THAT'S WHAT HE SAID: *The Office*, (Homo)Sexual Harassment, and Falling Through the Cracks of Title VII

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Oscar, would you reach over and touch his thing? That's what HE said! Right guys, 'cause of gay?

—Michael Scott

I. INTRODUCTION

On September 21, 2006, NBC's hit comedy television show, *The Office*, aired an episode titled "Gay Witch Hunt."[1] *The Office* is a "mockumentary" about Dunder-Mifflin, a mid-sized paper company. The camera crew "documents" the lives of the office workers as they deal with the foibles of their comically half-witted boss, Michael Scott.

The episode "Gay Witch Hunt" follows Michael Scott's horrifically funny series of inappropriate antics as he tries to rectify his politically incorrect outing of a gay character, the accountant Oscar Martinez.[2] After calling Oscar "faggy," Michael finds out that Oscar is an actual homosexual and panics.[3]

In the midst of facing backlash from corporate for his offenses, Michael tells the cameras, "[t]he company has made it my responsibility today to put an end to 100,000 years of being weirded out by gays."[4] Taking the responsibility seriously, Michael holds a conference meeting to apologize to Oscar and prove that he does not have a problem with homosexuals.[5]

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1. *The Office: Gay Witch Hunt* (NBC television broadcast Sept. 21, 2006).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

During the meeting, Michael attempts to embrace Oscar, who resists at first, but feels bad for hurting Michael's feelings and agrees to hug.[6] In a cringe-worthy (albeit well-meaning) attempt to show he is not afraid of Oscar's sexuality, Michael then kisses the struggling and reluctant Oscar.[7] At the end of the episode, Oscar reveals that corporate gave him three months of paid vacation and a company car so long as he would not sue the company.[8]

Although this concession seems like a natural conclusion, Dunder-Mifflin need not have wasted its money. As it turns out, homosexual harassment is not as big of a legal liability in the workplace as one might think.

This article uses *The Office* as a platform to explore the history of Title VII and illustrate the puzzling rationale for why homosexuals fall through the cracks of Title VII and are not protected from workplace harassment. This article analyzes the way Title VII would apply to Oscar's situation and shows how bringing a seemingly clear-cut case of sexual harassment would be unsuccessful despite common-sense perceptions of the law. In exposing the way Title VII law is inconsistent with common sense, this article has two objectives. First, it probes the history of Title VII jurisprudence and demonstrates that homosexuals have no recourse under Title VII—that is, unless they act "gay" enough or the harasser is actually homosexual. Understanding this reality exposes a more problematic logic in Title VII law: homosexual orientation is not protected, but others are always protected from homosexuals.

Second, the article examines the scholarship surrounding Title VII and other areas of the law to suggest that Title VII's paradox is rooted in the historical anxiety about homosexuality. This article argues that the solution to this problem is not to pass another law, i.e., the Employment Non-Discrimination Act (as it has been languishing in Congress since 1994), but for courts to stop participating in the legal scheme to isolate prejudice about sexual orientation from prejudice about sex. Accomplishing this paradigm shift would easily allow Title VII to protect homosexuals from workplace harassment and at least one area of the law can regain coherence.

Part II of this article traces the birth of Title VII and the evolution of the federal case law interpreting Title VII. Part III applies the current state of Title VII law to the outrageous facts of *The Office*'s "Gay Witch Hunt" episode. This application will illustrate the bizarre results that occur under the current law. Part IV explores the sociological reasons behind courts' treatment of Title VII and suggests that such treatment leaves the law incoherent. Part V concludes that courts can easily fix the incoherence by

6. *Id.*
7. *Id.*
8. *Id.*

acknowledging that discriminatory assumptions about sexual orientation necessarily stem from assumptions about sex. Discrimination against sexual minorities *is* discrimination "because of sex."

II. THE EVOLUTION OF AMERICAN LABOR LAW

Amid social upheaval and political unrest, President John F. Kennedy sent his comprehensive civil rights legislation to Congress on June 19, 1963.[9] A little over a year later, President Kennedy's legacy was memorialized when Congress passed the Civil Rights Act of 1964.[10] One of the most influential sections of the Act, which addressed employment discrimination, became known simply as Title VII.[11] Title VII prohibits discrimination in the workplace on the basis of age, sex, race, religion, or national origin.[12]

For the next fifty years, courts would wrestle with the scope and meaning of Title VII. It would take the Supreme Court twenty-two years to recognize sexual harassment as a form of discrimination proscribed by Title VII.[13] And another twenty-two years would pass before the Supreme Court recognized same-sex sexual harassment in 1998.[14]

A. The Birth of Title VII

Since 1997 sexual discrimination claims have, on average, made up nearly one-third of the total complaints received by the EEOC.[15] Initially, however, Title VII was not so inclusive; its primary objective was to protect against racial discrimination.[16] When President John F. Kennedy was calling for the Civil Rights Act, he told the American people: "Next week I shall ask the Congress of the United States to act, to make a commitment it has not fully

9. *Pre 1965: Events Leading to the Creation of EEOC*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/history/35th/pre1965/index.html (last visited Oct. 15, 2015).

10. *Id.*

11. *Id.*

12. *Id.*

13. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

14. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 76 (1998).

15. *Charge Statistics FY 1997 Through FY 2014*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Oct. 15, 2015).

16. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317 (2012).

made in this century to the proposition that race has no place in American life or law."[17]

Title VII's inclusion of "sex" as a prohibited basis of discrimination was an afterthought. It was not until late in the legislative debate that Representative Howard W. Smith introduced the amendment to add "sex" to Title VII.[18] The last minute amendment was met with opposition by many of the legislators supporting the bill, partly because the amendment threatened to "undermine legal 'protections' designed to accommodate women's special responsibilities in the home."[19] For proponents, however, the core purpose of the amendment was to eradicate those discriminatory "protective" laws and the enforcement of traditional sex roles.[20]

Several months after Title VII went into effect, Franklin D. Roosevelt, Jr., the chairman of the EEOC, reported to the President that enforcing Title VII's prohibition against sex discrimination meant that "certain traditional ideas about women's sex and family roles would need to be drastically revised in response to the new law."[21] Roosevelt complained about the lack of guidance from Congress; there was little legislative history behind the amendment and the bill itself contained no definitions of "sex" or "discrimination."[22]

Courts were thus left to struggle with the meaning of "discrimination because of sex"; with no other guidance, they started with a test that required evidence of "opposite-sex comparators."[23] *General Electric Co. v. Gilbert* explained that this test essentially meant that if the discrimination did not simply divide groups by the two genders, it was not discrimination because of sex.[24] For example, an insurance plan that just happened to not include pregnancy benefits would pass this test, while an insurance policy that excluded women from health benefits that were available to men would be

17. *Report to the American People on Civil Rights* (CBS Television Broadcast June 11, 1963) (video excerpt and transcript on file with the John F. Kennedy Presidential Library and Museum), http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx.

18. Franklin, *supra* note 16, at 1318.

19. *Id.* at 1321. Race certainly played a role in the opposition to the amendment; opponents were concerned that the amendment would take the focus away from race discrimination and thwart the efforts to protect against it. *See id.* at 1321 n.48.

20. *Id.* at 1326.

21. *Id.* at 1329.

22. *Id.* at 1330.

23. *Id.* at 1367–68; *see* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138 (1976) ("As there is no proof that the [insurance] package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits.").

24. *Gilbert*, 429 U.S. at 138 (explaining that excluding pregnancy benefits from an insurance plan did not discriminate because of sex because pregnancy was only a condition that affected some women).

struck down. However, Congress rejected this test when it responded to *Gilbert* with the Pregnancy Discrimination Act, which stated that pregnancy discrimination is discrimination because of sex, even though there are no male comparators.[25]

B. Sexual Harassment Becomes Discrimination "Because of Sex"

It would be another twenty-one years after the passage of Title VII before the Supreme Court would recognize sexual harassment as a form of discrimination in 1986.[26] In the Supreme Court case, *Meritor Savings Bank v. Vinson*, Michelle Vinson, a bank employee, brought suit against her former employer, claiming that her constant sexual harassment by her boss was a violation of Title VII.[27]

According to Vinson, her boss took her out to dinner and suggested that they go to a motel and engage in sexual activity.[28] Vinson refused at first, but then agreed to go;[29] she testified in court that they had intercourse between 40 and 50 times over the next several years.[30] She testified that she had not originally reported her boss or complained to her employer because she was afraid of him.[31] The defendant denied all allegations, and the trial court found that if a sexual relationship had existed, it was voluntary and so Vinson was not a victim of sexual harassment.[32]

Eventually the case made its way to the Supreme Court of the United States.[33] Vinson argued on appeal, and the Supreme Court agreed, that sexual harassment creates a hostile working environment in violation of Title VII.[34] The defendant did not dispute that sexual harassment could create a hostile environment, but instead argued that Title VII only prohibited tangible damage to the employee (meaning economic harm), not psychological

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25. Franklin, *supra* note 16, at 1366.
26. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
27. *Id.* at 60.
28. *Id.*
29. Vinson explained that she agreed to the intercourse because she was afraid to lose her job. She also claimed that he would follow her into the restroom and had even raped her several times. *Id.*
30. *Id.*
31. *Id.* at 61.
32. *Id.* The trial court also held that had the woman been sexually harassed, the bank would not be liable for the defendant's actions, because it did not have notice. *Id.* at 62.
33. *Id.* at 63.
34. *Id.* at 64. The Court of Appeals also agreed with this proposition. *Id.*

damage.[35] The Court disagreed.[36] In so deciding, the Court cited the Equal Employment Opportunity Commission's guidelines[37] and concluded that the guidelines supported finding that harassment that does not result in economic damage can still be a violation of Title VII.[38] Ultimately, the Court took a giant step in the history of workplace sexual harassment and held for the first time that "a claim of 'hostile environment' sex discrimination is actionable under Title VII."[39]

The Supreme Court waited seven years before it addressed what could constitute a hostile or abusive work environment in 1993.[40] In *Harris v. Forklift Systems, Inc.*, Harris was subjected to demeaning, sexual, and insulting comments from her supervisor.[41] She brought an action against her former employer for creating a hostile work environment in violation of Title VII, but the district court concluded that the supervisor's behavior did not constitute a hostile work environment because the employee's psychological well being had not been seriously affected.[42] On appeal, however, the Supreme Court decided that the presence or absence of psychological injury was not the correct test; the correct test required looking at the totality of the circumstances.[43] Under this new test, the Court explained, "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive," then it could constitute a hostile work environment without a showing of psychological injury.[44]

C. SCOTUS Recognizes (and Limits) Same-Sex Sexual Harassment

In the wake of Title VII, there was a furtive but widespread fear about homosexuality because anti-sex discrimination meant that men could possibly take on "women's jobs."[45] For example, in 1966, the Executive

35. *Id.*
36. *Id.*
37. In pertinent part, the guidelines state: "Harassment on the basis of sex is a violation of section 703 of title VII." 29 C.F.R. § 1604.11(a) (2015). Specifically, sexual harassment is a violation when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (2015).
38. *Vinson*, 477 U.S. at 65.
39. *Id.* at 73.
40. Harris v. Forklift Sys., Inc., 510 U.S. 17, 18 (1993).
41. *Id.* at 19.
42. *Id.* at 20.
43. *Id.* at 23.
44. *Id.* at 22.
45. *See* Franklin, *supra* note 16, at 1336.

Director of the EEOC expressed this sentiment: "there are those who think that no man should be required to have a male secretary—and I am one of them."[46] In 1975, the issue was addressed by a Georgia district court in *Smith v. Liberty Mutual Insurance Co.*[47] In that case, Smith was denied employment because the supervisor viewed him as effeminate.[48] The court concluded that Title VII did not protect discrimination based on sexual preference because Congress did not make it explicit in the Civil Rights Act.[49] This reasoning was affirmed by the Fifth Circuit, and followed by every other court through the 1980s.[50]

In 1993, the Fifth Circuit became the first federal court of appeals to address same-sex sexual harassment claims.[51] In that brief first opinion, the court held that the same-sex sexual harassment claim failed because Title VII is meant to protect against gender discrimination, and Giddens "did not allege how his employer treated him differently because he was a male and he produced no evidence at trial tending to prove such facts."[52]

A year later, the Fifth Circuit provided a fuller analysis of same-sex harassment claims in *Garcia v. Elf Atochem North America, Inc.*[53] There, the employee alleged that a foreman at the plant had grabbed his crotch and made sexual motions from behind.[54] Yet, the court held that the actions did not constitute sexual harassment because it was male-on-male.[55]

Finally, in 1998, the Supreme Court addressed the issue.[56] In *Oncale v. Sundowner*, the plaintiff Joseph Oncale quit his job and brought suit against his former employer, alleging that he had been the victim of sexual harassment in violation of Title VII.[57] Oncale endured forced sex-related acts, threats of rape, and verbal sexual abuse.[58] When Oncale reported the harassment, he was ignored.[59]

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46. *Id.* at 1337.
47. 395 F. Supp. 1098, 1099 (N.D. Ga. 1975).
48. *Id.*
49. *Id.* at 1101.
50. Franklin, *supra* note 16, at 1376.
51. Chris Diffee, *Going Offshore: Horseplay, Normalization, and Sexual Harassment*, 24 COLUM. J. GENDER & L. 302, 312 (2013) (giving brief history of same-sex harassment claims).
52. Giddens v. Shell Oil Co., No. 92-8533, 1993 U.S. App. LEXIS 38239, at *1–2 (5th Cir. Dec. 6, 1993).
53. 28 F.3d 446, 446 (5th Cir. 1994).
54. *Id.* at 448.
55. *Id.* at 451–52.
56. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 76 (1998).
57. *Id.* at 77.
58. *Id.*
59. *Id.*

Relying on previous cases, the district court summarily dismissed the claims because the harassment was male-on-male.[60] The Supreme Court clarified the precedent and held that Title VII sexual harassment claims are not categorically barred "merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[61] The Court was clear that even though such claims are cognizable, the plaintiff still must prove that he was discriminated against because of his sex.[62] Under this opinion, same-sex harassment claims are much harder to prove than their heterosexual counterparts.[63] In cases like *Oncale*, same-sex harassment is even harder to prove because there are no comparators of the opposite sex to prove that the plaintiff would not have been harassed if he was a woman. The Court stated that one way a plaintiff might bring such a claim is if he could prove that the harasser was homosexual because the harasser presumably would not have treated women the same way.[64]

As others have noted,[65] the *Oncale* opinion at once opened the door for same-sex sexual harassment relief, and narrowed the avenues by which victims may seek relief.[66] According to the opinion, one of the only avenues for employees in all-male environments to state a claim is to prove that the harasser is homosexual.[67]

For example, five years later in *McCown v. St. John's Health System, Inc.*,[68] the Eighth Circuit affirmed a decision that denied relief to a same-sex sexual harassment claim, based on the reasoning in *Oncale*.[69] There, McCown was employed as a construction worker, where he worked in a shop separated from the female employees.[70] During that time, McCown's supervisor consistently engaged in inappropriate physical contact with McCown (such as grabbing his rear), made lewd comments, and attempted to stick objects in McCown's rear.[71] The court concluded that this behavior was not sexual

60. *Id.* The Fifth Circuit Court of Appeals affirmed the decision. *Id.*
61. *Id.* at 79.
62. *Id.* at 80.
63. *Id.*
64. *Id.* The Court also noted that there are other ways to bring sex-based discrimination claims, such as "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Id.*
65. Diffee, *supra* note 51, at 313.
66. *Id.*
67. *See Oncale*, 523 U.S. at 80; Diffee, *supra* note 51, at 314–15.
68. 349 F.3d 540, 540 (8th Cir. 2003).
69. *Id.* at 544.
70. *Id.* at 542.
71. *Id.* at 541–42.

harassment under Title VII because there was no evidence that the supervisor was motivated by sexual desire and there were no female comparators.[72] Since McCown could not prove the supervisor was homosexual, his only other options under *Oncale* were to offer proof that the behavior was motivated by hostility to his gender or to offer comparative proof of disparate sex-based behavior, neither of which he could prove.[73]

In 2012, the Sixth Circuit issued a similar opinion in *Wasek v. Arrow Energy Services, Inc.*[74] In that case, Harold Wasek was a male employee who worked on an all-male oil rig.[75] On the job, Wasek roomed with his co-worker and future harasser, who quickly learned that sexual comments would incite Wasek.[76] The rooming situation did not last long, but the co-worker continued to harass Wasek with lewd comments, sexualized contact, and poking him in the rear with various objects.[77] Wasek reported the harassing to his supervisors, who essentially told him that the two should just fight over it.[78] Eventually, Wasek grew tired of the harassment and his supervisors' lack of response, so he quit his job.[79] On his way home, Wasek received a voicemail from his co-worker stating, "I miss holding you. I miss spooning with you. I love you. Please call me back."[80]

After quitting, Wasek brought an action against his former employer for sex discrimination in violation of Title VII.[81] Because the rig was an all-male workplace and there was no proof the harasser acted out of hostility toward men in general, Wasek could only attempt to prove that he was harassed out of sexual desire.[82] Although Wasek speculated that his harasser was perhaps bisexual,[83] the court held that such speculation was not enough evidence to support a claim of sexual harassment.[84] Perhaps the Sixth Circuit summed it up best when it wrote, "[i]n other words, the conduct of jerks, bullies, and

72. *Id.* at 543.
73. *Id.* at 543–44.
74. 682 F.3d 463, 465 (6th Cir. 2012).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 466.
79. *Id.*
80. *Id.*
81. *Id.* at 467.
82. *Id.* at 468.
83. Ironically, proving that his harasser was bisexual would only have hurt Wasek because then it would show that Wasek's harasser would have made those unwelcome sexual advances to Wasek whether he was a man or a woman, without sex discrimination.
84. *Id.*

persecutors is simply not actionable under Title VII unless they are acting because of the victim's gender."[85]

D. Violating Gender Stereotypes

Recently, victims of same-sex sexual harassment have sought relief under Title VII by claiming that they were discriminated against based on gender stereotypes.[86] However, relief under this theory remains in tension with courts' determination that "gender stereotyping claim[s] should not be used to bootstrap protection for sexual orientation into Title VII."[87]

Federal courts have made it clear that if a plaintiff is bringing an action because he was harassed based on his sexual orientation, Title VII does not provide protection. In *Vickers v. Fairfield Medical Center*,[88] the plaintiff (Vickers) was a police officer who befriended a homosexual doctor and was thereafter subjected to harassing accusations of being homosexual.[89] The harassment included being called a "fag" on numerous occasions and being handcuffed while his coworkers simulated anal sex with him and photographed the incident.[90]

Eventually, Vickers quit and brought a Title VII claim of sexual harassment against his former employer, but the district court granted defendants' motion for judgment on the pleadings on the grounds that Title VII did not prohibit the sexual orientation-motivated harassment he experienced.[91] On appeal, Vickers argued that the district court erred because the discrimination he experienced was supported by a gender stereotyping theory—his sexual practices did not conform to male stereotypes.[92] The Sixth Circuit rejected this claim because accepting it would effectively amend Title VII to include protection for sexual orientation: "[i]n all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by

85. *Id.* at 467.

86. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 717 (2014) ("[C]ourts have recognized Title VII claims by employees who are perceived to violate gender stereotypes. In recent years, gay and lesbian employees have increasingly followed this course, describing themselves as violators of gender stereotypes for the purpose of federal employment-discrimination claims.").

87. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (citations omitted).

88. 453 F.3d 757 (6th Cir. 2006).

89. *Id.* at 759.

90. *Id.*

91. *Id.* at 761.

92. *Id.*

definition, fail to conform to traditional gender norms in their sexual practices."[93]

The Tenth Circuit came to a similar conclusion in *Medina v. Income Support Division*.[94] There, Rebecca Medina was a heterosexual woman who was often subjected to offensive remarks from her lesbian boss.[95] Medina complained to HR about the harassment and perceived favoritism for the other lesbians.[96] The department launched an investigation but found that most of the claims were not substantiated.[97] Medina then brought a Title VII claim against her former employer, mostly alleging that she was discriminated against for not fulfilling gender stereotypes of typical lesbians.[98] The Tenth Circuit quickly rejected this claim and, in keeping with other circuits, held that her claim was essentially a claim of discrimination because of sexual orientation, which is not protected by Title VII.[99]

In contrast, homosexual plaintiffs have been able to win Title VII claims if the plaintiffs could frame their discrimination as being discriminated against because they were treated like the opposite sex, regardless of orientation.[100] In *Rene v. MGM Grand Hotel, Inc.*, Rene was an openly gay man who worked as a butler at a hotel.[101] Throughout his course of employment, Rene's coworkers harassed him with sexual comments, sexual gifts, gay pornography, and, importantly, touching him like "they would to a woman."[102]

The Ninth Circuit held that Rene could have a cognizable Title VII claim.[103] However, the court disagreed on the rationale for that conclusion.[104] The plurality opinion thought the claim was cognizable because the harassment he experienced was physical assault of a sexual, offensive nature (grabbing him in the crotch and poking fingers into his anus).[105] The

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93. *Id.* at 764.
94. 413 F.3d 1131 (10th Cir. 2005).
95. *Id.* at 1133.
96. *Id.*
97. *Id.*
98. *Id.* at 1135.
99. *Id.*
100. *See* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063 (9th Cir. 2001); *see also* Soucek, *supra* note 86, at 755 (describing the ways courts try to distinguish between harassment based on visible behavior at work and harassment based on knowledge about the plaintiff's sexual orientation).
101. *Rene*, 305 F.3d at 1064.
102. *Id.*
103. *Id.* at 1068.
104. *Id.*
105. *Id.* at 1064, 1068.

concurrences, however, agreed that the claim was cognizable because the plaintiff was treated like a woman, which was "ample evidence of gender stereotyping."[106]

As these cases and others demonstrate, if a plaintiff wishes to bring a federal claim under sexual stereotyping, merely being homosexual is simply not enough of a violation.[107]

III. APPLYING TITLE VII IN THE MIDDLE OF A GAY WITCH HUNT

"Gay Witch Hunt" is one of the only *Office* episodes where the Dunder-Mifflin corporate office actually seems to take affirmative action to prevent a sexual harassment lawsuit, but, ironically, this appears to be one of the few situations in which a lawsuit would be unlikely to survive summary judgment. Because Oscar is homosexual, it is not likely that he would be successful in bringing a Title VII claim.

As explained earlier, a plaintiff may bring a same-sex sexual harassment claim either by claiming that he was harassed based on gender stereotypes (*not* based on his sexuality)[108] or through one of the three *Oncale* avenues: (1) proving that the harasser was motivated by a general hostility toward the plaintiff's gender, (2) providing comparative evidence of how the harasser treated others of the opposite sex, or (3) proving that the harasser was in fact homosexual.[109]

A. He's Not Dressed in Women's Clothes

Strangely, for Oscar to succeed on a Title VII claim under a gender stereotyping theory, he would need to prove that Michael harassed him because he believed that Oscar did not conform to gender stereotypes *other than* his sexual orientation.[110] Because nearly all of Michael's harassment

106. *Id.* at 1068.

107. Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) ("[W]e have no basis in the record to surmise that [the plaintiff] behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation."); *see* Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011) ("Plaintiff believed he was subject to discrimination based upon his sexual orientation. It was only after commencement of this action that he re-framed his claim as one for gender stereotyping. This is precisely the bootstrapping claim prohibited by Second Circuit precedent."); Soucek, *supra* note 86, at 766 ("Plaintiffs who 'look gay' succeed under Title VII while those merely known or thought to be gay do not.").

108. Soucek, *supra* note 86, at 717.

109. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

110. Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006).

occurred because he found out Oscar was gay, it seems like Oscar would have difficulty proving Michael was harassing him based on gender stereotypes. One amusing and peculiar exchange between Michael and his employee Dwight illustrates the biggest obstacle for homosexuals in a gender-stereotyping claim:

> Michael Scott: Can you tell who's gay and who's not?
>
> Dwight Schrute: Of course.
>
> Michael Scott: What about Oscar?
>
> Dwight Schrute: Absolutely not.
>
> Michael Scott: Well, he is.
>
> Dwight Schrute: Well, he's not dressed in women's clothes, so. . .[111]

While federal case law hardly requires that men wear women's clothes in order to be successful under a gender-stereotyping theory, this conversation nevertheless reveals the bizarre logic of Title VII jurisprudence: gay plaintiffs are only protected from workplace harassment because of their sexuality if they appear stereotypically "gay enough."[112] In addition to the fact that Oscar was not wearing women's clothes, he arguably did not conform to Michael's idea of stereotypically gay behavior—nobody in the office even suspected that Oscar was gay until Michael exposed him.

If the case law is applied to these facts, Oscar's prospects are even gloomier. In *Vickers*, the plaintiff, Vickers, was handcuffed to a chair while his coworkers simulated having anal sex with him,[113] but the court rejected his gender stereotype claim precisely because the "harassment [was] based on Vickers' perceived homosexuality, rather than based on gender non-conformity."[114] Likewise, Michael only kissed Oscar because he knew Oscar was homosexual, not because of some perceived gender non-conformity.

B. Proving a "General Hostility" Toward One Sex

Under *Oncale*, Oscar could try to prove that Michael acted out of a "general hostility" toward men in the workplace.[115] This is probably Oscar's weakest claim, and he would likely have a hard time proving it.

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111. *The Office: Gay Witch Hunt* (NBC television broadcast Sept. 21, 2006).
112. *See* Soucek, *supra* note 86, at 755.
113. *Vickers*, 453 F.3d at 759.
114. *Id.* at 763.
115. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

Indeed, Michael appears to go out of his way quite often to make it known that he enjoys working with "the boys." In one episode, Michael is upset that the women get to have a "women in the workplace" meeting from which he is excluded, so he decides to have a "men in the workplace" meeting.[116] In an attempt to point out that men deserve equality too, he asks, "Why can't boys play with dolls? Why does society force us to use urinals when sitting down is far more comfortable?"[117] Without going into numerous other examples, it seems clear that Michael hardly had a general hostility toward men in the workplace.

One wonders what exactly *would* constitute a "general hostility" toward the plaintiff's sex in the workplace, when the harasser is of the same sex as the harassed. One example given by the Third Circuit is as follows: "a male doctor might believe that men should not be employed as nurses, leading him to make harassing statements to a male nurse with whom he works."[118] Essentially, it seems that a "general hostility" route would only apply in a narrow set of circumstances in which members of one sex are working in positions traditionally seen as roles for the opposite sex.[119]

However, this evidentiary route still does not manage to completely divorce the victim's sexuality from the harassment. If, for example, a homosexual male was employed as a secretary (a role traditionally held by females),[120] his male supervisor might harass him because he is hostile to men that work in traditionally feminine positions. His supervisor's view could be that men should not work in such positions *because* it is a sign of homosexuality. If the plaintiff avoided emphasizing his sexual orientation, and could prove that his harasser held a general hostility toward men working as secretaries (regardless of actual sexual orientation), he might be able to bring a claim without violating "the urgent command that [same-sex] intimacy never be discussed."[121] In sum, Oscar probably could not bring a Title VII claim against Michael under this "general hostility" avenue unless

116. *The Office: Boys and Girls* (NBC television broadcast Feb. 2, 2006).

117. *Id.*

118. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262 (3d Cir. 2001).

119. This set of circumstances is not an explicit requirement, but it is hard to imagine a different kind of situation where there would be any credible evidence that the harasser was motivated by a general hostility to his own sex in the work place.

120. *See* Franklin, *supra* note 16, at 1336–37 (referring to a comment made by the Executive Director of the EEOC in 1966 expressing he was among the people who thought no man should be required to have a male secretary).

121. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 209 (2012).

he could prove that Michael was hostile towards men in Oscar's position (accountants).

C. Separate but Equal[122]: Comparators in a Mixed Sex Workplace

Next, Oscar could try to provide comparative evidence of how women in the office are treated compared to men. Unfortunately for Oscar, as many fans of the show would confirm, Michael's harassment knows no boundaries and is not confined to one group.[123]

For example, in an ironic and misguided attempt to avoid being guilty of sexual harassment, Michael kneels next to his employee Phyllis, puts his arms around her, kisses her on the cheek, and says the only thing he's worried about is "gettin' a boner."[124]

In a later episode, Michael emails a topless photo of his supervisor Jan to the entire company.[125] In a similar vein (and in arguably Michael's most egregious moment) Michael once posted a picture of his employee Meredith's bare breasts on the bulletin board with the caption "gross" written underneath it.[126] Without mentioning the plethora of other examples, it is clear that the men under Michael's employ do not suffer any more harassment than the women do.

Presumably, then, a homosexual plaintiff may be able to succeed if he could prove that his harasser harassed all or most members of the plaintiff's sex, while allowing the opposite sex to go undisturbed. Again, however, in a same-sex harassment case it is difficult to conceptualize a situation where the

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122. When Michael is talking about throwing a bachelor party at work, he tells his friend Todd Packer that he can't get a stripper because of sexual harassment. Todd then tells him "Get one for the girls too, that evens it out. You know, separate but equal." Michael responds, "So that's what that means." *The Office: Ben Franklin* (NBC television broadcast Feb. 1, 2007). It's interesting how close Todd's logic comes to the real state of the law. *See infra,* note 123 and accompanying text.

123. Courts usually conclude that such "equal" harassment is outside of Title VII's purview. *See* Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (holding that a manager did not violate Title VII because he "was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike").

124. *The Office: Sexual Harassment* (NBC television broadcast Sept. 27, 2005). Another employee had just told a crude joke and insulted Phyllis's looks. *Id.* Michael had just gotten finished with sexual harassment training, so he said the joke crossed the line and tried to rectify the situation. *Id.*

125. *The Office: Back from Vacation* (NBC television broadcast Jan. 4, 2007).

126. *The Office: Stress Relief* (NBC television broadcast Feb. 1, 2009). Why corporate is not worried about lawsuits from any of the female harassment incidents is beyond me. However, this juxtaposition does reveal the particular panic there is over homosexuality, while heterosexual harassment is "normal."

harasser chose to harass members of his own sex while leaving others alone (absent sexual desire, which is a separate avenue). If, for example, a male supervisor smacks his male employees' rear ends on a regular basis, but does not do it to women, courts are more likely to just treat it as "boys being boys," rather than evidence that the supervisor is singling out his employees because of their sex.[127]

At the most fundamental level though, this evidentiary route appears to be the only one in which the plaintiff's sexual orientation is truly divorced from the harassment. The employer would have to have been harassing most of the other members of the plaintiff's sex, heterosexuals included.

D. The Homosexual Harasser

Oscar's last *Oncale* option for relief is to prove that Michael was actually a homosexual and was therefore harassing Oscar out of sexual desire and presumably would not have harassed Oscar had he been a woman.[128] In other words, the harasser's sexual orientation could make all the difference.

Michael's sexuality and lack of experience with women is repeatedly referenced in the show. The strongest piece of "evidence" is the running joke of Michael's obsession with the "temp" Ryan. For example, Michael wrote in his diary that Ryan is "just as hot as Jan but in a different way."[129] In another episode, Ryan's co-worker Jim keeps looking at Ryan because Ryan is seated at the desk of his crush.[130] Ryan explains to the camera that he would be creeped out by Jim's staring, but "it's nothing compared to the way *Michael* looks at me," and the camera cuts to Michael staring at Ryan through the window in his office.[131] In a later episode, Michael takes an intoxicated Ryan home after a night out and tries to undress him for bed, which Ryan, of course, vehemently protests.[132]

Despite the somewhat obvious suggestions that Michael has a crush on Ryan, this evidence probably still would not be enough to convince a court that Michael is homosexual. Proving that the same-sex harasser acted out of

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127. The Supreme Court adheres to strict requirements because they want "to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'" Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

128. *Id.* at 80–81.

129. *The Office: The Deposition* (NBC television broadcast Nov. 15, 2007).

130. *The Office: The Carpet* (NBC television broadcast Jan. 26, 2006).

131. *Id.*

132. *The Office: Night Out* (NBC television broadcast Apr. 24, 2008).

sexual desire is much harder than it seems. Mere speculation about a harasser's sexuality is not enough.[133]

IV. TRYING TO UNTANGLE TITLE VII

The Office's "Gay Witch Hunt" episode, its third season premier, received a total of 9.1 million viewers, up 23% from the second season's premier.[134] The writer of the episode, Greg Daniels, won the Primetime Emmy Award for Outstanding Writing for a Comedy Series.[135] Clearly the episode was a comedic success, but the joke was not that Oscar was gay; it was that Michael acknowledged it and insisted on talking about it.[136]

As described in Part II, for three of the four evidentiary routes for victims of same-sex sexual harassment, federal courts evade the sexual orientation element that is bound up in the harassment.[137] This is not just deference to congressional intent—it is symptomatic of the cultural fantasy that the law can obscure gay sexuality into non-existence.[138]

A. Title VII and the Gay Panic

For years, courts have been insisting that the discrimination against sexual orientation is completely divorced from discrimination based on stereotypes about gender. Yet, this premise seems absurd when one considers that prejudices against homosexuals stem from fundamental beliefs that "normal" members of one sex are only attracted to members of the other sex.

This conundrum does the cultural work of erasing same-sex intimacy. In other words, courts, whether knowingly or unknowingly, join in on the effort to pretend that gay sex does not exist.[139] This fiction persists for two reasons: (1) refusing to acknowledge something accomplishes the discrimination of

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133. Wasek v. Arrow Energy Servs., 682 F.3d 463, 468 (6th Cir. 2012); *see* Hopkins v. Balt. Gas and Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996) ("[P]roof of such homosexuality must include more than merely suggestive conduct.") (citations omitted).

134. *The Office Nielsen Ratings, Seasons 1–4*, OFFICE TALLY (Sept. 26, 2006), http://www.officetally.com/the-office-nielsen-ratings/3.

135. *59th Emmy Awards Nominees and Winners*, EMMYS, http://www.emmys.com/awards/nominees-winners/2007/outstanding-writing-for-a-comedy-series (last visted Oct. 27, 2015).

136. *The Office: Gay Witch Hunt* (NBC television broadcast Sept. 21, 2006). Michael brings it as far as having Dwight "research" gay pornography. *Id.*

137. Soucek, *supra* note 86, at 766 ("Plaintiffs who 'look gay' succeed under Title VII while those merely known or thought to be gay do not.").

138. *See* Wolff, *supra*, note 121, at 209.

139. Soucek, *supra*, note 86, at 780.

that thing, and (2) for individuals that are overwhelmed by the thought of gay sex, "erasure is the only answer."[140]

Such ideology endures throughout Title VII's jurisprudence. Part II explained how a harasser's "general hostility" toward a victim's gender likely stems from the harasser's underlying beliefs about sexual orientation.[141]

Some have argued that the project of obviating thoughts of same-sex sexuality comes from a deeper fear—that homosexuals will "infect" the rest of society.[142] This fear surfaces in the courts' preference for evidence that a plaintiff was sexually harassed out of sexual desire. Courts explain that evidence of sexual desire is a good way to prove sexual harassment by way of comparing it to heterosexual harassment: "it is reasonable to assume those proposals would not have been made to someone of the same sex."[143] They rationalize that if the harasser is harassing someone of the same sex out of sexual desire, then one could infer that the harasser would not do it to someone of the other sex, thus the victim is being harassed *because of* sex.[144]

Although the logic of the rationale itself seems valid, it exposes a broader attitude about homosexuality in America: actions perpetrated by a homosexual are far more dangerous than the same actions perpetrated by a heterosexual. One particularly striking example of this attitude emerges in criminal law—heterosexual men have successfully claimed "gay panic" as a defense to murder.[145] A gay panic defense is the "notion that a criminal defendant should be excused or justified if his violent actions were in response to a (homo)sexual advance."[146]

The perplexing nature of the "dangerous homosexual" concept is more readily visible when viewed in the reverse: a man would hardly be able to convince a jury that his violent response to a woman's sexual advances was

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140. Wolff, *supra*, note 121, at 211.

141. *Supra*, notes 86–107 and accompanying text.

142. *See* Wolff, *supra* note 121, at 210.

143. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

144. *Id.* at 80–81. This logic falls apart when it is applied to bisexual or pansexual individuals because the inference that they would not have harassed members of the other sex no longer holds. *See* Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000) ("Title VII does not cover the 'equal opportunity' or 'bisexual' harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).").

145. *See* Mills v. Shepherd, 445 F. Supp. 1231, 1234 (W.D.N.C. 1978) (Defendant claimed that the victim's homosexual advance provoked him into a heat of passion that resulted in fatal violence. The state trial judge allowed the defense, and the jury bought it, finding him guilty only of voluntary manslaughter.). *See generally* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008) (explaining the use and history of the gay panic defense).

146. Lee, *supra* note 145, at 475.

reasonable.[147] Moreover, if a heterosexual supervisor handcuffed a homosexual employee and pretended to have sex with him, it would not be sexual harassment.[148] But if the supervisor were homosexual, the outcome would likely be different because the plaintiff would be able to argue that it would not have happened to someone of the opposite sex.[149]

In sum, courts have decided that Title VII does not protect individuals from being harassed because of their sexual orientation, but it does protect employees from the advances of homosexual individuals. This consequence could be a manifestation of the pervasive anxiety about homosexual "contamination."[150]

B. Patching the Cracks: A Simple Solution

Currently, the Employment Non-Discrimination Act (ENDA), a bill that proposes to prohibit employment discrimination based on sexual orientation, is awaiting a House vote after passing in the Senate.[151] Some variation of this bill has been languishing in Congress since 1994.[152]

As the current bill stands, it proscribes discrimination against individuals based on the "individual's actual or perceived sexual orientation or gender identity."[153] Ostensibly, this bill would fill the void in Title VII and protect individuals against being harassed in the workplace based on their sexual orientation. The "perceived sexual orientation" provision seems to protect individuals against discrimination based what others think their sexual orientation is. However, as Professor Brian Soucek notes, "[t]his is the very assumption proven wrong, however, in *Vickers* and the many cases like it. Current Title VII case law more often offers a literalist reading of perception instead, however bizarre the results."[154]

Rather than waiting for the passage of the long-resisted ENDA, courts need to abandon the project of keeping homosexuality in the closet, and acknowledge that, at its most basic level, discrimination "because of sex" includes discrimination because of sexual orientation.

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147. *Id.* at 511.

148. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 759, 765 (6th Cir. 2006).

149. *See supra* note 128 and accompanying text.

150. Wolff, *supra* note 121, at 210 ("Dedicated opponents of equal treatment speak ominously about the seductive power of gay sexuality and its capacity to lead unwitting heterosexuals into same-sex practices. . . .").

151. Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013).

152. Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994).

153. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4 (2013).

154. Soucek, *supra* note 86, at 788.

Jurists have argued that such recognition would be in direct disregard of congressional intent because "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning."[155] Apparently, however, members of Congress already believe that sexual orientation is protected under Title VII. For example, House Speaker John Boehner has stated "[t]here are ample laws already in place to deal with [LGBT discrimination],"[156] referring to Title VII.

Moreover, the congressional intent argument is drained of any credibility when courts include "sexual stereotypes" in the definition of "sex." As mentioned earlier, it is nearly impossible to divorce assumptions about sex from assumptions about sexuality.[157] The very definition of homosexual is "of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex."[158] Absent stereotypes about which sexes "real" men and women are supposed to be attracted to, what legal objections to homosexuality are left?

V. CONCLUSION

My proposal is not just about equality, it is about addressing the incoherence in the law. Courts' refusal to recognize the inextricable link between sex discrimination and sexual orientation discrimination has left behind a confusing paradigm where some employees are protected if they act "gay" enough (regardless of orientation), most employees are protected from homosexual attention, and homosexual employees can be legally discriminated against because of their orientation.

Dunder-Mifflin's panicked reaction to Oscar says it all: the common sense perception of the law and the reality of the law are at odds with each other. The idea that a supervisor could kiss a homosexual employee on the mouth and get away with it in most places seems absurd. Yet, as I have shown, getting relief is much harder than one would think. This "loophole" is not accidental; it may be manufactured as a result of deeper anxieties about homosexuality at work in our culture,[159] or it may be fear of upsetting

155. Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977).

156. Chris Johnson, *Boehner on ENDA: 'I haven't thought much about it,'* WASH. BLADE (Apr. 18, 2012), http://www.washingtonblade.com/2012/04/18/boehner-on-enda-i-havent-thought-much-about-it/.

157. *See* Soucek, *supra* note 86 and accompanying text.

158. *Homosexual Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/homosexual (last visited Oct. 11, 2015).

159. *See* Lee, *supra* note 145 and accompanying text.

opponents of gay rights, or it may just be resistance to change. Regardless, it is time for the courts to drop the fiction, as they have elsewhere,[160] and recognize that discrimination because of sexual orientation goes to the core of Title VII's proscription against discrimination because of sex. Only then can we, in the words of Michael Scott, "put this matter to bed. That's what she said . . . Or, *he* said."[161]

160. On June 26, 2015, the Supreme Court of the United States finally ruled that bans on gay marriage were unconstitutional. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Additionally, on July 16, 2015, the EEOC decided that discrimination based on sexual orientation is discrimination based on sex. Though the decision is binding on federal agencies, it remains to be seen whether courts will apply the decision. Complainant v. Anthony Foxx, EEOC DOC 0120133080, 2015 WL 4397641 (July 15, 2015).

161. *The Office: Gay Witch Hunt* (NBC television broadcast Sept. 21, 2006).