

1-1-1999

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Recommended Citation

David B. Hawley, *Standing Up for Minority Coworkers - White Males Do Not Have Aggrieved Person Standing for Hostile Environment Actions under Childress v. City of Richmond*, 77 N.C. L. REV. 865 (1999).

Available at: <http://scholarship.law.unc.edu/nclr/vol77/iss2/9>

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NOTES

“Standing” Up for Minority Coworkers? White Males Do Not Have “Aggrieved Person” Standing for Hostile Environment Actions Under *Childress v. City of Richmond*

The work of police officers in a city police precinct can be hazardous, requiring not only constant alertness but also close cooperation with and dependence on coworkers. When a supervisor, a white male, makes disparaging and abusive remarks about minority police officers, sometimes only in the presence of white officers, but other times in front of the assembled workforce, it is arguable whether workforce morale could decline as a result of these remarks. The minority coworkers may be angered by the supervisor’s remarks and begin to resent their white male coworkers because they belong to the supervisor’s race and gender or because they are not the object of his remarks. The question with respect to this situation is whether a “hostile environment” has been created that may fall within the prohibitions of Title VII of the Civil Rights Act of 1964,¹ and if so, whether white male officers have standing to sue in federal court to try to change the situation.

In *Childress v. City of Richmond*,² the Fourth Circuit Court of Appeals, sitting en banc, held that seven white male police officers did not have standing to assert a hostile environment claim under Title VII when discriminatory conduct was directed at African-American or female police officers in the same precinct.³ The court reversed a decision by a three-judge panel of the court, which had concluded that the white male officers did have standing to assert such a claim, and upheld a district court decision dismissing the officers’ hostile environment and other claims.⁴ With this reversal, the court indicated its view of who qualifies as a “person claiming to be aggrieved . . . by [an] alleged unlawful employment practice”⁵ for

1. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15 (1994)).

2. 134 F.3d 1205 (4th Cir. 1998) (en banc) (per curiam), *cert. denied*, 118 S. Ct. 2322 (1998).

3. See *id.* at 1207-08.

4. See *id.*

5. 42 U.S.C. § 2000e-5(f)(1).

plaintiffs who are not part of the "protected class"⁶ being discriminated against, but who claim a hostile working environment because of discrimination against employees within that protected class. This view runs counter to the holdings of four other federal circuits⁷ and raises questions about how the Fourth Circuit will treat actions brought under Title VII by third parties not within a protected class.

Although the case presented to the court in *Childress* may seem unusual, one commentator has noted that it is not uncommon for whites to claim to be aggrieved persons⁸ under Title VII for

6. The term "protected class" generally refers to persons against whom discrimination is prohibited under Title VII because of their race, color, sex, religion, or national origin. *See id.* § 2000e-2(a)(1).

7. *See Stewart v. Hannon*, 675 F.2d 846, 850 (7th Cir. 1982) (noting that a white female teacher had standing as a "person aggrieved" by discriminatory acts against African-American and Hispanic coworkers); *EEOC v. Mississippi College*, 626 F.2d 477, 483 (5th Cir. 1980) (holding that white female college instructor could bring a Title VII action based on discrimination against African-American coworkers for "violation of her own personal right to work in an environment unaffected by racial discrimination"); *EEOC v. Bailey Co.*, 563 F.2d 439, 454 (6th Cir. 1977) (holding that a white female employee had standing to bring claim of discrimination for discriminatory acts directed at African-American females); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976) (concluding that a white female had standing to sue based on discrimination for discriminatory acts directed at African-American and Hispanic employees).

One of these circuits recently indicated that it may be leaning away from such a broad interpretation of standing for aggrieved persons under Title VII. In *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176 (7th Cir. 1998), the Seventh Circuit rejected a claim by a white female worker that an actionable hostile working environment had been created by racially discriminatory actions of her coworkers or supervisors against African-American job applicants. *See id.* at 1181. The plaintiff claimed that a hostile working environment had been created because a supervisor had yelled at her. *See id.* at 1179. She alternatively claimed that a hostile working environment had been created because fellow employees discriminated against blacks themselves or did so to satisfy client preferences to the extent that employees of "any race or sex who were opposed to discrimination felt uncomfortable." *Id.* at 1180. The court noted that it had "never recognized [uncomfortableness] as a valid theory of discrimination under Title VII," and that it was difficult to reconcile the theory "with the proposition that laws must be enforced by the victims (or by public prosecutors) rather than by third parties discomfited by the violations." *Id.* The court distinguished its holding in *Stewart*, commenting that the loss suffered by the white employee in that case—"the loss of important benefits from interracial associations"—was personal and was not the same as "[a]n adverse reaction to observing someone else's injury." *Id.* (quoting *Stewart*, 675 F.2d at 850). It should be noted, however, that the court did not decide the plaintiff's claim in *Bermudez* on "whether the approach of cases such as *Stewart* translates to claims of derivative hostile working environments," but rather that the plaintiff's complaint of being yelled at did not create a hostile environment. *Id.* at 1181.

8. Although the exact phrase in Title VII regarding who may bring a private enforcement action is "the person claiming to be aggrieved," 42 U.S.C. § 2000e-5(f)(1), the phrase "aggrieved person" is used throughout this Note for the sake of brevity.

discrimination directed against African-Americans.⁹ It is less common, but not unheard of, for males to bring Title VII actions for discriminatory practices against females.¹⁰ Three theories have been advanced in support of these claims: (1) Title VII should be construed broadly to allow any person to bring an action for discrimination against another; (2) the discrimination against a particular protected class creates an adverse working environment that harms all employees; and (3) the person claiming to be aggrieved is injured because of her support of members of a protected class in a discrimination action.¹¹ The white male police officers in *Childress* appeared to advance the second theory—that racial and gender discrimination against African-American and female officers “deprived them of an environment unaffected by ... discrimination.”¹²

The success of male plaintiffs in obtaining standing for claims of discrimination against female coworkers varies among the circuits;¹³ thus, the Fourth Circuit’s decision affirming the dismissal of the male officers’ claim for lack of standing on a gender discrimination basis is not necessarily inconsistent with other federal court decisions. What

9. See 2 BARBARA LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW 1292 (3d ed. 1996).

10. See, e.g., *Allen v. American Home Foods, Inc.*, 644 F. Supp. 1553, 1555 (N.D. Ind. 1986) (involving allegations by male plaintiffs that they may assert a claim under Title VII based on sex for employer’s discriminatory actions against females in closing a predominantly female plant); *Pecorella v. Oak Orchard Community Health Ctr., Inc.*, 559 F. Supp. 147, 149 (W.D.N.Y. 1982) (involving a male job applicant’s Title VII claim that an employer engaged in sex discrimination by offering him a higher wage than a female employee).

11. See 2 LINDEMANN ET AL., *supra* note 9, at 1292.

12. 2 *id.* at 1293.

13. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 78 & n.265 (1995) (commenting on the split in federal courts on the issue of whether men have standing to bring Title VII actions for discrimination against women); N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV. 365, 366 (1989) (noting that federal cases differ on whether men have standing to bring Title VII actions for discrimination against women). Professor Torrey contends:

Conflicting decisions such as these highlight the question of who has standing to protest sex discrimination—a question that gains particular importance in the context of Title VII because that statute is enforced primarily by private plaintiffs. Adverse standing decisions prevent any hearing on the merits of a discrimination charge. Thus, when injured males are denied standing because they are not the direct target of discrimination, a technicality is allowed to frustrate Title VII’s central purpose: to eradicate discrimination in the workplace.

Id. (footnote omitted).

is interesting, given the precedent in other jurisdictions,¹⁴ is the court's refusal to grant standing to the white officers based on racial discrimination.

This Note examines the facts of *Childress* and reviews the opinion of the district court, the Fourth Circuit panel decision, and the Fourth Circuit's en banc opinion.¹⁵ The Note briefly reviews the statutory framework pertaining to Title VII discrimination actions and the determination of standing for aggrieved persons,¹⁶ as well as the precedent in Supreme Court and federal circuit decisions addressing standing for persons outside a protected class.¹⁷ Finally, the Note analyzes the Fourth Circuit's decision in light of the statutory framework and case law.¹⁸

In *Childress*, seven white male and two white female Richmond police officers filed suit against the City of Richmond, Virginia, and the City's chief of police in the United States District Court for the Eastern District of Virginia.¹⁹ The officers sought relief under federal and state law for what they claimed was a hostile working environment created by the racially and sexually discriminatory actions of their precinct supervisor.²⁰ They claimed that: (1) the supervisor's disparaging comments about African-American and female police officers in the precinct created a hostile environment in violation of Title VII of the Civil Rights Act (the "Act");²¹ (2) their efforts to bring a complaint about the supervisor's actions to the police department leaders, and their subsequent efforts to file hostile environment charges with the Equal Employment Opportunity Commission ("EEOC"), resulted in retaliatory action against them in violation of § 1983 of the Civil Rights Act of 1871;²² and (3) the City

14. See *supra* note 7 and accompanying text; see also *EEOC v. T.I.M.E.-D.C. Freight*, 659 F.2d 690, 691-93 (5th Cir. 1981) (per curiam) (noting that white truck drivers were aggrieved persons under Title VII because discrimination against African-American truck drivers created a discriminatory work environment); *Bartelson v. Dean Witter Co.*, 86 F.R.D. 657, 665 (E.D.N.Y. 1980) (granting white female standing to sue for discriminatory actions against blacks).

15. See *infra* notes 19-65 and accompanying text.

16. See *infra* notes 66-89 and accompanying text.

17. See *infra* notes 90-154 and accompanying text.

18. See *infra* notes 155-84 and accompanying text.

19. See *Childress v. City of Richmond*, 907 F. Supp. 934, 937 (E.D. Va. 1995), *aff'd in part, rev'd in part*, 120 F.3d 476 (4th Cir. 1997), *reh'g en banc granted, opinion vacated, ruling aff'd by an equally divided court*, 134 F.3d 1205 (4th Cir. 1998), *cert. denied*, 118 S. Ct. 2322 (1998).

20. See *id.*

21. See *id.* at 937-38.

22. See *id.* at 940-42. Section 1983 of the Civil Rights Act of 1871, see 42 U.S.C. § 1983 (1994), "creates an action [for employees] for damages and injunctive relief" for

violated Virginia public policy regarding unlawful employment discrimination.²³

In their suit, the officers alleged that over a two-month period, their supervisor, a white male, made several highly derogatory remarks about African-American and female police officers under his command, either in the presence of only white officers or in front of all members of the force.²⁴ In January 1994, the officers filed a complaint letter with the precinct captain that questioned the supervisor's mental stability, claiming that he was "emotionally out of control, extremely verbally abusive, and given to alarming outbursts of temper and profanity."²⁵ The complaint did not mention any discriminatory actions.²⁶ The officer who presented the letter to the captain, however, allegedly mentioned the supervisor's discriminatory remarks at the time he filed the letter.²⁷ The police department's leaders conducted an investigation of the charges but did not take any action against the supervisor.²⁸ The complaining officers claimed that they were threatened with termination by police leadership during the investigation and that certain complaining officers later received poor performance evaluations or transfers.²⁹ In March and April of 1994, the officers filed hostile environment

violations of "(1) property interest procedural due process, (2) liberty interest procedural due process, (3) substantive due process, (4) equal protection, (5) free speech, (6) freedom of association, (7) searches and seizures, and (8) right of privacy." Harvey Brown & Sarah V. Kerrigan, 42 U.S.C. § 1983: *The Vehicle for Protecting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619, 621 (1995).

23. See *Childress*, 907 F. Supp. at 941-42.

24. See *id.* at 937-38. The district court opinion graphically described the comments supposedly made by the supervisor, Lieutenant Carroll, toward and about the African-American and female officers on the precinct force:

In November or December 1993, . . . Carroll [allegedly] said to three female officers "Well, I see all my bitches are here, it must not be that time of the month." On December 16, 1993, . . . Carroll [allegedly] noted with obvious approval that an all-white, all-male roll call of officers was "like it used to be." On January 3, 1994, . . . Carroll [allegedly] called female officers his "pussy posse" and "vaginal vigilantes" in the presence of both male and female officers. Early in 1994, . . . one of the officer's wives called Carroll and then [allegedly] heard him say in the background that a black female officer was a "mother-fucking worthless black bitch," a "no good black bitch" and a "most useless nigger."

Id.

25. *Id.* at 938.

26. See *id.*

27. See *Childress v. City of Richmond*, 120 F.3d 476, 478 (4th Cir. 1997), *reh'g en banc granted, opinion vacated, ruling aff'd by an equally divided court*, 134 F.3d 1205 (4th Cir. 1998), *cert. denied*, 118 S. Ct. 2322 (1998).

28. See *Childress*, 907 F. Supp. at 938.

29. See *id.*

charges with the EEOC and, subsequently, received right-to-sue letters³⁰ from the agency.³¹ The officers allegedly were subjected to further retaliatory actions after they filed the charges, prompting them to file a claim of retaliation with the EEOC.³² The officers also received right-to-sue letters for the retaliation claims.³³ In August 1995, the nine officers sued in district court.³⁴ Their primary claim was that the derogatory remarks made by their supervisor created a hostile working environment that "acted to destroy the necessary sense of 'teamwork' between officers of different sexes and races, and that this resultant loss of teamwork raised the possibility that officers in one group might be reluctant to assist officers in another group during the performance of their duties."³⁵

The district court dismissed the white male officers' hostile environment claim, stating that they did not have standing under Title VII of the Act to recover for violations of the civil rights of others.³⁶ The court noted that a person generally does not have a right to state a civil rights claim for another and can only allege that he she has been deprived of a right provided by the Constitution or federal law.³⁷ With regard to the officers' gender-based claims, the district court determined that they had not been intentionally discriminated against because the officers were of the same gender as their supervisor and, consequently, were not within a protected class under Title VII.³⁸ The court reviewed the officers' hostile

30. A person may file an action under Title VII after receiving a right-to-sue letter from the EEOC. See 42 U.S.C. § 2000e-5(f)(1) (1994). The EEOC may issue right-to-sue letters if it dismisses the charge or if it has not initiated an action or reached a settlement agreement to which the aggrieved individual is a party. See *id.* A person cannot proceed with an individual suit until the EEOC has determined that no reasonable cause exists to believe a violation has occurred or it is unable to reach a conciliation agreement with the entity charged with the violation and the agency no longer has jurisdiction. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.75(a) (1988).

31. See *Childress*, 120 F.3d at 478.

32. See *id.*

33. See *id.*

34. See *id.*

35. *Id.*

36. See *Childress v. City of Richmond*, 907 F. Supp. 934, 939-40 (E.D. Va. 1995), *aff'd in part, rev'd in part*, 120 F.3d 476 (4th Cir. 1997), *reh'g en banc granted, opinion vacated, ruling aff'd by an equally divided court*, 134 F.3d 1205 (4th Cir. 1998), *cert. denied*, 118 S. Ct. 2322 (1998). The court did find, however, that the female plaintiffs had stated a claim for a hostile environment for gender discrimination pursuant to Title VII and thus had standing to pursue their discrimination claims. See *id.* at 940. The two female officers settled prior to final judgment and their claims were dismissed. See *Childress*, 120 F.3d at 479 n.2.

37. See *Childress*, 907 F. Supp. at 939.

38. See *id.* Senior District Judge Richard L. Williams wrote the district court's

environment claim under a gender discrimination analysis using same-sex harassment cases decided by Fourth Circuit courts as "persuasive authority" for its analysis.³⁹ It held that "Title VII permits no claim for hostile environment based on same-sex harassment where there is neither an allegation of quid pro quo nor some sexual component of the harassing behavior."⁴⁰ Because the white male officers were asserting the rights of others (in this instance, female officers) and because they did not allege a quid pro quo nor sexual component to the harassment, the court held that they could not state a hostile environment claim based on gender discrimination.⁴¹ The court also held that the white officers (both male and female) did not have standing to assert a race-based claim of a hostile environment because they were attempting to assert a Title VII claim based on either "the civil rights of others or . . . that they were discriminated against by being provided disparate and *better* treatment than their black peers."⁴² Finally, the court dismissed the § 1983 claims for failure to state a cause of action⁴³ and also dismissed the state public policy claim because the officers could not state a public policy right of action.⁴⁴

On appeal, a three-judge panel of the Fourth Circuit upheld the district court's dismissal of the § 1983 and state public policy claims,⁴⁵ but vacated and remanded the decision that the white male police officers did not have standing under Title VII to bring a hostile environment claim based on the discriminatory treatment of African-American or female coworkers.⁴⁶ The panel noted that in enacting Title VII of the Act, "Congress conferred a private right of action on 'the person claiming to be aggrieved . . . by the alleged unlawful employment practice.'"⁴⁷ To determine whether the white male officers in this case were persons claiming to be aggrieved and thus had standing to bring a hostile environment claim, the panel relied on the Supreme Court's reasoning in *Trafficante v. Metropolitan Life*

opinion. *See id.* at 937.

39. *See id.*

40. *Id.*

41. *See id.* at 939-40.

42. *Id.* at 940.

43. *See id.* at 941.

44. *See id.* at 942-43.

45. *See Childress*, 120 F.3d at 483. Judge Hall delivered the opinion for the panel in which Judge Michael and Senior Judge Phillips joined. *See id.* at 477.

46. *See id.* at 483.

47. *Id.* at 480-81 (quoting 42 U.S.C. § 2000e-(5)(f)(1) (1994)).

*Insurance Co.*⁴⁸ According to the *Childress* panel, the Supreme Court in *Trafficante* noted that “‘the loss of important benefits from interracial associations’”⁴⁹ was sufficient injury to allow white housing tenants to bring claims as aggrieved persons under the fair housing provisions of Title VIII of the Civil Rights Act of 1968⁵⁰ for housing practices discriminating against African-American tenants. The panel noted that in *Trafficante* the Supreme Court explicitly applied a broad construction of the term “aggrieved person” so that Title VIII would reflect “‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution,’”⁵¹ and that the Court implicitly had applied a similar construction to Title VII claims.⁵² Buttressed by a finding that other circuit courts considering “the issue of a white person’s standing to sue under Title VII for associational or hostile environment claims flowing from [discrimination against] black persons” had applied the broad *Trafficante* construction of standing to permit the white plaintiff to bring a claim,⁵³ the panel held that *Trafficante* and these circuit court decisions compelled the conclusion that “white men have standing to assert hostile environment claims under Title VII when the discriminatory conduct is directed at blacks or females.”⁵⁴ The panel also vacated and remanded the district court’s decision dismissing the officers’ retaliation claims.⁵⁵

The Fourth Circuit vacated the panel decision by a majority vote and ordered that the officers’ appeal be reheard en banc.⁵⁶ In a per curiam opinion, the en banc court affirmed the district court’s judgment in its entirety, although it affirmed the district court’s dismissal of the hostile environment and retaliation claims by an equally divided vote of the members of the court.⁵⁷ The court did not

48. 409 U.S. 205 (1972).

49. *Childress*, 120 F.3d at 480 (quoting *Trafficante*, 409 U.S. at 210).

50. See Fair Housing Act, Pub. L. No. 90-284, Title VIII, 82 Stat. 81, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619).

51. *Childress*, 120 F.3d at 480 (quoting *Trafficante*, 409 U.S. at 209 (quoting *Hackett v. McGuire Bros.*, 445 F.2d 442, 446 (3d Cir. 1971))).

52. See *id.* at 481.

53. *Id.* (citing *Stewart v. Hannon*, 675 F.2d 846, 848-50 (7th Cir. 1982); *EEOC v. Mississippi College*, 626 F.2d 477, 481-83 (5th Cir. 1980); *EEOC v. Bailey Co.*, 563 F.2d 439, 452-54 (6th Cir. 1977); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70 (9th Cir. 1976)).

54. *Id.*

55. See *id.* at 483.

56. See *Childress*, 134 F.3d at 1207.

57. See *id.* at 1207-08. The case was argued before Chief Judge Wilkinson, Judges Widener, Murnaghan, Ervin, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Michael, and Motz, and Senior Circuit Judge Phillips. See *id.* at 1206.

explicitly set out its reasoning for affirming the district court decisions.⁵⁸ In a concurring opinion, however, Judge Luttig, joined by Judges Wilkins and Williams, indicated that the panel's reading of *Trafficante*, in reversing the district court's decision, was misplaced.⁵⁹ Judge Luttig agreed that the *Trafficante* Court had broadly interpreted the phrase "persons adversely affected or aggrieved" in Title VIII to mean "any person genuinely injured by conduct that violates anyone's rights under [Title VIII]."⁶⁰ In contrast, he noted that Congress had not specifically defined this phrase with regard to Title VII, thus leaving the determination of standing for third parties under Title VII to be tested under a "'term of art' definition of 'aggrieved person.'"⁶¹ As a result, persons bringing a claim under Title VII had to satisfy prudential standing limitations rather than being able to take advantage of the broad standing granted by Congress under Title VIII.⁶² Using this reasoning, Judge Luttig agreed with the court's affirmation of the district court's decisions.⁶³

In 1964, Congress enacted Title VII of the Civil Rights Act of 1964.⁶⁴ Title VII provides that it is unlawful for an employer "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."⁶⁵ Additionally, an employer cannot discriminate against an employee in a manner that would "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of these characteristics.⁶⁶ Title VII authorizes a private right of action by "the person claiming to be aggrieved . . . by the alleged unlawful employment practice."⁶⁷ To bring a Title VII enforcement action as an aggrieved person, an individual must meet specific standing requirements. These requirements involve the procedural duties of filing a charge of discrimination with the EEOC⁶⁸ and, if the agency does not pursue an enforcement action or

58. *See id.*

59. *See id.* at 1209 (Luttig, J., concurring).

60. *Id.* (Luttig, J., concurring).

61. *Id.* at 1210 (Luttig, J., concurring).

62. *See id.* at 1209-10 (Luttig, J., concurring).

63. *See id.* at 1211 (Luttig, J., concurring).

64. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-2 to 2000e-15 (1994)).

65. 42 U.S.C. § 2000e-2(a)(1).

66. *Id.* § 2000e-2(a)(2).

67. *Id.* § 2000e-5(f)(1).

68. *See id.* § 2000e-5(e)(1) (requiring employees to file an unlawful employment practice charge with the EEOC within 180 days after the alleged practice occurred);

is unsuccessful in its conciliation efforts with the alleged discriminator, filing a court action upon receipt of a right-to-sue letter from the EEOC.⁶⁹ In addition to these statutory requirements, case law requires the person to meet constitutional and, in some instances, prudential elements of the standing doctrine as applied by the Supreme Court.⁷⁰

In order to meet the constitutional standing requirements of Article III,⁷¹ a plaintiff bringing a private action must: (1) suffer an injury in fact, meaning an invasion of a legally-protected interest that

Valerie L. Jacobson, Note, *Bringing a Title VII Action: Which Test Regarding Standing to Sue is the Most Applicable?*, 18 FORDHAM URB. L.J. 95, 105 (1990).

69. See *id.* § 2000e-5(f)(1) (authorizing a person to bring a private action against an alleged discriminator within 90 days after receiving a right-to-sue letter from the EEOC); Jacobson, *supra* note 68, at 105; see also *supra* note 30 (discussing right-to-sue letters).

70. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("Though some of [the standing doctrine's] elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (stating that the "inquiry [into the question of standing] involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise"); see also *Torrey*, *supra* note 13, at 384 (noting that "a plaintiff under Title VII must satisfy the article III test for standing and, arguably, even the prudential zone of interests test"); Jacobson, *supra* note 68, at 105 (commenting that a plaintiff in a Title VII action also must meet a "zone of interests" prudential standing limitation). One commentator has noted:

Despite the fact that the Supreme Court has made clear that the "zone of interests" test is a prudential barrier, and not part of the Article III requirements, the Eighth Circuit has specifically applied, and the Second Circuit has affirmed, precisely that test in assessing Title VII standing. Of equal importance, the courts have ruled as if various prudential barriers impeded the standing of Title VII plaintiffs.

Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 563 (1995) (footnotes omitted). In *Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971), however, the court stated:

The national public policy . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing. . . . If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue

Id. at 446-47; see also Shannon E. Brown, Note, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117, 1125 (1992) ("Congress has directed federal courts to disregard prudential concerns when analyzing standing under Title VII."); Jeffrey M. Fisher, Note, *In the Wake of Lorance v. AT&T Technologies, Inc.: Interpreting Title VII's Statute of Limitations for Facially Neutral Seniority Systems*, 1990 U. ILL. L. REV. 711, 728 (stating that "prudential limitations do not apply in Title VII standing cases").

71. Article III, Section 2 of the Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, [and] the Laws of the United States, . . . ; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; [and] between Citizens of different States." U.S. CONST. art. III, § 2, cl. 1.

is concrete⁷² and “‘actual or imminent’”;⁷³ (2) show a causal connection between the injury and the conduct complained of;⁷⁴ and (3) show that it is likely that a favorable judicial decision will redress the injury.⁷⁵ In addition, courts may impose prudential limits on standing, including requirements that the plaintiff’s interest be within a “zone of interest” protected or regulated by the particular statute⁷⁶ or that the plaintiff seek only to defend her own rights and not those of others.⁷⁷ Congress may override these prudential limitations, however, by statutorily conferring standing to the full extent of Article III.⁷⁸

Courts and the EEOC have long recognized that the phrase “terms, conditions, or privileges of employment” in Title VII’s prohibition against employment discrimination is an “expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination”⁷⁹ as well as sexual discrimination.⁸⁰ Courts have applied this broad interpretation—that a “hostile” or “abusive” working environment may be created by an employer’s discriminatory actions—in cases involving all of the protected classes under Title VII.⁸¹

72. See *Lujan*, 504 U.S. at 560 (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth*, 422 U.S. at 508; *Sierra Club v. Morton*, 405 U.S. 727, 740-41 n.16 (1972)).

73. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

74. See *id.* at 560-61 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). The Court interpreted this causal connection to mean “the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result[] [of] the independent action of some third party not before the court.’” *Id.* at 560 (alteration in original) (quoting *Simon*, 426 U.S. at 41-42).

75. See *id.* at 561 (citing *Simon*, 426 U.S. at 38, 43).

76. See *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

77. See *Warth*, 422 U.S. at 499. One commentator has noted that “[t]he courts have imposed prudential limitations on themselves to preserve judicial resources for their most important functions.” Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1, 9 (1994).

78. See *Simon*, 426 U.S. at 58-60 (Brennan, J., concurring); Clark, *supra* note 77, at 9.

79. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

80. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (holding that sexual discrimination may create a hostile environment); 29 C.F.R. § 1604.11(a) (1997) (providing EEOC Guidelines on Discrimination Because of Sex, which define sexual harassment to include conduct creating a hostile working environment).

81. See, e.g., *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (religious discrimination); 29 C.F.R. § 1606.8(b)(1) (providing EEOC Guidelines on Discrimination Because of National Origin, which define harassment based on national origin to include conduct creating a hostile environment); *supra* notes 79-80 (noting hostile environment cases involving racial or sexual discrimination). In *Crawford v. Medina General Hospital*, 96 F.3d 830 (6th Cir. 1996), the Sixth Circuit allowed a hostile

In *Harris v. Forklift Systems, Inc.*,⁸² for example, the Supreme Court noted that “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ Title VII is violated.”⁸³ The Court concluded that if conduct does not create an environment that a reasonable person would find hostile or abusive, or that the person who is the subject of the conduct does not perceive to be abusive, then Title VII is not violated.⁸⁴ Determining what constitutes a hostile environment, however, “can be [performed] only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁸⁵ The Court in *Harris* also indicated that it would apply a similar standard to hostile environment claims based on racial, gender, national origin, or religious discrimination.⁸⁶

Despite what appears to be an established series of cases setting out the test for determining standing in Title VII actions, commentators have noted that the determination of whether an individual plaintiff has standing is a flexible decision that the courts

environment cause of action under the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. §§ 621-634 (1994 & Supp. 1995), an anti-discrimination statute that closely parallels Title VII. See *Crawford*, 96 F.3d at 834. But see *Burns v. AAF-McQuay*, 980 F. Supp. 175, 180 (W.D. Va. 1997) (declining to follow *Crawford*).

82. 510 U.S. 17 (1993).

83. *Id.* at 21 (citations omitted) (quoting *Meritor*, 477 U.S. at 65, 67). The *Harris* Court reaffirmed the holding of *Meritor* that “hostile environment sexual harassment is actionable, but circumscribed the kind of conduct that would be actionable to conduct that is severe or pervasive enough to create a work environment that can ‘reasonably be perceived, and is perceived, as hostile or abusive,’ even if no psychological harm results.” Alan M. Koral, *Critical Decisions in the Investigation of a Sex Harassment Claim: Practice Pointers and Case Law Update*, in AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 1998, 129, 137 (PLI Lit. & Admin. Prac. Course Handbook Series No. H0-0017, June 1998) (quoting *Harris*, 510 U.S. at 22). For further discussion of the relation of *Harris* and *Meritor*, see Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 448 & n.16 (1997); Kimberley McCreight, *Call for Consistency: Title VII and Same-Sex Hostile Environment Sexual Harassment*, 1 U. PA. J. LAB. & EMPLOYMENT L. 269, 271-72 (1998); Catherine M. Maraist, Note, *Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required by Harris v. Forklift Systems, Inc.*, 57 LA. L. REV. 1343, 1347-52 (1997).

84. See *Harris*, 510 U.S. at 21-22.

85. *Id.* at 23.

86. See *id.* at 21-22; see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (noting that the Court’s interpretation of what constitutes a sexually hostile environment in *Meritor* implicitly approved of a similar interpretation for a racially hostile environment).

have struggled to implement.⁸⁷ Complicating this struggle is a disagreement as to whether Congress, in enacting Title VII, intended to extend standing for aggrieved persons to the full extent of constitutional limits.⁸⁸ With regard to whether white employees have standing under Title VII to bring a claim for discrimination against African-American employees, however, the courts and administrative agencies have been relatively uniform in ruling that prerequisites for standing exist.⁸⁹ Courts that have recognized

87. See, e.g., Clark, *supra* note 77, at 7 ("Scholars have found the Supreme Court's development of the law of standing to be unsatisfactory."); Rosman, *supra* note 70, at 550 ("It is hard to read any significant number of cases or articles about standing without coming to the conclusion that few [courts] hold the internal coherence of that doctrine in high regard.").

88. See *supra* text accompanying note 70 (describing the controversy over whether Title VII standing for third parties should be given to the full extent of Article III). For examples of court decisions indicating that Title VII standing should be broadly construed, see *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972) (quoting with approval the holding of *Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971) and concluding that broad standing should be applied in actions under the Fair Housing Act), and *Hackett*, 445 F.2d at 446 (commenting that the use of the phrase "person claiming to be aggrieved" in Title VII indicated that Congress intended standing to be defined "as broadly as is permitted by Article III of the Constitution"). See also Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1183 n.114 (1995) (citing numerous cases to support the proposition that the "provisions of Title VII governing standing to sue are to be construed as broadly as permissible under Article III of the United States Constitution"). For an example of a case applying a narrow construction of standing under Title VII, see *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1281 (D.C. Cir. 1994) (holding that independent fair employment "testers" posing as job applicants do not have standing under Title VII). But see Jonathan Levy, Comment, *In Response to Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On*, 80 MINN. L. REV. 123, 159-64 (1995) (criticizing the *Fair Employment Council* court for narrowly construing Title VII standing provisions as applied to employment testers).

89. See, e.g., *Stewart v. Hannon*, 675 F.2d 846, 850 (7th Cir. 1982); *EEOC v. Bailey Co.*, 563 F.2d 439, 454 (6th Cir. 1977); see also *EEOC Dec. No. 71-969*, *EEOC Dec. (CCH) ¶ 6193* (Dec. 24, 1970) (noting that a white employee had standing to bring charges under Title VII for racial insults aimed at African-American employees that affected the white employee's work environment); *EEOC Dec. No. 70-09*, *EEOC Dec. (CCH) ¶ 6026* (July 8, 1969) (concluding that white employees had standing to file charge of discrimination under Title VII for discrimination against African-American coworkers); Rosman, *supra* note 70, at 605 (noting that "the courts have universally held (based upon the Supreme Court's citation in *Trafficante of Hackett v. McGuire Bros.*) that standing under Title VII extends to the full extent of Article III" (footnote omitted)); Torrey, *supra* note 13, at 376 (noting that "[c]ourts uniformly confer standing on plaintiffs who claim a relatively abstract injury to themselves resulting from a work environment tainted by discrimination against others"); Fisher, *supra* note 70, at 728-29 (noting that "[c]ourts have held that whites have standing to enjoin discrimination against minority groups under a variety of different theories, including the loss of interpersonal contacts between members of the same or different races and hostile work environment claims" (footnotes omitted)).

standing in these cases usually base their conclusion on the Supreme Court's reasoning in *Trafficante v. Metropolitan Life Insurance Co.*⁹⁰

In *Trafficante*, white tenants of a large apartment complex near San Francisco brought suit against the complex owners, claiming that the owners violated Title VIII of the Civil Rights Act of 1968—the Fair Housing Act⁹¹—by “engaging in discriminatory housing practices in violation of the Act, making [the complex] . . . a ‘white ghetto’ and depriving [the tenants] of their alleged right to live in a racially integrated community.”⁹² The district court found that the white tenants did not have standing to maintain an action under Title VIII because they were attempting to assert that the denial of fair housing rights of minorities deprived them of the benefits of living in an interracial community, rather than asserting that they, as white tenants, had been denied rights to purchase or rent real property under the Fair Housing Act.⁹³ The Ninth Circuit affirmed the district court's decision, noting that its reading of the legislative history of the Fair Housing Act showed a congressional intent to limit standing to parties directly affected by the discriminatory practice and not to include private third parties such as the white tenants.⁹⁴

The Supreme Court reversed the decision of the Ninth Circuit.⁹⁵ In doing so, it quoted approvingly the Third Circuit's decision in *Hackett v. McGuire Bros.*,⁹⁶ which interpreted the phrase “person claiming to be aggrieved”⁹⁷ to allow a third party outside a protected class to bring an action for discrimination in employment because

90. 409 U.S. 205 (1972); see, e.g., *Stewart*, 675 F.2d at 848-50; *EEOC v. Mississippi College*, 626 F.2d 477, 482 (5th Cir. 1980); *Bailey*, 563 F.2d at 452-54; *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70 (9th Cir. 1976).

91. 42 U.S.C. §§ 3601-3619 (1994). Title VIII provides in part that it is unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

Id. § 3604.

92. *Trafficante v. Metropolitan Life Ins. Co.*, 322 F. Supp. 352, 353 (N.D. Cal.), *aff'd*, 446 F.2d 1158 (9th Cir. 1971), *rev'd*, 409 U.S. 205 (1972).

93. *See id.*

94. *See Trafficante v. Metropolitan Life Ins. Co.*, 446 F.2d 1158, 1162-63 (9th Cir. 1971), *rev'd*, 409 U.S. 205 (1972).

95. *See Trafficante*, 409 U.S. at 212.

96. 445 F.2d 442 (3d Cir. 1971).

97. 42 U.S.C. § 2000e-5(f)(1) (1994).

Title VII “showed ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.’”⁹⁸ The Court applied this conclusion to the claims under the Fair Housing Act in *Trafficante*, determining that the standing provision of Title VIII also was “broad and inclusive,” and that the “injury to existing [white] tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations.”⁹⁹ Justice White concurred in the opinion, but noted that without the Civil Rights Act of 1968¹⁰⁰ “purporting to give all those who are authorized to complain to the [Department of Housing and Urban Development] the right also to sue in court,”¹⁰¹ he would have had difficulty in granting the white plaintiffs standing under Article III of the Constitution.¹⁰²

Justice White’s observations about the Civil Rights Act of 1968 may have foreshadowed the concerns expressed by Judge Luttig in *Childress* regarding whether Title VII should be read to provide as broad an interpretation of standing as Title VIII. Nevertheless, several courts that have confronted the issue of whether white employees can bring an action for injuries allegedly suffered because discrimination against African-American employees created an adverse working environment have seized on *Trafficante*’s approval of *Hackett*’s broad construction of Title VII standing. For example, in *EEOC v. T.I.M.E.-D.C. Freight, Inc.*,¹⁰³ the Fifth Circuit held that white truck drivers sustained injuries sufficient enough to be aggrieved persons under Title VII because discrimination against African-American truck drivers deprived the white drivers of a personal right to work in an environment unaffected by racial discrimination.¹⁰⁴

Similarly, in *Stewart v. Hannon*,¹⁰⁵ the Seventh Circuit held that a white female assistant principal had standing to bring an action alleging discrimination against nonwhites regarding promotions within her school system, even though she did not allege that the discrimination precluded her from work in an integrated working

98. *Trafficante*, 409 U.S. at 209 (quoting *Hackett*, 445 F.2d at 446).

99. *Id.* at 209-10.

100. Pub. L. No. 90-284, 82 Stat. 73, 73-92 (1968) (codified as amended in scattered sections of 18, 25 & 42 U.S.C.).

101. *Trafficante*, 409 U.S. at 212 (White, J., concurring). Justices Blackmun and Powell joined Justice White in his concurrence. *See id.* (White, J., concurring).

102. *See id.* (White, J., concurring).

103. 659 F.2d 690 (5th Cir. Oct. 1981) (per curiam).

104. *See id.* at 692 n.2.

105. 675 F.2d 846 (7th Cir. 1982).

environment.¹⁰⁶ In *Stewart*, seven assistant school principals—five African-Americans, one Hispanic, and one white—brought suit under Title VII against the Chicago Board of Education for racial discrimination in the selection of school principals within the school district.¹⁰⁷ Citing *Trafficante*, the Seventh Circuit held that Stewart was an aggrieved person, concluding that her “complaint sufficiently apprised the parties and the court of the claimed injury” because “the exclusion of minority persons from a work environment can lead to the loss of important benefits from interracial associations.”¹⁰⁸ The court concluded that Title VII standing should be interpreted as broadly as Title VIII standing, as the Supreme Court had implied in *Trafficante*, because both statutes aim to eliminate discrimination against protected classes.¹⁰⁹

The Seventh Circuit in *Stewart* listed four reasons for its conclusion. First, it noted that the statutory definition of an aggrieved person under each statute is similar in that both provide for the filing of charges with the federal agency responsible for investigating claims—the EEOC under Title VII and the Department of Housing and Urban Development (“HUD”) under Title VIII.¹¹⁰ Second, the court held that the procedures for enforcement of Title VII and Title VIII claims are “nearly identical,” despite the fact that the EEOC has public enforcement power while HUD does not.¹¹¹ The EEOC’s power, the court noted, was added in 1972¹¹² to “expand coverage of and increase compliance with the Act, and not to narrow the class of complainants.”¹¹³ Third, the court noted that *Trafficante* endorsed the *Hackett* court’s determination that standing under Title VII should be applied as broadly as allowed under Article III of the Constitution.¹¹⁴ Fourth, the court relied on several EEOC decisions interpreting Title VII broadly to allow “white person[s], aggrieved by discrimination against black persons at their place of work, to file

106. See *id.* at 848-50.

107. See *id.* at 847. The district court determined that the plaintiffs did not have standing under Title VII because only Ruth Stewart, the white assistant principal, had received a right-to-sue letter from the EEOC. See *id.* at 848. Because she was white, however, the court held that Stewart was not an aggrieved party who could claim racial discrimination. See *id.*

108. *Id.* at 850.

109. See *id.* at 849.

110. See *id.*

111. *Id.*

112. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8(f), 86 Stat. 103, 109-10 (codified as amended at 42 U.S.C. § 2000e-4(g)(6) (1994)).

113. *Stewart*, 675 F.2d at 849.

114. See *id.*

charges with the EEOC and to sue in court.”¹¹⁵ The court noted that the EEOC decisions are not controlling but are entitled to deference by a court considering the same issue.¹¹⁶

Other circuits also have relied on the *Trafficante* interpretation of Title VII standing in concluding that white plaintiffs may have standing to bring an action for the creation of a hostile working environment because of discrimination against blacks. In *Clayton v. White Hall School District*,¹¹⁷ a white female cafeteria manager in the White Hall School District moved outside of the school district but kept her child enrolled in a school within the district.¹¹⁸ A fellow school district employee—an African-American male—who also lived outside the school district attempted to enroll his child in a White Hall school.¹¹⁹ The school district refused to allow the African-American employee to enroll his child, citing a policy prohibiting the children of employees from attending a White Hall school when the employee lived outside the district.¹²⁰ The school district subsequently began enforcing this policy and told the white female employee that her child could no longer attend a White Hall school.¹²¹ The female worker brought a Title VII claim against the school district for the creation of a hostile working environment permeated by racial discrimination.¹²² The school district argued that the white employee did not have standing to bring a racially-based hostile environment claim.¹²³ The Eighth Circuit, citing *Trafficante* and other circuit court decisions,¹²⁴ noted that standing under Title

115. *Id.* (citing EEOC Dec. No. 72-0591, EEOC Dec. (CCH) ¶ 6314 (Dec. 21, 1971); EEOC Dec. No. 71-969, EEOC Dec. (CCH) ¶ 6193 (Dec. 24, 1970); EEOC Dec. No. 70-09, EEOC Dec. (CCH) ¶ 6026 (July 8, 1969)).

116. *See id.* (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-46 (1976)); *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (noting that guidelines interpreting Title VII that are adopted by the EEOC, as the enforcing agency, are “entitled to great deference”).

117. 875 F.2d 676 (8th Cir. 1989).

118. *See id.* at 678.

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. The court cited *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), in addition to *Trafficante*. *See Clayton*, 875 F.2d at 679. In *Waters*, the plaintiff—a white female—brought Title VII charges for sex, race, and national origin discrimination because of alleged discriminatory acts her employer had taken against her because of her sex and against certain coworkers because they were African-American or Hispanic. *See Waters*, 547 F.2d at 467-69. The Ninth Circuit stated that *Waters* was “logically indistinguishable” from *Trafficante* in that “[the] analysis of the standing question applies with equal force to actions brought under Title VII, the purpose and structure of which is ‘functionally

VII does not apply just to minority groups but is "dependent upon whether the plaintiff is a person claiming to be aggrieved by such discrimination."¹²⁵ Because the white employee had an "interest in a work environment free of racial discrimination [that] is clearly within the zone of interest protected by Title VII," the court held that she had standing to bring a Title VII action for discrimination against minority employees.¹²⁶

Until *Childress*, the Fourth Circuit had not addressed the question of whether white plaintiffs have standing to bring a Title VII hostile environment claim for discrimination against African-American employees or whether male plaintiffs can bring a similar action for discrimination against female employees. In *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*,¹²⁷ however, the Fourth Circuit concluded that a white male union member could not bring a Title VII discrimination action as a class representative for African-American or female employees.¹²⁸ The union officer, along with the woodworker's union and two other union officials, sued individually and as representatives of all blacks and females who may have been victims of discriminatory employment actions by Chesapeake Bay.¹²⁹ The court rejected the white male union officer's class representative and individual complaints, noting that as a class representative, "he obviously does not possess the same interests nor suffer the same injuries as the class members he seeks to represent ... [and thus] cannot be a class representative in this case."¹³⁰ Similarly, the court noted that the plaintiff could not bring an individual Title VII action because he "could not conceivably have suffered personally the injuries alleged in the complaint."¹³¹

identical' to the fair housing legislation construed in *Trafficante*." *Id.* at 469. The court noted that: (1) the benefits of interracial association free from disharmony were equally as strong in employment as in housing; (2) the differing enforcement powers of HUD under Title VIII and the EEOC under Title VII were the result of later amendments to Title VII to ensure greater enforcement and did not show a Congressional intent to "narrow the class of plaintiffs who might bring suit" under Title VII; and (3) the court's application of *Trafficante* did not create new law but was consistent with the *Trafficante* interpretation of who is an aggrieved person under both Title VII and Title VIII. *Id.* at 469-70. As a result, the court held that Waters had standing under Title VII to bring racial or national origin discrimination claims. *See id.* at 469.

125. *Clayton*, 875 F.2d at 679.

126. *Id.* at 680.

127. 659 F.2d 1259 (4th Cir. 1981).

128. *See id.* at 1270-71.

129. *See id.* at 1261.

130. *Id.* at 1269.

131. *Id.* at 1270. The court also noted that the white union employee could not bring a Title VII action as an individual plaintiff because he did not "allege that he has been

In *Childress*, on the other hand, the white male police officers alleged that *they* had been injured as a result of the creation of a hostile work environment due to the discriminatory conduct against their African-American and female coworkers, not that those coworkers allegedly were injured.¹³² The complaint by the white male officers in *Childress* formed the basis for the district court's analysis that the officers could not establish a hostile environment because of same-sex harassment.¹³³ The district court interpreted the officers' allegations to mean that they claimed injury because of harassment by their supervisor, who also was a white male.¹³⁴ At the time of its decision, the district court noted that "[t]he Fourth Circuit has not yet decided the same-sex issue, but the prevailing view is that Title VII addresses only discrimination *between* the sexes."¹³⁵ Since that time, the Fourth

retaliated against for his efforts in pursuing the civil rights claims of others," and thus "[t]here is nothing to suggest a possible claim that he has been denied the benefits of interracial associations [as in *Trafficante*]." *Id.* at 1270-71. Interestingly, although the *Childress* panel focused on *Trafficante* in holding that the white male officers had standing to bring a Title VII hostile environment action, *see Childress v. City of Richmond*, 120 F.3d 476, 480-81 (4th Cir. 1997), *reh'g en banc granted, opinion vacated, ruling aff'd by an equally divided court*, 134 F.3d 1205 (4th Cir. 1998), *cert. denied*, 118 S. Ct. 2322 (1998), the officers—like the union employee in *International Woodworkers*—did not claim denial of interracial association benefits, which was the basis for the Court's conclusion in *Trafficante* that the white plaintiffs had Title VII standing, *see* Brief of Appellant at 16-20, *Childress*, 134 F.3d 1205 (4th Cir. 1998) (No. 96-1585).

132. Professor Torrey notes that in cases such as *International Woodworkers*, plaintiffs, generally seeking class action representative status, do not assert any injury to themselves from the discrimination. Therefore, they do not meet the basic article III requirement that injury be caused by the defendant and redressable by litigation at issue. These cases are distinguishable from work environment standing decisions since the plaintiffs failed to claim that the employer's discrimination against others resulted in an injury to plaintiffs—only that the employer discriminated against others. If the plaintiffs had asserted their own work environment injury, or if the courts had acknowledged other types of injury resulting from the employer's improper discrimination against others, standing would have been found under this theory.

Torrey, *supra* note 13, at 381.

133. *See Childress*, 907 F. Supp. 934, 939-40 (E.D. Va. 1995), *aff'd in part, rev'd in part*, 120 F.3d 476 (4th Cir. 1997), *reh'g en banc granted, opinion vacated, ruling aff'd by an equally divided court*, 134 F.3d 1205 (4th Cir. 1998), *cert. denied*, 118 S. Ct. 2322 (1998).

134. *See id.* at 939. The district court, using the same-sex analogy, also denied the white male officers standing as to their race-based hostile environment claim, noting that "the civil rights laws permit no claim for same-race discrimination where the only allegation is that a supervisor is biased in the plaintiff's favor." *Id.* at 940. As discussed *infra* notes 157-70 and accompanying text, the district court's same-sex reasoning—and its application of that reasoning to same-race discrimination claims—was questionable and, as the plaintiffs argued in their brief before the Fourth Circuit on appeal, "curious." *See* Brief of Appellant at 16, *Childress* (No. 96-1585).

135. *Childress*, 907 F. Supp. at 939 (citing *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994); *Benekritis v. Johnson*, 882 F. Supp. 521, 525 (D.S.C. 1995)).

Circuit has successively ruled that: (1) a hostile environment claim under Title VII "does not lie where both the alleged harassers and the victim are heterosexuals of the same sex;"¹³⁶ (2) because alleged sexual discrimination by one male against another "was not sufficiently severe or pervasive . . . to establish a prima facie case of sexual harassment under Title VII," the court did not need to determine whether the discrimination was directed at the plaintiff because of his sex;¹³⁷ and (3) a "claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual."¹³⁸ The Fourth Circuit's decisions that a same-sex hostile environment claim could lie when the discriminator was homosexual falls between the holdings of other circuits. The Fifth Circuit, in *Garcia v. Elf Atochem North America*,¹³⁹ has stated that same-sex harassment claims are never actionable.¹⁴⁰ The Seventh Circuit, on the other hand, held in *Doe v. City of Belleville*¹⁴¹ that sexual harassment in the workplace is always actionable regardless of the gender of the harasser and harassed employee.¹⁴²

136. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996). The court specifically did not preclude addressing other same-sex harassment claims, noting that its holding did not "purport to rule out claims of discrimination by adverse employment decisions . . . involving only same-sex heterosexual actors . . . [n]or . . . reach any form of same-sex discrimination claim where either victim or oppressor, or both, are homosexual or bisexual." *Id.* at 1195 n.4.

137. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996). Although Judge Niemeyer wrote the opinion for the court, he concluded in a separate part of his opinion, which was not joined by the two other judges, that "sexual harassment of a male employee, whether by another male or by a female, may be actionable under Title VII if the basis for the harassment is because the employee is a man." *Id.* at 752.

138. *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 141 (4th Cir. 1996). For an extensive discussion of federal circuit decisions regarding Title VII and same-sex harassment issues at the time of the district court's decision in *Childress*, see Dale Carpenter, *Same-Sex Sexual Harassment Under Title VII*, 37 S. TEX. L. REV. 699, 713-25 (1996).

139. 28 F.3d 446 (5th Cir. 1994).

140. *See id.* at 452. Commentators have suggested that the court's statement in *Garcia* was dicta rather than a distinct holding that same-sex sexual harassment is not actionable. *See* Ramona L. Paetzold, *Same-Sex Sexual Harassment: Can It be Sex-Related for Purposes of Title VII?*, 1 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 25, 30 n.36 (1997) (indicating that "[s]ome district courts have interpreted *Garcia's* prohibition as mere dicta"); Amy Shahan, Comment, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Sexual Harassment*, 48 BAYLOR L. REV. 507, 513 (1996) (arguing that the court's statement was dicta). *But see* Richard F. Storrow, *Same-Sex Sexual Harassment Claims after Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 694 n.75 (1998) (arguing that the *Garcia* court's decision was not dicta because the court relied on not recognizing same-sex claims as one of its grounds for rejecting the plaintiff's claim).

141. 119 F.3d 563 (7th Cir. 1997), *vacated*, 118 S. Ct. 1183 (1998).

142. *See id.* at 574.

The Supreme Court's recent decision in *Oncale v. Sundowner Offshore Services, Inc.*¹⁴³ also merits review for its possible effects on *Childress*. In *Oncale*, the Court faced the issue of whether Title VII provided protection against workplace sexual harassment when the "harasser and the harassed employee are of the same sex."¹⁴⁴ The plaintiff, a male worker on an oil rig in the Gulf of Mexico, sued his employer under Title VII for sexual harassment allegedly caused by his coworkers and supervisor, all of whom were also male.¹⁴⁵ The plaintiff alleged that he was subjected to sexually humiliating acts and taunts by his fellow employees because of his sex and that this conduct constituted discrimination against him under Title VII.¹⁴⁶ The Fifth Circuit, following its holding in *Garcia*, refused to recognize that the plaintiff had a cause of action under Title VII because both he and his alleged harassers were of the same sex.¹⁴⁷

The Supreme Court reversed, holding 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."¹⁴⁸ In reaching its decision, the Court noted the various positions of the federal circuits on same-sex harassment hostile environment claims and the conclusion of some of these circuits that Congress most likely did not consider "male-on-male sexual harassment . . . the principal evil . . . when it enacted Title VII."¹⁴⁹ The Court stated that its holding on same-sex harassment would not create a "general civility code for the American workplace" because workplace harassment did not automatically connote discrimination simply because of sexual content.¹⁵⁰ Instead, to be actionable, harassment would have to entail "behavior so objectively offensive as to alter the 'conditions' of the victim's employment."¹⁵¹ In a situation in which a same-sex harassment plaintiff can show that the alleged discriminatory conduct was "because of sex" and did not involve just sexual connotations, however, the plaintiff should be able to bring a Title VII

143. 118 S. Ct. 998 (1998).

144. *Id.* at 1000.

145. *See id.* at 1000-01.

146. *See id.* at 1001.

147. *See Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120-21 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998).

148. *Oncale*, 118 S. Ct. at 1001-02.

149. *Id.* at 1002.

150. *Id.*

151. *Id.* at 1003.

discrimination action.¹⁵² The Court did not explain what “because of sex” meant. In his concurrence, Justice Thomas emphasized that “in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII’s statutory requirement that there be discrimination ‘because of . . . sex.’ ”¹⁵³ That Justice Thomas, and Justice Scalia for the majority, noted that a same-sex plaintiff must always prove discrimination because of sex and not just sexually offensive conduct¹⁵⁴ indicates that the same-sex plaintiff will have a difficult evidentiary burden to succeed in a Title VII action.

The combination of the Court’s decision in *Oncale* and the analysis for determining a hostile environment established by the Court in *Meritor Savings Bank v. Vinson*¹⁵⁵ and *Harris v. Forklift Systems, Inc.*¹⁵⁶ casts doubt on the validity of *Childress* and its denial of standing based on same-sex harassment. The district court denied the white male police officers standing by first finding that the officers were not within a protected class because they were the same sex as their supervisor.¹⁵⁷ After *Oncale*, however, this reason cannot be the sole basis for denying standing to bring a Title VII hostile environment action. To deny standing for a same-sex discrimination claim, a court would have to find that the plaintiffs—such as the white male officers in *Childress*—could not demonstrate that they had been injured by discriminatory actions taken “because of” sex.¹⁵⁸ Whether the officers’ alleged injuries were the result of harassment directed toward the female employees because of their sex would be a question of the sufficiency of the male officers’ evidence and whether the hostile environment standard of *Harris* had been encountered. They could not be denied standing, however, simply because they were the same sex as their supervisor.

The primary claim of the white male police officers in *Childress* was for disparate impact discrimination because of a hostile environment created by the alleged discrimination against their

152. See *id.* at 1002.

153. *Id.* at 1003 (Thomas, J., concurring) (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)).

154. See *id.* at 1002.

155. 477 U.S. 57 (1986).

156. 510 U.S. 17 (1993); see also *supra* text accompanying note 83 (discussing the relationship of *Meritor* and *Harris*).

157. See *Childress v. City of Richmond*, 907 F. Supp. 934, 939 (E.D. Va. 1995) *aff’d in part, rev’d in part*, 120 F.3d 476 (4th Cir. 1997), *reh’g en banc granted, opinion vacated, ruling aff’d by an equally divided court*, 134 F.3d 1205 (4th Cir. 1998), *cert. denied*, 118 S. Ct. 2322 (1998).

158. See *Oncale*, 118 S. Ct. at 1002.

African-American and female coworkers.¹⁵⁹ As such, it may have been more appropriate to analyze their claims using the *Meritor* and *Harris* hostile environment standard—that is, whether a reasonable person would find the alleged workplace conduct to be “‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”¹⁶⁰ This analysis would have involved an evaluation of, inter alia, the frequency, intensity, and threatening nature of the conduct and its potential interference with the plaintiff employees’ performance.¹⁶¹

According to the district court and the en banc court, the white male officers failed to establish standing for either a sexual or racial hostile environment claim or an intentional sexual or racial discrimination claim primarily because they were the same sex as their supervisor.¹⁶² The same-sex issue, as well as the district court’s remarks that the white male officers were complaining about discriminatory acts from which they reportedly benefited,¹⁶³ was emphasized in the City of Richmond’s appellate brief as grounds for denying standing to the officers.¹⁶⁴ The white male officers argued, however, that discriminatory acts directed toward their minority coworkers created a hostile working environment, which reportedly led to potential safety problems in that the minority officers would not support their fellow white male officers in the field.¹⁶⁵ This secondary discrimination, and the resultant safety concerns, were the injuries that the officers alleged they suffered as a result of the creation of a hostile environment.¹⁶⁶ Whether this type of injury was sufficient to establish standing to bring a Title VII hostile environment claim, and whether the white male officers—if granted standing—could show that a hostile environment existed under the *Meritor* and *Harris* analysis, were not fully addressed by the Fourth Circuit panel or the en banc court.

As noted previously, several courts have granted standing to

159. See Brief of Appellant at 17, *Childress* (No. 96-1585).

160. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

161. See *id.* at 23.

162. See *Childress*, 907 F. Supp. at 939-40. The district court used the same-sex analogy to deny the white officers standing to bring a race-based hostile environment claim, commenting that because the nine white officers were of the same race as their supervisor, “the race-based claim of all of the officers suffers from the same defects as the male officers’ gender claim.” *Id.* at 940.

163. See *id.* at 939.

164. See Brief of Appellee at 12-14, *Childress* (No. 96-1585).

165. See Brief of Appellant at 17, *Childress* (No. 96-1585).

166. See *id.* at 19.

non-minority employee plaintiffs to assert Title VII claims based on discrimination against minority employees.¹⁶⁷ In *Clayton v. White Hall School District*,¹⁶⁸ however, the Eighth Circuit concluded that even though a white employee had standing to bring a Title VII action for injuries caused by a hostile working environment created by discrimination against a fellow minority employee,¹⁶⁹ she "failed to make a showing sufficient to establish a hostile working environment claim."¹⁷⁰ The *Clayton* court noted that the white plaintiff had established that she was within the "zone of interest" required to obtain standing under Title VII and Article III¹⁷¹ by claiming that a "hostile working environment permeated by racial discrimination [that] caused her severe emotional and psychological distress."¹⁷² The court reached this conclusion by referring—as the Fourth Circuit panel did—to the broad interpretation of the term "aggrieved person" established by the Supreme Court in *Trafficante* and to its own precedent that "'Title VII . . . is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination.'" ¹⁷³ The *Clayton* court then evaluated the white plaintiff's hostile environment claim based on the evidence she presented regarding one instance of racial discrimination and determined that this single incident was insufficient to meet the requirement that discriminatory acts pervade the workplace.¹⁷⁴

This two-step analysis by the *Clayton* court—determining whether a non-minority plaintiff has standing to pursue a hostile

167. See *supra* note 7 and accompanying text.

168. 875 F.2d 676 (8th Cir. 1989).

169. See *id.* at 680; see also *supra* notes 117-26 and accompanying text (discussing the facts and holding in *Clayton*).

170. *Clayton*, 875 F.2d at 680.

171. See *supra* notes 68-81 and accompanying text (describing the requirements for a claimant to establish standing under Title VII and Article III of the Constitution).

172. *Clayton*, 875 F.2d at 679. As the Supreme Court noted in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), however, conduct creating a hostile environment does not have to

lead[] to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. . . . So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.

Id. at 22 (citation omitted).

173. *Clayton*, 875 F.2d at 679 (quoting *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 425 (8th Cir. 1970)).

174. See *id.* at 680.

environment claim for minority discrimination and then determining whether a hostile environment exists—appears to be a more appropriate way of addressing issues such as those raised in *Childress* than the analysis employed by the district court and the en banc court in that case. As the Fourth Circuit panel noted, the initial problem in *Childress* was one of standing by non-minority employees to bring a hostile environment claim when discrimination is directed at minority employees, not whether persons have standing when they are of the same sex or race as the person allegedly conducting the discrimination.¹⁷⁵ In addition, the Supreme Court's decision in *Oncale* raises serious questions about the automatic preclusion of standing for plaintiffs of the same sex or race as the alleged discriminator.¹⁷⁶ The initial analysis in a case such as *Childress*, therefore, would seem to be governed by precedent interpreting the expansiveness of Title VII standing. Based on *Trafficante* and other federal cases, one could argue that the Fourth Circuit panel was correct in granting standing to the white male officers to bring the hostile environment claim. Once standing is granted, the second stage of the *Clayton* analysis would determine whether the hostile environment claim was valid.

To determine whether a valid hostile environment exists, a court would apply the analysis established by the Supreme Court in *Meritor* and *Harris*—whether, under all the circumstances, a reasonable person would find the conduct hostile or abusive. Applying this test to the white male officers' claim in *Childress*, it is questionable whether the officers presented sufficient evidence to establish the existence of a hostile environment. The comments made by the white male officers' supervisor, although degrading and offensive, appeared to have occurred on only a few occasions and were not repeated after the officers complained to their superiors.¹⁷⁷ It is not certain that these discriminatory acts occurred with such frequency that they would rise to the level of being "severe or pervasive enough to create an objectively hostile or abusive working environment."¹⁷⁸ It is also uncertain whether this conduct itself, or the discrimination

175. See *Childress v. City of Richmond*, 120 F.3d 476, 480-81 (4th Cir. 1997), *reh'g en banc granted, opinion vacated, ruling aff'd by an equally divided court*, 134 F.3d 1205 (4th Cir. 1998), *cert. denied*, 118 S. Ct. 2322 (1998).

176. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998); see also *supra* notes 143-54 and accompanying text (discussing *Oncale*).

177. See Brief of Appellee at 13-15, *Childress* (No. 96-1585); Brief of Appellant at 8-9, *Childress* (No. 96-1585).

178. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

and safety problems allegedly caused by the conduct,¹⁷⁹ created a "physically threatening or humiliating" situation that "unreasonably interfere[d] with [the plaintiffs'] work performance."¹⁸⁰ Neither the district court nor the en banc court reviewed these circumstances, which *Harris* suggests should be addressed in evaluating hostile environment claims.¹⁸¹

The absence of a *Meritor* and *Harris* or a *Clayton* analysis from the district court and en banc court opinions in *Childress* does not indicate that the Fourth Circuit will fail to assiduously evaluate hostile environment claims under Title VII in the future. The court has in other instances applied the factors identified in *Harris* to find the existence of a hostile working environment.¹⁸² What is apparent from the en banc decision is that there does not appear to be a majority of the court willing to extend the scope of Title VII standing to certain "unprotected" classes of employees as other federal circuits and, arguably, the Supreme Court have done.¹⁸³ This hesitancy may limit future claims by persons such as white male employees and may affect the "dominant purpose of [Title VII] . . . to root out discrimination in employment."¹⁸⁴

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179. See Brief of Appellant at 18, *Childress* (No. 96-1585).

180. *Harris*, 510 U.S. at 23.

181. See *id.*

182. See, e.g., *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 772-73 (4th Cir. 1997) (applying *Harris* to determine whether a female salesperson was subject to sexual harassment that created a hostile working environment); *Sasaki v. Class*, 92 F.3d 232, 242 (4th Cir. 1996) (evaluating the district court's application of the hostile environment analysis from *Harris*); *Spicer v. Virginia*, 66 F.3d 705, 709-10 (4th Cir. 1995) (applying *Harris* in determining whether a female prison employee was subject to a hostile working environment).

183. The Supreme Court has not directly addressed the question of whether non-minority employees have standing to bring a Title VII action based on discrimination against fellow minority employees. As noted previously, see *supra* notes 95-102 and accompanying text, the Court has written approvingly, however, of circuit court decisions broadening Title VII standing to include such claims.

184. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984).