When Is Same-Gender Sexual Harassment Actionable under Title VII? Fredette v. BVP Management Associates

Linda K. Davis*
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I. INTRODUCTION

Imagine your supervisor at work, Chris, makes sexual advances towards you. Chris tells you life at work will be much better for you if you just give in to Chris's demands for sex. You might even get a promotion, and certainly, extra perks will come your way. Chris's "requests" occur on a daily basis and make you feel uncomfortable. You ask Chris to stop, but Chris persists. You complain to Chris's supervisor and nothing happens; Chris's lewd comments and sexual suggestions continue. Are you experiencing sexual harassment that is prohibited by federal law? Maybe. If Chris is a man, and you are a woman, then, yes, you are experiencing classic sexual harassment on the job, and Chris's behavior is illegal. Even if Chris is a woman and you are a man, though less common, Chris's behavior is still considered to be illegal sexual harassment. But, what if Chris is a man and you are a man? Or, Chris is a woman and you are a woman? Then, whether Chris's behavior is illegal sexual harassment depends primarily upon where you live. It also might depend upon Chris's sexual orientation. This discrepancy in the courts' interpretation and application of federal law in same-gender sexual harassment actions is the subject of this article. This article also explores, in depth, the Eleventh Circuit Court of Appeals recent first impression decision in *Fredette v. BVP Management Associates*,\(^1\) regarding the issue of whether same-gender sexual harassment is actionable under federal law.

II. SEXUAL HARASSMENT AS A FORM OF SEX DISCRIMINATION UNDER TITLE VII

Title VII of the Civil Rights Act of 1964\(^2\) makes it unlawful 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."\(^3\) It is generally accepted that the congressional intent of Title VII was to hinder

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3. *Id.*
racial discrimination. One day before the House of Representatives voted and approved the Civil Rights Act, the word “sex” was added as a floor amendment. It has been suggested that this last-minute addition was an attempt to prevent passage of the bill as a whole. However, the attempt failed, and the bill passed with the sex discrimination amendment included without significant discussion of its meaning or intent prior to its passage.

The United State Supreme Court first recognized traditional male-on-female sexual harassment as a form of sex discrimination actionable under Title VII in *Meritor Savings Bank, FSB v. Vinson* in 1986. In *Vinson*, the Supreme Court recognized two types of actionable sexual harassment: 1) *quid pro quo* harassment; and 2) harassment that results in a hostile or offensive work environment. In *quid pro quo* harassment, a supervisor promises and/or gives specific employment benefits to a subordinate in exchange for sexual favors. In a hostile work environment claim, the sexual harassment “must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”

The Equal Employment Opportunity Commission (“EEOC”) is the administrative agency given the authority to enforce Title VII. The EEOC guidelines define sexual harassment as any unwelcomed behavior of a sexual nature where: 1) the person’s compliance affects some term or condition of his/her employment; 2) the person exhibiting the unwelcomed sexual behavior uses the other person’s compliance, or refusal to comply, in making decisions that affect the other’s employment; or 3) the unwelcomed behavior excessively interferes with the person’s work or creates an environment that is “intimidating, hostile, or offensive.”

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4. 110 CONG. REC. 2581 (1964).
7. Id.
9. Id. at 62.
11. Vinson, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (alteration in original)).
III. JUDICIAL INTERPRETATION OF THE APPLICABILITY OF TITLE VII WHEN
THE HARASSER AND VICTIM ARE THE SAME SEX

A. United States Supreme Court

To date, the United States Supreme Court has not reviewed the issue of
whether same-gender sexual harassment is actionable under Title VII.
However, on June 9, 1997, the United States Supreme Court granted
certiorari on a Fifth Circuit Court of Appeals case, Oncale v. Sundowner
Offshore Services, Inc. In Oncale, Mr. Oncale alleged quid pro quo and
hostile work environment sexual harassment by his male supervisor and two
male co-workers. Employed on an offshore oil rig, Mr. Oncale claimed that
the three men sexually assaulted him on at least three separate occasions and
that two of the men threatened to rape him. Reluctantly relying upon
"binding precedent" established by the Fifth Circuit Court of Appeals in
Garcia v. Elf Atochem North America, the appeals court refused to
recognize Mr. Oncale's claim as viable under Title VII.

B. Circuit Courts of Appeals

In 1977, in the case of Barnes v. Costle, the District of Columbia
Circuit Court of Appeals became the first appellate level court to recognize
the cognizability of same-gender sexual harassment as discrimination under
Title VII. Although the case dealt with traditional male-on-female sexual
harassment, the court, in a footnote, commented:

It is no answer to say that a similar condition could be imposed on
a male subordinate by a heterosexual female superior, or upon a
subordinate of either gender by a homosexual superior of the same-
gender. In each instance, the legal problem would be identical to
that confronting us now—the exaction of a condition which, but
for his or her sex, the employee would not have faced.

15. Id. at 118–19.
16. Id. at 120.
17. 28 F.3d 446 (5th Cir. 1994).
18. Oncale, 83 F.3d at 120 (while this book was in the process of being published, the
United States Supreme Court rendered its opinion, which is discussed in the addendum).
20. Id. at 983.
21. Id. at 990 n.55 (emphasis added).
Later that same year, the Third Circuit Court of Appeals commented on the same-sex sexual harassment issue parenthetically in *Tomkins v. Public Service Electric & Gas Co.*:

It is not necessary to a finding of a Title VII violation that the discriminatory practice depend on a characteristic "peculiar to one of the genders," or that the discrimination be directed at all members of a sex. It is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff "had been a man she would not have been treated in the same manner."

To date, only five circuit courts have specifically heard and ruled on the issue of whether same-sex sexual harassment is actionable under Title VII, with conflicting results. The Eleventh Circuit was the first appeals court to address the issue, albeit without a published opinion, in *Joyner v. AAA Cooper Transportation.* In that case, a male employee alleged *quid pro quo* sexual harassment by a homosexual male supervisor. The appeals court affirmed the district court's holding that "unwelcomed *homosexual* harassment . . . states a violation of Title VII." The court applied the five elements of *quid pro quo* harassment as established in *Henson v. City of Dundee.* "(1) the employee belongs to a protected group . . . ; (2) the employee was subject to unwelcome sexual harassment . . . ; (3) the harassment complained of was based upon sex . . . ; (4) the harassment complained of affected a term, condition, or privilege of employment . . . ; and 5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action." Regarding the critical third element, i.e., that the harassment complained of was based on sex, the court stated: "[S]ince the evidence established the terminal manager's homosexual proclivities, the harassment to which plaintiff complained was based upon sex." The Eleventh Circuit Court of Appeals had not heard another case on this issue until *Fredette v. BVP Management Associates,* the subject of this article.

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22. 568 F.2d 1044 (3d Cir. 1977).
23. *Id.* at 1047 n.4 (quoting Williams v. Saxbe, 413 F. Supp. 654, 658 (D.D.C. 1976)).
27. *Id.* at 541 (emphasis in original).
28. 682 F.2d 897 (11th Cir. 1982).
29. *Id.* at 903–05.
Nine years passed after the Joyner case before another circuit court of appeals heard the issue again. In 1993, the Fifth Circuit in Giddens v. Shell Oil Co. affirmed, without a published opinion, the district court’s holding that same-sex sexual harassment does not state a claim under Title VII.

Although the district court’s opinion was unpublished, it was subsequently relied upon by the Fifth Circuit Court of Appeals and quoted in Garcia: “Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.” As noted above, in 1996, the Fifth Circuit, in Oncale v. Sundowner Offshore Services, Inc., relied upon Giddens and Garcia in affirming that same-sex sexual harassment is not cognizable under Title VIII.

The Fourth Circuit Court of Appeals first heard the issue in 1996, in McWilliams v. Fairfax County Board of Supervisors. In McWilliams, a male employee alleged hostile work environment sexual harassment by several of his male co-workers. The circuit court of appeals affirmed the district court’s granting of summary judgment for the defendants stating:

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 [target’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.

In his dissent, Judge Michael noted: “It is too early to write this case off to meanness and horseplay. For now there is a material factual issue whether McWilliams was discriminated against because of his sex.” The Fourth Circuit again considered the issue two months later in Hopkins v. Baltimore.
but gave no opinion about this issue. In August of 1996, the Fourth Circuit relied upon its holding in McWilliams to affirm a district court’s dismissal of a same-gender sex discrimination action in Mayo v. Kiwest Corp. Most recently, in October of 1996, the Fourth Circuit refined its holding on the issue by recognizing the possibility of same-sex sexual harassment of a male by other male co-workers who were homosexuals, resulting in a hostile work environment. In Wrightson v. Pizza Hut of America, Inc., the court stated:

An employee is harassed or otherwise discriminated against "because of" his or her sex if, "but-for" the employee's sex, he or she would not have been the victim of the discrimination . . . . There is . . . simply no "logical connection" between Title VII's requirement that the discrimination be "because of" the employee's sex and a requirement that a harasser and victim be of different sexes.

In Quick v. Donaldson Co. Inc., the Eighth Circuit Court of Appeals reversed a district court's granting of summary judgment for the defendant/employer in a situation where a male employee was subjected to over 100 incidents of "bagging" by his male co-workers. Applying the test established in Harris v. Forklift Systems, Inc., the court established: "The proper inquiry for determining whether discrimination was based on sex 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.'" The court determined that a material issue of fact existed as to whether the treatment of Quick was based on his gender.

Prior to the Eleventh Circuit's recent holding in Fredette, the Sixth Circuit was the latest appeals court to weigh in on the same-gender sexual harassment issue. In Yeary v. Goodwill Industries-Knoxville, Inc., a male alleged sexual harassment by a male co-worker who was known to be

40. 77 F.3d 745 (4th Cir. 1996).
41. 94 F.3d 641 (4th Cir. 1996).
43. Id. at 138.
44. Id. at 142.
45. 90 F.3d 1372 (8th Cir. 1996).
46. Id. at 1374 (the court defined "bagging" as the intentional grabbing and squeezing of a male's testicles).
47. Id.
49. Quick, 90 F.3d at 1379 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)).
50. Id. at 1379.
51. 107 F.3d 443 (6th Cir. 1997).
homosexual. The court reversed the district court's granting of the defendants' motion to dismiss noting: "[W]hen a male sexually propositions another male because of sexual attraction, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male—that is, 'because of . . . sex.'"

While not specifically addressing the issue, both the Seventh and Ninth Circuit Courts of Appeals have acknowledged, in dicta, the cognizability of same-gender sexual harassment as an actionable claim under Title VII. In *Baskerville v. Culligan International Co.*, Judge Posner stated, as an aside: "Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases." Also, in *Steiner v. Showboat Operating Co.*, the court stated: "[A]lthough words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that both men and women working at Showboat have viable claims against [the male supervisor] for sexual harassment."

C. District Courts

The remaining seven circuit courts of appeals have not ruled on the issue of whether same-gender sexual harassment is actionable under Title VII, but all have district courts that have heard and ruled on the issue. District courts in the First, Second, and District of Columbia Circuits have consistently held that same-gender sexual harassment is actionable under Title VII, but with a limited number of judicial opinions to support their holdings. District courts in the Third and Tenth Circuits have also consistently allowed same-gender sexual harassment claims under Title VII, both with slightly more supportive case law than the First, Second, and

52. Id. at 444.
53. Id. at 448 (emphasis in original).
54. 50 F.3d 428 (7th Cir. 1995).
55. Id. at 430.
56. 25 F.3d 1459 (9th Cir. 1994).
57. Id. at 1464 (emphasis in original).
58. Specifically, the First, Second, Third, Seventh, Ninth, Tenth, and District of Columbia Courts.
The decisions of the district courts in the Seventh and Ninth Circuits that have heard the issue can only be described as contradictory.

District courts in the Seventh Circuit have heard eighteen cases on the issue of same-gender sexual harassment since 1981. This is equal to the number of cases on the issue heard by district courts in all other circuits combined. The first case on point in the Seventh Circuit, *Wright v. Methodist Youth Services, Inc.*, was decided in 1981. The court unequivocally recognized the actionability of Mr. Wright's claim under Title VII when he was terminated from his job because he refused the homosexual advances of his male supervisor. The court relied on dicta in *Barnes v. Costle*, a 1977 decision, from the District of Columbia Circuit Court of Appeals.

Seven years later, Judge Williams refused to recognize a Title VII claim in *Goluszek v. Smith*. Mr. Goluszek alleged hostile work environment
sexual harassment by several male machine operators at H.P. Smith. Relying, in part, on a *Harvard Law Review* article, written by a student, Judge Williams stated that the behavior Mr. Goluszek had been subjected to was not the type Congress intended to prohibit under Title VII. Rather, according to Judge Williams, Congress enacted Title VII to protect vulnerable persons from those more powerful, who exploit their power by inflicting sexual demands upon the weaker group. Finding that Mr. Goluszek worked in a male-dominated environment, Judge Williams wrote: "In fact Goluszek may have been harassed 'because' he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace." Judge Williams's opinion in *Goluszek* has been occasionally relied upon; sometimes openly criticized, and often distinguished or ignored by judges, including other district court judges within the Seventh

66. Id. at 1453.
67. Id. at 1456.
68. Id.
69. Id. (citation omitted).
71. Miller v. Vesta, Inc., 946 F. Supp. 697, 704 (E.D. Wis. 1996) ("Reliance on *Goluszek* is misplaced. . . . The *Goluszek* court built its understanding of Congressional intent upon a foundation of quicksand. . . . The *Goluszek* court had no basis for its gloss on Title VII's legislative history. Not only is it inappropriate to delve into Congressional intent when the statute's language is clear, *Goluszek* is simply not persuasive or reliable authority for interpreting Title VII's provisions on sex discrimination."); Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393, 400 (D. Minn. 1996) ("We are not persuaded by the rationale articulated in *Goluszek*."); Kaplan v. Dacommed Corp., No. 95-C6987, 1996 WL 89148, at *1 (N.D. Ill. Feb. 27, 1996) ("This Court has disagreed sharply with *Goluszek* from the beginning—in this Court's view, that decision and others like it represent a kind of social judgment about Congress' purposes in enacting Title VII that is at odds with what Congress actually said."); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 354 (D. Nev. 1996) ("Notwithstanding the *Goluszek* court's sweeping statements regarding Congressional intent, its analysis is unsupported by any legislative history. . . . Moreover, the additional requirement imposed by *Goluszek* on a sexual harassment plaintiff is an unwarranted extension of the elements of proof set forth by the Supreme Court. . . ."); Ton v. Information Resources, Inc., 70 Fair Empl. Prac. Cas. (BNA) 355, 360 (N.D. Ill. 1996) ("*Goluszek* has . . . developed into a favored target of jurisprudential criticism, most of which makes sense."); Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1379 (C.D. Cal. 1995) ("In *Goluszek*, the court explored the 'underlying concerns of Congress' to determine that Title VII did not apply to a male
Circuit.72  The other sixteen cases heard within the district courts of the Seventh Circuit have, for the most part, recognized a claim for same-gender sexual harassment under Title VII.73  The exceptions consist of three cases

heard before Judge Norgle, who gives a thoughtful and thorough analysis of his reasoning for not allowing same-gender sexual harassment claims in two of his three opinions on the issue. Referring to Judge Posner's affirmation of the possibility of same-gender sexual harassment in dicta in Baskerville, and relying, ultimately, upon his own interpretation of Congress's intent in passing Title VII, Judge Norgle states:

[T]he court agrees with Chief Judge Posner that sexual harassment occurs in male-on-male and female-on-female formats, though less frequently than in the prevalent male-on-female harassment cases. Yet, Title VII's drafters did not intend to protect one gender from the sexual conduct of those of the same-gender, and therefore, Title VII cannot be a vehicle for sexual harassment litigation between individuals of the identical gender. No matter whether the predator is a homosexual or heterosexual, and no matter whether the prey is sexually attracted to men or women, Title VII does not allow for claims alleging same-gender sexual harassment.

Finally, in Blozis v. Mike Raisor Ford, Inc., and Vandeventer v. Wabash National Corp., Judge Sharp appears to come out on both sides of the question, but his opinions are, in fact, consistent. While the opinion in Blozis is dated before that in Vandeventer, Judge Sharp obviously wrote the Vandeventer opinion first, as he distinguishes it in the Blozis opinion. In Vandeventer, the plaintiff, Douglas Feltner, alleged he had been sexually harassed by a male co-worker who had called him a “dick sucker” and a homosexual. Judge Sharp stated: “[A] man can state a claim under Title VII for sexual harassment by another man only if he is being harassed because he is a man.”

While the epithet used and the taunting had a ‘sexual’ component, as do most expletives, the crucial point is that the ‘harasser’ was not aiming expletives at the victim because of the victim's maleness. He was taunting the victim because he did not like him; Mr. Feltner's gender was irrelevant. . . . Thus, [his claim is] not actionable under Title VII.

75. Schoiber, 941 F. Supp. at 739.
77. 887 F. Supp. 1178 (N.D. Ind. 1995).
79. Id. at 1181 n.2.
80. Id. (emphasis in original).
81. Id.
In *Blozis*, Judge Sharp allowed the claim of same-gender sexual harassment to go forward, refusing to grant the defendant’s motion to dismiss. He distinguished his decision here from his summary judgment ruling in *Vandeventer*, noting courts’ general reluctance to grant motions to dismiss and the fact that the plaintiff in *Vandeventer* produced no evidence that he was harassed because he was a male. In *Blozis*, Judge Sharp found that it was the existence of a male or female bias that was protected by Title VII and not just being subjected to sexual comments or actions. Though he expressed some doubt about the cognizability of male bias between heterosexual men, he acknowledged that it might be possible to prove and allowed Mr. Blozis’ claim to proceed.

Finally, the district courts in the Ninth Circuit are also conflicted on the issue of whether same-gender sexual harassment is actionable under Title VII, but with very little case support on either side. In *Ashworth v. Roundup Co.*, the court refused to recognize the possibility of same-gender sexual harassment under Title VII, relying upon the decision in *Goluszek* and *Garcia*. In *Easton v. Crossland Mortgage Corp.*, and *Tanner v. Prima Donna Resorts, Inc.*, the judges were critical of the *Goluszek* decision and allowed the claim.

**IV. FREDETTE V. BVP MANAGEMENT ASSOCIATES**

**A. Background of the Case**

Robert Fredette, a male heterosexual, worked from 1988 until 1994 as a waiter at Arthur’s 27, a restaurant in the Buena Vista Palace Hotel in Orlando, Florida. BVP Management Associates owned and operated Arthur’s 27 during the time of Mr. Fredette’s employment. Dana Sunshine, a male homosexual, was the maitre d’/manager of the restaurant during the time of Mr. Fredette’s employment. As manager, Mr. Sunshine had the authority to hire, fire, and schedule the servers.

82. *Id.* at 808.
84. *Id.* at 808.
88. 905 F. Supp. 1368 (C.D. Cal. 1995), rev’d, 114 F.3d 979 (9th Cir. 1997).
90. Brief for Appellant at 4, *Fredette*, (No. 95-3242) [hereinafter Brief for Appellant].
Mr. Fredette alleged that Mr. Sunshine sexually harassed him over the course of several years. The alleged harassment began shortly after Mr. Fredette began to work at Arthur’s 27. He claimed that Mr. Sunshine told him of an easy way for him to get promoted, and he should see him on his day off so they could discuss it. Mr. Fredette told Mr. Sunshine he preferred to be promoted through his hard work. Mr. Sunshine then, allegedly, grabbed his crotch, shook it at Mr. Fredette, and said that being “‘hard is exactly what it takes.’” Mr. Fredette alleged that Mr. Sunshine repeatedly sexually propositioned him and that some of these propositions were made with the promise of a raise or a promotion.

Other male servers at the restaurant, some homosexual and some heterosexual, testified to Mr. Sunshine’s sexual harassment of them. Mr. Fredette also alleged that one male homosexual waiter, with no fine dining experience, was promoted by Mr. Sunshine after providing Mr. Sunshine with sexual favors. This waiter allegedly told Fredette: “‘[U]se your imagination, you don’t have to know how to wait tables to get what you want around here.’” Allegedly, Mr. Sunshine’s sexual partner told Mr. Fredette and other servers that they could get better table assignments by giving in to Mr. Sunshine’s requests. Despite his refusals of Mr. Sunshine’s requests, Mr. Fredette was promoted to captain in November of 1989, six months after beginning work. He retained that position until his resignation in February of 1993.

In January of 1993, Mr. Fredette became intoxicated at the restaurant’s bar and caused a disturbance. As a result of his drunken behavior, he was suspended for three days, required to obtain counseling for alcohol abuse, and subjected to random drug testing. Upon returning to work, Mr. Fredette met with the Human Resource Manager of the hotel and, for the first time, complained of Mr. Sunshine’s sexual harassment. The Director of Human Resources met with Mr. Sunshine who denied most of the allegations. Mr. Sunshine was given a written warning as a result of that meeting.

Following his meeting with human resources personnel, Mr. Fredette was no longer sexually harassed by Mr. Sunshine. However, Mr. Fredette claims that Mr. Sunshine subjected him to retaliatory actions by reprimanding him for minor infractions, assigning him to fewer or lower-
tipping tables, and by having other employees complain about him. On the advice of his doctor, Mr. Fredette resigned from his position on February 6, 1993.

B. Procedural History

On March 17, 1994, Mr. Fredette filed suit against Mr. Sunshine, BVP Management Associates, Royal Palace Hotel Associates, and Buena Vista Hospitality Group. In his complaint, Mr. Fredette alleged violations of Title VII, the Florida Human Rights Act, and the Fair Labor Standards Act. Specifically, Mr. Fredette alleged hostile work environment and "quid pro quo sexual harassment."

On July 6, 1994, Mr. Sunshine filed a motion to dismiss on the grounds that he could not be held individually liable for sexual harassment. A magistrate judge reviewed the motion and recommended its denial. On October 26, 1994, the United States District Judge agreed with the Magistrate Judge’s recommendation and denied Mr. Sunshine’s motion to dismiss.

On February 16, 1995, Mr. Sunshine filed a motion for judgment on the pleadings, again claiming he could not be held individually liable for sexual harassment. Mr. Fredette filed his opposition to Mr. Sunshine’s motion on March 17, 1995. On May 1, 1995, Mr. Sunshine filed a motion for summary judgment. On May 10, 1995, the magistrate issued a report regarding Mr. Sunshine’s motions. In his report, he recommended that Mr. Sunshine’s motion for judgment on the pleadings be granted as Mr. Sunshine was not a proper defendant under Title VII or the Florida Human Rights Act. On June 19, 1995, the district judge approved the magistrate’s report and dismissed all claims against Mr. Sunshine.

On April 19, 1995, Mr. Fredette voluntarily dismissed his claims against Royal Palace Hotel Associates and Buena Vista Hospitality Group. On May 9, 1995, BVP filed a motion for summary judgment stating that Title VII does not prohibit same-gender sexual harassment. BVP claimed that

98. Id. at 6.
99. Id.
100. Brief for Appellee, supra note 96, at 2.
102. Fredette v. BVP Management Assocs., 112 F.3d 1503, 1504 (11th Cir. 1997) (emphasis added).
103. Brief for Appellee, supra note 96, at 3.
104. Id.
105. Id.
106. Id..
107. Id.
108. Brief for Appellee, supra note 96, at 3.
Congress did not intend to protect men in a male-dominated work environment and that Mr. Fredette may have been discriminated against, but the discrimination was due to his sexual preference and not because of his gender. Title VII, BVP claimed, does not protect against discrimination based on sexual orientation. On June 5, 1995, Mr. Fredette filed opposition to BVP’s motion for summary judgment. Mr. Fredette claimed that Title VII does protect against same-gender sexual harassment when the harassment is an attempt to extract sexual favors because he is a male.

On June 30, 1995, the magistrate issued a report and recommended that the district judge deny BVP’s motion for summary judgment. The magistrate relied on his interpretation of the plain language of the applicable statutes, prohibiting discrimination based on sex regardless of the gender of the alleged harasser or the victim. He noted that, if the harassment would not have happened but for the victim’s gender, then Title VII protections would apply.

On September 11, 1995, the district judge refused to accept the magistrate’s recommendations and issued an order granting BVP’s motion for summary judgment under Title VII and the Florida Human Rights Act. The judge adopted the magistrate’s recommendation regarding the denial of BVP’s motion on the Fair Labor Standards Act claim, stating a genuine issue of fact remained to be resolved.

In granting BVP’s motion on the Title VII and Florida Human Rights Act claims, the district judge agreed with BVP that the alleged discrimination of Mr. Fredette was based on his sexual orientation and was not, therefore, actionable under Title VII. “[T]he determinative factor is that the discrimination or harassment would not have occurred ‘but for the fact of [the plaintiff’s] sex.’” But, the judge added, “[T]he term ‘sex’ as used in Title VII is not synonymous with ‘sexual preference.’” Quoting from Garcia, the judge wrote: “Harassment by a male supervisor against a

109. Brief for EEOC, supra note 91, at 5.
110. Brief for Appellant, supra note 90, at 2.
111. Brief for EEOC, supra note 91, at 5-6.
112. Brief for Appellee, supra note 96, at 4.
113. Brief for EEOC, supra note 91, at 6.
114. Id.
116. Id.
117. Brief for EEOC, supra note 91, at 7.
119. Id.
120. 28 F.3d 446 (5th Cir. 1994).
male subordinate does not [necessarily] state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." The judge justified his decision by claiming that Mr. Fredette would not have suffered the discrimination if he had given in to Mr. Sunshine's requests.

Thus, if Fredette suffered the claimed harassment or discrimination at the hands of the restaurant manager, it stemmed not from the fact that Fredette was a man, but rather from the fact that Fredette refused the manager's propositions and did not share the same sexual orientation or preferences as the manager. Title VII does not provide a cause of action for discrimination or harassment levied because of one's sexual orientation or preference. Any expansion of Title VII... that would include such a cause of action is for... Congress... and not this court, to make.\textsuperscript{122}

On September 21, 1995, Mr. Fredette filed a notice of appeal of the district court's judgments in favor of Mr. Sunshine and BVP.\textsuperscript{123} The parties agreed to dismiss the Fair Labor Standards Act claims and, in December of 1995, Mr. Fredette dismissed the claims against Mr. Sunshine.\textsuperscript{124} The case proceeded on appeal to the Eleventh Circuit Court of Appeals on Mr. Fredette's claim against BVP Management Associates for discrimination in violation of Title VII and the Florida Human Rights Act.\textsuperscript{125}

C. Appeals Court's Holding and Rationale

The court narrowly defined the legal issue in Fredette: "[W]hether, under the circumstances of this case, the sexual harassment of a male employee by a homosexual male supervisor is actionable under Title VII."\textsuperscript{126} In deciding that Mr. Fredette's claim was actionable under Title VII, the court considered five areas: 1) the language of Title VII; 2) the statute's causation requirement, that the discrimination occurred "because of" the person's sex; 3) the legislative history of Title VII; 4) the EEOC's interpretation of Title VII; and 5) relevant case law.\textsuperscript{127}

First, the court quoted and reviewed the wording of the statute itself. Focusing on Congress's use of such gender neutral terms as "employer" and
“any individual,” the court said, “[t]here is simply no suggestion in these statutory terms that the cause of action is limited to opposite gender contexts.”

Many courts have used, to some extent, a similar interpretation of the statute’s plain language and relied on it in finding same-gender sexual harassment claims actionable under Title VII. The court in Easton v. Crossland Mortgage Corp. established: “Where the statutory language is clear, our sole function is to enforce it, according to its terms.”

The Fredette appeals court then looked to the statute’s causation requirement, that the alleged discrimination be “because of” the person’s sex. Comparing Mr. Fredette’s male-on-male sexual harassment by Mr. Sunshine to a traditional male-on-female situation, the court noted that “[t]he

128. Id. at 1505.

131. Id. at 1378 (quoting Rake v. Wade, 508 U.S 64 (1993)).
reasonably inferred motives of the homosexual harasser are identical to those of the heterosexual harasser—i.e., the harasser makes advances towards the victim because the victim is a member of the gender the harasser prefers.\footnote{Fredette v. BVP Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997).}

Also, the court found, that since the alleged harassment experienced by Mr. Fredette was not experienced by women at the restaurant, this supported Mr. Fredette’s claim that he was harassed because of his gender, in other words, because he was a man.\footnote{Id.}

In \textit{Yeary v. Goodwill Industries-Knoxville, Inc.}, a male employee alleged sexual harassment by a male co-worker, a known homosexual.\footnote{107 F.3d 443 (6th Cir. 1997).} In \textit{Yeary}, the court held: “\textit{[W]hen a male sexually propositions another male because of sexual attraction, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male—that is, ‘because of . . . sex.’}”\footnote{Id. at 448 (emphasis in original).} Two other courts have allowed Title VII causes of action where the alleged harasser was known to be homosexual, finding the fact that the harasser was a homosexual as support of the plaintiff’s position that he/she was harassed because of his/her sex.\footnote{Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) (“[W]e hold that a same-sex ‘hostile work environment’ sexual harassment claim may lie under Title VII where a homosexual male (or female) employer discriminates against an employee of the same sex or permits such discrimination against an employee by homosexual employees of the same sex.”); EEOC v. Walden Book Co., Inc., 885 F. Supp. 1100, 1102–03 (M.D. Tenn. 1995) (“It is obvious that sexual harassment by a homosexual supervisor of the same sex is an action of a condition of employment which, but for his or her sex, an employee would not have faced.”).} Other courts have found the homosexuality of the harasser persuasive, but not conclusive, in determining that the plaintiff was harassed because of his/her sex.\footnote{See McCoy v. Macon Water Auth., 966 F. Supp. 1209, 1217 (M.D. Ga. 1997) (“[Specific courts] have held that Title VII provides a cause of action for same-sex harassment if the harasser is homosexual, but not if the harasser is heterosexual. . . . This Court finds [these holdings] more consistent with the language of Title VII and the judicially-created doctrine of sexual harassment.”); Caldwell v. KFC Corp., 958 F. Supp. 962, 969 (D.N.J. 1997) (“Like any other sexual-harassment plaintiff, plaintiff must still prove that the sexual harassment he suffered was ‘because of’ his sex—that had he been a woman, he would not have been subjected to Mr. Worley’s sexual harassment.”); Swage v. Inn Philadelphia, 72 Fair Empl. Prac. Cas. (BNA) 438, 441 (E.D. Pa. 1996) (“[P]laintiff must still prove that the alleged harassment was ‘because of’ his sex.”).}

Next, the appeals court looked to the legislative history and intent of Title VII. The court said, “we find nothing in the legislative history that
suggests an express legislative intent to exclude same-sex harassment claims from the purview of Title VII.\textsuperscript{139}

Many courts have lamented about the lack of congressional intent regarding Title VII.\textsuperscript{140} Most of those courts have overcome the lack of intent and found same-gender sexual harassment claims actionable under Title VII.\textsuperscript{141} However, Judge Murnaghan, in \textit{Wrightson v. Pizza Hut of America, Inc.}, gave this critical dissent:

The majority treats the absence of legislative history as a license to 'legislate' and impermissibly to rewrite Title VII to include claims never intended, nor contemplated, by Congress. The majority’s approach ignores the context within which Congress enacted Title VII. The absence of legislative history to guide the courts can be read in either of two ways. Either, as the majority argues, Congress's failure to exclude the possibility of same sex claims should be interpreted as allowing for such claims. Or, Congress simply never fathomed that Title VII would be used in the manner in which the majority today holds, and hence, Congress, not the courts, should address, in the first instance, whether Title VII’s 'sex' language should apply when a heterosexual male alleges that he was harassed by a homosexual male. The instant case demonstrates the wisdom of the Constitution’s three branches of

\begin{itemize}
    \item \textsuperscript{139} Fredette v. BVP Management Assoc., 112 F.3d 1503, 1505 (11th Cir. 1997).
    \item \textsuperscript{141} Wrightson, 99 F.3d at 138; Caldwell, 958 F. Supp. at 962; Swage, 72 Fair Empl. Prac. Cas. at 438; Johnson, 932 F. Supp. at 269; Tanner, 919 F. Supp. at 351; King, 911 F. Supp. at 161; Griffith, 887 F. Supp. at 1133; Walden Book Co., 885 F. Supp. at 100.
\end{itemize}
government, which leaves to the legislative branch, not the
judiciary, the task of making the law. 142

Like the appeals court in Fredette, at least three other courts have found that
the lack of legislative intent does not negate the possibility of same-gender
actions. 143

Also regarding congressional intent, the Fredette court noted: “The
obvious Congressional focus on discrimination against women has not
precluded the courts from extending the protections of Title VII to men.” 144
This reverse discrimination analogy used in same-gender actions was relied
upon by the courts in EEOC v. Walden Books, 145 and Sardinia v. Dellwood
Foods. 146

Next, the court considered the EEOC’s interpretation of Title VII. In a
footnote, the court recognized the EEOC’s expertise that, while not binding
on courts, can be useful for interpretation of and guidance in Title VII
actions. 147 The court quoted the EEOC’s Compliance Manual that explicitly
states that sexual harassment can exist even if the harasser and victim are not of opposite genders. 148 Instead, the EEOC recommends that the focus be on
the disparate treatment of one person by another and sexual harassment based
based on a person’s sex. 149 The court quotes a specific example in the EEOC
Compliance Manual of sexual harassment where the harasser and victim are,
in fact, the same sex. 150 Many other courts have relied, in part, on the

142. Wrightson, 99 F.3d at 145.
143. See Peric v. Board of Trustees of Univ. of Ill., 71 Fair Empl. Prac. Cas. (BNA)
1760, 1762 (N.D. Ill. 1996) (“[N]o legislative history exists to contradict a gender neutral
legislative history that suggests that victims of sexual harassment must be sexually harassed
by harassers of the opposite sex before they may invoke the protections of Title VII.”);
(“[T]here is little legislative history to support such a claim [that same sex harassment is not
prohibited under Title VII].”).
144. Fredette v. BVP Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997).
145. 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) (“It would be untenable to allow
reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title
VII.”).
146. 69 Fair Empl. Prac. Cas. (BNA) 705, 709 (S.D.N.Y. 1995) (“I agree with those
courts . . . which finds [sic] it ‘untenable to allow reverse discrimination cases but not same-
sex sexual harassment cases to proceed under Title VII.’”) (quoting EEOC v. Walden Book
Co., Inc., 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995)).
147. Fredette, 112 F.3d at 1505 n.4.
148. Id. at 1505.
149. Id. at 1505–06.
150. Id.
EEOC's recognition of the possibility of same-gender sexual harassment in finding for a plaintiff in a same-gender Title VII action.\(^{151}\)

Finally, the Fredette appeals court looked for guidance from case law precedent in making its decision. It noted that the United States Supreme Court has not explicitly ruled on the same-gender sexual harassment issue.\(^{152}\) However, the appeals court stated that the United States Supreme Court did rule on a case of reverse employment discrimination. In Johnson v. Transportation Agency,\(^{153}\) a male supervisor's decision to promote a female over a male employee was analyzed by the Court for possible discrimination under Title VII.\(^{154}\) The appeals court found that the United States Supreme Court's acknowledgment of this type of reverse discrimination claim with same-gender undertones was enough, at least implicitly, to support the idea of same-gender sexual harassment claims.\(^{155}\)

The Fredette court then looked at cases beyond the Eleventh Circuit, relying especially upon the decisions of the Sixth and Fourth Circuit Courts of Appeal in Yeary and Wrightson. The court found both of those cases factually similar to Fredette as the male victims had been sexually harassed by a male homosexual. In both Yeary and Wrightson, the courts allowed the plaintiffs' claims to continue. The Fredette court also noted supportive dicta in Barnes v. Costle, Tomkins v. Public Service Electric & Gas Co., Baskerville v. Culligan International Co., and Steiner v. Showboat Operating


152. Fredette v. BVP Management Assoc., 112 F.3d 1503, 1505 (11th Cir. 1997).
154. Id. at 616.
155. Id.
and cited, in a footnote, to several district court cases that have recognized the cognizability of same-gender sexual harassment under Title VII.

The Fredette court criticized the decisions of the Fifth Circuit Court of Appeals in Oncale and Garcia. First, the court examined what it determined to be those courts’ lack of reasoning in reaching a decision that all same-gender sexual harassment claims are not actionable. The Fredette court then went on to factually distinguish Oncale, where the behavior was “teasing and harassment with sexually-focused speech or conduct” between coworkers and not a supervisor’s request for sexual favors from a subordinate. The Fredette court was also critical of the district court’s decision to not recognize a same-gender sexual harassment claim in Goluszek v. H.P. Smith. Again, finding the court’s reasoning flawed, and relying upon judicial acceptance of reverse discrimination actions, the Fredette court noted that there is no need to demonstrate a male dominated environment, as required in Goluszek.

Both the lower district court and BVP Management Associates asserted that the harassment suffered by Mr. Fredette was based upon sexual orientation, and not upon gender. The appeals court concluded that its decision to allow Mr. Fredette’s claim for same-gender sexual harassment was, in no way, an endorsement of sexual harassment claims based upon sexual orientation. Specifically, the court stated: “[W]e hold today that when a homosexual male supervisor solicits sexual favors from a male subordinate and conditions work benefits or detriment on receiving such favors, the male subordinate can state a viable Title VII claim for gender discrimination.”

156. Fredette, 112 F.3d at 1508.

158. Fredette, 112 F.3d at 1508 (11th Cir. 1997).
159. Id. at 1510 (emphasis in original).
V. CONCLUSION

The significant trend by courts is to find sexual harassment claims actionable under Title VII. Title VII's obvious intent, regardless of the lack of specific legislative history, is to protect against discrimination in the workplace based upon, among other things, a person's "sex." If a plaintiff can show that the sexual harassment he or she has experienced was directed to him/her because of sex, then a Title VII claim exists. In same-gender claims, the homosexuality of the harasser, though persuasive, should not be the sole determining factor in deciding whether the harassment was based on sex. Nor should the heterosexuality of the harasser rule out the possibility of a viable Title VII claim. Whether the harassment was based on the victim's sex is a question of fact to be decided by the fact finder. Judge Lawson, in McCoy v. Macon Water Authority, put it aptly: "Proving that the harassment was directed at the plaintiff because of sex, rather than for some other reason, may be an unpleasant and difficult affair, but it is the duty of courts, and especially of juries, to sort out such things."160

Linda K. Davis

ADDENDUM

On March 4, 1998, the United States Supreme Court published its decision of Oncale v. Sundowner Offshore Services, Inc.161 At long last, the issue of whether a sexual harassment claim under Title VII is viable when the harasser and victim are the same sex has been answered affirmatively.162 The unanimous Court, in an opinion written by Justice Scalia, seemed genuinely confused by the "bewildering variety of stances" taken by courts that have previously addressed the issue.163

Not unlike many circuit courts of appeals that have faced this question, the United States Supreme Court looked for case law precedent on related issues to support its position that same-gender harassment claims are actionable under Title VII. For example, the Court referenced its decision in Newport News Shipbuilding & Dry Dock Co. v. EEOC,164 which extended Title VII's protection to men as well as women.165 The Court observed that it had previously rejected the notion that individuals do not discriminate

162. Id. at *5.
163. Id. at *3.
165. Id. at 685.
against members of their own race in *Castaneda v. Partida.* Finally, the Court cited favorably to *Johnson v. Transportation Agency, Santa Clara County,* where a man filed a claim for sex discrimination against his employer when a promotion for which he applied was given to a female employee by his male supervisor.

The Court relied most heavily upon the statutory language and its interpretation of broad Congressional intent for its decision that same-sex harassment claims are not precluded from Title VII actions. Even though same-gender claims were not the "principal evil" considered by the legislature when it enacted Title VII, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Since the language of Title VII prohibits "discrimination...because...of...sex," the Court extended the statute's coverage to include any sexual harassment that meets the statutory requirements. This includes same-gender claims.

Thankfully, the Court went beyond its mere holding, giving guidelines for plaintiffs wishing to prove same-gender sexual harassment claims under Title VII. Harassment by a homosexual of another of his/her same-gender was compared by the Court to traditional male-on-female sexual harassment claims. One can assume, the Court reasoned, that the harassment in that situation is likely due to the person's sex, thus, meeting Title VII's requirement that the discrimination be because of sex. However, the Court did not restrict legitimate discriminatory harassment to that based on sexual desire. If a plaintiff can show that the harasser demonstrated general hostility toward the presence of the particular gender in the workplace, the because of sex requirement will be satisfied. Proof of disparate treatment of one sex in a mixed sex work environment would also constitute legitimate proof that the harassment met the statutory requirement. Finally, the Court emphasized that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged...

168. Id. at 641-42.
172. Id. at *4.
173. Id.
174. Id.
175. Id.
with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex.’”

While some may construe this decision by the Court to open the gate to the slippery slope of sexual harassment lawsuits, the Court was quick to reinforce what it considers a “crucial” requirement of Title VII. The conduct must be so offensive, the Court reminded readers, that it either: 1) alters the conditions of the victim’s employment; or 2) is “severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.” Normal social behavior in the workplace (“such as male-on-male horseplay or intersexual flirtation”) is not enough to meet this standard. The Court cautioned that factfinders must look to the context of the behavior and use common sense in their determination of what constitutes actionable sexual harassment under Title VII.

Although the Court, with its decision in Oncale, has relieved some of the confusion about same-general sexual harassment claims under Title VII, questions still remain. For example, what of plaintiffs like Joseph Oncale? How does Mr. Oncale prove that the sexually humiliating treatment he received from three male heterosexual co-workers in an all-male work environment constituted discriminatory treatment because of his sex? Is sexual harassment in his situation legally possible, even given the arguably lenient evidentiary guidelines delineated by the Court?

And, what of Mr. Fredette in his same-gender sexual harassment claim against BVP Management Associates? As of this writing, his claim has not been reheard by the trial court. Given the Supreme Court’s ruling in Oncale, Mr. Fredette’s claim, unlike Mr. Oncale’s, may be easier to prove. His harasser was a known homosexual, thus easing his burden of proving that the harassment was because of his sex. However, like all sexual harassment plaintiffs, Mr. Fredette will still need to prove that the harassment he experienced altered the conditions of his employment in some way and/or was so abusive or hostile as to offend the “objective” reasonable person.

At least the Supreme Court has now made clear that whether Mr. Fredette, Mr. Oncale, and other plaintiffs like them, experienced discriminatory treatment because of their sex is not a legal question, but one of fact, to be decided by the factfinder.

177. Id.
178. Id.
179. Id. (quoting Harris v. Forklift Sys., Inc., 50 U.S. 17 (1993)).
180. Id.
182. Id.