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Katherine Roush

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LET'S TALK ABOUT SEX DISCRIMINATION: THE TENTH CIRCUIT'S DECISION IN *DICK V. PHONE DIRECTORIES CO.*

INTRODUCTION

The term "sexual harassment" popularly conjures an image of a dedicated but vulnerable young woman who is working in a male-dominated field. Under the threat of firing, she is forced to endure late-night sexual rendezvous in a dimly lit high-rise office with her predatory male boss. While striking, this image represents only one facet of what Congress and the Supreme Court considers sexual harassment.

Today, under Title VII of the Civil Rights Act of 1964 (Title VII),¹ the broad federal statutory scheme that addresses discriminatory employment practices, sexual harassment encompasses claims with no tangible economic loss to the victim and is no longer limited to traditional man-woman relationships. Since the Supreme Court decided the seminal case *Oncale v. Sundowner Offshore Services*² in 1998, same-sex hostile work environment harassment claims are actionable under Title VII.³ A sexual hostile work environment claim alleges that the conditions of the plaintiff's work environment are altered due to severe and pervasive sexual harassment by co-workers.⁴ Under *Oncale*, a plaintiff bringing a sexual hostile environment claim must meet two requirements. First, the harassment must be severe enough to discriminate.⁵ Second and most importantly, the discrimination must be "because of . . . sex."⁶ The "because of sex" language demands that the discrimination against an employee must be motivated by her sex. If this element is not met the plaintiff has not been the victim of sex discrimination in violation of Title VII, regardless of how unpleasant her work environment is.⁷ *Oncale's* emphasis on this causation element in sexual harassment cases has resulted in a very limited scope of interpretation for same-sex harassment issues.

The United States Court of Appeals for the Tenth Circuit recently addressed same-sex harassment for the first time in *Dick v. Phone Directories Co.*⁸ In *Dick*, the Tenth Circuit held that a same-sex sexual harassment hostile work environment claim satisfies the "because of sex" requirement if the plaintiff proves that her harasser's actions were moti-

1. 42 U.S.C.A. § 2000e (West 2005).

2. 523 U.S. 75 (1998).

3. *Oncale*, 523 U.S. at 78.

4. *See Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 67 (1986).

5. *Oncale*, 523 U.S. at 81.

6. *Id.* at 78.

7. *See Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997).

8. 397 F.3d 1256 (2005).

vated by sexual desire.⁹ This contrasts with other circuits, which have alternatively required a showing that the same-sex harasser is a homosexual in order to satisfy the “because of sex” requirement.¹⁰ This article will analyze the Tenth Circuit’s holding in light of other Circuits’ approaches, and will demonstrate why, within the restrictive confines of *Oncale*, the Tenth Circuit’s approach best articulates the goals of Title VII: prevention and deterrence of harassment in the workplace.¹¹ The article will further argue that the Supreme Court’s narrow definition of the term “because of sex” in Its *Oncale* decision fails to adequately prevent all types of sex discrimination.

Part I of this article will examine the unusual roots of the sexual harassment doctrine, focusing on the development of the hostile work environment claim. Part II will explore *Oncale* and its progeny. Part III will summarize the facts and the holding of *Dick*. Part IV will first argue that although superficially, *Oncale* expanded the scope of Title VII by expressly recognizing same-sex harassment claims, its emphasis on causation actually limits the scope of sexual harassment claims. Despite this restriction, the Tenth Circuit found the broadest possible interpretation of *Oncale* in *Dick*. Finally, Part IV will conclude with the argument that a broader interpretation of “sex” under Title VII is needed to address work-place harassments that remain unpunishable under *Oncale*’s current guidelines.

I. SEXUAL HARASSMENT DEFINED

Title VII states that it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹² The House of Representatives added the term “sex” to the enumerated list of prohibited discriminatory motives in the eleventh hour of debate on the bill, in an attempt to defeat the entire amendment the day before it passed.¹³ Because of the last-minute nature of the amendment, there was very little legislative history to aid the courts in interpreting what constitutes discrimination based on sex.¹⁴ In addition, there was no clear legislative intent to prohibit any kind of sex discrimination in the workplace,

9. *Dick*, 397 F.3d at 1264. The Tenth Circuit also noted that *Oncale* provides that the inference of sexual harassment can be drawn without showing the harasser was motivated by sexual desire when the issue does not involve “explicit or implicit proposals of sexual activity.” *Id.* at 1263.

10. *Id.* at 1264.

11. Julie A. Seaman, *Form and (Dys)function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 ARIZ. ST. L.J. 321, 432 (2005).

12. 42 U.S.C.A. § 2000e-2(a)(1) (West 2005).

13. See Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 144-45 (2005).

14. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

and the term was virtually meaningless in the early years after Title VII was passed.¹⁵

Initially, "sexual harassment" had no relationship with the vague idea of "sexual discrimination" that was theoretically prohibited by Title VII.¹⁶ In fact, the term "sexual harassment" was coined outside the legal spectrum by the feminist group Working Women United, who defined sexual harassment as "the treatment of women workers as sexual objects."¹⁷ While accurate, this definition failed to define any disparate treatment of women and therefore, remained outside the aegis of Title VII.¹⁸

A. *Feminism and the Importance of Gender*

Feminists have long controlled the theory of sexual harassment.¹⁹ In the simplest terms, feminists initially argued (and continue to do so today) that there is a disparate level of male power in society because males control gender roles.²⁰ Today, conventional sexual harassment wisdom accepts as true that sex and gender are two separate ideas.²¹ Sex is considered a product of nature, while gender is a function of culture.²² Sex refers to the biological nature of men and women, while gender is a fabricated social construct that suggests the biological differences between men and women dictate the societal role each must play.²³ Feminists focus on this notion of gender as a fictional construction and assert that gender and gender roles have been created by men for the purpose of subordinating women.²⁴ This male control over gender has resulted in a pervasive patriarchal "gender hierarchy" in the workplace.²⁵ Within this framework of unequal power, feminists view sexually harassing practices as a means to subordinate women, and therefore, discriminate against them.²⁶ Feminists, in their definition of sexual harassment, focus on harassment based on one's gender.

1. Catharine MacKinnon

Professor Catharine MacKinnon, described as one of the foremost architects of the sexual harassment doctrine,²⁷ is credited for bringing

15. See Hill, *supra* note 13, at 144-45.

16. See *id.* at 145.

17. *Id.*

18. See *id.*

19. See *id.*

20. See Seaman, *supra* note 11, at 358.

21. See Katherine Franke, *The Central Mistake in Sexual Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1 (1995).

22. See *id.*

23. See Seaman, *supra* note 11, at 356, 358.

24. See *id.* at 358.

25. See Hill, *supra* note 13, at 140.

26. See *id.* at 155.

27. See Seaman, *supra* note 11, at 421.

sexual harassment under the auspices of Title VII by expressly highlighting the discriminatory consequences of sexual harassment.²⁸ She defined sexual harassment as, "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."²⁹ By naming women as subordinates in the gender-based disparate power structure of the American workplace, Professor MacKinnon was able to cast the necessary discriminatory hue over sexual harassment.³⁰

Armed with this definition, Professor MacKinnon defined two types of sexual discrimination. The first she called *quid pro quo*: where an employer conditions employment benefits on sexual favors.³¹ Here, Professor MacKinnon was able to identify the sex discrimination easily: only women are being forced to provide sexual favors in return for what should be a natural employment right.³² Second, she found sexual discrimination existed in a "hostile work environment."³³ She viewed this as a counterpart to a *quid pro quo* claim because working in an environment filled with "pervasive intimidation, ridicule, and insult" served to subordinate women at the hands of their male counterparts.³⁴ Professor MacKinnon found sexual discrimination in *quid pro quo* cases through men expressly using their superior gender role to exert power over women, while she found sexual discrimination in a hostile environment because she saw in such instances men implicitly wielding sex "differences" as a subordinating power over their female co-workers.³⁵

B. The Hostile Work Environment Sexual Harassment Claim

While a *quid pro quo* sexual harassment claim is unique to sex-specific offenses and fairly straightforward in its requirements, the sexual hostile work environment claim is more ambiguous. The formal legal recognition that a hostile environment could be a type of sexual harassment was a later development that arose from two distinct logical arguments.³⁶ First, the doctrine grew from Professor MacKinnon's feminist argument that a hostile work environment had the same discriminatory effect as the "classic" *quid pro quo* sexual harassment case.³⁷ Second, previous to the express judicial recognition of the sexual hostile environment claim, it was widely recognized that a racial discrimination claim based on hostile work environment was actionable.³⁸ The sexual

28. See Hill, *supra* note 13, at 145.

29. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979).

30. See Hill, *supra* note 13, at 146.

31. MACKINNON, *supra* note 29, at 32.

32. *Id.*

33. *Id.* at 2.

34. *Id.*

35. See Hill, *supra* note 13, at 146.

36. See Seaman, *supra* note 11, at 417.

37. See *id.*

38. See *id.*

hostile environment claim developed in part as a logical analogy to this accepted standard.³⁹

1. The Gender Subordination Argument

A *Quid pro quo* sexual discrimination case casts the injury in terms of concrete choices a woman must make: comply with her supervisor's demands for sexual favors, or suffer an adverse employment action.⁴⁰ A hostile work environment claim, on the other hand, presents a more subtle type of injury—one that affects an employee's performance, the likelihood of her advancing, or even the chances of her choosing to remain at her position.⁴¹ Professor MacKinnon and other feminists argued that despite the ambiguity, a hostile environment created from an "an aggregation of words and conduct . . . [had the effect of] exclud[ing] or control[ing] the victim or victims, often through humiliation or fear."⁴² In addition, because men remain in the dominate position in the gender hierarchy of the workplace, it is women that suffer the harassment.⁴³ This disparate treatment creates a discriminatory result from the harassment.⁴⁴

2. The Racial Harassment Analogy

The first hostile environment harassment claim was recognized by federal courts in *Rogers v. EEOC*.⁴⁵ In *Rogers*, the plaintiff claimed her employer, an optometrist, treated patients preferentially according to their race.⁴⁶ In a now familiar holding, the Fifth Circuit held that the phrase "terms, conditions, or privileges of employment" is necessarily an expansive concept; one that should be interpreted broadly.⁴⁷ Within such a broad interpretation, the court went on to find that "[working in an atmosphere permeated with] extreme racial . . . bigotry or ridicule implicated a 'term or condition' of employment sufficient to trigger Title VII protection regardless of whether a tangible employment action was taken."⁴⁸

Soon after *Rogers*, various appellate courts extended this reasoning to a sexual hostile work environment claim.⁴⁹ However, while both racial and sexual hostile environment claims needed to demonstrate that the harassment was severe enough to interfere with the terms or conditions of employment, this threshold was much more ambivalent in the

39. *See id.*

40. *See id.* at 422.

41. *See id.*

42. *Id.* at 424.

43. *See Hill, supra* note 13, at 145.

44. *See id.*

45. 454 F.2d 234 (5th Cir. 1971).

46. *Rogers*, 454 F.2d at 240.

47. *Id.* at 238.

48. Seaman, *supra* note 11, at 417.

49. *See Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981); *see also Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

sexual context.⁵⁰ Some courts complained that the same sexual behavior that may be unwelcome in one context could be perfectly appropriate in another.⁵¹ Others expressed concern about the subjective nature of the sexual claim, noting that it largely depended on the singular interpretation of "harassment" by the victim.⁵² These concerns combined to make the threshold for determining whether a claim for sexual hostile environment existed higher than its racial harassment counterpart.⁵³

3. *Meritor Savings Bank v. Vinson*⁵⁴

In *Meritor Savings Bank v. Vinson*, the Supreme Court first endorsed the viability of a hostile work environment sexual harassment claim by enlisting both the feminist reasoning as well as the logical analogy of the racial hostile environment claim.⁵⁵ The resulting broad reading of Title VII was similar to the interpretation in *Rogers*,⁵⁶ but also focused exclusively on the paradigmatic dominant man versus victimized woman sexual harassment case, therefore embracing the feminist framework of a gender based hierarchy.⁵⁷

Meritor involved Plaintiff Mechelle Vinson, who worked as a teller at the Defendant bank. During her four year employment, it was undisputed that Ms. Vinson was promoted from teller to head teller to assistant branch manager based on merit alone.⁵⁸ However, after Ms. Vinson was fired for taking an excessively long sick leave, she brought suit against her former employer, claiming that during her four year employment, she was subjected to more or less constant sexual harassment by her supervisor, Mr. Taylor, and that this harassment created a hostile work environment.⁵⁹ Her allegations included repeated touching and fondling, many occasions of sexual intercourse (to which Ms. Vinson allegedly acquiesced for fear of losing her job), and episodes where Mr. Taylor followed her into the women's restroom and exposed himself to her.⁶⁰

During trial, Mr. Taylor denied all allegations, but the trial court never endorsed either party's story.⁶¹ Instead, the court held that even if Ms. Vinson's version of the facts were true, she did not experience sexual discrimination under Title VII because she did not suffer a tangible economic loss.⁶² The Court of Appeals for the District of Columbia Cir-

50. See Seaman, *supra* note 11, at 419.

51. See *id.* at 420.

52. See *id.*

53. *Id.*

54. 477 U.S. 57 (1986).

55. *Meritor*, 477 U.S. at 66-67.

56. *Id.*

57. See Hill, *supra* note 13, at 148.

58. *Meritor*, 477 U.S. at 59-60.

59. See *id.* at 60.

60. *Id.*

61. *Id.* at 61.

62. See *id.*

cuit reversed.⁶³ Relying on a previous holding of a case⁶⁴ it had recently decided, the court found that it was possible to find sexual discrimination based on sexual behavior that created a hostile work environment.⁶⁵ The Supreme Court affirmed, using various justifications for locating a hostile environment claim.⁶⁶

The Court in *Meritor* pointed toward the language of Title VII itself.⁶⁷ It held that “the phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”⁶⁸ This is similar to the language the Fifth Circuit used in *Rogers*.⁶⁹ The broad interpretation of the “terms and conditions” language in Title VII underlined the Court’s acceptance of the racial harassment analogy.⁷⁰ However, the Court’s presumption of a male harasser and a female victim demonstrated that the Court was also embracing MacKinnon’s male subordination framework.⁷¹

II. *ONCALE V. SUNDOWNER OFFSHORE SERVICES*⁷² AND SAME-SEX HARASSMENT

A. *Brief Overview of Same-Sex Claims Between Meritor Savings Bank v. Vinson*⁷³ and *Oncale*

Meritor left many questions unanswered, including whether hostile environment same-sex harassment claims were actionable under Title VII. Prior to the Supreme Court’s decision in *Oncale*, Circuits approached the problem in various ways. In *Doe v. City of Belleville*,⁷⁴ the Seventh Circuit held that the presence of a hostile environment sufficed to establish a valid claim under Title VII even if the harasser and the harassed were of the same sex.⁷⁵ *Doe* involved sixteen-year-old twin boys who were routinely harassed by their co-workers at a cemetery.⁷⁶ H. Doe, one of the plaintiffs, was routinely called a “bitch” and asked

63. *Id.* at 62.

64. The Court of Appeals relied on *Bundy v. Jackson*, 641 F.2d 934, 943–44 (D.C. Cir. 1981) (finding an actionable sexual harassment claim based on the finding of a hostile work environment).

65. *Meritor*, 477 U.S. at 62.

66. *Id.* at 63.

67. *Id.* at 64.

68. *Id.* (quoting *Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978) (citation omitted)).

69. *See Rogers*, 454 F.2d at 238 (“[T]he phrase ‘terms, conditions, or privileges of employment’ in Section 703 [of Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”).

70. *See Hill*, *supra* note 13, at 148.

71. *Id.*

72. 523 U.S. 75 (1998).

73. 477 U.S. 57 (1986).

74. 119 F.3d 563 (7th Cir. 1997).

75. *Doe*, 119 F.3d at 577-78.

76. *Id.* at 566.

whether he was a boy or a girl.⁷⁷ After enduring months of taunts such as these and repeated threats of assault, both twins quit after a co-worker grabbed H. Doe's testicles in order to "finally find out if H was a girl or a guy."⁷⁸ The Seventh Circuit found the claim actionable, noting that the act of grabbing another's testicles must be related to sex regardless of either party's sex.⁷⁹ Such a low standard for establishing the causal element has been referred to as a "sex per se" standard, because if something was even remotely sexual, it was considered as satisfying the causation requirement.⁸⁰ The Seventh Circuit specifically stressed that the most important test under Title VII was not why the victim has been harassed, but whether the conditions of his or her work environment has been altered.⁸¹

In addition, it is significant that the Seventh Circuit considered references to the victim's gender as satisfying the causation requirement.⁸² This suggests that the Seventh Circuit considered the term "sex" under Title VII to include both one's biological sex as well as one's gender. In *Doe*, the victim was not harassed because he was a male, but because he failed to meet the appropriate gender stereotype of a male.⁸³

The Fifth Circuit approached the issue differently and held in *Garcia v. Elf Atochem North America*,⁸⁴ that Title VII addressed only sex discrimination against women.⁸⁵ Specifically, the Fifth Circuit found that a male employee's claim that his male supervisor at a Texas chemical plant sexually harassed him were not colorable under Title VII.⁸⁶ The Court reasoned that the purpose of Title VII was to prevent discrimination against women only, and therefore did not support claims of same-sex harassment.⁸⁷

B. The Oncale Decision

The Supreme Court resolved this circuit split in 1998 when it addressed the issue of same-sex harassment in *Oncale*. *Oncale* involved a male plaintiff, Joseph Oncale, who worked as a roustabout with an all-male eight-man crew on an oil platform in the Gulf of Mexico.⁸⁸ During the course of his employment, co-workers subjected Mr. Oncale to se-

77. *Id.* at 576-77.

78. *Id.* at 577.

79. *Id.* at 580.

80. See Hill, *supra* note 13, at 151.

81. *Doe*, 119 F.3d at 578.

82. *Id.* at 577 ("In view of the overt references to H.'s gender and the repeated allusions to sexual assault, it would appear unnecessary to require any further proof that H.'s gender had something to do with this harassment; the acts speak for themselves in that regard.") (emphasis added).

83. See *id.*

84. 28 F.3d 446 (5th Cir. 1994).

85. See, e.g., *Garcia*, 28 F.3d at 451-52.

86. *Id.* at 451-52.

87. *Id.*

88. *Oncale*, 523 U.S. at 77.

vere and ongoing sexually-related humiliations, including having a bar of soap inserted into his anus while forcibly restrained and threats of rape.⁸⁹ The District Court, acting under the guidelines of *Garcia*, found that Mr. Oncale had no claim, and the Fifth Circuit affirmed.⁹⁰

Justice Scalia, writing for the unanimous majority, found that Title VII's prohibition of discrimination "because of sex" applies to both men and women.⁹¹ Scalia admitted that while same-sex harassment cases were "assuredly not the principal evil Congress was concerned with when it enacted Title VII," it was nonetheless within the scope of Title VII to cover "comparable" evils as well.⁹² The "critical" issue, according to Scalia, was whether the harassment resulted in discrimination; namely, if "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁹³ In other words, Scalia held that the essential determination under a Title VII claim was not whether harassment had occurred, but whether the harassment occurred because of the sex of the victim.⁹⁴

The majority opinion went on to define various "evidentiary routes" of finding an inference of discrimination because of sex. First, it noted that such an inference was "easy to draw" in a typical male-female situation because such circumstances usually involve explicit or implicit proposals of sexual activity and similar proposals would not be made to members of the same sex.⁹⁵ Scalia suggested that the same "chain of inference" would be available in same-sex harassment claims if the harasser was a homosexual.⁹⁶

89. See Jennifer A. Drobac, *The Oncale Opinion: A Pansexual Response*, 30 MCGEORGE L. REV. 1269, 1273 (1999).

90. *Oncale*, 523 U.S. at 77.

91. *Id.* at 78 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)).

92. *Id.* at 79.

93. *Id.* at 80 (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

94. Despite this new express recognition of causation, the Court nonetheless reiterated the importance of the requirement that the harassment be sufficiently severe or pervasive so as to create an *objectively* hostile work environment – that is, behavior so egregious that it rises well above routine interactions between members of the opposite sex. *Id.* at 81. Scalia noted that, taken together, these two requirements would effectively prevent Title VII from becoming a "general civility code" for the workplace. *Id.* In fact, this emphasis of severity has been echoed in numerous cases involving Title VII discrimination claims. See, e.g., *Dick v. Phone Directories Co.*, 397 F.3d 1256 (10th Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999).

95. *Oncale*, 523 U.S. at 80.

96. *Id.* Scalia also defined two other "evidentiary routes" that can be used to determine that the discrimination was based on sex. He found that a showing that the harasser was motivated by "general hostility" to his or her sex in the same workplace could satisfy the requirement that the discrimination occurred because of sex. *Id.* Finally, one can satisfy this causal element by showing, through direct comparative evidence, that the harasser treated men and women differently in a mixed-sex workplace. *Id.* at 81.

Oncale deviated from previous Title VII rulings in that it emphasized the intent of the harasser in finding causation in a discrimination claim.⁹⁷ Under *Oncale*, it was no longer enough to merely find that a hostile work environment that was sexual in nature existed, as the Seventh Circuit had done in *Doe*.⁹⁸ In fact, the same day the Court issued its *Oncale* opinion, it vacated the Seventh Circuit's holding in *Doe*.⁹⁹ Under the new *Oncale* regime, the hostile environment must be present *because* of the victim's sex; the harassment need not have any sexual overtones as long as it is motivated by the victim's sex.¹⁰⁰

C. Circuit Interpretations of *Oncale*

Faced with the explicit requirement that a plaintiff bringing a same-sex harassment claim must show his harasser's motivation stemmed from the plaintiff's sex, the Circuits have differed only slightly in interpreting the first evidentiary route of *Oncale*'s holding. The Seventh Circuit, in *Shepherd v. Slater Steels Corp.*,¹⁰¹ found that in order for a plaintiff to demonstrate that she was discriminated against because of his sex, the plaintiff needed to bring evidence that suggested that the harasser was a homosexual.¹⁰² In *Bibby v. Philadelphia Coca Cola Bottling Co.*,¹⁰³ the Third Circuit held differently, stating that in order to satisfy the "because of sex" element, the victim need only prove that the harasser sexually desired her.¹⁰⁴ The Third Circuit reasoned that such a showing was more than enough for a reasonable jury to deduce that the sexual discrimination was motivated by the victim's sex.¹⁰⁵ Finally, some circuits have used a combination of both – requiring that the plaintiff show "credible evidence" that the harasser was a homosexual *and* that the harasser sexually desired the plaintiff.¹⁰⁶

III. *DICK V. PHONE DIRECTORIES CO.*¹⁰⁷

In *Dick v. Phone Directories Co.*, the Tenth Circuit followed the Third Circuit's lead, finding that a plaintiff in a same-sex hostile work environment harassment claim could satisfy the first evidentiary route articulated in *Oncale v. Sundowner Offshore Services*¹⁰⁸ by demonstrating that her harasser was motivated by sexual desire.¹⁰⁹ This differs from

97. See Hill, *supra* note 13, at 159.

98. See *id.* at 160–61.

99. *Id.*

100. *Oncale*, 523 U.S. at 79–80.

101. 168 F.3d 998 (7th Cir. 1998).

102. *Shepherd*, 168 F.3d at 1009.

103. 260 F.3d 257 (3d Cir. 2001).

104. *Bibby*, 260 F.3d at 262.

105. *Id.*

106. See *LaDay v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir. 2002).

107. 397 F.3d 1256 (10th Cir. 2005).

108. 523 U.S. 75 (1998).

109. *Dick*, 397 F.3d at 1264.

the Seventh and the Fifth Circuits' holdings that the plaintiff must furnish "credible evidence" that her harasser is a homosexual.¹¹⁰

A. Facts

In *Dick*, the plaintiff, Ms. Diane Dick, worked as a sales representative in the Vernal, Utah office of Defendant Phone Directories Company (PDC).¹¹¹ After approximately three years, Ms. Dick's immediate supervisor was fired, and PDC hired Ms. Laura Bills as the Vernal office manager and Ms. Dick's immediate supervisor.¹¹² Ms. Dick alleged that Ms. Bills and her co-workers began to sexually harass her about a month after Ms. Bills was hired, and that this harassment continued for about six months.¹¹³

Ms. Dick claimed the harassment was spearheaded by Ms. Bills and three female coworkers.¹¹⁴ Ms. Dick's allegations of the harassment included episodes where one of her co-workers, Ms. Camie Hinkle, would approach Ms. Bills and another female co-worker from behind and make "sexual gestures with her body toward them."¹¹⁵ Ms. Hinkle would also place her foot in Ms. Bills' lap and say, "Yo buff b*tch. How does that feel? Yo, buff b*tch. You like that."¹¹⁶ Ms. Hinkle also hung a replica of a penis from the ceiling and brought a pillow into the office, on which she and other co-workers would kneel when making references to oral sex.¹¹⁷

However, the only gestures directed toward Ms. Dick involved two attempts by Ms. Hinkle to pinch Ms. Dick's breasts, but Ms. Dick told her to "get away" from her.¹¹⁸ In addition, Ms. Hinkle once shoved a replica of a penis in Ms. Dick's face while they were visiting a novelty sex shop over the lunch hour.¹¹⁹ Other allegations include another co-worker pointing to a collection of stuffed cats on Ms. Dick's desk and saying she had a "pussy;" another questioning Ms. Dick about a sex toy used by lesbians; and the fact that Ms. Dick was repeatedly referred to as "Ivanna Dick" or "Granny Dick" on a regular basis.¹²⁰

At trial, the district court granted summary judgment for PDC regarding Ms. Dick's Title VII hostile work environment same-sex harassment claims because Ms. Dick had failed to prove the harassment was

110. *See id.* at 1265.

111. *Id.* at 1260.

112. *See id.*

113. *See id.*

114. *Id.*

115. *Id.* at 1261.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

because of her sex.¹²¹ The district court required Ms. Dick to show that there was both credible evidence that her harassers were homosexual and that they were motivated by sexual desire in order to meet *Oncale's* first evidentiary route.¹²² The Tenth Circuit reversed, holding that a showing that Ms. Dick's harassers were motivated by sexual desire was enough to satisfy the causation requirement.¹²³

B. Holding

The Tenth Circuit noted all three "evidentiary routes" laid out in *Oncale*, and concluded that Ms. Dick relied on the first route in making her case, which required a showing that her harassers sexually desired her.¹²⁴ The court ceded that at "first blush," the first evidentiary route suggests the requirement that the plaintiff demonstrate that her harasser was a homosexual.¹²⁵ In eliminating this requirement, the court noted that the first route clearly encompasses conduct that is motivated by sexual desire.¹²⁶ It arrived at this conclusion because the *Oncale* Court prefaced its discussion of the other two evidentiary routes by explicitly stating that they do not require a showing of sexual desire.¹²⁷ It stated, "[i]t directly follows, then, that the Court considered conduct that was motivated by sexual desire to meet the requirements under the first evidentiary route."¹²⁸

The Tenth Circuit asserted that a plaintiff need not demonstrate that her harasser is a homosexual in order to establish that the harassment was motivated by sexual desire.¹²⁹ It reasoned that often, a heterosexual harasser may nonetheless propose sexual activity with a victim in a harassing manner.¹³⁰ In such circumstances, there would be no corroborating evidence beyond the harassment itself that the harasser was a homosexual, yet the harassment would still be a result of the harasser's sexual desire.¹³¹ The Court noted that in such situations, proving the sexual orientation of a person could be extremely difficult.¹³²

Despite this holding, the question still remained whether Ms. Dick had provided a genuine issue of material fact as to whether her harassers were motivated by sexual desire.¹³³ The Court initially noted that the district court, in granting summary judgment to PDC, relied heavily on

121. *Id.* at 1262.

122. *See id.* at 1264.

123. *Id.*

124. *Id.* at 1264; *see also supra* notes 95-96 and accompanying text.

125. *Dick*, 397 F.3d at 1264.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1265.

130. *Id.*

131. *See id.*

132. *Id.*

133. *Id.*

evidence that Ms. Dick was harassed because her co-workers disliked her.¹³⁴ Such evidence included statements from Ms. Dick's own deposition to the effect that she thought her co-workers would just do "things like that" to upset her.¹³⁵

The Tenth Circuit, however, reasoned that while the evidence could support a finding that Ms. Dick was harassed because she was not liked, a reasonable jury could also find that she was harassed because of sexual desire.¹³⁶ As evidence, the Court cited the incidents wherein Ms. Hinkle attempted to pinch Ms. Dick's breasts, as well as Ms. Hinkle's same-sex advancements toward Ms. Bills (placing her foot in her lap), which could suggest that any advances made toward Ms. Dick were also a result of sexual desire.¹³⁷

While the Tenth Circuit did find that a question of material fact existed as to whether Ms. Dick was sexually harassed, it was equally quick to point out that the question of whether the harassment was "severe or pervasive enough" to qualify as discrimination under Title VII had yet to be answered.¹³⁸ Therefore, the Tenth Circuit reversed the district court's decision that her harassment was not based on sex because the court used the wrong test, and remanded the case for a determination of whether the discrimination was based on sex, as well as whether the harassment was severe enough to create an abusive work environment.¹³⁹

IV. ANALYSIS

It is difficult to find much leeway in *Oncale v. Sundowner Offshore Services*'s¹⁴⁰ holding.¹⁴¹ Indeed, despite the variations in the different circuit interpretations of the first evidentiary route, they all share the same underlying element, which is a showing that the harasser was motivated by sexual desire.¹⁴² Some circuits, in order to find sexual desire, additionally require that the plaintiff show that the harasser is a homosexual.¹⁴³ By avoiding this additional requirement, the Tenth Circuit established in *Dick v. Phone Directories Co.*¹⁴⁴ a more practical and theoretically stable burden of proof than its sister circuits.¹⁴⁵

134. *Id.*

135. *Id.*

136. *Id.* at 1266.

137. *Id.*

138. *Id.*

139. *Id.* at 1267.

140. 523 U.S. 75 (1998).

141. *Oncale*, 523 U.S. at 80-81 (outlining the possible ways a same-sex plaintiff could prove discrimination because of sex.).

142. *See id.* at 80.

143. *See* *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999); *LaDay v. Catalyst Tech. Inc.*, 302 F.3d 474, 478 (5th Cir. 2002).

144. 397 F.3d 1256 (10th Cir. 2005).

145. *See* *Drobac*, *supra* note 89, at 1278-81.

This Part will first explain the limitations that *Oncale*'s holding placed on same-sex harassment claims by focusing on the causation element of the harassment claim. It will then illustrate why, within the framework of such limitations, the Tenth Circuit's approach to *Oncale*'s first evidentiary route most adequately meets Title VII's broad goals. This is because first; a showing of the harasser's homosexuality is both difficult to prove and is inconclusive of a finding that the harasser sexually desired the victim. Second, the Tenth Circuit's broad interpretation of the facts set a low standard to satisfy the controversial causation requirement and shifts the focus back to the effects of the harassment rather than its cause. Finally, this Part will suggest a further method to expand the reach of *Oncale*'s holding to the greatest number of same-sex claims by implicitly including the social construction of gender within the meaning of "because of sex."

A. *The Limitations in "Because of Sex"*

On its face *Oncale* purports to expand Title VII by expressly recognizing same-sex harassment claims.¹⁴⁶ However, several authors have argued that *Oncale*'s emphasis on causation actually severely limits the scope of sexual hostile work environment claims, both same-sex and otherwise.¹⁴⁷ One example of *Oncale*'s restrictive effect on same-sex claims can be seen in the final result of *Oncale* itself.¹⁴⁸ On remand, Joseph Oncale found his case had been rendered toothless because his harassers were not homosexual, and thus were not motivated by sexual desire.¹⁴⁹ The other two evidentiary avenues—a showing of hostility to all men in general and that men and women were treated disparately—were also closed to Mr. Oncale, because he worked on an all-male oil platform.¹⁵⁰

Jennifer Drobac, in her article *The Oncale Opinion: A Pansexual Response*, went further, looking beyond the final result in *Oncale* and asserting that an entire subsection of sexual harassment claims—not only same-sex harassment claims—exist that are arguably no longer actionable under *Oncale*.¹⁵¹ She argued that *Oncale* invalidated claims wherein workplace behavior such as hanging nude pictures of women everywhere, was sexual harassment.¹⁵² Such behavior pre-*Oncale* was found to be actionable under Title VII because it created a barrier to women in the workplace by sending a message that women do not belong, and can

146. *Id.* at 1279.

147. See Hill, *supra* note 13, at 160; Drobac, *supra* note 89, at 1270.

148. See Hill, *supra* note 13, at 162.

149. *Id.* Note that in the Fifth Circuit, a plaintiff bringing a same-sex harassment suit must furnish "credible evidence" that his harassers are homosexual. See *supra* note 106 and accompanying text.

150. Hill, *supra* note 13, at 162.

151. Drobac, *supra* note 89, at 1277.

152. *Id.*

only belong if they are willing to subvert to the gender stereotype hanging on the wall.¹⁵³ Ms. Drobac reasoned that these claims were actionable because it was the behavior itself that discriminated and an inquiry into the motivation of the harasser was unnecessary.¹⁵⁴

B. Why the Tenth Circuit's Approach Best Satisfies Title VII's Goals

The Supreme Court has held that the two main goals of Title VII are to prevent and remedy employment discrimination in the workplace.¹⁵⁵ In addition, the Court has suggested that Title VII aims to encourage employees to bring sexual harassment complaints to their employer's attention.¹⁵⁶ By making the elements of a sexual harassment claim more difficult to meet in *Oncale*, the Court failed to effectuate these previously articulated goals. However, the Tenth Circuit adopted a broad interpretation of *Oncale's* requirements, and in so doing, was able to better satisfy Title VII's goal of addressing all types of employment discrimination than the circuits who strictly interpreted *Oncale*.

1. The Dangers of Requiring a Showing of Homosexuality

The requirement that the plaintiffs of a same-sex harassment case show that their harassers were homosexual can have unjust results, some of which were emphasized in the final result of *Oncale* itself.¹⁵⁷ Other problems with such a requirement include the possibility that only bona fide homosexuals could ever be found guilty of sexual harassment in same-sex cases.¹⁵⁸ In reality, many self-proclaimed heterosexuals "may find erotic and sexually stimulating the same-sex sexual advances and aggressions [such as those] committed against Joseph Oncale."¹⁵⁹

A second problem with such a requirement, one that the Tenth Circuit articulated clearly, is that proving homosexuality is often very difficult.¹⁶⁰ In illustrating the problems associated with discerning what exactly constitutes credible evidence of homosexuality, one author cited a case where a woman discovered, after twenty-five years of marriage to a man, that she was a lesbian.¹⁶¹ Alternatively, people who appear more masculine or feminine than "traditional" gender stereotypes dictate may

153. *Id.*

154. *Id.* at 1276.

155. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

156. *See* Ann M. Henry, Comment, *Employer and Employee Reasonableness Regarding Retaliation Under the Ellerth/Faragher Affirmative Defense*, 1999 U. CHI. LEGAL F. 553, 568.

157. *See supra* notes 148-50.

158. Drobac, *supra* note 89, at 1280.

159. *Id.*

160. *Id.* at 1280-81; *see also supra* Part III.B (discussing the Tenth Circuit's justifications in eliminating the requirement that the harasser be homosexual).

161. Drobac, *supra* note 89, at 1280-81.

be more susceptible to erroneously being labeled a homosexual when in fact they are not.¹⁶²

These examples demonstrate that limiting actionable same-sex claims that follow *Oncale*'s first evidentiary route to those that can furnish credible evidence that the harasser is a homosexual exclude an array of potential claims. Under such a requirement, it is possible for same-sex harassers who are not homosexual to avoid liability. In addition, the ambiguity of people's sexuality often makes finding credible evidence a very difficult task. By eliminating such a requirement, the Tenth Circuit broadened the scope of same-sex harassment suits that are actionable through *Oncale*'s first evidentiary route.

2. A Return to the Seventh Circuit's "Sex Per Se" Standard?

The Court's approach in *Oncale* has been characterized as one that fundamentally rejected the Seventh Circuit's "sex per se" standard, which was articulated in *Doe v. City of Belleville*.¹⁶³ While the Seventh Circuit found any sexual conduct satisfied the causal requirement of Title VII's "because of sex" language, the *Oncale* Court stressed a much more stringent causation requirement.¹⁶⁴ The former standard allowed the Seventh Circuit to focus on the harassment itself, rather than the superfluous question of why the harassment was perpetrated in the first place.¹⁶⁵ In addition to rejecting the requirement that the plaintiff offer credible evidence that her harasser is a homosexual, the Tenth Circuit, with its expansive interpretation of the facts in determining whether the harassment was motivated by sexual desire, was able to reconcile the Seventh Circuit's emphasis on the effects of the harassment with the tougher causation requirement in *Oncale*.

Specifically, the Court interpreted seemingly mild incidents as indicative of sexual desire.¹⁶⁶ This includes the "same-sex sexual conduct" that Ms. Bills and Ms. Hinkle engaged in around the workplace.¹⁶⁷ It also includes Ms. Hinkle's attempts to touch Ms. Dick's breasts.¹⁶⁸ It is significant that the Tenth Circuit found harassing behavior that was motivated by sexual desire in acts that merely suggest sexual desire because it mirrors the language used by the Seventh Circuit in *Doe*.¹⁶⁹ Such a

162. *Id.* at 1281.

163. Hill, *supra* note 13, at 151-52; *see also supra* Part II.A (discussing the Seventh Circuit's opinion in *Doe*).

164. *See* Hill, *supra* note 13, at 151-52.

165. *Id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *Compare Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) ("Frankly, we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender.") with *Dick*, 397 F.3d at 1266 ("Ms. Hinkle touched, on more than one occasion, one of the most intimate parts of Ms. Dick's body—an act seldom carried out without some sort of sexual motivation.").

holding makes meeting *Oncale*'s causal requirement of the first evidentiary route more plausible in the Tenth Circuit than in other circuits.

This intimates that in the Tenth Circuit, a similar "sex per se" standard as the now-defunct one the Seventh Circuit employed in *Doe* is present. Granted, there are several differences. The most notable is that under *Oncale*, it is necessary to demonstrate the harasser's motivation by sexual desire, and a mere showing of sexually-related conduct is not enough to satisfy Title VII.¹⁷⁰ However, the Tenth Circuit reconciled this new requirement with the Seventh Circuit's broad causal standard by finding that *any* sexual conduct¹⁷¹ could be indicative of harassment motivated by sexual desire. Instead of finding conduct that is sexual in nature satisfies the causal requirement, the Tenth Circuit found that any conduct indicative of sexual desire satisfies the causal requirement.¹⁷²

The low Tenth Circuit standard for satisfying the causal requirement allows for more focus on effects of the harassment itself. Thus, a court can take the time to examine thoroughly a much more pertinent question: how severe and pervasive is the harassment? This is a more desirable outcome because the material question becomes one of whether harassment occurred in the first place, not why the harassment occurred. This is consistent with a main Title VII goal: avoiding harm to protected classes in the workplace.¹⁷³ By focusing on the effects of the behavior in question rather than the reason why it is happening, courts are more able to address any harm that discriminating behavior may inflict.

C. Beyond Sex

This article has argued that the Tenth Circuit interpreted *Oncale*'s language in an expansive way.¹⁷⁴ However, it is possible to further expand *Oncale* to reach the greatest number of harassment victims.¹⁷⁵ Today, there remain many sex discrimination claims that are not directly causally linked to the victim's biological sex—and are therefore not actionable under Title VII—but still result in an undeniably hostile environment. Often these people are harassed because of their perceived gender role or their sexual orientation.¹⁷⁶

170. See *Oncale*, 523 U.S. at 80.

171. "Sexual conduct," as used by the Tenth Circuit in *Dick*, refers to conduct that is suggestive of sexual intercourse. See *Dick*, 397 F.3d at 1266 ("The record contains sufficient evidence from which a jury could find that her harassers' conduct was motivated by sexual desire. . . . [For example,] Ms. Hinkle and Ms. Bills engaged in same-sex sexual conduct with other people in the workplace . . . [and] Ms. Hinkle allegedly rubbed Ms. Bills' crotch while asking Ms. Bills if she liked it . . .").

172. *Id.*

173. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) ("The statute's 'primary objective' is 'a prophylactic one'; it aims, chiefly, 'not to provide redress but to avoid harm.'").

174. See *supra* Part III.B (discussing the Tenth Circuit's analysis in *Dick*).

175. See *supra* Part IV.A (discussing various writers' criticisms of the *Oncale* opinion).

176. See *Drobac*, *supra* note 89, at 1280-84.

This remainder of this article will argue that *Oncale's* decision to define the word "sex" to only include one's biological sex and not one's gender has resulted in limiting potential sexual harassment claims. It will demonstrate how this narrow definition conflicts with the underlying arguments for the sexual harassment doctrine as well as the Court's previous sexual harassment jurisprudence. Finally, it will suggest that a broader interpretation of "sex" may create some actionable claims which involve discrimination based on one's sexual orientation.

One of the strongest criticisms of *Oncale* stems from its narrow interpretation of the word sex.¹⁷⁷ *Oncale's* narrow interpretation of what constitutes discrimination based on sex implies that the term "sex" refers only to biological sex.¹⁷⁸ The inherent danger in such a holding is that while the Supreme Court may not choose to recognize discrimination because of one's gender as sex discrimination, it is nonetheless true that our culture has been conflating one's biological sex to one's gendered behavior for centuries.¹⁷⁹ Same-sex harassment often occurs because the harasser takes issue with the victim's failure to meet his or her traditional gender role, and not his or her biological sex in the strictest sense.¹⁸⁰

1. Conflict with Historical Arguments

By implicitly assuming in *Oncale* that all men are masculine and all women are feminine, Justice Scalia effectively eliminated harassment claims by effeminate men or masculine women.¹⁸¹ Such a narrow interpretation is at odds with both of the underlying arguments that originally supported the recognition of a hostile environment sexual harassment claim. First, feminists aimed to eliminate *gender-based* stereotyping.¹⁸² Feminists understood differences existed between men and women on a physiological level, but resented (and continue to resent) the assumption that such physical differences automatically resigned women to inferior societal roles.¹⁸³ The sex of women was never the issue, it was the gender roles that they were expected to fill because of their sex.¹⁸⁴ By declaring that the harasser must have issue with the actual sex of the victim,

177. See *id.* at 1269.

178. See *id.* (arguing that the *Oncale* Court never used the word "gender," whereas in previous opinions, it used "sex" and "gender" interchangeably); see also *Oncale*, 523 U.S. at 80 ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.") (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). This suggests that the *Oncale* court believes that the only pertinent motivation for harassment is one's biological sex.

179. See Drobac, *supra* note 89, at 1281.

180. See *id.*, at 1281-82.

181. *Id.*

182. See Hill, *supra* note 13, at 140.

183. See *id.*

184. See *id.*

the Court fails to address motivations that might stem from disgust at a victim's failure to meet traditional gender roles.¹⁸⁵

Second, *Oncale* relied on an analogy to racial harassment in finding that same-sex sexual harassment was viable under Title VII.¹⁸⁶ In condoning the use of this racial analogy in the context of same-sex sexual harassment, Justice Scalia wrote that, "in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race."¹⁸⁷ As Scalia himself recognized, it is entirely possible that a racial harasser may use racial epithets against people of several races, and still be guilty of racial discrimination.¹⁸⁸ In light of this reliance on such an analogy, it is illogical to claim that a male sexual harasser who harasses men based on their gender is not actionable under Title VII.¹⁸⁹ In such a situation, the environment, such as one inundated by racial epithets, is still hostile even though it is more likely the harasser was motivated by the victim's gender rather than his or her sex.

2. Conflict with Precedent

Not only does the narrow interpretation of sex in *Oncale* fail as a policy matter, it seriously conflicts with another of the Supreme Court's own cases, *Price Waterhouse v. Hopkins*.¹⁹⁰ In *Price Waterhouse*, the plaintiff Ann Hopkins was denied a partnership in an accounting firm based in part on her failure to act "feminine."¹⁹¹ The Supreme Court, in an opinion written by Justice Brennan, found that her claim was actionable, because she was able to fulfill the "because of sex" requirement by showing that her employer relied on gender-based considerations in coming to its decision regarding her promotion.¹⁹² Justice Brennan wrote, "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute."¹⁹³ This strongly suggests that Justice Brennan thought that gender considerations were included in the word "sex" in Title VII.

In addition to embracing gender in the definition of sex, the *Price Waterhouse* majority specifically decried the need for the plaintiff to

185. See Drobac, *supra* note 89, at 1281-82. See also Franke, *supra* note 21, at 34-35. Ms. Franke, one of the leading feminist scholars today, has argued that in addition to reinforcing the "gender hierarchy" in the workplace, sexual harassment has a dual aim: to produce masculine (hetero)sexual men, and feminine (hetero)sexual women. *Id.* Therefore, according to Ms. Franke's paradigm, individuals of either gender who refuse or fail to conform to stereotypes can be victims of sexual harassment. *Id.*

186. *Oncale*, 523 U.S. at 78-79.

187. *Id.* at 78.

188. See Drobac, *supra* note 89, at 1279.

189. *Id.*

190. 490 U.S. 228 (1989).

191. *Price Waterhouse*, 490 U.S. at 235.

192. *Id.* at 241-42.

193. *Id.* at 239.

identify a “precise causal role” in the discriminatory action.¹⁹⁴ The Court supported its broad definition of causation by noting that Congress rejected an amendment that would prohibit discrimination “solely because of” sex.¹⁹⁵ This conflicts with *Oncale*’s explicit emphasis on causation.

3. Discrimination Based on Sexual Orientation?

Courts across the country agree that discriminating based on one’s sexual orientation is “a noxious practice, deserving of censure and opprobrium,” and is “morally reprehensible.”¹⁹⁶ However, Congress has repeatedly rejected attempts to amend current legislation to include a cause of action for discrimination based on sexual orientation.¹⁹⁷ A legislative solution may be difficult to attain at this point in time.

However, many of the claims that legislation forbidding discrimination based on sexual orientation would address can potentially become actionable through a broad interpretation of the term sex. This is because at least in part, gay men and women are discriminated against because they fail to meet the gender stereotypes that their sex requires them to meet.¹⁹⁸ Although such a solution does not address the entire spectrum of discrimination based on sexual orientation, it potentially provides redress to gay men and women who are harassed largely because they fail to act in a sufficiently feminine or masculine manner.

CONCLUSION

*Oncale v. Sundowner Offshore Services*¹⁹⁹ limits the ability of many to bring same-sex hostile work environment suits although it purported to expand Title VII. However, under the Tenth Circuit’s broad interpretation of the first evidentiary route in *Dick v. Phone Directories Co.*,²⁰⁰ the same-sex plaintiff has a better chance of successfully combating workplace sexual harassment. Despite this step forward, there remain other methods for effectively addressing all sexual discrimination in the workplace, but it would require the Supreme Court to take a more expansive approach to the term “sex” under Title VII than it articulated in *Oncale*.

*Katherine Roush**

194. *Id.* at 241.

195. *Id.* (internal quotations omitted).

196. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (quoting *Simon-ton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) and *Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252, 259 (1st Cir. 1999)) (internal quotations omitted).

197. *See, e.g., Bibby*, 260 F.3d at 265.

198. *See Franke, supra* note 21, at 35.

199. 523 U.S. 75 (1998).

200. 397 F.3d 1256 (10th Cir. 2005).

* J.D. Candidate, May 2007, University of Denver Sturm College of Law.