

THE UNFULFILLED PROMISE OF ONCALE:

**An Examination of and Proposed Solution to the Disparity Between
Same-Sex and Opposite-Sex Sexual Harassment Law**

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Navid Dayzad, Esq

dayzad@dayzadlaw.com
www.DayzadLaw.com

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I. Introduction

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex ." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court for the first time in Meritor Sav. Bank, FSB v. Vinson held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. 57, 66. Furthermore, Meritor embraced the Equal Employment Opportunity Commission's position that sexual harassment described as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" constitutes a form of sex discrimination. Id. at 66-67. As long as the harassment is sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment," it affects a "term, condition or privilege of employment" and thus violates the statute. Id. at 67.

Because sexual harassment is actionable under Title VII as a form of sex discrimination, "courts typically speak of the threshold question presented by a sexual harassment claim as being whether the plaintiff was harassed 'because of' her sex." Doe v. City of Belleville, 119 F.3d 563, 569 (7th Cir. 1995). See also, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) ("Title VII's broad rule of workplace equality" is offended when "the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender."); Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill 1988) ("the requirement remains that the plaintiff must

demonstrate that but for the plaintiff's sex the plaintiff would not have been the object of harassment.")

Moreover, courts have emphasized that mere profanity, vulgarity, and general unpleasantness in the workplace typically will not by themselves support a Title VII claim because "Title VII is not directed against unpleasantness per se but only . . . against discrimination in employment;' thus it is not any and all harassment that is actionable under Title VII, but . . . only harassment that is in some way linked to the plaintiff's sex." Doe at 575, 570 (quoting Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1009 (7th Cir. 1994)).

In one of its most recent opinions on sexual harassment, the Supreme Court held that same-sex sexual harassment is actionable under Title VII. Oncale v. Sundowner Offshore Serv., Inc., 118 S. Ct. 998, 1001-1002 (1998). In its terse decision, the Court repeatedly emphasized that in same-sex claims--as in opposite-sex claims--the plaintiff "must always prove that the conduct at issue . . . actually constituted 'discrimination . . . because of . . . sex.'" Id. at 1002. To underscore this requirement, Justice Thomas wrote a separate opinion which in its entirety stated, "I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'" Id. at 1003.

Unfortunately, however, Oncale provides few clues as to how this crucial "because of sex" requirement can be satisfied in same-sex sexual harassment claims. In this paper, I explore three different approaches courts have wrestled with in

establishing whether the harasser discriminated “because of sex” and then evaluate the viability of these approaches in light of the Oncale decision. The three approaches for establishing “because of sex” that I discuss are 1) sexual attraction toward the victim of harassment, 2) explicit sexual content of harassment, and 3) sex-stereotyping.

As I explore each of the three methods, I will establish the following thesis:

There is a double standard applied in proving discrimination “because of sex” in sexual harassment cases making it much more difficult for a plaintiff to successfully establish this element in a same-sex suit as compared to a plaintiff in an opposite-sex sexual harassment suit. I describe the disparity between same-sex and opposite-sex sexual harassment law as a “double standard” in the sense that courts, when analyzing the “because of sex” requirement, readily adopt certain assumptions and apply a lax standard in opposite-sex cases while requiring more rigorous proof in same-sex cases. Consequently, this two-tier approach renders sexual harassment law under-inclusive because it affords less protection for victims of same-sex sexual harassment--a result contrary to the spirit of Title VII. Furthermore, I explain that this double standard and under-inclusiveness stems from the definition of “because of sex” that a court embraces.

Finally, to resolve this problem and make sexual harassment law equally inclusive, I propose a two-part amendment to Title VII. First, I suggest adoption of a “because of gender” standard instead of the “because of sex” requirement. This broader standard encompasses not only biological sex, but also discrimination based on gender stereotypes, sexual activity, or gender traits. A focus on gender reflects a

more accurate description of the variables involved in sexual harassment, for it represents the intersection of biological sex with culture which together motivate sexual harassment.

The second amendment I suggest is use of a mix-motive approach in sexual harassment cases. In this way, courts will be less tempted to naively attribute sexual harassment to legitimate basis for discrimination instead of recognizing a same-sex plaintiff's case for what it is: discrimination because of gender. Admittedly, my two proposed amendments to Title VII broaden the scope of sexual harassment law. However, as I explain in my conclusion, this added breadth that results from the amendments still holds faithful to the spirit of Title VII.

II. The Double Standard

A. Establishing "Because of Sex" Through Sexual Attraction

The Supreme Court in Oncale stated that generally one way to establish discrimination "because of sex" is to show that the harasser was sexually attracted to the victim. 118 S. Ct. at 1002. This avenue is equally open to same-sex plaintiffs as long as "there is credible evidence that the harasser was homosexual." Id. Although it may appear at first blush that the same standard is being applied to opposite-sex and same-sex cases, the court clarifies that "[c]ourts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations", while in a same-sex case the plaintiff must offer "credible evidence that the harasser was

homosexual.” Id. Thus, a plaintiff bringing an opposite-sex case of sexual harassment has the advantage of a presumption that there is sexual desire and hence discrimination “because of sex.” In stark contrast, same-sex plaintiffs must carry the extra burden of proving their harasser was homosexual and thus attracted to them.

This is the case because the sexual harassment paradigm is based on the more commonplace heterosexual assumptions: There is an “assumption that sexual harassment is a function of the harasser’s sexual attraction to the harassee. Thus, the heterosexual man who sexually harasses a woman discriminates within the meaning of Title VII because (assuming he is a zero on the Kinsey scale) he is sexually uninterested in men and so would have no reason to harass a man sexually.” Doe v. City of Belleville, 119 F.3d 563, 585 (7th Cir. 1995). Perhaps it is not so outrageous for courts or juries to be more likely to infer sexual attraction and thus sexual discrimination in an opposite-sex case. Nevertheless, it presents a double standard that clearly disadvantages the same-sex plaintiff.

Specific examples of this double standard abound in lower court decisions which have grappled with this method of proving discrimination “because of sex.” In Hopkins v. Baltimore Gas & Electric Co., Judge Niemeyer explained:

When someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is “because of” the victim’s gender. This presumption is grounded on the reality that sexual conduct directed by a man, for example, toward a woman is usually undertaken because the target is female and the same conduct would not have been directed toward another male. But when the harasser and the victims are of the same gender, the presumption is just the opposite because such sexually suggestive conduct is usually motivated by entirely different reasons.

Thus, when a male employee seeks to prove that he has been sexually harassed by a person of the same sex, he carries the burden of

proving that the harassment was directed against him "because of" his sex. The principal way in which this burden may be met is with proof that the harasser acted out of sexual attraction to the employee. In McWilliams, we noted that a male employee who undertakes to prove sexual harassment directed at him by another male may use evidence of the harasser's homosexuality to demonstrate that the action was directed at him because he is a man. But we cautioned that proof of such homosexuality must include more than "merely suggestive" conduct.

7 F.3d 745, 752 (4th Cir. 1996) (citations omitted).

Judge Manion of the 7th Circuit echoes the same philosophy:

When a male worker is making paltry sexual remarks to or about a male coworker, the automatic response is not that he is saying these things because the target of the offensive talk is male. For a Title VII sexual harassment claim to exist, the target must show more, such as . . . a homosexual man was harassing another man because he was a man--a man the harasser found sexually attractive. Otherwise the inference is that the male harasser uses the sexual gutter-talk to mock, hurt, criticize, intimidate, or otherwise denigrate the other male because of some animosity, jealousy, antipathy, or even hate. Without more it is unreasonable to infer that the harassment was meted out because he is a male.

Doe at 605 (dissenting).

In an effort to rationalize this double standard, Judge Manion explains that in the typical male harassing female case,

the courts were not asked to consider whether the harassment was "because of such individual's sex" because in the typical case the discriminatory nature of the conduct is readily apparent: a woman has been targeted with offensive behavior by a man or men, but no men were targeted; Courts deal with the facts and arguments presented, so the fact that the courts have never questioned whether male-on-female harassment of an explicit sexual nature was "because of such individual's sex" does not mean that we need not look for such proof.

Id.

Using a similar analysis, Hart v. Nat'l Mortgage & Land Co., 189 Cal. App. 3d 1420 (1987) dismissed a plaintiff's cause of action alleging sexual harassment in violation of a state statute identical to Title VII. Even though the male plaintiff had been subjected to genital grabbing, attempted mounting, sexually suggestive gestures, and crude remarks by a male co-worker, the court concluded that the harassment was not "because of sex" because there was no evidence of the harasser's attraction to the plaintiff. Id. at 1424, 1426.

In contrast to this narrow view, a more cognizant court refused to submit to this blatant double standard. Mogilefsky v. Super. Ct., 20 Cal. App. 4th 1409 (1993).

Hart is of questionable value as a legal precedent. The reviewing court's failure to deal with the undeniably sexual nature of the conduct to which Hart was subjected is, to say the least, troublesome. Such conduct, whether motivated by hostility or by sexual interest, is always "because of sex" regardless of the sex of the victim. Indeed, [defendants] admit that if Hart had been a women, the conduct alleged would "unquestionably have constituted sexual harassment" . . . The Hart court's failure to mention, much less discuss this double standard leaves the opinion vulnerable to criticism.

Id. at 1416 (quoting Hart, 189 Cal. App. at 1426).

Despite most courts' reluctance to assume any sexual attraction and thus discrimination "because of sex" in same-sex cases, when the plaintiff does meet the extra burden of proving attraction, courts do find a cause of action. When a gay, male coworker asked a newly-hired male for a date and subsequently persisted with offensive sexual conversation, touching, and outright propositioning in person and on the telephone, the court found a clear case of sexual harassment "because of" the victim's sex. Yeary v. Goodwill Industries-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997). The court reasoned that the harasser targeted the plaintiff for sexual attention "because

[the plaintiff] was a male and he was attractive to [the harasser]. If true, this creates an institutional disadvantage for [the plaintiff] in working at Goodwill, simply by virtue of the fact that he is a man. He had to put up with abuse and harassment that women there did not have to endure. Id. at 448.

Analogously, in Fredette v. BVP Management Associates, 112 F.3d 1503 (11th Cir. 1997), where a gay maitre d' sexually harassed a male waiter, the court held that the waiter could maintain a Title VII claim for same-sex harassment. The court explained, "where a homosexual male propositions another male the reasonably inferred motives of the homosexual harasser are identical to those of the heterosexual harasser--i.e., the harasser makes advances towards the victim because the victim is a member of the gender the harasser prefers." Id. at 1505. The Fourth Circuit has also held that when a male plaintiff alleges same-sex sexual harassment against his supervisor and co-workers who are gay, the claim is viable under Title VII. Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 143 (1996).

Even though the Supreme Court now allows plaintiff's to bring same-sex claims by means of showing sexual interest, the double standard it advances presents troubling implications. As previously stated, there is an additional burden for a same-sex plaintiff because there is a requirement that the plaintiff offer proof of his/her harasser's sexual orientation, whereas the victim of opposite-sex harassment has no such burden. As the Doe court sagely observes, "[i]t may well be true that we have always assumed, in the familiar case of opposite-sex harassment, that the harasser was heterosexual and that his sexual orientation toward the opposite sex in some

measure attributed to the harassment. But to imbue that assumption with the legal weight of a presumption strikes us as a dramatic step in the evolution of sexual harassment law with troubling implications for claims . . . of same-sex harassment.” 119 F.3d at 588.

Besides the disadvantage of meeting an extra burden, the double standard present in using sexual attraction to establish “discrimination because of sex” causes other difficulties too. For example, it portends appalling discovery issues. An alleged harasser typically would not admit from the outset that he is gay or she is lesbian. Consequently, the plaintiff would be entitled to investigate the issue, deposing any roommates, friends, and family members. Id. at 589. Certainly this would create privacy concerns. Thus, [e]xploring the sexual orientation of the harasser would unduly burden Title VII because the focus would improperly ‘shift from an examination of what happened to the plaintiff to a pursuit . . . of the ‘true sexual orientation of the harasser,’ which undoubtedly will be ‘complicated, far-ranging and elusive.’ Christopher W. Deering, Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII’s Ban on Discrimination “Because of” Sex, Cumb. L. Rev. 231, 287 (1996-1997) (citing McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191, 1195-96 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996) (Michael, J., Dissenting)).

Moreover, categorizing a harasser as gay, straight, bisexual, or something else is not an easy task. “Few people are either entirely heterosexual or homosexual in orientation, for example--zeros or sixes on the Kinsey scale.” Id. Equally problematic

is the reality that many gays/lesbians are closeted. As such, it would be difficult for a same-sex plaintiff to prove his/her harasser was a homosexual who was attracted to the victim. Id. It becomes clear, then that this method of proving "discrimination because of sex" that Oncale offers presents a double standard that is far less useful in a same-sex claim.

B. Establishing "Because of Sex" Through Sexual Content

Reliance on sexual content is another way by which courts create a disparity between same-sex and opposite-sex sexual harassment law. There is a double standard whereby in opposite-sex cases, the explicitly sexual content of the harassment alone is enough to support "discrimination because of sex." But once again, this shortcut avenue is not available to same-sex plaintiffs:

[I]t is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against because of her sex. But courts by and large have been unwilling to make the same assumption when a man harasses another man in the workplace, however rife the harassment may be with sexual innuendo, sexual contact, and other conduct of a sexual nature. They have looked instead for proof, above and beyond the sexual content of the harassment itself, that the plaintiff was singled out for harassment because of his gender.

Doe v. City of Belleville, 119 F.3d 563, 574-75 (7th Cir. 1995).

Some courts have indeed used gender-neutral standards in holding that explicit sexual content is enough to meet the "because of sex" requirement. See, Andrews v. City of Philadelphia, 895 F. d 1469, 1482 n.3 (3d Cir. 1990) ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic

materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course.”), Cline v. General Elec. Credit Auto Lease, Inc., 748 F. Supp. 650, 654 (N.D. Ill 1990) (“The main issue in sexual harassment cases is not whether the employer harassed the employee on the basis of her gender, but whether the claimed harassment affected the terms, conditions, or privileges of the plaintiff’s employment.”).

Progressive courts have seized upon such language to hold explicit sexual language in same-sex cases also creates a presumption of “discrimination because of sex”. Doe involves a 16 year old boy who was hired by the City of Belleville to cut weeds in the municipal cemetery with a group of older men. 119 F.3d 563, 566. Doe, who wore an earring, was subjected to a relentless campaign of harassment by his male co-workers: The harassers repeatedly questioned his gender (“Are you a boy or a girl?”), and called him a “bitch”. Id at 566,568-569. One co-worker in particular, Jeff Dawe, repeated his threat to sexually assault Doe (“I’m going to take you out in the woods and give it to you up your ass”) while others encouraged Dawe (“Get a piece of that young ass.”; “Is he tight or loose?”; Would he scream or what?”). Ultimately, Dawe in an inebriated state grabbed Doe’s testicles “to determine once and for all if he was a boy or a girl.” Id. at 568-569.

The court held that it is reasonable to infer from the sexual character of the harassment itself that Doe was harassed “because of” his sex. Id. at 575. It explained that proof that a plaintiff is harassed because he is a man rather than a woman “would seem unnecessary when the harassment itself is imbued with sexual overtones” because “the premise of the hostile environment claim . . . is that the conditions of the

plaintiff's work environment have been altered in a way that made the environment hostile to him or her as a man or woman. Id. at 577-78.

As such, the harassment "was targeted specifically at [Doe] and it was explicitly sexual--it both revolved around his gender and specifically alluded to sexual conduct . . . In view of the overt references to [Doe's] gender and the repeated allusion to sexual assault, it would appear unnecessary to require any further proof that his gender had something to do with this harassment; the acts speak for themselves in that regard." Id. at 576-77. "Frankly we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender. But the overall context of the harassment alleged in this case--the name-calling, the references to sexual assault, and the intrusive intimate touching, all of which expressly invoked [Doe's] gender--certainly makes it reasonable to infer that the workplace was made hostile to him because of his gender . . . Dawe and his cohorts chose [Doe] . . . to humiliate him as a man." Id. at 580. Hence, the court avoids the double standard and draws the same presumption in a same sex case. Accord, Quick v. Donaldson Co., 90 F.3d at 1379 (verbal taunts with names such as "queer" and "pocket lizard licker" and physical aggression where plaintiff's testicles were repeatedly grabbed in and of itself may amount to sexual harassment "because of sex"). Though this line of logic is encouraging, its viability is doubtful--ultimately leaving us once again with the double standard.

An illustrative example of a court which does submit to the double standard is Easton v. Crossland Mortgage Corp which acknowledges the double standard, but justifies it by reference to gender imbalance:

In the typical hostile environment case--that is, a male supervisor makes sexually suggestive remarks to a female employee--the conduct is presumptively discriminatory. The causal link between the supervisor's conduct and the victim's harassment is the victim's gender. But for the employee being female, the supervisor would not make the offending comments; but for the fact that the victim is female, the remarks would not have been discriminatory, intimidating, ridiculing or insulting. In the male-female or female-male context, sexual and gender-oriented comments are discriminatory because the offender is expressing by words and acts that the victim is inferior because of her or his sex . . . Thus, when a male supervisor engages in conduct of a sexual nature, or that is gender-oriented, towards a female employee, he exploits a societal as well as workplace imbalance in power to disadvantage the female.

In a same-gender sexual harassment case, however, conduct of a sexual or gender-oriented nature cannot be presumed to be discriminatory. Communications among women do not carry the same societal baggage that creates the inequities Title VII seeks to correct. The sexual or gender-oriented conduct occurs within an environment removed from the concerns about male dominance and sexual violence. The imbalance of power resulting from a dominant gender disadvantaging a subservient gender does not figure into the exchanges between parties. When the alleged offender and the alleged victim share the same gender, similar sexually suggestive words and acts can take on a whole other meaning. Consequently, while the court acknowledges that there can exist intra-gender disparities where offensive conduct can be a form of gender discrimination, they cannot be generalized into Title VII . . . for they arise in situations that are too varied, individualized and unique for the courts to hold that conduct of a sexual nature or gender-oriented conduct among members of the same gender is presumptively discriminatory.

905 F. Supp 1368, 1382-83 (C.D. Cal 1995).

Also, the 5th Circuit, for example, has held "male-on-male sexual harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex." Giddens v. Shell Oil, No. 92-08533

(1993) (affirmed without published opinion). Moreover, just one month after the Seventh Circuit wrote its opinion in Doe, it retreated from its liberal stance holding that sexually charged conduct does not meet "because of sex" in same-sex cases and acknowledged that there is some tension with the analysis in Doe. Johnson v. Hondo, 125 F.3d 408 (7th Cir 1997).

More significantly, in a very terse opinion, the Supreme Court vacated the judgment in Doe and remanded the case for further consideration in light of Oncale. City of Belleville v. Doe, 118 S. Ct. 1183 (1998). Examining the standard in Oncale, it seems unlikely that a presumption of discrimination "because of sex" from explicit sexual content in same-sex cases will pass muster. Although the Court states, "[a] trier of fact might reasonably find . . . 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," it immediately cautions, "[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.'" Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1002.

Accordingly, federal courts interpret Oncale as holding that "workplace harassment will not automatically constitute sexual harassment under Title VII where the alleged statements merely involve sexual content or connotations." Higgins v. New Balance Athletic Shoe, Inc. 21 F. Supp. 2d 66, 74 (D. Maine 1998). Thus, the plaintiff "cannot merely rely on the sexually explicit nature of his co-workers' conduct to support

his claim of sexual harassment. Rather, the key issue is 'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which member of the other sex are not exposed. Id. (citing Oncale 118 S. Ct. at 1002.) See also, Holman v. State of Indiana, 24 F. Supp. 2d 909, 915 (N.D. Ind. 1998) ("After Oncale, the Seventh Circuit's recognition in Doe that harassment which is sexual in content is always actionable is no longer convincing"). Again, a same-sex plaintiff has the burden of proving "because of sex" through methods above and beyond the explicit sexual content of the harassment which suffices for opposite-sex cases.

C. Establishing "Because of Sex" Through Sex-Stereotyping

There is an additional double standard in which courts accept sex-stereotyping as evidence of discrimination "because of sex" when it is perpetrated by opposite-sex parties. However, courts are reluctant to accept sex-stereotyping as proof of sex discrimination in same-sex cases because they are quick to label the conduct as sexual orientation discrimination instead--which is not covered by Title VII. The court in Doe sagely points out this double standard: "If [the male plaintiff taunted by male co-workers] were a woman, no court would have any difficulty construing such abusive conduct as sexual harassment. And if the harassment were triggered by the woman's decision to wear overalls and a flannel shirt to work, for example--something her harassers might perceive to be masculine just as they apparently perceived [Doe's] decision to be feminine--the court would have all the confirmation that it needed that

the harassment indeed amounted to discrimination on the basis of sex.” Doe v. City of Belleville, 119 F.3d 563, 568 (7th Cir. 1995).

The notion of sex-stereotyping forming the basis of sex-discrimination begins with Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). This case establishes that Title VII does not permit an employee to be treated adversely because his/her conduct or appearance does not conform to stereotypical notions of gender. Id. It was impermissible sex discrimination for the employer to deny Ann Hopkins, an accountant, partnership because she was “macho,” needed “a course in charm school,” and “was a lady using foul language.” Id. at 235. In order to increase her chances for making partner, the employer advised her to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry. Id. Holding that the conduct constitutes sex discrimination, the Court explained, “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” Id. at 251.

In Doe, the 16 year old male plaintiff wearing an earring advanced an additional argument of sex-stereotyping (aside from the explicit sexual content of the abuse) to establish he was harassed “because of his sex” by his male co-workers. This progressive court again avoided the double standard and equally applied the principle of sex-stereotyping to this same-sex case to find proof of sex discrimination. Doe, 119 F.3d at 580. It reasoned that just as the accounting firm’s reliance on gender stereotypes in Price Waterhouse provided sufficient proof that she was denied partnership because of her sex, so too analogous stereotypes caused Dawe to harass

Doe because of his sex. Id at 581. “[T]estimony here suggests that Doe was harassed . . . in whole or in part because he wore an earring, a fact that evidently suggested to his co-workers that he was a ‘girl’ or, in their more vulgar view, a ‘bitch.’” Id. Hence, Doe presents a unique case in which the court applied a principle equally in a same-sex case and avoided the double standard.

In the same familiar pattern, however, this progressive philosophy ultimately fails. As is usually the case, courts are quick to transform a sex-stereotyping argument into a losing argument for protection of sexual orientation discrimination. The dissent in Doe exemplifies such an attitude. It explains that as a whole the evidence does not create the inference that Dawe harassed Doe because he was a male. Id. at 607. “[A]t most, it creates the possible inference that Dawe harassed [Doe] because Dawe thought [Doe] was a homosexual” or “because Dawe did not like the earring and used it as a reason to ridicule [Doe] as a means of entertainment for the other low-lives on the graveyard crew.” Id. Accord, Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (male employee called “fag” and accused of “sucking dick” was not discriminated against “because of his sex” when he was subjected to stereotyping of not being macho. Instead, the court held he was abused because of his alleged homosexuality which Title VII does not bar).

Most significantly, the Supreme Court vacated the progressive judgment in Doe, in light of Oncale. City of Belleville v. Doe, 118 S. Ct. 1183. Apparently, then, sex-stereotyping in same-sex cases does not establish the critical “because of sex” requirement.

D. Source of Double Standard

Comparing the cases described above, the root of the double standard becomes apparent: The differing treatment in same-sex and opposite-sex cases stems from the conception of discrimination the court embraces. On one hand, a minority of courts adopt a broad definition of discrimination, allowing the same method of proof to be available for same-sex cases as it is for opposite-sex cases, and avoiding creation of a double standard. In contrast, the majority of courts adopt a narrow definition of discrimination, foreclosing methods of proof for same-sex cases, and advancing the double standard.

The majority in Doe presents the clearest example of a broad definition amenable to same-sex claims. Generally, there is "discrimination because of sex" when the victim's gender is implicated by way of sex stereotyping or sexually explicit content. As such, the victim is treated in an abusive way because s/he is a woman or a man. See, Doe v. City of Belleville, 119 F.3d 563.

An even more liberal conception of sexual harassment posits that the "because of sex" requirement is not essential to establishing discrimination in sexual harassment claims. "Arguably, the Meritor Court moved away from a disparate treatment or 'but for' analysis of gender harassment, and moved toward the view that gender harassment occurs when unwelcomed physical or verbal conduct creates a hostile work environment." Chiapuzio v. BLT Operating Corp, 826 F. Supp. 1334, 1336 (D. Wyo 1993). See also, Cline v. General Elec. Credit Auto Lease, Inc., 748 F. Supp. 650, 654

(N.D. Ill 1990) ("The main issue in sexual harassment cases is not whether the employer harassed the employee on the basis of her gender, but whether the claimed harassment affected the terms, conditions, or privileges of the plaintiff's employment").

In contrast to these characterization of the discrimination requirement, more courts have adopted a stricter definition which makes it more difficult for a same-sex claim to survive. For example, Goluszek v. Smith, conceives of discrimination as encompassing an imbalance in the power of genders: "The sexual harassment that is actionable under Title VII is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person. In effect the offender is saying by words or actions that the victim is inferior because of the victim's sex." 697 F. Supp. 1452, 1456 (N.D. Ill 1988).

Using its narrow definition, the court held that Goluszek (who was taunted for not having a girlfriend or getting any "pussy", shown pictures of nude women, poked in the butt with a broom, and accused of being gay or bisexual) has no cause of action because he was a male in a male dominated environment. Id. at 1452-1454, 1456. The court in its myopic view even conceded that "[i]n fact, Goluszek may have been harassed 'because' he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace. A wooden application of the verbal formulations created by the courts would salvage Goluszek's sexual-harassment claim. The court, however, chooses instead to adopt a reading of Title VII consistent with the underlying concerns of Congress." Id. Hence, this attitude starkly portrays that once a narrow definition is embraced, a same-sex plaintiff is not likely to succeed.

Another definition which creates a double standard and difficulty for a same-sex claim is one adopted by the dissent in Doe. 119 F.3d at 603-605. Such a standard focuses on comparative evidence and contemplates that there is discrimination when, for example, a male victim is abused because he is a man as opposed to a woman and that a woman in the same situation would not be abused. Id. "Title VII does not prohibit discrimination on the basis of . . . something linked to sex . . . [but] only discrimination . . . because the victim is a man, or because the victim is a woman. Id. at 604.

Not surprisingly, such a hostile standard makes it very difficult for a same-sex plaintiff to bring a claim. The dissent in Doe boldly admits "[p]roof of discrimination against [Doe] because of [his] sex is made more difficult . . . The difficulty of proving discrimination because of the person's sex stems from the reality that when a man harasses another man it is very unlikely that he is doing so because the victim is a man. In other words, it is difficult to prove discrimination because there was no discrimination." Id. at 605-606. In its final attack, the dissent proclaims, "It will be a truly rare case of same-sex harassment where the burden [of proving discrimination] is satisfied. When a man harasses a man, or a woman harasses a woman, an inference does not arise that the harassment was because of the victim's sex." Id. at 607.

Although the Supreme Court in Oncale does not reach the extremes of the Doe dissent, it endorses the dissent's narrow analysis of discrimination which is not amenable to same-sex cases. "The Supreme court's vacation of the decision in [Doe] 'in light of Oncale' suggests that the Court may favor [the dissent's] stricter reading of

the term 'sex' over the majority's broader use of the term 'gender.'" Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 75, n.9 (D. Maine 1988).

Thus, Oncale's great concession in allowing same-sex claims--upon closer examination--turns out to be a mirage, for it leaves little room for a plaintiff in a same-sex case to successfully establish discrimination "because of sex."

III. Proposed Solution

I contend that Oncale's emphasis on a narrow definition of "because of sex" is misguided. As I discuss below, the spirit and purpose of Title VII dictates a broad, liberal interpretation of "because of sex" rather than the narrow, conservative approach Oncale adopted. See infra Part IV. Accordingly, a broad reading will eliminate the double standard and allow same-sex plaintiffs an equal opportunity to redress employment discrimination.

In order to achieve this broad reading, I argue in the remainder of the paper that in remaining faithful to the spirit of Title VII and keeping pace with the evolution of sexual harassment thereunder, Congress should amend Title VII in two ways. First, instead of the "because of sex" requirement, plaintiffs in sexual harassment cases (same-sex or opposite-sex) should only be required to prove the hostile work environment occurred "because of gender." This standard encompasses not only biological sex, but also discrimination based on gender stereotypes, sexual activity, or gender traits.

There are many reasons for this alteration. Most importantly, by encompassing all gender-related traits instead of just biological sex, this broader standard avoids the problematic double standard. Also, gender is a more significant determinant of discrimination, for it reflects the interconnection of biological sex and culture which *together* motivate sexual harassment. Finally, the “because of gender standard” still maintains its link to Title VII’s prohibition against sex discrimination.

Even with this new, broader standard, however, the problem remains that courts are quick to attribute legitimate factors--such as horseplay, prudery, or sexual orientation--to gender-based discrimination. In this way, courts summarily dismiss same-sex plaintiffs’ claims. See *supra* II. C and *infra* Part III. B. Thus, I arrive at part two of my proposal: Congress should require a mix-motive approach to Title VII claims instead of a “but for” analysis. In this manner, a plaintiff’s claim will survive as long as gender is at least one of the motivating factors in the harassment.

A. The “Because of Gender” Standard

Building on the work of Zalesne and Franke, I suggest that the focus of sexual harassment claims be proof that an employee faced a hostile work environment due to the plaintiff’s *gender*, rather than focusing only on biological sex. See generally Deborah Zalesne, When Men Harass Men: Is It Sexual Harassment?, 7 Temp. Pol. & Civ. Rts L. Rev. 395 (1998); see generally Katherine M. Franke, What’s Wrong With Sexual Harassment?, 49 Stan. L. Rev. 691 (1997). This broader “because of gender” standard eliminates the double standard against same-sex plaintiffs and promotes the

underlying purpose of Title VII—assuring a work environment free of discriminatory harassment for all people.

1. The court's present focus on biological sex

Presently, courts interpret Title VII's word "sex" in its most narrow sense to mean biological sex, as determined by a person's genitals. See, e.g., McWilliams v. Fairfax County Board of Supervisors. 72 F.3d 1191, 1195-96 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996). Accordingly, courts examine whether the discriminatory conduct occurred because of the employee's physically being male or female. Zalesne, supra at 404. They single out the X and Y chromosomes as determining a person's gender at the expense of other gender-related characteristics. Id. Furthermore, courts obviously equate biological sex with gender. Id. This narrow reading is problematic because biological sex is the least relevant aspect of sex as determinant of whether a person has a cause of action under Title VII. Id. at 397.

By assuming that "maleness and femaleness are two opposing, easily defined and mutually exclusive categories . . . [courts] perpetuate stereotyped distinction between the sexes and exclude from protection those who are singled out for adverse treatment in the workplace based on their failure to conform to gender stereotypes." Id. at 397. In short, courts have precluded claims based on the victim's self-identified and socially constructed gender. Instead, they limit sex discrimination to conduct that would not have occurred but for the employee's biological sex.

2. An enunciation of the “because of gender” standard

In contrast to this narrow definition, I urge the adoption of the “because of gender” standard. In addition to biological sex, this standard would account for disparate treatment based on all aspects of gender, including secondary sex characteristics, gender traits, sexual activity, sexual anatomy, sexual identity, gender stereotypes, or any other issues relating to sex and gender. Indeed, even sexual orientation properly fits within this standard because sexual orientation ties in directly with gender: a person’s gender identity is partly based on the sex of his/her sexual partner. “The gender of a person with whom one has sex, or is thought to have sex, is a powerful constituent of whether one is considered a woman or a man in society.”

Catharine A. MacKinnon, Amicus Brief: Oncale V. Sundowner Offshore Services, Inc., 8 UCLA Women’s L.J. 9, 32 (1997).

My proposed standard, in its entirety, is not an extreme anomaly to current sexual harassment jurisprudence because these factors are all legitimately tied to a person’s sex. But to crystallize this concept and to avoid confusion with the narrow definition of sex, I adopt the word “gender” as the focal point in determining whether discriminatory activity occurred. In sum, “because of gender” is the broadest reading of “because of sex” to mean not only biological sex, but also anything relating to sexual issues, behavior, anatomy, or identity.

3. Gender is the significant determinant of discrimination

The most compelling reason for using gender rather than the narrow definition of sex lies in the fact that most significant differences between men and women are

grounded not in biology, but in gender norms. Katherine M. Franke, The Central Mistake of Sex Discrimination: The Disaggregation of Sex From Gender, 144, U. Pa. L. Rev. 1, 2 (1995). Most instances of hostile work environment sexual harassment can be shown to be grounded in normative gender roles. Id. "Biological distinctions, therefore, are much less informative than gender distinctions. It is gender . . . which transforms an anatomical difference into a socially relevant distinction." Zalesne, supra at 406.

As I later illustrate through the use of cases, it is the feminine or masculine gender traits (or the lack thereof)--along with the genitals associated with them--that motivates discriminatory sexual harassment. For example, male victims of sexual harassment usually fail to display socially appropriate male gender norms and appear effeminate instead. Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2516 (1994). As Zalesne explains,

[A]rguably, the employee is being harassed because of his gender role identity--that is, the harassment is motivated by the employee's failure to live up to gender expectations. The same traits or behavior exhibited by a man would not be objectionable to the harasser if displayed by a woman. It is the fact that they are displayed by a man that inspires the harasser's hostility. Males who demonstrate feminine characteristics fail to meet the image society has created for men.

Zalesne, supra at 407. It is when a person does not conform to socially constructed gender roles that s/he faces the abuse of sexual harassment. Amelia A. Craig, Musing about Discrimination Based on Sex and Sexual Orientation a "Gender Role" Discrimination, 5 S. Cal. Rev. L. & Women's Stud. 105, 112 (1995). Hence, courts

should focus on the connection of the harassment to gender, for gender is the most relevant determinant of discrimination.

4. The link to Title VII's prohibition against sex discrimination

When plaintiffs are harassed due to their gender traits, it still constitutes discrimination within the embrace of Title VII because disparate treatment based on gender perpetuates sexism. As Franke describes,

[S]exual harassment--between any two people of whatever sex--is a form of sex discrimination when it reflects or perpetuates gender stereotypes in the workplace . . . Sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex, not because it is sexual, and not because men do it to women, but precisely because it is a technology of sexism. That is, it perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men.

Franke, supra at 696.

As such, it encourages men to play the role of a macho, sexual aggressor while punishing those "effeminate" men who restrain themselves from such vulgar behavior. Id. at 693, 760, 763. Similarly, enforcing such gender norms perpetuates sexism in that it encourages women to play the role of sexual objects and punishes those women who take leadership roles at work--places historically reserved for men. Id. Thus, enforcing gender norms and punishing those who do not conform based on their gender characteristics constitutes sex discrimination because it perpetuates sexist social rules.

5. Illustrative cases

To further explain the "because of gender" standard, I will illustrate its application to sexual harassment cases. It will become apparent that this standard can

effectively determine when there has been sex discrimination without placing an extra burden on same-sex plaintiffs.

a. opposite-sex cases

Steiner v. Showboat Operating Co. involves opposite-sex sexual harassment where the court, in its customary fashion, finds the plaintiff meets the “because of sex” requirement due to a presumption of sexual attraction. 25 F.3d 1459, 1464, (9th Cir. 1994). However, I will show that the uniform “because of gender” standard works just as effectively and ties into sex discrimination just as it would in a same-sex case.

Barbara Steiner was the first woman to acquire the managerial position of floor person in defendant’s Las Vegas casino. Id. at 1460. Presumably, before Steiner’s promotion, female casino employees only occupied the more traditional female role: cocktail waitress. Steiner’s male supervisor would call her “dumb fucking broad,” “cunt,” and “fucking cunt.” Id. at 1461. More significantly, the supervisor would berate her in front of customers yelling, “You are not a fucking floor man. You are a fucking casino host . . . Why don’t you go in the restaurant and suck their dicks[?]” Id.

Even though the court found the sexual content of the harassment is what made this sexual harassment, it can also be explained by using the “because of gender” approach. Steiner faced sex discrimination because she violated her gender role by occupying a traditionally male job. Accordingly, the supervisor used sexual harassment as a vehicle for enforcing gender norms, putting Steiner in her “proper” place, and diminishing her authority as floor person. Franke, supra at 764.

In his sense, the sexual harassment feminized Steiner, rendering her less competent and more sexual, while at the same time it

masculinized the male supervisor as someone who possessed both the will and the power to render his female subordinate a sex object. In a case such as this, sexual harassment is used both to police and discipline the gender outlaw: the woman who dares to do a man's job is made to pay.

Id. Hence, because Barbara Steiner did not conform to her gender norm--the role assigned to her sex--she became the victim of sex discrimination.

b. same-sex cases

This form of gender-based sex discrimination that is so easy to spot in an opposite-sex case operates in like manner with same-sex cases. For instance, Goluszek v. H.P. Smith exemplifies a male plaintiff who faces sexual harassment because of his non-conformity to his gender role. 697 F. Supp. 1452 (N.D. Ill. 1988). Goluszek was the male plaintiff who "ha[d] never been married nor ha[d] he lived anywhere but at his mother's home." Id. at 1453. He led an "isolated existence" with "little or no sexual experience." Id. He "blushe[d] easily and [was] abnormally sensitive to comments pertaining to sex." Id. Coworkers asked why he did not have a wife or a girlfriend and teased that he needed to "get married and get some of that soft pink smelly stuff that's between the legs of a woman." Id. They frequently asked if "he had gotten any pussy or had oral sex," and forcibly showed him pictures of nude women. Id. at 1453-54.

In this pre-Oncale case, the court held same-sex sexual harassment is not actionable. Even if the court did recognize same-sex sexual harassment, it is unlikely that he would meet the heavy burden of establishing "because of sex" according to the narrow definition. In contrast, his claim would survive by use of the "because of gender" in a similar fashion as Barbara Steiner's: Goluszek's coworkers used sexual

harassment to punish this “mama’s boy” for violating his gender norm; he occupied a man’s job but did not display the sexual behavior or characteristics associated with his gender. Franke, supra at 765.

Another case which illustrates the effective use of “because of gender” is McWilliams v. Fairfax County Board of Supervisors. 72 F.3d 1191 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996). The plaintiff in this case, McWilliams who had a learning and development disability, endured a campaign of harassment by his coworkers known as the “lube boys.” Id. at 1193. They asked him about his sexual activities, exposed themselves to him, put a condom in McWilliam’s food, and taunted him with remarks such as, “The only woman you could get is one who is deaf, dumb, and blind.” Id. Furthermore, the harassers tied McWilliams hands together, blindfolded him, forced him to his knees, and placed a finger in his moth to simulate oral sex. Id. On another occasion, they fondled him to the point of erection. Id. at 1199.

The court in McWilliams incorrectly concluded that the lube boys did not harass McWilliams because of his sex, but rather because of his sexual prudery. Using the “because of gender” standard, however illuminates why his claim should constituted sexual harassment under Title VII. As in Goluszek, McWilliams was sexually harassed by his coworkers “because of the plaintiff’s failure to conform to a norm of masculinity that assumed certain [characteristics] heterosexuality, sexual experience, sexual interest in and desire to objectify women, and an inclination to engage in social customs of manliness.” Franke, supra at 739. Sexual harassment was a vehicle to enforce and punish those who were insufficiently masculine.

As a final example, I consider a case of sexual harassment that has obvious homophobic overtones. In Dillon v. Frank, coworkers taunted and physically beat Dillon because they believed he was gay. 952 F.2d 403 (6th Cir. 1992). They called him “fag” and accused him of “sucking dick.” Id. at 406. In contrast to this court’s reasoning which found the harassment was not because of sex, the “because of gender” standard provides a more enlightened framework for analysis.

The derisive comments directed at Dillon’s sexual orientation is a form of discrimination “because of gender.” The category of people with whom the target has sex strongly affects society’s perception of the target’s gender identity. MacKinnon, supra at 32. Dillon was harassed as a male because only men are taunted for performing fellatio. Denigration by gay-bashing terms like “faggot” are inherently socially gendered. MacKinnon, supra at 33. Furthermore, this harassment denigrated Dillon’s gender inadequacy for failing to live up to the masculine womanizer role.

Therefore, the “because of gender” standard provides an effective means of determining discriminatory sexual harassment both in opposite sex cases and same-sex cases--without the injection of a double standard.

B. Mix-Motive Analysis

The “because of gender” requirement with its great breadth is very effective in providing same-sex plaintiffs an equal opportunity to redress discriminatory conduct because it calls attention to gender traits that are the basis for discrimination. However, the courts’ present “but for” analysis can undermine the advantages of the

"because of gender" standard: Courts ignore evidence of gender discrimination and instead focus on legitimate basis of discrimination. In this way, they dismiss a plaintiff's claim by concluding the discrimination would not have occurred "but for" personal animosity--rather than admit the discrimination would not occur but for the plaintiff's gender.

Consequently, I advance part two of my proposition which builds on the work of Robert Brookins (see generally Robert Brookins, A Rose by Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment, 46 Drake L. Rev. 441 (1998)).

Congress should amend Title VII to require a mix-motive analysis in sexual harassment claims. Accordingly, as long as gender-based discrimination constitutes one of the motivating factors (along with legitimate factors) for discrimination, the plaintiff's claim survives.

1. The courts' present "but for" analysis

Many courts use a "but for" test in analyzing sexual harassment cases. see, e.g., Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992). Under such a test, the plaintiff must establish that "but for" the fact of his or her sex, the plaintiff would not have been the object of harassment. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

Such an analysis artificially attributes a single motive as the basis for discrimination and ignores other factors that strongly influence the decision to discriminate or sexually harass. Price Waterhouse v. Hopkins, 490 U.S. 228, 240-42 (1989). Thus, some courts emphasize sexual orientation to the exclusion of gender-based factors as the reason for the discriminatory conduct. In this way, they permit

evidence of sexual orientation to obviate a search for underlying gender-based considerations. see, e.g. Dillon v. Frank, 952 F.2d 403; Doe v. City of Belleville, 119 F.3d 563, 569 (7th Cir. 1995) (Dissent). Similarly, courts hastily attribute sexual harassment between two men as horseplay and discount underlying gender-related factors. Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1502 (E.D. Va. 1996). "These courts seem content to cease analysis after finding that the harassing conduct resembles or involves horseplay, without determining: (1) if gender plays any part in the decision to subject particular males to such derogatory, humiliating 'horseplay' or (2) why the 'horseplay' involves a particular kind of sexual conduct." Brookins, supra at 503. Still other courts avoid considerations of gender by ascribing the harassment to a superficial criteria like the plaintiff's shyness, prudery, or vulnerability. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996).

2. The mix-motive paradigm

In contrast to the "but for" analysis, Price Waterhouse established the mix-motive approach for analyzing the causal connection in discrimination cases. 490 U.S. 228 (1989). Under this approach, the plaintiff need only show that gender was one of the various motivating factors in the discriminatory decision (or harassment). Id. at 241. Congress never mandated that plaintiff's have a burden of establishing a "but for" nexus. DeGrace v. Rumsfeld, 614 F.2d 796, 805 (1st Cir. 1980). Instead, Congress's "because of" language simply manifests an intent to link unlawful discriminatory intent to the protected trait, such as gender. Price Waterhouse, 490 U.S. at 242 (observing

that Title VII recognizes degrees of causality without the realm of the but-for standard). The mixed-motive approach recognizes this necessary link.

3. Mix-motive analysis in same-sex cases

Both Congress and the Supreme Court have recognized that in any given situation, human conduct is seldom amenable to a single motive. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989); see also 110 Cong. Rec. 13, 837-38 (1964) (quoting Senator Case during the Title VII debates as stating, "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.") Same-sex sexual harassment claims are usually mixed-motive claims. Brookins, supra at 501. For example, personal hostility permeate all but the most genteel sexual harassment and even if personal enmity explains some portion of the harassment, it is doubtful that is the sole explanation. Id. at 524. Thus, it makes sense to use a mixed-motive approach in sexual harassment claims because it acknowledges that other motives "may share the causal lime light with gender, without destroying the gender basis of plaintiff's prima facie case." Id. at 504.

a. horseplay and prudery

Quick and McWilliams illustrate instances where the court dismissed the same-sex plaintiff's claims by attributing the harassment to horseplay or prudery and ignoring the gender component. Quick v. Donaldson Co., 895 F. Supp 1288, 1296 (S.D. Iowa 1995); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996). A mix-motive approach would avoid this problem.

In Quick, the plaintiff was subjected to “bagging”, where the harassers repeatedly grabbed his testicles. The court readily point out the legitimate elements in bagging such as the harassers’ “non-sexual aggression.” Id. at 1296. While the court concedes bagging may involve more than horseplay, it nevertheless dismisses the claim by concluding the harassment did not occur because of Quick’s sex.

The use of a mix-motive analysis along with the “because of gender” standard would save Quick’s claim. The court would be forced to recognize the gender-based discrimination as one of the motivating factors and conclude there is a sufficient nexus to discrimination. In this case, the bagging does involve the plaintiff’s gender (in addition to horseplay) since the harassers did not attempted to bag a female by grabbing her crotch. Brookins, supra at 506. Thus, the gender component is crystallized because the tormentors bagged only one gender. Id. at 1293, n.3.

Recall also the scenario with the lube boys in McWilliams. 72 F.3d 1191. The court reasoned the harassment was due to plaintiff’s “known or believed prudery, or shyness, or . . . vulnerability to sexually-focused speech or conduct” and dismissed the case. Id. at 1196. Without the use of the mix-motive approach, “the court was able to easily evade the underlying gender component of the harassment: Shyness, prudery, or vulnerability to sexual matter is precisely the type of macho-deficient behavior . . . [that] violates a male role stereotype” and triggers this abuse. Brookins, supra at 512. With a mix-motive approach, however, showing that gender was at least one of the motivating factors for harassment--regardless of believed prudery, etc--allows the plaintiff to succeed.

Thus, as Brookins explains, the mixed-motive approach in the horseplay and prudery context can be very effective:

The . . . legitimate behavior that often veneers same-sex sexual harassment exacerbates the problem of separating lawful from unlawful conduct. Legitimate behavior among males, such a horseplay and joking, often resembles sexually harassing conduct, and thus, vigorously competes with unlawful harassing behavior for the causal limelight in same-sex sexual harassment litigation. This similarity confounds and ultimately skews but for analyses by drawing attention to superficial, legitimate, non-gender-based similarities and anyway from underlying gender-based motives that actually cause the conduct.

Brookins, supra at 523-524.

b. sexual-orientation discrimination

The mix-motive approach is especially important if a conservative Congress decides not to include sexual orientation within the definition of “because of gender” contrary to my suggestion. Courts frequently dismiss same-sex cases by attributing the sexual harassment to sexual orientation rather than to sex. see, e.g., Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (male employee called “fag” and accused of “sucking dick” was not discriminated against “because of his sex” when he was subjected to stereotyping of not being macho. Instead, the court held he was abused because of his alleged homosexuality which Title VII does not bar).

However, a mix motive approach will still allow plaintiffs to establish a nexus to discrimination through gender-based disparate treatment--regardless of any sexual orientation discrimination. For example, a plaintiff may still be able to prove discrimination because of gender since there is usually a distaste for the victim because of his gender or some gender-related trait, such as violation of a role

stereotype in conjunction with aversion to his sexual orientation. Brookins, supra at 513; Zalesne, supra at 410.

Zalesne explains another reason why sexual orientation discrimination should not foreclose a claim based on gender discrimination: feminine gender traits in men and gay male sexual orientation are far from overlapping categories. Zalesne, supra at 410. There are effeminate men who are not gay, and gay men who are not effeminate. Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 57 (1995). Hostile environment harassers generally target anyone who is effeminate, whether gay or not, for the motive behind sexual harassment often is to drive out of workplace all who contaminate it "with the taint of feminine passivity." Id. Thus, gender-based discrimination against effeminate men--distinct from sexual orientation discrimination--provides an avenue of relief with the mix-motive approach.

IV. Conclusion: Viability of My Proposal

Despite its advantages, my proposal poses a few potential problems. As with any legal theory, one problem is the potential for misinterpretation. Linda B. Epstein, What Is a Gender Norm and Why Should We Care? Implementing a New Theory in Sexual Harassment Law, 51 Stan. L. Rev. 161, 173 (1998). Since the judiciary cannot even agree on what violates current sexual harassment doctrine, it may have difficulty determining when gender norms are illegally being enforced. Id. Admittedly, the concepts of gender norms and gender identity are somewhat abstract and fuzzy.

Also, “the because of gender” standard will be less appealing to conservatives as compared to the traditional “because of sex” requirement. Id. The traditional sexual desire paradigm allows judges to engage in paternalistic protection of women from sexual violation, while relieving them of the responsibility to redress broader gender-based forms of disadvantage at work. Id. “In other words, putting a stop to sexual advances on chaste women in the workplace is acceptable; forcing the underlying structures of the workplace to change in order to meet . . . the broader mandate of Title VII is far more radical and perhaps too intrusive for a conservative judiciary to contemplate. Id.

In addition, the mix-motive framework has limited effect. The mix-motive analysis will effectively encourage a court to recognize the gender-based component of the sexual harassment and hold the harasser liable. However, the harasser may rebut that regardless of the gender component, the harassment would occur anyway, for example, due to the plaintiff’s sexual harassment. In such a case, even though the harasser will still remain liable for his conduct, the evidence from his rebuttal could reduce the damage award to the plaintiff.

The most obvious and significant obstacle to my proposal is that it expands the scope of Title VII by including more bases of discrimination related to gender. However, for the following reasons, this should not hinder this new standard.

The legislative history of Title VII provides little guidance as to the breadth or narrowness of protection based on sex. As a matter of fact, Virginia Representative Howard Smith proposed the addition of “sex” to the civil rights act in an effort to derail

the bill. Charles Whalen & Barbara Whalen, The Longest Debate 84 (1985). There was very little debate on the issue and consequently "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'". Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986); see also General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976) ("The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity.") What is evident, though, is that Congress intended for Title VII to prohibit employment discrimination against anyone, whether male or female. 110 Cong. Rec. 2578 (1964) (Rep. Celler states it was the authors' intent that Title VII would "cover white men and white women and all Americans.") Thus, legislative history does not lend support to Oncale's narrow reading; if anything it advises the contrary.

A more informative source for interpretation of the "because of sex" requirement is the court's previous treatment of Title VII and their interpretation of its purpose. Examination of this area reveals that a broad reading is consistent with the spirit of the Civil Rights Act. In a previous decision, the Supreme Court has stated that the Congressional intent behind Title VII is "'to strike at the entire spectrum of disparate treatment of men and women'" Meritor, 477 U.S. at 64 (quoting Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978)). Hence, courts have properly read Title VII's prohibition of sex discrimination broadly. See Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (Title VII's "language evinces a Congressional intention to define discrimination in the broadest

possible terms”). Furthermore, the federal courts have routinely held that Congress intended for Title VII to be construed broadly:

[Title VII’s] language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unrestrictive . . . We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of . . . discrimination.”

Rogers, 454 F.2d at 238.

It is not unusual for courts to look at the overall purpose of the statute when Title VII is ambiguous. See United Steelworkers of America v. Weber, 443 U.S. 193, 200-04 (1979) (interpreting Title VII “against the background of the legislative history . . . and the historical context from which the Act arose”). It is apparent that the main purpose of Title VII is to bring equal opportunity in employment. See 110 Cong. Rec. 13166 (1964). For example, Griggs v. Duke Power Co. explains that

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or [sexual] classification.

401 U.S. 424, 429 (1971). Thus, rendering Title VII as impotent by means of a double standard for plaintiffs “who are sexually harassed by one who is fortuitously a member of the victim’s own gender group substantially inhibits the purpose of the statute from being realized.” Christopher W. Deering, Same-Gender Sexual Harassment: A Need to

Re-Examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because of" Sex, Cumb. L. Rev. 231, 271 (1996-1997).

Despite these clear indications pointing to a liberal reading of sex in Title VII, Oncale's constrictive interpretation forecloses such possibility. See supra Part I. As a specific example, one federal court has considered the "because of gender" standard similar to the one I have postulated, and concluded that Oncale "limit[s] the viability of . . . a gender-based, as opposed to sex-based, approach to same-sex sexual harassment." Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 75, n.9 (D. Maine 1988).

Because it is now beyond the federal judiciary to adopt the "because of gender" standard in combination with a mix-motive approach, I urge Congress to amend Title VII to incorporate these modifications. Only in this way will the double standard be destroyed and finally afford same-sex plaintiffs a viable avenue for redressing sexual harassment in the workplace.