THE PLIGHT OF SAME-SEX HARASSMENT VICTIMS UNDER TITLE VII: WHY SEXUAL ORIENTATION DISCRIMINATION SHOULD BE RECOGNIZED AS A FORM OF SEX STEREOTYPING

*Sonya K. Parrish**

I. INTRODUCTION

Antonio Sanchez was employed as a waiter for a local chain of restaurants in Washington State. He has effeminate traits that were often pointed out to him by his co-workers.[1] Throughout his employment, Sanchez was continually harassed by fellow workers who mocked him and told him that he carried his serving tray "like a woman."[2] They referred to him as "she" and "her" and taunted him with derogatory names that implied he was gay or womanly.[3] Sanchez complained to his general manager and an assistant manager, but no action was taken until he finally reported the treatment to the company's human resources director.[4] After four or five "spot checks," whereby the director spoke only once to Sanchez and never to any of the offending employees, Sanchez walked out on his job.[5] He then filed a charge with the Equal Employment Opportunity Commission, alleging he was a victim of harassment "because of sex" in violation of Title VII of the Civil Rights Act.[6] Sanchez alleged sexual stereotyping, claiming he was harassed because he did not act how others perceived a man should act.[7]

Meanwhile, in Las Vegas, Nevada, Medina Rene was on a team of all-male butlers who worked on the twenty-ninth floor of one of the largest casinos in the valley.[8] Unlike Sanchez, Rene is an openly gay man, a fact known to his

* J.D. Candidate for 2004, William S. Boyd School of Law, University of Nevada, Las Vegas; B.A. and B.S., University of California, Davis (1997). I would like to thank Professor Ann C. McGinley for her contributions to early thoughts on this topic.

[1] *See* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 870 (9th Cir. 2001).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 871.

[6] *Id.* at 874; *see also* 42 U.S.C. § 2000e-2(a)(1) (2000) (making it unlawful 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 . . .").

[7] *Nichols*, 256 F.3d at 874.

[8] *See* Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001), *reh'g en banc*, 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1573 (March 24, 2003).

co-workers. For two years, Rene's co-workers harassed him daily.[9] They made crude and demeaning remarks, calling him "sweetheart" and "doll," whistling at him and giving him sexually-oriented "joke gifts."[10] His complaints to superiors were to no avail.[11] Like Sanchez, Rene filed a complaint, alleging he had been sexually harassed in violation of Title VII.[12] Rene stated in his complaint that he was harassed because he is gay.[13]

The circumstances underlying the claims of these two victims are strikingly similar, the difference being that Sanchez's harassers presume he is gay, while Rene's harassers know he is gay. Both men suffered name-calling and sexual comments, although Rene suffered them on a daily basis and also received sexually explicit gifts. In the Ninth Circuit, Sanchez has a valid sexual harassment claim based on sexual stereotyping. Rene, however, has no cause of action because his harassment allegation is based on the fact that he is gay. The Ninth Circuit has held, absent some further evidence such as physical touching of a sexual nature, sexual orientation discrimination is not cognizable under Title VII.

This note will examine the treatment of "same-sex" harassment victims like Sanchez and Rene in the American court system. Part II looks at the history of sexual harassment and illustrates the progression of harassment "because of sex" to include sex stereotyping and same-sex harassment. In doing so, this note focuses on the Supreme Court decisions that make such claims actionable. Part III examines the shift in understanding of the term "because of sex" as it has moved from a strict biological interpretation to a broader gender-based definition of "sex." Part IV compares the plight of Antonio Sanchez and Medina Rene in an effort to make sense of why the Ninth Circuit, absent some type of physical harassment of a sexual nature, would find relief for one harassment victim but not the other. This comparison illustrates the difficulty in distinguishing between sexual stereotyping and sexual orientation discrimination within the context of same-sex harassment. It also reveals why sexual orientation discrimination should be recognized as a form of impermissible sex stereotype harassment. Finally, Part V of this note shows the growing trend toward recognizing sexual orientation as a protected category of Title VII of the Civil Rights Act, noting that protection for victims of this type of discrimination is not only warranted, but is inevitable.

II. THE PROGRESSION OF HARASSMENT "BECAUSE OF SEX" TO INCLUDE SEX STEREOTYPING AND SAME-SEX HARASSMENT

The text of Title VII of the Civil Rights Act explicitly states that "it shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion,

---

[9] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc decision).
[10] *Id.*
[11] *Rene*, 243 F.3d at 1207 (panel opinion).
[12] *Rene*, 305 F.3d at 1064 (en banc decision).
[13] *Id.*

sex or national origin . . . ."[14] However, the statute gives no guidance as to what "because of sex" actually means.

Congressional debates and legislative history are not helpful in interpreting the meaning of "sex" in the statute because the term "sex" was proposed and added to the prohibitions of Title VII with little discussion or thought. "Sex" was not included in the list of protected categories until supporters of the Equal Rights Amendment ("ERA") began a campaign to include the category.[15] ERA supporters urged Congressman Howard Smith, a conservative Virginian and long-time supporter of the ERA, to make a motion to add "sex" to the Civil Rights Act.[16] Though Smith supported equal rights for women, he had opposed the Civil Rights Act for being an impermissible regulation of private business.[17] Congressman Smith's motion to add "sex" to the Act, a category he thought sufficiently different from that of race or religion, was actually an attempt to thwart passage of the entire Act.[18] As the language of the statute reflects, this attempt backfired; "sex" was added to the bill, and the concept of what constitutes discrimination "because of sex" has evolved ever since.[19]

A. Meritor Savings Bank v. Vinson: *The Development of Sexual Harassment as a Cognizable Claim Under Title VII*

One major step in the evolution of discrimination "because of sex" was the recognition of sexual harassment as a form of sex discrimination. In *Meritor Savings Bank v. Vinson*, the Supreme Court acknowledged that, because the term "sex" was added to Title VII at the last minute and with scant discussion in Congress, courts have been left with little guidance in interpreting the Act's prohibition of sex discrimination.[20] To aid its interpretation, the Court looked to the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex.[21] In defining actionable Title VII sexual harassment, the Guidelines outline workplace conduct that may be prohibited.[22] Examples of such conduct include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[23] The Guidelines provide that such misconduct "constitutes prohibited 'sexual harassment,' whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"[24] Thus, the *Meritor* Court

---

[14] 42 U.S.C. § 2000e-2(a)(1) (2000).

[15] Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 23 (1995) [hereinafter *Central Mistake*].

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

[20] *Id.*

[21] *Id.* at 65.

[22] *Id.* (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1985)).

[23] *Id.*

[24] *Id.*

recognized not only economic harm to sexual harassment victims, but also harm to their dignity that results from the unwelcome conduct.

In addition to the EEOC's interpretation of discrimination because of "sex," the *Meritor* Court looked to the plain language of Title VII, noting an absence of language limiting discrimination to that which is "economic" or "tangible."[25] The statutory language includes the phrase "terms, conditions, or privileges of employment," inferring a congressional intent to "strike at the entire spectrum of disparate treatment of men and women."[26] Based on these considerations, the Court held that a plaintiff may establish a violation of Title VII by showing discrimination based on sex that leads to a "hostile work environment."[27] According to this theory, workplace conduct is actionable when it is unwelcome and affects a "term, condition, or privilege" of employment.[28] This conduct must be both objectively and subjectively severe or pervasive, actually altering the conditions of employment.[29] Mere horseplay or stray offensive utterances are generally insufficient for an actionable claim.[30]

Even though Vinson's involvement in a sexual relationship with her supervisor was "voluntary," the Court rejected the argument that her claim should fail on that basis.[31] The Court would not provide a defense under Title VII just because Vinson was not forced to participate in sexual conduct with her boss against her will.[32] Rather, the material component of a sexual harassment complaint is that the alleged sexual advances were "unwelcome."[33] Thus, the appropriate question is not whether the victim of sexual harassment voluntarily participates in the sexual activity, but whether the victim indicates by words or conduct that the advances are unwelcome.[34] This approach by the *Meritor* Court validated the lower courts' treatment of sexual harassment claims based on EEOC Guidelines and precedent from racial harassment claims. However, this approach did not end the inquiry regarding exactly what discrimination "because of sex" means.

B. Price Waterhouse v. Hopkins: *Recognition of "Sexual Stereotyping" as a Form of Sexual Harassment*

Three years after deciding *Meritor*, the Supreme Court had an opportunity to test the limits of what constitutes discrimination "because of sex." In *Price Waterhouse v. Hopkins*, Ann Hopkins brought a suit against her employer for

---

[25] *Id.* at 64.
[26] *Id.* (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).
[27] *Id.* at 66.
[28] *Id.* at 67.
[29] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993) (setting out objective and subjective standards for determining whether conduct is severe enough to create a hostile work environment). In order to meet the subjective standard of severity, the victim must actually perceive the environment as hostile. In order to satisfy the objective standard of severity under *Meritor*, the environment must also be objectively hostile or abusive to a "reasonable person." *Id.* at 21-22.
[30] *Meritor*, 477 U.S. at 67.
[31] *Id.* at 68.
[32] *Id.*
[33] *Id.*
[34] *Id.*

failure to promote her to partner, alleging she had been discriminated against on the basis of sex.[35] Hopkins had been employed with Price Waterhouse for five years, and had just secured a major contract with the Department of State worth twenty-five million dollars, when the partners in her office proposed her as a candidate for partnership.[36] The trial court found Hopkins' negotiations secured more major contracts than any other partnership candidate proposed in that year.[37] The trial court also found that Hopkins was the only woman out of eighty-eight candidates considered for partnership.[38] Many partners in Hopkins' office gave positive evaluations of her work performance, noting she was "'an outstanding professional' who had a 'deft touch,' a 'strong character, independence and integrity.'"[39] Based on these evaluations, as well as positive client comments, the trial court found that Hopkins was "generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked."[40]

However, this drive to succeed often came across as *too* pushy. In fact, she had been counseled by partners to improve her relations with staff members, many of whom found her "brusque" and "unduly harsh."[41] At trial, Hopkins testified that despite her success in securing major contracts for the partnership, she was criticized by certain partners for her aggressive behavior. She was called "macho" and was told that she "overcompensated for being a woman."[42] Her use of profanity was also criticized, not merely for its content, but "because it's a lady using foul language."[43] Most advantageous for Hopkins' case was the advice given by a partner that her chances for partnership would improve if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[44] In short, the same aggressive behavior that made her a successful producer for the company was seen as inappropriate behavior for a female partner. This dynamic created an impossible "catch 22."[45]

In analyzing the language of Title VII with respect to Hopkins' case, the Supreme Court found that the prohibition of discrimination "because of sex" meant that "gender must be irrelevant to employment decisions."[46] In the context of sex stereotyping, the Court held that "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."[47] In Hopkins' case, aggressiveness is an essential requirement of her job, creating a double bind: if she behaves too aggres-

---

[35] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[36] *Id.* at 233.
[37] *Id.* at 233-34.
[38] *Id.* at 233.
[39] *Id.* at 234.
[40] *Id.*
[41] *Id.* at 234-35.
[42] *Id.* at 235.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 251.
[46] *Id.* at 240.
[47] *Id.* at 250.

sively she will be fired, while the same would be true if she does not act aggressively enough.[48] The Court found that Title VII was designed to lift women out of this bind and "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[49] However, to have an actionable claim based on sex stereotyping, the plaintiff must show that the employer did, in fact, rely on gender when making its adverse employment decision.[50] Stereotypical remarks will always be evidence that gender was a motivating factor, but they may not always be enough.[51]

Though the gay and lesbian community viewed the Court's opinion in *Price Waterhouse* as a positive step towards prohibiting sexual orientation discrimination, lower courts remained hesitant to question gender roles and continued to find that "hostile work environment" sexual harassment was not cognizable in a unisex workplace.[52] It was nearly a decade before the Supreme Court addressed the issue of "same-sex" harassment.

C. Oncale v. Sundowner: *Same-Sex Harassment Prohibited Under Title VII*

The Supreme Court has not specifically addressed whether men have an actionable claim under Title VII for sexual stereotyping. However, the Court's decision in *Oncale v. Sundowner Offshore Services* indicates that males should be equally protected under this theory.[53] Joseph Oncale worked as a roustabout on an oil platform with an all-male crew. During his employment, he was forcibly subjected to humiliating sex-related acts by his co-workers and was threatened with rape.[54] These acts included multiple physical assaults of a sexual nature.[55] When complaints to supervisory personnel failed to end the harassment and produced no disciplinary action, Oncale quit his job and filed a complaint alleging he was discriminated against in his employment "because of sex."[56] The trial court held that Oncale had no cause of action as a male against male co-workers.[57] The Supreme Court disagreed, finding nothing in the statutory language suggesting that same-sex harassment claims were excluded from the scope of Title VII.[58]

The *Oncale* Court listed examples of what might constitute same-sex harassment. For instance, same-sex harassment "because of sex" may be proven by credible evidence that the harasser was homosexual.[59] However, harassing conduct "need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[60] A cause of action may also exist if a female victim can sufficiently prove that she was harassed in such "sex-specific

---

[48] *Id.* at 251.
[49] *Id.* (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
[50] *Id.*
[51] *Id.*
[52] *See Central Mistake*, *supra* note 15, at 96.
[53] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).
[54] *Id.* at 77.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 79.
[59] *Id.* at 80.
[60] *Id.*

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."[61] Likewise, a plaintiff may offer comparative evidence to show how the harasser treats members of both sexes in a mixed-sex workplace, a situation commonly referred to as the "equal opportunity harasser."[62]

Acknowledging lower court arguments that male-on-male sexual harassment was not the "principal evil" Congress intended to protect when enacting Title VII, the *Oncale* Court stated: "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[63] The Court reasoned that citizens are ultimately governed by the provisions of our laws, rather than the principal concerns of our legislators.[64] Thus, same-sex harassment may be recognized when conduct is so objectively offensive that it alters employment conditions. The Court also emphasized that objective severity should be judged from the perspective of a reasonable person in the victim's position while considering the surrounding circumstances.[65] This includes paying close attention to the social context in which the victim experiences the unwelcome behavior of his or her aggressor.[66]

The examples set forth in *Oncale*, though helpful, have resulted in confusion among lower courts. Some courts read the list as exhaustive, limiting remedies accordingly.[67] Other courts equate same-sex harassment as a form of sexual orientation discrimination and dismiss the case for not stating a cognizable claim under Title VII.[68] However, the *Oncale* Court never suggested these were the only possible ways to bring a same-sex harassment claim. In fact, the Court stated: "[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.'"[69] The language – "whatever evidentiary route" – indicates that a plaintiff may choose any path to prove the requisite discrimination and is not bound by the examples set forth in *Oncale*. Nonetheless, several courts continue to read such limitations into the language of *Oncale*.[70] At this

---

[61] *Id.* This is often called the "queen bee syndrome." *See* Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 170-71 (2002) (describing "queen bee" syndrome, but noting that existence of a "queen bee" is "most likely over-reported and largely anecdotal").

[62] *Oncale*, 523 U.S. at 80-81. *See also* Kyle F. Mothershead, *How the "Equal Opportunity" Sexual Harasser Discriminates on the Basis of Gender Under Title VII*, 55 VAND. L. REV. 1205 (2002).

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

[64] *Id.*

[65] *Id.* at 81.

[66] *Id.*

[67] *See* Matthew Fedor, *Can* Price Waterhouse *and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of* Oncale *Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455, 468-75 (2002).

[68] *Id.*

[69] *Oncale*, 523 U.S. at 81.

[70] Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1125 (D.C. Cir. 2002) (noting that "plaintiffs in same-sex harassment suits can survive summary judgment by making a plausible showing according to one of the three *Oncale* methods"); King v. Super Serv., Inc., 2003 WL 21500008 (6th Cir. June 26, 2003) (relying on the three examples given in *Oncale*);

time, only the Ninth Circuit recognizes a claim for same-sex sexual stereotype harassment.[71] However, as discussed below, even the Ninth Circuit has experienced difficulty drawing the line between sexual stereotyping and sexual orientation discrimination. This difficulty will continue to exist until sexual orientation discrimination is recognized as a form of prohibited sexual stereotyping.

III. What Is the Meaning of "Because of Sex"?: The Movement from a Biological or Anatomical View of Sex to a Gender-Based Definition of Sex

Part of the difficulty in separating sexual orientation discrimination from sexual stereotyping lies in the fact that definitions of sex and gender have continually evolved throughout the history of sexual discrimination jurisprudence. In an article lamenting the "disaggregation of sex from gender," Katherine Franke tracks the definitions of "sex" and "gender," noting how the Supreme Court's perception has changed over time.[72] These perceptions have been clouded by the Court's oversight or refusal to clearly state what it means by the "characteristic that is sex."[73] This problem is compounded by the absence of Title VII legislative history interpreting discrimination "because of sex."[74]

This lack of direction has led many lower courts to read Title VII as a prohibition of discrimination based on biological sex – that an individual's biological or anatomical sex should be irrelevant in employment decisions.[75] Under this theory, one can only be discriminated against "because of sex" when the individual is treated differently because of his or her status as a man or a woman, which is the "biological fact" of the individual's sexual identity.[76] Basing employment decisions on an individual's biological sex, which defines the individual from the moment of birth and stems from "unalterable, biological traits," is just as unfair as arbitrary discrimination against an individual because of his race.[77] In both instances, the individual has no power to change his or her circumstances, and membership in the disfavored category generally has little to do with an individual's ability to perform the functions of a job.

Hampel v. Food Ingredients Specialties, Inc., 729 N.E.2d 726 (Ohio 2000); *but cf.* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2000) (noting that, based on the Supreme Court's opinion in *Price Waterhouse*, "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."); Schmedding v. Tnemec Co., Inc., 187 F.3d 862, 865 n.4 (8th Cir. 1999) (noting that limiting relief to the three scenarios presented in *Oncale* was a misguided reading of the case because "[w]hile *Oncale* does recite these three methods of proving sexual harassment, it refers to them as examples of 'evidentiary routes' a plaintiff might 'choose [ ] to follow' in establishing his case.").

[71] *See* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001).

[72] *See generally Central Mistake*, *supra* note 15.

[73] *Id.* at 13.

[74] *See supra* text accompanying notes 14-19.

[75] *Central Mistake*, *supra* note 15, at 31.

[76] *Id.* at 31-32.

[77] *Id.* at 32.

The theory that "because of sex" means "because of biological or anatomical sex" was seriously challenged when courts began facing claims of sex discrimination by "transgendered" individuals.[78] Courts struggled with how to define rights for individuals who had previously been a member of the opposite sex. For example, when faced with a man and a transgendered woman seeking a marriage license, an Ohio court declared: "it is generally accepted that a person's sex is determined at birth by an anatomical examination by the birth attendant."[79] Thus, once a baby is identified as either a boy or girl, this becomes the person's "true sex" for eternity,[80] no matter what external changes an individual may go through.

However, current gender theory has moved away from the concept that "sex" refers only to the anatomical and biological distinctions separating men and women, recognizing that the term "sex" also encompasses gender and the characteristics seen as appropriate in an individual's sex.[81] This shift was embodied in the Supreme Court's holding in *Price Waterhouse* that "gender must be irrelevant to employment decisions."[82] It is clear from that opinion that those in charge of making employment decisions may not refuse employment or promotion to an individual for failing to comply with gender norms associated with his or her biological sex. What is not as clear in the aftermath of *Price Waterhouse*, and even *Oncale*, is just how same-sex sexual stereotyping and sexual orientation discrimination can be distinguished. The result has been a backlash in this area of sexual harassment law, causing courts to regress to the limiting biological definition of "sex," which offers little relief to a victim when the harasser is the same sex.

Kathryn Abrams addressed the problem of same-sex sexual harassment by comparing sexual harassment to racial harassment.[83] Abrams noted that Title VII's inclusion of discrimination because of "color" and "national origin" enabled courts to uphold cases brought by plaintiffs against alleged harassers that appeared to be in the same protected "race" as the plaintiff (such as a light skinned black person bringing a claim against a darker skinned black person).[84] It has not been nearly as easy for individuals filing claims against others within the same protected category of "sex" (such as the effeminate man bringing a cause of action against his more masculine harasser).[85] Courts dealing with early cases of same-sex harassment found causes of action only where the alleged harasser was homosexual.[86] In essence, this followed the theory that "because of sex" meant biological or anatomical sex, whereby a plaintiff could prevail only by showing that he would not have been harassed "but for his

---

[78] *Id.* at 33-51.

[79] *Id.* at 52 (quoting *In Re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 832 (Ohio Ct. Com. Pl. 1987)).

[80] *Id.* at 52-53.

[81] 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, 10 (1995).

[82] Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

[83] Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2510-17 (1994).

[84] *Id.* at 2503-09.

[85] *Id.* at 2510-17.

[86] *Id.* at 2511.

sex."[87] Because of judicial reliance on the biological theory of sex, Title VII did not protect male plaintiffs who did not fit neatly into their gender category or were uncomfortable with sexual conduct or discussions in the workplace.[88]

Ideally, courts should recognize that like race, there are many "shades" in the gender spectrum, and harassers are often motivated by animosity towards an individual who rests somewhere in between the feminine or masculine extremes. Instead, courts seem reluctant to veer from the traditional understandings of "sex." Since legitimate sexual harassment claims by these plaintiffs cannot pass the "but for" test,[89] such claims continually fail, even after the Supreme Court's decisions in *Price Waterhouse* and *Oncale.*

One reason lower courts may be uneasy about extending the stereotype theory of sexual harassment to same-sex harassment claims is that throughout its opinion in *Oncale*, the Court did not once cite *Price Waterhouse*.[90] This makes it questionable whether the Court intended to address sex stereotyping among members of the same sex. However, *Price Waterhouse* also dealt with an adverse employment action (the denial of a partnership) by Hopkins' supervisors. This is vastly different from co-worker harassment. This may be a "can of worms" the Supreme Court did not mean to open in regard to sexual stereotype discrimination since it is often hard to distinguish between normal workplace banter between co-workers and actionable harassment.

Furthermore, while the *Oncale* Court recognized that same-sex harassment may be actionable, it did not decide whether Oncale was subjected to a hostile work environment. Instead, the Court remanded the case for the lower court to decide.[91] Even though the Court stressed that nothing in Title VII infers that same-sex harassment claims be excluded,[92] it appears that many courts are unwilling to recognize most of these claims. Thus, while the *Oncale* opinion opened the door to the possibility that claims of same-sex stereotype harassment may be actionable, it has not given lower courts, with the exception of the Ninth Circuit, the confidence to proceed under this theory.

IV. A Comparison of Two Cases in the Ninth Circuit

Thus far, only the Ninth Circuit has braved the waters that lie between same-sex harassment and sexual stereotyping, but it has not done so without its share of confusion. An examination of two cases will show how difficult it has been for the Ninth Circuit to draw the line, both factually and morally, between sex stereotyping and sexual orientation discrimination in same-sex harassment cases. This examination illustrates the need to treat both claims equally.

---

[87] *Id.*

[88] *Id.* at 2512.

[89] *Id.* at 2511-12. Using the "but for" test, a plaintiff would have to show that he or she would not have been discriminated against "but for" his or her sex.

[90] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[91] *Id.* at 82.

[92] *Id.* at 79.

A. Nichols v. Azteca Restaurant Enterprises, Inc.: *Discrimination "Because of Sexual Stereotyping"*

Antonio Sanchez was employed with Azteca Restaurants for nearly four years.[93] During his tenure with Azteca, Sanchez endured ongoing verbal abuse by several male co-workers and a supervisor, who based their comments on his effeminate characteristics.[94] Specifically, Sanchez testified that male co-workers mocked him for walking and carrying his serving tray "like a woman."[95] They referred to him as "she" and "her," and called him a "faggot" and a "female whore."[96] These offensive taunts occurred at least once a week and often several times within the same day.[97] In addition to offensive comments, Sanchez was chastised for not having sexual intercourse with a female co-worker who was a friend.[98] This behavior was clearly against company policy. Sanchez complained to both his general manager and an assistant manager.[99] When his complaints produced no results, he went to the human resources director who eventually followed up with four or five "spot checks" to assess the situation.[100] During these visits, the director spoke only once to Sanchez and made no attempt to investigate his complaints or discuss the situation with the offending employees.[101] Sanchez eventually filed a complaint with the EEOC alleging sexual harassment in violation of Title VII.[102] The district court dismissed his complaint, finding that Sanchez's work environment was neither objectively nor subjectively hostile and the conduct had not occurred because of Sanchez's sex.[103]

The Ninth Circuit disagreed.[104] The court pointed to Sanchez's uncontradicted testimony regarding the frequency of insults and the severity of his work environment.[105] It was not for the lower court to determine whether these actions were severe or pervasive, but to determine whether the environment was both objectively and subjectively hostile.[106] The record illustrated that Sanchez sustained ongoing harassment, in the form of sexually derogatory names and insults, and references to him using the female gender.[107] This evidence was sufficient to suggest that "a reasonable man would have found the sustained campaign of taunts, directed at Sanchez and designed to humiliate and anger him, sufficiently severe and pervasive to alter the terms and conditions of his employment."[108] The fact that Sanchez complained to his superiors

---

[93] Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 870 (9th Cir. 2001).
[94] *Id.* at 872.
[95] *Id.* at 870.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 874.
[99] *Id.* at 870.
[100] *Id.* at 871.
[101] *Id.* at 876.
[102] *Id.* at 871.
[103] *Id.* at 872.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 873.

also showed that the conduct was unwelcome, creating a subjectively hostile work environment.[109] Sanchez's complaint was sufficient for the court to infer his subjective belief that he was being harassed.[110]

Furthermore, Sanchez alleged that the abuse was motivated by the harassers' perception that he was effeminate; therefore, he was harassed because of his sex.[111] The court found that the vulgar name-calling that Sanchez endured, which was cast in female terms, was closely linked to gender.[112] The continual abuse directed at him reflected a belief that Sanchez did not act as his co-workers perceived a man should act.[113] The court focused on comments that Sanchez carried his tray like a woman, that he was referred to as "she" and "her," and that he was teased for not having sex with his female friend.[114] The court found that the rule set out in *Price Waterhouse*, designed to bar sexual stereotype discrimination, applied to Sanchez's case. Therefore, the trial court's finding of no hostile work environment was clearly erroneous.[115] Not once did the court refer to the sexual orientation of the victim, nor did Sanchez ever claim that he was singled out because his harassers perceived him to be gay.

B. Rene v. MGM Grand Hotel, Inc.: *Discrimination "Because of Sexual Orientation"*

Medina Rene is an openly gay man who worked as a butler for high-rollers and wealthy guests of the MGM Grand Hotel.[116] During a two-year period, Rene alleged that he was subjected to a hostile work environment created by his co-workers, an all male staff, which occurred on nearly a daily basis.[117] Like Sanchez, Rene's male co-workers called him names associated with women,[118] such as "sweetheart" and "doll;" they also whistled and blew kisses at him.[119] But their harassment did not stop with mere name-calling. The butlers also told crude jokes and gave Rene gag "gifts" that were sexual in nature.[120] In addition, these co-workers forced Rene to look at pictures of naked men having sex while they taunted and laughed at him.[121] On numerous occasions the harassment consisted of physical conduct of a sexual nature.[122] Rene testified that the other men would "touch [his] body like they would to a

---

[109] *Id.*
[110] *Id.*
[111] *Id.* at 874.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 875.
[116] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc decision).
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*

woman."[123] They would caress and hug him, grab his crotch, and poke their fingers in his anus through his clothing.[124]

Complaints to supervisors were unavailing. Rene eventually filed a complaint in district court alleging he was discriminated against because of his sex and that being male was a factor in the unwelcome treatment.[125] Though Rene initially declared that the harassment was directed toward him "because of sex," he later admitted he believed he was being targeted because he is gay.[126] As a result, the district court dismissed his claim, finding that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and is not extended to include discrimination based on sexual preference."[127]

A three judge panel of the Ninth Circuit affirmed the dismissal of Rene's claim for failure to show that the discrimination he endured was "because of sex."[128] The panel's reasoning was influenced by the Supreme Court's decision in *Oncale*, from which three examples of same-sex discrimination were offered.[129] First, a plaintiff can show that the harasser was motivated by sexual desire for his victim.[130] To do so, the plaintiff must present credible evidence that his harasser is homosexual.[131] Rene failed in this regard when he admitted he was being harassed because of his sexual orientation, and not because of the sexual orientation of his harasser.[132] Second, a plaintiff may show that the harasser was "motivated by general hostility to the presence of [men] in the workplace."[133] Rene again failed, since the workplace was entirely made up of males and he was the only one who received such treatment.[134] Third, a plaintiff may present comparative evidence to show how members of both sexes are treated in a mixed-sex workplace.[135] Because Rene worked among only males, this option was not available to him.[136]

Another important factor in the dismissal was Rene's deposition testimony.[137] On nine separate instances during this deposition, Rene stated that his co-workers specifically harassed him because he was gay.[138] The trial court indicated that Rene never claimed that the harassment was based on his gender, but only upon his sexual orientation.[139] Unfortunately, this fact proved fatal to Rene's case. Because Title VII protects victims of harassment based on gen-

---

123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1207 (9th Cir. 2001) (panel opinion quoting lower court).
128 *Id.* at 1210.
129 *Id.* at 1208.
130 *Id.* at 1208-09.
131 *Id.* at 1209.
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.* at 1210.
138 *Id.*
139 *Id.*

der, but not sexual orientation, the court determined that Rene's claim must fail.[140] The court stressed that Title VII protects only the express categories included, "sex" being interchangeable with "gender," and that discrimination based on other characteristics, "no matter how unfortunate and distasteful that discrimination may be," is not protected by the statute.[141]

Like other circuit courts forced to dismiss claims by homosexual victims who suffered horrendous harassing conduct, the Ninth Circuit panel did not do so comfortably. The court made clear that it found the conduct "appalling" and extremely disturbing.[142] In addition, the panel majority quoted the "eloquent words" of the First Circuit:

> We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. 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.[143]

In her dissent, Judge Nelson framed the issue as "whether countless sexual assaults of an openly gay employee by male co-workers over the course of more than two years of employment can constitute discrimination on the basis of sex."[144] Unlike the majority, she found that it did.[145] Judge Nelson claimed that Rene's case was similar to the facts of *Oncale*, in that Rene was subjected to several incidents of offensive touching of a sexual nature.[146] The only difference between the cases was that Rene testified he was openly gay and believed that his abuse was based on his sexual orientation.[147] Regardless of Rene's sexual orientation, the effect of this harassment was to humiliate him as a man.[148] Though offensive comments directed at homosexuals are not actionable under Title VII, "a line is crossed when the abuse is physical or sexual."[149] In addition, Judge Nelson noted, the *Oncale* Court recognized that the three examples presented did not constitute an exhaustive list of actionable Title VII claims for same-sex harassment.[150] In effect, the majority opinion served to make the egregious conduct suffered by Rene "immune from legal recourse."[151]

The Ninth Circuit had a chance to revisit the issue just seven months later when it agreed to rehear Rene's argument *en banc*.[152] Surprisingly, the 8-4 opinion began with the bold assertion that an "employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of

---

[140] *Id.*
[141] *Id.* at 1209.
[142] *Id.*
[143] *Id.* (quoting Higgins v. New Balance Shoes, 194 F.3d 252, 259 (1st Cir. 1999)).
[144] *Id.* at 1211 (Nelson, J., dissenting).
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 1212.
[149] *Id.* at 1211.
[150] *Id.*
[151] *Id.* at 1212.
[152] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc decision).

action for sexual harassment."[153] However, the reasoning behind this new stance focused on whether the harassers engaged in severe or pervasive unwelcome "physical conduct of a sexual nature," a phrase the court took directly from *Meritor Savings Bank.*[154] If so, the plaintiff has a cognizable claim.[155] Based on this theory, the actions taken by Rene's harassers – poking him in the anus, grabbing his crotch, and caressing him – were inescapably "because of sex,"[156] and were sufficiently severe and pervasive to create an objectively offensive work environment.[157]

Strangely enough, this time the court read *Oncale* in a new light, making note of two important "lessons" derived from the opinion.[158] The first lesson is that Title VII prohibits "severe or pervasive same-sex offensive sexual touching."[159] Consequently, sexual harassment claims under Title VII may not be defeated by a mere showing that both parties were of the same gender.[160] Second, a cause of action exists for "offensive sexual touching" even if all employees in the workplace are of the same gender.[161] Here, the court read *Oncale* to say that discrimination because of sex "can occur entirely among men, where some men are subjected to offensive sexual touching and some men are not."[162]

Judge Pregerson concurred in the opinion, but argued that Rene presented a case of actionable gender stereotyping.[163] He pointed out that Rene testified that his harassers touched his body "like they would to a woman," a phrase that links the harassment to his gender and presented evidence of gender stereotyping.[164] In many ways, the facts of Rene's case were indistinguishable from those presented in *Nichols*, where the court found actionable gender stereotyping harassment.[165] According to Judge Pregerson, what should be at issue is "not what Rene perceived himself to be, but what his co-workers perceived him to be, and how they acted on that perception."[166]

Judge Hug, in a dissent joined by three other Judges, declared: "[d]iscrimination in the form of harassment or assault on the job because of a man's activity *outside* the workplace, such as his sexual activities, is not a basis for discrimination based on gender stereotyping of how he is expected to work on the job."[167] The dissent also argued that Rene did not assert a claim of gender stereotyping, and thus should not be allowed to bring such claim on appeal.[168] The alleged harassment in Rene's case was not because of his sex,

---

[153] *Id.* at 1063.
[154] *Id.* at 1065; Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).
[155] *Rene*, 305 F.3d at 1065 (en banc decision).
[156] *Id.* at 1066.
[157] *Id.* at 1065.
[158] *Id.* at 1067.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 1068 (Pregerson, Graber & Fisher, JJ., concurring).
[164] *Id.*
[165] *Id.* at 1068-69.
[166] *Id.* at 1069 n.2.
[167] *Id.* at 1072 (Hug, Schroeder, Fernandez & Nelson, JJ., dissenting).
[168] *Id.* at 1070-71.

but because of his homosexuality.[169] Since Rene's complaint solely alleged harassment based on his sexual orientation, which is not cognizable under Title VII, Judge Hug found that summary judgment was properly granted.[170]

C. *Understanding the Effects of* Nichols *and* Rene: *What Is the Solution?*

Even though Rene ultimately prevailed on his Title VII claim, there are several oddities about the two *Rene* decisions. In the first opinion, the panel focused on Rene's deposition testimony, in which Rene admitted nine separate times that he believed his harassers targeted him because he is gay. The panel also read *Oncale* narrowly, limiting itself to the three examples offered in the opinion. In the panel decision, there was no reference to the portion of *Oncale* indicating that the list was not exhaustive. The *Oncale* Court clearly stated that "[w]hatever evidentiary route the plaintiff chooses to follow" in pursuing a sexual harassment claim, he or she must show that the offensive conduct was "*discrimination* . . . because of . . . sex."[171] This language allows a plaintiff to choose any method he deems proper to prove his case; a plaintiff is not limited to the examples set out by the Court.

The panel focused only on the three illustrative examples in *Oncale*, ignoring the physical sexual abuse that Rene endured. In doing so, it swiftly dismissed Rene's claim because, as a victim of discrimination based on his sexual preference, the court found that Title VII afforded him no protection. But, as Judge Nelson was quick to point out in her dissent, "a line is crossed" when harassment turns to physical sexual assaults.[172] Such harassment in the workplace has been actionable since the Supreme Court's holding in *Meritor*, regardless of the gender or sexual preferences of the victim or aggressor. The panel's discomfort with Rene's case led it to completely overlook this point and instead lament the injustices endured by Rene as a victim of such appalling and disturbing conduct.[173]

To confuse the matter further, the subsequent *en banc* court gleaned lessons from *Oncale* that the Supreme Court may never have meant to instruct. To the *en banc* court, *Oncale* stands for the proposition that "Title VII forbids severe or pervasive same-sex sexual touching," and that discrimination because of sex "can occur entirely among men, where some men are subjected to offensive touching and some men are not."[174] This is wishful thinking on the court's part, because nowhere in the opinion does the *Oncale* Court proclaim that same-sex offensive touching is prohibited under Title VII. To be sure, Oncale suffered physical assaults of a sexual nature, as did Rene, but the Supreme Court did not claim that this conduct was actionable. It found only that Title VII protects both men and women, reasoning that nothing in the language of the statute says relief is precluded for a victim harassed by someone of the

---

[169] *Id.* at 1074.

[170] *Id.* at 1078.

[171] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

[172] Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1211 (9th Cir. 2001) (panel opinion) (Nelson, J., dissenting).

[173] *Rene*, 243 F.3d at 1209 (panel opinion).

[174] *Rene*, 305 F.3d at 1067 (en banc decision).

same sex. Whether or not Oncale had a cause of action based on the facts of his case was a matter for the lower court to decide on remand.

Moreover, it is unclear how the same court could dismiss Rene's case after he admitted that his harassers targeted him because he is gay, and then subsequently make the bold assertion that sexual orientation is irrelevant to a Title VII claim. The reasoning of the *en banc* Ninth Circuit court is also unclear because the sentence following this bold assertion imposes a further element onto a claim of sexual harassment – that there must be some evidence of "physical conduct of a sexual nature."[175] This is at odds with the Ninth Circuit's decision in *Nichols*, where Sanchez was the target of derogatory insults based on his effeminacy, but was never physically abused in a sexual way. Yet, in *Nichols* the Ninth Circuit found the harassment was actionable because of sex. It did so knowing that the harassers called Sanchez a "faggot," an assertion clearly indicating that his co-workers perceived him to be gay.[176] These facts are strikingly similar to *Rene*, with the exception that Rene was openly gay and Sanchez was not. The Ninth Circuit appears to contradict itself by saying that sexual orientation is irrelevant, yet if you happen to be openly gay, you have no cause of action unless you have been physically assaulted in a sexual manner by your harassers.

As noted above, the Ninth Circuit could have easily avoided the issue of sexual orientation in *Rene* altogether, and simply followed the precedent set out in *Meritor* prohibiting harassment involving physical conduct of a sexual nature. As the *Meritor* court held, the essential component of a sexual harassment complaint is that the advances were "unwelcome," and it does not matter if the victim's participation in the acts appears "voluntary."[177] The effect of the court's original panel decision is to hang Rene's future on how he categorized his harassment, and not on the actions of the harassers. The absurdity of this result is further evidenced by the court's willingness to revisit the issue, focusing on the physical abuse of a sexual nature. The fact that the panel court ignored traditional notions of sexual harassment laid out in *Meritor* shows the difficulty that arises when trying to distinguish sexual stereotyping from sexual orientation discrimination. The panel decision follows in the footsteps of other lower court opinions, treating same-sex harassment claims based on stereotyping as impermissible sexual orientation claims. These opinions appear to revert back to traditional notions of construing "sex" in the biological sense.

Though the *en banc* court finally found an avenue of relief for Rene under the theory of unwelcome physical conduct of a sexual nature, this decision does not end the uncertainty of how to treat same-sex discrimination claims. The Supreme Court continually espouses that the intent of Congress in creating Title VII was to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,"[178] yet courts are still unwilling to include gender stereotyping based on perceptions of sexual preference within this "entire spectrum." As Judge Pregerson declared in his concurrence, the

---

[175] *Id.* at 1064.

[176] Nichols v. Azteca Rest. Enters., Inc., 256 F.3d at 864, 870 (9th Cir. 2001).

[177] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

[178] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

focus should be on what plaintiff's co-workers perceive him to be.[179] This is what motivates the behavior behind their actions, whether or not they actually know if their victim is gay.

To end confusion over who is, and who is not, entitled to protection under the theory of sexual stereotyping, the court should recognize sexual orientation discrimination as a category of gender stereotyping. Sexual orientation discrimination arises when homosexuals are discriminated against for not conforming to the masculine stereotype of being sexually attracted to members of the opposite sex. By recognizing this as a type of gender stereotyping, plaintiffs like Sanchez and Rene, who suffer from virtually identical humiliating and degrading treatment, would have equal remedies. For example, the court in *Nichols*, in determining Sanchez's harassment to be "because of sex," noted that Sanchez had been taunted with gender-specific derogatory terms designed to humiliate him as a man, and that he had been chided for not having sexual relations with his female friend. The court did not address Sanchez's sexual orientation when it decided that the effect was to "humiliate him as a man." Yet, it was because of his failure to conform to a masculine stereotype, and his perceived lack of attraction for the opposite sex, that drove his harassers. The same is true in Rene's case. The only difference is that the perception of the harassers was validated by Rene's openness regarding his sexual orientation. The motivation behind the conduct was the same in both cases, whether or not the victim had officially "come out" with his sexual preference.

Until courts recognize sexual orientation discrimination as a subset of sex stereotyping, we will have to continue to wade through confusing and contradictory opinions. It is too difficult to draw the line between the two forms of discrimination, and doing so necessarily imposes a moral judgment on victims who are openly gay. Without allowing equal justice for both types of victims, and affording a remedy only for the "closet homosexual," courts will continue to dismiss claims of impermissible gender stereotyping, in apparent contradiction with precedent and congressional intent.

V. SEXUAL ORIENTATION LEGISLATION: THE TREND TOWARD RECOGNITION

The strongest argument against acknowledging sexual orientation discrimination as a form of sex stereotyping is that it appears to be contrary to legislative intent. Those opposed to protecting victims of sexual orientation discrimination under Title VII are quick to point out that proposals to add sexual orientation to the list of protected classes have repeatedly failed.[180] They also argue that it is not the court's place to make laws or recognize causes of action that are contrary to congressional intent. Yet, the Supreme Court has already recognized sexual harassment, sexual stereotyping, and same-sex discrimination even though the statute does not explicitly provide for such causes of action and there is little or no legislative history indicating that Congress

[179] *Rene*, 305 F.3d at 1069 n.2 (en banc decision) (Pregerson, Graber & Fisher, JJ., concurring).

[180] Sunanda K. Ray-Holmes, *Discrimination Based on One's Sexual Preference: Should Strict Scrutiny Apply?*, 34 How. L.J. 341, 342 n.12 (1991) (listing several amendment proposals that were rejected).

intended this type of protection. In fact, *Meritor* has been followed as precedent for sexual harassment claims for nearly seventeen years despite the fact that Congress has never expressly added a sexual harassment claim to Title VII.

It is very unlikely that Congressman Smith, who proposed that "sex" be added as a protected category in an attempt to defeat the Civil Rights Act, would ever have imagined or intended that "because of sex" would be read to include the broad range of claims that it now covers. Furthermore, in *Oncale*, the Supreme Court asserted: "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[181] One can certainly argue that it is reasonable for the Supreme Court to extend the same discretion to sexual orientation discrimination as it utilized in recognizing sex stereotyping and same-sex harassment as cognizable Title VII claims.

Moreover, to say that proposals to add sexual orientation to Title VII have repeatedly failed is to tell only half of the story. Finding protection for victims of sexual orientation discrimination is a cause that refuses to die in the political arena. In fact, it continues to grow and draw strength. When Representative Koch first proposed an amendment to the Civil Rights Act to prohibit discrimination based on "affectional or sexual preference" in public accommodation, housing and employment opportunities in 1977, he was backed by only ten co-sponsors.[182] When re-introduced into the House of Representatives only two years later, the bill was backed by fifty-six co-sponsors.[183] More recently, Representative Gerry Studds introduced the Employment Non-Discrimination Act of 1994 to prohibit employment discrimination on the basis of sexual orientation; this bill was backed by 137 co-sponsors.[184] That number grew to 160 by 1997.[185] In addition, a push to add a sexual orientation amendment to Title VII in 1996 was only narrowly defeated in the Senate by a 50-49 margin.[186] Thus, the drive to protect victims who have been discriminated against based on sexual preference is gaining force. This trend shows it is only a matter of time before victims like Rene will have justice for the unthinkable conduct they have endured.

VI. CONCLUSION

Title VII of the Civil Rights Act is designed to protect victims from arbitrary discrimination in employment. Title VII was enacted to provide relief to victims for a broad array of violations. The Supreme Court determined that Congress intended to protect victims of harassment as well as other forms of discrimination. With regard to harassment "because of sex," the Court has

---

[181] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).
[182] Civil Rights Amendments, H.R. 451, 95th Cong. (1977).
[183] Civil Rights Amendment of 1979, H.R. 2074, 96th Cong. (1979).
[184] Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994).
[185] Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997).
[186] Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory in the Realm of Employment Discrimination*, 6 AM. U. J. GENDER SOC. POL'Y & L. 333, 366 (1998).

extended this theory to victims of sexual stereotyping and same-sex harassment. It determined that when an employer discriminates on the belief that an individual must act in accordance with traditional gender stereotypes, the employer has violated Title VII.

Though the Supreme Court has made it clear that this protection covers both men and women, even when the victim and harasser are of the same gender, many lower courts have continued to reject claims of same-sex harassment as being impermissible claims of sexual orientation discrimination, a category not expressly covered by Title VII. Until the Court recognizes that sexual orientation discrimination is merely a subset of sexual stereotyping, lower courts will either stretch to find relief for deserving victims of same-sex harassment, or struggle with distinguishing the two types of claims based on confusing and contradictory precedent.