

# Same-Sex Sexual Harassment Claims: Maintaining Equality Under Title VII - *Wrighton v. Pizza Hut of America, Inc.*

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# **SAME-SEX SEXUAL HARASSMENT CLAIMS: MAINTAINING EQUALITY UNDER TITLE VII— WRIGHTSON V. PIZZA HUT OF AMERICA, INC.**

## **I. INTRODUCTION**

The passage of the Civil Rights Act of 1964,<sup>1</sup> namely Title VII, was a legislative victory for proponents of workplace equality. Title VII, which forbids an employer from discriminating against an employee “because of [his/her] ... sex,” has since afforded numerous employees redressibility for sexual harassment.<sup>2</sup> On October 31, 1996, the United States Court of Appeals for the Fourth Circuit, in *Wrightson v. Pizza Hut of America, Inc.*,<sup>3</sup> extended Title VII’s protective reach to claimants alleging harassment by a perpetrator of the same sex, provided that the perpetrator is homosexual.<sup>4</sup> The *Wrightson* decision highlighted the disagreement between those federal appellate courts that preclude same-sex harassment claims and those that recognize such claims.

This Note begins with a synopsis of the facts and procedural holdings of *Wrightson*. A discussion follows of the influential cases and legislation from which *Wrightson* evolved. Finally, an evaluation and analysis of the court’s holding and dissent is presented, focusing on the case’s value and future implications.

## **II. STATEMENT OF THE CASE**

From March 1993 until March 1994, sixteen-year old Arthur Wrightson was employed as a cook and waiter by a local Pizza Hut restaurant in North Carolina.<sup>5</sup> At that time, Wrightson’s immediate supervisor was Bobby Howard, an openly homosexual male.<sup>6</sup> Nearly eight months after

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1. 42 U.S.C. § 2000e-2(a)(1) (1994).

2. Title VII’s text reads:

It shall be unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin;

*Id.* (emphasis added).

3. 99 F.3d 138 (4th Cir. 1996), *rev’d* 909 F. Supp. 367 (W.D.N.C. 1995).

4. *Id.* at 144.

5. *Id.* at 139.

6. *Id.*

Wrightson began working at the restaurant, Howard and the other homosexual male employees began to sexually harass Wrightson as well as the other heterosexual male employees.<sup>7</sup> Howard made sexual advances towards Wrightson, explicitly describing homosexual sex in an attempt to pressure Wrightson into participating in the described acts.<sup>8</sup> Howard also harassed Wrightson by provocatively rubbing against Wrightson, squeezing Wrightson's buttocks, and pulling Wrightson's pants out in order to look down them.<sup>9</sup> Likewise, Howard harassed the other heterosexual male employees, attempting to kiss one of them as the employee left the restaurant.<sup>10</sup> This harassment was not directed, however, towards any female or homosexual male employees.<sup>11</sup>

Wrightson and his heterosexual male co-workers clearly insisted that Howard stop the harassment, threatening to file formal complaints.<sup>12</sup> Additionally, the restaurant's manager and assistant manager were cognizant of the harassment, personally witnessing the abusive conduct several times.<sup>13</sup> The manager even held a meeting with Howard and the others during which the manager informed them that their actions "violated federal law."<sup>14</sup> Nevertheless, the harassment persisted.<sup>15</sup>

In August of 1995, Wrightson filed suit against Pizza Hut in the

7. *Id.* After a male employee was hired at this particular Pizza Hut, the homosexual employees routinely launched an effort to determine the new employee's sexual preference. *Id.* If the employee was heterosexual, pressure was then placed upon the new employee to engage in homosexual acts. *Id.*

8. *Id.* The complaint alleged that:

[D]uring working hours [Howard] made numerous comments to [Wrightson] of a graphic and explicit nature wherein Howard ... would graphically describe his homosexual lifestyle and homosexual sex, would make sexual advances towards [Wrightson], would subject [Wrightson] to vulgar homosexual sexual remarks, innuendoes and suggestions, and would otherwise embarrass and humiliate [Wrightson] by questioning [him] as to why he did not wish to engage in homosexual activity and would encourage and invite [Wrightson] to engage in such homosexual activity.

*Id.* at 139-40. Although not as extreme as Howard's behavior, the other homosexual male employees at Pizza Hut made similar sexually explicit comments to Wrightson. *Id.* at 140.

9. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 140 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995). Howard also repeatedly ran his fingers through Wrightson's hair and massaged Wrightson's shoulders. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The manager of the restaurant, Jennifer Tyson, "admitted to Wrightson's mother that [Tyson] was aware of the harassment and also that Howard's actions constituted sexual harassment, but [Tyson] contended that she was unable to control Howard." *Id.*

14. "After this meeting, the homosexual employees joked about the possibility of a federal sexual harassment suit, and the harassment continued and 'intensified.'" *Id.* at 140-41.

15. *Id.* at 141.

United States District Court for the Western District of North Carolina alleging sexual harassment and discrimination in violation of Title VII of the Civil Rights Act of 1964, as well as the negligent retention of an employee and the intentional infliction of emotional distress.<sup>16</sup> In response, Pizza Hut filed a motion to dismiss for failure to state a claim and for lack of jurisdiction.<sup>17</sup> The district court dismissed Wrightson's complaint, finding "no evidence that Congress intended to prohibit intra-gender harassment in enacting Title VII."<sup>18</sup> However, the Court of Appeals for the Fourth Circuit reversed the district court's decision, applying Title VII's protection to same-sex sexual harassment claims only in the limited circumstance that "the perpetrator of the ... harassment is *homosexual*."<sup>19</sup>

### III. BACKGROUND OF THE LAW

Since Title VII's passage, numerous sexual discrimination claims have been filed in federal courts. However, plaintiffs have recently filed an increasing number of non-traditional discrimination claims, alleging discrimination by a supervisor of the *same* sex.<sup>20</sup> The inconclusive legislative history regarding Title VII, as well as the inconsistent and irreconcilable law preceding *Wrightson*, has left the circuits "hopelessly divided."<sup>21</sup>

#### A. *The Statute*

Fundamentally, the courts have struggled to ascertain a single interpretation of Title VII's text.<sup>22</sup> In the days leading up to Title VII's pas-

16. *Wrightson v. Pizza Hut of Am. Inc.*, 909 F. Supp. 367, 367 (W.D.N.C. 1995).

17. *Id.* at 368.

18. *Id.*

19. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141, 144 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995) (emphasis added).

20. *See, e.g.*, Cullen P. Cowley, Comment, *Same-Gender Harassment and Homosexuality in Title VII Sexual Harassment Litigation*, 50 WASH. U. J. URB. & CONTEMP. L. 443, 444 n.5 (1996); Pamela J. Papish, Comment, *Homosexual Harassment or Heterosexual Horseplay? The False Dichotomy of Same-Sex Sexual Harassment*, 28 COLUM. HUM. RTS. L. REV. 201, 203 n.7 (1996).

21. *See, e.g.*, *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.4 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 72 (1996) ("[T]he lower federal courts which have [addressed this issue] are hopelessly divided.").

22. *See* 42 U.S.C. § 2000e-2(a)(1) (1994); *see also* *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 755 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996) (Wilkinson, J., concurring) ("The general language used by Congress in Title VII makes its intentions with respect to the actionability of same sex conduct ambiguous at best.").

sage, there was minimal congressional discussion regarding the last-minute addition of the word "sex" to the bill's list of forbidden discrimination bases.<sup>23</sup> Commentators have suggested that the true motive behind the word's addition was a faction of conservative legislators' strategic attempt to defeat the bill by splitting the liberal votes.<sup>24</sup> However, the effort to build up opposition to the bill backfired.<sup>25</sup> Title VII passed as amended, resulting in an unfortunate lack of concrete legislative history to use as an interpretation tool.<sup>26</sup>

The limited congressional record does, however, include discussion of "do[ing] some good for the minority sex."<sup>27</sup> Nevertheless, the United States Supreme Court has "interpreted [Title VII's] broad language to protect both men and women."<sup>28</sup> In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,<sup>29</sup> the Court examined an insurance plan that afforded a more comprehensive pregnancy-benefits package to married female employees than to the spouses of married male employees.<sup>30</sup> The Court held that the plan discriminated against males, violating Title VII.<sup>31</sup> In reaching this conclusion, the Court opined that although "congressional discussion focused on the needs of female members of the workforce ... [t]his does not create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment."<sup>32</sup> Thus, the congressional conversations that perhaps instigated the addition of the word "sex" to Title VII did not implicitly limit Title VII's scope.

While the Supreme Court has not to date addressed the issue of same-sex sexual harassment, the Court has suggested that the word "sex" in Title VII is interchangeable with the word "gender," precluding

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23. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986) (citing 110 CONG. REC. 2577-84 (1964)).

24. Amy Shahan, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Sexual Harassment*, 48 BAYLOR L. REV. 507, 510 (1996).

25. *Id.*

26. *Meritor*, 477 U.S. at 63-64; see also Shahan, *supra* note 24, at 510 ("Perhaps the manner in which Congress included the term 'sex' explains why Congress neglected to define the term.").

27. 110 CONG. REC. 2577 (1964) (emphasis added).

28. *Hopkins*, 77 F.3d at 749-50 (citation omitted).

29. 462 U.S. 669 (1983).

30. *Id.* at 671-72. The plan was examined under the Pregnancy Discrimination Act which amended Title VII in 1978. *Id.* Thus, as amended, Title VII's prohibition of sex discrimination included discrimination on the basis of pregnancy. *Id.*

31. *Id.* at 676.

32. *Id.* at 679.

a broad interpretation of "sex" that would include discrimination based upon sexual orientation.<sup>33</sup>

### B. The Cases

Despite the lack of formal legislative guidance, sexual harassment has long been acknowledged as a form of sexual discrimination under Title VII.<sup>34</sup> The legal community routinely recognizes two types of sexual harassment claims: quid pro quo claims and "hostile work environment" claims.<sup>35</sup> A quid pro quo claim for sexual harassment exists when "sexual consideration is demanded in exchange for job benefits."<sup>36</sup> Alternatively, as defined by the Supreme Court of the United States in *Meritor Savings Bank v. Vinson*, a "hostile work environment" claim is not necessarily set against the background of economic or career manipulation.<sup>37</sup> Instead, such a claim is based upon unreasonable, and perhaps intangible, interferences with an employee's work performance or environment, including "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical [sexual] conduct."<sup>38</sup>

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33. *Hopkins*, 77 F.3d at 749 n.1 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989) (using "gender" and "sex" interchangeably)).

34. EEOC Compl. Man. (CCH), § 615.2 (a) (1987). The Equal Employment Opportunity Commission's Guidelines, while not binding upon any court of law, are highly instructive due to the commission's statutory authority to administer Title VII. See, e.g., Christopher W. Deering, *Same-Gender Sexual Harassment: A Need to Re-examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because of" Sex*, 27 CUMB. L. REV. 231, 237 n.37 (1996); see also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

35. *Meritor*, 477 U.S. at 64-65.

36. *Spencer v. General Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1989). A *prima facie* case for quid pro quo sexual harassment has five elements: (1) the employee is a member of a "protected group"; (2) the employee has experienced unwelcome sexual harassment; (3) the harassment was "because of" the claimant's sex; (4) the harassment "affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment"; and (5) the employer knew of the harassment and took no action. *Id.*; *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983).

37. *Meritor*, 477 U.S. at 66-67

38. *Id.* at 65. The elements of a *prima facie* "hostile work environment" claim are: (1) that the questionable conduct was unwelcome; (2) that the harassment was "because of" the victim's sex; (3) that the harassment was "sufficiently severe to create a hostile work environment"; and (4) that a basis exists for imputing liability to the employer. *Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) (citations omitted). "The rationale for the hostile-environment doctrine is that sufficiently abusive harassment adversely affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Yeary v. Goodwill Indus.-Knoxville*, 107 F.3d 443, 445 (6th Cir. 1997) (citations omitted).

In 1994, in *Garcia v. Elf Atochem North America*,<sup>39</sup> the Court of Appeals for the Fifth Circuit became the first federal appellate court to directly address the issue of same-sex sexual harassment.<sup>40</sup> The male claimant in *Garcia* alleged that another male employee had sexually grabbed the claimant on several occasions.<sup>41</sup> Devoting a mere paragraph to its analysis, the Fifth Circuit concluded that such a claim was not viable under Title VII.<sup>42</sup> According to the court, the repeated, provocative grabbing of a male employee by a male supervisor “could not in *any event* constitute sexual harassment within the purview of Title VII.”<sup>43</sup> The Fifth Circuit, by failing to elaborate on its reasoning, set precedent for unilaterally denying relief to all non-traditional claimants<sup>44</sup> without providing more than a scintilla of independent, analytical guidance for future courts.

Nearly two years later, in *McWilliams v. Fairfax County Board Of Supervisors*,<sup>45</sup> the Fourth Circuit Court of Appeals denied relief to a heterosexual male employee who alleged that other male employees had verbally and physically assaulted him in a sexual manner.<sup>46</sup> Of particular significance is the fact that the *McWilliams* claimant never set forth any allegations or factual propositions regarding the harassers’ sexual orientation.<sup>47</sup> Thus, the Fourth Circuit ultimately rejected the feasibility of the “hostile work environment” harassment claim because both the perpetrator and the claimant were presumably heterosexual

39. 28 F.3d 446 (5th Cir. 1994).

40. *Id.* Prior to *Garcia*, federal district courts from various circuits had struggled with the issue. See Deering, *supra* note 34, at 248. Most of the early cases seemed to suggest that a same-sex sexual harassment claim would be within Title VII’s reach. *Id.*

41. *Garcia*, 28 F.3d at 448.

42. *Id.* at 451-52. The court ultimately dismissed the case on other grounds. *Id.*

43. *Id.* at 452 (emphasis added).

44. *Id.* The court made this clear when it succinctly stated that “[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.” *Id.* at 451-52 (citation omitted).

45. 72 F.3d 1191 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 72 (1996).

46. *Id.* at 1193. The conduct in question included: “[tying] McWilliams’ hands together, blindfold[ing] him, and forc[ing] him to his knees”; placing a male employee’s “finger in McWilliams’ mouth to stimulate oral sex”; placing “a broomstick to McWilliams’ anus” while a male employee exposed his genitals to McWilliams; and fondling McWilliams. *Id.*

47. *Id.* at 1195 n.5. In a thought-provoking dissent, Judge Michael called into question the majority’s apparent requirement that a harasser and a victim be of different sexual orientations. *Id.* at 1198 (Michael, J., dissenting). Acknowledging that while evidence of one’s (particularly of a harasser’s) sexual preference could be relevant to a claim, Judge Michael reasoned that “it should not be elevated to a required element of the plaintiff’s proof.” *Id.*

males.<sup>48</sup> In coming to this conclusion, the court focused on Title VII's critical "because of" language<sup>49</sup> and questioned whether "heterosexual-male-on-heterosexual-male" sexual behavior, although offensive and insulting, could ever satisfy the requisite causal element of Title VII.<sup>50</sup> The court concluded that the "shameful" type of behavior alleged in *McWilliams* could have transpired "because of" many things, including the claimant's "prudery" or "vulnerability" and the perpetrator's "sexual perversion," "insecurity," or "meanness of spirit."<sup>51</sup> But, the court reasoned the behavior had not transpired "specifically 'because of' the victim's sex."<sup>52</sup>

The *McWilliams* court specifically drew attention to the limits of its holding, indicating it would not necessarily bar quid pro quo claims of "discrimination by adverse employment decisions (hiring, firing, etc.)" involving two same-sex heterosexuals.<sup>53</sup> The court also emphasized that the holding did not claim to address any type of same-sex sexual harassment claim where the perpetrator and/or the claimant were homosexual or bisexual.<sup>54</sup> The court did suggest, however, that if Title VII was applied to same-sex claims, the "fact of homosexuality (to include bisexuality) should be considered an *essential* element of the claim, to be alleged and proved."<sup>55</sup> Furthermore, the court stated that proof of a harasser's homosexuality must include more than "merely suggestive" conduct.<sup>56</sup> In sum, the court concluded: "There perhaps 'ought to be a law against' such puerile and repulsive workplace behavior even when it involves only heterosexual workers of the same sex, in order to protect the victims against its indignities and debilitations, but we conclude that Title VII is not that law."<sup>57</sup>

Soon after deciding *McWilliams*, the Fourth Circuit once again addressed a same-sex harassment claim, and once again highlighted the limitations of the *McWilliams* holding.<sup>58</sup> In *Hopkins v. Baltimore Gas &*

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48. *Id.* at 1195.

49. *Id.* at 1195; *See* 42 U.S.C. § 2000e-2(a)(1) (1994).

50. *McWilliams*, 72 F.3d 1191 at 1195-96.

51. *Id.* at 1196.

52. *Id.*

53. *Id.* at 1195 n.4.

54. *Id.*

55. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.5. (4th Cir. 1996), *cert denied*, 117 S. Ct. 72 (1996).

56. *Id.*

57. *Id.* at 1196.

58. *See id.* at 1195 n.4.



*Electric Co.*,<sup>59</sup> the Fourth Circuit dismissed a “hostile work environment” claim involving two males. Judge Niemeyer, writing as part of the majority, concluded that a same-sex sexual harassment claim could be actionable given the “appropriate circumstances.”<sup>60</sup> Specifically, the majority concluded that “sexual harassment of a male employee ... by another male ... may be actionable under Title VII if the basis for the harassment is *because* the employee is a man.”<sup>61</sup> Although the court provided a lengthy discussion on the history of the causal element in a same-sex claim, the court never actually reached the issue of whether the harassment in *Hopkins* was based upon the employee’s sex.<sup>62</sup> Such an analysis was effectively precluded by the court’s determination that the claimant did not establish the requisite severity for a “hostile work environment claim.”<sup>63</sup> Nevertheless, the court stressed that a correct analysis under Title VII would focus on an employee’s status as a man or woman, regardless of the employer’s gender.<sup>64</sup>

In 1996, the Court of Appeals for the Eighth Circuit, in *Quick v. Donaldson Co.*,<sup>65</sup> became the first federal appellate court to recognize the viability of same-sex claims, specifically including claims in which both the perpetrator and the victim are heterosexuals.<sup>66</sup> In its reasoning, the court offered the broad statement that if “members of one sex are exposed to disadvantageous ... conditions of employment to which members of the other sex are not exposed,” Title VII’s causal element is satisfied.<sup>67</sup> This rationale directly contradicted the equally broad language of *Garcia* that expressly barred same-sex cases from ever satisfying Title VII’s causal element.<sup>68</sup> Moreover, the *Quick* court rejected the *McWilliams* court’s suggestion that a harasser must be proven to be homosexual or bisexual, effectively removing any discussion of a harasser’s

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59. 77 F.3d 745 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996).

60. *Id.* at 751.

61. *Id.* at 752 (emphasis added). *But see McWilliams*, 72 F.3d at 1195 (dismissing hostile environment claim because both the alleged harasser and the claimant were heterosexual males).

62. *Hopkins*, 77 F.3d at 754.

63. *Id.* at 753.

64. *Id.* at 752.

65. 90 F.3d 1372 (8th Cir. 1996).

66. *Id.* at 1379.

67. *Id.* at 1378.

68. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994); *see also McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1193 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 72 (1996).

motive from a proper analysis of same-sex harassment claims.<sup>69</sup> Under *Quick*, whether a harasser acts “because of” perversion, attraction, or sheer cruelty, if the harasser treats members of one sex disparately from the other sex, federal law covers the conduct.<sup>70</sup>

While the *Quick* decision provided hope for future same-sex claimants, it did not resolve the contradictory rationale among the circuits. Just months after deciding *Quick*, the Court of Appeals for the Fifth Circuit revisited same-sex sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.*<sup>71</sup> In *Oncale*, the court was encumbered with graphic and egregious facts including forceful acts of sexual perversion among males.<sup>72</sup> The Fifth Circuit discarded the judicial trend of other circuits to entertain the possibility of same-sex claim viability.<sup>73</sup> Instead, the court concluded they were bound by *Garcia* and dismissed the victim’s claim.<sup>74</sup>

The disparity among the federal appellate decisions, particularly between *Quick* and *Garcia*, has presented courts, such as the Fourth Circuit Court of Appeals in *Wrightson*, with inconsistent analyses regarding the viability of same-sex harassment claims.

#### IV. EVALUATION OF THE CASE

##### A. The Opinion

The United States District Court for the Western District of North Carolina in *Wrightson* relied heavily upon the vague, yet preclusive, rationale of *Garcia*.<sup>75</sup> However, the appellate court chose to pursue a different approach. In an opinion authored by Judge Luttig, the Fourth Circuit Court of Appeals narrowly held that a same-sex “hostile work environment” sexual harassment claim is viable under Title VII, pro-

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69. *Quick*, 90 F.3d at 1378.

70. *Id.*; see also *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996).

71. 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997).

72. *Id.* at 118. *Oncale* alleged that co-workers had held him down while his supervisor placed his genitals upon *Oncale*’s neck; that on another occasion his supervisor threatened him with homosexual rape; and yet on another occasion *Oncale*’s supervisor used force to push a bar of soap into *Oncale*’s anus. *Id.*

73. *Id.* at 118.

74. *Id.* at 119. The court did entertain the argument that *Garcia*’s language striking down male-to-male claims was merely dicta. *Id.* at 120. Nevertheless, the court concluded that *Garcia* is binding precedent. *Id.*

75. *Wrightson v. Pizza Hut of Am., Inc.*, 909 F. Supp. 367, 368 (W.D.N.C. 1995), *rev’d*, 99 F.3d 138 (4th Cir. 1996).

vided that the perpetrator is homosexual.<sup>76</sup>

In reaching this conclusion, the majority initially reiterated the elements of a *prima facie* "hostile work environment" claim.<sup>77</sup> The court then focused on the crucial causation language of Title VII,<sup>78</sup> pointing out that an employer of either sex who *only* treats employees of the same sex in an abusive or hostile way, would be discriminating *because of the employee's sex*.<sup>79</sup> Likewise, an employer who only treats employees of the opposite sex adversely would be discriminating *because of sex*.<sup>80</sup> The court concluded that Howard would not have harassed Wrightson *but for* the fact that Wrightson was a male.<sup>81</sup> In sum, the court of appeals clearly rejected the district court's interpretation of Title VII to require that a claimant and a perpetrator be of opposite sexes.<sup>82</sup>

The court also employed the persuasive guidance of the Equal Employment Opportunity Commission's ("EEOC") compliance manual, noting the manual's explicit recognition of same-sex sexual harassment.<sup>83</sup> The court specifically pointed out the manual's utilization of an exemplary fact pattern similar to the facts in *Wrightson*.<sup>84</sup> Applying the

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76. *Wrightson*, 99 F.3d at 141.

77. *Id.* at 142 (citations omitted).

78. *Id.* at 142.

79. *Id.*

80. *Id.*

81. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995).

82. *Id.* at 142. The court stated that:

Through its proscription of "employer" discrimination against "individual" employees, the statute obviously places no gender limitation whatsoever on the perpetrator or the target of the harassment. Therefore, the only possible source of condition that the harasser and victim be of different sexes is Title VII's causal requirement that the discrimination be "because of" the employee's sex. In this causal requirement we find no such limitation either .... There is ... simply no "logical connection" between [the] requirement that the discrimination be "because of" the employee's sex and a requirement that a harasser and victim be of different sexes.

*Id.*

83. *Id.* The compliance manual specifically states: "[t]he victim does not have to be of the opposite sex from the harasser ... [T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex." EEOC Compl. Man. (CCH) § 615.2(b)(3) (1987).

84. *Wrightson*, 99 F.3d at 143. The manual's text reads:

*Example 1*—If a male supervisor of male and female employees makes unwelcome sexual advances toward a male employee because the employee is male but does not make similar advances toward female employees, then the male supervisor's conduct may constitute sexual harassment since the disparate treatment is based on the male employee's sex.

EEOC's interpretation, the court reasoned that a homosexual male supervisor's "unwelcome sexual advances" towards male employees but not towards female employees violated Title VII.<sup>85</sup>

Additionally, the court addressed Pizza Hut of America's contention that Wrightson's claim was truly based upon his sexual orientation.<sup>86</sup> Acknowledging that a claim based upon sexual orientation is not actionable under Title VII, the court clarified that discrimination based upon sexual orientation was never alleged in this case.<sup>87</sup> Moreover, the court took its analysis one step further, holding that if Wrightson had concurrently alleged discrimination based upon the fact he was a male *and* the fact he was a heterosexual, the claim would still be actionable.<sup>88</sup> The court reasoned that the words "because of" cannot be equated with the words "*solely* because of."<sup>89</sup> Thus, according to the majority opinion, "Title VII meant to condemn even those [claims] based on a mixture of legitimate and illegitimate considerations."<sup>90</sup>

Lastly, the court validated other courts' predictions that expanding Title VII would inevitably result in an influx of same-sex claims.<sup>91</sup> Determining that its role was to "faithfully interpret" Title VII,<sup>92</sup> the court opined that it had a duty to sustain causes of action "unmistakably provided" for by Congress.<sup>93</sup>

### B. The Dissent

In his dissenting opinion, Circuit Judge Murnaghan expressed his discord with the majority's attempt to "stretch Title VII's 'because of' sex language to include 'unmanageably broad protection of the sensibili-

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EEOC Compl. Man. (CCH) § 615.2(b)(3) (1987).

85. *Wrightson*, 99 F.3d at 143.

86. *Id.* Pizza Hut contended that even if a same-sex harassment claim is actionable under Title VII, Wrightson's claim must still be dismissed because the harassment was not because he was male, but rather because he was heterosexual. *Id.*

87. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 144 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995). The complaint specifically alleged that Wrightson was "discriminated against 'because of his sex, male.'" *Id.* at 143.

88. *Id.* at 144.

89. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989)).

90. *Id.*

91. *Id.* ("[W]e recognize and appreciate the reasons for reticence of many of the federal courts to recognize a cause of action under Title VII for same-sex discrimination. We, as they, have no doubt that an expanded interpretation of Title VII will result in a significant increase in litigation under this antidiscrimination provision.")

92. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 144 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995).

93. *Id.*

ties of workers simply in matters of sex.”<sup>94</sup> Murnaghan reiterated that Title VII was not enacted to rid the workplace of *all* insulting and distasteful behavior.<sup>95</sup> Instead, he posited that claims similar to Wrightson’s should be filed under state tort or employment law.<sup>96</sup>

Additionally, the dissenting opinion accused the majority of characterizing Title VII’s lack of legislative history as a “license to legislate” and “[a license] to include claims never intended, nor contemplated, by Congress.”<sup>97</sup> Judge Murnaghan looked to the outright preclusive language of *Garcia* as well as the “merely shameful behavior” analysis from *McWilliams* in concluding that “Title VII was not intended, nor does the statute provide, a path for Wrightson to obtain the relief he seeks.”<sup>98</sup>

## V. ANALYSIS OF THE CASE

The Fourth Circuit reached the correct result in *Wrightson v. Pizza Hut of America, Inc.* although it did not go far enough. A male employee, like Wrightson, who was forced to endure relentless verbal and physical harassment because he happened to be a male, should be afforded a cause of action under Title VII. However, an employee such as Wrightson should be afforded that cause of action regardless of his harasser’s sexual orientation. The *Wrightson* decision’s primary strength is the recognition of same-sex claims as cognizable under Title VII. The decision is flawed, however, insofar as it characterizes such cognizability as dependent upon the harasser’s sexual orientation.

### A. Statutory Interpretation

Under federal law, employment discrimination claims are bound by Title VII. As in all cases of statutory interpretation, the starting point of a thorough analysis is the plain language employed by Congress. Title VII’s plain language clearly prohibits discrimination “because of” an individual’s sex.<sup>99</sup> By failing to clearly define the term “sex,” Congress effectively “relinquished the duty to delineate proscribed behavior in the

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94. *Id.* (Murnaghan, J., dissenting) (quoting *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996)).

95. *Wrightson*, 99 F.3d at 144 (citing *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 755 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996)).

96. *Id.* The dissenting opinion suggested assault, battery, intentional infliction of emotional distress, and *respondeat superior* liability as alternative causes of action. *Id.*

97. *Id.* at 145.

98. *Wrightson*, 99 F.3d at 145-46 (Murnaghan, J., dissenting).

99. 42 U.S.C. § 2000e-2(a)(1) (1994).

workplace relating to 'sex' in the judiciary."<sup>100</sup> Critics of a broad interpretation of the term "sex," like Judge Murnaghan in the *Wrightson* dissent, argue that regardless of the statute's plain meaning, courts are ignoring the historical context within which Title VII was enacted.<sup>101</sup> Analogously, a majority of the legislative discussions with regard to Title VII's inclusion of the word "race" focused on the disparate treatment of African Americans in the workforce.<sup>102</sup> However, Title VII's protection is not denied "to other racial groups, such as Asian Americans or even white Americans, because the legislative history did not support such a finding."<sup>103</sup> Title VII, in general, was enacted with the "broad philosophical proposition" of "bring[ing] about equal opportunity in employment."<sup>104</sup> The statute encompasses people of all religions, all colors, all races, all national origins and all *sexes*.<sup>105</sup>

The *Wrightson* court correctly summarized: "[W]here Congress has unmistakably provided a cause of action, as it has through the plain language of Title VII, [the courts] are without authority in the guise of interpretation to deny that such exists, whatever the practical consequences."<sup>106</sup> In this sense, *Wrightson* "demonstrates the wisdom of the Constitution's three branches of government, which leaves to the legislative branch, not the judiciary, the task of making the law."<sup>107</sup> Thus, pursuant to Title VII's language, the Court of Appeals for the Fourth Circuit legitimately reasoned that it was compelled to afford *Wrightson* a cause of action given the fact that female employees were not subjected to the same abusive and offensive conduct.<sup>108</sup>

As Judge Murnaghan pointed out in his *Wrightson* dissent, *all* offensive conduct cannot conceivably be eliminated from the workplace via Title VII.<sup>109</sup> The conduct in *Wrightson*, as well as the conduct in the majority of previously discussed cases, is not merely "offensive" or "tasteless."<sup>110</sup> A graphic joke might be "tasteless." Displaying a sexual

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100. Shahan, *supra* note 24, at 510.

101. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 145 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995) (Murnaghan J., dissenting).

102. Papish, *supra* note 20, at 214-15 n.63.

103. *Id.*

104. Deering, *supra* note 34, at 271.

105. See 42 U.S.C. § 2000e-2(a)(1) (1994).

106. *Wrightson*, 99 F.3d at 144.

107. *Id.* at 145 (J. Murnaghan, dissenting).

108. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 144 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995).

109. *Id.* at 144 (Murnaghan, J., dissenting).

110. *Id.*

photo or cartoon might be "offensive." However, the groping of one's sexual anatomy, the relentless sexual propositions by a supervisor, the forceful penetration of a body cavity with a foreign object, and the obsessive inquiry and discussion about graphic, perverted sexual acts, are more than just "offensive" and "tasteless." Such actions are appalling, abusive, and hostile, and should be recognized as such. Moreover, if such actions are paired with the fact that only one sex is subjected to such abuse, these actions are sexually discriminatory under Title VII. Courts, such as the Fifth Circuit in *Garcia*, which have failed to recognize same-sex sexual harassment, have given homosexual and bisexual harassers "free rein to victimize same-sex employees without the threat of liability."<sup>111</sup>

### B. Sexual Orientation as a Required Element

The Fourth Circuit's analytical weakness lies specifically in restricting viability to same-sex claims in which the harasser is homosexual.<sup>112</sup> In *Wrightson*, the Fourth Circuit refuted the assertion that Title VII requires a claimant and a perpetrator be of opposite sexes.<sup>113</sup> However, in doing so, the court created a new requirement: that the perpetrator and claimant be of different sexual preferences.<sup>114</sup> This is incorrect reasoning. Whether a claim involves homosexual, bisexual, or heterosexual parties, discriminating against an employee "because of" an employee's sex is unlawful.<sup>115</sup>

Instead, the *Wrightson* court should have impelled its analysis towards the Eighth Circuit's expansive interpretation of Title VII in *Quick*.<sup>116</sup> The details of a perpetrator's sexual orientation should not be at issue in a Title VII claim as the *Wrightson* court suggests, since "[a]n employer ... never [has] a legitimate reason' for creating ... a hostile work environment" based upon an employee's sex.<sup>117</sup> Requiring an employee to offer proof of the harasser's sexual orientation is a step backwards in the realm of civil rights. Furthermore, as Judge Michael suggested in his *McWilliams* dissent, requiring a claimant to offer proof of

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111. Shahan, *supra* note 24, at 526.

112. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995).

113. *Id.*

114. *See, e.g., McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 72 (1996).

115. *See* 42 U.S.C. § 2000e-2(a)(1) (1994); *see also Quick*, 90 F.3d at 1378.

116. *See Quick v. Donaldson*, 90 F.3d 1372, 1377-80 (8th Cir. 1996).

117. *Id.* at 1378 (citations omitted) (emphasis added).

the harasser's sexual orientation "puts too fine a point" on the causal element.<sup>118</sup> In due time, the focus of Title VII claims would inevitable shift from the harassment's substantive and factual nature to a mingled and misleading inquisition into the "'true' sexual orientation of the harasser."<sup>119</sup> The unavoidable result would be a dangerous vehicle for unprecedented judicial pursuits into the personal lives of private citizens, as well as a chilling effect on what would otherwise be legitimate claims.

In sum, the *Wrightson* court's attempt to distinguish between heterosexual-heterosexual harassment and heterosexual-homosexual harassment "produces a result more discriminatory than a ruling [such as] *Garcia* that same sex discrimination is not covered by Title VII."<sup>120</sup> The merit of a claim should be based upon a harasser's actual conduct, not upon his or her hidden agenda. As Judge Murnaghan stated in his dissent, Title VII "was intended to lessen, not to increase, discrimination."<sup>121</sup>

### C. Subsequent Cases

Subsequent to *Wrightson*, several circuits have followed suit, holding that same-sex sexual harassment claims are indeed actionable under federal law. In *Fredette v. BVP Management Assocs.*,<sup>122</sup> the Eleventh Circuit concluded that the sexual harassment of a male waiter by a homosexual male manager was actionable under Title VII.<sup>123</sup> Likewise, the Sixth Circuit, in *Yeary v. Goodwill Industries-Knoxville, Inc.*,<sup>124</sup> recently affirmed a district court's decision not to dismiss a similar claim.<sup>125</sup>

Until this past summer, the United States Supreme Court had repeatedly declined to address the issue of same-sex sexual harassment. However, on June 9, 1997, the Supreme Court granted certiorari in the

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118. *McWilliams*, 72 F.3d at 1198 (Michael, J., dissenting).

119. *Id.*

120. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 145 (4th Cir. 1996), *rev'g* 909 F. Supp. 367 (W.D.N.C. 1995) (Murnaghan, J., dissenting).

121. *Id.*

122. 112 F.3d 1503 (11th Cir. 1997).

123. *Id.* at 1504. The court specifically reserved the issue addressed in *McWilliams* (a heterosexual male perpetrator and a heterosexual male claimant) for future decisions. *Id.* at 1507.

124. 107 F.3d 443 (6th Cir. 1997).

125. *Id.* at 448. The court added to its analysis the concept of sexual attraction, noting that "all that is necessary for [the court] to observe is that when a male sexually propositions another male *because of sexual attraction*, there can be little question that the behavior is a form of harassment that occurs *because* the propositioned male is a male." *Id.*



*Oncale* case.<sup>126</sup> The future implications of *Wrightson*, therefore, are currently uncertain, but soon to be decided.

## VII. CONCLUSION

The Court of Appeals for the Fourth Circuit, in deciding *Wrightson v. Pizza Hut of America, Inc.*, undoubtedly strengthened the impetus that eventually forced the Supreme Court of the United States to grant certiorari to the petitioner in *Oncale*. While the *Wrightson* court expanded Title VII's scope by affording a cause of action to those who are sexually discriminated against by a homosexual supervisor of the same sex, other circuits' decisions that categorically deny relief to same-sex claimants remain intact. The time has come for consistent judicial recognition that all Americans, male or female, should be afforded redressibility against employers who discriminate because of the employee's sex.

Without a doubt, as the traditional makeup of the workforce, as well as the nation's acceptance of alternative lifestyles, continues to change, so will the types of discrimination cases. It is the Supreme Court's task to address the disparity among the appellate courts' decisions and provide the requisite leadership for maintaining equality in the workplace. Before the conclusion of the Court's current term, such an interpretation will assuredly occur, and the ultimate fate of same-sex claims will be resolved.

COLLEEN LINEHAN

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126. *Oncale v. Sundowner Offshore Servs. Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997).