The Importance of Updating Sexual Harassment Policies to Thwart Same-Sex Sexual Harassment Claims

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NOTES

THE IMPORTANCE OF UPDATING SEXUAL HARASSMENT POLICIES TO THwart SAME-SEX SEXUAL HARASSMENT CLAIMS

I. INTRODUCTION

Many employees—laypeople and professionals included—enjoy horsing around at work. For some individuals, “mooning,” “goosing,” “bagging,” “dry humping” and other vulgar pranks might make for

1. For the uninitiated, to “moon” is to expose one’s buttocks to another. See Crane v. Iowa Dep’t of Job Serv., 412 N.W.2d 194, 195-96 (Iowa Ct. App. 1987); see, e.g., EEOC v. Regency Architectural Metals Corp., 896 F. Supp. 260, 264 (D. Conn. 1995) (describing a workplace where it was not unusual for male workers to “drop their pants and moon” other male co-workers).

2. To “goose” is “to poke or dig [a person] in some sensitive spot; esp: to poke [a person] between buttocks with an upward thrust of a finger or hand from the rear.” Delaney J. Kirk & Maria M. Clapham, “Bagging” or “Goosing”: How the Courts Are Ruling in Same-Sex Sexual Harassment Claims, 47 LAB. L.J. 403, 403 (1996) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 979 (1981)); see, e.g., Ashworth v. Roundup Co., 897 F. Supp. 489, 490 (W.D. Wash. 1995) (recounting how a male butcher goosed his male subordinate with a knife sharpening steel); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193 (4th Cir. 1996) (revealing how a male worker goosed his male co-worker with a broomstick).

3. “Bagging” has been defined in various ways, but typically involves a deft action aimed at a male’s groin area, such as the grabbing and squeezing of his testicles. See Quick v. Donaldson Co., 90 F.3d 1372, 1374 (8th Cir. 1996). In Quick, a male was bagged on so many occasions by various male co-workers that one of his testicles was “swell[ed] and bruis[ed]” to the point where he experienced “a bobbing sensation” and required “medical and psychological treatment.” Id. at 1375.

4. Last on this parade of horribles, to “dry hump” is to approach someone from behind and then simulate a sex act by thrusting one’s pelvis forward in a fornicating gesture. See Gerd v. United Parcel Serv, Inc., 934 F. Supp. 357, 358 (D. Colo. 1996). In Gerd, a male approached a fellow male co-worker from behind and rubbed his thighs while simulating a sexual act. See id. As this exchange unfolded, another male co-worker who witnessed the act announced “wouldn’t you love to see [the victim] get down on the floor and roll around and get dirty?” Id. at 358-59; see also Cummings v. Koehn, 568 N.W.2d 418, 420 (Minn. 1997) (describing how a male “routinely placed his hands on [his male co-worker’s] hips, simulating anal sex, while stating

Published by Scholarly Commons at Hofstra Law, 1999
hearty laughter. Apparently these pranksters never pause amid the ribaldry to consider if anything is wrong with their irreverence.6

Prior to the Supreme Court’s recent decision in Oncale v. Sundowner Offshore Services, Inc.,7 some courts held that even if an employer condoned these antics, the employer had not committed a legal wrong for which the victim could seek redress.8 However, as Oncale held, horseplay that rises to the level of same-sex sexual harassment is illegal, and an employer can therefore be held liable for its occurrence.9 In order to understand why, Part II of this Note recounts the legal history behind the cause of action for “hostile environment sexual harassment,”10 explores the pre-Oncale cases that dealt with same-sex sexual

5. Other particularly egregious tales of same-sex horseplay can readily be told. See, e.g., Torres v. National Precision Blanking, 943 F. Supp. 952, 953 (N.D. Ill. 1996) (revealing that a male co-worker “engaged in ‘lewd and obscene . . . acts’ including ‘inserting his finger into [a male co-worker’s] rectum, bragging about how much of his finger he was able to insert . . . and walking around the plant floor holding his penis and asking male employees whether they wanted a piece of it’”); Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-19 (5th Cir. 1996) (recounting how a male co-worker laid his penis upon a male co-workers neck, and how the victim was restrained in a shower by two of his male counterparts and had a bar of soap pushed into his anus).

6. Indeed, many victims of this male-on-male debauchery fail to appreciate the “humor,” and even languish from the torment. “Male sexual assault is a frightening, dehumanizing event, leaving men who have been assaulted feeling debased and contaminated, their sense of autonomy and personal invulnerability shattered. These effects [are] most devastating when the men [are] sexually inexperienced before the assault.” MALE VICTIMS OF SEXUAL ASSAULT 8 (Gillian C. Mezey & Michael B. King eds., 1992). Other potential problems for a male victim of same-sex sexual assault include: confusion about sexual orientation; sexual dysfunction, such as impotence; post-traumatic stress disorder; difficulty forming close relationships with other men; or suicide. See Adrian W. Coxell & Michael B. King, Male Victims of Rape and Sexual Abuse, 11 SEXUAL & MARITAL THERAPY 297, 302-03 (1996).


8. See, e.g., Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (refusing to hold employer liable because same-sex conduct such as “locker room antics, joking, or horseplay . . . by its very nature [is] not discriminatory”); Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1176 (D. Nev. 1995) (opining that in a same-sex sexual harassment case, an employer cannot be held liable because the “sexually charged atmosphere . . . although possibly hostile, abusive or oppressive, is not discriminatory”). But see, e.g., Griswold v. Fresenius USA, Inc., 978 F. Supp. 718, 728, 731 (N.D. Ohio 1997) (confronting a same-sex sexual harassment case, noting that the plaintiff “alleged discriminatory conduct that took place on a daily basis,” and concluding that an employer could be held liable for the harasser’s conduct).

9. See Oncale, 118 S. Ct. at 1001-02 (“If our precedents leave any doubt on the question, we hold today that nothing . . . necessarily bars a claim of [sex-based] discrimination merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”).

10. See infra Part II.A.
harassment," and reveals how the Supreme Court ultimately resolved the issue. Part III presents two related theories of why heterosexual same-sex sexual harassment occurs. Finally, building on these two theories and Oncale, Part IV offers a model same-sex sexual harassment clause which the labor practitioner may insert into any employer's existing sexual harassment policy. Thus, one intention of this Note is to educate employers, their counsel and their human resources managers as to why a heterosexual employee sexually harasses another heterosexual employee of the same sex. By becoming sensitive to this phenomenon, counsel can tailor the employer's sexual harassment policy accordingly to fend off potential liability for same-sex sexual harassment claims.

II. THE LEGAL ASPECTS OF SAME-SEX "HOSTILE ENVIRONMENT SEXUAL HARASSMENT" CLAIMS

A. The Development of "Hostile Environment Sexual Harassment" Claims

Employer liability predicated upon sexual harassment in the workplace is a relatively recent trend in law. Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating against their employees on the basis of their sex. A paucity of legislative and judicial action has characterized the development of sexual harassment law. It was not until the 1970's that sexual harassment of working women by their male counterparts in the workplace began to be acknowledged as an unacceptable barrier to the full and equal participation of women in the workforce. E. Gary Spitko, He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard, 18 BERKELEY J. EMP. & LAB. L. 56, 57 (1997). In response to this glaring inequity, a federal cause of action for sexual harassment was first recognized 23 years ago. See Williams v. Saxbe, 413 F. Supp. 654, 660-61 (D.D.C. 1976) vacated sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); see also CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 63-65 (1979) (examining Williams).

11. See infra Part II.B.
12. See infra Part II.C.
13. See infra Part III.
14. See infra Part IV.B. This Note is intended to provide useful information about the topics covered, and should not be construed as legal advice.
15. During the 1970's, sexual harassment of working women by their male counterparts in the workplace began to be acknowledged as "an unacceptable barrier to the full and equal participation of women in the work force." E. Gary Spitko, He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard, 18 BERKELEY J. EMP. & LAB. L. 56, 57 (1997). In response to this glaring inequity, a federal cause of action for sexual harassment was first recognized 23 years ago. See Williams v. Saxbe, 413 F. Supp. 654, 660-61 (D.D.C. 1976) vacated sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); see also CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 63-65 (1979) (examining Williams).
17. For purposes of determining if an enterprise is subject to Title VII's purview, an "employer" is defined as an entity with "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." Id. § 2000e(b).
18. See id. "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 . . . sex . . . ." Id.
about this ban on sex-based discrimination has resulted in confusion among judges who have endeavored to interpret the statute. Courts have generally interpreted the word "sex" in the text of Title VII to mean the biological difference between men and women.

19. See Sardinia v. Dellwood Foods, Inc., 69 Fair Empl. Prac. Cas. (BNA) 705, 709 (S.D.N.Y. 1995) (describing Title VII as a statute with "little legislative history," and noting that Title VII's ban on sex-based discrimination was a measure "added . . . at the eleventh hour"). Before the House of Representatives passed Title VII, it considered an amendment that included "sex" as a prohibited basis for workplace discrimination in order to "do some good for [women]") by ensuring that they would receive "as high compensation for their work as do . . . [men]." 110 CONG. REC. 2577 (1964). The amendment was opposed on the grounds that the bill was already "all-embracing" by banning discrimination based on race, since the bill covered "everybody in the United States," including "white men and white women and all Americans." Id. at 2578. The amendment was defended on the grounds that when a qualified white woman was denied a job because she was a woman, she would have "no recourse" without the amendment. See id. at 2579. To combat this discrimination, the House included the proposed measure in Title VII. Hence, Congress's "particular focus in amending Title VII to prohibit discrimination on the basis of 'sex' was to ensure equal employment rights for women . . . ." Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 749 (4th Cir. 1996).


21. For purposes of this Note, it is important to distinguish—and this Note does distinguish—"sex," which is a physical concept, from "gender," which is the "cultural or attitudinal characteristics (as opposed to physical) distinctive to the sexes." J.E.B. v. Alabama, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting). Hence, "gender is to sex as feminine is to female and masculine to male." Id. As Professor Case noted, "[t]here can be . . . a world of difference between being female and being feminine" since "the categories of sex, gender, and orientation do not always come together in neat packages." 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, 11, 15-16 (1995). However, not every court will make this distinction, and will use the terms "sex" and "gender" interchangeably. See, e.g., Hopkins, 77 F.3d at 749 n.1 (acknowledging Justice Scalia's distinction between the terms, and noting that "[w]hile it may be useful to disaggregate the definition of 'gender' from 'sex' for some purposes, in this opinion we make no such effort, using the terms interchangeably to refer to whether an employee is a man or a woman"). For ease of comprehension, this Note has altered quotations at various points by changing the word "sex" to "gender," and vice versa, to ensure that the terms are kept distinct.

22. See, e.g., Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (confronting Title VII's "dearth of legislative history" and inferring that the void "indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex"); Hopkins, 77 F.3d at 749 n.1 ("Congress intended that the term 'sex' in Title VII mean simply 'man' or 'woman' . . . ."); Plakio v. Congregational Home, Inc., 902 F. Supp. 1383, 1389 n.3 (D. Kan. 1995) (observing that with "no meaningful legislative history on what Congress intended by 'sex,' courts have inferred from the other Title VII prohibited discriminatory motives that the Congress in 1964 intended 'sex' to have the traditional meaning of a person's [sex] rather
1. Elements of a “Hostile Environment Sexual Harassment” Claim

Congress established the Equal Employment Opportunity Commission ("EEOC") as the federal agency responsible for investigating sex-based discrimination complaints and enforcing Title VII. EEOC Guidelines state that “sexual harassment,” which violates Title VII, is comprised of “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” The Guidelines also delineate a specific form of sexual harassment, popularly known as “hostile environment” sexual harassment, which occurs when the harasser’s conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or [creates] an intimidating, hostile or offensive working environment.” A statu-


Another recent development that should put employers on notice of the seriousness of sexual harassment claims is that whereas million dollar settlements were once “viewed as hefty,” this is not the case anymore since Japanese car manufacturer Mitsubishi recently opted to “shell out $34 million” to settle a pending sexual harassment claim. Kimberly Mills, Suiting Up, SEATTLE POST-INTELLIGENCER, July 12, 1998, at E1.

26. Id. The other type of sexual harassment, commonly known as “quid pro quo” sexual harassment, occurs when a supervisor has taken a tangible job benefit away from a subordinate because they have rejected the supervisor’s sexual advances. See id.; see, e.g., Jones v. Clinton, 990 F. Supp. 657, 674 (E.D. Ark. 1998) (finding no evidence of a tangible job detriment, hence dismissing the plaintiff’s quid pro quo sexual harassment claim).

As previously stated, the purpose of this Note is to educate the employer and its counsel in hopes of enabling them to prevent liability for same-sex sexual harassment by re-drafting their sexual harassment policies. However, an employer is always liable for quid pro quo harassment, irrespective of any language contained in its sexual harassment policy. See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998) (“No . . . defense is available . . . when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment.”). For this reason, the entire focus of this Note is on same-sex, hostile environment sexual harassment.
tory cause of action entitled "sexual harassment" does not exist. The victim is being sexually harassed while the harasser is presumably not sexually harassing co-workers of the opposite sex—the victim is being burdened, the thought goes, because of the victim's sex. Thus, the victim can pursue a claim against the employer for sex-based discrimination under Title VII.

In Meritor Savings Bank v. Vinson, the Supreme Court approved of the EEOC's definition of hostile environment sexual harassment, and for the first time equated that behavior with discrimination as a practice actionable under Title VII. In order to make out a prima facie case of hostile environment sexual harassment, a plaintiff must prove that the conduct complained of was unwelcome; the unwellcome conduct

27. See Pamela J. Papish, Homosexual Harassment or Heterosexual Horseplay? The False Dichotomy of Same-Sex Sexual Harassment Law, 28 Colum. Hum. RTS. L. Rev. 201, 205 (1996); see also Theodore F. Claypoole, Comment, Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation, 48 Ohio St. L.J. 1151, 1166 (1987) (pointing out that "no explicit federal statutory prohibition of sexual harassment exists").

28. See LYNN EISAGUIRRE, SEXUAL HARASSMENT 82 (2d ed. 1997); see also Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 439 (1st Cir. 1997) ("Hostile environment sexual harassment is a particular species of sex discrimination.").

Alternatively, the victim could seek damages from the harasser rather than the employer by asserting an intentional tort claim pursuant to state law, such as battery or intentional infliction of emotional distress. See EISAGUIRRE, supra, at 116-17.

29. 477 U.S. 57 (1986). In Meritor, a female worker's male supervisor "made repeated demands upon her for sexual favors . . . ." Meritor, 477 U.S. at 60. He then "fondled her in front of other employees, . . . exposed himself to her, and even forcibly raped her on several occasions." Id.

30. See id. at 66.

31. Unlike quid pro quo sexual harassment, when attempting to make out a prima facie case for hostile environment sexual harassment, a plaintiff need not allege an economic or tangible job detriment. See id. at 64.

32. The following sextet of elements enumerated in the text that a plaintiff must prove to make out a prima facie case when alleging a hostile environment is an amalgam of the Supreme Court's original definition of a hostile environment sexual harassment claim in Meritor, the Court's subsequent refinement of this definition in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), and the Court's recent statement about the scope of employer liability in Faragher.

33. "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" Meritor, 477 U.S. at 68. The "conduct must be unwelcome in the sense that . . . the [plaintiff] regarded the conduct as undesirable or offensive." Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

Furthermore, consent to a sexual relationship is irrelevant because "[t]he correct inquiry is whether [the plaintiff] by [their] conduct indicated that the alleged sexual advances were unwelcome, not whether [their] actual participation . . . was voluntary." Meritor, 477 U.S. at 68. Finally, when examining this element, the trier of fact is entitled to consider evidence of the plaintiff's "provocative speech or dress," since this sort of evidence is "obviously relevant" to the question of welcomeness. See id. at 69; cf. Kelly Ann Cahill, Note, Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?, 48 Vand. L.
was so severe or pervasive that it polluted the plaintiff’s working environment; a reasonable person in the plaintiff’s situation would have felt that a sexually hostile environment existed; the harassment was sex-based; and an avenue of liability to the employer.


34. See Meritor, 477 U.S. at 67. The unwelcome conduct must be permeated with “discriminatory intimidation, ridicule and insult.” Id. at 65. The conduct must be “sufficiently severe or pervasive [so as] to alter the conditions of [the plaintiff’s] employment and create an abusive working environment.” Id. at 67 (quoting Henson, 682 F.2d at 904). When this is the case, “[t]he employer can thus implicitly and effectively make the employee’s endurance of sexual intimidation a ‘condition’ of her employment.” Bundy v. Jackson, 641 F.2d 934, 946 (D.C. Cir. 1981). The endurance of the harassment is now “part of” the employee’s job since the employee is now faced with a “cruel trilemma” where all paths lead to remaining on the job and keeping silent: She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave the job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew.

Id.

The severity or pervasiveness of the harassing conduct will be determined in light of “the record as a whole and . . . the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.” 29 C.F.R. § 1604.11(b) (1998). A non-exhaustive list of factors a court will examine includes: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Harris, 510 U.S. at 23; see, e.g., Jones, 990 F. Supp. at 674-76 (observing that after the inappropriate incident, the plaintiff “never missed a day of work . . . [and] never consulted a psychiatrist” and could not otherwise prove that the experience “interfered with her work,” hence dismissing her hostile environment sexual harassment claim).

35. See Harris, 510 U.S. at 21-22. “[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.” Id. Furthermore, even though evidence of a deleterious effect upon the victim’s psychological well-being is relevant to this element, no actual psychological injury need be alleged. See id. at 22. “Such an inquiry may needlessly focus the factfinder’s attention on concrete psychological harm, an element Title VII does not require.” Id.

36. “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” Id. at 21. “Common sense, and an appropriate sensitivity to social context” enables fact-finders to determine if there has been “conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.” Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998). Such an objective examination will prevent Title VII from being transformed “into a general civility code for the American workplace.” Id. at 1002.

37. “[T]he plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.” Henson, 682 F.2d at 904. However, a new formulation of this element arguably exists, and discrimination is sex-based when “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” Oncale, 118 S. Ct. at 1002. Justice Scalia, writing for a unanimous court, parroted this language from Justice Ginsburg’s concurrence in Harris. See Harris, 510 U.S. at 25 (Ginsburg, J., concur-
2. Employer's Scope of Liability for Hostile Environment Sexual Harassment

In answering the question of when an employer can be held liable for hostile environment sexual harassment, the Supreme Court in *Meritor* determined that Congress, when enacting Title VII, envisioned courts looking towards the law of agency for the answer. Unfortunately, the Court sidestepped the "invitation to issue a definitive rule on employer liability." In cases where one co-worker creates a sexually hostile environment for another, the EEOC takes the position that liability inures to the employer "where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." As one federal appellate court stated:

Because an employer is only potentially liable for negligence in remedying and preventing harassment of which it negligently failed to discover, courts must make two inquiries: first, into the

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38. See discussion infra Part II.A.2.
40. The Supreme Court concurred with the EEOC's view, as amici in *Meritor*, that "Congress wanted courts to look to agency principles for guidance in this area." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986); *see also Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2264 (1998) ("Congress has left it to the courts to determine controlling agency law principles in a new and difficult area of federal law.").
41. *Meritor*, 477 U.S. at 72. The Court only went so far as to state that an employer is not automatically liable for sexual harassment. *See id.* When defining the terms of Title VII, Congress chose to prohibit sex-based discrimination not only by employers, but also by "any agent[s] of" the employer. 42 U.S.C. § 2000e(b) (1994). This decision "surely evince[d] an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72.

42. 29 C.F.R. § 1604.11(d) (1998).
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employer’s actual or constructive knowledge of harassment, and second, into the adequacy of the employer’s remedial and preventative responses to any actually or constructively known harassment.43

Thus, “[a]n employer is only obligated to respond to harassment of which it actually knew, or in the exercise of reasonable care should have known.”44 Once the employer has actual or constructive notice of the problem, the employer has a duty to take prompt remedial and preventative action that is reasonably calculated to end the harassment.45 If the employer is derelict in the discharge of its duty, the employer will be held liable.46

Recently, in Faragher v. City of Boca Raton,47 the Supreme Court answered the question of when an employer is liable for hostile environment sexual harassment caused by a supervisory employee.48 The employer will be held liable for the acts of its supervisors unless it can “raise an affirmative defense to liability or damages” by satisfying two elements.49 First, the employer must show that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior . . . .”50 Second, the employer must prove “that the plaintiff employee un-

43. Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998).
44. Id.
45. See id. at 676.
46. See id. at 673.
47. 118 S. Ct. 2275 (1998). In Faragher, a female lifeguard’s male supervisors created a hostile environment for her and other female lifeguards through “uninvited and offensive touching,” Faragher, 118 S. Ct. at 2280. The municipal employer had an anti-harassment policy but failed to disseminate it to the plaintiff, her co-workers or her supervisors. See id. at 2280-81.
48. See id. at 2291. If employers were to be held vicariously liable for every instance or form of sexual harassment, the primary objective of Title VII, which is to avoid harm, would be frustrated. See id. at 2292 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)). This is because employers have an “affirmative obligation to prevent violations [of Title VII]” and should be “give[n] credit” when they engage in “reasonable efforts to discharge their duty.” Id.
49. Id. at 2293. Just like the affirmative defenses of res judicata, statute of limitations or estoppel, the employer’s defense must be raised affirmatively “[i]n pleading to a preceding pleading.” Fed. R. Civ. P. 8(c). The affirmative defense is “subject to proof by a preponderance of the evidence.” Faragher, 118 S. Ct. at 2293.
50. Faragher, 118 S. Ct. at 2293. “While proof that an employer had promulgated an [anti-harassment] policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case . . . .” Id.

Immediately after the Faragher decision, legions of commentators strenuously asserted the paramountcy of instituting a sexual harassment policy. See, e.g., Kevin B. Leblang & Robert N. Holtzman, Supreme Court Offers Primer on Title VII, N.Y.L.J., July 30, 1998, at 5 (“In light of Faragher, all employers should adopt . . . an effective sexual harassment policy. The employer that fails to do so can expect to be held strictly liable for any harassing conduct . . . .”). Addition-
reasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

B. The Problem of Heterosexual Same-Sex Hostile Environment Sexual Harassment

The usual hostile environment exists when a heterosexual male sexually harasses a female co-worker. In this situation, some courts presume that the harassment occurred because of a sexual attraction, and the "but for . . . [the victim's] sex" element of a hostile environment sexual harassment claim is neatly satisfied. An unusual hostile ally, employers were advised to "enunciat[e] clear procedures through which aggrieved employees can voice complaints." \(\text{Id.}\). Finally, it was suggested that "[t]he policy should be distributed to all employees on at least an annual basis and to new employees at the commencement of their employment." \(\text{Id.}\); \textit{see also}, e.g., Dominic Bencivenga, \textit{Looking for Guidance}, N.Y.L.J., July 2, 1998, at 5 (suggesting that an employer have the employees sign an acknowledgment so that there is no question they read it or understood it). \textit{But see} Lancaster v. Sheffler Enters., 19 F. Supp. 2d 1000, 1003 (W.D. Mo. 1998) ("Simply forcing all new employees to sign a policy does not constitute 'reasonable care.' The employer must take reasonable steps in preventing, correcting and enforcing the policy.").

For general advice on how to maximize the effectiveness of any sexual harassment policy, see infra Part IV.A.

51. \textit{Faragher}, 118 S. Ct. at 2293. "[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden . . . . \textit{Id.}\) The employee's "coordinate duty" reflects a "policy imported from the general theory of damages, that a victim has a duty" to avoid or mitigate her damages that resulted from a statutory violation. \textit{Id.} at 2292. Thus, "[i]f the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care." \textit{Id.}; see, e.g., Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2262-63, 2271 (1998) (noting that plaintiff knew of the employer's sexual harassment policy and procedures, but remanding the case to determine if her failure to inform any authoritative person of the harassing conduct was unreasonable).

52. \textit{See} Doe v. City of Belleville, 119 F.3d 563, 605 (7th Cir. 1997) (Manion, J., concurring in part and dissenting in part), \textit{vacated and remanded}, 118 S. Ct. 1183 (1998); \textit{see also} Wal-Mart Stores, Inc. v. Davis, 979 S.W.2d 30, 44 n.12 (Tex. App. 1998) (referring to this genre of male-on-female situation as the traditional sexual harassment scenario).

53. \textit{Henson} v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982); \textit{see also supra} note 37.

54. In other words, but for the fact that the victim was a woman, the heterosexual male would not have sexually harassed her. In \textit{Henson}, the Eleventh Circuit utilized this presumption in their analysis of this element:

In the typical case in which a male [employee] makes sexual overtones to a female [co-worker], it is obvious that the [male employee] did not treat [other] male employees in a similar fashion. It will therefore be a simple matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment. \textit{Henson}, 682 F.2d at 904; \textit{see also} Richard F. Storrow, \textit{Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct}, 47 \textit{Am. U. L. Rev.} 677, 680 (1998) ("There is a presumption of heterosexuality in opposite-sex cases that alleviates the need for courts
environment could occur when, for example, a homosexual male sexually harasses a male co-worker. Again, even though the harassment has now occurred within the same-sex context, some courts presume that a sexual attraction exists, and the "but for . . . [the victim's] sex" element is likewise satisfied.

However, when a heterosexual sexually harasses a heterosexual co-worker of the same sex, and no sexual attraction exists, perplexing issues arose as to how the victim could satisfy the "but for . . . [the vic-

to evaluate the causation prong of [hostile environment] sexual harassment claims."). But see Flynn, supra note 39, at 18 (asserting that "[t]aking the harasser's actual or perceived sexual desire into account confuses [the harasser's] motive with the intention behind the discrimination"); Griswold v. Fresenius USA, Inc., 978 F. Supp. 718, 728 (N.D. Ohio 1997) (noting that those "who have argued that there can be no 'sexual harassment' in the absence of sexual attraction ignore completely the possibility that an employee may suffer harassment based on sex that is motivated by pure misanthropy or misogyny").

The Canadian Supreme Court forcefully refuted the notion that sexual harassment only occurs because of an individual's unbridled sexual desire for the victim. See Janzen v. Platy Enters. Ltd. [1989] 59 D.L.R. (4th) 352, 380 ("To argue that the sole factor underlying the discriminatory action was the sexual attractiveness of the [victims] and to say that their [sex] was irrelevant strains credulity."). Recently the United States Supreme Court echoed this sentiment. See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.").

Employers should not dismiss this situation as an improbability, since "about one in 10 cases of workplace harassment involves harassment between members of the same sex . . . ." Linda Burwell, Same-Sex Harassment Now a Lawsuit Waiting to Happen, CRAIN'S DET. BUS., Apr. 13, 1998, at E6. Furthermore, in a public sector study, "a 1995 survey of 28,296 U.S. military personnel suggests[ed] that 7% of the women and 26% of the men were subjected to unwanted sexual attention from someone of the same [sex] while on the job over the previous year." Stuart Silverstein, Sexual Harassment Ruling Charts New Legal Frontier, L.A. TIMES, Mar. 6, 1998, at A1.

Interestingly, under this view, if the harasser is bisexual and sexually harasses both men and women alike, there would be no disparate treatment of the victims and hence no sex-based discrimination. See Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); see also Ecklund v. Fuisz Tech., Ltd., 905 F. Supp. 335, 339 n.3 (E.D. Va. 1995) ("Although [the female] plaintiff alleges that [her female harasser] is bisexual, there are no allegations that [the harasser] harassed any male employees . . . . If the plaintiff had alleged that [her harasser] sexually harassed both male and female employees, there would be no 'disparate treatment [of female employees in the workplace]' and therefore no actionable claim . . . ."); see generally Robin Applebaum, Note, The "Undifferentiating Libido": A Need for Federal Legislation to Prohibit Sexual Harassment by a Bisexual Sexual Harasser, 14 HOFSTRA LAB. L.J. 601, 602-03 (1997) (exploring and criticizing the bisexual harasser exemption).
tim’s] sex” element of a hostile environment sexual harassment claim. For this reason, prior to the Supreme Court decision in *Oncale v. Sun- downer Offshore Services, Inc.*, dozens of courts struggled with the question of whether Title VII provided a remedy for heterosexual same- sex hostile environment sexual harassment claims. Because of varying judicial interpretations of Title VII, three different approaches to deciding these claims emerged from this legal quagmire. Even though the holdings of some of these cases have subsequently been overruled by *Oncale*, a discussion of the courts’ varied approaches to heterosexual same-sex sexual harassment claims is important. Such a discussion is significant for purposes of this Note because the issues inherent in heterosexual same-sex sexual harassment claims are illuminated.

1. Court Decisions Prohibiting a Cause of Action for Heterosexual Same-Sex Hostile Environment Sexual Harassment

A small number of courts construed the language of Title VII to reject all heterosexual same-sex sexual harassment claims. In *Garcia v.

58. See Papish, supra note 27, at 207; see also Storrow, supra note 54, at 680 (observing that “in same-sex cases . . . presumptive heterosexuality is not applied in the same way, rendering the causation prong of Title VII sexual harassment claims the object of much attention and analysis”); Melissa C. George, *Because of Sex: Same-Sex Sexual Harassment Claims Under Title VII of the Civil Rights Act of 1964*, 22 L. & PSYCHOL. REV. 251, 255 (1998) (“This ‘because of’ language has been the major source of disagreement among courts faced with the issue of same-sex sexual harassment.”); Gabriel A. Terrasa, *Fitting a Square Peg Into a Round Hole: “Same- Sex” Sexual Harassment and the “Because of . . . Sex” Requirement in Hostile Environment Claims*, 67 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO 163, 183 (1998) (“The difficulty stems from an unstated requirement . . . that the conduct complained of be sexual in nature.”).


60. See, e.g., Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997) (asserting that the claim could always be brought); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that the claim could never be entertained); Quick v. Donaldson Co., 90 F.3d 1372, 1378-79 (8th Cir. 1996) (announcing that the claim could be heard under limited circumstances); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (concluding that the claim could never be heard).

61. See Papish, supra note 27, at 208; see also Terrasa, supra note 58, at 164 (“The ambiguity of the statutory language, the scarcity of legislative history, and the factual uniqueness of each case . . . resulted in a myriad of holdings, doctrines, and elements that . . . divided the courts and puzzled the scholars.”); Robert Brookins, *A Rose by any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment*, 46 DRAKE L. REV. 441, 450, 462, 479 (1998) (dividing these cases into three lines of reasoning).

62. The sociological and legal theories concerning heterosexual same-sex sexual harassment *infra* Part III will also shed light on these issues.

63. Recall that the language of Title VII states that it is improper for an employer “to discriminate against any individual . . . because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1) (1994).
Elf Atochem North America, the Fifth Circuit tersely held that such a cause of action never exists since the “but for... [the victim’s] sex” causation element of a hostile environment sexual harassment claim could never be proved in these cases. Later cases, such as McWilliams v. Fairfax County Board of Supervisors, shed light on the reasoning behind some courts’ blanket denial of heterosexual same-sex sexual harassment claims. Again focus-

64. See Pamela J. Papish, Homosexual Harassment or Heterosexual Horseplay? The False Dichotomy of Same-Sex Sexual Harassment Law, 28 Colum. Hum. Rts. L. Rev. 201, 213 (1996); see, e.g., McWilliams, 72 F.3d at 1195 (“We believe this result compelled by a commonsense reading of the critical causation language of [Title VII]: ‘because of the [victim’s] sex.’”); Mayo v. Kiwest Corp., 69 Empl. Prac. Dec. (CCH) ¶ 44,383, at 87,272 (4th Cir. 1996) (concluding that to interpret Title VII to cover same-sex sexual harassment would be “irrational because it is completely at odds with [the statute’s] plain language”).

65. 28 F.3d 446 (5th Cir. 1994). In Garcia, the male victim was dry humped repeatedly by his heterosexual male co-worker. See Garcia, 28 F.3d at 448. The employer dismissed this behavior as mere horseplay. See id.

66. The court noted that even though heterosexual same-sex sexual harassment situations have sexual overtones, a cause of action for sexual harassment in these situations was prohibited under Title VII. See id. at 451-52. Hence, the Garcia court “flatly exclude[d]” same-sex sexual harassment claims, “irrespective of the surrounding facts or circumstances.” Brookins, supra note 61, at 451; see also Schoiber v. Emro Mktg. Co., 941 F. Supp. 730, 737 (N.D. Ill. 1996) (holding “that a male cannot, as a matter of law, sue for sexual harassment by a fellow male under Title VII, no matter the sexual orientations of the two”). Apparently, this reasoning did not “garner full support” in the Fifth Circuit. Brookins, supra note 61, at 451-52. Subsequently, in the Fifth Circuit’s Oncale decision, which involved the same issues, the court felt “bound by [its] decision in Garcia” in affirming the district court’s grant of summary judgment against a same-sex sexual harassment plaintiff, even though the reasoning in Garcia was “rejected by various district courts.” Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 119 (5th Cir.), reh’g en banc denied, 95 F.3d 56 (5th Cir. 1996).

67. 72 F.3d 1191 (4th Cir. 1996). McWilliams is yet another example where horseplay in the workplace went too far. The male plaintiff, who suffered from a learning disability, was ruthlessly victimized by other male co-workers. See McWilliams, 72 F.3d at 1193.

The conduct involved physical assaults. On at least three occasions, [co-workers] tied [the plaintiff’s] hands together, blindfolded him, and forced him to his knees. On one of these occasions, a [co-worker] placed his finger in [the plaintiff’s] mouth to simulate an oral sexual act. During another of these incidents, [two co-workers] placed a broomstick to [the plaintiff’s] anus while a third exposed his genitals to [the plaintiff].

Id.

68. “[S]uch a claim does not lie where both the alleged harassers and the victim are heterosexuals of the same sex.” Id. at 1195 (emphasis added). The majority, however, paid no attention to the fact that that one harasser asked the victim for sexual favors, asked if he could masturbate the victim and rubbed the victim’s penis until it became erect. See id. at 1198-99 (Michael, J., dissenting).

In dicta, the Fourth Circuit stated that if the harassment was attributable to homosexual attraction, the “but for... [the victim’s] sex” causation element would be proved, and a Title VII action could lie. See id. at 1195 n.5. This dicta was rendered binding precedent by the Fourth Circuit in Wrightson. See Wrightson v. Pizza Hut of Am. Inc., 99 F.3d 138, 141 (4th Cir 1996). But see Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (“[T]he sexual

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ing on the causation element of a hostile environment sexual harassment claim, the court explained:

As a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here (nor comparable female-on-female conduct) is considered to be “because of the [victim’s sex].” Perhaps “because of” the victim’s known or believed prudery, or shyness, or other form of vulnerability to sexually-focused speech or conduct. Perhaps “because of” the perpetrators’ own sexual perversion, or obsession, or insecurity. Certainly, “because of” their vulgarity and insensitivity and meanness of spirit. But not specifically “because of” the victim’s sex.69

Hence, according to the court, the appalling conduct occurs not because of the harasser’s desire to treat a member of the harasser’s sex worse than a member of the opposite sex, but because of the victim’s personal characteristics or the harasser’s moral bankruptcy.70 Subsequent decisions from several district courts concurred with this reasoning and also never entertained causes of action under Title VII based on heterosexual same-sex sexual harassment.71

69. McWilliams, 72 F.3d at 1195-96. The court’s concern about broadening the scope of Title VII to cover heterosexual same-sex sexual harassment claims was that by doing so, the result would be “unmanageably broad protection of the sensibilities of workers simply “in matters of sex.”” Id. at 1196.

70. Cf. Ramona L. Paetzold, Same-Sex Sexual Harassment: Can it Be Sex-Related for Purposes of Title VII?, 1 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 25, 31 n.47 (1997) (noting that the McWilliams court attributed the harassers’ behavior to their own perversions, and attributed their choice to harass the plaintiff to his prudery and vulnerability).

71. See, e.g., Torres v. National Precision Blanking, 943 F. Supp. 952, 959 (N.D. Ill. 1996) (finding nothing in the language of Title VII to allow the claim, and thus holding as a matter of law that heterosexual same-sex sexual harassment never occurs because of the victim’s sex); Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044, 1049-50 (N.D. Ala. 1996) (opining that the facts of a heterosexual same-sex hostile environment case did not provide any assurance that the conduct occurred because of the victim’s sex; therefore, if the claim was allowed, the word “discrimination” would be read out of Title VII); Gibson v. Tanks, Inc., 930 F. Supp. 1107, 1109 (M.D.N.C. 1996) (following McWilliams).
2. Court Decisions That Required Proof of a Hostile Environment For Members of Plaintiff’s Sex

For the first time, a cause of action for heterosexual same-sex sexual harassment was recognized under Title VII, albeit under limited circumstances, in *Goluszek v. Smith.* In *Goluszek*, the district court discussed the legislative intent behind the “because of . . . sex” language of Title VII. The court determined that “[t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.” The court concluded that the claim could only be allowed when the plaintiff worked in an environment hostile to members of the plaintiff’s own sex. In other words, a male plaintiff must have “worked in an environment that treated males as inferior [to females]” or per-

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72. 697 F. Supp. 1452 (N.D. Ill. 1988). In *Goluszek*, the male victim was incessantly badgered by his heterosexual male co-workers about his lack of sexual experience. See *Goluszek*, 697 F. Supp. at 1453.
73. See supra note 19.
74. See *Goluszek*, 697 F. Supp. at 1456; see also supra note 18.
75. *Goluszek*, 697 F. Supp. at 1456; see also Storrow, supra note 54, at 706 (“According to the court, Congress intended to outlaw abuses by the powerful against the vulnerable to degrade the victim by attacking his or her sexuality.”); George, supra note 58, at 266 (“They explained that sexual harassment actionable under Title VII involves an exploitation of powerful positions . . .”).
76. See *Goluszek*, 697 F. Supp. at 1456. “In fact, [the plaintiff] 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.” Id. Thus, “[u]nder this construction, the conditions precedent for an anti-male environment [were] found where men [were] a statistical minority in the workplace, thereby reversing their more typical cultural status as subordinator to that of subordinated.” Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 753 (1997). Hence the plaintiff in *Goluszek* was denied a cause of action under Title VII. See *Goluszek*, 697 F. Supp. at 1456.

To further illustrate, if female X worked in a female-dominated workplace, and if heterosexual female Y sexually harassed X, as a result of whatever motivation, while ignoring the males in the workplace, X would have had an action under Title VII since her working environment was hostile toward members of her sex. See, e.g., *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1383 (C.D. Cal. 1995), rev’d on other grounds, 114 F.3d 979 (9th Cir. 1997) (dismissing female plaintiffs’ complaint because the heterosexual female harassers harassed all the male and female workers in the office in the same manner); *Eschbach v. County of Lehigh*, 70 Empl. Prac. Dec. (CCH) ¶ 44,605, at 88,480-81 (E.D. Pa. 1997) (allowing same-sex sexual harassment claim to proceed because the heterosexual female harasser “gave women employees more work than [male] employees” and explained to a female worker that she “liked a male [co-worker] better than a female [co-worker] ‘because he has a dick and you don’t’”).
77. *Goluszek*, 697 F. Supp. at 1456. But see *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D.Nev. 1996) (“[T]itle VII does not require that the work environment be hostile to all workers of the plaintiff’s sex; it requires that the environment be hostile to the plaintiff.”).
haps a “[sex]-biased atmosphere; an atmosphere of oppression by a ‘dominant’ [sex]” of which the plaintiff was not a member. However, under the Goluszek standard, a male plaintiff would have great difficulty proving an anti-male atmosphere. Some district courts adhered to this standard, even though it was often subjected to questioning by scholars and scathing judicial criticism.

3. Court Decisions That Treated a Heterosexual Same-Sex Sexual Harassment Claim Like the Usual Sexual Harassment Claim

In Quick v. Donaldson Co., the Eighth Circuit became the first federal appellate court to hold that any same-sex sexual harassment claim “came within the ambit of Title VII.” In rejecting the reasoning of Goluszek, the court asserted that “[p]rotection under Title VII is not limited to only disadvantaged or vulnerable groups.” Furthermore, the

79. See Vandeventer, 887 F. Supp. at 1180 (“The ‘anti-male’ atmosphere that Goluszek would require here does not exist, and it would be the rare case indeed where it did.”).
80. See, e.g., Ashworth v. Roundup Co., 897 F. Supp. 489, 494 (W.D. Wash. 1995) (dismissing the claim because the male plaintiff failed to provide evidence that the male-dominated workplace was overshadowed by anti-male sentiment, or that males were treated as inferior to females); Fleenor v. Hewitt Soap Co., 67 Fair Empl. Prac. Cas. (BNA) 1625, 1628 (S.D. Ohio 1994) (concluding that “a claim of male against male hostile environment, sexual harassment is not actionable under Title VII, in the absence of an allegation that an anti-male environment was created thereby”).
81. See, e.g., Brookins, supra note 61, at 457, 459 (criticizing the Goluszek court’s “strained, superficial analysis” because it “fail[ed] even to adumbrate the conditions that might constitute an [anti-male] environment”); Terrasa, supra note 58, at 175, 177 (asserting that the Goluszek court relied on “tenuous authority” in coming to this conclusion, which was “contrary to Supreme Court precedent, contrary to the historical reality of Title VII’s enactment, and in conflict with the EEOC [G]uidelines”); Charles R. Calleros, Same-Sex Harassment, Textualism, Free Speech, and Oncale: Laying the Groundwork for a Coherent and Constitutional Theory of Sexual Harassment Liability, 7 GEO. MASON L. REV. 1, 21 (1998) (“[T]he plain meaning of the statutory language of Title VII militates strongly against Goluszek and supports an expansive remedial interpretation.”).
82. See, e.g., Sardinia v. Dellwood Foods, Inc., 69 Fair Empl. Prac. Cas. (BNA) 705, 709 (S.D.N.Y. 1995) (attacking the reasoning and “hollow core” of Goluszek and its progeny); Tanner, 919 F. Supp. at 354 (“Notwithstanding the Goluszek court’s sweeping statements regarding Congressional intent, its analysis is unsupported by any legislative history.”).
83. 90 F.3d 1372 (8th Cir. 1996). In Quick, the male victim was bagged about 100 times by at least 12 of his heterosexual male co-workers. See Quick, 90 F.3d at 1374.
84. See Julianna Ryan & John M. Butler, Without Supreme Court Precedent, Federal Courts Struggle With the Issue of Whether Title VII Lawsuits May be Brought for Same-Sex Sexual Harassment, NAT'L L.J., Dec. 23, 1996, at B8 (“[T]he 8th Circuit became the first federal appeals court to affirm the validity of same-sex sexual harassment under Title VII.”).
85. Brookins, supra note 61, at 463.
86. Quick, 90 F.3d at 1378. Title VII’s protective umbrella extends over “all employees and
Importance of Updating Sexual Harassment Policies

The court asserted that sexual harassment can occur absent sexually aggressive behavior. Finally, turning to the causation element, the court pointed out that:

the key inquiry is whether “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” Evidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was [based on sex] . . . . The motive behind the discrimination is not at issue because “[a]n employer could never have a legitimate reason for creating or permitting a hostile work environment.”

In *Doe v. City of Belleville*, the Seventh Circuit likewise held that any same-sex sexual harassment claim is covered by Title VII, albeit for reasons different than the *Quick* court. First, “the facial breadth and clarity of Title VII’s language militated against narrowly construing” the language of Title VII to deny coverage of same-sex claims. Sec-

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87. See id. at 1377. Under EEOC regulations, conduct that constitutes sexual harassment includes “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . .” 29 C.F.R. § 1604.11(a) (1998). This regulation, coupled with the notion that “Congress intended to define discrimination in the broadest possible terms,” led the court to conclude that “sexual harassment can occur in many forms, [and] may be evidenced by acts of physical aggression or violence [as well as] incidents of verbal abuse.” *Quick*, 90 F.3d at 1377. Thus, under this reasoning, when a heterosexual man bags another heterosexual man, this could constitute “prohibited sexual harassment.” *Id.* at 1379.

88. *Id.* at 1378 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring); Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994)). Hence, because a fact-finder could reasonably conclude that the treatment of men in the workplace was worse than the treatment of the women, since no women were bagged at the plant, the plaintiff’s claim was allowed to proceed. *See id.* at 1374, 1379.

89. 119 F.3d 563 (7th Cir. 1997), vacated and remanded, 118 S. Ct. 1183 (1998). The Supreme Court remanded this case for reconsideration in light of its decision in *Oncale*. *See Doe*, 118 S. Ct. at 1183; *see also infra* Part II.C.


91. *Id.* This was in marked contrast to those courts who interpreted the language of Title VII to prohibit same-sex sexual harassment claims. *See supra* Part II.B.1. The Doe court rejected the reasoning of those courts and noted that “[t]he language of Title VII . . . does not purport to limit who may bring suit based on the sex of either the harasser or the person harassed.” *Doe*, 119 F.3d at 572; *see also* Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995) (“The plain language of Title VII simply does not restrict its prohibition against discrimination to employees of the opposite sex.”).

92. The Doe court also criticized the *Goluszek*-type “power-abuse criterion” prevalent in the thread of cases discussed *supra* Part II.B.2. Brookins, *supra* note 90, at 467. The Doe court cau-
ond, when the harasser’s conduct is sexual in nature, this will suffice to demonstrate “the nexus to the plaintiff’s [sex] that Title VII requires,” that is, satisfies the “but for . . . [the victim’s] sex” element of a hostile environment sexual harassment claim.\textsuperscript{93} Hence, under the \textit{Doe} standard, as long as a sexually hostile environment was created for the victim, the victim could always bring suit under Title VII, regardless of the harasser’s sex.\textsuperscript{94} At the time, \textit{Doe} offered the most protection for victims of same-sex sexual harassment,\textsuperscript{95} yet the reasoning still came under fire.\textsuperscript{96}

\textbf{C. The Supreme Court Resolves the Circuit Split}

By granting certiorari to the Fifth Circuit in \textit{Oncale v. Sundowner Offshore Services, Inc.},\textsuperscript{97} the Supreme Court addressed the circuit split tioned that “to attribute to Congress an intent solely to strike at sexual harassment reflecting the historic exploitation of women by their male co-workers reads far too much into a legislative history that amounts to little more than a last-ditch effort to scuttle the entire statute.” \textit{Doe}, 119 F.3d at 572.

\textsuperscript{93} \textit{Doe}, 119 F.3d at 576; \textit{see also} Richard F. Storrow, \textit{Same-Sex Sexual Harassment Claims After \textit{Doe}: Defining the Boundaries of Actionable Conduct}, 47 Am. U. L. Rev. 677, 714 (1998) (observing that \textit{Doe}, “unlike existing case law, posited that unwelcome sexual conduct in the workplace is deeply humiliating and is proscribed for the simple reason that it is tied in some way to [sex]”). This element was satisfied because the male plaintiff had his testicles groped by a heterosexual male harasser after he announced that he was going to “finally find out if [the plaintiff was] a girl or a guy.” \textit{Doe}, 119 F.3d at 567. The court asserted that “[w]hen a male employee’s testicles are grabbed . . . he experiences that harassment as a man, not just as a worker . . . . In that sense [he] is the victim of sex discrimination.” \textit{Id.} at 578.

\textsuperscript{94} “Thus, so long as the environment itself is hostile to the plaintiff because of her sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.” \textit{Doe}, 119 F.3d. at 578; \textit{see also} Brian Cummings, \textit{Harassment Knows No Gender: Court, Cm. Daily L. Bull., July 18, 1997, at 1 (“The [Seventh] Circuit panel, in an opinion that diverges from other federal appeals court rulings, found that same-sex sexual harassment in the workplace does not differ from male-to-female sexual harassment when the harassers’ actions create a hostile work environment.”).


\textsuperscript{96} \textit{See}, e.g., Storrow, supra note 93, at 714 (asserting that \textit{Doe} “offered the most controversial analytical paradigm for [same-sex sexual harassment] cases . . . to date”); Brookins, supra note 90, at 469 (criticizing \textit{Doe} since it “adopted an evidentiary paradigm that . . . eliminate[d] the need for independent proof of either a but-for nexus or differential treatment by automatically inferring those prima facie criteria from sexually explicit conduct”).

\textsuperscript{97} 118 S. Ct. 998 (1998). In \textit{Oncale}, the male victim was sexually harassed in the most deplorable of manners by his heterosexual male co-workers. \textit{See Oncale v. Sundowner Offshore Servs., Inc.}, 83 F.3d 118, 118-19 (5th Cir. 1996). While working aboard an offshore oil rig, the plaintiff was restrained while a co-worker laid his penis upon the plaintiff’s neck. \textit{See id.} at 118. Additionally, the plaintiff was held on the floor of a shower while a co-worker forced a bar of soap into the plaintiff’s anus. \textit{See id.} at 118-19.
in the area of same-sex sexual harassment. The decision which ostensibly would decide the degree to which same-sex sexual harassment was actionable was eagerly awaited.

The Court unanimously ruled that same-sex sexual harassment is always a cognizable form of sexual discrimination under Title VII, and offered several justifications in support of its holding. To begin with, the Court refuted the argument that the text and legislative history of Title VII did not allow the action. The Court also reiterated that a same-sex sexual harassment plaintiff still has to be proved to have occurred because of the plaintiff's sex. The Court stated that:

A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex [sexual] harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connota-

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98. Even the Clinton administration had an opinion—it "told the [J]ustices that the lower courts were wrong" in denying the Oncale plaintiff's sexual harassment claim and "asked the Supreme Court to overturn those rulings." Richard Carelli, Court to Decide Same-Sex Harassment Flap, CHI. DAILY L. BULL., June 9, 1997, at 1.


100. Justice Scalia, in delivering the opinion for the Court, stated that "[i]f our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination because of . . . sex merely because the plaintiff and the . . . [harasser] are of the same sex." Oncale, 118 S. Ct. at 1001-02.

101. See id. The Court pointed out that because of the complexities of human motivation, it is counterproductive to assume as a matter of law that human beings of one definable group would never discriminate against fellow members of that group. See id. at 1001. In other words, the Court reasoned that it is entirely possible for one man to discriminate against another man because of his sex. In response to the argument that Title VII could not be interpreted in light of its legislative history to cover heterosexual same-sex sexual harassment, the Court highlighted the notion that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." Id. at 1002. For discussion on the text and legislative history of Title VII, see supra notes 18-19.

102. See Oncale, 118 S. Ct. at 1002. The Court implicitly rejected the reasoning in Doe, since the Court reminded us that it "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." Id.
tions, but actually constituted “discrimina[tion] . . . because of . . . sex.”

Furthermore, the requirement of objectivity still remains to ensure that Title VII will not be transformed “into a general civility code for the American workplace.” Like any other Supreme Court decision, Justice Scalia’s opinion had its critics.

D. What Oncale Means for Employers

Before Oncale broadened the scope of Title VII, most employers had already taken steps to curtail sexual harassment, primarily through the implementation of anti-harassment policies. Despite Oncale’s warning that same-sex sexual harassment is actionable, some commentators suggest that employers need not alter their existing sexual harassment policies. However, this Note argues, along with other com-

103. Id. Again, the critical issue in proving causation is “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” Id. (citing Harris v. Forklift Sys. Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)); see also supra note 37.

104. See supra note 36.

105. Oncale, 118 S. Ct. at 1002. The Court emphasized that in the same-sex context, Title VII “does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex.” Id. at 1002-03. The objectivity requirement “ensure[s] that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’” Id. at 1003. “Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.” Id.

106. One concern was to what extent courts should “permit the vagaries of environment to mediate the definition of reasonableness and decency . . . .” Brookins, supra note 90, at 495. For example, “[o]rdinary socializing” in a lumber camp or some other “macho” environment is likely to differ substantially from “ordinary socializing” in a monastery.” Id. In other words, under the objectivity standard announced in Oncale, a mooning might be acceptable under Title VII when one male lumberjack moons another, yet the same incident would probably be branded unacceptable when a male monk moons one of his brethren. See Kathryn Abrams, Postscript, Spring 1998: A Response to Professors Bernstein and Franke, 83 CORNELL L. REV. 1257, 1258 (1998) (criticizing Justice Scalia for skirting “the ‘what,’ the ‘how’ and the ‘why’ of sexual harassment,” for failing to offer a “theory of the wrong that purports to explain why same-sex cases should be included in Title VII’s ambit,” and for providing “only a few hints as to how [decision-making] in these cases should occur”).

107. Nearly eight months after the Supreme Court ruled that same-sex sexual harassment was actionable, the plaintiff in Oncale had procured a settlement with the defendant employer, and was working aboard a different offshore oil rig for another company. See Oil Rig Worker, Company Reach Settlement, ADVOC. (Baton Rouge), Oct. 25, 1998, at 7B.


109. See, e.g., Kristine M. Zayko, United States Supreme Court Recognizes Same-Sex Har-
mentators, that the better idea is to tread carefully in this new area and to "take immediate steps to amend anti-harassment policies and expand training programs to include same-sex harassment." After all, there's not much danger in having an extremely specific and comprehensive sexual harassment policy. This statement reflects the foundation of this Note's message—a clear and explicit prohibition of same-sex sexual harassment embodied in a written policy will not only deter this behavior in the workplace, but will also help employers stave off liability if it does nevertheless occur. First, the implementation of a same-sex sexual harassment clause into an existing policy can only help satisfy

110. Jane Howard-Martin, Supreme Court Decides that Title VII Extends to Same-Sex Sexual Harassment, METROPOLITAN CORP. COUNS., Apr. 1998, at 19; see also, e.g., Kevin B. Leblang & Robert N. Holtzman, Supreme Court Offers Primer on Title VII, N.Y.L.J., July 30, 1998, at 5. ("Employers must pay heed to these decisions and ensure that their policies and procedures are structured to eradicate harassment from the workplace and provide an effective defense to liability for any wrongful harassment that nonetheless occurs."); Laabs, supra note 109 ("Most experts say there's going to be quite a bit of tweaking of policies, practices and training going on over the next few years to comply with the new law because of the [Oncale] case."); Gillian Flynn, Sexual Harassment Clarified?, WORKFORCE, May 1998, at 105, 108 ("It's essential that employers have specific sexual-harassment policies regarding what's expected and what's prohibited ....") (emphasis added); Stuart Silverstein, Same-Sex Harassment Cases Might Increase, OREGONIAN, Mar. 8, 1998, at E1 (reporting that in response to Oncale, "[l]awsuit-wary employers are expected to respond by expanding their anti-harassment policies and training programs"); Julie M. Buchanan, Same-Sex Ruling Fails to Clarify the Issue, MILWAUKEE J. SENTINEL, Mar. 16, 1998, at 21 (advising that to protect against same-sex sexual harassment claims, employers "should have a comprehensive anti-harassment policy in place") (emphasis added).


112. Cf. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998) ("Title VII is designed to encourage the creation of [anti-harassment] policies and effective grievance mechanisms."); 29 C.F.R. § 1604.11(f) (1998) ("Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring .... ").
the first prong of the affirmative defense outlined in Faragher, and thus potentially reduce employer liability.\textsuperscript{113} Second, in the co-worker context, adoption of a same-sex sexual harassment policy will make it more likely that the employer will receive actual notice of the harassment and will have a greater opportunity to remedy the situation.\textsuperscript{114} Additionally, if a same-sex sexual harassment clause with a grievance procedure is in place and disseminated, it will be difficult for a plaintiff to succeed in a constructive notice argument.\textsuperscript{115} Indeed, a quick look at some jury awards for same-sex sexual harassment claims,\textsuperscript{116} as well as some labor arbitrators’ decisions on this issue,\textsuperscript{117} demonstrates the seriousness of this threat to employers as plaintiffs’ attorneys are beginning to realize “that these claims can be extremely worthwhile to pursue.”\textsuperscript{118}

It is imperative to note that in many same-sex sexual harassment cases, co-workers sexually harassed their victims at least in part because they did “not fit the stereotypical role for their gender.”\textsuperscript{119} Part III will

\textsuperscript{113} See supra notes 47-51 and surrounding text. Take, for example, the following court’s approval of a particular employer’s policy:

[Plaintiff] concedes that [the employer’s] sexual harassment policy . . . makes it clear that sexual harassment is strictly prohibited . . . [and] defines sexual harassment in a broad inclusive fashion . . . . [Plaintiff] states she received [the policy] and read it, remembered looking over the sexual harassment policy, [and] understood [the] policy and what constituted sexual harassment . . . . In light of these undisputed facts, there is no genuine dispute that [the employer] exercised reasonable care to prevent and correct promptly any sexual harassment in its organization. Therefore, [the employer] has met the first prong of the affirmative defense.


\textsuperscript{114} See supra notes 42-46 and surrounding text.

\textsuperscript{115} See Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1366 (11th Cir. 1999) (“When an employer has taken steps, such as promulgating a considered sexual harassment policy, to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer’s directives have been breached so that the employer has the opportunity to correct the problem.”) (emphasis added).

\textsuperscript{116} See, e.g., J&J Snack Foods Employee Awarded $4.2M, RECORD (N.N.J.), Apr. 17, 1997, at B2 (reporting a jury award of $1.7 million in compensatory damages and $2.5 million in punitive damages in a same-sex sexual harassment case from California); Mark A. Cohen, Same-Sex Harassment Action Produces $1 Million Verdict, MASS. LAW. WKLY., June 15, 1998, at 1 (reporting that a same-sex sexual harassment claim based on Massachusetts law netted a man a $1 million verdict); Alan Byrd, Brevard Woman Wins $1 M in Same-Sex Harassment Lawsuit, ORLANDO BUS. J., June 5, 1998, at 3 (reporting that a woman from Florida received a $1 million judgment against her employer because of same-sex sexual harassment that consisted of, among other things, a goosing).

\textsuperscript{117} See, e.g., Panel Rules Salomon Must Pay $750,000 in Harassment Case, WALL ST. J., Mar. 17, 1998, at A10 (reporting that an arbitration panel ordered a major firm “to pay about $750,000 to settle same-sex sexual harassment . . . claims”).

\textsuperscript{118} Cohen, supra note 116.

\textsuperscript{119} Robert Brookins, A Rose by any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment, 46 DRAKE L. REV. 441, 506 (1998). Recall that “gender” in the context of this Note
offer some provocative theories that perhaps explain why sexual harassment based on deviation from stereotypes takes place, and why this harassment constitutes—or at least should constitute—sex-based discrimination. By understanding this, and by intertwining this knowledge with valuable advice relating to the prudential drafting of sexual harassment policies, this Note will conclude with a model same-sex sexual harassment clause that hopefully will be useful to employers and employment law practitioners in curbing this behavior and preventing same-sex sexual harassment lawsuits.
III. UNDERSTANDING THE MOTIVATIONS UNDERLYING HETEROSEXUAL SAME-SEX SEXUAL HARASSMENT

A. Professor Franke’s Theory of “Gender Harassment”

As soon as we are born, our “gender role socialization” begins. We learn to stereotype men as “active, physical, dominant, independent, unemotional, objective [and] forceful” beings who “should be the active initiators and pursuers in sexual situations . . . .” Women are stereotyped as being cooperative, subservient and compassionate. Without even realizing how they behave, sexual harassers unconsciously “are


126. Id. at 38; see also Denise A. Donnelly & Stacy Kenyon, “Honey, We Don’t Do Men,” 11 J. INTERPERSONAL VIOLENCE 441, 442 (1996) (“Males are socialized to be strong, sexually aggressive, and always in control.”); CHRISTINE L. WILLIAMS, STILL A MAN’S WORLD 183 (1995) (“[T]o be masculine . . . means to be different from and better than women.”); cf. Matt C. Zaitchik & Donald L. Mosher, Criminal Justice Implications of the Macho Personality Constellation, 20 CRM. JUST. & BEHAV. 227, 230 (1993) (revealing that the macho personality is a recognized personality script, and explaining how a macho man is socialized to be masculine, virile and physical); Donald L. Mosher & Silvan S. Tomkins, Scripting the Macho Man: Hypermasculine Socialization and Enculturation, 25 J. SEX RES. 60, 65-71 (1988) (exploring the shaping of the macho personality and lifestyle of the macho man).

127. See Grauerholz, supra note 125, at 36-37.
often merely acting out the roles they have been taught by society,” and thus, are sometimes “unaware of the hostile nature of their conduct.”

Franke argues that sexual harassment is the way that an individual who strays from the stereotypical boundaries of their gender is made to conform:

[Sexual harassment] is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects. This dynamic is both performative and reflexive in nature. Performative in the sense that the conduct produces a particular identity in the participants, and reflexive in that both the harasser and the victim are affected by the conduct.

Thus, according to Franke, the primary goal of sexual harassment is not necessarily the satisfaction of sexual urges or the abuse of a power differential. Rather, the harasser’s aim could be the “production of feminine women . . . and masculine men . . .”

Franke asserts, and this Note concurs, that courts should “reconceptualiz[e] . . . sexual harassment as gender harassment.” When regarded in this manner, sexual harassment is a form of sex discrimination because the harassment “perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men.” Franke’s plea for reconceptualization is buttressed by the Su-

128. Nadine Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C. L. Rev. 345, 361 (1980). Taub felt that women are sometimes stereotyped as “sexual objects” by their male co-workers, whether the men do so “consciously . . . or not.” Id. This could be what prompts men to sexually harass women at work, creating a hostile environment that “interfer[e] with their performance,” is “uniquely disturbing” and “unduly intrusive or humiliating.” Id. at 361, 368, 376.

129. Franke, What’s Wrong With Sexual Harassment?, supra note 124, at 693-94.

130. See supra notes 52-57 and surrounding text; cf. Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (“[H]arassment, like other forms of victimization, is often motivated by issues of power and control on the part of the harasser, issues not necessarily related to sexual preference.”).

131. See supra notes 75-78 and surrounding text.

132. Franke, What’s Wrong With Sexual Harassment?, supra note 124, at 763. Stated alternatively, the goal is “to keep gender nonconformists in line.” Id. at 696.

133. Id.

134. Id.; cf. Laura Eckert, Inclusion of Sexual Orientation Discrimination in the Equal Credit Opportunity Act, 103 COM. L.J. 311, 324-25 (1998) (forewarning that “[i]t is only a matter of time before courts” will include “discrimination based on sex stereotyping” as impermissible sex-based discrimination).
preme Court’s decision in *Price Waterhouse v. Hopkins.* She argues that according to *Price Waterhouse*, “when an employer acts on the basis of sex stereotyping, the employer has acted on the basis of [sex] in violation of Title VII. Sexual harassment is a form of sex stereotyping” and thus is a form of sex-based discrimination.136

Relevant to the theme of this Note, Franke trumpets that “this framework has the advantage of furnishing a principled way to approach . . . same-sex sexual harassment.”137 In *Doe v. City of Belleville,*138 the Seventh Circuit apparently shared this view.139 By understanding sexual harassment as a way to make gender nonconformists conform, we not only understand why women who work “men’s jobs”140 are sexually harassed,141 but why “men who fail to live up to a societal norm of mas-
culinity are punished by their male [co-workers] through sexual means.\textsuperscript{142}

B. Professor Abrams's Theory of Entrenchment of Masculine Norms

Abrams argues that sexual harassment is a vehicle "to preserve male control and entrench masculine norms in the workplace . . . .\textsuperscript{143}" The conduct is engaged in "to secure familiar working conditions or re-establish a comfort level" for the males in the workplace.\textsuperscript{144} Like Franke's theory, Abrams posits that her theory likewise "encompasses cases of same-sex sexual harassment."\textsuperscript{145} Same-sex sexual harassment could operate not only to make masculine male co-workers more comfortable in the workplace, but could "also mark the workplace as an arena in which masculinity is appropriate or even constitutive."\textsuperscript{146} Hence, any type of sexual harassment will "perpetuate the workplace as a site of male control, where gender hierarchy is the order of the day and masculine norms structure the working environment."\textsuperscript{147}

Although acknowledging the viability of Franke's theory of sexual harassment, Abrams criticized Franke for not being greatly "concerned with situating [her gender harassment theory] within the salient dynamics of the workplace."\textsuperscript{148} Franke responded that she was trying "to pro-
vide an overarching theory by which to understand sexual harassment generally as a kind of discrimination "because of sex." 149

C. The Relevance to Sexual Harassment Policies

The lesson to be learned from these theories is that when a particular workplace or occupation is gendered as masculine, employers must be wary of the potential sexual harassment of an effeminate male worker by his male counterparts. 150 Likewise, employers should not ignore the possibility that a masculine female worker might be sexually harassed by her female counterparts in a workplace gendered as feminine. 151 Based on the sexual harassment theories presented, and the potential liability for same-sex sexual harassment under Oncale, employers must make sure that their employees allow their co-workers a reasonable degree of latitude in expressing their genders. The employer can attempt to ensure tolerance and mutual respect among its employees, and thus prevent potential sexual harassment suits, by drafting an effective same-sex sexual harassment clause. Part IV offers some general tips on writing effective sexual harassment policies, 152 builds upon those principles with the theories espoused by Franke and Abrams, 153 and concludes with a model same-sex sexual harassment clause that can be added to any existing sexual harassment policy. 154

IV. CONSTRUCTING THE MODEL SAME-SEX SEXUAL HARASSMENT CLAUSE

This Note has discussed the current law of sexual harassment 155 as well as same-sex sexual harassment, 156 and has provided knowledge about the complex motivations underlying these phenomena. 157 Now this

149. Franke, Gender, Sex, Agency and Discrimination, supra note 124, at 1250.
150. See Franke, What's Wrong With Sexual Harassment?, supra note 124, at 760 (noting that the male co-workers who sexually harassed the male victims in the cases cited supra note 119 were "policing proper masculinity in men"). The victims were humiliated because they "held a man's job without acting manly." Id. at 765.
151. The co-workers here would be "policing proper femininity in women." Franke, What's Wrong With Sexual Harassment?, supra note 124, at 760.
152. See infra Part IV.A.
153. See supra Parts III.A & B.
154. See infra Part IV.B.
155. See supra Part II.A.
156. See supra Part II.C.
157. See supra Part III.
Note endeavors to create a model same-sex sexual harassment clause. In the first subsection, essential sexual harassment policy ingredients are revealed.\textsuperscript{158} The second subsection mixes these ingredients with Franke’s and Abrams’s theories on same-sex sexual harassment to create the model clause.\textsuperscript{159}

\textit{A. Effective Sexual Harassment Policies}

As previously stated, in order to have an affirmative defense to a hostile environment sexual harassment claim, it is absolutely essential for the employer to have a viable sexual harassment policy that is disseminated to its employees.\textsuperscript{160} Remember that the following points about drafting a policy are merely general guidelines, as “[t]here is no blueprint for designing sexual harassment policies.”\textsuperscript{161}

First, the policy should affirmatively raise the subject of sexual harassment\textsuperscript{162} and express the employer’s strong disapproval of the behavior.\textsuperscript{163} Second, the policy should define “sexual harassment”\textsuperscript{164} and

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\textsuperscript{158} See infra Part IV.A.

\textsuperscript{159} See infra Part IV.B.

\textsuperscript{160} See supra notes 50, 115; see also Judith I. Pearson, Preventing Sexual Harassment: Risk Management Tools, RISK MGMT., Jan. 1997, at 24, 26 (“A written policy is the first step in reducing the employer’s liability.”); Ellen J. Wagner, Sexual Harassment in the Workplace 109 (1992) (“A well-drafted, carefully thought-out policy statement on sexual harassment can be valuable to an organization . . . as a way of minimizing legal liability to the organization in hostile-environment sexual harassment cases.”).

\textsuperscript{161} Julie M. Tamminen, Sexual Harassment in the Workplace 56 (1994) (“Development of a sexual harassment policy is more art than science.”).

\textsuperscript{162} Because the focus of this Note is on hostile environment sexual harassment, this section accordingly omits references in the policy to quid pro quo sexual harassment.

\textsuperscript{163} See Tamminen, supra note 161, at 57. For example: “It is the policy of the Company to promote a productive work environment and not to tolerate verbal or physical conduct by any employee that harasses, disrupts, or interferes with another’s work performance or that creates an intimidating, offensive, or hostile environment.” Sample Policy (visited Mar. 18, 1999) <http://www.ppspublishers.com/samplesexualharassment.htm>; see also 2 Kurt H. Decker, Drafting and Revising Employment Policies and Handbooks 224 (Supp. 1998) (“It is the Company’s policy to regard sexual harassment as a very serious matter and to prohibit it in the workplace by any person and in any form.”).

\textsuperscript{164} EEOC Guidelines cogently define “sexual harassment” as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . that has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a) (1998).

On the other hand, “[w]hile it may be tempting simply to replicate . . . [the EEOC definition of sexual harassment], the employer might opt to “create a statement that is clear and written in plain English rather than in legalese.” Wagner, supra note 160, at 111.
provide a non-exhaustive list of acts that constitute sexual harassment.\textsuperscript{165} Third, the grievance procedure should be described,\textsuperscript{166} and a promise of confidentiality whenever possible should be made,\textsuperscript{167} along with a pledge not to retaliate against the complainant.\textsuperscript{168} Fourth, the policy should delineate the adverse actions the employer may take against a harassing party.\textsuperscript{169} Some suggest that the policy should be physically separate from general policy statements covering a variety of employer policies.\textsuperscript{170}

**B. A Model Same-Sex Sexual Harassment Clause**

Because there is no harm in being overly cautious when drafting a sexual harassment policy,\textsuperscript{171} this Note now proposes a model same-sex sexual harassment clause, which can be inserted into an existing sexual harassment policy.

\begin{footnotes}
\item[165] See Wagner, supra note 160, at 112 ("If examples are used, include disclaimer language that clearly states the conduct portrayed in the examples is not all-inclusive but only illustrative."). Examples of behavior to be included in this list are: unwelcome flirtations, advances or propositions; verbal, written or physical abuse of a sexual nature; graphic comments about an individual's body; sexually degrading words; or displays of sexually provocative material. See Decker, supra note 163, at 224.
\item[166] See Taminen, supra note 161, at 59 (outlining a model reporting procedure). Rather than directing claimants to their immediate supervisors, since they are the people likely to be accused, the procedure should direct the employee to a neutral party. See Wagner, supra note 160, at 113-14.
\item[167] See Decker, supra note 163, at 224-25 ("All actions taken to resolve sexual harassment complaints through internal investigations shall be conducted confidentially."). However, absolute confidentiality should not be guaranteed. The employer will make its required investigation, and in the process others will necessarily become acquainted with the situation. See Wagner, supra note 160, at 115. Strong language should prohibit unauthorized disclosure of the facts discovered or opinions stated. See id. at 116.
\item[168] See Wagner, supra note 160, at 116. However, "[o]nly when it is clear that the employee is motivated by spite or malice, and is using the complaint-resolution system for personal revenge, is the employer justified in imposing discipline." Id.
\item[169] See id. at 114; see also Taminen, supra note 161, at 61 ("The harasser will be dealt with appropriately. Responsive action may include, for example, training, referral to counseling, and disciplinary action such as warnings, reprimands, withholding of a promotion, reassignment, temporary suspension without pay, compensation adjustments or termination."). Adumbrating punitive measures "is a strong indication of how the organization feels about sexual harassment in the workplace." Wagner, supra note 160, at 114-15.
\item[170] See Wagner, supra note 160, at 110 ("A separate policy... indicates the seriousness that management accords the subject, and reinforces the message that this conduct will not be tolerated.").
\item[171] See supra notes 110-18 and accompanying text.
\end{footnotes}
MALE-ON-MALE AND FEMALE-ON-FEMALE SEXUAL HARASSMENT
POLICY STATEMENT

In addition to the sexual harassment of a woman by a man, or of a
man by a woman, it is the policy of the Company to regard same-sex
sexual harassment as an equally serious matter\(^\text{172}\) and to prohibit it in the
workplace.

The Company will not tolerate the stereotyping of a job as being a
"man’s job" or "woman’s job."\(^\text{173}\) Likewise, the Company will not tol-
erate abuse of a fellow employee because he or she is not thought of as
being "manly" or "womanly" enough to perform his or her job compe-
tently.\(^\text{174}\)

"SAME-SEX SEXUAL HARASSMENT" DEFINED

"Same-sex sexual harassment" consists of unwelcome sexual ad-
vances, requests for sexual favors and other unwelcome verbal or physi-
cal conduct of a sexual nature. The conduct occurs because of sexual
desire, sex or gender stereotyping, or any other sexually-discriminatory
motivation. Such conduct is directed at a co-worker of the same sex, and
harasses, disrupts, or interferes with that co-worker’s work perform-
ance, or creates an intimidating, offensive or hostile environment for
that worker.\(^\text{175}\)

\(^{172}\) Those responsible for handling complaints must be aware of their natural proclivity to
engage in gender stereotyping when faced with a same-sex sexual harassment complaint. For ex-
ample, in Wilcox v. Dome Ry. Servs., 987 F. Supp. 682 (S.D. Ill. 1997), the male victim, who was
six feet tall and 280 pounds, was sexually harassed by his male co-worker, who was five feet, eight
inches, and 160 pounds. See id. at 685 & n.3. Upon receipt of the complaint, the foreman told the
plaintiff "that he was a 'big boy' and to take care of the problem himself." Id. at 685-86. Another
example of how not to handle a same-sex sexual harassment complaint is found in Quick v. Don-
aldson Co., 90 F.3d 1372 (8th Cir. 1996), where the supervisor instructed the male complainant to
"turn around and bag the shit out of" his harassers. Id. at 1375.

\(^{173}\) See supra note 140.

\(^{174}\) See supra notes 140-41 and accompanying text.

\(^{175}\) Cf. 29 C.F.R. § 1604.11(a) (1998) (stating the EEOC’s definition of “sexual harass-
ment”).
The following list is not exhaustive and provides some examples of intolerable same-sex conduct:

1. Unwelcome or excessive roughhousing or horseplay of a sexual nature.\textsuperscript{177}
2. Unwelcome commentary about, inquiry into, or criticism of another's intimate relationships.\textsuperscript{178}
3. Unwelcome commentary about a co-worker's appearance or mannerisms that attacks the co-worker's masculinity or femininity.\textsuperscript{179}

**CONFIDENTIALITY**

The Company promises to keep all claims of same-sex sexual harassment confidential whenever possible.\textsuperscript{180}

**V. CONCLUSION**

Because sexual harassment is the fastest growing area of employment discrimination claims,\textsuperscript{181} employers, their counsel and their human

\textsuperscript{176} See Thomas M. Sipkins & Joseph G. Schmitt, Same-Sex Harassers Get Equal Time (visited Mar. 18, 1999) <http://www.ljx.com/practicelaboremployment/0608samesex.html> ("Employers should be sure to include . . . examples of prohibited conduct that is considered same-sex sexual harassment.").

\textsuperscript{177} According to Justice Scalia, "simple teasing or roughhousing among members of the same sex" would likely be permissible. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998); see also Jeffrey M. Schlossberg, The Pendulum Swings Back in Sexual Harassment Cases, N.Y.L.J., Mar. 17, 1998, at 1 ("[T]he Court's express approval of . . . 'teasing or roughhousing' might be viewed as a signal that a certain level of sexual fraternization in the workplace is permissible . . . ").

\textsuperscript{178} See Stuart Silverstein, Same-Sex Harassment Cases Might Increase, OREGONIAN, Mar. 8, 1998, at E1 (noting that same-sex sexual harassment typically "involves abusive locker-room type talk" in which one man degrades another because of his lack of sexual prowess).

\textsuperscript{179} See supra notes 135-36 and surrounding text.

\textsuperscript{180} See supra note 167. An explicit promise of confidentiality whenever possible is essential in the same-sex sexual harassment context because, for example, "In a culture which is often negative toward homosexuality, heterosexual males may under-report sexual assaults by other males for fear of being labeled gay." Adrian W. Coxell & Michael B. King, Male Victims of Rape and Sexual Abuse, 11 SEXUAL & MARITAL THERAPY 297, 300 (1996). "Given these powerful social norms, it is extremely difficult for a male to admit to having been sexually assaulted." Denise A. Donnelly & Stacy Kenyon, "Honey, We Don't Do Men," 11 J. INTERPERSONAL VIOLENCE 441, 442 (1996)

\textsuperscript{181} See Katherine M. Franke, Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams, 83 CORNELL L. REV. 1245, 1245 (1998).
resources managers would be wise to keep abreast of every development in sexual harassment law. Unfortunately, because of the recency of the Supreme Court’s decision in *Oncale v. Sundowner Offshore Services, Inc.*, the parameters of employer liability for same-sex sexual harassment are presently blurry. It is practically a necessity for every employer to have and disseminate a sexual harassment policy in order to avoid liability under Title VII.

The problem this poses for employers is to determine what, if anything, they should specifically include in their sexual harassment policies to avoid liability for same-sex sexual harassment. This Note suggests that employers exercise caution in this uncharted area, and include a same-sex sexual harassment clause.

*Kenneth Band*

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184. See supra notes 50, 115.
* I extend my appreciation to the members of the Managing Board of the *Hofstra Labor & Employment Law Journal*, as well as its Editorial Board and Staff, for all of their support and assistance in this adventure. Specifically, I wish to offer my utmost gratitude to Christopher M. Castano and Bram D. Weber, whose dedication to excellence contributed immensely to this Note. Finally, I would like to thank Professor Grant M. Hayden and Professor Linda C. McClain for their thoughtful commentary.