Same-Sex Sexual Harassment: Is it Sex Discrimination? A Review of Canadian and American Law

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I. INTRODUCTION

It IS WIDELY RECOGNISED THAT sexual harassment in the workplace is commonplace in both Canada and the United States. Most Canadian jurisdictions have developed specific prohibitions in their human rights legislation against sexual harassment although some still rely on the general prohibition against sex discrimination—which, as our Supreme Court confirmed in *Janzen* v. *Platy Enterprises Ltd.*,[1] includes a prescription against sexual harassment. In the United States, the general prohibition against sex discrimination in Title VII of the *Civil Rights Act* of 1964 is the vehicle for similar restrictions as was finally confirmed by the U.S. Supreme Court in *Meritor Savings Bank* v. *Vinson*.[2] The

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1 *Janzen* v. *Platy Enterprises Ltd.*, (Man. 1989) 10 C.H.R.R. D/6205 (S.C.C.) [hereinafter *Janzen*].

2 *Meritor Savings Bank* v. *Vinson*, 106 S.Ct. 2399 (1986) [hereinafter *Meritor*].

leading cases in the evolution of the law all dealt with conduct between men and women.

The issue of whether same-gender sexual harassment amounts to sex discrimination under human rights legislation arose in Canada for the first time in 1984. Thereafter, same-sex sexual harassment cases have been few and far between. The lack of same-sex sexual harassment cases should not be seen as an indication that same-sex sexual harassment is not widespread or does not exist in Canada. This phenomenon is more likely due to the fact that victims of same-sex sexual harassment are reluctant to report their ordeal, or choose to use other redress mechanisms rather than the human rights tribunal.[3]

Sexual harassment, particularly same-sex sexual harassment, has been widespread in areas other than the workplace, for example in the sports industry. Three years ago, Sheldon Kennedy, a former professional hockey player, came forward and publicly complained of sexual abuse and harassment by his junior hockey coach, Graham James. Kennedy's public disclosure was a rude awakening for many Canadians and his allegations opened the nation's eyes to the pervasiveness of the traditionally taboo issue of sexual abuse and the exploitation of children.[4] Kennedy's exposure of the issue encouraged many more athletes throughout the country to come forward to report similar sexual abuse and harassment by coaches and/or administrators. Same-sex sexual harassment in the sports industry drew public and media attention to the issue and to the employers of the harassers. Some of the individual harassers were criminally charged, found guilty, and punished.[5]

On 18 February 1997, Martin Kruze, a hockey player, held a press conference to publicly reveal how he and other hockey players had suffered sexual abuse and harassment by the personnel at Maple Leaf Gardens, including assistant-equipment manager Gordon Stuckless, for years. They had sexually and indecently assaulted a number of boys in hundreds of incidents. The boys suffered physically and psychologically to the extent that Martin Kruze, aged 35,

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3 Victims of same-sex sexual harassment will often be even more reluctant to report the sexual harassment for fear of the stigmatism of homosexuality associated with same-sex sexual harassment.

4 Until recently there has been a lack of awareness and a denial in society generally that such conduct is a common problem. I can tell you that what I have learned and heard over the past few months about this issue has changed me forever. Only within the last few years it has been recognized that this is a societal problem that has touched religious and educational institutions, social services, charitable and sports organizations, and many, many families.

Gordon Kirke, "Players First" *Report on sexual abuse and harassment to Canadian Hockey League*, August 7, 1997.

5 For example Maple Leaf Gardens' staff.

committed suicide on 30 October 1997, (just three days after Stuckless was sentenced).

On 24 September 1997, Gordon Stuckless pleaded guilty to 24 charges of indecent and sexual assault on boys aged 10–15. Another Gardens employee, John Paul Roby, was also charged criminally, and, in 1999, was found guilty and sentenced to imprisonment. The Ontario Court of General Division found "repeated acts of fondling, fellatio and masturbation upon and with children whose participation had been obtained by breaches of a position of trust and authority."[6] Stuckless was initially sentenced to prison for two years less a day.

Madam Justice Rosalie Abella of the Ontario Court of Appeal, while increasing Gordon Stuckless' sentence from two to five years, ruled:

> These were not unconnected, isolated acts of sexual or indecent assault, they were part of a systematic 20 year pattern of unrelenting predatory and exploitative sexual conduct involving children.[7]

She also stated:

> Rather than threats, Stuckless used the irresistible lure of Maple Leaf Gardens to entice many of these vulnerable boys into his web, offering them access to otherwise unattainable amenities in order to reduce their resistance to his sexual assaults.
>
> ...
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> Sexual abuse is an act of violence. When committed against children, the violence is both physical and profoundly psychological.[8]

Neither of these situations generated human-rights complaints. It would not be unreasonable to speculate that many more cases of same-sex sexual harassment go unreported.[9]

A. What is Same-Sex Sexual Harassment?

Before proceeding any further, it is necessary to understand what is meant by same-sex sexual harassment. Same-sex sexual harassment may be found in any of the following forms:

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6 As quoted in the judgment of Abella J. on appeal in *R* v. *Stuckless* (1998), 41 O.R. (3d) 103 (Ont. C.A.) at 111.

7 1998 41 O.R. (3rd) 103 (Ont. C.A.) at 116.

8 *Ibid.* at 116–117.

9 Note that neither of these cases came before the Human Rights Commission for a number of reasons: 1. These were not job-related abuses and harassment; 2. The conduct was not simply harassment, but sexual assault, a crime under the criminal code; 3. It was the fastest and most effective way to punish the wrongdoers; and 4. There was a need to satisfy public outrage and anger.

1. Sexual harassment by a heterosexual male-to-male or heterosexual female to female,

2. Sexual harassment by a homosexual male to male or by a homosexual female to female, or

3. Sexual harassment by a bisexual person to a male or female of the same gender.

B. Same-Sex Sexual Harassment in Canada

Romman v. *Sea-West Holdings Ltd.*[10] was the first Canadian case where a male employee alleged that his male supervisor sexually harassed him. The complainant alleged that the skipper of a tug sexually harassed him by grabbing his genitals and patting him in the genital area. When he complained about these sexual advances to the owner, his services were terminated. A Canadian Human Rights Tribunal found that the company was guilty of sexual harassment and observed:

> It should never be part of a person's employment environment, or part of their employment situation, to have to submit to the touching of the genitals. That must be seen as unacceptable. Nobody should have to put up with that as part of having a job.[11]

In *Cassidy* v. *Sanchez*,[12] the complainant, a male employee, alleged that his male supervisor, Mr. Sanchez sexually harassed him during his employment. Cassidy alleged that when he resisted Sanchez' sexual invitations and advances, his employment was terminated. The offending sexual conduct included patting his buttocks, touching his crotch, and an invitation home to share liquor and drugs.[13] When Cassidy asked to be paid, Sanchez put his arm around him and said that he "could get paid any time he wanted."[14]

After reviewing the statutory provisions and the case law, the British Columbia Human Rights Tribunal held that Sanchez' actions towards Cassidy constituted sexual harassment and awarded Cassidy approximately $2000 (the maximum allowed under the *B.C. Human Rights Act*) as compensation for loss of dignity and loss of self-esteem.

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[10] *Romman* v. *Sea-West Holdings Ltd.*, (Can. 1984) 5 C.H.R.R. D/2312 (Jones).

[11] *Ibid.* at D/2314, Para. 19502.

[12] *Cassidy* v. *Sanchez*, (B.C. 1988) 9 C.H.R.R. D/5278 (Wilson).

[13] *Ibid.* at D/5279, Para. 39790.

[14] *Ibid.*

In *Van Berkel* v. *MPI Security Ltd.*,[15] a 19-year-old female employee, Van Berkel, was sexually harassed by a female co-owner of the business, Mrs. Banks. Van Berkel alleged that Banks made several comments about her appearance and clothing. She said that Van Berkel had a "hot little body;" she could see Van Berkel's underwear through a white skirt she wore one day; she touched Van Berkel on the buttocks in a sexual way several times; and she told Van Berkel that she "would probably look great naked." Van Berkel resigned because of the sexual harassment and filed a complaint with the B.C. Human Rights Commission.

The basic issue before the B.C. Human Rights Tribunal was whether sexual harassment by a person of the same sex constituted discrimination within the meaning of s. 8 of the *B.C. Human Rights Act*. Section 8 is a standard clause in human rights statutes prohibiting sex discrimination in the workplace. The section reads:

> 8 (1) No person shall:
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person with respect to employment or any term or condition of employment, because of ... [the] sex ... of that person.

The Tribunal found in favour of Van Berkel, and held that Banks sexually harassed her. The Tribunal referred to, and quoted from, the Supreme Court decision in *Janzen*,[16] which held that sexual harassment was a form of sex discrimination prohibited by human rights legislation in Canada. Chief Justice Dickson defined sexual harassment as:

> Unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse consequences for the victim of harassment.[17]

The Chief Justice characterised sexual harassment as "an abuse of both economic and sexual power," and a demeaning practice, which constituted a "profound affront to the dignity of the employees forced to endure it." Thus, the Tribunal, after reviewing the *Janzen* decision, stated:

> To constitute sexual harassment, therefore, a given conduct must have a sexual nature, be unwelcome, and have a detrimental effect on the work environment. *It is not*

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[15] *Van Berkel* v. *MPI Security Ltd.*, (B.C. 1996) 28 C.H.R.R. D/504 (Attafuah) [hereinafter *Van Berkel*].

[16] *Janzen*, *supra* note 1.

[17] *Ibid.* at D/6227, Para. 44451.

> *necessary for the conduct to be overtly sexual as long as it is gender-related such that it would not be directed at members of the other sex.*[18] [Emphasis added.]

C. Was the conduct sexual in nature?

The Tribunal held:

> It is also clear that the frequent touching of the complainants buttocks and the references to her dress and appearance, including her 'hot little body', directed attention away from her performance as an investigator to her physical attributes and sexual endowments.[19]

The Tribunal concluded that:

> [The pinching] incident was sexual in nature and is sufficient on its own to constitute sexual harassment. Mrs. Banks' pinching of the complainant's buttocks outside the office in Mr. Banks' presence, as well as in the office while the complainant was bent over a table, was sexual in nature and clearly offensive to the complainant. I also find that the "hot little body" comments, in the contexts in which they were made, were sexual in nature.[20]

This case also falls in the category of *quid pro quo* sexual harassment, as the harasser was her supervisor and the victim suffered adverse job consequences. The question as to whether sexual harassment by a person of the same sex falls within the prohibition of sex discrimination was not highly contested in *Van Berkel*.

The case of *Hanes* v. *M&M Ventures and Wight*[21] dealt with sexual harassment involving two heterosexual women. The workplace was a truck stop staffed entirely by women. The complainant, a female employee, alleged that her female supervisor sexually harassed her by touching her genitals. The complainant had recently separated from her husband and felt that her marital situation was used as an excuse by other employees to comment on her sex life. She alleged that co-workers joked about setting her up with various men for dates and/or sexual encounters.

The Saskatchewan Board of Inquiry, after reviewing various definitions of sexual harassment, which generally involved the power dynamic between men and women, concluded that the prohibition on sexual harassment was not confined to male against female harassment. The Board expressly recognised that same-sex sexual harassment constituted sex discrimination prohibited under Canadian law. The Board held that it should never be part of an employee's

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[18] *Van Berkel*, *supra note* 15 at D/514, Para. 103.

[19] *Ibid* at D/515, Para. 106.

[20] *Ibid.* at D/515 Para. 109.

[21] *Hanes* v. *M&M Ventures and Wight*, (Sask. 1998), 99 CLLC, Para. 230-001 (Knott) [hereinafter *Hanes*].

employment environment, or part of their employment situation to have to submit to the touching of the genitals. The Board held that such behaviour was an affront to the complainant's sexual dignity as a woman, and ordered Ms. Wight, the harasser, personally to pay $250 to the complainant for the damages to her dignity.

However, the Board concluded that the sexual banter between the women in this workplace did not constitute sexual harassment. The Board stated:

> I have had some difficulty deciding if joking about sexual activity (which may be offensive to some) with fellow members of the same sex can constitute sexual harass-ment ... . Crude language about sexual activity is not necessarily sexual harassment.[22]

The Board noted that as the complainant had not stated her disapproval of the sexual joking expressly and unambiguously, it did not rise to the level of harassment.

In sexual harassment cases including same-sex sexual harassment cases, the Canadian human rights tribunals try to determine whether the conduct in question:[23]

> -was unwelcome;
> -was sexual in nature;
> -had a detrimental affect on the work environment;
> -led to adverse consequences for the victim; and
> -was an offensive affront to the dignity of the victim.

Recall that sexual harassment is often about power and its abuse, and not just about sex.

It is obvious from a review of the few Canadian same-sex cases that there is little controversy in the Canadian legal profession over whether same-sex sexual harassment is sexual harassment. The issue of the harasser's gender and/or sexual orientation was not raised nor discussed in these cases. So long as the conduct of the harasser was sexual in nature, offensive and unwanted, such conduct amounts to sexual harassment[24] irrespective of the harasser's gender or sexual orientation. Same-sex sexual harassment is simply afforded the same treatment as opposite-sex sexual harassment.

D. Same-Sex Sexual Harassment in the United States

In the United States, Title VII of the 1964 *Civil Rights Act* prohibits discrimination based on sex in employment, but, like some Canadian statutes, Title VII does not specifically address sexual harassment. Title VII provides that it is:

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22 *Hanes*, *supra* note 21 at p.145, 007.

23 *Ibid.*

24 As these criteria were laid down by the Supreme Court in *Janzen*.

> an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individuals ... sex.[25]

However, the U.S. Supreme Court in the 1986 decision of *Meritor Savings Bank* v. *Vinson*,[26] confirmed that sexual harassment constitutes sex discrimination for the purpose of Title VII. More recently in *Harris* v. *Forklift Systems, Inc.*,[27] the U.S. Supreme Court held that a sexually hostile work environment exists when an individual is subjected to unwelcome harassment based on gender that affects a term, condition or privilege of employment, and that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[28]

In the United States, in contrast to Canada, the issue of same-sex sexual harassment has been highly controversial.[29] In 1997, the Equal Employment Opportunity Commission (EEOC) reported that since 1991 there had been a 131% increase in the number of complaints filed by men: men filed 1,534 complaints in 1996. Although the EEOC does not distinguish between opposite-sex and same-sex claims, the significant rise in claims by men suggests a dramatic increase in the number of same-sex claims. A survey conducted by Society of Human Resource Management in the United States surveyed 292 U.S. companies and found that 14% had one or more complaints of same-sex sexual harassment filed between 1991 and 1994.

Both the public and the judiciary were divided as to whether same-sex sexual harassment was prohibited under the sex discrimination provisions of Title VII of the *Civil Rights Act*. The basic issues were:

1. Whether or not Congress intended to prohibit same-sex sexual harassment; and

2. Whether or not Courts should allow same-sex sexual harassment suits.

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[25] 42 U.S.C. § 2000–2(a)(1).

[26] *Meritor Savings Bank* v. *Vinson*, 106 S.Ct. 2399 (1986); 477 U.S. 57 (1987) [hereinafter *Meritor*].

[27] *Harris* v. *Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), 510 U.S. 17 [hereinafter *Harris*].

[28] 510 U.S. 17, 21 (1993).

[29] See a thorough analysis of same-sex sexual harassment in the following articles: Delaney J. Kirk and Maria M. Clapham, "'Bagging' or 'Goosing': How the Courts are Ruling in Same-Sex Sexual Harassment Claims," (1996) 47 *Labor Law Journal* 403; Maria M. Clapham & Delaney J Kirk, "Defining 'Sex' in Same-Sex Sexual Harassment: The Opinions of the Federal Courts," (1997) 48 *Labor Law Journal* 535 [hereinafter Clapham & Kirk]; Sandra J. Perry & Ross L. Fink, "Doe v. City of Belleville: Should the Employer Differentiate Between Horseplay and Same-Sex Sexual Harassment?," (1997) 48 *Labor Law Journal* 749.

The U.S. Courts split on these issues. A study revealed that in the United States 63 cases of same-sex sexual harassment have reached the level of Court of Appeal. In 51 of these 63 cases, Circuit Courts found that the claims of same-sex sexual harassment were actionable, while in 12 cases, the Circuit Courts have found that the claims were not actionable.[30]

The Courts have taken three different views:

1. A claim of same-sex sexual harassment is not actionable in any circumstance;

2. A claim of same-sex sexual harassment is actionable only if the harasser is a homosexual; and

3. A claim of same-sex sexual harassment is actionable regardless of the harasser's gender or sexual orientation.

There are a number of examples that illustrate the discourse that exists on this issue. The Fifth Circuit Court in *Oncale* v. *Sundowner Offshore Services*[31] held that same-sex sexual harassment claims are never cognisable under Title VII.[32] The Court of Appeals for the Fourth Circuit in *Wrightson* v. *Pizza Hut of America*,[33] found that same-sex sexual harassment was actionable because the harasser was a homosexual, and thus presumably motivated by sexual desire. But, the same court in *McWilliams* v. *Fairfax Co. Bd. of Supervisors*[34] denied the claim of same-sex sexual harassment because both the harasser and the victims were heterosexuals. The Fifth Circuit Court in *Garcia* v. *Elf Atochem North America*,[35] and in *Oncale*[36] denied the same-sex sexual harassment claims. The Court of Appeals for the Seventh Circuit in *Doe* v. *City of Belleville*,[37] held that same-sex sexual harassment was actionable where the harassment was severe

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30 Clapham & Kirk, *supra* note 29 at542. See also USA Today, 7 July 1997, at 3A approximating 60 same-sex sexual harassment claims in the past five years up from a handful of complaints in the 1980's, and approximating two same-sex claims per month that reach the federal district courts.

31 *Oncale* v. *Sundowner Offshore Services*, 83 F.3d 118 (5th Cir. 1996) [hereinafter *Oncale*].

32 See also *Goluszek v. H. P. Smith* , 697 F. Supp. 1452 (ND Ill. 1988).

33 *Wrightson* v. *Pizza Hut of America*, 99 F.3d 138 (4th Cir. 1996).

34 *McWilliams* v. *Fairfax Co. Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) Cert. Denied 117 S.Ct. 72 1996.

35 *Garcia* v. *Elf Atochem North America*, 28 F.3d 446 (5th Cir 1994).

36 *Supra* note 31.

37 *Doe* v. *City of Belleville*, 119 F.3d 563 (7th Cir. 1997).

and pervasive and based on sex, regardless of the sexual orientation of the harasser. In *Quick* v. *Donaldson*,[38] the Eighth Circuit Court held that same-sex sexual harassment was actionable where heterosexual harassers grabbed the testicles of the male victims. However, the Eleventh Circuit Court of Appeal in *Fredette* v. *BVP Management Associates*,[39] held that a claim for same-sex sexual harassment was actionable only where the harasser was homosexual.

1. Basis for Denial of Same-Sex Sexual Harassment Claims

Those federal courts which have held that Title VII does not encompass same-sex sexual harassment claims have argued that same-sex sexual harassment is not the type of conduct that Congress intended to cover when enacting Title VII.[40]

In *Glouszek* v. *H.P. Smith*,[41] one of the earlier cases dealing with a claim of same-sex sexual harassment, *Glouszek* claimed that he had been verbally and physically harassed by his male co-workers. The abuse included showing him pictures of nude women, accusing him of being homosexual, and poking him in the buttocks with a stick. The District Court denied his claim and stated that he "may have been harassed because he is male, but the harassment was not a kind which created an anti-male environment in the workplace."[42]

The *Glouszek* case has been frequently cited and applied by those courts that have denied same-sex sexual harassment claims. Seven years later in *Quick* v. *Donaldson*,[43] the District Court, in denying the claim of same-sex sexual harassment, referred to the *Glouszek* case and stated that

> Title VII does not focus solely on the question of whether a person is male or female; instead, it determines whether the victim, male or female, was working in a discriminatory atmosphere of oppression dominated by gender.[44]

The Court thus concluded, "male-to-male harassment without discriminatory treatment is not prohibited by Title VII."[45]

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38 *Quick* v. *Donaldson*, 90 F.3d 1372 (8th Cir. 1996).

39 *Fredette* v. *BVP Management Associates*, 112 F.3d 1503 (11th Cir. 1997).

40 As a matter of fact, the courts have interpreted Congress' intent to suit their respective point of view.

41 *Glouszek* v. *H.P. Smith*, 697 F.Supp. 1452, (N.D. Ill. 1988) [hereinafter *Glouszek*].

42 *Ibid.* at 1456.

43 *Quick* v. *Donaldson*, 895 F.Supp. 1288, (S.D. Iowa 1995).

44 *Ibid.* at 1294–95.

45 *Ibid.* at 1296.

In *Polly* v. *Houston Lighting and Power Co.*,[46] the Court stated that the sexual behaviour that Polly was subjected to by his male co-workers was "heinous, egregious, and unquestionably beyond mere 'horseplay'... ."[47] In this case, the Court still held that Polly was not a victim of sexual harassment under Title VII because "Congress in enacting Title VII, intended to establish equal employment opportunities for women and therefore Congress did not envision prosecution of the conduct for which Polly now complains."[48] The Court followed the ruling in *Glouszek* and denied Polly's claim. The Court stated that,

> "Polly failed to submit to the Court any legal authority which supports his contention that conduct that is of a sexual nature committed against a male and by other males is actionable under Title VII."[49]

Upon *de novo* review, the Magistrate Judge's decision was overturned.[50] On review, the Court noted that the issue of same-sex sexual harassment was one of first impression for the circuit and that other federal court decisions on this point were inconsistent. However, the Court relied on the EEOC Compliance Manual and noted that,

> "the cases nonetheless provide support for the conclusion that Title VII was intended to apply to claims of harassment based on sex, without regard to the gender of the complainant or the harassing party."[51]

In *Vandeventer* v. *Wabash National Corp.*[52] the District Court, in determining the meaning and scope of Title VII, examined the definition of the terms "sex," and "sexual," and denied the claim based on the fact that the comments in the case related to "sexual/reproductive behaviour" and did not state a claim under Title VII. The Court stated that:

> The words 'sex' and 'sexual' create definitional problems because they can mean either 'relating to gender' or 'relating to sexual/reproductive behaviour.' The two are not the same but are certainly related and are easily confused. Title VII only recognizes harassment based on the first meaning, although that frequently involves the second meaning.[53]

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[46] *Polly* v. *Houston Lighting and Power Co.*, 803 F.Supp. 1 (S.D. Texas 1992) [hereinafter *Polly*].

[47] *Ibid.* at 4.

[48] *Ibid.*

[49] *Ibid.* at 5.

[50] 825 F.Supp. 135 (S.D. Texas 1993), overturning Magistrate Judge's decision in part.

[51] *Ibid.* at 137.

[52] *Vandeventer* v. *Wabash National Corp.*, 887 F.Supp 1178 (N.D. Ind. 1995).

[53] *Ibid.* at 1181.

Harassment that involves sexual behaviour or has sexual overtones, for example, remarks, touching, or the displaying of pornographic pictures, must be based on gender bias in order to fall within the scope of Title VII. The Court emphasised that gender bias is the cornerstone of Title VII.

Same-sex sexual harassment cases vary in form and severity as do opposite-sex sexual harassment cases, all of which are inappropriate: horseplay, double-entendres come-ons, predatory comments, invitations, etc. It is the particular conduct that is at issue and not the gender or sexual orientation of the harasser or the victim in determining whether sex discrimination laws have been violated. In fact, it is questionable whether or not lawyers for the accused have the right to ask the plaintiff's sexual orientation.[54]

It may be noted that the EEOC has clearly indicated that same-sex sexual harassment may be actionable under Title VII:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (*not* on the victim's sexual preference) and the harasser does not treat the employees of the opposite sex the same way.[55]

However, as we can deduce from the case law, the courts appeared to be drawing their own lines in the sand with respect to when they will and when they will not classify same-sex sexual harassment as sexual harassment. Some federal judges have dismissed same-sex sexual harassment claims, arguing that if a heterosexual man harasses a gay or straight man with no intention of having sex, then there is no sex discrimination. Those judges, in fact, have missed the basic point that sexual harassment is often about power and not always about sex.

2. Same-Sex Sexual Harassment and Quid Pro Quo Harassment

The U.S. Courts have nevertheless found it relatively easy to recognise same-sex sexual harassment when the harasser was the victim's supervisor.[56] Such cases fall under the category of *quid pro quo* harassment. For the purposes of *quid pro quo* harassment, the Courts have made no distinction on whether the supervisor was of the same sex as the victim.

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[54] *Fitzpatrick* v. *QVC Inc.* as quoted in "In Same-Sex Harassment Cases Are Questions About Homosexuality Allowed?" by Shannon P. Duffy in Law News Network: Employment Law Centre. See, http://lawnewsnetwork.com/stories/A9748–1999Nov16.html (as of 16 November 1999).

[55] EEOC Compliance Manual § 615 2(h), (3) (1991).

[56] Same-sex sexual harassment occurs by both male and female supervisors.

Several cases have found that *quid pro quo* same-sex sexual harassment is actionable under Title VII. For example, in EEOC v. *Walden Book Co.*,[57] a Nashville jury awarded $1.6 million in punitive damages and $75,000 in compensatory damages in a Title VII action to a male employee who alleged that he was sexually harassed by a male homosexual supervisor. In another case, *Pritchett v. Sizeler Real Estate Management Co.*,[58] a Louisiana district court permitted a female employee to proceed with a Title VII claim against her employer for alleged sexual harassment by a female boss. Like the Tennessee Court in *Walden Book*, the Louisiana Court rejected the reasoning of other courts that have held that Title VII does not prohibit same-sex harassment. In making this finding, the Louisiana Court reasoned that to deny a claim of same-gender sexual harassment would allow a homosexual supervisor to sexually harass his or her subordinate, when a heterosexual supervisor may be sued under Title VII for similar conduct.

The federal courts that have found same-sex sexual harassment actionable under Title VII have argued that Title VII is not limited to protecting against heterosexual sexual harassment, and have noted that Supreme Court decisions on sexual harassment are "cast in gender neutral terms." The courts also relied upon the EEOC's interpretation guidelines on sexual harassment, which focus on whether the harasser treats a member of one sex differently from a member of the other sex.

In *Prescott* v. *Independent Life and Accident Ins. Co.*,[59] Prescott claimed *quid pro quo* sexual harassment by his homosexual supervisor who demanded sexual favours for job benefits. The Court ruled in favour of the plaintiff, stating that companies are responsible for the behaviour of their supervisors. "When a supervisor requires sexual favours as quid pro quo for job benefits, the supervisor, by definition, acts as the company."[60]

In determining whether same-sex sexual harassment was actionable under Title VII, the Court stated that: "had Congress intended to prevent only heterosexual sexual harassment, it could have used the term 'member of the opposite sex.'"[61] The fact that Congress did not use this language indicates to the court that same-sex sexual harassment is also a type of disparate treatment covered by Title VII.

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57 EEOC v. *Walden Book Co.*, 885 F. Supp. 1100 (1995) [hereinaftere *Walden Book*].

58 *Pritchett v. Sizeler Real Estate Management Co.*, 1995 WL 241855, 67 Empl. Prac. Dec. P. 43, 832 (E.D. La. Apr. 25, 1995).

59 *Prescott v. Independent Life and Accident Ins. Co.*, 878 F.Supp. 1545 (Middle District Ala. 1995), 67 Fair Empl. Prac. Cas. (BNA) 876.

60 *Ibid.* at 1549.

61 *Ibid.* at 1550.

In *Roe* v. *K-Mart Corporation*,[62] Richard Roe, a homosexual male employee claimed that he was fired because he refused the sexual advances of his homosexual male supervisor. A federal district court in South Carolina noted that the Supreme Court in *Meritor* did not restrict its holding to sexual advances from a member of the opposite sex as a victim, and that the EEOC supported this position.

In *Griffith* v. *Keystone Steel and Wire*,[63] Griffith, a male electrician, claimed that he was subjected to continuous sexual contact, improper touching, and sexual propositions in exchange for favourable working conditions. A district court in Illinois held that same-sex sexual harassment was prohibited by Title VII because the plain language of Title VII did not restrict its prohibition against discrimination to employees of the opposite sex.

A female-to-female *quid pro quo* sexual harassment case, though rare, arose in *Nogueras* v. *University of Puerto Rico*,[64] where Nogueras, a female librarian at the University of Puerto Rico, alleged sexual harassment by her female supervisor and another female library consultant. Ruling in favour of Nogueras, the Court cited *Morgan* v. *Massachusetts General Hospital*,[65] in which the First Circuit rejected the proposition that same-sex sexual harassment claims were not actionable under Title VII. The Court held that the defendant's contention that same-sex sexual harassment was not prohibited by Title VII was "contrary to the plain language of Title VII."

3. *U.S. Supreme Court on Same-Sex Sexual Harassment*

On 4 March 1998, the U.S. Supreme Court had an opportunity to put to rest the bitter split among the U.S. Federal Courts of Appeal over the issue of same-sex sexual harassment. The Supreme Court, in *Oncale* v. *Sundowner Offshore Services Inc.*,[66] unanimously held that same-sex sexual harassment *was* actionable under Title VII of the Civil Rights Act of 1964.

Joseph Oncale worked for Sundowner Offshore Services on an oil rig in the Gulf of Mexico. On several occasions, Oncale was "forcibly subjected to sex-related, humiliating actions against him ... in the presence of the rest of the crew."[67] In addition, several co-workers physically assaulted him in a sexual manner and one co-worker threatened to rape him. Oncale quit when his em-

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62 *Roe* v. *K-Mart Corporation*, 1995 WL 316783 (D.S.C. March 28, 1995).

63 *Griffith* v. *Keystone Steel and Wire*, 887 F.Supp. 1133 (C.D. Ill. 1995).

64 *Nogueras* v. *University of Puerto Rico*, 890 F.Supp. 60 (D. Puerto Rico 1995).

65 *Morgan* v. *Massachusetts General Hospital*, 901 F. 2d. 186 (1st Cir. 1990).

66 *Oncale* v. *Sundowner Offshore Services Inc.*, 118 S.Ct. 998. (1998).

67 *Ibid.* at 1000.

ployer ignored two formal complaints. Oncale filed suit against Sundowner under Title VII claiming sexual harassment.

The district court held that because Oncale was male, he had no cause of action under Title VII for harassment by male co-workers, and the Court of Appeal for the Fifth Circuit confirmed this.[68] Thus, both the District Court and the Court of Appeal ruled that Title VII does not provide relief under any circumstances to an individual claiming to have been the victim of sexual harassment by a person of the same sex.[69]

The simple question before the Supreme Court was whether Title VII's prohibition against sex discrimination was violated when the harasser and the harassed employee are of the same sex? In a brief filed with the Supreme Court, the Justice Department and the EEOC agreed that because Title VII contained gender-neutral language, "it should be irrelevant whether the supervisor and victim are of the same or opposite sex." They further argued that there was nothing in the legislative history to indicate that in drafting Title VII, Congress meant to exclude same-sex sexual harassment claims. The Court stated:

> If our precedents leave any doubt on the question, *we hold today that nothing in Title VII necessarily bars a claim of discrimination "because of ... sex" merely because the plaintiff and the defendant ... are of the same sex.*[70] [Emphasis added.]

The Court then added that there is "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[71] Thus, the Supreme Court ruled that Title VII protected against workplace sexual harassment whether it be by a person of the same or opposite sex as the victim.

Courts have generally presumed that sexual conduct involving a male perpetrator and a female victim, or vice versa, is based on the victim's sex. Where the perpetrator and the victim are heterosexual and of the same gender, as in *Oncale*, no such inference can necessarily be drawn. It has been argued that permitting same-sex sexual harassment suits under Title VII would effectively convert Title VII from a focused mandate to end discrimination into an unmanageably broad code of workplace behaviour. It has also been argued that Congress never intended to have the 1964 *Civil Rights Act* extend to "relationships between people of the same sex" or to "federalize regulation of conduct between men and men."

In *Oncale*, the Supreme Court rejected arguments that permitting same-sex sexual harassment claims would turn Title VII into a general civility code. It

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68 *Oncale*, *supra* note 31.

69 *Ibid.* at 120.

70 *Oncale*, *supra note* 66 at 1001.

71 *Ibid.* at 1002.

emphasised that Title VII would not be a civility code because only certain types of conduct were prohibited by Title VII, and unlawful discrimination was not found simply because the words used had sexual content or connotation. The Supreme Court then restated the principles established over a decade ago in *Meritor* and reconfirmed more recently in *Harris*, that actionable conduct was only that which is so severe or pervasive and objectively offensive as to alter the conditions of the victim's employment.

The Court in *Oncale* emphasised that it is "crucial" that the conduct be severe or pervasive enough to create an objectively hostile environment. This will

> 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.'[72]

The Court stressed that the alleged harassment should be examined from the viewpoint of a reasonable person in the plaintiff's position.

Further, the Court explained that Title VII was not intended to address "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[73] It stated

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat[ion] ... because of ... sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.[74]

The Court made an effort to dispel the fear of opening the floodgates of litigation, stating that Title VII's prohibition on harassment requires neither asexuality nor androgyny in the workplace.

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[75]

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72 *Oncale*, *supra* note 66 at 1003.

73 *Ibid.* at 1002.

74 *Ibid.*

75 *Ibid.* at 1003.

It is interesting to note that the Supreme Court acknowledged that Congress certainly was not focused on same-sex sexual harassment when it passed Title VII in 1964. However, it held that:

> 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. Title VII prohibits 'discriminat[ion] ... because of ... sex' in the 'terms' or 'conditions' of employment. The holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.[76]

It appears that viewing *Oncale* as a triumph was premature. While the Supreme Court confirmed that the sex of the harasser and the victim were irrelevant to a sexual harassment complaint, in trying to dispel the floodgates and civility code concerns, the Supreme Court may have narrowed rather than broadened the scope of sexual harassment coverage. *Oncale* makes it clear that same-sex sexual harassment by a homosexual harasser is actionable However, the question remains whether harassment by a heterosexual harasser of a heterosexual victim of the same sex is also actionable. The Supreme Court implied that such behaviour would also be actionable when it stated: "...harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[77] The Supreme Court also emphasised that the complainant had to show that the harassment was pervasive and directed at him or her "because of" his or her sex. The question becomes whether members of one sex are discriminated against while members of the other sex were not. Unfortunately, the lower courts have applied the language used by the Supreme Court very literally.

For example, in *Higgins* v. *New Balance Athletic Shoes Inc.*,[78] the district court dismissed the case of a gay worker, who claimed that he was harassed by a colleague because of his homosexuality, on the grounds that the complainant had not presented facts supporting that the harassment he suffered was based on his gender. Similarly, in *Holman* v. *Indiana*,[79] a husband and wife, both employees of the Indiana Department of Transportation, alleged sexual harassment by the same supervisor. The district Court dismissed the case on the grounds that since both a man and a woman were harassed, it could not be "because of sex." In *Scusa* v. *Nestle*,[80] a woman claimed hostile environment harassment by her supervisors and co-workers. The Court dismissed the case on the

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[76] *Oncole, supra* note 66 at 1002.

[77] *Oncole, supra* note 66 at 1002

[78] *Higgins* v. *New Balance Athletic Shoes Inc.*, 21 F. Supp. 2d 66 (U.S. Dist. Ct. Me 1988).

[79] *Holman* v. *Indiana*, 24 F. Supp. 2d 909 (U.S. Dist. Ct. Ind. 1998).

[80] *Scusa* v. *Nestle*, 181 F. 3d 958 (8th Cir. 1999).

grounds that *Oncale* did not prohibit ordinary socialising. Also, in *Shermer* v. *Illinois Department of Transportation*,[81] the Court again denied the sexual harassment claim of a heterosexual man claiming sexual harassment from his male supervisor citing the "because of sex" language in *Oncale* and stating that the complainant had to prove that he had been the victim of discrimination. Therefore, experts in the employment field fear that *Oncale* may have, in fact, set back the progress of sexual harassment law.

4. *Sexual Orientation Discrimination*

The *Oncale* decision clearly held that same-sex sexual harassment was prohibited by Title VII, though it failed to clearly define what is meant by "same-sex sexual harassment." The Supreme Court also made no mention about harassment based on sexual orientation. Under Title VII of the *Civil Rights Act*, discrimination based on the grounds of sexual orientation is not a prohibited form of sex discrimination. However, a claim of harassment by a person of the same sex has been found to be a violation of constitutional rights. *Federal Statute 42* U.S.C. Section 1983 creates a federal cause of action for violations of civil rights created by the Constitution.

In *Quinn* v. *Nassau County*,[82] a former male police officer alleged that his male colleagues harassed him because of his homosexuality. The Court held that the Constitution and federal statutes, combined with logic, common sense and fairness, dictated that individuals have rights under the Equal Protection Clause of the Constitution to be free from sexual orientation discrimination causing a hostile work environment in public employment. The plaintiff suffered "barbaric pranks" including having pornographic material posted throughout the precinct portraying him as a child molester, deviant and transvestite. The jury awarded the former police officer $380,000 in damages for emotional distress, wrongful termination, and punitive damages.

It may be noted that though discrimination based on sexual orientation or preference is not prohibited by Title VII, it may be unlawful by Presidential Order #13087, which specifically prohibits discrimination against federal employees based on sexual orientation. Several municipalities and a number of states[83] also prohibit discrimination based on sexual orientation. The U.S. Congress is presently considering legislation that would add sexual orientation to the list of prohibited conduct in most employment situations. Therefore, employers should add discrimination based on sexual orientation to their harassment policies, and they should take positive steps to address any complaints of sexual orientation

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81 *Shermer* v. *Illinois Department of Transportation*, 171 F. 3d 475 (7th Cir. 1999).

82 *Quinn* v. *Nassau County*, 80 FEP Cases 286 (E.D.N.Y. 1999).

83 California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, Wisconsin and the District of Columbia.

discrimination. Employers should treat same-sex sexual harassment complaints in the same fashion as opposite-sex sexual harassment complaints.

5. Settlements

A Minnesota employer (Long Prairie Packing Co.) and the U.S. Equal Employment Opportunity Commission made a historic breakthrough by agreeing to a $1.9 million settlement in the first same-sex harassment lawsuit to receive class-action status. The settlement amount will be distributed among all eligible men who worked at the company between 1 January 1996 and 22 June 1999 and were subject to harassment.

The lawsuit was filed on behalf of workers at the meatpacking plant who alleged that they were subjected to repeated verbal and physical harassment by co-workers. This settlement came more than a year after the Supreme Court *Oncale* decision. The Company also agreed to establish a "zero tolerance" policy for sexual harassment and to provide sexual harassment training to all plant employees, supervisors, managers and new employees.

In another landmark case, a jury in El Paso, Texas,[84] awarded $7.3 million to a male salesman, Gonzales, who alleged that his male supervisor sexually harassed him. The case is believed to be one of the largest damage awards in a same-sex harassment case for a single victim. The case was heard in state district court and raised a sexual harassment claim under Chapter 21 of the state labour code, which mirrors Title VII. The claim for damages included damages based on intentional infliction of emotional distress. The jury unanimously awarded the victim $5 million in punitive damages and $2,325,520 in actual damages ($1.5 million of which stemmed from the intentional infliction of emotional distress).

The victim, Gonzales, alleged that his supervisor made sexually suggestive remarks and inappropriately touched his back, groin and buttocks. The case is unusual as the victim was heterosexual and married at the time, as was the supervisor. Gonzales reported the behaviour to the store manager three times in a week, but management did not even talk to the supervisor until three weeks later. Store officials refused to transfer Gonzales and refused to say whether the supervisor would be disciplined. The incidents led Gonzales to attempt suicide.

The record indicates that the store did not provide any sexual harassment training for its employees. The jury's verdict is probably more of a reaction to the failure of the employer to take effective, remedial action to stop the harassment once it became aware of it.

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[84] *David Gonzales* v. *Dillard Department Stores Inc.* as quoted in "Texas Jury Hammers Department Store for $7.3 Million in Same-Sex Harrassment Case" by Susan Borreson in Law News Network: Employment Law Centre. See, http://www.lawnewsnetwork.com/ stories/A1977–1999Jun2.html (as of 2 June 1999).

II. CONCLUSIONS

THE REAL SOCIAL IMPACT of workplace behaviour often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable our courts to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

The U.S. Supreme Court in *Oncale* cited various examples of permissible conducts which are not prohibited by the Title VII: "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[85] A recurring point in these opinions is that simple teasing, offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." The Court further stated that standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code."[86] Properly applied, courts will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.

This "demeaning" standard for sexual harassment as established by the U.S. Supreme Court in *Oncale*, permits "normal" day-to-day sexual harassment — what is termed as hostile-environment sexual harassment — and as such may not fit well with Canadian laws, practices, precautions and inspirations, of a Canadian society committed to a harassment-free work environment. Gender-related jokes and teasing are believed to be the starting point for the workplace to become hostile and should not be brushed off lightly. Why not attack the root before it grows?

It is doubtful, in view of prevalent and accepted Canadian social values, that broadening permissible conduct would find favourable reception by Canadian Courts and human rights tribunals. The Canadian case law on sexual harassment does not suggest acceptance of some of the types of workplace behaviour that the U.S. Supreme C urt suggests may be permissible. Some have regarded the *Oncale* decision as "the pendulum swinging back in sexual harassment cases."[87]

At least the U.S. Supreme Court in *Oncale* put to rest the controversy in the United States over same-sex sexual harassment, holding that if the conduct

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[85] *Oncole, supra* note 66 1003.

[86] *Ibid.* at 1002.

[87] See: Jeffrey M. Schlossberg: The Pendulum Swings Back in Sexual Harassment Cases — *New York Law Journal*, March 17, 1998) [hereinafter *Schlossberg*].

meets other criteria, it would constitute sexual harassment irrespective of the gender or sexual orientation of the harasser. The criteria to determine whether same-sex sexual harassment is actionable remains the same—whether the harasser is of the same-sex, heterosexual, or bisexual—as long as the conduct is sexual in nature, and it is pervasive to the extent that it creates a hostile work environment.

The Court in *Oncale* also put to rest the fears that recognizing same-sex sexual harassment claims would open the floodgates for sexual harassment claims; restating that the law and criteria remains the same as was pronounced by the Supreme Court in *Meritor*[88].

As a matter of fact, the United States law on the same-sex controversy, after lengthy judicial gymnastics, has come full-circle to the recognition that the law does not permit any distinction whether the harasser is of the opposite sex or of the same sex as that of the harassee. Workplace harassment that is sexual in content is always actionable regardless of the harasser's sex, sexual orientation, or motivations. The same has been the position of Canadian tribunals from the start, as they appear to have never entertained a doubt as to whether the sex of the harasser would make a difference in determining whether the conduct constituted sexual harassment or not. As discussed earlier, Canadian tribunals have always found sexual harassment by a person of the same sex equally prohibited. Thus, U.S. law has finally come inline with the Canadian position.

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[88] Schlossberg, *supra* note 25.