

ONE IS A CLAIM, TWO IS A DEFENSE: BRINGING AN END TO THE EQUAL OPPORTUNITY HARASSER DEFENSE

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INTRODUCTION

Consider the following three workplace scenarios.¹

Alice, a female employee at ABC corporation, has been subjected to almost continuous harassment by her immediate supervisor, Bob, for the past two months. Several times each week, Bob makes crude and sexually suggestive comments and, on numerous occasions, Bob has touched Alice inappropriately in the workplace. Assuming Alice attempts to remedy this situation in a reasonable time period and her employer has unreasonably failed “to prevent and correct promptly any sexually harassing behavior,”² Alice will most likely be able to bring a hostile workplace sex discrimination claim against her employer for Bob’s sexual harassment under Title VII of the Civil Rights Act of 1964.³

Andrew, a male employee at XYZ Corporation, has been subjected to almost continuous harassment by his immediate supervisor, Ben, for the past

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1. This note will focus primarily on hostile workplace sexual harassment claims brought under federal anti-discrimination laws, most notably Title VII of the Civil Rights Act of 1964, and will not deal with quid pro quo sexual harassment. All cases examined will consider the equal opportunity harasser defense in the context of hostile work environment claims. The use of the defense in other areas and in state discrimination cases is beyond the scope of this note.

2. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

3. In order to bring a successful sexual harassment claim against an employer under Title VII, a plaintiff must satisfy the requirements of a prima facie case, which are as follows:

1. The plaintiff must be in a protected class;
2. The plaintiff must be subjected to unwelcome sexual harassment;
3. The harassment must be sufficiently severe or pervasive to alter the terms, conditions, or privileges of the plaintiff’s employment;
4. The harassment must be because of sex (this requirement will be the major focus of this note);
5. The doctrine of respondeat superior must apply.

See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

two months. Several times each week, Ben makes crude and sexually suggestive comments and, on numerous occasions, Ben has touched Andrew inappropriately in the workplace. Assuming Andrew attempts to remedy this situation in a reasonable time period and his employer has unreasonably failed “to prevent and correct promptly any sexually harassing behavior,” Andrew will most likely be able to bring a hostile workplace sex discrimination claim against his employer for Ben’s sexual harassment under Title VII of the Civil Rights Act of 1964.⁴

Alice and Andrew, a female and male employee, respectively, of a large corporation have *both* been subjected to almost continuous harassment by their immediate supervisor, Barry, for the past two months. Several times each week, Barry, when alone with Alice, makes crude and sexually suggestive comments and, on numerous occasions, Barry has touched Alice inappropriately in the workplace. Moreover, several times each week, Barry, when alone with Andrew, makes crude and sexually suggestive comments and, on numerous occasions, Barry has touched Andrew inappropriately in the workplace as well. Assuming both Andrew and Alice attempt to remedy their respective situations in a reasonable time period and their employer has unreasonably failed “to prevent and correct promptly any sexually harassing behavior,” in certain federal courts⁵ neither Andrew nor Alice, whether filing separately or jointly, will be able to bring a hostile workplace sex discrimination claim against their employer for Barry’s sexual harassment under Title VII of the Civil Rights Act of 1964.

Though the above three hypothetical scenarios all appear to be the same (both in terms of actionable wrongs as well as identical wording), the legal result in the last situation involving Andrew and Alice, in many federal courts, would differ dramatically from the legal result that would arise in the first two hypothetical scenarios as a result of the acceptance of the equal opportunity harasser defense by certain federal courts of appeal. Under the equal opportunity harasser defense, a defendant attempts to illustrate that the alleged harasser harassed both men and women alike,⁶ and as such, a sexual

4. Same-sex sexual harassment was held to be actionable under Title VII by the U.S. Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Assuming Andrew, like Alice in the first hypothetical, satisfies the prima facie requirements, his claim is viable under Title VII despite the fact that he (the victim) and Ben (the harasser) are of the same sex.

5. See, e.g., *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255 (4th Cir. 2001); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000), *cert. denied*, 531 U.S. 880; *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

6. See Shylah Miles, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 614 (2001).

harassment victim is unable to satisfy the “because of sex” prima facie case requirement.⁷ In those federal courts of appeal that accept the equal opportunity harasser defense,⁸ Andrew and Alice (from scenario number three) would both be victims of their supervisor’s sexual harassment; however, both would be left without a remedy under Title VII due to the unfortunate circumstance that their supervisor, Barry, targeted both men and women as victims of his sexual harassment. When the equal opportunity harasser defense is accepted, the “because of sex” requirement “is impossible to satisfy, leaving plaintiffs without protection under sexual harassment law.”⁹ Because Title VII is meant to prevent an employer from *discriminating* against an individual “because of such individual’s race, color, religion, sex, or national origin,”¹⁰ leaving victims of sexual harassment without a remedy and wrongdoers unpunished appears to frustrate the goals of the statute and leads to an absurd result due to the mere fact that the perpetrator sexually harasses a member or members of both sexes.

How can federal courts avoid such unfortunate and antithetical results, provide victims of sexual harassment a remedy, as well as respect the goals and purposes underlying Title VII’s prohibitions against sex discrimination?

In order to eliminate federal reliance on the equal opportunity harasser defense in Title VII hostile work environment sexual harassment claims, the U.S. Congress or the U.S. Supreme Court must articulate a broader definition of “sex” (as it applies to Title VII sexual harassment actions) and/or adopt a mode of individual analysis, which analyzes claims of sexual harassment individually instead of analyzing sexual harassment claims as they relate to other individuals who have also brought a similar claim against the same employer.

Part I of this note analyzes the circumstances surrounding the passage of Title VII and the purposes behind such federal legislation. This section will focus primarily on the underlying and evolving purposes and goals of federal anti-discrimination law, in general, and sexual harassment law, in particular. This section also will argue and conclude that the purposes and goals of Title VII oppose the acceptance of the equal opportunity harasser defense in sex discrimination claims. Part II analyzes the cases in which several federal courts have accepted the equal opportunity harasser defense to sexual harassment claims. This section will pay close attention to the legal and

7. *Id.* at 614.

8. *See, e.g., Lack*, 240 F.3d 255; *Holman*, 211 F.3d 399; *Henson*, 682 F.2d 897.

9. Miles, *supra* note 6, at 606.

10. 42 U.S.C. § 2000e-2(a)(1) (2000).

statutory arguments that courts rely upon to justify acceptance of this controversial shield to liability. Part III explores the several courts that have either rejected the equal opportunity harasser defense or held it to not be a *per se* bar to all claims of sexual harassment. This section will focus primarily on the arguments that are made and the modes of analysis that are utilized to find liability despite the existence of an individual who sexually harasses both men and women. Part IV argues and concludes that Title VII sexual harassment law should adopt an individualized mode of analysis as opposed to its current approach. Under this suggested method, the treatment and harassment of each victim would be analyzed in isolation without considering the sexual harassment claims of other individuals in the same workplace to determine if the plaintiff has satisfied the “because of sex” *prima facie* case requirement. This approach will best serve the underlying purposes and goals of Title VII’s prohibition against sexual harassment and provide victims who would otherwise be left unprotected with a remedy. Finally, Part V will argue that, even if an individualized mode of analysis is rejected by federal courts, the U.S. Congress or the U.S. Supreme Court should redefine the meaning of “sex” in sexual harassment law in order to eliminate reliance on the equal opportunity harasser defense. By adopting a more expansive definition of “sex” as it applies in the sexual harassment context, the Congress or the Court will best further the aims of Title VII and eliminate the use of the equal opportunity harasser defense.

I. THE EVOLVING PURPOSES OF TITLE VII

Undoubtedly, Congress enacted Title VII of the Civil Rights Act of 1964 for the primary purpose of eradicating both the past and continuing practices of racial discrimination in a variety of employment contexts. However, over time, Title VII has embraced a variety of employment practices not originally envisioned by its framers, most notably in the area of sexual harassment law.¹¹ Initially, Title VII was used as a vehicle to eradicate sex-based compensation schemes,¹² but as an evolving piece of legislation, Title VII was used to remove other forms of sex discrimination from the workplace, including quid

11. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (embracing same-sex sexual harassment); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (embracing hostile workplace sexual harassment claims).

12. *See, e.g.*, *County of Washington v. Gunther*, 452 U.S. 161 (1981) (challenging the pay of female prison guards as compared to male prison guards).

pro quo and hostile workplace sexual harassment.¹³ While the wording of 42 U.S.C. § 2000e-2(a)(1) appears to be limited to tangible and, primarily economic, elements,¹⁴ the U.S. Supreme Court has expanded on Title VII's scope of protection by emphasizing that Title VII is meant "to strike at the entire spectrum of disparate treatment of men and women."¹⁵

While the eradication of racial discrimination was the primary goal of Title VII, the statute has adapted to deal with issues not originally considered by the legislators who enacted it into law. In *Oncale v. Sundowner Offshore Services, Inc.*,¹⁶ the U.S. Supreme Court, in holding that same-sex sexual harassment claims are actionable under Title VII, stated, "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."¹⁷ Title VII was not passed for the primary purpose of eliminating sexual harassment in the workplace, or more specifically, to eliminate equal opportunity harassers from the work environment, but nevertheless, Title VII must adapt to modern employment situations, as the Court acknowledged that it must in *Oncale*. As one commentator has emphasized, "[w]e must be aware that whatever rules we develop will require constant reexamination, modification, and fine-tuning. The sexual, gender, and preference revolutions are not over. Society is in a constant state of evolution."¹⁸ Title VII has adapted over the past two decades to deal with the unique, and sometimes unforeseeable, problems associated with sexual harassment law, such as hostile work environment sexual harassment claims,¹⁹ same-sex sexual harassment,²⁰ and the liability of employers for the conduct of their supervisors.²¹ The equal opportunity harasser defense presents yet another one of those unforeseeable problems.

13. See generally *Meritor*, 477 U.S. 57.

14.

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise 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. . . .

15. *Meritor*, 477 U.S. at 64.

16. 523 U.S. 75 (1998).

17. *Id.* at 79.

18. Miles, *supra* note 6, at 603 (quoting Hon. Stephen Reinhardt, *Foreword* to BARBARA T. LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW*, at xix (1992)).

19. See *Meritor*, 477 U.S. 57.

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

21. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The equal opportunity harasser defense is a relatively recent phenomenon that must be dealt with before its disastrous implications affect numerous victims of sexual harassment. As businesses and their attorneys become more sophisticated and attempt to avoid liability under Title VII, the law must keep pace in order that the goals of anti-discrimination legislation are not frustrated.

Aside from the fact that Title VII and its prohibitions against sexual harassment must adapt to modern employment problems, such as the equal opportunity harasser, Title VII is legislation, under a disparate treatment analysis, that seeks to provide *individuals* with protection from discrimination and a remedy against those who violate its dictates. In *Connecticut v. Teal*,²² the majority of the U.S. Supreme Court emphatically stated on several occasions that Title VII protects individuals. The Court wrote, “[t]he principal focus of the statute [Title VII] is the protection of the *individual* employee [T]he entire statute and its legislative history are replete with references to protection for the *individual* employee.”²³ If Title VII is meant to protect individuals from acts of discrimination, the equally inappropriate treatment of other individuals should not bar otherwise actionable claims. For example, if a supervisor referred to all black employees as “niggers” but also referred to all Asian employees as “gooks,” would we, as a society, allow the employer to escape liability for the supervisor’s discrimination? If society is disgusted at these actions, then why do we accept the equal opportunity harasser defense?

The *Teal* Court further stated, “[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.”²⁴ In essence, all male and female employees in an office may be “balanced” based on the fact that all are subjected to an equal opportunity harasser, yet this “equal” treatment should not protect an employer from the specific acts of individual sexual harassment.²⁵ While the *Teal* decision dealt with a disparate impact claim (and not a disparate treatment claim of sexual harassment), it would seem antithetical to Title VII’s overall goals to prevent an individual (i.e., a female employee) from bringing a claim merely because the group as

22. 457 U.S. 440 (1982).

23. *Id.* at 453-54 (emphasis added).

24. *Id.* at 454 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978)).

25. See Miles, *supra* note 6, at 631 (“Equal-opportunity harassment creates the same hostile work environment and inequalities that traditional harassment does and thus should be prohibited by sexual harassment laws.”).

a whole (i.e., the entire office of male and female employees) is treated equally poorly.²⁶

Title VII's goal of eliminating discrimination, in general, and sexual harassment, in particular, is frustrated by acceptance of the equal opportunity harasser defense in two additional ways. First, by allowing the equal opportunity harasser defense to shield liability, an entire group of sexual harassment victims is left without any federal protection or remedy.²⁷ If, for example, a female plaintiff, pleading the same facts, was the sole victim of the harasser's conduct, Title VII would offer her protection; however, merely because the harasser subjected a male employee to similar conduct, both are left without protection. Title VII was meant to serve as a vehicle to eliminate discrimination and provide victims with a remedy, not to serve as a means to allow discrimination to flourish without a response. Second, while all sexual harassment is deplorable, an equal opportunity harasser could be considered worse than a traditional harasser because the former treats everyone horribly.²⁸ In essence, courts that accept the equal opportunity harasser defense are telling individuals that the "more people one harasses, the less susceptible one is to prosecution."²⁹ Considering the effects and consequences of the equal opportunity harasser defense, it is difficult to argue that it is consistent with the goals and purposes underlying the passage of Title VII. While Title VII intended to eliminate discriminatory behavior from the workplace, the equal opportunity harasser defense allows it to continue unabated.

II. ACCEPTANCE OF THE EQUAL OPPORTUNITY HARASSER DEFENSE

In *Harris v. Forklift Systems, Inc.*,³⁰ Justice Ginsburg, in concurrence, stated the following: "[T]he critical issue, Title VII's text indicates, is whether members of *one* sex are exposed to disadvantageous terms or conditions of employment to which members of the *other* sex are *not*

26. See Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 383, 407 (1996)

There is no denying the fact that the victims of an attack by a bisexual are no better off than victims of a heterosexual or homosexual attack. It is only because courts are locked into the traditional analysis requiring that in order for a harasser to be liable, he must have selected only one gender as the target that a bisexual/equal opportunity harasser's acts are not prohibited under Title VII.

Id.

27. Miles, *supra* note 6, at 629.

28. *Id.* at 630.

29. *Id.*

30. 510 U.S. 17 (1993).

exposed.”³¹ This statement was cited with approval by Justice Scalia in his majority opinion in *Oncale*.³² Moreover, in the same opinion, the Court stated that Title VII does not deal with all harassment in the workplace but only with sexual harassment that can be characterized as “*discriminat[ion]* . . . because of . . . sex.”³³ While the U.S. Supreme Court has never dealt with or ruled on the viability of the equal opportunity harasser defense, several courts have read the language in the *Harris* and *Oncale* decisions as tacit approval of the equal opportunity harasser defense as a means to avoid liability under Title VII.

In *Holman v. Indiana*,³⁴ the Seventh Circuit affirmed the district court’s dismissal of the claim for failure to state a cause of action because the plaintiffs, a husband and wife, alleged that their male supervisor had sexually harassed both of them on separate occasions.³⁵ The circuit court emphasized that:

[B]ecause Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute’s ambit. 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).³⁶

The circuit court further emphasized that Title VII was meant to eliminate discrimination and stated, “[g]iven this premise, requiring disparate treatment is consistent with the statute’s purpose of preventing such treatment.”³⁷ Since both Karen and Steven Holman were subjected to the same treatment and harassment, neither one could bring a sex discrimination claim under Title VII because neither could prove disparate treatment or that the conduct was “on the basis of sex.”³⁸

The holding in *Holman* is consistent with the holdings of several other circuits on the issue of the equal opportunity harasser defense. According to the Seventh Circuit, “Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate

31. *Id.* at 25 (emphasis added).

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

33. *Id.*

34. 211 F.3d 399 (7th Cir. 2000).

35. *Id.* at 400-01.

36. *Id.* at 403.

37. *Id.* at 404 (emphasis removed).

38. *Id.* at 403.

treatment, is not actionable because the harassment is not based on sex.”³⁹ In a case involving an equal opportunity harasser, the Eleventh Circuit held:

[T]here may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, the sexual harassment would not be based on sex because men and women are accorded like treatment. Although the plaintiff might have a remedy under state law in such a situation, the plaintiff would have no remedy under Title VII.⁴⁰

In the case of *Walker v. National Revenue Corp.*,⁴¹ in dismissing a claim of sexual harassment by a male employee, the Sixth Circuit emphasized that the plaintiff not only failed to present evidence that the conduct in question was because of sex, but the plaintiff presented evidence that the alleged harasser “treated every employee badly, male and female alike.”⁴² In *Rabidue v. Osceola Refining Co.*,⁴³ the Sixth Circuit, following the precedents in other circuits, declared, “Instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment.”⁴⁴ In these circuits, the equal opportunity harasser defense is a shield to liability for claims of sexual harassment under Title VII.

The federal courts that accept the equal opportunity harasser defense have emphasized that Title VII is meant to prevent and eliminate discrimination,⁴⁵ and in the absence of disparate treatment between men and women (which essentially is lacking in cases dealing with equal opportunity harassers), there is no discrimination for Title VII to remedy. Specifically, the court in *Holman* emphasized that, unless there is disparate treatment and harassment “because of sex,” Title VII would turn into a general civility code,⁴⁶ which the Supreme Court has explicitly stated Title VII was not intended to be.⁴⁷

Though the U.S. Supreme Court has not ruled on the applicability of the equal opportunity harasser defense in Title VII actions, one commentator in

39. *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996); *see also* *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1011 (7th Cir. 1999) (“[W]e readily acknowledge that the factfinder could infer from such evidence that Jemison’s harassment was bisexual and therefore beyond the reach of Title VII . . .”).

40. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (citations omitted).

41. 43 F. App’x 800 (6th Cir. 2002).

42. *Id.* at 804.

43. 805 F.2d 611 (6th Cir. 1986).

44. *Id.* at 620.

45. *See, e.g., Holman v. Indiana*, 211 F.3d 399, 404 (7th Cir. 2000).

46. *Id.* at 404.

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

particular believes that, based on the Court's holding in *Oncale* and its emphasis on comparative evidence,⁴⁸ it would hold that the equal opportunity harasser defense does not violate Title VII.⁴⁹ However, on the contrary, it could also be argued that the use of comparative evidence may help in defeating the equal opportunity harasser defense. For example, the use of comparative evidence may illustrate that, while the supervisor sexually harassed both men and women, he treated women worse.⁵⁰ Though the commentator's opinion is mere speculation, the Court's emphasis in *Oncale* that the plaintiff prove discrimination "because of sex"⁵¹ may illustrate its tendency to rule in favor of the equal opportunity harasser defense. In the end, this question will only be decided when the Supreme Court grants certiorari to a case to decide the applicability of the equal opportunity harasser defense in Title VII sexual harassment cases.

III. JUDICIAL RESISTANCE TO THE EQUAL OPPORTUNITY HARASSER DEFENSE

One of the most prominent cases to reject the equal opportunity harasser defense is *Chiapuzio v. BLT Operating Corp.*⁵² Similar to the *Holman* case, the plaintiffs, who included a husband and wife, were subjected to sexually harassing conduct by their male supervisor.⁵³ In order to avoid liability, the defendant asserted that Bell, the harassing supervisor, harassed both men and women alike, and as such, he was an equal opportunity harasser and did not discriminate because of sex.⁵⁴ Though many federal courts have accepted this defense,⁵⁵ the Wyoming District Court rejected the defense for several reasons. The district court first ruled that the U.S. Supreme Court in *Meritor Savings Bank, FSB v. Vinson* "moved away from a disparate treatment or 'but

48. *Id.* at 80-81.

49. See David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1739-40 (2002).

50. *Id.* at 1742; see also *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994) ("The numerous depositions of Showboat employees reveal that Trenkle was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct.").

51. *Oncale*, 523 U.S. at 82 (Thomas, J., concurring) ("I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'").

52. 826 F. Supp. 1334 (D. Wyo. 1993).

53. *Id.* at 1335.

54. *Id.* at 1336.

55. See *supra* Part II.

for' analysis of gender harassment" and embraced the position that sexual harassment "occurs when unwelcome physical or verbal conduct creates a hostile work environment."⁵⁶ Moreover, the district court then illustrated the strange results that would occur by accepting the equal opportunity harasser defense.⁵⁷ The court emphasized that it seemed unlikely that Title VII protects an individual from unwelcome heterosexual or homosexual advances in the workplace but leaves the same individual unprotected when dealing with unwelcome bisexual advances.⁵⁸ Based on its understanding of Title VII, the court emphasized that an equal opportunity harasser is not immune from liability.⁵⁹ In rejecting the equal opportunity harasser defense, the court stated that even if an individual is an equal opportunity harasser, "it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender."⁶⁰ Using this as its basis, the court held that, looking at the supervisor's behavior, he harassed each individual plaintiff because of sex and the behavior was actionable under Title VII.⁶¹

The Second Circuit in *Brown v. Henderson*⁶² emphasized that there is "no *per se* bar to maintaining a claim of sex discrimination where a person of another sex has been similarly treated."⁶³ The *Brown* court further stated, "[T]he inquiry into whether ill treatment was actually sex-based discrimination cannot be short-circuited by the mere fact that both men and women are involved."⁶⁴ Though the court did not find liability in this specific case, the Second Circuit may be willing to find liability in a case even if the harasser was an equal opportunity harasser. While somewhat more ambiguous, the Fourth Circuit decision in *Lack v. Wal-Mart Stores, Inc.*⁶⁵ illustrated that evidence of an equal opportunity harasser may not preclude an individual plaintiff's sexual harassment claim. The circuit court emphasized,

56. *Chiapuzio*, 826 F. Supp. at 1336; *see also* Miles, *supra* note 6, at 619-20 ("In other words, the [*Chiapuzio*] court chose to focus on the 'un-welcome' and 'severe and pervasive' elements of the sexual harassment test with the belief that these elements would make up for any ambiguity as to the question of 'but for one's sex.'").

57. *Chiapuzio*, 826 F. Supp. at 1337.

58. *Id.*

59. *Id.*

60. *Id.* (quoting John J. Donahue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1610-11 (1992) (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)).

61. *Id.* at 1338.

62. 257 F.3d 246 (2d Cir. 2001).

63. *Id.* at 256.

64. *Id.* at 254.

65. 240 F.3d 255 (4th Cir. 2001).

“[w]hile the female employees’ complaints do not, as a matter of law, preclude Lack’s [a male] claim, they do present an imposing obstacle to proving that the harassment was sex-based.”⁶⁶ While the Fourth Circuit would not immediately preclude Title VII relief to a victim of an equal opportunity harasser, it does, however, view evidence of an equal opportunity harasser as a significant burden a plaintiff must overcome to satisfy the statute’s requirements and to impute liability to the employer.

The Ninth Circuit also rejected the use of the equal opportunity harasser defense in the case of *Steiner v. Showboat Operating Co.*⁶⁷ In that case, the supervisor in question sexually harassed both male and female employees, though his harassment was more vulgar and explicit toward the female employees.⁶⁸ Nevertheless, the court emphasized that even if the supervisor’s sexual harassment of male employees was equal to the sexual harassment of the female employees, the supervisor cannot use his harassment of men to “cure” his harassment of women in the workplace.⁶⁹ Moreover, while the court was deciding the individual case of *Steiner*, it clarified its rejection of the equal opportunity harasser defense by stating that *both* men and women working at Showboat could have viable sexual harassment claims under Title VII against the equal opportunity harasser.⁷⁰

Though the *Holman* court accepted the equal opportunity harasser defense, it mentioned and quickly disregarded the argument that acceptance of the equal opportunity harasser defense would, in essence, encourage harassers to “manufacture a second harassment of a different sex so they could insulate themselves from Title VII liability.”⁷¹ This policy-based argument was also furthered, and rejected, in another case from the Seventh Circuit.⁷² Though the fabrication of additional sexual harassment claims may, at first glance, seem like a preposterous notion, it is an argument that deserves some careful consideration before being so quickly dismissed. The relief available to a plaintiff under Title VII, prior to the passage of the Civil Rights Act of 1991, provided little incentive for employers to modify their behavior; however, with the passage of the Civil Rights Act of 1991, a plaintiff may be

66. *Id.* at 262 (citation omitted).

67. 25 F.3d 1459 (9th Cir. 1994).

68. *Id.* at 1462.

69. *Id.* at 1464.

70. *Id.*

71. *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000).

72. See *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996) (“It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female.”).

entitled to both compensatory and punitive damages in disparate treatment cases, including claims of sexual harassment.⁷³ Though a plaintiff must prove vicarious liability⁷⁴ and the compensatory and punitive damages are subject to statutory limits,⁷⁵ the possibility of paying damages may provide an employer, especially a smaller one, with the incentive to fabricate additional sexual harassment claims to take advantage of the equal opportunity harasser defense. For example, an employer with more than 14 employees but less than 100 could face punitive damages up to \$50,000.⁷⁶ While this amount of money may be insignificant to a large corporation, the possibility of paying large amounts of punitive damages could potentially cripple a small- to medium-size company. Faced with the danger of heavy financial losses associated with sexual harassment litigation and liability, an employer may manufacture additional cases of sexual harassment to take advantage of the shield offered by the equal opportunity harasser defense.⁷⁷ Though it could be argued that neither an ethical attorney nor an employer would encourage additional cases of sexual harassment since such actions could lead to lawsuits grounded in state tort law, a desperate employer could find willing co-employees, who will manufacture claims as well as guarantee they will not bring additional causes of action (e.g., lawsuits not based on Title VII) in return for favorable treatment in other areas of the employer-employee relationship (e.g., pay raises, promotions). It is not the belief of the author that this type of collusive behavior between employers and employees is widespread,⁷⁸ however, it is possible and must be addressed by courts considering the equal opportunity harasser defense before accepting such a controversial shield to sexual harassment liability.

73. ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 865 (7th ed. 2004).

74. *See generally* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

75. 42 U.S.C. § 1981a(b)(3) (2000).

76. *Id.* § 1981a(b)(3)(A).

77. While an employer may avoid federal civil liability under Title VII via the equal opportunity harasser defense, the employer (or supervisor) could potentially face civil and potentially criminal liability under state substantive law, in particular tort law.

78. Though the author does not believe sexual harassment conspiracies are a common occurrence in the workplace, one need only look to the variety of inappropriate behaviors of American corporations (e.g., Enron, Adelphia) to realize that such actions are not beyond comprehension.

IV. ADOPTION OF AN INDIVIDUALIZED ANALYSIS

To fully effectuate the goals underlying Title VII and to eliminate sexual harassment in the workplace, courts must adopt an individualized mode of analysis in examining sexual harassment claims involving an equal opportunity harasser.⁷⁹ Though one court in particular has adopted such a method of analysis in these types of cases,⁸⁰ most courts refuse to look at each individual claim of sexual harassment when there is evidence that the harasser is an equal opportunity harasser.⁸¹ Moreover, while some courts have rejected the equal opportunity harasser defense when there was evidence that one sex was treated much worse than the other,⁸² thereby illustrating disparate treatment, the more typical case involving an equal opportunity harasser involves harassment of both sexes that is equally offensive without any evidence that one sex in particular was targeted for the more severe and inappropriate behavior.

Before delving into the specifics of this novel method of analysis for cases involving equal opportunity harassers, it is critical to understand why sexual harassment claims, in particular, should be analyzed under such an individualized approach. While sexual harassment usually involves the harassment of an individual, the disparate treatment framework is a class-based mode of analysis.⁸³ Courts and commentators alike have suggested that sexual harassment claims do not fit comfortably within the disparate treatment framework developed for Title VII claims.⁸⁴ Since sexual harassment claims do not fit perfectly within this analytical scheme, the court in *Chiapuzio* emphasized that some of the doctrines developed under disparate treatment analysis, such as burden of proof and causation, would require some adjustments in sexual harassment cases.⁸⁵ As suggested by the *Chiapuzio* court, in order to properly analyze claims of sexual harassment under Title

79. See Miles, *supra* note 6, at 621.

80. See *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993).

81. See *supra* Part II.

82. See, e.g., *Kopp v. Samaritan Health Sys.*, 13 F.3d 264 (8th Cir. 1993).

83. Miles, *supra* note 6, at 610 (emphasizing that “[c]lass-based discrimination occurs when a perpetrator chooses a victim based on his or her membership in a targeted class”).

84. See *Chiapuzio*, 826 F. Supp. at 1337; see also Michelle R. Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1099 (1989) (suggesting several problems with characterizing sexual harassment as gender discrimination under Title VII).

85. *Chiapuzio*, 826 F. Supp. at 1337; see also *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) (“If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines.”).

VII, some doctrines must be modified, illustrating the need for an individualized mode of analysis in certain cases, such as those involving an equal opportunity harasser.

While a supervisor who is racist will most likely discriminate against all members of the disfavored race, a supervisor is unlikely to sexually harass all individuals who are members of one sex or another (or in the case of an equal opportunity harasser, the supervisor will not sexually harass all individuals in the workplace). In instances of individual discrimination, such as cases of sexual harassment, the harasser does not sexually harass all individuals in a certain class (e.g., women) but harasses an individual based on his/her inclusion in a class *as well as* the target's individual characteristics, such as physical appearance or personality.⁸⁶ In essence, many victims of sexual harassment are selected not solely as a result of their inclusion in a specified class but because of their unique individual characteristics as well. For example, a woman may be targeted by a sexual harasser not only because she is a woman but also due to the fact that she has blonde hair and blue eyes, two individual characteristics that the harasser particularly enjoys. As such, it could be argued that women who do not meet the harasser's "criteria" will not be harassed. Conversely, the same harasser may sexually harass a man in the same office not only because he is a man but also based on the fact that he has a muscular build, an individual feature of the victim that the harasser enjoys. Since sexual harassment is primarily the result of the victim's individual characteristics, traditional disparate treatment analysis, which focuses exclusively on an individual's membership in a certain class, is inadequate, and an individualized mode of analysis must be adopted to protect sexual harassment victims and further the goals of Title VII.

Under traditional analysis, most courts use evidence of an equal opportunity harasser as a means to bar a plaintiff's sexual harassment claim; however, under the suggested individual mode of analysis, each individual plaintiff's claim would be examined very closely to determine if sexual harassment under Title VII has occurred.⁸⁷ While the substantive law in question would remain the same, the only major change that courts analyzing sexual harassment claims would experience would be one of procedure.⁸⁸ Courts may be more willing to adopt this approach since it is not a significant

86. Miles, *supra* note 6, at 610.

87. *Id.* at 623.

88. *Id.*

departure from traditional sexual harassment law, which would be the case in adopting a new definition of “sex” for sexual harassment jurisprudence.⁸⁹

Under an individual mode of analysis, a court, first and foremost, must separate the individual claims of the plaintiffs (if there are multiple plaintiffs or if there is evidence that another individual not a party to the lawsuit was harassed as well).⁹⁰ Second, when analyzing each individual claim, the court must focus only on conduct that was targeted at the individual plaintiff without considering the harasser’s conduct directed at other individuals.⁹¹ For example, a court should consider evidence that a supervisor referred to a female plaintiff as a “cunt” even if the same supervisor referred to a male plaintiff as a “dick” or a “prick.”⁹² Finally, the plaintiff must present sufficient evidence, including the three types of evidence outlined in *Oncale*,⁹³ to show that the harassment in question was because of the plaintiff’s sex.⁹⁴ In the previous example, since the use of the word “cunt” is a derogatory and sex-specific term, the court could conclude that the supervisor’s harassment toward this specific plaintiff was because of sex.⁹⁵

As mentioned above, the *Chiapuzio* court was the first court to adopt the suggested individualized mode of analysis to consider claims involving equal opportunity harassers.⁹⁶ The district court, instead of analyzing the plaintiffs as a group, analyzed each plaintiff’s claim separately.⁹⁷ The court looked at the evidence as it pertained to each victim, and instead of determining whether the harasser harassed only members of a certain sex, the court determined if sex was a significant factor in each individual case of harassment.⁹⁸ Based on the evidence on the record, the court concluded that the individual plaintiffs were harassed because of sex and each had a cause of action under Title VII.⁹⁹

89. See *infra* Part V.

90. Miles, *supra* note 6, at 623.

91. *Id.* at 623-24.

92. *Id.* at 624. While the use of these derogatory words may not have the same effect, they are used as mere illustrations to show that a court should focus only on conduct directed at a specific plaintiff when analyzing a claim of sexual harassment.

93. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998).

94. Miles, *supra* note 6, at 624.

95. *Id.* at 624-25.

96. See *supra* notes 52-61 and accompanying text.

97. *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337-38 (D. Wyo. 1993).

98. Miles, *supra* note 6, at 620.

99. *Chiapuzio*, 826 F. Supp. at 1338. But see Kristi J. Johnson, *Chiapuzio v. BLT Operating Corporation: What Does it Mean to Be Harassed “Because of” Your Sex?: Sexual Stereotyping and the “Bisexual” Harasser Revisited*, 79 IOWA L. REV. 731, 746 (1994) (arguing that the *Chiapuzio* court’s analysis “swallows the rule of the but-for sex requirement, at least for equal opportunity harassers”).

Under the individual mode of analysis, the “because of sex” requirement is not eliminated, yet the requirement is satisfied by considering the evidence for each individual claim regardless of the existence of other victims of harassment.¹⁰⁰

To further illustrate the practicality and usefulness of the individualized mode of analysis for cases dealing with equal opportunity harassers, this approach will be applied to the third hypothetical included in Part I of this discussion.¹⁰¹ Very briefly, two individuals, Alice and Andrew, are both being sexually harassed by their supervisor, Barry. To start, a court analyzing the claims of Alice and Andrew should separate each complaint in order to determine whether each one is actionable. Second, the court must then analyze each claim by looking at Barry’s conduct toward each individual plaintiff. In Alice’s case, she was subjected to crude and sexually suggestive language and was touched inappropriately by Barry. Based on this evidence, it could easily be argued that Barry’s conduct toward Alice was because of Alice’s sex, and as such, the “because of sex” requirement would be satisfied and her claim could go forward, assuming all other requirements were met. At this point, the court should then turn its attention to Andrew’s claim of sexual harassment against Barry. Similar to Alice, Andrew was subjected to crude and sexually suggestive comments and was touched inappropriately as well. As a result of the evidence on the record, it would be reasonable to conclude that Barry’s conduct toward Andrew was because of his sex and, assuming all other requirements are satisfied, Andrew has a viable claim of sexual harassment under Title VII. This type of analysis allows courts to reach the merits of individual claims in which victims present sufficient evidence of sex-based conduct.¹⁰²

The adoption of the individualized mode of analysis in dealing with cases of equal opportunity harassers is the best approach from the standpoint of fairness and justice. While evidence of disparate treatment is necessary when dealing with class-based discrimination, as illustrated above, sexual harassment law does not fit neatly within traditional disparate-treatment analysis. Though an individual’s membership in a certain class is an important factor, it is not determinative of who a harasser will target. If and when courts adopt this individualized approach, the goals underlying Title

100. Miles, *supra* note 6, at 620.

101. *See also id.* at 625-26 (applying the individual mode of analysis to the *Holman* case in order to allow both plaintiffs in that case to have a cause of action for sexual harassment and to eliminate the use of the equal opportunity harasser defense).

102. *Id.* at 626.

VII's prohibitions against sexual harassment will be furthered. If courts continue to dismiss meritorious claims of sexual harassment based solely on the presence of an equal opportunity harasser, victims of sexual harassment will be left without protection and sexual harassment will continue unabated into the future.

V. REDEFINING "SEX" IN SEXUAL HARASSMENT LAW

As is well known, the term "sex" in Title VII was included primarily as a last minute political effort by Southern Congressional members to create opposition to the Civil Rights Act of 1964.¹⁰³ As a result, there is little legislative history to provide the courts with any guidance on what exactly the term "sex" was meant to encompass.¹⁰⁴ Traditionally, under Title VII analysis, many courts, including the U.S. Supreme Court, have used the terms "sex" and "gender" synonymously and have concluded that "sex" applies only to discrimination because of one's biological distinction as a male or female.¹⁰⁵ While explaining the myriad of differences between "sex" and "gender" is beyond the scope of this analysis, suffice it to say that the term "sex" as used in Title VII sexual harassment claims has been limited to traditional notions of what "sex" means (i.e., the biological distinction as being male or female). This limited view of "sex" has been used as justification by a variety of courts to reject arguments put forth by homosexuals, who contend that the term "sex" in Title VII includes sexual orientation or sexual preference.¹⁰⁶ When rejecting such arguments for an extension of the term "sex," many courts emphasize that, while there have been proposed amendments, to prohibit discrimination under Title VII because of sexual orientation, none have ever been enacted into law.¹⁰⁷ However, a narrow definition of "sex" as a biological classification differentiating men and women limits the ability of Title VII to prohibit sexual harassment in the workplace, most notably at the hands of an equal opportunity harasser.

103. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986) ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives.").

104. *Id.* at 64.

105. *See, e.g., De Santis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977)).

106. *See, e.g., id.* at 329-30.

107. *Id.* at 329 (emphasizing that "[l]ater legislative activity makes this narrow definition more evident").

While it may be conceded that Congress had traditional notions of “sex” in mind when it originally included the term “sex” in Title VII, Congress must now provide a more expansive definition of this term in order to eliminate the wide range of sexual harassment that exists throughout this country, as well as to eliminate the use of the equal opportunity harasser defense. As several courts have emphasized, “If the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”¹⁰⁸ The remainder of this section will offer alternatives to the current limited definition of “sex” as applied in hostile work environment sexual harassment cases. The more expansive definitions that are offered will allow individuals who are sexually harassed by an equal opportunity harasser to satisfy the “because of sex” requirement, which, under a strict interpretation, is currently impossible to satisfy in cases involving equal opportunity harassers.¹⁰⁹

To begin, according to Steven Locke, the “because of sex” requirement, which focuses judicial attention on determining the harasser’s motives, must be replaced by an inquiry into the sexual nature of the harassing conduct.¹¹⁰ In essence, the current “because of sex” analysis is too limited because it focuses primarily on the gender of the victim without understanding that all sexual harassment is “rooted in sex-based conduct regardless of the parties’ gender or sexual orientation.”¹¹¹ Any analysis of a hostile work environment sexual harassment claim under Title VII must begin by determining if the harassment in question is sex-based or non-sex-based.¹¹² Courts and commentators who suggest that an individual who harasses both men and women cannot harass them both on the basis of sex fail to recognize this important distinction.¹¹³ Locke provides a more expansive definition of “sex” asserting:

Rather than asking if the plaintiff was harassed because of his or her sex, the court should ask whether the vehicle of harassment was sex-based (i.e. was the harassment rooted in sex, sexuality, sex roles, or sex stereotypes). . . . This factor, combined with an emphasis on the harm suffered by the victim, will provide a test which properly focuses on the conduct rather than the motive of the perpetrator.¹¹⁴

108. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984); *see also De Santis*, 608 F.2d at 329 (quoting *Holloway*, 566 F.2d at 662-63).

109. Locke, *supra* note 26, at 411.

110. *Id.* at 408.

111. *Id.* at 415.

112. *Id.* at 413.

113. *Id.*

114. *Id.* at 414.

Under this definition, “[w]hen a supervisor uses a sex-based medium to harass both men and women employees, he is effectively harassing them because of their sex. . . . This conduct should be prohibited by Title VII.”¹¹⁵ If this view is adopted, Alice and Andrew from the third hypothetical above would most likely have a Title VII claim against their supervisor even though he can be characterized as an equal opportunity harasser.¹¹⁶ Locke applauded the *Chiapuzio* court since it closely examined the sexual nature of the supervisor’s harassing conduct instead of focusing on the traditional motive-based “because of sex” analysis in finding that the supervisor violated Title VII.¹¹⁷ An analysis that focuses on the conduct of the harasser, as opposed to his motives, appears to be consistent with the nature of discrimination laws, in general, and sexual harassment law, in particular. In essence, anti-discrimination laws are meant to punish discriminatory behavior and not discriminatory thoughts.¹¹⁸ As one commentator has suggested, “[w]hat makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is sexual.”¹¹⁹

Conversely, if the supervisor harasses both men and women using a non-sex-based medium (e.g., he forces all employees to work long hours or gives all employees difficult assignments), this is not harassment “because of sex,” and as such, it is not actionable under Title VII.¹²⁰ Based on Locke’s definition, a supervisor who is simply rude and generally hostile in non-sexual ways to all employees would not be guilty of sexual harassment because the harasser would have harassed them regardless of their sex. In the end, by focusing on the sexual nature of the harasser’s conduct, the equal opportunity harasser defense will be eliminated and the goals of preventing sexual harassment and providing relief to those who have been harmed will be furthered.¹²¹ As an aside, it could also be argued that, if Congress adopts Locke’s definition of sex and eliminates the traditional but-for sex requirement, Title VII will also provide protection for individuals who are

115. *Id.* at 413.

116. *See supra* notes 1-5 and accompanying text.

117. Locke, *supra* note 26, at 412.

118. *See EEOC v. Consol. Serv. Sys.*, 989 F.2d 233, 236 (7th Cir. 1993) (“Discrimination is not preference or aversion; it is acting on the preference or aversion.”).

119. Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 *STAN. L. REV.* 691, 714 (1997) (quoting Susan Estrich, *Sex at Work*, 43 *STAN. L. REV.* 813, 819-20 (1991)).

120. Locke, *supra* note 26, at 413.

121. *Id.* at 414-15.

sexually harassed because they are homosexual.¹²² Though the major argument set forth in this note is for the elimination of the equal opportunity harasser defense, if adoption of this definition not only eliminates the use of that defense, but also provides homosexuals with protection from sexual harassment, then this only provides additional justification for adoption of the ideas set forth herein. The goal of this note is to expand the protective umbrella of Title VII to victims of equal opportunity harassers, but as the cliché goes, if expanding the definition of sex “kills two birds with one stone,” then serious consideration should be given to such a definition.

While not explicitly adopting Locke’s expansive definition of “sex,” the Ninth Circuit in a plurality opinion in *Rene v. MGM Grand Hotel, Inc.*¹²³ applied a much more liberal view of “sex” in order to hold that the plaintiff had an actionable sexual harassment claim. In this case, Rene, an openly homosexual man, was subjected to offensive physical contact of a sexual nature by several of his co-workers.¹²⁴ In framing the issue to be decided, the plurality stated, “[t]his case presents the question of whether an employee who alleges that he was subjected to severe, pervasive, and unwelcome ‘physical conduct of a sexual nature’” has a viable sexual harassment claim under Title VII.¹²⁵ In answering the question in the affirmative, the plurality stated, “It is enough that the harasser have engaged in severe or pervasive unwelcome physical conduct of a sexual nature.”¹²⁶ Similar to Locke’s view, the plurality focused its attention on the conduct of the harassers and not their motives (which may have been because Rene was homosexual).¹²⁷ Moreover, while the facts of this case illustrate egregious behavior,¹²⁸ in cases of less egregious behavior, the judicial focus on the sexual conduct of the harasser would provide plaintiffs with a viable claim in cases that would otherwise fail under the traditional mode of analysis. Though the *Rene* case did not involve an equal opportunity harasser, it could be argued that if it did, as a result of the court’s focus on the sexual conduct of the harassers, the plurality would still allow Rene’s case to go forward. Under Locke’s definition, this would be the correct result.

122. See Johnson, *supra* note 99, at 747.

123. 305 F.3d 1061 (9th Cir. 2002) (plurality opinion).

124. *Id.* at 1064.

125. *Id.* at 1063.

126. *Id.* at 1064.

127. See *id.* at 1066.

128. *Id.* at 1064 (“On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing.”).

Similar to *Rene*, the Seventh Circuit in *Doe v. City of Belleville*¹²⁹ took a more liberal view of “sex” than traditionally applied. In that case, the court emphatically stated, “[W]e have difficulty imagining when harassment of this kind [i.e., grabbing of testicles] would *not* be, in some measure, ‘because of’ the harassee’s sex . . . it would seem to us impossible to de-link the harassment from the gender of the individual harassed.”¹³⁰ If courts adopted the more expansive view of “sex” advocated above, the equal opportunity harasser defense would become inapplicable. In the third hypothetical outlined in the introduction, both of the plaintiffs would have a viable claim against their equal opportunity harasser since his conduct against both victims constituted “physical conduct of a sexual nature.”¹³¹

As Justice Scalia stated in *Oncale*, one way a plaintiff in a same-sex sexual harassment case could bring an actionable claim is to show that the harasser was motivated by sexual desire, so long as there is evidence that the harasser was homosexual.¹³² It seems antithetical that a plaintiff can have a viable Title VII claim against an individual if he could show that the harasser was homosexual, but that the same plaintiff could not bring a Title VII sexual harassment claim against the same harasser if it is shown that the harasser is not homosexual, but bisexual. Though the Court in *Oncale* did not accept such an expansive definition of “sex” as is argued above, it may be difficult for the Court to justify that evidence of sexual desire for victims of homosexual harassers is relevant and vital to a Title VII claim but irrelevant in the case of an equal opportunity harasser.

VI. CONCLUSION

Since its inception in the Civil Rights Act of 1964, Title VII has continued to evolve to deal with the always-changing area of employment discrimination. Though originally enacted to deal with the problems associated with racial discrimination, Title VII now prohibits countless behaviors in the workplace. As such, Title VII must adapt once again to deal with the recent phenomenon known as the equal opportunity harasser defense. While some courts have accepted the equal opportunity harasser defense as a means to escape liability under Title VII, other courts have resisted the temptation to accept this defense to dismiss sexual harassment cases that come

129. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).

130. *Id.* at 580 (emphasis added).

131. *Rene*, 305 F.3d at 1065 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)).

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

before them. Acceptance of the equal opportunity harasser defense is an impediment to the underlying goals and purposes of Title VII. By allowing the defense, courts are allowing, and it could be argued encouraging, such behavior to continue while depriving victims of such conduct of any remedy against the wrongdoer. In order to avoid the consequences associated with the equal opportunity harasser defense, courts must adopt an individualized mode of analysis to determine if certain individuals are victims of sexual harassment without considering the sexual harassment of others within the same work environment. It would be absurd to hold a supervisor liable for his continuous sexual harassment of a female employee, but then to allow his behavior to go unpunished merely because he subjects a male employee to the same disgusting treatment. Moreover, adopting a more expansive definition of "sex" as set forth by Steven Locke would focus attention on the sexual nature of the conduct in question as opposed to the motives of the sexual harasser. Acceptance of this definition would not only eliminate the use of the equal opportunity harasser defense but also support efforts to prohibit harassment based on sexual orientation under Title VII as well. In the end, the aspirations and objectives underlying the passage of the Civil Rights Act of 1964 would be furthered by adopting these proposals and thus allowing the dream of equality to become more of a reality.