintiff’s allegations were sufficient to survive the motion to dismiss and that the claim could be “‘more appropriately resolved upon consideration of a complete summary judgment record.’” *Id.* (citing *Lee v. Gecewicz*, CIV. ACTION NO. 99-158, 1999 U.S. Dist. LEXIS 7317, at *11 (E.D. Pa. May 20, 1999)).
155. 211 F.3d 399, 403 (7th Cir. 2000).
156. *Id.* at 401.
157. *Id.* at 403.
158. *Id.* A later case suggested that plaintiffs of opposite sexes could bring a single sexual harassment claim against an employer so long as each was harassed by a different coworker. In *Venezia v. Gottlieb Memorial Hosp., Inc.*, 421 F.3d 468, 471 (7th Cir. 2005), a husband and wife sued their employer, claiming each had been subject to sexual harassment by a different male supervisor. Since there were two supervisors, the court rejected the
statement from *Oncale* that ""The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.""\(^{159}\)

Yet, courts have found that even if a harasser does subject both men and women to his or her behavior, the plaintiff may still prevail if the harassment towards one sex is of a different degree or nature than the harassment towards the other sex. In *EEOC v. Pentman, L.L.C.*, a group of female employees alleged that their female supervisor ""subjected them to constant graphic comments and questioning about sex, propositions for sex with [the supervisor] and her boyfriend, and slapping and touching of their bodies.""\(^{160}\) The employees acknowledged that their supervisor also made sexual comments to men, but they argued that women were the main target of the harassment.\(^{161}\) In addition, when the women employees complained about the mistreatment, the supervisor allegedly required them to work longer hours than male employees and complete degrading work, such as cleaning the floor with a toothbrush.\(^{162}\) The court found that this was sufficient evidence to survive the employer’s motion for summary judgment.\(^{163}\)

Similarly, in *Breitenfeldt v. Long Prairie Packing Co.*, the court held that despite evidence that both men and women at the plaintiff’s workplace were ""touched in offensive ways,"" a reasonable fact-finder could conclude that ""men and women were treated in a qualitatively different way and that men... were at a distinct disadvantage because of their gender.""\(^{164}\) In *Breitenfeldt*, the alleged harassment towards women involved the male coworkers making sexually-tinged remarks and draping their arms around them, whereas towards men, the conduct included simulation of anal and oral sex and ""painful physical assault on their genitalia.""\(^{165}\)

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161. Id.

162. See id.

163. Id. at *3.


165. Id.; see also Shepherd v. Slater Steels Co., 168 F.3d 998, 1011 (7th Cir. 1999) (finding that despite evidence that the harasser “flashed” a female coworker, the evidence as a whole indicates that women were not harassed to the same degree as plaintiff); Merritt v. Del. River Port Auth., No. CIV.A.98-3313, 1999 U.S. Dist. LEXIS 5896, at *10-11 (E.D. Pa. Apr. 20, 1999) (finding that despite evidence that the male harasser had directed his behavior towards male and female coworkers, “genuine issues of material fact exist as to whether [the coworker] treated men and women differently in the DRPA workplace”). Plaintiffs have not always prevailed under this theory, however. In Caines v. Vill. of Forest Park, No. 02C7472, 2003 U.S. Dist. LEXIS 11153, at *7-8 (N.D. Ill. June 30, 2003), the plaintiff agreed that both men and women were sexually harassed by his supervisor, but argued that the harassment differed in that the supervisor demonstrated sexual desire for his female coworkers, but
The theory advanced in these cases is consistent with Oncale's overall message that the important question is whether or not the plaintiff has suffered discrimination based on sex.\(^\text{166}\) Even if a harasser is directing his or her behavior towards both sexes, he or she may still be discriminating based on sex if there is a difference in the way in which each sex is harassed, particularly if one sex receives the brunt of the treatment.\(^\text{167}\) The Holman court seemed to miss this point, finding that harassment directed towards both sexes was enough to preclude a cause of action for sex discrimination.\(^\text{168}\) If the plaintiff can put forth enough evidence showing differential treatment, he or she should be able to prevail under the comparative evidence route, even if both sexes are harassed.

**Is evidence of differential treatment always enough?**

The majority of the cases described in this section interpret Oncale to mean that the comparative evidence prong by itself is sufficient to find sex discrimination. There are a few cases, however, that hint that more is needed. In EEOC v. Harbert-Yeargin, Inc., the male plaintiffs complained that they had been subjected to "goosing" (grabbing of their genitals and buttocks) by a male coworker.\(^\text{169}\) Although this coworker stated that he would never have treated women in that manner—and, indeed, the evidence showed that he had not bothered his female coworkers—the judge delivering the opinion of the court, Judge Guy, felt that this was not sufficient evidence to allow the claim to reach a jury.\(^\text{170}\) His decision seemed to rest in part on a belief that the female workers were not similarly situated, for Judge Guy pointed out that "all members of the large, male work force worked out in the field while the total of three female workers were in an office and had no contact with [the alleged harasser]." Yet other language in the opinion suggests that even if there had been women who worked with the alleged harasser, the court would have required more evidence to allow the case to reach the jury.\(^\text{171}\) Judge Guy referred to the decision in Shepherd v. Slater Steels Corp. (in which the court found that evidence that the alleged harasser flashed a female coworker was not enough for the equal opportunity harasser defense, since severe and prolonged sexual harassment was directed only at the male plaintiff)\(^\text{172}\) as "a good example of the analytical gymnastics in which a court will engage in order to contort sexually offensive

\(^{167}\) See Lanctot, supra note 46, at 928.
\(^{168}\) See id. (arguing that Holman was an overly rigid interpretation of Oncale).
\(^{169}\) 266 F.3d 498, 500-03 (6th Cir. 2001).
\(^{170}\) Id. at 503, 520, 522.
\(^{171}\) Id. at 520.
\(^{172}\) The appeal in this case involved an appeal of a judgment as a matter of law. Id. at 500.
\(^{173}\) See supra note 165.
conduct in the workplace into gender discrimination."¹⁷⁴ He maintained that harassment "of a sexual nature" is not necessarily gender discrimination,¹⁷⁵ and then stated that "[w]hat went on in the case at bar was gross, vulgar, male horseplay in a male workplace," comparing the facts to those of Oncale, which he distinguished because the harasser in Oncale was gay.¹⁷⁶ He acknowledged that Oncale does not require that the harasser be homosexual, but in listing the other possible methods of proof, he did not mention the comparative evidence route.¹⁷⁷ Judge Guy then declared that there could not have been gender hostility in this case, for "[the alleged harasser] liked nothing better than to have men in the workplace. If not, who else would he roughhouse with?"¹⁷⁸ Finally, he concluded by stating that "[s]ame-sex sexual harassment cases of this nature present a slippery slope, and this case either goes over the edge or comes so close to it that a line needs to be drawn. If not, what's next—towel snapping in the locker room?"¹⁷⁹ He then reversed the trial court's denial of judgment as a matter of law for the defendant.¹⁸⁰

The precise reasoning for Judge Guy’s reversal is not clear, and it may be that it was based on his view that there were no similarly situated female workers to allow the plaintiff’s claim under the comparative evidence route to proceed to the jury. His language, however, suggests that in his view, disparate treatment is not enough. In stating that the alleged harasser liked to have men around with whom to “roughhouse,” Judge Guy seems to be acknowledging that the harasser did treat men differently from women, and that it was not merely because women were not around, but rather that the harasser chose to “roughhouse” with the plaintiffs because they were men. Judge Guy’s fear that “towel snapping in the locker room” would be next also supports the idea that he viewed the harassment as purposely directed at men only. In addition, although Judge Guy asserted that the harasser had no contact with female coworkers, the opinion acknowledged that “[a]ll three women testified that they had daily contact with the construction workers, and that none of the male employees, including [the alleged harasser], ever said anything of a sexual nature to them or touched them

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¹⁷⁴. See Harbert-Yeargin, 266 F.3d at 521. Judge Guy was also generally critical of the equal opportunity harassment defense, stating that “it is hard for me to come to grips with the fact that if [the harasser] had been an equal opportunity gooser, there would be no cause of action here,” although the judge does seem to acknowledge that this is the law. Id. at 520.

¹⁷⁵. See id. at 521 (“The error is in concluding that all harassment of a sexual nature amounts, ipso facto, to gender discrimination.”) (bold typeface in original).

¹⁷⁶. Id. at 522. In actuality, it is not at all clear that the harasser in Oncale was gay. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998).

¹⁷⁷. Harbert-Yeargin, 266 F.3d. at 522 n.6. Judge Guy cited the Third Circuit decision, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 1997), and stated that a plaintiff might also demonstrate same-sex discrimination if “the harasser was expressing a general hostility to the presence of one sex in the workplace, or the harasser was acting to punish the victim’s noncompliance with gender stereotypes.” Id.

¹⁷⁸. Id. at 522.

¹⁷⁹. Id.

¹⁸⁰. Id. at 523.
Moreover, the harasser himself stated that he would not have assaulted women, and other courts have found such evidence key in finding gender discrimination.

All of this suggests that Judge Guy in the Harbert-Yeargin case felt that something more than differential treatment was required to demonstrate sex discrimination, even where the differential treatment involved sexual conduct. This was indeed the way in which the court in English v. Pohanka of Chantilly, Inc. interpreted Judge Guy’s opinion. In English, described in Part II.A., the court found that the plaintiff had failed to produce enough evidence that his alleged harasser intended an earnest sexual solicitation. The court also struck down the plaintiff’s argument under the comparative evidence route. In doing so, the court pointed out that there was evidence that the harasser also bothered his female coworkers, and evidence that men were harassed more severely would not be dispositive, since the two sexes rarely shared the same workspace. In addition, the court relied on Harbert-Yeargin for the proposition that merely showing that one sex is treated differently than the other is not enough, stating that “[a]s the Harbert-Yeargin court noted, ‘if the harassment is specifically directed at men, and not women, it doesn’t have to be of a sexual nature.’ This is precisely, however, what [the plaintiff] would have the Court hold in this case.”

The court went on to say that Harbert-Yeargin was “particularly instructive,” since it also involved “male-on-male horseplay,” and that the Harbert-Yeargin court had “found that plaintiff’s same-sex discrimination claim failed because he did not provide evidence that the harassers’ roughhousing was motivated by sexual desire, general hostility to men in the workplace or that the harassers punished plaintiff for failing to comply with gender stereotypes.”

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181. Id. at 503.
182. Id.
183. See, e.g., Carney v. City of Shawnee, 38 F. Supp. 2d 905, 909 (D. Kan. 1999) (denying summary judgment for the defendant employer where the plaintiffs presented evidence that the supervisor’s harassment was directed only towards other men, and the supervisor himself admitted that he only targeted men).
185. See supra text accompanying notes 91-95.
187. Id.
188. See id. (citing Harbert-Yeargin, 266 F.3d at 521). The English court seems to interpret this quotation as meaning that if the harassment is not of a sexual nature, it is not sex discrimination. See id. This was not necessarily the intention of the Harbert-Yeargin court: however, the court, at this point in its opinion, was criticizing the lower court’s jury instructions, and it is possible that Judge Guy was actually pointing out that one could still find sex discrimination where the content of the harassment was not “of a sexual nature.” See Harbert-Yeargin, 266 F.3d at 521.
189. English, 190 F. Supp. 2d at 848. The Harbert-Yeargin court also later stated in King v. Super Serv., Inc., another same-sex harassment case, that even if the harassers in that case “would not subject a woman to the same sort of harassment they directed at King, such a difference in treatment is still not adequate to show discrimination on the basis of sex if the plaintiff cannot show either (1) a general bias against men in the workplace, or (2) discrimination against King specifically because he is a male,” citing Harbert-Yeargin, 266 F.3d at 521.
other words, the English court interpreted Harbert-Yeargin as requiring more than a showing of differential treatment—the plaintiff had to also show that one of the three above-listed motivations was behind the harasser’s conduct. The English court then concluded that its case involved mere horseplay, and that the plaintiff had failed to meet his burden of providing evidence that the coworker harassed him because of his gender. "To hold otherwise," the court maintained, "would open the door to litigation to theoretically any form of sexually tinged teasing or roughhousing among male workers solely on the grounds that such horseplay occurred," when "Oncale specifically counsels against taking such a leap." 191

In my view, the Harbert-Yeargin and English courts, in implying that more is required than evidence of differential treatment, have misinterpreted Oncale. The Supreme Court specifically stated that one way in which the plaintiff may meet his burden is by providing “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.” 192 This was offered as its own, distinct evidentiary route, 193 not one that also requires a showing of sexual desire, hostility toward one’s gender, or sex-based stereotyping, as the Harbert-Yeargin and English courts suggested. 194 Moreover, even acknowledging that Justice Scalia’s description of the three routes was technically dicta, since the holding was simply that Title VII does protect against same-sex harassment, 195 the comparative evidence route should be sufficient on its own because it does indicate sex discrimination. If a harasser is directing his conduct towards one sex and not the other, then that is “discrimination... because of... sex.”

Additionally, these courts erred when they cited Oncale’s counseling against finding discrimination in ordinary “horseplay” as support for their refusal to find that the plaintiffs had submitted enough evidence of discrimination based on sex. Both Harbert-Yeargin and English involve claims of a hostile work environment, 196 claims that require a plaintiff to demonstrate that the conduct in question was sufficiently “severe and pervasive” in addition to showing that it was “because of... sex.” 197 The Oncale Court’s discussion of the “horseplay”

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F. App’x 659, 664 (6th Cir. 2003). See also Lavaek v. Owen’s World Wide Enterprise Network, Inc., 409 F. Supp. 2d 848, 854 (E.D. Mich. 2005) (plaintiff argued that the coworker directed his sexual harassment at men only, and not at similarly-situated women, but the court, citing Harbert-Yeargin, 266 F.3d at 520, stated that “it is established in the Sixth Circuit that the Court will not find grounds for an actionable gender discrimination claim when no cause of action would have existed if Defendant had been an ‘equal opportunity’ harasser.”). 190

English, 190 F. Supp. 2d at 848. 191

Id. 192


Id. 194

See supra notes 177, 189 and accompanying text. 195

See Oncale, 523 U.S. at 82. 196

Harbert-Yeargin, 266 F.3d at 500; English, 190 F.Supp. 2d at 840. 197

examples relates to the "severe or pervasive" element, not to the question of whether or not the conduct could be considered discrimination because of sex. Justice Scalia states that it is the severe or pervasive prong that will prevent Title VII "from expanding into a general civility code," and explains that "[a] professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field..." Thus, when Judge Guy in Harbert-Yeargin justifies his refusal to find sex discrimination with the argument that "a line needs to be drawn," lest "towel snapping" be next, and when the English court states that it does not want to open the door to just "any form of sexually tinged teasing," they confuse the question of whether or not conduct is "because of... sex" with the question of whether or not it is severe or pervasive. Allowing the plaintiff's claim to reach the jury in Harbert-Yeargin would not mean that towel snapping would become grounds for liability, because towel snapping would be unlikely to meet the severe and pervasive prong.

C. Is the harasser motivated by animosity towards a specific gender?

The final evidentiary route from the Oncale case, whether or not there is evidence that the harasser is motivated by "general hostility" towards his or her own gender in the workplace, has been utilized by very few plaintiffs, and where it has been used, the plaintiffs are often relying on other evidentiary routes as well. This section will discuss the few cases in which the "hostility" route from Oncale has received independent treatment.

In Caines v. Village of Forest Park, the male plaintiff alleged that he had been subject to sexual harassment by one of his superiors, because the latter had

199. Id.
200. Harbert-Yeargin, 266 F.3d at 522.
201. English, 190 F.Supp.2d at 848.
202. As mentioned, both the Harbert-Yeargin court and the English court also suggest that even viewing the comparative evidence test on its own, there was not enough evidence in either case to show that the harasser treated women differently from men. See supra text accompanying notes 169-87. These arguments were weak, however, particularly in Harbert-Yeargin. The evidence in the record that female employees had contact with the harasser without incident and that the harasser himself stated that he would not have treated women the way he treated his male coworkers should have been enough to show discrimination because of sex. See supra text accompanying notes 169-70. In English, the court does state that the harasser's workspace was disproportionately populated by men, and that women were sometimes subjected to the harasser's offensive conduct. See supra text accompanying note 187. Yet, it acknowledges that the behavior was directed more at men, and the facts suggest that the sexually explicit conduct may have been directed solely at men. See English, 190 F. Supp. 2d at 847. As described in previous sections, other courts have held that plaintiffs may still utilize the comparative evidence route, even if harassment has been directed towards both sexes, so long as the plaintiff can show that the nature or degree of the harassment differs between the sexes. See supra text accompanying notes 160-65. But see supra text accompanying notes 155-59.
203. Oncale, 523 U.S. at 80.
an "antipathy toward men in the workplace" and "intended to emasculate and humiliate [plaintiff] because he is a man and because [the coworker] wanted to belittle men he perceived as threats." The court, however, granted the employer's motion to dismiss for failure to state a claim. It pointed out that there were also two female coworkers who had joined in the plaintiff's lawsuit, and found that allegations that both men and women were sexually harassed "undermine[d] the more general and conclusory assertions that [the coworker's] conduct was the result of a general antipathy toward men in the workplace." Moreover, the fact that the plaintiff supported his claim with evidence that his superior perceived him as a "threat" actually weakened his position. According to the court, the suggestion that the coworker harassed plaintiff because he was a threat meant that he "thus would have no reason to harass a man who was not a threat."

In Walker v. SBC Services, Inc., the female plaintiff alleged that she had suffered sex discrimination because she was subjected to sexual conversation and conduct at her workplace. The plaintiff claimed that her female supervisor made a crude gesture and relayed sexually graphic stories to the other women at the office. The court granted the employer's motion for summary judgment, stating that the plaintiff had failed to provide any evidence of her supervisor's general hostility towards women in the workplace. Instead, the court explained, the plaintiff had merely declared that the supervisor was "motivated by a hostility toward [p]laintiff because she was a black woman." Thus, similar to the Caines decision, the plaintiff lost because she was unable to put forth any evidence of a "general hostility" towards the plaintiff's sex.

Finally, in Lee Crespo v. Schering Plough Del Caribe, Inc., the plaintiff claimed that her female supervisor had sexually harassed her by, among other things, discussing the sexual orientation and relationships of other employees, commenting on the plaintiff's dating life and appearance, and criticizing the plaintiff's work performance. In the court's view, many of the incidents described by the plaintiff, could "at worst" be categorized as "boorish or overbearing behavior," not sex discrimination. Even considering the more
sexually-tinged comments, there was no evidence that the supervisor’s behavior resulted from hostility towards women in the workplace.\textsuperscript{214}

As mentioned, this gender hostility evidentiary route has been very infrequently used, and there is no record of a plaintiff reaching trial under it. One reason for this may be that, in cases where there is some evidence of hostility towards one gender, both plaintiffs and courts find it easier to proceed under the comparative evidence evidentiary route, showing that the harasser treats one sex differently from the other. For example, the plaintiff in \textit{Chavez v. Thomas & Betts Corporation} might have argued that the mistreatment she and other female coworkers suffered by their supervisor was evidence of the supervisor’s hostility towards women, but instead she limited her argument to direct comparative evidence.\textsuperscript{215} If there is evidence that similarly situated members of each sex are present in the workplace, yet treated differently by the alleged harasser, it is relatively clear that the court should allow the plaintiff past summary judgment.\textsuperscript{216} Meeting the summary judgment standard for showing hostility towards one’s gender, on the other hand, requires the court to make additional inferences and is thus probably a riskier route for plaintiffs.

\textbf{D. Going beyond \textit{Oncale}’s three evidentiary routes}

As Part \textbf{III} will discuss, courts have generally concluded that plaintiffs may also bring same-sex sex discrimination claims under the theory that the harassment stemmed from the plaintiff’s failure to comply with gender stereotypes. Besides this exception, however, very few cases have looked beyond the three evidentiary routes listed in \textit{Oncale}, despite courts’ assertions that they are not bound by these routes.\textsuperscript{217} This section will examine the few decisions that have taken a broader view of the \textit{Oncale} decision.\textsuperscript{218}

\textsuperscript{214} \textit{Id.} at 430. \textit{See also} \textit{Fitzer v. Chevron Corp.}, No. 2:05-cv-507-GEH-GGH, 2006 U.S. Dist. LEXIS 9593, at *12 (E.D. Cal. Feb. 27, 2006) (stating that evidence that a female coworker had called the female plaintiff “bitch” was not enough to show gender hostility) (citing to \textit{Galloway v. General Motors Service Parts Operations}, 78 F.3d 1164, 1168 (7th Cir. 1996), \textit{overruled in part on other grounds by AMTRAK v. Morgan}, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)).


\textsuperscript{216} \textit{See discussion supra} Part II.B. The exceptions are the cases following the reasoning from \textit{Harbert-Yeargin}. \textit{See supra} text accompanying notes 169-202.

\textsuperscript{217} \textit{See supra} note 8 and accompanying text.

\textsuperscript{218} A number of cases have rejected claims made by plaintiffs pursuant to the three routes from \textit{Oncale}, but have not provided any useful analysis of the routes. \textit{See Lignore v. Hosp. Univ. of Penn.}, No. 04-5735, 2006 U.S. Dist. LEXIS 43996, at *6, *22-23 (E.D. Pa. June 27, 2006) (plaintiff alleged coworker asked about her personal life, invited plaintiff to a gay bar, and often tried to brush up against her; court found plaintiff has presented no evidence of sexual harassment); \textit{Collins v. Louis Jones Enterprises, Inc.}, No. 05 C 1237, 2006 U.S. Dist. LEXIS 6309, at *2, 8 (N.D. Ill. Feb. 16, 2006) (coworkers allegedly groped plaintiff and made sexual comments; court stated there was no evidence of sexual desire, gender hostility, or differential treatment); \textit{Strishock v. Swift & Co.}, No. 04-cv-2603-PSF-CBS, 2005 U.S. Dist.
In *Breitenfeldt v. Long Prairie Packing Co.*, the plaintiff, a meat packing plant employee, alleged that his coworkers had, among other things, frequently “jumped” him and held him down, sometimes in a trough of blood or raw meat, and simulated sexual acts; painfully assaulted the plaintiff’s genitals; and verbally harassed the plaintiff about his sexual practices. The defendant pointed to the plaintiff’s admission that he did not know why his coworkers treated him that way as evidence that the conduct was not based on the plaintiff’s sex, but the court rejected this argument. Rather, the court found that “a reasonable fact-finder could conclude from the sexually explicit quality of the verbal and physical assaults, especially the frequent references to homosexual sex acts, that Plaintiff’s gender was one motivating factor of the offensive behavior.”

LEXIS 33223, at *2, *14-15 (D. Colo. July 5, 2005) (supervisor bound plaintiff’s hands and feet at work and wrote “Happy Birthday” across his buttocks; court found the act “childish,” but no evidence it was based on gender); Humphries v. Consolidated Grain & Barge Co., 412 F. Supp. 2d 763, 766, 768 (S.D. Ohio June 7, 2005) (coworkers allegedly used derogatory terms for “homosexual” when referring to plaintiff and attached playing cards depicting nude men to plaintiff’s time card; court found no evidence supporting any of the three routes from *Oncale*); Ciccotteto v. LCOR, Inc., No. 99 Civ. 11646, 2001 U.S. Dist. LEXIS 1125, at *15-16 (S.D.N.Y. Jan. 31, 2001) (coworkers made “sexually charged” remarks and lewd phone calls to plaintiff; court concluded there was nothing suggesting this behavior was motivated by sexual desire or gender hostility, or that the harassers discriminated between men and women); Kahill v. Unified Government of Wyandotte County/Kansas City, 197 F.R.D. 454, 456-58 (D. Kan. 2000) (coworkers teased plaintiff for being raped and called her a “whore;” court found no evidence that the harassers were homosexual or hostile towards women in the workplace); Piroli v. World Flavors, Inc., No. 98-3596, 1999 U.S. Dist. LEXIS 18092, at *10-13 (E.D. Penn. Nov. 23, 1999) (coworkers allegedly groped plaintiff and simulated sexual acts; court found no evidence to support any of the three routes from *Oncale*). In addition, there are cases that conclude that there is insufficient evidence of sex discrimination, without specifically discussing any of the routes (or providing many details regarding their reasoning). See *Linville v. Sears, Roebuck and Co.*, 335 F.3d 822, 823-24 (8th Cir. 2003) (coworker on several occasions struck plaintiff on the scrotum and laughed; court found no evidence of gender discrimination); *Raum v. Laidlaw Ltd.*, No. 98-9091, 1999 U.S. App. LEXIS 8219, at *2, *4-5 (2nd Cir. Apr. 23, 1999) (plaintiff claimed that his coworker subjected him to obscene gestures and comments; the court granted defendant’s motion to dismiss for failure to state a claim, finding that the alleged remarks “do not suggest sex discrimination”); *Nichols v. Snow*, No. 3:03-1341, 2006 U.S. Dist. LEXIS 4281, at *31-32 (M.D. Tenn. Jan. 23, 2006) (plaintiff alleges he was insulted and ridiculed by his coworker, and that the coworker expressed disapproval of plaintiff’s lifestyle; the court granted summary judgment, finding that there was no evidence that the conduct related to plaintiff’s sex); *McCaulcy v. White*, No. 01-4071, 2002 U.S. Dist. LEXIS 13036, at *3, *10-11 (E.D. Penn. May 21, 2002) (supervisor grabbed plaintiff’s arm and forced it towards supervisor’s groin; court states that there is no evidence from this one incident that the harassment was based on plaintiff’s gender); *Pierce v. Mich. Dept. of Corrections*, No. 4:00 cv 37, 2001 U.S. Dist. LEXIS 11992, at *60-61 (W.D. Mich. Aug. 9, 2001) (supervisor approached plaintiff with staff complaints of noxious odors from plaintiff’s desk; plaintiff interprets this to mean “female” odors, but court finds no evidence of gender discrimination beyond plaintiff’s unreasonable subjective belief).


220. *Id*. at 1176.

The court in *Breitenfeldt* thus took a very different approach from most of the other courts facing similar facts. Where other courts focused on one of the specific evidentiary routes from *Oncale*, and questioned whether or not the plaintiff had provided enough evidence for that specific route, the *Breitenfeldt* court simply asked the broader question of whether or not there was evidence that the plaintiff's treatment was based on his sex. *Bacon v. Art Institute of Chicago* reached a similar result. The plaintiff in *Bacon* alleged that one of his coworkers had taken a photograph of the plaintiff's backside, continually touched the plaintiff's buttocks, and simulated sexual acts with the plaintiff. Citing also the fact that the coworker had been ultimately terminated for "physical conduct of sexual nature," the court found that there was sufficient evidence of sex discrimination. Although the *Bacon* court did not state it as straightforwardly as did the court in *Breitenfeldt*, implicit in the former court's decision was the notion that the sexually explicit nature of the coworker's conduct was enough to provide the inference of discrimination because of sex.

Lastly, in *Ashmore v. J.P. Thayer Co.*, the two male plaintiffs alleged that their supervisor harassed them by touching their buttocks and genitals and commenting about their bodies. On one occasion, the supervisor grabbed and held onto one plaintiff's genitals with a device used to pick up trash. In addressing the "because of . . . sex" question, the court stated that whether or not the supervisor was homosexual "does not answer the question." Rather, "[t]he issue is whether his conduct was directed at Plaintiffs because they were male." Since the supervisor's conduct was aimed only towards males, and involved "simulation and discussion of sexual acts between males," the court found that there was enough evidence that the discrimination was based on sex. In *Ashmore*, this inference may have been easier to find since the case involved more than one plaintiff; however, the case is still notable for the court's language suggesting that sex discrimination could be inferred from the nature of the harassment.

222. See discussion supra Parts II.A-C.
224. Id. at 765.
225. Id. at 766-67, 767 n.3.
226. See id. at 766-67. See also Corona v. Kefro LLC & Kosterco, Inc., No. 04-6283-AA, 2006 U.S. Dist. LEXIS 14750, at *12 (D. Or. March 14, 2006) (court reasoned that because the unwanted touching suffered by the plaintiff was "overtly sex-based," he could withstand the summary judgment motion). The court in *Leake v. Ryan's Family Steakhouse*, discussed in section B of this Part, was also amenable to the idea that the sexual nature of the conduct was enough for a reasonable factfinder to infer sex discrimination. See supra text accompanying notes 143-46.
228. Id. at 1369.
229. Id.
230. Id.
231. *Ashmore* also differs from the other two cases in that the court was addressing the defendant's motion to overturn the jury verdict and enter judgment for defendant as a matter of law, whereas the other cases involved motions for summary judgment for the defendant.
asked whether or not the harassment faced by the plaintiff could be seen as discrimination because of sex, rather than narrowing itself to the three evidentiary routes from *Oncale*.  

E. Determining discrimination “because of . . . sex”

As the descriptions of the cases in this Part suggest, courts in same-sex sex discrimination cases have on the whole limited themselves to the three evidentiary routes that the Supreme Court offered as examples in *Oncale*. Of the few cases that did embody a broader approach to *Oncale*, two of them, *Breitenfeldt* and *Bacon*, took place within a year following the *Oncale* decision, and cases in those circuits after 1999 suggest that the courts have since abandoned that approach.

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232. Two additional cases suggest similar approaches to finding same-sex sex discrimination. In *Fry v. Holmes Freight Lines, Inc.*, 72 F. Supp. 2d 1074, 1076-77 (W.D. Mo. 1999), the plaintiff alleged that a group of his coworkers subjected him to continuous sexual harassment, including kissing his neck, throwing him on the ground and attempting to grab his genitals, and making explicit comments suggesting that the plaintiff engaged in homosexual conduct. The defendant argued the plaintiff had not put forth evidence suggesting that his harassers were motivated by homosexual desire, thus his claim must fail. *Id.* at 1078. The court disagreed, however, stating that the plaintiff need only offer evidence that he was discriminated against because of his gender. *Id.* at 1078-79. Evidence that the plaintiff’s coworkers harassed him based on his sex is, in itself, “credible evidence” that they were homosexual. *Id.* at 1079. Thus, although the court in this case appeared to be applying the first evidentiary route from *Oncale*, dealing with whether or not the harasser was homosexual, in its analysis it focused first on the question of whether or not the harassment could be considered discrimination because of sex. Cf. *Chambers*, supra note 22, at 574-75 (“The Fry court simply asked whether an inference of gender or sex discrimination could flow from the conduct the plaintiff endured, implicitly ignoring the sexual aspects of the case.”). In another case, *Burley-Sullivan v. Philadelphia*, No. 00-2413, 2001 U.S. Dist. LEXIS 15730, at *13 (E.D. Penn. Sept. 17, 2001), the plaintiff was able to withstand a summary judgment motion with evidence that her female supervisor had subjected her to “lewd” office gossip relating to the plaintiff’s body, her spouse, and masturbation. The court did not specifically rely on any of *Oncale’s* evidentiary routes, but stated that a showing of sexual desire was unnecessary; there was a material issue of fact as to whether the harassment was based on sex. *Id.* Very little explanation was provided for the court’s holding, but its decision implied that the court may have considered factors outside of those provided in the three *Oncale* evidentiary routes in finding evidence of sex discrimination. *See id.*

233. The exception, as mentioned in Part II.D, is evidence of gender-stereotyping, an “evidentiary route” that will be discussed in Part III.

234. *Id. Corona v. Kefro LLC & Kosterco, Inc.*, discussed supra note 226, was decided in 2006, but based its reasoning on *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), a case whose finding that “offensive sexual touching is actionable discrimination,” *Rene*, 305 F.3d at 1067, has not been mirrored in courts’ opinions outside of the Ninth Circuit. *See* Corona, 2006 U.S. Dist. LEXIS 14750, at *9-10; supra text accompanying note 233; infra Part III.B.

235. *See, e.g., McCown v. St. John’s Health Sys., Inc.*, 349 F.3d 540, 543-44 (8th Cir. 2003) (finding for the defendant employer after determining that the plaintiff had failed to provide enough evidence of any of the three evidentiary routes from *Oncale*); *Jones v. Pac. Rail Servs.*, No. 00C5776, 2001 U.S. Dist. LEXIS 16663, at *5 (N.D. Ill. Oct. 10, 2001) (granting the employer summary judgment after determining that the plaintiff had failed to provide sufficient evidence for the first evidentiary route, whether the harasser was homosexual).
One result of this trend is that even though the *Oncale* Court insisted that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex," the reality is that plaintiffs who cannot show sexual desire on the part of their harasser typically lose.236 As discussed in this Part, plaintiffs have difficulty utilizing the comparative evidence and gender hostility evidentiary routes, since in many cases the plaintiff works in a single-sex environment and has been singled out for the harassment.237 Yet, *Oncale* does not require that a plaintiff prove his or her case under one of the three evidentiary routes described in that opinion. First, the holding of *Oncale* is simply that same-sex sexual harassment is actionable under Title VII as a form of sex discrimination; the discussion of how a plaintiff might show same-sex sex discrimination is therefore dicta. Second, in its discussion the Court does not assert that same-sex sex discrimination can be found only under one of its described routes. Rather, the Court insists that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."238 The description of the three evidentiary routes provides additional guidance as to how a court might find sex discrimination, but as many courts have agreed, this list of example routes was not meant to be exhaustive.239 In explaining the three routes, the Court states that "[a] trier of fact might reasonably find such [sex] discrimination, for example, if... " underscoring that the evidentiary routes described are meant as illustrations, not as the sole methods of finding sex discrimination.240 After describing the three routes, the Court goes on to state 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 'discrimination... because of... sex.'"241 Thus, while it is consistent with the
Oncale opinion for a court to examine a plaintiff's claim under the three evidentiary routes, if the claim does not fit neatly into any of the routes, the court's analysis should not end there. The "critical issue" of whether or not one sex has been exposed to differential treatment should still be addressed. 242

Recognizing that the evidentiary routes provided in Oncale were not meant to be exhaustive is important, because there may be additional means of inferring sex discrimination. For example, many of the cases involve male-only workplaces, where one employee or a group of employees is bullying a coworker in a sexual manner. There may not be evidence that the harassers are gay, or that they are hostile towards their own gender, yet there may still be a discriminatory motive. It may be, for example, that men will torment each other, but not women, in sexual ways as a means of emasculating or humiliating the victim. 243

If so, their harassing conduct would be based on sex, yet it would not fit neatly into any of the evidentiary routes. Or, it may be that in some cases there is sexual desire underlying the harassing conduct, but the harasser himself or herself is not fully aware of it. If the harasser does not consider himself to be sexually oriented towards his same sex, it would be very difficult for the plaintiff to meet the requirements of the first evidentiary route by offering "credible evidence" that the harasser is homosexual, outside of the sexual nature of the harassing conduct itself. Yet, the harassment would still be based on the plaintiff's sex. It is for this reason that courts should take a broader approach to the Oncale opinion, considering, for example, the sexual nature of the harassment as evidence of discrimination. 244

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242. See Chambers, supra note 22, at 575 (arguing that the Fry opinion is a permissible interpretation of Oncale, since it asks the broader question of whether or not sex discrimination can be inferred).

243. This possibility seemed to be on the mind of the court in Breitenfeldt v. Long Prairie Packing Co., the case in which a gang of workers would allegedly "jump" the plaintiff and sexually assault him. See supra note 219-21 and accompanying text. The court stated that, at the plaintiff's workplace, "men—at least some men, the men perceived as vulnerable—were at a distinct disadvantage because of their gender." 48 F. Supp. 2d 1170, 1176. The plaintiff in Caines v. Village of Forest Park also (unsuccessfully) claimed that his supervisor had harassed him as a way to "emasculate and humiliate" him, although that case did not involve sexual conduct. See supra note 165. See also Jones v. Pac. Rail Servs., 2001 U.S. Dist. LEXIS 16663, at *6 (plaintiff argued that the coworker's harassment had insulted his "manhood," but the court did not consider this type of evidence as a means of meeting the "because of sex" test).

244. Cf DelPo, supra note 3, at 23 (arguing that "hatred" sexual harassment claims should be left for the jury to decide, because there may be a gender-based reason for the sexually-tinged harassment, even if the harassers are not homosexual); Brookins, supra note 23, at 488-85 (stating that "a but-for gender component often exists in same-sex sexual harassment between heterosexual males, even though the harasser lacks sexual desire for the victim"). One might object that inferring sex discrimination from the sexual nature of the harassment is inconsistent with the Oncale Court's decision to remand Doe v. City of Belleville, assuming the way in which the majority of commentators interpreted the remand was correct. See supra text accompanying notes 34-37. However, recall that the Oncale Court interpreted Doe as "suggest[ing] that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations." Oncale, 523 U.S. at 79. I do not mean to argue for such a proposition. Harassment that is sexual in content, yet directed equally towards both sexes, would not qualify as sex discrimination. My
One objection to this argument might be that it will open up causes of action under Title VII to include any form of sexually-tinged banter between members of the same sex. The Oncale Court maintains, after all, that "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace."\textsuperscript{245} The Oncale opinion also explains the importance of the social context to the alleged harassment: "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."\textsuperscript{246} Yet, as explained in the discussion of Harbert-Yeargin, these pieces of the Oncale opinion are not tied to the "because of . . . sex" requirement, but, rather, to the issue of whether or not the harassment is "severe or pervasive."\textsuperscript{247} Justice Scalia, after discussing the "because of . . . sex" requirement, explains: "[a]nd there is another requirement that prevents Title VII from expanding into a general civility code . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.'"\textsuperscript{248} It is in this description of the "severe and pervasive" requirement that Justice Scalia discusses the importance of the plaintiff's "social context," and makes his point regarding androgyny in the workplace.\textsuperscript{249} Thus, even if same-sex employees have ways of treating each other that are different from the way in which they treat members of the opposite sex, or if there is a sexual nature to teasing that occurs between employees of the same sex, under Oncale, courts should not find a cause of action under Title VII if the conduct fails to meet the severity test.

PART III: SEXUAL ORIENTATION HARASSMENT AND SEX STEREOTYPING

Part III will address cases in which the harassment directed towards the plaintiff is related to knowledge or suspicion that the plaintiff is homosexual. As the first section will explain, most courts agree that discrimination based on sexual orientation is not prohibited by Title VII. Most courts also hold, however, that a plaintiff who is discriminated against for failing to conform to gender stereotypes is protected by Title VII. Yet, as the fourth section will demonstrate, plaintiffs have often had difficulty prevailing under this theory, particularly outside of the Ninth Circuit.

\textsuperscript{245} Oncale, 523 U.S. at 81.
\textsuperscript{246} Id. at 81-82.
\textsuperscript{247} See supra text accompanying notes 198-202
\textsuperscript{248} Oncale, 523 U.S. at 81 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).
\textsuperscript{249} See id. at 81.
SAME-SEX SEXUAL HARASSMENT

A. Title VII does not protect against sexual orientation discrimination

Courts have consistently held that Title VII does not protect against discrimination based on sexual orientation. In Higgins v. New Balance Athletic Shoe, Inc., for example, the plaintiff alleged that his coworkers had beleaguered him with "obscene remarks" and derogatory names, all on account of his sexual orientation.\(^{250}\) The court insisted that sexual orientation harassment "is a noxious practice," but proclaimed itself unable to find support for the idea that Title VII protects individuals from this type of harassment.\(^{251}\) In Simonton v. Runyon, on the other hand, the plaintiff claimed that he had suffered continual sexual harassment from his coworkers in the form of name-calling, sexually suggestive comments, postings of notes with names of celebrities who had died of AIDS, and sexually explicit photographs placed in his work area and mailed to his home.\(^{252}\) As in Higgins, the plaintiff apparently acknowledged that the harassment was based on his sexual orientation,\(^{253}\) and as in Higgins, the court found that the law was "well-settled" that sexual orientation harassment was not protected.\(^{254}\) In addition to prior case law in various circuits, the Simonton court cited Congress's repeated refusal to pass bills that would extend Title VII to protect against discrimination based on sexual orientation as justification for its decision.\(^{255}\) Similar decisions have been handed down by courts in most of the other circuits, including several appeals courts.\(^{256}\)

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250. 194 F.3d 252, 257 (1st Cir. 1999).
251. Id. at 258-59 ("But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.").
252. 232 F.3d 33, 35 (2d Cir. 2000).
253. Id. at 34.
254. Id. at 35.
255. Id. at 35-36.
The only circuit that seems to have charted a slightly different course with regards to sexual orientation discrimination is the Ninth Circuit. In *Rene v. MGM Grand Hotel, Inc.*, the court allowed a plaintiff who alleged that he had been harassed as a result of his sexual orientation to proceed past summary judgment. In making this decision, however, the court did not specifically rule that Title VII protects against sexual orientation discrimination. Rather, it found that the plaintiff's sexual orientation is irrelevant, and that the true question is whether or not the harassment is made up of offensive conduct of a sexual nature. In *Rene*, the plaintiff—who was openly gay—alleged that he had suffered from sexual harassment from his supervisor and coworkers. The discriminatory conduct, according to the plaintiff, included the coworkers whistling and blowing kisses at him, calling him derogatory names, telling vulgar jokes, and grabbing his crotch and buttocks.

In finding for the plaintiff, the court first pointed out that "physical sexual assault has routinely been prohibited as sexual harassment under Title VII," and cited a number of cases, including *Doe v. City of Belleville*, in which the court had stated that, where the plaintiff's genitals had been grabbed by a coworker, "it would seem to us impossible to delink the harassment from the gender of the individual harassed." The *Rene* court asserted that the lower court had been incorrect in granting the employer summary judgment on the grounds that the plaintiff believed he had been discriminated against based on his sexual orientation. In opposite-sex harassment cases, the court reasoned, women are not denied relief because they may be lesbians. The sexual orientation of the victim of same-sex harassment should be similarly irrelevant.

Reciting the facts from *Oncale*, the court stated that two lessons could be deduced from that decision. First, "Title VII forbids severe or pervasive same-sex offensive sexual touching," and second, "offensive sexual touching is actionable discrimination even in a same-sex workforce." In elaborating the second point, the *Rene* court explained that "the Court in *Oncale* held that 'discrimination... because of... sex' can occur entirely among men, where some men are subjected to offensive sexual touching and some men are not.

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257. 305 F.3d 1061, 1068 (9th Cir. 2002).
258. Id. at 1067-68.
259. See id. ("Title VII forbids severe or pervasive same-sex offensive sexual touching.")
260. Id. at 1064.
261. Id.
262. Id. at 1065-66 (citing Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997), vacated, 523 U.S. 75 (1998).
263. Id. at 1066.
264. Id.
265. Id.
266. For a short description of the facts, see supra note 26.
267. See Rene v MGM Grand Hotel, Inc., 305 F.3d 1061, 1066-67 (9th Cir. 2002).
268. Id. at 1067.
There had been no women, the court pointed out, at the drilling rig where the plaintiff in *Oncale* worked.\(^{269}\) As a result, "Oncale did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men*.\(^{270}\) Returning to its own facts, the court concluded that the plaintiff, like Oncale, had been singled out amongst other men for harassment, that the harassment was clearly sexual, and that it was clearly discriminatory.\(^{271}\)

On the one hand, the *Rene* opinion seems consistent with *Oncale* in that it focuses on the broader question of whether or not the conduct at hand is discrimination based on sex, rather than narrowly constraining itself to the examples of evidentiary routes. As I suggested in Part II, and as several courts have held, sex discrimination could be inferred from the sexual nature of the conduct itself.\(^{272}\) However, the *Rene* court also has misinterpreted the holding of *Oncale*. In concluding that offensive sexual conduct alone warrants an inference of sex discrimination, and that this can be found in an all-male workplace, the court assumes that the Supreme Court agreed that the conduct in *Oncale* met the summary judgment standard for sex discrimination.\(^{273}\)

Whatever the opinions of the Supreme Court Justices, however, this was not the holding of *Oncale*.\(^{274}\) *Oncale* held only that same-sex discrimination is actionable under Title VII.\(^{275}\) Although it gave some general guidelines as to what evidence might provide an inference of sex discrimination, it did not decide whether or not the plaintiff in *Oncale* himself had provided sufficient evidence.\(^{276}\)

**C. Other hints of protection against sexual orientation discrimination**

There are a few district court opinions outside of the Ninth Circuit that also indicate a willingness to find protection in Title VII against harassment based on sexual orientation—some so more directly than did the *Rene* court. In *Nguyen v. Buchart-Horn, Inc.*, for example, the court stated that "[t]here is nothing in *Oncale* to prevent a plaintiff from claiming same-sex harassment where the harassment is motivated by hostility based on the victim’s sexual orientation."\(^{277}\)

In *Nguyen*, a male employee alleged that his supervisor harassed him by touching him inappropriately.\(^{278}\) The case did not involve harassment based on sexual orientation; thus, the court’s statement on this issue was not a part of its

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269. *See id.*

270. *Id.*

271. *Id.*

272. *See supra* text accompanying notes 243-44; *see also* discussion *supra* Part II.D.


275. *See id.*

276. *See id.* at 79-81.


278. *See id.* at *3-4.
holding. It suggests, however, that some courts may still be willing to find protection for discrimination based on sexual orientation in Title VII: *Nguyen* took place in 2003, and in a circuit whose court of appeals has not yet directly addressed the issue of sexual harassment based on sexual orientation. The *Nguyen* court applauded the reasoning of the Ninth Circuit in *Rene*, which it viewed as a return to the “traditional” elements of sexual harassment: unwelcome sexual physical conduct. There were murmurs of support for the idea that sexual orientation harassment is actionable in other circuits as well, although these decisions can no longer be seen as authoritative.

**D. Sex stereotyping**

Although courts have been predominately unwilling to find protection under Title VII in cases involving discrimination based on sexual orientation, courts have found that harassment based on a person’s failure to comport with gender stereotypes is actionable. The theory derives from *Price Waterhouse v. Hopkins*, a Supreme Court case dealing with opposite-sex sex discrimination. In *Price Waterhouse*, the plaintiff, a female accountant, claimed that she had been denied partnership at least in part because her coworkers found her “macho” and in need of “a course in charm school.” One partner advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,” if she wished to advance. In finding for the plaintiff, a plurality of the Supreme Court found that “in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”

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279. See id. at *3-4, *9-10.
280. See supra Part III.A.
282. See *Preston v. City of Danville*, No. CIV.A.99-461, 2000 U.S. Dist. LEXIS 20565, at *13 (E.D. Ky. Nov. 22, 2000) (court concluded that, where the plaintiff was harassed for allegedly engaging in homosexual behavior, the jury could find that the harassment was because of sex); *Patterson v. CBS*, Inc., No. 94Civ2562, 2000 U.S. Dist. LEXIS 6916, at *1-2, *17 (S.D.N.Y. May 18, 2000) (plaintiff alleged that he was harassed for being a homosexual, and the court assumed that, were these allegations true, they would constitute same-sex harassment under Title VII). These cases cannot be seen as authoritative in their circuits after *Simonton v. Runyon*, see supra notes 252-56 and accompanying text, and *King v. Super Serv.*, Inc., see supra note 256 and accompanying text.
283. 490 U.S. 228, 250 (1989). This discrimination case was not about sexual harassment, but about a denial of promotion. *Id.*
284. *Id.* at 235.
285. *Id.*
286. *Id.* at 250. The Court went on to explain that “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
SAME-SEX SEXUAL HARASSMENT

Analogizing to the same-sex context, courts have found that persons who are discriminated against by others of their same sex for failing to correspond to gender stereotypes also have a cause of action under Title VII. Indeed, there were hints of this theory in many of the cases mentioned in the first section of this Part, where the plaintiff was denied relief for sexual orientation discrimination. In **Higgins**, for example, the plaintiff had also alleged (in addition to discrimination based on his sexual orientation) discrimination based on his failure to meet "stereotyped standards of masculinity."287 The court did not state whether or not this would be a viable argument, but rather refused to consider it, since it had not been part of the plaintiff's appeal in the lower court.288 The court did state in a footnote, however, that the question of whether or not sex stereotyping could be a viable basis for same-sex discrimination had already been answered in **Oncale**; since **Oncale** stated that standards of liability applying to opposite-sex harassment cases would apply to same-sex harassment cases, "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity [under Price Waterhouse] . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."289

Then in **Bibby v. Philadelphia Coca Cola Bottling Co.**, another case involving sexual orientation discrimination, the court declared that Title VII protects against discrimination based on one's failure to comport with gender stereotypes.290 As was the case in **Higgins** and **Simonton**, the **Bibby** court found that its plaintiff had failed to argue this theory, and thus could not prevail past summary judgment.291 The court nevertheless confirmed, relying on **Price Waterhouse** and **City of Belleville**, that sex stereotyping was a viable evidentiary route for plaintiffs in same-sex harassment cases.292

In **Nichols v. Sanchez**, the plaintiff was able to successfully utilize the sex-stereotyping theory.293 The plaintiff in **Nichols** claimed he had been subject to a "relentless campaign of insults, name-calling, and vulgarities" by his coworkers because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."**Id.** at 251 (citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978), quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).


288. **See id.** at 259-60. Similarly, in **Simonton**, the court refused to consider the plaintiff's sex-stereotyping argument in his appeal of a dismissal for failure to state a claim, stating that the argument had not been "sufficiently pled." **Simonton** v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000).

289. **Higgins**, 194 F.3d at 261 n.4.


291. **Id.** at 264.

292. **Id.** at 262-63 ("although it is less clear [than evidence based on sexual desire or comparative treatment], a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.").

293. 256 F.3d 864, 874 (9th Cir. 2001).
and supervisor, taunting that centered around suggestions that he was effeminate. The plaintiff argued that he had been harassed for “failing to conform to a male stereotype,” and cited Price Waterhouse. The court agreed that Price Waterhouse has “equal force” in the context of men harassed for acting too feminine, and found that the “essence” of the abuse directed at the plaintiff was based on his perceived failure to “act as man should act.” The plaintiff was ridiculed for his feminine mannerisms and his apparent lack of interest in a female coworker. This type of harassment, the court stated, was “closely linked to gender.”

In contrast, in Sisco v. Fabrication Technologies, Inc., the plaintiff’s sex-stereotyping theory failed because the court found that he had not provided enough evidence to support his claim. In Sisco, the plaintiff complained that his supervisor had harassed him by, among other things, making sexually explicit comments, exposing himself to the plaintiff, and rubbing up against the plaintiff. The plaintiff alleged that he was harassed because he is an “effeminate man,” and that he consequently did not fit the stereotype of an oil field worker. The court, however, stated that Title VII does not protect against such a specific type of discrimination, and that, moreover, there was evidence contradicting the notion that the plaintiff was effeminate.

The sex-stereotyping theory similarly failed in EEOC v. Trugreen Ltd. Partnership. In Trugreen, the plaintiff claimed that his coworker harassed him with lewd jokes, pictures of nude women, and offensive, sexually-explicit comments about the plaintiff’s wife. This harassment, according to the plaintiff, was based on the coworker’s stereotypes about men and women. Specifically, the plaintiff argued that his coworker believed that men should have “a healthy appreciation for adult magazines and sexual banter.” The plaintiff, who was a “born-again Christian,” had expressed his distaste for “adult” material, and it was allegedly this attitude that caused the coworker to torment him. The court agreed that a plaintiff could potentially succeed under Title VII on this theory, but found that in this case, the plaintiff had not alleged sufficient evidence to support his claim.

294. Id. at 870. The conduct involved, among other things, referring to the plaintiff as “she” and “her,” teasing him for carrying his serving tray “like a woman,” and calling him “faggot” and “fucking female whore.” Id.
295. Id. at 874.
296. Id.
297. Id.
298. Id.
300. Id. at 936-37.
301. Id. at 940.
302. Id.
304. Id. at 988.
305. Id. at 993.
306. Id. at 992.
307. Id.
facts. In the court’s view, the facts warranted many other interpretations of the coworker’s behavior, such as the notion that he did not like the plaintiff because the latter was a Christian, or that he had other personal conflicts with the plaintiff. There was no evidence causally linking the harassment to the plaintiff’s gender. The court acknowledged that the harassment suffered by the plaintiff was gender-related in the sense that, but for the employee’s gender (and sexual orientation), “he would not be associated intimately with a woman,” and thus would not be subject to lewd comments about his wife. However, the court maintained that allowing cases to proceed on such a standard would “render meaningless the Seventh Circuit’s admonition that vulgar behavior is commonplace in some social circles and often bears only an incidental relationship to the gender of the person at whom such behavior is directed.”

Several courts have also denied plaintiffs relief where they suspect that the harassment was actually motivated by a belief that the plaintiff was gay or lesbian. For example, in Allen v. Mineral Fiber Specialists, Inc., the plaintiff alleged that his coworkers harassed him with suggestions that he was gay. The plaintiff, who was married, countered the defendant employer’s summary judgment motion with the argument that the harassment was motivated by his “failure to comport with male stereotypes.” The court disagreed, however, arguing that the plaintiff “presents no evidence that anyone at [defendant employer] thought he was effeminate or did not act sufficiently masculine.” Rather, the plaintiff offered only a “general statement” that he had been stereotyped. The sole inference one could make from the harassment, explained the court, was that “despite his marital status, certain coworkers thought that Plaintiff might be homosexual.”

In Webb v. International Brotherhood of Electrical Workers, the plaintiff claimed that his coworkers began subjecting him to sexual harassment after he pierced his ears. The harassment consisted of sexually explicit drawings and graffiti, coupled with frequent comments insinuating that the plaintiff was gay. The plaintiff attempted to proceed under the sex-stereotyping theory, arguing that the ridicule he suffered was based on his earrings, his large lips, and his

308. Id. at 993.
309. Id.
310. Id.
311. See id. at 994.
312. No. CIV.A.02-7213, 2004 U.S. Dist. LEXIS 1982, at *3-5 (E.D. Pa. Jan. 30, 2004). Among other things, the plaintiff claimed that the coworkers had drawn pictures in the men’s restroom of the plaintiff engaging in sexual acts with other men and had called him derogatory names and written those names on his truck. Id.
313. Id. at *4.
314. Id. at *12.
315. Id. at *13.
316. Id.
317. Id. at *19.
319. Id. at *4.
presence at nightclubs frequented by homosexuals, and that, in actuality, he was not homosexual. He also claimed that the evidence that his coworkers insulted him with names implying that he was a woman further demonstrated that his harassment was based on gender stereotyping. Again, the court disagreed with the plaintiff, stating, “although some of the harassment alleged by Webb involves ridicule of his appearance—his lips and his pierced ears—that could perhaps in some situations be motivated by gender stereotyping, the broader context of the harassment, including the more offensively obscene remarks and drawings, alleged by Webb, makes it clear that this conduct implicated sexual orientation bias.” The court went on to say that the harassment based on the plaintiff’s appearance was consistent with the notion that he was harassed on suspicion of being gay, because earrings and big lips were characteristics associated with homosexuality. Finally, the court noted that Congress had in many instances passed up opportunities to extend Title VII to protect against sexual orientation discrimination.

Other courts have been similarly reluctant to find for the plaintiff when they suspect that sexual orientation discrimination is the underlying issue. In Hamm v. Weyauwega Milk Products, Inc., the plaintiff was teased because coworkers suspected he was gay and had formed a sexual relationship with a male coworker. The court acknowledged that “distinguishing between failure to adhere to sex stereotypes...and discrimination based on sexual orientation...may be difficult,” yet, it too upheld summary judgment for the employer, finding that the plaintiff’s evidence suggested animosity based on a suspicion of homosexuality, and not gender stereotyping. In Spearman v. Ford Motor Co., the plaintiff alleged that his coworkers harassed him by calling him “bitch,” “fag,” and “pussy-ass,” putting up graffiti that implied that he should die of AIDS, using him as an example in sexual harassment training, and offering to give him hugs. The plaintiff argued that the mistreatment he suffered was due to gender stereotyping, because his coworkers “perceived him to be too feminine

320. Id. at *27, *30.
321. Id.
322. Id. at *29.
323. Id. at *30. Similarly, in Mowery v. Escambia County Utilities Authority, No. 3:04cv382-RS-EMT, 2006 U.S. Dist. LEXIS 5304, at *19-20 (N.D. Fla. Feb. 10, 2006), the plaintiff alleged he had been stereotyped where his coworkers teased him for being homosexual on the basis of plaintiff being forty years old, owning a home and truck, yet living alone and refusing to discuss his sexual partners. The court granted defendant’s summary judgment motion, finding that these stereotypes were not based on gender since they were not traits associated with femininity, but instead may have been traits associated with homosexuality. Id.
325. 332 F.3d 1058, 1060 (7th Cir. 2003).
326. Id. at 1065 n.5. The court stated that because the plaintiff had not provided enough evidence of sex discrimination, it need not address the “difficult problem” of the difference between sexual orientation discrimination and gender stereotyping. Id.
327. 231 F.3d 1080, 1082-83 (7th Cir. 2000).
to fit the male image at Ford."\(^{328}\) To support his argument, the plaintiff pointed out that one coworker had agreed that calling the plaintiff “bitch” was a way of calling him a woman, and that he had been given tasks that were traditionally reserved for women, such as window-washing.\(^{329}\) The court did not agree, however, that this behavior suggested sex discrimination; instead, it found that the record “clearly demonstrate[d]” that the harassment stemmed from work-related altercations and the plaintiff’s apparent homosexuality.\(^{330}\)

In *Dawson v. Bumble & Bumble*, the plaintiff argued that she had been discriminated against by the other employees at the hair salon where she worked for failing to conform to expectations of her gender.\(^{331}\) Specifically, she alleged that coworkers called her “Donald,” referred to her clothing as a costume, and asserted that she needed to “get fucked.”\(^{332}\) In denying the plaintiff’s claims, the court stated that in its view the plaintiff was trying to “bootstrap protection for sexual orientation into Title VII,” a move that the court in *Simonton* had specifically counseled against.\(^{333}\) The “primary focus” of the plaintiff’s charge, the court stated, was on her status as a lesbian, not on her status as a woman, since the plaintiff had compared her treatment to that of heterosexuals at the salon, rather than that of other women.\(^{334}\)

Courts have also been unwilling to find sex discrimination where they suspect that bias against *heterosexuals* is what is at issue. In *Medina v. Income Support Division*, the plaintiff cited three incidents, all involving her female supervisor, as proof of discrimination. In the first two, the supervisor sent the plaintiff emails containing sexually explicit jokes, and in the third incident, the supervisor stated at the employees’ sexual harassment training session that she “[did] not want to hear any more sexual harassment complaints, only sexual advancements.”\(^{335}\) The plaintiff’s argument was that she was discriminated against for failing to conform with gender stereotypes, but the court countered that there was no evidence that the plaintiff had not “dress[ed] or behave[d] like a stereotypical woman.”\(^{336}\) Instead, in the court’s view, the plaintiff was actually

\(^{328}\) *Id.* at 1085.

\(^{329}\) *Id.*

\(^{330}\) *Id.* Interestingly, in *Trugreen*, a case involving a straight male plaintiff, the court suggested that if the alleged harasser had used gender-based derogatory terms such as “queer,” the plaintiff might have had a better case. See EEOC v Trugreen Ltd. P’ship, 122 F. Supp. 2d 833, 994 (W.D. Wis. 1999).


\(^{332}\) *Id.* at 306-07.

\(^{333}\) *Id.* at 315 (citing Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)).

\(^{334}\) *Id.* at 316. The plaintiff referred to herself as “a lesbian who does not conform to gender norms.” *Id.* The court also based its decision on the finding that, “insofar as Dawson purports to state claims based solely on sex or gender stereotyping, the fragmentary evidence she adduces is insufficient to establish intentional discrimination.” *Id.* at 312. The comments that the plaintiff offered as evidence of sex-stereotyping seemed in reality, the court argued, to be gender neutral, particularly in light of the diverse character of the defendant’s salon. See *id.* at 309-10, 320.

\(^{335}\) 413 F.3d 1131, 1133 (10th Cir. 2005).

\(^{336}\) *Id.* at 1135.
arguing that her mistreatment was due to her failure to match up to the stereotypical woman at her workplace, which was a lesbian. 337 Her claim, therefore, was based on her sexual orientation, and, as a result, she could not look to Title VII for protection. 338

Other courts have found that the existence of discrimination based on sexual orientation does not preclude the existence of discrimination based on sex. In Schmedding v. Tnemec Co., the plaintiff alleged that he was subject to lewd conduct by his coworkers that included being taunted with derogatory names such as “homo.” 339 Since the plaintiff claimed that he was taunted for his “perceived sexual preference,” the district court dismissed his complaint for failure to state a claim, reasoning that Title VII does not protect against discrimination based on sexual orientation. 340 On appeal, the plaintiff explained that, by the phrase “perceived sexual preference,” he meant that his coworkers had “falsely labeled him as homosexual in an effort to debase his masculinity.” 341 The appeals court reversed the lower court’s decision, stating “[w]e do not think that, simply because some of the harassment alleged by [plaintiff] includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is thereby transformed from one alleging harassment based on sex to one alleging harassment based on sexual orientation.” 342

Similarly, in Fischer v. City of Portland, the plaintiff, a lesbian whose sexual orientation was known at her workplace, complained of a barrage of harassment from her coworkers. 343 Fellow employees frequently made offensive

337. Id.
338. Id. See also Kay v. Indep. Blue Cross, 142 F. App’x. 48, 50 (3d Cir. 2005) (depublished) (comments that the plaintiff was not a “real man” must be viewed along with the comments clearly based on the plaintiff’s sexual orientation); King v. Super Serv., Inc., 68 F. App’x. 659, 664 (6th Cir. 2003) (depublished) (“This record demonstrates beyond peradventure that [plaintiff] was harassed . . . because he was gay, not because he is a male.”); Bianchi v. Phila., 183 F. Supp. 2d 726, 736-37 (E.D. Penn. 2002) (plaintiff failed to offer enough evidence on summary judgment to overcome evidence indicating that the harassers were motivated by the plaintiff’s apparent homosexuality); Dandan v. Radisson Hotel Lisle, No. 97 C 8342, 2000 U.S. Dist. LEXIS 5876, at *10-11 (N.D. Ill. 2000) (rejecting plaintiff’s argument that since his coworkers did not know he was gay, their taunts regarding his supposed homosexuality must have been based on his sex).
339. 187 F.3d 862, 865 (8th Cir. 1999).
340. Id. at 864-65.
341. Id. at 865.
342. Id. In an analogous case, EEOC v. Grief Bros. Corp., No. 02-CV-468S, 2004 U.S. Dist. LEXIS 29071, at *5-7 (W.D. N.Y. Sept. 30, 2004), the plaintiff’s coworkers also called him offensive names indicating they believed he was homosexual. The defendant argued that this treatment was clearly based on sexual orientation discrimination, but the court disagreed, citing evidence that the coworkers neither knew that the plaintiff was a homosexual nor suspected him to be one. Id. at *30-31. Rather, in the court’s view, the name-calling actually carried “a non-sexual connotation of weakness or disparagement.” Id. at *31.
343. No. CV02-1728, 2004 U.S. Dist. LEXIS 20453, at *20-22 (D. Or. Sept. 27, 2004). The plaintiff in Fischer alleged sexual harassment against both her male and her female coworkers, see id. at *19-22, but here I will only address the claims against the female coworkers.
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comments relating to her sexual orientation, and mocked her appearance as too masculine.\textsuperscript{344} The plaintiff argued that she was discriminated against because she did not conform to "traditional female stereotypes," since she wore her hair short, dressed in men's clothing, did not wear make-up, and treated men as equals.\textsuperscript{345} The court acknowledged that Title VII does not protect against discrimination based on sexual orientation, but also maintained that a finding of such discrimination does not preclude a cause of action for discrimination based on sex.\textsuperscript{346} The plaintiff had provided enough evidence that her harassment stemmed from her "dress, physical appearance, and mannerisms," and the court found it "irrelevant" that the harassers may have also been motivated by homophobia.\textsuperscript{347}

\textit{Cox v. Denny's Inc.} demonstrated similar reasoning, although its facts involved discrimination against a transsexual.\textsuperscript{348} In \textit{Cox}, the plaintiff alleged that he had been both physically and verbally harassed by a male coworker, who first made sexual advances and then, when rejected, taunted the plaintiff with derogatory language.\textsuperscript{349} The defendant employer argued that it should be granted summary judgment, because the essence of the harassment was based on the plaintiff's sexual identity as a transsexual, which is not protected by Title VII.\textsuperscript{350} The court agreed that discrimination based on sexual identity does not give rise to a cause of action under Title VII, but maintained that a transsexual may nevertheless have a claim under Title VII if the discrimination is based on sex.\textsuperscript{351} The court then concluded that the plaintiff's allegations that his coworker had been motivated by sexual desire were enough to provide an inference that the harassment was based on the plaintiff's sex.\textsuperscript{352} This case thus differs from the previous cases in this section in that the "because of... sex" prong was met through evidence of sexual desire on the part of the harasser rather than through evidence of sex stereotyping. Yet, as with \textit{Schmedding} and \textit{Fischer}, \textit{Cox} provides an example of a court looking past evidence of discrimination based on sexual orientation or identity (here, the derogatory name-calling) with the view that such discrimination notwithstanding, there can still be evidence of

\begin{itemize}
    \item \textsuperscript{344} \textit{Id.} at *20-22. Specifically, one female coworker would ignore the plaintiff at work, sometimes ordering the plaintiff not to talk to her and complained loudly that she was "surrounded by all these fags." \textit{Id.} at *20-21. Another told the plaintiff that her shirt "looks like something her father would wear," and suggested that the plaintiff needed sexual intercourse with a man so that she would no longer be a lesbian, while a third coworker referred to the plaintiff as a "guy." \textit{Id.} at *21-22.
    \item \textsuperscript{345} \textit{Id.} at *25.
    \item \textsuperscript{346} \textit{Id.} at *31.
    \item \textsuperscript{347} \textit{Id.} at *32.
    \item \textsuperscript{348} No. 98-1085-CIV-J-16B, 1999 U.S. Dist. LEXIS 23333, at *6-7 (M.D. Fla. Dec. 22, 1999).
    \item \textsuperscript{349} \textit{Id.} at *1-2. According to the plaintiff, his coworker had groped him "to find out whether he was biologically a male," stating "I gonna get me some of that." \textit{Id.} at *1. Later, the coworker began to harass him daily with insults such as "fag" and "whore bitch." \textit{Id.} at *2.
    \item \textsuperscript{350} \textit{Id.} at *4.
    \item \textsuperscript{351} \textit{Id.} at *5-6.
    \item \textsuperscript{352} \textit{Id.} at *6-7.
\end{itemize}
discrimination based on sex.\textsuperscript{353}

The Ninth Circuit took the inference of sex discrimination one step further in\textit{Heller v. Columbia Edgewater Country Club}.\textsuperscript{354} In\textit{Heller}, the plaintiff alleged that her female supervisor subjected her nearly every day to offensive comments based on the plaintiff's failure to comport with gender stereotypes as well as the fact that she was dating another woman.\textsuperscript{355} Similarly to\textit{Schmedding} and\textit{Fischer}, the\textit{Heller} court found that the plaintiff could prevail on the sex-stereotyping argument, despite the evidence that the harassment was also based on the plaintiff's sexual orientation.\textsuperscript{356} The supervisor had derided the plaintiff for wearing men's shoes, and made comments such as, “I thought you were the man [in the plaintiff's relationship with her girlfriend],” both of which, in the court's view, indicated that the plaintiff did not meet her supervisor's gender expectations.\textsuperscript{357} The court maintained that the fact that the supervisor perceived the plaintiff as a lesbian “does not compel a different outcome,” and speculated that if the plaintiff in\textit{Price Waterhouse} had also been called a “lesbian” or “butch,” the Supreme Court would not have reached a different decision.\textsuperscript{358}

The\textit{Heller} court departed from the other opinions, however, in finding that sexual orientation discrimination actually fits into discrimination based on sex stereotyping.\textsuperscript{359} The evidence that the plaintiff “is attracted to and dates other women, whereas [the supervisor] believes that a woman should be attracted to and date only men” further supported the argument, in the court’s view, that the plaintiff failed to match her supervisor’s stereotype of women.\textsuperscript{360} Even further separating it from the other cases, the court believed that the plaintiff could have prevailed without using the \textit{Price Waterhouse} argument at all, stating that “[a] jury could find that [the supervisor] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.”\textsuperscript{361} Under this doctrine, presumably any plaintiff who can show that he or she was harassed due to his or her sexual orientation would be able to reach a jury, since

\begin{flushleft}
\textsuperscript{353} See id. See also Fry v. Holmes Freight Lines, Inc., 72 F. Supp. 2d 1074, 1079 (W.D. Mo. 1999) (despite evidence that the plaintiff was harassed at least in part because his coworkers believed he was gay, the court found enough evidence of discrimination based on sex to deny the defendant's summary judgment motion).

\textsuperscript{354} 195 F. Supp. 2d 1212, 1223 (D. Or. 2002).

\textsuperscript{355} Id. at 1217. According to the plaintiff, the supervisor would often refer to her as "fag" or "homo," labeled the plaintiff's shoes as "faggy," and, upon hearing that a male coworker was gay, accused the plaintiff of spreading her homosexuality to others. Id. at 1217-18.

\textsuperscript{356} See id. at 1224-25.

\textsuperscript{357} Id. at 1224.

\textsuperscript{358} See id.

\textsuperscript{359} See id. at 1223-24.

\textsuperscript{360} Id.

\textsuperscript{361} Id. at 1223. This theory was also argued by the plaintiff in\textit{Higgins v. New Balance Athletic Shoe, Inc.} See 194 F.3d 252, 259 (1st Cir. 1999). Calling it a "sex-plus" theory, the plaintiff claimed that his employer discriminated against men who "possessed certain qualities," which in his case was attraction to other men. Id. The court did not address the merits of this argument, however, finding instead that the plaintiff was precluded from arguing under this theory since it had not been raised before the trial judge. Id.
\end{flushleft}
discrimination based on one's homosexuality would not take place if the harasssee were of the opposite sex. Since no other case has taken this point of view, however, it cannot be regarded as representative.  

### E. Challenges in applying the sex-stereotyping theory

As described in Part I, there were some commentators who doubted that the sex-stereotyping theory survived after *Oncale*.  

The Court's reasoning for vacating and remanding *Doe v. City of Belleville* was not clear, and as explained, a few writers interpreted that move as a rejection of the sex-stereotyping theory advocated by the *City of Belleville* court.  

The Supreme Court did not, after all, mention this theory as a possible evidentiary route in its opinion. As one commentator pointed out, this omission was not likely to be mere oversight, since the theory was discussed in many of the amicus briefs for *Oncale*.  

Since the *Oncale* decision, however, courts have concluded that plaintiffs in same-sex sexual harassment cases may bring their claims under the sex-stereotyping theory. *Oncale* held that protection against sex discrimination applies equally to same-sex sexual harassment cases and opposite-sex sexual harassment cases; thus, the *Higgins* court argued that if a female who is discriminated against by a male coworker for failing to conform to gender stereotypes has a cause of action under Title VII, it should follow that a cause of action also exists if both persons are of the same sex.  

Regarding *Oncale*'s treatment of *City of Belleville*, the court in *Bibby* pointed out that the decision in that case was based on alternative holdings, thus, “[a]bsent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question.”  

At the same time, however, plaintiffs have not had an easy time surviving motions for summary judgment in these cases. In *Bibby*, the plaintiff had argued that by disallowing sexual orientation discrimination as a viable theory under Title VII, the court was “placing an extra burden on gay and lesbian plaintiffs

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362. See *supra* Part III.A. The plaintiff in *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762-63 (6th Cir. 2006), made a similar argument, claiming that he was stereotyped for “behav[ing] more like a woman” in his sexual practices. The court was not convinced, however, stating that the sex-stereotyping theory from *Price Waterhouse* extended only to characteristics “readily demonstrable in the workplace,” and that accepting the plaintiff’s theory “would have the effect of de facto amending Title VII to encompass sexual orientation . . . “. *Id.* at 764. See also *Dandan v. Radisson Hotel Lisle*, No. 97 C 8342, 2000 U.S. Dist. LEXIS 5876, at *11-12 (N.D. Ill. 2000) (finding that Title VII does not “stretch so far to envelop harassment based on a person’s sexuality”).

363. See *supra* text accompanying notes 42-46.

364. *Id.*


366. See *supra* text accompanying note 44.

367. See *supra* text accompanying note 289.

bringing an action for same-sex sexual harassment by requiring that such plaintiffs prove that their harassers were not motivated by anti-gay animus.\textsuperscript{369} The Bibby court maintained that this prediction was incorrect, arguing that a victim’s sexual orientation is “irrelevant,” for “once it has been shown that the harassment was motivated by the victim’s sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus.”\textsuperscript{370}

As Part III.D demonstrated, however, the Bibby plaintiff’s fears were not unfounded. Courts have had difficulty with cases in which the harassers appear to have mixed motives. In some cases, such as Schmedding and Fisher, the plaintiffs were able to prevail, even though sexual orientation discrimination may have also been involved. Many other courts, however, have granted defendants’ motions for summary judgment when there is evidence of sex stereotyping if the court suspects that the primary reason behind the alleged harassment was a belief that the plaintiff was gay or lesbian.\textsuperscript{371} Thus, although at least some courts believe that “anti-gay or anti-lesbian animus” should be no defense against sex discrimination,\textsuperscript{372} courts have struggled to apply this principle in practice.\textsuperscript{373}

One of the causes of this confusion is that, as the court in Hamm observed, there is a very thin line between sex stereotyping and discrimination based on sexual orientation. When a man is teased for being “effeminate,” or a woman for being too masculine, it is difficult to decipher whether the harassment is based on gender stereotyping or stems from animosity towards gays and lesbians. In Webb, for example, where the coworkers had allegedly harassed the plaintiff for wearing earrings, the court interpreted the harassment as stemming from the coworkers’ assumption that earrings signaled that the plaintiff was gay.\textsuperscript{374} Thus, in the court’s view, the harassment was based on sexual orientation and not on sex stereotyping. The facts, however, could just as easily be interpreted as sex stereotyping: that the coworkers bullied the plaintiff because, in their view, men should not wear earrings. The Schmedding case equally illustrates this difficulty. In Schmedding, the plaintiff had lost his claim when he characterized the harassment he faced as based on his “perceived sexual orientation,” yet prevailed

\textsuperscript{369} Id. at 264.
\textsuperscript{370} Id. at 264-65.
\textsuperscript{371} See supra text accompanying notes 312-34.
\textsuperscript{373} See supra Part III.D. Regarding mixed motives, the Court in Price Waterhouse held that an employer could “avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play such a role.” Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989). Subsequently, Congress passed the Civil Rights Act of 1991, which stated that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (1991).
\textsuperscript{374} See supra text accompanying notes 318-24.
when he re-characterized the same facts as demonstrating attempts to “debase his masculinity.”\textsuperscript{375}

These conflicting opinions suggest that the exclusion of sexual orientation discrimination as a basis for a cause of action under Title VII does not sit comfortably with the sex-stereotyping theory from \textit{Price Waterhouse}. The case law has declared that harassment based on sexual orientation is not protected, but these cases raise the question: Is discrimination based on a person’s sexual orientation itself a form of sex stereotyping? If a group of men harass a male coworker because he is gay, one might argue, they are in essence harassing him because he does not meet their view of how a man should be, i.e., he does not meet their stereotype that men should only be attracted to women. Is failing to conform to gender stereotypes because of one’s dress or manner categorically different from failing to conform to gender stereotypes because of one’s sexuality? Several scholars have argued that it is not,\textsuperscript{376} and some plaintiffs have made this argument in court, although they have been unsuccessful.\textsuperscript{377} Courts frequently respond that Congress intended only to protect “traditional” notions of sex when it passed Title VII and was not contemplating protection against discrimination based on sexual orientation.\textsuperscript{378} Another common argument is that because sexual orientation discrimination is directed towards both gay men and gay women, each sex receives equal treatment and it is therefore not sex discrimination.\textsuperscript{379} In essence, the disagreement turns on how one characterizes the discrimination—whether it is seen as discrimination against homosexuals as

\textsuperscript{375} See supra text accompanying notes 339-42. Another example is \textit{Allen}, in which the defendant was granted summary judgment on facts nearly identical to those in \textit{Schmedding}. See supra text accompanying notes 312-17.

\textsuperscript{376} See, e.g., Anthony E. Varona & Jeffrey M. Monks, \textit{En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation}, 7 Wm. & Mary J. Women & L. 67, 84 (2000) (arguing that “those who are attracted to members of the same sex contradict traditional notions about appropriate behavior for men and women. Just like the plaintiff in \textit{Price Waterhouse}, gays fail to match the stereotype associated with their group and any employment discrimination against a gay person is ‘because of sex’ under Title VII”); Toni Lester, \textit{Protecting the Gender Nonconformist from the Gender Police-Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court’s Decision in Oncale v. Sundowner}, 29 N.M. L. Rev. 89, 117 (1999) (arguing that “there should be a presumption that harassment against gays... is a form of disparate treatment sex discrimination because its effect is to police the boundaries of acceptable male-female conduct and demeanor in the workplace. This approach is in consonance with the Supreme Court’s decision in \textit{Price Waterhouse} and the underlying purpose and spirit of Title VII”).

\textsuperscript{377} See Varona, supra note 376, at 102-03.

\textsuperscript{378} See id. at 93; Lester, supra note 376, at 97. Courts also draw support from Congress’s refusal to pass bills that would extend Title VII’s protection to sexual orientation discrimination. See supra text accompanying note 255.

\textsuperscript{379} See, e.g., DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979); Edward Stein, \textit{Evaluating the Sex-Discrimination Argument for Lesbian and Gay Rights}, 49 UCLA L. Rev. 471, 490 (2001). This leaves an open question, however, as to why harassment directed only against a homosexual male, for example, is not considered discrimination because of sex. Would the presence of similarly situated women be enough to prove discrimination, or would the court require similarly situated homosexual women for an adequate comparison?
a group, or as separated into discrimination against a gay man for failing to comport with the male stereotype, and against a lesbian for failing to comport with the female stereotype. With the exception of the Heller decision, however, courts have been unwilling thus far to adopt the latter viewpoint.380

CONCLUSION

The Supreme Court’s decision in Oncale v. Sundowner Offshore Services confirmed that Title VII protects against same-sex sexual harassment, but, as many commentators have pointed out, the opinion did little to clarify exactly how the “because of . . . sex” requirement could be met.381 As this paper has demonstrated, most courts have clung to the three example evidentiary routes provided by the Court in Oncale: evidence that the harasser is homosexual, evidence that the harasser is motivated by hostility towards a specific gender, and evidence that the harasser has treated members of the two sexes differently. Of these three routes, the first evidentiary route is by far the most utilized, perhaps because plaintiffs have difficulty demonstrating gender hostility, or that coworkers of the opposite sex who are not harassed are similarly situated.

As an exception to the tendency to focus on the three evidentiary routes from Oncale, courts have also accepted the sex-stereotyping theory from Price Waterhouse as a valid “evidentiary route” in same-sex sexual harassment cases. Yet, as was demonstrated in Part III, plaintiffs have struggled to defeat summary judgment motions in these cases. Often, the evidence cited by the plaintiff in order to demonstrate discrimination based on a sex stereotype also suggests discrimination based on sexual orientation, a category of discrimination that is not prohibited by Title VII.382 Courts have had difficulty distinguishing between these two concepts, particularly where there may be mixed motives for the harassment, and the result has often been that the court will find for the employer.383 The implication of these cases is that plaintiffs bringing claims under the sex-stereotyping theory must distance themselves from any characterization of the harassment that would hint at prejudice against gays and lesbians, and focus instead on the specific stereotyping that they suffered and the way these stereotypes are connected with gender. As the Webb case indicated, however, this task will not be simple, particularly where the stereotypes are also closely linked with persons of same-sex sexual orientation.384

Outside of the sex-stereotyping theory, courts have rarely found sufficient evidence of discrimination “because of . . . sex” without employing one of the three evidentiary routes from Oncale. Yet, as discussed in Part II, the three routes in Oncale serve as instructive examples, not as the sole means by which a

380. See supra Part III.D.
381. See supra text accompanying notes 13-17.
382. See supra Part III.A.
383. See supra Part III.D-E.
384. See supra text accompanying notes 318-24.
plaintiff might prove sex discrimination. Thus, if a plaintiff is unable to demonstrate discrimination under any of those routes, a court should still consider whether or not the alleged harassment indicates discrimination “because of . . . sex.” As the case history in this article shows, courts appear to be unwilling to approach claims in this manner. Yet, since courts have at the same time generally agreed that the routes from *Oncale* were not meant to be “exhaustive,” they may be open to considering new arguments for finding sex discrimination, even if they are unwilling to formulate the arguments themselves. A plaintiff who proposes a motivation for his or her harassment outside of the established routes may therefore be successful in introducing new ways in which courts understand discrimination “because of . . . sex.”

385. *See supra* note 8 and accompanying text.
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