Legal Issues for Provosts, Academic Deans and Department Chairs: A Review of Current Cases and Legal Trends Affecting the Administration of Academic Programs

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I. FACULTY ADVISORY COMMITTEES AND PERSONNEL DECISIONS

A. Shared governance and faculty personnel decisions

Many colleges and university have a tradition of seeking faculty guidance on important decisions. Since the quality of the faculty has a significant impact on the quality of an academic institution, faculty personnel decisions are among the most important decisions that college administrators make. Furthermore, faculty review of the quality of an individual's scholarship, teaching and service provide important information to the ultimate decision maker in personnel decisions.

This tradition of shared governance in faculty personnel decisions has been codified at many institutions. Private colleges may include policies and procedures for faculty involvement in personnel decisions in faculty handbooks, contracts, or other documents with legal significance. Public institutions, in addition to the sources listed above, may be subject to state laws or administrative regulations that provide for a faculty role in such decisions. Collective bargaining agreements may also specify a role for faculty in personnel decisions at either private or public colleges.

B. Faculty advisory committees

Faculty advisory committees may exist at one or multiple levels within the college. Typical promotion and tenure procedures would specify faculty involvement at the department or unit level, at the decanal level, and sometimes at the institutional level. Faculty may also serve on internal appeal boards or boards created to review allegations of unfair treatment.

When a faculty member is serving on a review committee whose role is to advise the administration about a personnel decision, that faculty member may be acting as an agent of the college. Any unlawful behavior by the faculty member may create liability for that individual,

and for the college as well. Serious problems arise when the institution's policies or procedures require the administration to consider the recommendations of a faculty advisory committee that has engaged in unlawful or unethical behavior, used inappropriate criteria or applied criteria in an arbitrary fashion, or has violated the privacy rights of the promotion or tenure candidate.

C. Legal issues

1. Contract compliance:

    a. Were the members of the faculty advisory committee appointed/elected in accordance with written policies and rules, a collective bargaining agreement, or past practice?
    b. Did the faculty advisory committee use the stated criteria? Were additional criteria used to evaluate the candidate?

2. Nondiscrimination:

    a. Were the same criteria applied to all faculty personnel decisions?
    b. Were the criteria applied evenhandedly, irrespective of race, gender, age, national origin, religion, sexual orientation, etc.?
    c. If collegiality was used as a criterion, were safeguards in place to avoid biased judgments?

3. Privacy compliance:

    a. Did advisory committee members confine their evaluative discussions and their outcome to those with a business need to know?
    b. Did advisory committee members refrain from communicating personal information about the faculty candidate to non-committee members?

4. Potential sources of individual liability for committee members

    a. Discrimination and retaliation (discussed in next section)

    b. Defamation

    Defamation may be oral (slander) or written (libel). It is a common law tort claim; state case law precedent is used to evaluate defamation claims.

    1. In order to establish liability for defamation, the plaintiff must demonstrate all of the following elements:

        a. A false and defamatory statement concerning another
        b. An unprivileged publication (communication) to a third party
        c. Fault amounting at least to negligence on the part of the publisher

d. Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication [Restatement (Second) of Torts §558]

2. Defenses to defamation claims

   a. Truth
   b. Qualified privilege, based on business needs of the organization (the "intra-corporate immunity doctrine"--communication of business information, fair comment and criticism)
   c. Absolute privilege (such as testifying in court)
   d. Public official privilege (available only if alleged defamer was performing official duties)

3. Application to letters of recommendation, employment references

   a. "Pure" opinion is not actionable
   b. Letters that rely on facts that are documented (e.g., attendance, disciplinary problems for employees) are easier to defend than letters that contain speculative or unsubstantiated claims
   c. If the letter involves a student, remember the provisions of FERPA regarding disclosure of "educational records" (such as grades or the outcome of student judicial proceedings)

For further information, see Francine Bazluke, *Defamation Issues in Higher Education* (National Association of College and University Attorneys, 1996).

b. Invasion of privacy

In order to state a claim of invasion of privacy, the plaintiff must establish a legitimate expectation of privacy. Examples of such legitimate expectations include the privacy of one's home or residence hall room, and the contents of one's locker, purse, car trunk, or other closed receptacle that others do not typically have access to.

1. Appropriation of another's name or likeness. May be used by an individual whose picture is used by the institution or by another individual without the subject's permission.

2. False light publicity, in which an individual publicly attributes false characteristics to the plaintiff. The characteristics must be highly offensive to a reasonable person, and the plaintiff must demonstrate that the defendant knew or should have known that he or she was placing the plaintiff in a false light. This claim may be used in a challenge to an

employment termination or the discipline of a student that was done in such a way that the plaintiff appeared to have engaged in some form of misconduct.

3. Public disclosure of private facts, in which an individual discloses private information about the plaintiff that is not appropriately the concern of the public. For example, disclosing an individual's HIV positive status in a situation in which there was no health risk could lead to this type of claim. Disclosure to co-workers of the plaintiff is sufficient to support such a claim.

4. Intrusion upon seclusion, in which an individual intrudes upon the solitude or seclusion of another, as in a residence hall room, an individual's email, etc. The intrusion must be highly offensive to a reasonable person.

d. Intentional infliction of emotional distress

This claim is typically appended to lawsuits involving termination of employment, sexual or racial harassment, or student claims involving discipline.

1. In order to demonstrate intentional infliction of emotional distress, the plaintiff must demonstrate:

    a. that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct [Restatement (Second) of Torts sec. 46, comment i]
    b. that the conduct was "extreme and outrageous," was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community" [Restatement (Second) of Torts sec. 46, comment d]
    c. that the actions of the defendant were the cause of the plaintiff's distress, and
    d. that the emotional distress sustained by the plaintiff was "severe" and of a nature "that no reasonable man [sic] could be expected to endure it" [Restatement (Second) of Torts sec. 46, comment j] [*Agis v. Howard Johnson Co.*, 355 N.E.2d 315 (Mass. 1976)]

e. Negligence

To state a claim of negligence against an individual, a plaintiff must demonstrate that the individual owed a duty to the plaintiff, that the individual's actions did not meet the standard of care created by that duty (or breached the duty), that the plaintiff was harmed in some way as a result of the breach of the duty (the proximate cause doctrine), and that the harm was

foreseeable by a prudent actor. Both compensatory and punitive damages are available against the employing organization and the individual decision-maker.

In most states, employees or former employees will not be able to state negligence claims against their employers because of the exclusivity doctrine of the worker's compensation statutes. But students and non-employee third parties may state such claims.

1. In hiring

This claim may be brought by an individual who alleges harm caused by an employee of the college or university. The claim will be against the organization and the individual who made the hiring decision. The claim is that

a. the hiring official had a duty to protect the victim from unreasonable risk of harm
b. the official breached that duty by hiring an individual who was unfit for the job
c. the unfitness was the proximate cause of the victim's injury
d. the employer knew or should have known of the employee's unfitness (for example, by conducting a background check)

2. In supervision

This claim may be brought by an individual who alleges harm caused by an employee of the college or university because of improper supervision. The claim is similar to the negligent hiring claim, except that the plaintiff must demonstrate that a reasonable supervisor would have known that the individual was unfit and that closer supervision, or a different form of supervision, would have prevented the harm suffered by the victim.

3. In evaluation

This claim may be made by an employee who alleges that he or she was terminated because the supervisor or manager did not exercise care and skill in carrying out performance evaluations. This claim is not recognized in all states, and in states where it has been recognized, such as Michigan, it is not available for at-will employees.

f. Fraud and misrepresentation

These claims involved allegedly false promises made by managers or supervisors (or other agents of the institution, such as faculty) regarding terms and conditions of employment (for employees), academic program requirements (for

students), or the approval of a program by licensing or accrediting bodies (for students).

1. In order to state a claim for fraud or misrepresentation, an individual must show:

    a. a false representation of fact, opinion, intention, or law
    b. knowledge or belief that the information is false
    c. intent to induce another to act, or to refrain from acting, in reliance upon the false representation
    d. causing the other to act, or refrain from acting, in reasonable reliance upon the false representation
    e. damage to the other person resulting from reliance upon the false representation

2. The misrepresentation must be "material," that is, important to the decision that is being made. Concealment of material information is also actionable.

3. In many states, oral promises may be the basis for these claims; the plaintiff may not need written proof that the misrepresentation was made.

g. Personal contract liability

1. If an individual signs a contract as the institution's agent, having been authorized to do so, there should be no individual liability.

2. But if the individual signs without authorization, and the institution does not later ratify that individual's act, personal liability may be found.

3. Even if the institution does not formally ratify the contract, if executives know of the contract and act in ways that make it appear that they approve of the agreement, a court may infer ratification.

h. Interference with contractual relationship

In this type of claim, a plaintiff would allege that some individual or group of individuals acted in ways that interfered with the plaintiff's contractual relationship with the employing college (or with some other entity). The claim is typically against some third party rather than the plaintiff's supervisor or manager. But see, *Bakalis v. Board of Trustees of Community College District No. 504*, 886 F. Supp. 644 (N.D. Ill. 1995), in which a former college president alleged that certain members of the Board of Trustees, because of political motivations, interfered with his contract, resulting in his termination. The court characterized the "third party" as an "unbiased Board of Trustees," and allowed the claim to proceed.

For further information about avoiding and defending against workplace tort claims, see Ronald M. Green and Richard J. Reibstein, *Employer's Guide to Workplace Torts*. Washington, DC: Bureau of National Affairs, 1992.

Should this Professor Receive Tenure?

Susan Strong is an Assistant Professor of Philosophy at Eastern State University. She is the first female tenure-track faculty member hired by the department in over two decades. Professor Strong has been reviewed for tenure this year. There are many contradictions and inconsistencies in the record. The President of ESU has asked for your advice.

Professor Strong is regarded by both internal and external evaluators as an excellent scholar. She has published in the top journals, has a book contract with Oxford University Press, and has made numerous scholarly presentations at the conferences that are appropriate for her discipline. Professor Strong has received good to excellent student course evaluation ratings (which are done for every section of every course every year for every instructor). However, a male departmental colleague, with whom Professor Strong has had some arguments over the past few years (he received tenure last year), has interviewed students in two courses she taught recently, and has provided information that some of these students are dissatisfied with her teaching, with her treatment of students during office hours, with her apparent decision not to return course papers with comments or grades, and with what appears to be a condescending attitude toward students in general (as reported by approximately 15 students interviewed by the colleague). There are no other written complaints from students.

Over the past several years, Professor Strong has been asked by the Dean to assume several administrative obligations, including managing the Honors Program for the College of Arts and Science and also managing the service learning program for the College. Several faculty and staff have clashed with Professor Strong with respect to these administrative assignments. A few staff members have requested transfers, and several faculty have refused to participate in the honors program or the service learning program because they are "intimidated" by Professor Strong. No formal complaints have been filed against her, although there have been a few complaints from parents concerning how she dealt with issues affecting their children.

Professor Strong's department voted 12-10 in favor of tenure, but suggested that tenure be granted in the Honors Program rather than in the department. The College-wide faculty Tenure and Promotions Committee voted 4-1 against tenure. Its vote was based on two concerns: the negative information about her performance as an administrator that members of the College-wide committee collected on its own, and the negative student reactions collected by Professor Strong's departmental colleague. The College-wide committee's narrative did not contain any comments on Professor Strong's scholarship or service. The colleague from her department who provided the negative student reactions is a member of the Tenure and Promotions Committee and provided similar information to that committee. The Dean of the College of Arts and Sciences has recommended tenure because Professor Strong is an "excellent scholar and a tireless worker for the University." Now the decision is in the hands of the president.

What advice would you give the president?

II. FACULTY RETIREMENT ISSUES

The "uncapping" in 1994 of the mandatory retirement age of 70 in the federal Age Discrimination in Employment Act (ADEA) has resulted in changes in faculty retirement patterns at many colleges and universities. A study of retirements by faculty at the fifteen campuses of the North Carolina State University system found that after uncapping, retirement rates for faculty aged 70 and over fell from 100 percent to 33 percent (Edward Wyatt, "Tenure Gridlock: When Professors Choose Not to Retire," New York *Times*, February 16, 2000, p. H-11.) Similar data have been collected for other colleges, and the issue is particularly acute at research universities, where teaching loads are typically lower than at community or liberal arts colleges. Some colleges have instituted phased retirement or partial retirement plans in an attempt to provide incentives for older faculty to move out of the institution to "make room" for younger faculty.

A. Legal Issues

1. Age discrimination

The federal ADEA, as well as state law, forbids termination solely on the grounds of age. Although there are a few exceptions (e.g., public safety officials, commercial airline pilots), these generally do not apply to college faculty. Therefore, any termination must either be voluntary or for cause.

2. Disability discrimination

The federal Americans With Disabilities Act forbids termination on the basis of a disability. The laws requires the employer of a "qualified" faculty member with a disability to provide a "reasonable accommodation." Faculty members who have a disability, or who report that they have a disability, can be required to provide documentation concerning the nature of the disability and the accommodations that are needed to enable the individual to perform his or her job.

a. Does the disability substantially limit one or major life functions?

b. Can the individual perform the essential functions of the position?

   1. What are the essential functions of a faculty member?
   2. Do they include the time of day or location at which the function is performed?

c. Is the accommodation requested by the faculty member reasonable, or does it disrupt class schedules, teaching, research or service expectations, or the ability of the unit to provide necessary courses?

B. Performance management issues

1. Regular evaluations of all faculty

   Conducting periodic evaluations only for older faculty would probably violate the age discrimination laws. Assessment of faculty performance is important for all faculty, irrespective of age.

2. Post tenure review

   This process can help academic administrators and peer faculty work with individuals whose performance has declined or who need additional support, training, or technical assistance to improve their teaching, research, and/or service.

   Resources discussing how to develop an effective program of post tenure review are discussed in W. A. Kaplin and B.A. Lee, *Year 2000 Cumulative Supplement to the Law of Higher Education, 3d ed.* (National Association of College and University Attorneys, 2000), p. 172.

3. Long term planning for all faculty

   Performance management issues for all faculty, especially those with tenure, should include regular discussion of current and future plans. At a minimum, discussion should review current and future plans in the following areas:

   a. course assignments

      Department chairs and deans may lawfully require faculty to be up-to-date in their course materials and assignments, as long as this requirement is applied to all faculty.

   b. use of technology

      If opportunities for training or other developmental activities with respect to technology are offered to faculty, they cannot be conditioned on the faculty member's age. Such opportunities could, however, be conditioned on the faculty member's agreement to incorporate technology into courses, to offer the course(s) over a certain period of years, etc.

   c. program of scholarship

      Faculty members who have not maintained an active program of scholarship may be asked to do so, as long as younger faculty are held to the same requirement.

d. service obligations and plans

   If a dean or director wishes to do so, additional committee assignments or other duties may be given to individuals who are not research active or who do not carry a regular teaching load.

e. differential teaching loads or service expectations for individuals who are not active in scholarship

   Unless a contract specifies a certain teaching load for faculty, differential (i.e., heavier) teaching loads for faculty who are not research active are permissible, as long as this policy is applied irrespective of faculty members' age.

Problem—Faculty Performance Management

Professor Watson has been on the faculty at Arden University for 40 years. In recent years he has tired of course preparation and updating his syllabi. Thus, although he is nominally assigned four different courses in related areas in the History Department, he teaches the same materials in all four of them. He has refused on numerous occasions to produce syllabi for his courses when the department chair has asked for them. He teaches at both the main campus and a branch campus. The Dean of the branch campus has requested that he not be assigned to classes there but the faculty member continues to be assigned courses there. Students have complained, faculty morale is low because he is not contributing to the department and there is a general sense of frustration.

Additional facts that may be of interest include the following. There is a strong faculty union at Arden and the elected chairs of departments are members of the union. The vast bulk of pay increases is in the form of across the board automatic payments. There is very little merit pay. The culture in this particular college has tolerated a system of entitlement based on seniority. This results in plum assignments and lighter teaching loads for more senior faculty.

A new Dean is appointed and is aghast at this situation. She seeks your advice on how to remedy the situation while not violating any laws or University or union regulations. What would you tell her?

III. EVOLVING LAW IN SAME-SEX HARASSMENT AND SEXUAL ORIENTATION DISCRIMINATION

A. Introduction

The law of sexual harassment has been a rapidly evolving area of the law over the past two decades.[1] The evolution began in 1981 when the Equal Employment Opportunity ommission amended its Guidelines on Discrimination Because of Sex to add a section expressly dealing with sexual harassment and first used the term "sexual harassment." In 1983, the Supreme Court held that Title VII protected men as well as women from sex discrimination.[2] The Supreme Court in 1986 recognized a "hostile environment" as a form of sexual harassment cognizable under Title VII, in addition to quid pro quo harassment.[3] In 1991, Congress enacted the Civil Rights Act of 1991, which expanded existing remedies for sexual harassment to provide for the award of punitive damages and the right to a jury trial.[4] In 1992, the Supreme Court held that Title IX provides relief for sexually harassed students the same way Title VII provides relief for employees and that students can recover money damages under Title IX.[5] The evolution continued in 1993, when the Supreme Court held that a sexual harassment victim does not have to prove psychological damage in order to prevail on a Title VII claim.[6] In 1998, the Supreme Court issued four landmark decisions clarifying the source of vicarious employer liability, setting

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[1] See generally Francis Achampong, "The Evolution of Same-Sex Sexual Harassment Law: A Critical Examination of the Latest Developments in Workplace Sexual Harassment Litigation," 73 St. John's L. Rev. 701 (Summer 1999).

[2] See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

[3] See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[4] See 42 U.S.C. § 1981a(b)(1) (1994). A victim of sexual harassment may recover compensatory damages (including damages for emotional pain, suffering, mental anguish, and loss of enjoyment of life) and punitive damages in cases where the employer engaged in discrimination which was malicious or recklessly indifferent to the employee's civil rights. Compensatory and punitive damages cannot exceed $300,000 for employers with more than 500 employees.

[5] See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75-76 (1992). There is no cap on money damages under Title IX.

[6] See Harris v Forklift Systems, 510 U.S. 17, 22 (1993) ("Title VII comes into play before the harassing conduct leads to a nervous breakdown.")

forth the standards by which schools will be assessed in the sexual harassment context, and declaring that Title VII prohibits same-sex sexual harassment.[7]

B. Overview of the Law of Sexual Harassment

Sexual harassment is a form of discrimination prohibited in the workplace by Title VII and at school by Title IX. The Equal Employment Opportunity Commission has enforcement responsibility for Title VII and the Office for Civil Rights for Title IX. Both agencies have defined sexual harassment as being unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment or participation in an educational program or activity, (2) submission to or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting that individual, or (3) such conduct creates an intimidating, hostile, or offensive environment, which unreasonably interferes with a person's ability to work or to participate in a school program or activity.[8]

To constitute sexual harassment, the underlying conduct must be unwelcome to the victim, as well as objectively offensive to the public at large. Some courts have recognized that men and women may experience the same conduct differently and have adopted a "reasonable woman" or "reasonable person of the same gender" standard.[9]

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[7] See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998); and Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998). For excellent discussions of the importance and impact of these decisions, see Edward N. Stoner II and Catherine S. Ryan, "Burlington, Faragher, Oncale, and Beyond: Recent Developments in Title VII Jurisprudence," 26 J. C.& U. L. 645 (2000) and William Kaplin, "A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis," 26 J. C. & U. L. 615 (2000).

[8] See EEOC, Guidelines on Discrimination Because of Sex, EEOC Compl. Man. § 615.2(a) (1998) and OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, available at <http://www.ed.gov/ocr/shguide/index.html>.

[9] See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (using a "reasonable woman" standard); Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987) (using a "reasonable person of the same sex" standard); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1296 (N.D. Cal. 1993) (adopting a "reasonable victim" standard and referring to OCR's use of it).

A victim's seemingly "voluntary" submission to sexual advances has no bearing on a determination of "welcomeness." The fact that an employee or student may have willingly participated in the conduct on one occasion does not prevent him or her from charging that similar conduct is unwelcome when encountered at a later time. Conduct is unwelcome if the victim did not request or invite it and regarded the conduct as undesirable or offensive. Unwelcomeness need not be expressed verbally. In Chamberlin v. 101 Realty,[10] the court ruled that a woman who removes her hand every time a supervisor attempts to touch it or who silently walks away from sexual comments has shown that such conduct is unwelcome.

Actionable sexual harassment comes in two different forms: quid pro quo and hostile environment.[11] Quid pro quo harassment is the most easily identified type of sexual harassment. It is a demand for sexual favors in exchange for a job benefit,[12] a grade, or participation in an educational activity.[13] Hostile work or school environment is the more pervasive type of sexual harassment. It occurs when verbal, nonverbal, or physical conduct of a sexual nature is severe, persistent or pervasive enough to limit a person's ability to work or benefit from an educational experience.[14] Factors to consider in determining whether the objectionable conduct constitutes cognizable sex discrimination are: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance; and whether it

[10] 915 F.2d 777 (1st Cir. 1990).

[11] The terms "quid pro quo" and "hostile environment" do not appear in the statutory text of Title VII. The terms appeared first in academic literature. See Catherine McKinnon, Sexual Harassment of Working Women (1979).

[12] See Heyne v. Caruso, 69 F.3d 1475, 1478 (9th Cir. 1995) (noting that quid pro quo sexual harassment is established when the complainant shows "that an individual 'explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct'").

[13] See Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998) (noting that definition of sexual harassment in the educational context is derived from Title VII precedent).

[14] See Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (holding that a plaintiff may recover for a hostile environment if she or he shows that unwelcome sexual conduct based on gender was "sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment'").

Unreasonably interferes with an employee's work performance or a student's learning opportunities.[15]

An employer can be held vicariously liable for sexual harassment caused by a supervisor with immediate or successively higher authority over a victimized employee when a supervisor's harassment culminates in a tangible employment action, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits. However, when no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to avoid the harm otherwise. Evidence of using reasonable care includes having a sexual harassment policy in place, following the policy in practice, and showing that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities to end the harassment. No affirmative defense is available, however, when a supervisor's conduct results in a negative tangible employment action, such as discharge or demotion.[16]

In Gebser v. Lago Vista Independent School District, the Supreme Court held that a school district may not be held liable for damages under Title IX for the sexual harassment of a student by one of the district's teachers unless an official of the school district with authority to institute corrective measures has actual notice of and is deliberately indifferent to the teacher's misconduct.[17] The Gebser case involved an eighth-grade student who joined a high school book discussion group led by a teacher who often made sexually suggestive comments to the students. When Gebser entered high school, she was assigned classes with this same teacher. Eventually, the teacher initiated sexual contact with Gebser, and the two had sexual intercourse on a number

[15] See Harris, 510 U.S. at 23; see also Clark County Sch. Dist. v. Breedon, 532 U.S. 268, (2001) (per curiam) (reiterating that sexual harassment is actionable under Title VII only when it is so severe or pervasive as to alter conditions of the victim's employment, and finding that no reasonable person in the instant case could have believed that the single incident at issue could have violated Title VII's standard), rehg. denied, 121 S.Ct. 2264.

[16] Burlington Indus., 524 U.S. at 764-65; Faragher, 524 U.S. at 807-08.

[17] See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

of occasions over a period of several months. Although Gebser did not report the relationship to school officials, parents of two other students complained to the principal about the teacher's inappropriate comments in class. The principal met with the teacher, who then apologized to the parents. The principal did not report the incidents to the superintendent.

A few months later, a police officer discovered Gebser and the teacher having sexual intercourse in an automobile and arrested the teacher. The school district then fired him and revoked his teaching license. The school district did not have an official grievance procedure or a formal anti-sexual harassment policy, as required by OCR.

Gebser filed suit under Title IX seeking money damages. The Supreme Court refused to expand liability under Title IX to include the concepts of respondeat superior or constructive notice that apply in Title VII cases.[18] In denying Gebser's claim, the Court established a 3-part standard for determining institutional liability for a teacher's sexual harassment of a student: (1) an official of the school district must have had "actual knowledge" of the harassment; (2) this official must have authority to institute corrective measures to resolve the problem; and (3) this official must have failed to adequate respond to the harassment and have acted with "deliberate indifference."[19]

In 1999, the Court extended the Gebser "deliberate indifference" standard to apply to peer sexual harassment in limited circumstances where: (1) the institution had "actual knowledge" of the harassment; (2) the institution acted with "deliberate indifference to the conduct; (3) the institution had "substantial control" over the student harasser and the context of the harassment; and (4) the harassment was so "severe, pervasive, and objectively offensive," as to have deprived the victim of educational opportunities or services.[20]

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[18] See generally Jan Alan Neiger, "Actual Knowledge Under Gebser v. Lago Vista: Evidence of the Court's Deliberate Indifference or an Appropriate Response for Finding Liability?" 26 J. C. & U. L. 1 (1999).

[19] See Gebser, 524 U.S. at 300.

[20] See Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

C. SAME-SEX SEXUAL HARASSMENT

1. Pre-Oncale Decisions: A Bewildering Variety of Stances

Prior to the Supreme Court's decision in Oncale v. Sundowner Offshore Services, Inc.,[21] courts confronted with same-sex harassment had taken a variety of stances on the issue.[22] The Fifth Circuit held that same-sex sexual harassment claims were never actionable under Title VII.[23] The Fourth, Sixth and Eleventh Circuits held that such claims were actionable only if the plaintiff could prove that the harasser was homosexual and, presumably, motivated by sexual desire.[24] The Seventh and Eighth Circuits held that sexual harassment in the workplace is actionable, regardless of the harasser's sex, sexual orientation, or motivation, as long as it is gender based.[25] In reviewing the decisions of the various circuits, the Supreme Court described them as "a bewildering variety of stances."[26]

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[21] 523 U.S. 75 (1998).

[22] See McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 n.4 (4th Cir. 1996) (referring to lower federal courts considering the issue as "hopelessly divided").

[23] See Oncale, 83 F.3d 118 (5th Cir. 1996), overruled, 523 U.S. 75 (1998); Garcia v. Elf Atochem North Am., 28 F.3d 426 (5th Cir. 1994) (holding that harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment had sexual overtones).

[24] See Wrightson v. Pizza Hut Am., Inc., 99 F.3d 138 (4th Cir. 1996) (holding that a claim under Title VII for same-sex hostile work environment harassment may lie where the perpetrator of the sexual harassment is homosexual); Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997) (delineating a test where the only requirement is that the proposition be the result of sexual attraction); Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997) (holding that a Title VII claim is stated when a homosexual male supervisor solicits sexual favors from a male subordinate and conditions work benefits or detriments on receiving such favors).

[25] See Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997) (suggesting that workplace harassment that is sexual in context is always actionable regardless of the harasser's sex, sexual orientation, or motivation), vacated by 523 U.S. 1001 (1998); Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996) (accepting that all same-sex sexual harassment cases, regardless of the motivation of the harassment, are actionable).

[26] Oncale, 523 U.S. at 79.

2. The Oncale Decision

On March 4, 1998, the United States Supreme Court unanimously overruled the Fifth Circuit and held in Oncale that Title VII's prohibition against sexual harassment applies to harassment by a member of one sex against a member of the same sex.[27]

Joseph Oncale worked as a roustabout on an oil rig in the Gulf of Mexico as part of an eight-man crew. Oncale sued his employer, alleging that sexual harassment by male co-workers and supervisors was so bad that he was forced to quit. Oncale alleged that he was forcibly subjected to sex-related, humiliating actions and was physically assaulted and threatened with rape. He also alleged that his complaints to supervisors produced no remedial action. In fact, the company's safety compliance clerk told Oncale that two of the crew had also picked on him. Oncale eventually quit, asking that his pink slip reflect that he voluntary left due to sexual harassment and verbal abuse. Oncale contended that the pattern of harassment by his co-workers and supervisors amounted to employment discrimination based on his sex.

Relying on precedent in the Fifth Circuit, the district court granted summary judgment to the employer, reasoning that male plaintiffs could not sue under Title VII for harassment by male co-workers. On appeal, a panel of the Fifth Circuit concluded that Fifth Circuit precedent was binding and affirmed the district court's decision in favor of the employer.

The Supreme Court granted certiorari and in a unanimous decision reversed the Fifth Circuit. Justice Scalia, writing for the Court, said: "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 (or the person charged with acting on behalf of the defendant) are of the same sex." [28]

In the Court's first pronouncement on the same-sex issue, it noted the following:

- Title VII protects men as well as women.
- Although male on male sexual harassment may not have been the principal evil with which Title VII was concerned, statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.

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[27] Id.

[28] Id.

- Harassing conduct may be, but is not required to be, motivated by sexual desire to support an inference of discrimination on the basis of sex.
- The critical issue 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.
- Title VII is not a "general civility code" and does not prohibit ordinary socializing in the workplace, such as male on male horseplay or intersexual flirtation.
- To be illegal, harassing conduct must be so objectively offensive as to alter the working conditions of the victim's employment.
- The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position and by considering the social context in which the conduct took place.
- A same-sex plaintiff could create an inference of discrimination by evidence that the harasser is homosexual, by evidence that the harasser is motivated by a general hostility to the presence of women in the workplace [or men as the case may be], or by direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

The Supreme Court remanded the case to the district court for a jury trial of Oncale's claims. A week before the scheduled trial, the parties settled the suit for an undisclosed amount.[29]

3. Interpreting Oncale

Since the Supreme Court did not set forth any specific guidelines in Oncale for determining when same-sex harassing conduct exists "because of sex," the lower courts have given both expansive and restrictive readings of the Court's decision.[30] Some courts have found gender-stereotyping to exist in violation of Title VII or Title IX, while others have not. Some courts have found discrimination on the basis of "perceived sexual orientation" to be protected under Title VII's broad prohibitions, while others have not. Some courts have found the

[29] See "Parties Settle Same-Sex Harassment Suit Just Short of Trial Before Federal Jury," Daily Lab. Rep. (BNA), Oct. 29, 1998.

[30] For a good discussion of the Court's efforts to simplify Title VII, including its decision in Oncale, see Henry L. Chambers, Jr., "Discrimination, Plain and Simple," 36 Tulsa L.J. 557 (2001).

"because of sex" theory of recovery to have been properly pled, while others have dismissed similar cases because of deficiencies in the pleadings. Some courts have found the three evidentiary methods of proof suggested in Oncale to be mandatory, while others have found them to be examples only. Some courts have found the evidence of harassment to be severe and pervasive, while others have found similar egregious conduct to be mere "horseplay." Suffice it to say, that the decisions form no consistent pattern of interpreting Oncale.

It is difficult to organize the post-Oncale decisions in a manner which would make the legal arguments or even the fact patterns fall into a neat, orderly arrangement. To put the cases in some context for discussion, I have organized them along the evidentiary lines suggested in Oncale, although quickly noting that these methods of proof were set forth by the Court as examples only and were not intended to be the only methods of proof available to a plaintiff.

The Oncale court suggested that a plaintiff in a same-sex sexual harassment case could create an inference of discrimination "because of sex" with three different types of proof: (1) evidence that the harasser sexually desires the victim; (2) evidence that the harasser is motivated by a general hostility to the presence of a particular sex in the workplace; and (3) direct comparative evidence of how the harasser treated members of both sexes in a mixed-sex workplace.[31]

1. Evidence that harasser is homosexual ("desire" cases").

The Oncale court noted that an inference of discrimination on the basis of sex can arise if there is credible evidence that the harasser is homosexual.[32] The Court gave as an example a situation in which a gay or lesbian supervisor treats a same-sex subordinate in a way that is sexually charged. Commentators have described this type situation as a "desire case," one in which the harasser desires the victim and creates an unreasonably offensive work environment by unrelenting, unwelcome sexual advances.[33]

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[31] See Oncale at 80-81.

[32] See Id.

[33] See B. J. Chisholm, "The (Back)Door of Oncale v. Sundowner Offshore Services, Inc.: "Outing" Heterosexuality as a Gender-Based Stereotype," 10 Law & Sex. 239, 259 (2001) (stating that courts seem to be most comfortable with sexual harassment claims when the complained of conduct is "desire based"); and Marianne C. DelPo, "The Thin Line Between Love and Hate: Same-Sex Hostile-Environment Sexual Harassment," 40 Santa

In Mota v. University of Texas Houston Health Science Center,[34] Dr. Luis F. Mota alleged that he was harassed[35] by his supervisor and department chair, Dr. Raul Caffesse, a renowned periodontist at the University. Mota claimed that the first incident of sexual harassment occurred at an academic conference in Mexico in 1966. Caffesse made the travel arrangements, which involved Mota sharing his hotel room. Mota testified that during this stay, Caffesse engaged in unwanted and offensive sexual conduct toward him while they were in the hotel room, told Mota that he had to "get along with him," and that his immigration status could be jeopardized if he no longer worked at the University.

Following the trip, Caffesse promised Mota that the incidents which occurred in Mexico would not happen again. Despite these assurances, incidents of harassment continued. Mota testified that Caffesse engaged in unwanted and offensive sexual advances at conferences he attended in Philadelphia, Breckenridge, and Orlando, as well as while both men were in Houston.

Prior to trial, Dr. Caffesse's insurance company settled the claims made against him individually for $290,000. Following trial, a jury returned a verdict of $448,000 in favor of Mota and against the University for the same-sex harassment he experienced. The Court of Appeals for the Fifth Circuit unanimously upheld the lower court, finding there to be sufficient evidence to support the jury's conclusion that Caffesse engaged in repeated, aggressive sexual advances in the face of adamant refusals by Mota, that this conduct was humiliating and degrading, and that the University failed to exercise reasonable care to prevent and properly correct the harassment.[36]

In Shepherd v. Slater Steels Corporation,[37] Lincoln Shepherd had worked for Slater for approximately two years when he was assigned to a new position within the company and a new supervisor, Jemison, with whom he worked alone. Shepherd said the harassment by his

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Clara L. Rev. 1, 17 (1999) (describing hostile environment claims as being divided into two types: "desire" claims and "hatred" claims).

[34] 261 F.3d 512 (5th Cir. 2001).

[35] Mota also claimed that he was retaliated against by the University. Discussion of the retaliation portions of this case are omitted here.

[36] See Courtney Leatherman, "Jury Awards $448,000 to Fired Texas Professor," The Chronicle of Higher Education, November 19, 1999, and Piper Fogg, "Court Upholds Verdict Against U. of Texas Medical Center in Case of Same-Sex Harassment," The Chronicle of Higher Education, August 13, 2001.

[37] 168 F.3d 998 (7th Cir. 1999).

supervisor began when Jemison told him that he was a "handsome young man" and then began to repeatedly expose himself four or five times a week to Shepherd. The offensive conduct rapidly escalated. Shepherd subsequently complained of the incident to his wife, to a co-worker, and to his department manager, Wally Martin, who in turn reported it to Joe Jordan of the company's HR department. Jordan confronted Jemison, the alleged harasser, but the conduct did not improve. In fact, it progressively became worse. Shepherd continued to complain without effect.

Shepherd filed a sexual harassment charge with EEOC. Shortly thereafter, Shepherd and Jemison got into a physical altercation which resulted in both having to seek medical treatment. The company decided to terminate both men.[38]

Shepherd sued. The district court granted summary judgment for Slater, finding that Shepherd failed to demonstrate that any harassment he suffered was based on his gender. The court particularly noted that there was evidence in the record that Jemison had engaged in sexual conduct in front of female as well as male workers.

On appeal, the Seventh Circuit stated that there was only one question after Oncale that it needed to answer: Can one reasonably infer from the evidence that the harassment that Shepherd describes was discrimination "because of his sex?" Finding there to be sufficient evidence from which a jury could infer that Jemison's harassment of Shepherd was one of sexual attraction, the court remanded the case for trial on Shepherd's claim of sex discrimination.

[38] The union offered both men a work-arrangement agreement in order to keep their jobs. Jemison signed the agreement and was still employed by Slater at the time of this suit. Slater refused to sign the agreement and was discharged.

Even though the plaintiff in Fry v. Holmes Freightlines, Inc.[39] did not offer definite proof that his harasser was homosexual, the court found that this was not fatal to his case. "If the conduct directed at Fry allows the inference that Fry was harassed because he was a man, then those acts constitute 'credible evidence that the harasser is homosexual.'"[40]

In this case, Fry worked as a dock worker and then a full-time janitor for Holmes Freightlines. Four of Fry's co-workers taunted him with graphic insinuations of his homosexuality, called him "Sally," and physically touched him in an offensive manner. Fry repeatedly complained to management, but no action was taken. He eventually sued. The company argued that the conduct of its employees were simply acts of "juvenile provocation" or "school yard taunts" and were unrelated to sexual interest in Fry on the part of the harassers. The company further argued that Fry had to prove that his harassers were homosexual to establish that he was discriminated against because of his sex. The court disagreed, saying that there was a genuine issue for the jury about whether the conduct of the co-workers was visited upon Fry because he was a man. "The persistent sexual propositions, epithets, and offensive touchings engaged in by Fry's co-workers suggest that one or all of them may be oriented toward members of the same sex."[41]

The Seventh Circuit in Cooke v. Stefani Management Services, Inc.[42] recently upheld a jury verdict in favor of a former bartender at a restaurant who claimed that he was sexually harassed by the restaurant manager who is homosexual. Almost immediately after Cooke was hired, Fred Logan, the manager, subjected him to a litany of sexual propositions, inappropriate touching, and nonverbal gestures of a sexual nature. Cooke complained numerous times. He was eventually fired by the manger and sued. The defendant owner of the restaurant contested Cooke's claims by arguing that there were not witnesses to the allegedly offensive conduct, that Cooke's girl friend testified that he had not complained to her about the conduct, that Cooke spent time at the restaurant on his days off, and that he wrote a personal thank you note to the

[39] 72 F. Supp. 2d 1074 (W.D. Mo. 1999).

[40] Id. at 1079.

[41] Id.

[42] 250 F.3d 564 (7th Cir. 2001).

manager for a bottle of wine he had given him. The court declared the case was not a "slam dunk case for either side," but held that there was sufficient evidence from which the jury could have found that the conduct in question was offensive, unwelcome and degrading sexual harassment.

2. Evidence that harasser is motivated by hostility to specific gender ("hatred cases")

The Oncale court did not limit same-sex sexual harassment to "desire cases" only. It also suggested that an inference of discrimination could arise "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[43] In this type situation, referred to as a "hatred case," the harasser inflicts humiliating, degrading treatment of a sexual nature on the victim because the harasser resents or disdains the victim– either individually or as part of a group. Included in this analysis are cases in which the victim is harassed because the victim does not display stereotypical characteristics of his or her gender, or because of his or her "perceived" or acknowledged sexual orientation.

(a) Victim harassed for failure to display stereotypical characteristics of gender

Although not a cause of action per se, sex stereotyping is a form of sex discrimination that can occur in the context of disparate treatment or sexual harassment. There are situations in which a harasser targets for discriminatory treatment men or women who look or act in a way that the harasser believes is appropriate only for members of the opposite sex. This practice is known as "sex stereotyping" and has been recognized by the Supreme Court as a form of sex discrimination in the workplace in Price Waterhouse v. Hopkins[44] and in the school by OCR.[45]

Ann Hopkins sued after having been denied partnership in an accounting firm, in part because she was considered "macho" and in need of "a course in charm school." Hopkins was advised that she could improve her chances for partnership if she would "walk more femininely,

[43] See Oncale, 523 U.S. at 80.

[44] 490 U.S. 228 (1989).

[45] OCR, Revised Sexual Harassment Guidance at 6 & 12 (clarifying that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an educational program).

talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Hopkins alleged that she had been the victim of sex stereotyping. The Supreme Court, deciding in favor of Ms. Hopkins, held that the conduct of Price Waterhouse was unlawful sex discrimination. Justice Brennan, writing for the plurality, said: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . .[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotypes associated with their group."[46] According to the Price Waterhouse Court, if an employer discriminates against a member of one gender for exhibiting a particular characteristic (such as aggressiveness) that it would find acceptable in the other gender, that employer has discriminated "because of sex."[47]

The Supreme Court has not yet addressed the issue of whether Title VII prohibits an employer from discriminating against a male employee because he acts more like a woman, but it is an issue of significant debate among the lower courts. Male employees in Ann Hopkins' shoes have been unsuccessful in many cases,[48] while in others the courts have acknowledged that gender discrimination based on a failure to conform to gender norms might be cognizable under

[46] See Price Waterhouse at 250-51.

[47] The central holding of Price Waterhouse was that an employer could avoid liability for sex discrimination under Title VII if it could show that it would have made the same decision in the absence of an unlawful motive. Congress superceded this holding in 1991 with an amendment to the Civil Rights Act to provide that once a plaintiff proves that discrimination based on a protected category was at least one motivating factor in the decision, liability is established. The Court's statements regarding gender stereotyping as sex discrimination were not affected by the amendments. For an in-depth discussion of gender nonconformity discrimination, see Anthony E. Varona and Jeffrey M. Monks, "En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation," 7 Wm. & Mary J. Women & L. 67 (2000).

[48] See, e.g., Simonton v. Runyon, 232 F.3d 33, 38 (2nd Cir. 2000) (dismissing male employee's Title VII claim based on failure to conform to gender norms); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 707 (7th Cir. 2000) (same); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 (1st Cir. 1999) (same); Dandan v. Radisson Hotel Lisle, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000) (same); Mims v. Carrier Corp., 88 F. Supp. 2d 706, 714-15 (E.D. Tex. 2000) (same); Klein v. McGowan, 36 F. Supp. 2d 885, 890 (D. Minn.1999) (same), aff'd 198 F.3d 705 (8th Cir. 1999). For an in-depth discussion of why male gender stereotyping claims, brought by homosexual and heterosexual employees alike, have failed under Title VII, see Stephen J. Nathans, "Twelve Years after Price Waterhouse and Still No Success for 'Hopkins in Drag': The Lack of Protection for the Male Victim of Gender Stereotyping under Title VII," 46 Vill.L.Rev. 713 (2001).

Title VII.[49] Although the plaintiff in Price Waterhouse was female, the Court wrote the opinion in gender-neutral language; therefore, the reasoning should apply to both men and women who exhibit gender nonconforming characteristics.

In Nichols v. Azteca Restaurant Enterprises,[50] the Ninth Circuit recently held that a man who was verbally harassed by coworkers and a supervisor because his effeminate behavior did not meet their views of a male stereotype suffered sexual harassment under Title VII. Antonio Sanchez was a host and food server at restaurants operated by Azteca. During his four years of employment with the company, he endured what Judge Ronald Gould termed "a relentless campaign" of verbal abuse by some male coworkers and one of his supervisors. They mocked Sanchez for walking and carrying his tray like a woman, referred to him as "she" and "her," called him sexually derogatory names, derided him for not having sexual intercourse with a waitress who was his friend, and taunted him for having feminine mannerisms.

The court found that the systematic abuse directed at Sanchez reflected a belief by his harassers that he did not act as a man should act. Relying on the rule set forth in Price Waterhouse that bars discrimination on the basis of sex stereotypes, the Ninth Circuit said: "That rule squarely applies to preclude the harassment here."[51]

A powerful and tragic example of sex stereotyping in the school setting, which resulted in a finding by the court of sexual harassment under Title IX, exists in Montgomery v. Independent School District No. 709.[52] In that case, a male student, Jesse Montgomery, was harassed by other students almost daily from kindergarten through the tenth grade because they perceived him as gay. He was taunted with names such as "faggot," "princess," "fairy," "Jessica," femme

[49] See, e.g., Nichols v. Azteca Restaurant Enter., 256 F.3d 864 (9th Cir. 2001) (applying Price Waterhouse rule with equal force to a man who is discriminated against for acting too feminine); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (stating in dicta that Title VII encompasses instances in which the perpetrator's actions stem from the fact that he believed that the victim was a man who failed to act like one); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (denying relief for the plaintiff, but recognizing that "[j]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity").

[50] 256 F.3d 864 (9th Cir. 2001).

[51] Id. at 874-75.

[52] 109 F. Supp. 2d 1081 (D. Minn. 2000).

boy," "queer," and "pansy." He was super-glued to his seat, punched and kicked on the playground, tripped or knocked down during hockey drills, and pelted with trash on the school bus and in art class. On one occasion, another student threw Jesse to the ground and pretended to sodomize him while others looked on and laughed.

Jesse sued, contending that the school district failed to protect him from sexual harassment both because of his gender (sex stereotyping) and his perceived sexual orientation. The court stated that while Title IX does not protect individuals against discrimination based on sexual orientation or perceived sexual orientation, Jesse had pled sufficient facts to support a claim of harassment based on the perception that he did not fit his peers' stereotypes of masculinity, a claim that is cognizable under Title IX.

(b) Victim harassed because of sexual orientation

While some lower courts have extended Title VII and Title IX protection against discrimination on the basis of sex stereotyping, none have extended protection on the basis of sexual orientation. A few courts have extended protection to victims who have been sexually harassed on the basis of their "perceived" sexual orientation by likening their claim to one for sex stereotyping. The Supreme Court has not directly addressed the issue. Both EEOC and OCR guidelines explicitly state that Title VII does not cover charges of discrimination based on sexual orientation.[53] Congress has also declined to amend Title VII to provide protection against discrimination in the workplace to gays and lesbians.[54]

Rejecting the "perceived" sexual orientation claim of the plaintiff, the district court in Dandan v. Radisson Hotel Lisle,[55] denied relief to Edward Dandan, a bartender, who was consistently subjected to comments by his co-employees such as "fruitcake, fagboy, and

[53] See EEOC Compl. Man. § 615.2(b)(3)(July 1998); OCR, Revised Sexual Harassment Guidance at 12.

[54] A bill designed to expressly prohibit employment discrimination on the basis of sexual orientation was first introduced in the 103rd Congress in 1994 and has been introduced in each session thereafter. In the 104th Congress, the Employment Non-Discrimination Act missed passage in the Senate by one vote. Some courts that have rejected Title VII sexual orientation claims have urged Congress to act. For example, a district court in Maine recently stated: "In determining along with numerous other jurisdictions that Title VII does not provide a remedy for discrimination based on sexual orientation, the Court does not in any way condone this serious and pervasive activity in the American workplace. The intolerable working conditions set forth in the cases denying relief under Title VII for rampant discrimination based on sexual orientation call for immediate remedial response by Congress." Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 76 n.10 (D. Me. 1998).

[55] 2000 WL 336528 (N.D. Ill. Mar. 28, 2000).

Tinkerbell," and to criticism of his speech for being feminine. Although Dandan was homosexual, this fact was not known to his co-workers. He argued that the harassing treatment he received was due to the fact that he did "not match-up to his co-workers' expectations of what a man should be or how he should live his life." Nonetheless, the court characterized his claim as one for discrimination based on "perceived" sexual orientation (not sex stereotyping), which it held was not protected by Title VII.

Likewise rejecting a "perceived" sexual orientation claim, the court in Klein v. McGowan[56] denied the plaintiff's plea. Josh Klein, a technician in the county sheriff's office, was told by his supervisor, "If I ever find out you're queer, I'll fire you." Co-workers called him a "homo," made fun of the car he drove, and installed a bell over his work space and rang it to upset him. Klein maintained that he was entitled to relief under Title VII because he had suffered discrimination based on the "sexual aspect of [his] personality." The court found plaintiff's claim to be based on the perception that he was a homosexual and stated: "It is well settled that Title VII does not recognize a cause of action for discrimination based on sexual orientation"[57]

Neither the Dandan or the Klein court discussed Price Waterhouse, although arguably the conduct in both cases was a violation of Title VII under the Price Waterhouse standard. It appears that neither court was able to draw a distinction between the effeminate behavior of the plaintiffs and their sexual orientation.

Declining to grant plaintiff relief, the court in Mims v. Carrier Corporation[58] said: "Neither sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act."[59] The plaintiff, Quentin Mims, worked as a press operator with Carrier Air Conditioning. He alleged that two co-workers made offensive and unwelcome sexual comments and gestures toward him, and suggested that he was engaging in homosexual conduct with another male co-worker, Kelly Ray. Plaintiff reported the offensive behavior to his supervisors.

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[56] 36 F. Supp. 2d 885 (D. Minn. 1999), aff'd,198 F.3d 705 (8th Cir. 1999).

[57] Klein, 36 F. Supp. 2d at 889.

[58] 88 F. Supp. 2d 706 (E.D. Tex. 2000).

[59] Id. at 714.

However, despite his complaints, the harassing conduct continued unabated. Mims contended that although he is not homosexual, he was harassed and treated as a homosexual.

The court specifically found that Mims did not prove his case through any of the methods suggested by the Supreme Court in Oncale (sexual desire, general hostility, comparative evidence). Mims testified that his harassers were not, to his knowledge, homosexual and that they had never expressed any sexual interest in him. He likewise testified that the defendant company did not, as a general rule, discriminate against men and that there was not a general hostility toward men at Carrier. Finally, Mims testified that the individual defendants treated both men and women equally in that they made homosexual jokes in front of mixed company as well as specifically to women. Rejecting all of Mims' arguments and evidence, the court noted that no one touched Mims in any way or propositioned him for sex and that while the off-color teasing and joking of the defendants was in bad taste, Title VII is not a guardian of taste.

Plaintiffs bringing suit under Title IX on the basis of their perceived homosexuality have a far better chance of success than those seeking relief under Title VII. OCR states in the Revised Guidance that "if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian."[60]

Granting relief under Title IX, the court in Ray v. Antioch Unified School District[61] addressed the complaint of Daniel Ray, an eighth grade student. Ray claimed that fellow students' repeated harassment and attacks against him were based on their perception that he was a homosexual, that the defendant school district showed deliberate indifference to his complaints, and that the harassment was so severe, pervasive, and objectively offensive as to deprive him of access to educational opportunities provided by the school, all in violation of Title IX.

Daniel's mother is a transgendered female in the process of gender transformation. During January and February 1999, Jonathan Carr and other students at Antioch Middle School repeatedly threatened, insulted, taunted, and abused Daniel during the school day based on their perception that he was a homosexual, and on the status and physical appearance of his mother.

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[60] OCR, Revised Sexual Harassment Guidance at 12.

[61] 107 F. Supp. 2d 1165 (N.D. Calif. 2000).

In late February, Jonathon assaulted Daniel on his way home from school, causing him to suffer a concussion, hearing impairment in one ear, and severe permanent headaches and psychological injury. Daniel repeatedly reported the harassing behavior to school officials, who were aware of the widespread general perception that Daniel was a homosexual.

The court found that Daniel was targeted by his classmates due to his perceived sexual status as a homosexual and was harassed based on those perceptions. The court found no material difference between a female student being subject to unwelcome sexual comments and advances due to her harasser's perception of her as a sexual object and the instance in which a male student is insulted and abused due to his harasser's perception that he is a homosexual, and therefore a subject of prey. "In both instances, the conduct is a heinous response to the harasser's perception of the victim's sexuality, and is not distinguishable to this Court."[62]

Upholding summary judgment for the employer in a recent case brought by an openly gay man charging that he was discriminated against because of his sexual orientation, the Ninth Circuit said: "The degrading and humiliating treatment Rene contends that he received from his fellow workers is appalling, and is conduct that is most disturbing to this court. However, this type of discrimination, based on sexual orientation, does not fall within the prohibitions of Title VII." [63]

Medina Rene, an openly gay man, was employed by MGM Grand Hotel in Las Vegas as a butler on a floor reserved for high-profile, wealthy guests. All of the employees assigned to the floor were male. Rene's supervisor and several of his co-workers subjected him to a panoply of crude, demeaning, and sexually oriented activities on a daily basis. He was touched, made to look at pictures of naked men having sex while his co-workers looked on and laughed, blown kisses, and called things like "sweetheart".

The court reviewed the three examples given by the Oncale court of ways a plaintiff can prove that members of one sex could discriminate against members of the same sex based on gender. First, the plaintiff could show that the harasser was motivated by sexual desire, i.e., the harasser was homosexual. The court found, however, that Rene presented no evidence that any of his harassers were homosexual, nor that they were in any way motivated by sexual desire.

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[62] Id. at 1170.

[63] Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001).

Secondly, the court noted that Rene could show that the harassment arose by general hostility to the presence of men in the workplace. However, Rene presented no evidence of hostility toward men since all of his co-workers on the 29th floor were male. Third, a plaintiff may offer direct comparative evidence. Rene could not offer such evidence since there were no women working on the 29th floor.

While deploring the humiliating and degrading harassment Rene experienced, the court concluded that Rene failed to raise a triable issue of fact with regard to the harassment since he repeatedly stated himself that his co-workers harassed him because of his sexual orientation, which is not prohibited by Title VII. On July 2, 2001, the Ninth Circuit ordered this case to be reheard by the court sitting en banc.[64]

The Second Circuit was equally shocked at treatment experienced by the plaintiff, a United States Postal Service employee, in Simonton v. Runyon.[65] Simonton was employed for approximately twelve years as a postal worker in Farmingdale, New York. His sexual orientation was known to his co-workers, who repeatedly assaulted him with appalling comments. They placed notes on the wall in the employee's bathroom with Simonton's name and the name of celebrities who had died of AIDS. They taped pornographic photographs in his work area, vulgar pictures in his workplace, and made repeated statements to him which the court described as "appalling persecution." Nevertheless, the court held that Simonton had no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation. The court rejected Simonton's effort to argue that the abuse he suffered was discrimination based on sexual stereotypes, which the court noted might be cognizable as discrimination based on sex, since this argument was not sufficiently pled.

Likewise denying relief to the plaintiff because of his pleading, the First Circuit in Higgins v. New Balance Athletic Shoe, Inc.,[66] spoke out strongly against the deplorable treatment the plaintiff received from his supervisor and co-workers because of his homosexuality. The court stated, however, that the fact that he "toiled in a wretchedly hostile

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[64] Rene v. MGM Grand Hotel, 255 F.3d 1069 (2001). No decision has been made upon rehearing.

[65] 232 F.3d 33 (2nd Cir. 2000).

[66] 194 F.3d 252, 258-59 (1st Cir. 1999).

environment," was not enough to make the defendant liable because Title VII prohibits only discrimination based on sex, not discrimination based on sexual orientation. The court declined to consider his theories that only men who are homosexual were harassed, and that he was harassed because of stereotyped standards of masculinity because these theories were not presented to the district court and were not supported by the summary judgment record.

In Bibby v. Philadelphia Coca Cola Bottling Company,[67] the plaintiff claimed to have been subjected to same-sex sexual harassment at the hands of his employer, the Philadelphia Coca Cola Bottling Company. He alleged that he was assaulted in a locker room by a co-worker, repeatedly yelled at with words such as "everybody knows you're gay as a three-dollar bill," and called a "sissy." Bibby further claimed that supervisors harassed him by ignoring his reports of problems with machinery and arbitrarily enforcing rules against him in situations where infractions by other employees would be ignored. He did not assert that there was any sexual component to these two complaints.

The district court determined that Bibby was harassed because of his sexual orientation and not because of his sex. In affirming, the Third Circuit noted that Bibby failed to present evidence that he was harassed because he was a man. He made no allegation that his harassers were motivated by sexual desire, or that they possessed any hostility to the presence of men in the workplace, or that he failed to comply with societal stereotypes of how men ought to appear or behave. His claim was pure and simple that he was discriminated against because of his sexual orientation, a claim that is not cognizable under Title VII.[68]

Some courts have gone out of their way to avoid dismissing a claim based on sexual orientation if the court believes the claim would otherwise be valid. For example, in Schmedding v. Tnemec Co., Inc.,[69] the Eighth Circuit allowed the plaintiff to amend his complaint to delete the phrase "perceived sexual preference" and replace it with "sex" so that he would have a cognizable Title VII claim. The district court had dismissed Schmedding's

[67] 2001 W.L. 919976 (3rd Cir. Aug. 1, 2001).

[68] Id.

[69] 187 F.3d 862 (8th Cir. 1999).

allegations of harassment because it found them to be premised on a sexual orientation claim.[70] However, the Eighth Circuit found that even though Schmedding's complaint included allegations that he was subjected to taunts of being homosexual, such allegations did not necessarily transform his complaint "from one alleging harassment based on sex to one alleging harassment based on sexual orientation."[71]

3. Comparative evidence that men and women were treated differently

In Oncale, the Supreme Court held that where sexual banter and indiscriminate sexual touching are directed at both genders, the conduct is not actionable. Thus, in several post-Oncale cases, employers have tried to escape liability for same-sex sexual harassment by showing that the alleged harasser targeted men and women equally, thereby raising an "equal opportunity harasser" defense.[72] At least six federal circuits have accepted in principle the equal-opportunity defense, reasoning that men and women exposed to the same offensive environment do not suffer discrimination based on sex.[73]

For example, the Fourth Circuit in Lack v. Wal-Mart Stores, Inc.[74] reversed a jury verdict for the plaintiff because the court found sufficient evidence that the supervisor's vulgar and offensive conduct was obnoxious to both male and female employees. The Seventh Circuit, in Holman v. Indiana,[75] dismissed the complaint of a married couple who claimed that they were both sexually harassed by the same supervisor at the Indiana Department of Transportation.

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[70] Schmedding alleged in his complaint that he was patted on the buttocks, asked to perform sexual acts, given derogatory notes referring to his anatomy, called names such as "homo," and subjected to exhibitions of graphic sexual behavior such as unbuttoning of clothing and imitations of sexual acts.

[71] Schmedding, 187 F.3d at 865.

[72] See Shylah Miles, "Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense," 76 Wash.L.Rev. 603 (2001) (arguing that courts should reject the equal-opportunity-harasser defense since it allows harassers who target both males and females to escape liability thereby frustrating the purpose of Title VII).

[73] See, e.g., Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 319 (2nd Cir. 1999); Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 965 (8th Cir. 1999); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1011 (7th Cir. 1999); Butler v. Yslete Indep. Sch. Dist., 161 F.3d 263, 270 (5th Cir. 1998); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986); and Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

[74] 240 F.3d 255 (4th Cir. 2001).

[75] 211 F.3d 399 (7th Cir. 2000), cert. denied 121 S. Ct 191 (2000).

Finding that the plaintiffs could not show that one gender was subjected to a working environment different from the other, the court said: "Both before and after Oncale, we have noted that because 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 treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly)."[76]

The Ninth Circuit and a district court in the Tenth Circuit have rejected the defense. In Steiner v. Showboat Operating Company,[77] the Ninth Circuit stated in dicta that evidence of an equal-opportunity harasser would not bar sexual harassment claims against that harasser by both men and women. Barbara Steiner alleged that her supervisor spoke to her in a threatening and derogatory fashion using sexually explicit and offensive terms. The employer argued that the supervisor harassed everyone and, therefore, was not harassing Steiner based on her sex. The court accepted the fact that the supervisor was abusive to both men and women. However, the court distinguished the supervisor's treatment of Steiner from his treatment of male employees, finding that his offensive conduct toward women was clearly related to their gender, while his conduct toward men was not. The court's reasoning denied the equal-opportunity-harasser defense and suggested that it would allow both men and women to lodge successful claims of sexual harassment against the same harasser.

The district court in Chiapuzio v. BLT Operating Corporation,[78] analyzed the "because of sex" requirement on an individual basis and denied the equal-opportunity-harasser defense. Dale and Carla Chiapuzio, a married couple, complained that their supervisor continuously subjected them to sexually abusive remarks. Specifically, he commented that Dale could not satisfy his wife sexually and that he, the supervisor, could do a better job. When speaking to Carla, the supervisor made sexually explicit advances. The employer argued that since the supervisor

[76] Id. at 403.

[77] 25 F.3d 1459 (9th Cir. 1994).

[78] 826 F. Supp. 1334 (D. Wyo. 1993).

harassed both men and women, he could not have discriminated against the Chiapuzios because of either's sex.

The court determined that both plaintiff's were harassed because of their sex. The supervisor attempted to demean and harass Dale because he was male due to remarks regarding his sexual prowess. Such remarks would not have created the same effect had he been a woman. The supervisor propositioned Carla because she was a woman. The key to the court's analysis was not whether the perpetrator harassed only members of one gender, but whether gender was a significant factor in each allegation of harassment.

IV. RETALIATION

"Retaliation is a fancy form of revenge."[79] Both Title VII and the Title IX regulations prohibit retaliation against persons who file a discrimination charge, who testify on behalf of the complaining party, or who oppose in any manner discriminatory treatment. Retaliation claims have exploded in the last ten years. In 1991, the EEOC received 7,900 retaliation charges. By 1997 the number of charges had more than doubled to 18,100. In 1999, retaliation charges constituted 22.5 percent of all EEOC charges.[80]

Plaintiffs are becoming more successful in bringing retaliation claims than they are in their original discrimination claims. Juries seem to presume that there is a causal connection between a complaint by an employee and any subsequent negative actions an employer might take in regard to that person's employment.

The process of retaliation begins when an individual makes a complaint about possible wrongdoing by the institution. For example, a man files a charge with EEOC of sexual harassment by his supervisor. Soon after filing the charge, he is demoted. Or, a student files an internal charge that her coach sexually harassed her. After that, she is cut from the team.

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[79] Ann H. Franke and Thomas M. Santoro, "The High Stakes Game of Retaliation on Campus: Complaints, Confidentiality, and Compliance," The University of Vermont 10th Annual Conference on Legal Issues in Higher Education, October 2000.

[80] United Educators, "Wrongdoing and Revenge: The Essence of Retaliation Claims," 2 Employment Action 1 (Spring 1999).

Claims of unlawful retaliation do not depend on the success of the underlying claim.[81] The plaintiff must only establish that he or she reasonably believed the complained-of practices were illegal to be covered under the anti-retaliation provisions of Title VII and Title IX.[82]

A. Establishing the Prima Facie Case

To establish a prima facie case of retaliation under Title VII, an employee must show that: (1) he or she has engaged in protected activity; (2) the employer has taken an adverse employment action against the employee and (3) a causal connection exists between the protected activity and the adverse action.[83] Protected activity is defined as being opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in an investigation or hearing. Adverse employment actions include termination, failure to promote, demotion, reprimands, harassment, loss of normal work assignments, salary reduction, intimidating and threatening comments.[84] While there is general agreement among the federal circuits on these severe employment actions, there is sharp disagreement when lesser employment actions take place.[85]

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[81] See Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994) ("As for the participation clause, there is nothing in its wording requiring that the charges be valid, nor even that they be reasonable."); Volberg v. Pataki, 917 F. Supp. 909, 914 (N.D.N.Y.) ("It is well-settled that a finding of unlawful retaliation generally does not depend on the merits of the underlying discrimination complaint."), aff'd mem., 112 F.3d 507 (2nd Cir. 1996).

[82] See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261-62 (1st Cir. 1999) ("Neither state nor federal law requires that the reported condition, activity, or practice actually be unsafe or illegal; under either scheme an employee's reasonable belief that it crosses the line suffices, as long as the complainant communicates that belief to his employer in good faith.") (emphasis in original).

[83] See Mota v. University of Texas Houston Health Science Ctr., 261 F.3d 512, 519 (5th Cir. 2001).

[84] See generally, Barbara Lindemann and Paul Grossman, I Employment Discrimination Law 668-69 (3rd ed. 1996) and 1998 Supp. at 256-57; See also, Fielder v. UAL Corp., 218 F.3d 973 (9th Cir. 2000) (holding that an adverse employment action results when an employee is demoted or given a disadvantageous transfer, assignment or job evaluation); Harrison v. Metropolitan Government, 80 F.3d 1107, 1119 (6th Cir. 1996) (supervisor's threatening comments and excessive scrutiny of performance is adverse employment action); Humphreys v. Medical Towers, 893 F. Supp. 672, 687 (S.D. Tex. 1995) (refusing to discipline a harassing supervisor is an adverse employment action).

[85] See Oyoyo v. Baylor Health Network, 2000 WL 655427 (N.D. Tex., May 17, 2000) (employer's refusal to allow employee to set her own working hours, monitoring her telephone usage, and failing to provide her keys to office while giving keys to others are not adverse employment actions); Benningfield v. City of Houston, 157 F.3d 369, 377 (5th Cir. 1998) (changing employee's work schedule and increasing workload are merely administrative decisions and do not constitute type of ultimate employment decisions

To demonstrate causation, the plaintiff must show that "but for" the protected activity, the [adverse employment action] would not have occurred..[86] Timing is often a key factor in a jury finding that an employer did indeed take retaliatory action.

B. Defendant Must Produce Legitimate, Non-Discriminatory Reasons

Should the plaintiff establish a prima facie case of retaliation, the burden of production shifts to the defendant to proffer legitimate, non-discriminatory reasons for its actions.

C. Plaintiff Must Show Defendant's Reasons Not True

When the defendant produces these reasons, the plaintiff bears the ultimate burden of showing that the reasons given are not true. A jury may then infer retaliation.[87]

D. Retaliation in Same-Sex Sexual Harassment Cases

Courts have found retaliation in some same-sex sexual harassment cases and not in others, including several of the cases discussed earlier in this paper. In Mota v. University of Texas Houston Health Science Center,[88] the Fifth Circuit upheld a jury verdict in favor of Dr. Mota on his retaliation claim. After Mota filed a charge with the University and with EEOC of same-sex sexual harassment by his department chair, the University denied Mota a $2,500 stipend for serving as the dental school clinical

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contemplated by Title VII); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (4th Cir. 1997) (holding that loss of status and prestige that accompanied removal of supervisor's staff when salary and position remained same did not constitute adverse employment action); Speer v.Rand McNally, 123 F.3d 658, 664 (7th Cir. 1997) ("[A] poor performance evaluation alone, even if undeserved, is not an adverse action for purposes of Title VII."); Munday v. Waste Management of North America, 126 F.3d 239, 244 (4th Cir. 1997) (yelling at employee during public meeting, directing other employees to ignore and spy on her, and refusing to communicate with her are not adverse employment actions); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (holding that change in duties that cause no materially significant disadvantage are insufficient to establish adverse action); Flaherty v. Gas Research Institute, 31 F.3d 451, 457 (7th Cir. 1994) ("bruised ego" and semantic change in title not adverse action where pay, benefits, and level of responsibility remained same).

[86] Mississippi State University v. Vadie, 218 F.3d 365, 374 (5th Cir. 2000).

[87] See Reeves v. Sanderson Plumbing Co., 530 U.S. 133 (2000).

[88] 261 F.3d 512 (5th Cir. 2001).

coordinator, denied Mota's request for a paid six-month leave of absence, denied his request for additional unpaid leave, and ultimately terminated him. The court sufficient evidence from which the jury could have inferred retaliation against Mota by the University because of his participation in protected activity.

In Dandan v. Radisson Hotel Lisle,[89] Dandan sued alleging that after he complained about sexually harassing treatment by his co-workers, he was suspended for two weeks for failing to follow a request not to chew gum. (A normal suspension for such an infraction was three to five days.) The district court dismissed Dandan's claim of sexual harassment, finding that the bigoted comments inflicted upon him were due to his co-workers' perception of his sexual orientation, which is not actionable under Title VII. The defendant, Radisson Hotel, argued that his retaliation claim should be dismissed also since there was no merit in the harassment claim. The court disagreed, holding that Dandan had a reasonable, good faith belief that the constant vulgar and offensive language directed at him created a valid claim of discrimination. Under Title VII, a plaintiff's retaliation claim does not depend on the success of the sexual harassment claim. Instead, it is sufficient if the plaintiff has a reasonable belief that he is challenging conduct that violates Title VII.[90]

Dismissing the plaintiff's retaliatory discharge claim while permitting his sexual harassment claim to go forward, the Seventh Circuit in Shepherd v. Slater Steels Corporation,[91] found no evidence that the employer's explanation for plaintiff's termination to be pretextual. The company had fired both the alleged harassing supervisor and the victim for fighting with clubs on company property.

E. Jurisdictional Challenges to Title IX Retaliation Suits

While beyond the scope of this paper, it is important to note that jurisdictional challenges to Title IX cases are being raised since the decision of the Supreme Court in Alexander v. Sandoval.[92] In Sandoval, the Court held that a private plaintiff may not

[89] 2000 WL 336528 (N.D. Ill., Mar. 28, 2000).

[90] Id. at *4.

[91] 168 F.3d 998 (7th Cir. 1999).

[92] 532 U. S.275 (2001).

sue under Title VI of the Civil Rights Act of 1964 to enforce rights granted or protected by federal regulations rather than the text of the statute itself. (The Court had earlier said that since both Title IX and Title VI were passed pursuant to the Spending Clause, Congress intended for Title IX to be interpreted and enforced in the same manner as Title VI.)

For example, retaliation is prohibited by the enforcement regulations promulgated by the Department of Education.[93] Arguably, there is no private right of action to enforce the anti-retaliation provision. Enforcement is accomplished through termination of federal financial assistance.

The only court to consider whether Sandoval's holding applies in the Title IX context concluded that it does, thus barring a claim for retaliation under Title IX:

> [A]lthough it specifically dealt with Title VI, the principles underlying the holding in Sandoval logically limit the scope of the private right of action to enforce Title IX. In the wake of Sandoval, the private right of action in such cases extends only to the substantive provisions contained in the statutes themselves, or to the valid interpretive regulations. Thus, an individual may no longer bring suit to enforce effectuating regulations enacted pursuant to Title IX that expand the scope of prohibited discrimination.[94]

[93] See 34 C.F.R. § 100.71 (incorporating by reference the procedural provisions of Title VI). One of the incorporated Title VI regulations bars a recipient of federal funds from retaliating against one who complains of gender discrimination in violation of Title IX.

[94] Litman v. George Mason Univ., 156 F. Supp.2d 579, 587 (E.D. Va. 2001).