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# Same-Sex Harassment - The Next Step Up in the Evolution of Sexual Harassment Law under Title VII Comment.

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# SAME-SEX HARASSMENT—THE NEXT STEP IN THE EVOLUTION OF SEXUAL HARASSMENT LAW UNDER TITLE VII

REGINA L. STONE-HARRIS

"Sexual harassment is more about power and control than it is about sex."[1]

## I. INTRODUCTION

Edward Castellano complained that he was sexually harassed by a co-worker at Whole Foods Market in Houston, Texas.[2] According to Castellano, his co-worker badgered him for sex, grabbed him in the crotch, and even tried to pull off his pants while they were alone in a storeroom.[3] Embarrassed by his situation, Castellano complained to his supervisor; however, the harassment only intensified.[4]

Castellano's situation is unique because his harasser was another man.[5] Surely a woman in Castellano's position would not have to tolerate such conduct by another employee.[6] A woman sexually harassed by a male co-worker is protected by Title VII of the Civil Rights Act.[7] Castellano is not protected, however, because the federal courts in the Fifth Circuit do not protect men who are sexually harassed by other men.[8] Castellano would be protected if he lived in another district that does offer Title VII protection to same-sex victims, but should geography dictate protection?[9]

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1. *See* L.M. Sixel, *Wrongs Without Remedy; Federal Laws Offer Little Relief from Same-Sex Harassment*, HOUS. CHRON., Sept. 17, 1995, at 1 (quoting Jeanette Mann, director of affirmative action programs for California State University).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* L.M. Sixel, *Wrongs Without Remedy; Federal Laws Offer Little Relief from Same-Sex Harassment*, HOUS. CHRON., Sept. 17, 1995, at 1 (observing that Fifth Circuit does not consider same-sex harassment to be violation of Title VII).

6. 42 U.S.C. § 2000e (1994); *see* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (holding that woman who was pressured for sex and sexually assaulted at work was protected by Title VII); *see also* Bundy v. Jackson, 641 F.2d 934, 946 (D.C. Cir. 1981) (reversing lower court decision against female victim of sexual demands and sexual comments because of violation of rights under Title VII).

7. *See Vinson*, 477 U.S. at 73 (finding that Title VII protects victims of sexual harassment); *Bundy*, 641 F.2d at 934 (holding that Title VII protects women from discrimination by male employees).

8. *See* Garcia v. Elf Atochem North America, 28 F.3d 446, 451–52 (5th Cir. 1994) (denying male employee's claim of sexual harassment by male supervisor under Title VII of Civil Rights Act).

9. *See, e.g.*, Roe v. K-Mart Corp., No. CIV.A.2:93–2372–18AJ, 1995 WL 316783, at *2 (D.S.C. Mar. 28, 1995) (recognizing male-to-male sexual harassment claim under Title VII); EEOC v. Walden Book Co., 885 F. Supp. 1100, 1103–04 (M.D. Tenn. 1995) (holding that man's claim of sexual harassment by another man is actionable under Title VII); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995) (finding that Title VII protects male sexually harassed by another male).

The federal courts are currently split as to whether a claim of sexual harassment between members of the same gender is actionable under Title VII of the Civil Rights Act.[10] The decisions in *Myers v. City of El Paso*[11] and *Nogueras v. University of Puerto Rico*[12] illustrate the conflict.[13] In *Myers*, the United States District Court for the Western District of Texas held that a claim for female-to-female sexual harassment was *not* actionable under Title VII.[14] Four months later in *Nogueras*, however, the United States District Court for the District of Puerto Rico held that a claim of same-sex sexual harassment *could* be addressed by Title VII.[15] Other courts have since examined this issue, and their holdings are as contradictory as those in *Myers* and *Nogueras*.[16]

In the absence of legislative guidance or direction by the United States Supreme Court, the federal district courts have struggled with the question of whether a claim is actionable when the parties to a sexual harassment lawsuit are of the same gender.[17] Only the Fifth Circuit has

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10. *See, e.g.*, Quick v. Donaldson Co., 895 F. Supp. 1288, 1294 (S.D. Iowa 1995) (discussing mixed results reached by federal courts in Title VII cases involving members of same sex); *Walden Book Co.*, 885 F. Supp. at 1101–02 (addressing varied ways federal courts have dealt with claims that homosexual supervisor harassed member of same sex); Fleenor v. Hewitt Soap Co., No. C–3–94–182, 1995 WL 386793, at *2 (S.D. Ohio Dec. 21, 1994) (describing conflicting court decisions).

11. 874 F. Supp. 1546 (W.D. Tex. 1995).

12. 890 F. Supp. 60 (D.P.R. 1995).

13. *Compare* Myers v. City of El Paso, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995) (refusing to recognize claim of sexual harassment between two females), *with* Nogueras v. University of Puerto Rico, 890 F. Supp. 60, 63 (D.P.R. 1995) (recognizing claim of sexual harassment brought by woman against another woman).

14. *See Myers*, 874 F. Supp. at 1548 (granting summary judgment for defendant-employer because Title VII only covers gender discrimination and same-sex cases are not considered gender discrimination).

15. *See Nogueras*, 890 F. Supp. at 63 (opining that gender is irrelevant in Title VII sexual harassment cases).

16. *Compare* Raney v. District of Columbia, 892 F. Supp. 283, 288 (D.D.C. 1995) (rejecting defendant-employer's argument that Title VII allows sexual harassment by members of same sex in male-to-male claim of sexual harassment), *with* Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822, 834 (D. Md. 1994) (holding that no cause of action exists under Title VII for male employee who was sexually harassed by male supervisor), *aff'd on other grounds*, 77 F.3d 745 (4th Cir. 1996).

17. *See, e.g.*, Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 762 (D.D.C. 1995) (proposing that Congress amend Title VII to reflect Congress's "specific intentions" that statute apply solely to members of same gender); *Raney*, 892 F. Supp. at 287 (commenting on lack of legislative history to guide courts in analyzing Title VII); Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1171 (D. Nev. 1995) (bemoaning "paucity" of legislative history to tell courts what Congress actually intended); *Walden Book Co.*, 885 F. Supp. at 1103 (finding no legislative history to guide courts); *see also* Pritchett v. Sizeler Real Estate Mgmt. Co., No. 93–2351, 1995 U.S. Dist. LEXIS, at *4 (E.D. La. Apr. 20, 1995) (commenting that issue has not yet been addressed by United States Supreme Court). The United States Supreme

provided its district courts with the guidance needed to address this issue.[18] Meanwhile, as other courts facing this issue for the first time continue to struggle, litigants armed with case law supporting both sides of the issue are understandably frustrated.[19] One commentator has called the whole question of whether this cause of action exists under Title VII a "judicial lottery."[20]

Part II of this Comment presents the legal background for sexual harassment as a cause of action under Title VII. Part III analyzes recent

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Court denied certiorari in a case which would have served as a case of first impression on the issue of same-sex sexual harassment. Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993) (unpublished table decision), *cert. denied*, 115 S. Ct. 311 (1994). Although *Giddens* is unpublished, the Fifth Circuit invoked its holding in *Garcia v. Elf Atochem North America*, stating "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones." 28 F.3d 446, 451–52 (5th Cir. 1994) (quoting *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993) (unpublished table decision)).

18. *See Garcia*, 28 F.3d at 451–52 (stating that claim of sexual harassment by male against another male was not actionable under Title VII). Two other circuits have considered cases addressing the issue. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195–96 (4th Cir. 1996) (denying claim for "heterosexual-male-on-heterosexual-male" harassment, but reserving judgment on other forms of same-sex harassment); Christian v. Merchants Servs. Corp., No. 93–3919, 1994 WL 718507, at *1 (7th Cir. Dec. 27, 1994) (unpublished) (affirming lower court's finding that female plaintiff's evidence failed to show female supervisor's harassment created hostile or abusive working environment, without raising question as to whether claim existed). *But see* Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541 (M.D. Ala. 1983) (affirming lower court decision which held "that unwelcomed homosexual harassment . . . states a violation of Title VII"), *aff'd*, 749 F.2d 732 (11th Cir. 1984). Also, the United States Court of Appeals for the District of Columbia rejected, in dicta, an argument that "sexual harassment could not be gender discrimination simply . . . because any homosexual supervisor could harass an employee of the same gender." Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981).

19. *See* Michael Kirkland, *Court Rejects Heterosexual Harassment*, WASH. NEWS, Oct. 11, 1994, at *2 (reporting Richard Giddens's frustration over results in his same-sex sexual harassment case), *available in* LEXIS, Nexis Library, UPI File. Even though a jury found that Giddens's male supervisor sexually harassed him, Giddens lost his Title VII claim because his supervisor had not made employment decisions "about Giddens because of his disdain for him." *Id.* In contrast, Elba Llampallas was awarded $1.7 million in damages after she was discharged for ending a 13-year sexual relationship with her female supervisor. *See Sexual Harassment: Federal Judge Awards Woman $1.7 Million in Same-Sex Harassment Case in Florida*, Daily Lab. Rep. (BNA), Sept. 25, 1995, at *1–2 (reporting details of damage award in same-sex harassment case), *available in* LEXIS, News Library, CURNWS File; *see also Sexual Harassment: Three Federal Courts Diverge Over Same-Sex Claims Under Title VII*, Daily Lab. Rep. (BNA), Apr. 10, 1995, at *1–2 (contrasting results in courts in Georgia, Louisiana, and South Carolina, while noting that plaintiff Joseph Oncale's claim would have been actionable under Louisiana state law, but not in federal court in Louisiana), *available in* LEXIS, Nexis Library, UPI File.

20. John Carlin, *Harassed American Men Can Sue the Pants Off One Another: Sexism/ Straight Male Takes Offence*, THE INDEP. (London), Mar. 5, 1995, at 18.

decisions addressing the issue of whether Title VII sexual harassment applies to parties of the same gender and discusses the reasoning used by courts in confronting the same-sex sexual harassment issue. Part IV explores possible solutions to resolve the current conflict in the federal courts and argues that since Title VII already protects plaintiffs in same-sex cases, a more consistent application of Title VII can be reached by focusing primarily on the alleged misconduct rather than on the gender of the parties. By using this mode of analysis, courts can determine whether plaintiffs have been sexually harassed, regardless of the gender of their harassers, so that Title VII's broad goal of workplace equality can be achieved.

However, despite a legal basis for adjudicating same-sex sexual harassment cases, the split in the federal courts will not be resolved on judicial initiative alone. Because the United States Supreme Court has historically refused to expand the definition of sex discrimination,[21] federal legislation is needed to ensure that victims of same-sex sexual harassment are uniformly guaranteed a cause of action regardless of jurisdiction. Since legislation prohibiting employment discrimination on the basis of sexual orientation would prohibit harassment on the basis of sexual orientation, Part V of this Comment advocates the enactment of the proposed Employment Non-Discrimination Act (ENDA).[22] As a federal law prohibiting employment discrimination on the basis of sexual orientation,[23] ENDA would ensure that same-sex sexual harassment victims receive the same protection given to other victims of sexual harassment.

## II. SEXUAL HARASSMENT UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[24] The United States Supreme Court has interpreted this language to include "sexual harassment" as a form of sex discrimination.[25] Specifically, the court has recognized two types of sexual harass-

21. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 145–46 (1976) (reasoning that discrimination on basis of pregnancy is not sex discrimination under Title VII); Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (refusing to recognize discrimination on basis of pregnancy as sex discrimination).

22. S. 2238, 103d Cong. (1994).

23. *Id.* § 3.

24. 42 U.S.C. § 2000e-2(a)(1) (1994).

25. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (interpreting Title VII to prohibit sexually abusive or hostile work environment); Meritor Sav. Bank v. Vinson, 477

ment—quid pro quo harassment and harassment due to a hostile or abusive work environment.[26]

Quid pro quo harassment is defined as unwelcome "sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature."[27] Typically, an action for quid pro quo harassment arises when a subordinate employee is pressured to engage in some type of sexual activity with a supervisor as a condition of retaining employment or receiving consideration for a promotion.[28] The action is characterized by an "exchange" of sexual favors for some job-related benefit.[29]

In hostile or abusive work environment sexual harassment, an exchange of favors may or may not occur.[30] Here, the victim is subjected to

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U.S. 57, 66 (1986) (agreeing with lower courts that sexual harassment may equate to sexual discrimination under Title VII).

26. *See Vinson*, 477 U.S. at 65–67 (finding that cause of action for sexual harassment arises when employment is conditioned on sexual favors or when harassment creates hostile working environment); *see also* Kauffman v. Allied Signal, Inc., 970 F.2d 178, 182 (6th Cir. 1992) (recognizing two types of sexual harassment); Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991) (distinguishing two types of sexual harassment); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 618 (6th Cir. 1986) (describing both quid pro quo and hostile work environment as variants of sexual harassment), *cert. denied*, 481 U.S. 1041 (1987); Wilson v. Wayne Co., 856 F. Supp. 1254, 1259 (M.D. Tenn. 1994) (recognizing two prohibited types of harassment).

27. 29 C.F.R. § 1604.11(a) (1995); *Vinson*, 477 U.S. at 65 (citing 29 C.F.R. § 1604.11(a) (1985)).

28. *See, e.g.*, Virgo v. Riviera Beach Assoc., 30 F.3d 1350, 1362 (11th Cir. 1994) (stating quid pro quo harassment occurs when employer alters conditions of employment because employee does not submit to sexual demands); Kariban v. Columbia Univ., 14 F.3d 773, 778 (2d Cir. 1994) (describing typical quid pro quo harassment case where employee's refusal to submit to employer's advances results in reprisal); Collins v. Baptist Mem'l Geriatric Ctr., 937 F.2d 190, 196 (5th Cir. 1991) (distinguishing quid pro quo harassment from hostile environment harassment by requiring plaintiff to prove job benefits were conditioned on submission to sexual demands); Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989) (describing quid pro quo harassment as sexual blackmail).

29. *See* Pritchett v. Sizeler Real Estate Mgmt. Co., No. 93–2351, 1995 U.S. Dist. LEXIS 5565, at *4 (E.D. La. Apr. 20, 1995) (describing quid pro quo harassment as involving exchange of benefits); Raney v. District of Columbia, 892 F. Supp. 283, 286 (D.D.C. 1995) (stating that quid pro quo action involves demand for sexual consideration in return for employment benefits); *see also* Ellen F. Paul, *Sexual Harassment As Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 349 (1990) (describing typical quid pro quo case as when supervisor demands favors in exchange for job benefits). Paul describes the "classic" quid pro quo pattern as: "A refuses to do X for B unless B provides A with sexual favors." *Id.* at 352–53. A's oppressive behavior is triggered by B's unwillingness to provide sexual favors. *Id.* at 353.

30. *See* EEOC Compl. Man. (CCH) ¶ 3102, at 3206 (1981) (stating that prohibited conduct might not require submission to sexual advance, but rather may unreasonably interfere with employee's work environment); *see also* Spain v. Gallegos, 26 F.3d 439, 447 (3d Cir. 1994) (commenting that hostile work environment can be proved without demonstrating sexual misconduct).

abuse and hostility in the work environment itself.[31] To determine if a work environment is abusive or hostile, courts look at all related circumstances to determine whether a reasonable person would perceive the environment as hostile or abusive.[32] In reviewing the circumstances, courts also consider the victim's own subjective perception of the environment.[33]

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing Title VII.[34] Pursuant to that authority, the EEOC has defined the scope of sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[35]

Ironically, according to the *EEOC Compliance Manual*, the victim of sexual harassment need not be "of the opposite sex from the harasser";[36] however, the manual also states that Title VII does not cover charges based on sexual orientation.[37] Although not binding on the courts, these

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31. *See* EEOC Compl. Man. (CCH) ¶ 3102, at 3206 (1981) (describing scenarios which violate Title VII by producing intimidating, hostile, or offensive environment through sexual discrimination of employees); *see also Vinson*, 477 U.S. at 65 (stating that workplace is abusive when permeated "with discriminatory intimidation, ridicule, and insult").

32. *See, e.g., Harris*, 114 S. Ct. at 370 (affirming "reasonable person" standard for evaluating hostile or abusive work environment claim); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995) (explaining that whether workplace is hostile is determined from "perspective of a reasonable person with the same fundamental characteristics"); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1454 (7th Cir. 1994) (stating that both effect of harassment on victim and on reasonable person in victim's position must be considered).

33. *See* Spain v. Gallegos, 26 F.3d 439, 447 (3d Cir. 1994) (concluding that both subjective and objective harassment of victim must be considered in claim of hostile work environment).

34. *See* 42 U.S.C. § 2000e-5(a) (1994) (giving EEOC authority to "prevent any person from engaging in any unlawful employment practice . . . [under] section 2000e-2" of Title VII).

35. 29 C.F.R. § 1604.11(a) (1995).

36. EEOC Compl. Man. (CCH) ¶ 3101, at 3204 (1981).

37. *Id.*

guidelines have served as a reference for some courts in deciding whether Title VII protection encompasses same-sex sexual harassment.[38]

The law concerning sexual harassment originally developed through cases involving male harassment of female employees.[39] Later it became apparent that the reasons for prohibiting a man from harassing a woman were equally applicable to situations where a woman might be the aggressor.[40] Like a woman, a man could be the target of unwelcomed sexual advances. A man's job performance could also be unreasonably interfered with by such advances, and his livelihood might be jeopardized if he refused to submit to sexual demands.[41] Moreover, females, like males, could create a work environment that was abusive and hostile, leaving a male employee debilitated or ostracized.[42] Consequently, the law that developed to protect women against sexual harassment was applied to men facing similar situations.[43] The courts now face a new chapter in the evolution of sexual harassment law—claims of sexual harassment where the offender and the victim are of the same gender.[44]

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38. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (commenting on use of EEOC guidelines by courts); Raney v. District of Columbia, 892 F. Supp. 283, 287 (D.D.C. 1995) (explaining EEOC's position on same-sex harassment); Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 (N.D. Ind. 1995) (relying on *EEOC Compliance Manual* to recognize same-sex claim); Polly v. Houston Lighting & Power Co., 825 F. Supp. 135, 137 (S.D. Tex. 1993) (referring to *EEOC Compliance Manual* for proposition that victim of sexual harassment need not be of opposite gender from harasser).

39. *See* SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 21.03 (1995) (discussing early history of Title VII sexual harassment cases); *see also* Michelle R. Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1087 (1989) (noting that claims of female harassment of males are rarely litigated, but companies still receive complaints).

40. *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 6 (1979) (stating that because each gender possesses sexuality, men can also be sexually harassed); *see also* SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 21.03 (1995) (finding male was able to sustain sexual harassment claim against female supervisor as early as 1982).

41. *See* LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 46.04 (1995) (commenting that female harassment of males is not lesser violation of Title VII); SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 21.03 n.8 (1995) (noting cases involving male victim of quid pro quo harassment).

42. *See* EEOC Compl. Man. (CCH) ¶ 3101, at 3204 (1981) (indicating that males as well as females may be victims of sexual harassment); CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 6 (1979) (explaining that men can be sexually harassed in same way that women are harassed).

43. *See* EEOC Compl. Man. (CCH) ¶ 3101, at 3204 (1981) (remarking that males may be victimized by female offenders); Michelle R. Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1087 (1989) (stating that Title VII also protects men from harassment by women).

44. *See* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 105 (2d ed. 1994) (noting that same-sex harassment has not been litigated very much

## III. Previous Judicial Approaches to the Issue

Since 1994, at least forty federal courts have considered the issue of whether a claim of sexual harassment is actionable under Title VII when the offender and the victim are of the same gender.[45] Such cases are commonly referred to as "same-sex sexual harassment" cases and the courts have taken very different approaches in handling such cases.[46]

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to date); Susan M. Omilian & Jean P. Kamp, Sex-Based Employment Discrimination § 22.03 (1995) (explaining that same-sex sexual harassment as cause of action is still developing).

45. *See, e.g.*, McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996); Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Christian v. Merchants Servs. Corp., No. 93–3919, 1994 WL 718507 (7th Cir. Dec. 27, 1994) (unpublished); Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993) (unpublished table decision), *cert. denied*, 115 S. Ct. 311 (1994); Williams v. District of Columbia, No. 94–02727 (JHG), 1996 U.S. Dist. LEXIS 1338 (D.D.C. Feb. 5, 1996); Tanner v. Prima Donna Resorts, 919 F. Supp. 351 (D. Nev. 1996); Ton v. Information Resources Inc., No. 95–C–3565, 1996 U.S. Dist. LEXIS 51 (N.D. Ill. Jan. 3, 1996) (unpublished); Ladd v. Sertoma Handicapped Opportunity Program, 917 F. Supp. 766 (N.D. Okla. 1995); Ecklund v. Fuisz Tech., Ltd., 905 F. Supp. 335 (E.D. Va. 1995); Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368 (C.D. Cal. 1995); King v. M.R. Brown, Inc., 911 F. Supp. 161 (E.D. Pa. 1995); Wenner v. C.G. Bretting Mfg. Co., 917 F. Supp. 640 (W.D. Wis. 1995); Fredette v. BVP Mgmt. Assoc., 905 F. Supp. 1034 (M.D. Fla. 1995); Mayo v. Kiwest Corp., 898 F. Supp. 335 (E.D. Va. 1995); Quick v. Donaldson Co., 895 F. Supp. 1288 (S.D. Iowa 1995); Raney v. District of Columbia, 892 F. Supp. 283 (D.D.C. 1995); Plakio v. Congregational Home, Inc., No. 93–4222–SAC, 1995 U.S. Dist. LEXIS 7088 (D. Kan. Apr. 27, 1995); Pritchett v. Sizeler Real Estate Mgmt. Co., No. 93–2351, 1995 U.S. Dist. LEXIS 5565 (E.D. La. Apr. 20, 1995); Blozis v. Mike Raisor Ford, Inc., 896 F. Supp. 805 (N.D. Ind. 1995); Boyd v. Vonnahem, No. 93–CV–4358–JPG, 1995 U.S. Dist. LEXIS 7542 (S.D. Ill. Mar. 29, 1995); Roe v. K-Mart Corp., No. CIV.A.2:93–2372–18AJ, 1995 WL 316783 (D.S.C. Mar. 28, 1995); Oncale v. Sundowner Offshore Servs., No. 94–1483, 1995 U.S. Dist. LEXIS 4119 (E.D. La. Mar. 23, 1995); Nogueras v. University of Puerto Rico, 890 F. Supp. 60 (D.P.R. 1995); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133 (C.D. Ill. 1995); EEOC v. Walden Book Co., 885 F. Supp. 1100 (M.D. Tenn. 1995); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545 (M.D. Ala. 1995); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229 (S.D. Ga. 1995); Ryczek v. Guest Servs., Inc., 877 F. Supp. 754 (D.D.C. 1995); Fox v. Sierra Dev. Co., 876 F. Supp. 1169 (D. Nev. 1995); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822 (D. Md. 1994), *aff'd on other grounds*, 77 F.3d 745 (4th Cir. 1996); Fleenor v. Hewitt Soap Co., No. C–3–94–182, 1995 WL 386793 (S.D. Ohio Dec. 21, 1994); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wyo. 1993); Polly v. Houston Lighting & Power Co., 825 F. Supp. 135 (S.D. Tex. 1993); Parish v. Washington Nat'l Ins. Co., No. 89 C 4515, 1990 U.S. Dist. LEXIS 1393 (N.D. Ill. Oct. 19, 1990); Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 32 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981).

46. *Compare King*, 911 F. Supp. at 166–67 (reporting that courts have reached divergent results in same-sex cases, but recognizing plaintiff's claim), *with Quick*, 895 F. Supp. at

Some courts have faced the same-sex sexual harassment issue squarely,[47] while others have managed to side-step the issue by dismissing such cases on other grounds.[48] While a few cases have been decided by a jury,[49] most cases have been decided through summary judgment proceedings.[50]

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1294 (describing inability of courts to reach consensus on same-sex sexual harassment while denying plaintiff's same-sex claim).

47. *See Walden Book Co.*, 885 F. Supp. at 1104 (stating unequivocally that same-sex sexual harassment is prohibited by Title VII); *Garcia*, 28 F.3d at 451–52 (holding that same-sex claim between males is never actionable).

48. *See, e.g.*, *Wenner*, 917 F. Supp. at 643 (granting defendant-employer summary judgment because plaintiff failed to show conduct rising to level of actionable sexual harassment); *Plakio*, 1995 U.S. Dist. LEXIS 7088, at *4 (denying defendant-employer's motion to amend pleadings to add issue of whether same-sex harassment is actionable under Title VII); *Blozis*, 896 F. Supp. at 807–08 (denying defendant-employer's motion to dismiss so defendant could develop arguments for summary judgment in light of recently decided same-sex case); *Vandeventer*, 887 F. Supp. at 1182 (refusing to decide whether same-sex claim is actionable under Title VII, but finding plaintiff did not show he was discriminated against because he was male); *Ryczek*, 877 F. Supp. at 762 (finding plaintiff's claim failed because plaintiff did not suffer job detriment; therefore, same-sex harassment question need not be addressed); *Christian*, 1994 WL 718507, at *1 (affirming dismissal of plaintiff's claim because incidents of harassment did not seem serious); *Polly*, 825 F. Supp. at 137 (declining to "adopt the [m]agistrate [j]udge's conclusion that sexual harassment of males against another male is not proscribed by Title VII" because claim could be disposed of otherwise); Parish v. Washington Nat'l Ins. Co., No. 89 C 4515, 1990 U.S. Dist. LEXIS 13934, at *13–14 (N.D. Ill. Oct. 19, 1990) (granting defendant-employer's motion for summary judgment because plaintiff's allegations fell short of establishing actionable sexual harassment).

49. *See, e.g.*, *Jury Dismisses Same-Sex Harassment Claim*, Daily Lab. Rep. (BNA), Oct. 27, 1995 (announcing that federal jury ruled in favor of defendant-employer despite fact that Thomas Raney's claim of same-sex harassment survived motion for summary judgment), *available in* LEXIS, Labor Library, DLABRT File; *Sexual Harassment: Federal Judge Awards Woman $1.7 Million in Same-Sex Harassment Case in Florida*, Daily Lab. Rep. (BNA), Sept. 25, 1995 (reporting that jury in Southern District of Florida awarded Elba Llampallas $319,156 in back pay and $1.417 million in future pay when fired for breaking off sexual relationship with female boss), *available in* LEXIS, Labor Library, DLABRT File; *Same-Sex Harassment: Jury Finds for Former Insurance Employee Who Alleged Male Supervisor Harassed Him*, Daily Lab. Rep. (BNA), Aug. 16, 1995 (reporting that jury in Northern District of Alabama found Ford Prescott's male supervisor harassed him), *available in* LEXIS, News Library, CURNWS File; Michael Kirkland, *Court Rejects Heterosexual Harassment*, WASH. NEWS, Oct. 11, 1994 (writing that even though jury found Richard Giddens's male supervisor sexually harassed him, claim was not actionable because supervisor had not based employment decisions on harassment actions), *available in* LEXIS, News Library, CURNWS File.

50. *See Tanner*, 1996 U.S. Dist. LEXIS 3078, at *5–11 (explaining why plaintiff should be allowed to proceed to prove claim of same-sex harassment); *Ladd*, 1995 U.S. Dist. LEXIS 20393, at *4 (denying defendant-employer's motion to dismiss plaintiff's claim of same-sex harassment); *K-Mart Corp.*, 1995 WL 316783, at *2 (finding male-to-male claim is actionable under Title VII on consideration of defendant-employer's motion for summary judgment).

A review of these cases reveals the contradictory results which have frustrated both judges and litigants alike.[51]

Some courts have found that a claim of sexual harassment is *never* actionable when both the victim and the offender are of the same gender, while other courts have reached the exact opposite conclusion.[52] As a result, it is impossible to predict how the remaining courts will decide this issue; however, it is possible to identify the trends emerging from same-sex sexual harassment cases and the reasoning that characterizes these trends.

### A. *A Claim Is Actionable When a Homosexual Supervisor Harasses a Heterosexual Employee*

Most of the cases in which courts have found that same-sex sexual harassment is actionable under Title VII have involved homosexual advances by a supervisor under quid pro quo circumstances.[53] The United States District Court for the Northern District of Illinois was the first court to consider such a claim.[54] In *Wright v. Methodist Youth Services*,[55] the court considered Donald Wright's claim that he was fired when he refused the homosexual advances of his supervisor.[56] The district court found that Wright's allegations were true and analogized his claim to those of females who had sued their employers when they were fired for refusing sexual advances from their male supervisors.[57] The court found that a woman's Title VII claim was historically allowed when she was fired for refusing her male supervisor's advances "on the notion that making a demand of a female employee that would not be made of a

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51. *Compare Griffith*, 887 F. Supp. at 1137 (finding Title VII offers protection for male harassed by male supervisor), *with Mayo*, 898 F. Supp. at 337–38 (finding Title VII does not protect male harassed by male supervisor).

52. *Compare Oncale*, 1995 U.S. Dist. LEXIS 4119, at *4–5 (holding that male harassment by male supervisor did not state claim under Title VII), *with Prescott*, 878 F. Supp. at 1551 (finding that male harassment by male supervisor is actionable under Title VII).

53. *See, e.g.*, Pritchett v. Sizeler Real Estate Mgmt. Co., No. 93–2351, 1995 U.S. Dist. LEXIS 5565 (E.D. La. Apr. 20, 1995); Boyd v. Vonnamen, No. 93–CV–4358–JPG, 1995 U.S. Dist. LEXIS 7542 (S.D. Ill. Mar. 29, 1995); Nogueras v. University of Puerto Rico, 890 F. Supp. 60 (D.P.R. 1995); EEOC v. Walden Book Co., 885 F. Supp 1100 (M.D. Tenn. 1995); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133 (C.D. Ill. 1995); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545 (M.D. Ala. 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 32 (11th Cir. 1984).

54. *See* Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 309–10 (N.D. Ill. 1981) (examining Wright's Title VII claims).

55. 511 F. Supp. 307 (N.D. Ill. 1981).

56. *See Wright*, 511 F. Supp. at 308 (describing male plaintiff's complaint that he was fired after refusing sexual advances made by homosexual supervisor).

57. *Id.* at 310 (citing cases where courts upheld female's claim for refusing sexual demand from male supervisor who subsequently fired her).

male employee involves sex discrimination."[58] Absent guiding case law on same-sex sexual harassment, the *Wright* court relied on the only authority it had to support a ruling in Wright's favor[59]—dicta contained in *Barnes v. Costle*.[60]

In *Barnes*, the United States District Court for the District of Columbia stated:

> It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual supervisor of the same gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, *but for his or her sex*, the employee would not have faced.[61]

Relying on this "but for his . . . sex" element, the court found that Wright's supervisor had made a demand on him that he would not have made on a female employee.[62] Accordingly, since Wright had been harassed simply because he was male, the court held that Wright's claim was actionable under Title VII.[63]

Another early case involved similar circumstances. In *Joyner v. AAA Cooper Transportation*,[64] a former driver of a trucking company sued his employer when he was terminated for refusing homosexual advances from a terminal manager.[65] Like the court in *Wright*, the *Joyner* court analogized the case to those cases involving unwelcomed heterosexual harassment of female employees.[66] The *Joyner* court found no difference between unwelcomed homosexual advances and unwelcomed heterosexual advances, but required the plaintiff to prove that he was a "member of a protected class" and that he was "subjected to unwelcome sexual harassment to which members of the opposite sex had not been subjected."[67] After finding that the driver was a member of a protected class (males), and that the terminal manager's advances were unwelcome, as

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58. *Id.*
59. *Id.*
60. 561 F.2d 983 (D.C. Cir. 1977).
61. *Barnes*, 561 F.2d at 990 n.55 (emphasis added).
62. *Wright*, 511 F. Supp. at 310.
63. *Id.*
64. 597 F. Supp. 537 (M.D. Ala. 1983).
65. *See Joyner*, 597 F. Supp. at 542 (finding that plaintiff's refusal of sexual advances resulted in loss of job).
66. *Id.* at 541–42.
67. *Id.* Courts have traditionally used these same elements when deciding cases where a female employee has sued her employer for harassment suffered at the hands of a male employee. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619–20 (6th Cir. 1986) (establishing elements required for female's claim of sexual harassment under Title VII).

well as determining that the plaintiff was fired solely because he refused the terminal manager's advances, the *Joyner* court awarded the plaintiff damages in the form of back wages.[68]

In the wake of the *Wright* and *Joyner* decisions, other courts have required the plaintiff in a same-sex sexual harassment case to prove that he or she was harassed because of his or her gender.[69] Plaintiffs have successfully proven this "but for" element by showing that the offender harassed only men or only women, which ultimately proved that the offender did not treat men and women in a similar way.[70] Other courts have followed the *Joyner* court by evaluating claims of same-sex sexual harassment in the same way used to evaluate more traditional claims of sexual harassment where the victim and the harasser are of different gender.[71] Under this analysis, a plaintiff in a same-sex suit, like a plaintiff in a traditional harassment suit, must prove that: (1) the plaintiff is a member of a protected class, (2) the plaintiff was a victim of unwelcome sexual advances, (3) the harassment complained of was based on sex, and (4) the harassment affected the plaintiff's employment.[72]

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68. *Joyner*, 597 F. Supp. at 544. The court made no finding as to whether females had been subjected to similar advances by the terminal manager. *Id.* at 542. As illustrated later in this Comment, other courts have required a male plaintiff to prove he was treated differently than female employees. *See* Quick v. Donaldson Co., 895 F. Supp. 1288, 1297 (S.D. Iowa 1995) (finding that plaintiff did not prove he was discriminated against because he was male and, therefore, stated no claim under Title VII).

69. *See Griffith*, 887 F. Supp. at 1137 (requiring plaintiff to prove he was harassed because of his gender); *Prescott*, 878 F. Supp. at 1551 (finding plaintiff proved sexual advances were made because of gender).

70. *See Griffith*, 887 F. Supp. at 1137 (determining that if male supervisor only harassed men, then plaintiff could prove disparate treatment of men); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (explaining that female plaintiff need only prove that female offender harassed women rather than men).

71. In each of the following cases, the court cited to a sexual harassment case involving male harassment of a female as authority for the required elements of a viable sexual harassment claim. *See Pritchett*, 1995 U.S. Dist. LEXIS 5565, at *3 (noting requirements for actionable Title VII claim); *Griffith*, 887 F. Supp. at 1137 (listing required elements for sexual harassment claim); *Prescott*, 878 F. Supp. at 1549 (relying on Virgo v. Riviera Beach Ass'n, Ltd., 30 F.3d 1350 (11th Cir. 1994), in stating elements required for quid pro quo claim).

72. *Compare* Virgo v. Riviera Beach Ass'n, Ltd., 30 F.3d 1350, 1361 (11th Cir. 1994) (establishing requirements for sexual harassment claim in considering same-sex case), *with* Henson v. City of Dundee, 682 F.2d 897, 903–04 (11th Cir. 1982) (establishing elements required to prove allegation of sexual harassment in different-gender case). *Henson* was one of the earliest sexual harassment cases considered by the federal courts and was used as precedent for many other cases including same-sex cases. *See* Ellen F. Paul, *Sexual Harassment As Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 342 (1990) (characterizing *Henson* as leading authority in setting parameters for actionable sexual harassment).

In response to other courts' contrary holdings that same-sex harassment is *never* actionable, the courts which allow same-sex sexual harassment claims find that the "plain meaning" of Title VII prohibits gender discrimination against employees.[73] These courts interpret the term "sex" within Title VII to mean "gender."[74] Thus, when a homosexual supervisor harasses a subordinate of the same gender, the victim is being harassed "but for his or her gender." Consequently, these courts hold that Title VII is applicable.[75]

### B. *A Claim Is Actionable When a Homosexual Supervisor Harasses a Homosexual Employee*

At least one court has found that a claim of same-sex sexual harassment is actionable under Title VII when a homosexual supervisor harasses a homosexual employee.[76] Faced with a male homosexual employee's complaint that he was fired for refusing the sexual advances of his male homosexual supervisor, the United States District Court for the District of South Carolina in *Roe v. K-Mart Corporation*[77] relied on

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73. *See, e.g.*, Ladd v. Sertoma Handicapped Opportunity Program, Inc., 917 F. Supp. 766, 767 (N.D. Okla. 1995) (relying on plain language of Title VII to find that same-sex harassment is prohibited); *Boyd*, 1995 U.S. Dist. LEXIS 7542, at *8 (declining to "read Title VII as applicable only to heterosexual sexual harassment"); *Nogueras*, 890 F. Supp. at 63 (noting that plain language of Title VII makes same-sex harassment unlawful); *Griffith*, 887 F. Supp. at 1136–37 (stating that "[t]he plain language of Title VII simply does not restrict its prohibition against discrimination to employees of the opposite sex"); *Walden Book Co.*, 885 F. Supp. at 1103 (referring to Title VII for proposition that "it is unlawful to discriminate against women because they are women and against men because they are men"); *Prescott*, 878 F. Supp. at 1550 (finding "language of Title VII is clear" and supports claim for same-sex sexual harassment).

74. *See Pritchett*, 1995 U.S. Dist. LEXIS 5565, at *6 (describing plaintiff's claim as same-gender sexual harassment); *Nogueras*, 890 F. Supp. at 63 (discussing "sex" in language of Title VII as "gender" in considering plaintiff's claim); *Prescott*, 878 F. Supp. at 1551 (finding plaintiff's treatment was based on gender).

75. *See, e.g.*, *Boyd*, 1995 U.S. Dist. LEXIS 7542, at *6–7 (citing *Wright* in finding that plaintiff was harassed because he was male); *Pritchett*, 1995 U.S. Dist. LEXIS 5565, at *6 (reasoning that same-gender harassment is actionable when subordinate would not have been harassed "but for" his or her gender); *Nogueras*, 890 F. Supp. at 63 (finding that female plaintiff successfully argued that her treatment was based on gender); *Walden Book Co.*, 885 F. Supp. at 1103–04 (explaining that Title VII is violated when homosexual supervisor makes unwelcome advances to member of same gender); *Prescott*, 878 F. Supp. at 1550–51 (stating that "when a homosexual man propositions or harasses a male subordinate, but does not similarly proposition or harass female workers, the male employee has been singled out because of his gender").

76. *See* Roe v. K-Mart Corp., No. CIV.A.2:93–2372–18AJ, 1995 WL 316783, at *2 (D.S.C. Mar. 28, 1995) (finding that plaintiff's claim was actionable under both quid pro quo and hostile working environment theories of sexual harassment).

77. No. CIV.A.2:93–2372–18AJ, 1995 WL 316783 (D.S.C. Mar. 28, 1995).

*Wright* and *Joyner* in holding that the plaintiff's claim was actionable under Title VII.[78] The *Roe* court determined that the United States Supreme Court had not restricted the application of Title VII to "sexual advances from a member of the opposite sex as the victim."[79] Referring to the "but for his sex" analysis in *Wright* and *Joyner*, the *Roe* court held that the plaintiff's claim was actionable as both a quid pro quo harassment claim and as an offensive or hostile working environment claim.[80] The court noted that "[a]ny other conclusion conceivably subjects Title VII to an attack on equal protection grounds."[81]

### C. *A Claim Is Actionable When a Homosexual Employee Harasses a Heterosexual Employee*

Likewise, many courts have extended protection to heterosexual employees who are harassed by homosexual co-workers.[82] These cases differ from those discussed above in that they involve allegations of hostile working environment harassment rather than quid pro quo harassment.[83] In relying on the reasoning in *Joyner*, courts have found that "nothing in the text of the statute indicates that Title VII's protections extend only to individuals who are harassed by members of the opposite sex."[84]

### D. *A Claim Is Actionable When a Bisexual Supervisor Harasses an Employee*

Another line of cases extends Title VII protection to employees who are sexually harassed by bisexual supervisors.[85] However, courts have

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78. *K-Mart Corp.*, 1995 WL 316783, at *2.

79. *Id.* at *1.

80. *Id.* at *2.

81. *Id.* at *2 n.2.

82. *See* King v. M.R. Brown, Inc., No. 95-2271, 1995 U.S. Dist. LEXIS 14211, at *17 (E.D. Pa. Sept. 22, 1995) (finding that heterosexual female waitress who was harassed by homosexual female waitress stated actionable Title VII claim); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 233 (S.D. Ga. 1995) (denying defendant-employer's motion to dismiss female security guard's claim that she was harassed by other female guards).

83. *Compare McCoy*, 878 F. Supp. at 231 (describing facts in hostile work environment claim in which female employees harassed another female employee to force her to resign), *with* Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 308 (N.D. Ill. 1981) (outlining facts of quid pro quo case where male was fired for refusing sexual advances of male supervisor).

84. *Id.*; *see King*, 911 F. Supp. at 167–68 (indicating that Title VII is not limited to cases involving parties of different genders).

85. *See* Raney v. District of Columbia, 892 F. Supp. 283, 287–88 (D.D.C. 1995) (addressing claim in which defendant asserted employee's bisexuality as defense).

had to manipulate the "but for" test in these type of cases.[86] Employers argue that Title VII does not apply in cases involving sexual harassment by bisexual supervisors because the insistence on sexual favors applies equally to both male and female employees.[87] Moreover, since the bisexual supervisor can sexually harass members of both sexes, a member of neither gender is harassed "but for" his or her gender. Without the "but for" element, defendant-employers argue, a plaintiff's claim must fail in this type of case.[88]

Courts have rejected this argument, however, finding that "equal harassment of both genders does not escape the purview of Title VII."[89] Using the "but for" element of sex discrimination, some courts allow a claim if the plaintiff can prove that the bisexual supervisor harassed only members of his or her gender.[90] If such a burden of proof is met, a plaintiff has stated a claim for which Title VII offers protection.

### E. *A Claim Involving a Harasser and a Victim of the Same Gender Is Never Actionable*

Despite the willingness of some courts to allow same-sex sexual harassment claims, many courts have determined that same-sex claims are *never* actionable.[91] These cases typically involve claims of a hostile or abusive work environment.[92] The trend in denying such claims began when the

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86. *Id.* (finding that male plaintiff had satisfied "but for" element by alleging male bisexual harassed only men, not women). In *Raney*, the district court manipulated the "but for" test in response to the defendant-employer's argument that a bisexual supervisor can harass neither sex "but for the victim's gender" since a bisexual can prey on either gender. *Id.* at 288. However, the court found that the male plaintiff in *Raney* had satisfied the "but for" element by alleging that his male bisexual supervisor harassed only men. *Id.* Consequently, the plaintiff's claim could withstand the defendant-employer's motion for summary judgment. *Id.*

87. *See id.* (analyzing argument that Title VII is inapplicable to bisexual offenders because they harass both sexes).

88. *See id.* (rejecting defendants' argument that bisexual harassment is not gender discrimination); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1336 (D. Wyo. 1993) (noting defendants' argument that offender harassed both men and women so, therefore, Title VII did not apply).

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

90. *See Raney*, 892 F. Supp. at 288 (addressing allegation that male supervisor only harassed men).

91. *See, e.g.*, Garcia v. Elf Atochem North America, 28 F.3d 446, 451–52 (5th Cir. 1994) (holding that male harassment of another male is not actionable under Title VII); Wrightson v. Pizza Hut of America, 909 F. Supp. 367, 368 (W.D.N.C. 1995) (denying male plaintiff's cause of action in same-sex allegation); Benekritis v. Johnson, 882 F. Supp. 521, 526 (D.S.C. 1995) (dismissing plaintiff's same-sex sexual harassment claim).

92. *See, e.g.*, *Wrightson*, 909 F. Supp. at 368 (considering same-sex sexual harassment claim involving sexually hostile work environment); Fleenor v. Hewitt Soap Co., No.

United States District Court for the Northern District of Illinois considered one of the earliest cases involving a hostile-abusive work environment.[93] Even though this same court had previously found quid pro quo harassment actionable under Title VII in *Wright v. Methodist Youth Services*,[94] the court reached an entirely opposite conclusion in *Goluszek v. Smith*.[95]

In *Goluszek*, Anthony Goluszek sued his employer for sexual harassment and retaliatory discharge.[96] Before he was terminated, Goluszek was routinely subjected to sexual comments and derogatory remarks by male co-workers who believed that he was either homosexual or bisexual.[97] In addition to verbal insults, several male employees, while driving jeeps, threatened to knock Goluszek off a ladder he used while performing his duties as a mechanic.[98] At one point, Goluszek was even "poked . . . in the buttocks with a stick."[99] Despite Goluszek's complaints to the management, the harassment continued for eight years until Goluszek was eventually fired pursuant to union rules for "willfully creating [an] avoidable waste of time."[100]

Despite the egregious behavior of Goluszek's co-workers and his employer's failure to act, the district court held that Goluszek's claim for

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C-3-94-182, 1995 WL 386793, at *2 (S.D. Ohio Dec. 21, 1994) (describing plaintiff's claim as creation of hostile work environment); Polly v. Houston Lighting & Power Co., 825 F. Supp. 135, 137 n.3 (S.D. Tex. 1993) (characterizing plaintiff's claim as allegation of hostile work environment).

93. *See* Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (identifying hostile events constituting plaintiff's claim of sexual harassment).

94. 511 F. Supp. 307 (N.D. Ill. 1981).

95. *Compare Goluszek*, 697 F. Supp. at 1456 (holding that male plaintiff's claim of hostile work environment created by males was not actionable), *with Wright*, 511 F. Supp. at 310 (finding male plaintiff's claim of quid pro quo harassment by male was actionable).

96. *Goluszek*, 697 F. Supp. at 1453, 1455. Goluszek also alleged national origin discrimination. *Id.* The court found that Goluszek failed to state a prima facie case on this claim. *Id.* at 1457.

97. *Id.* at 1453–55. Anthony Goluszek's male co-workers routinely asked him if he "had gotten any 'pussy' or had oral sex, showed him pictures of nude women, told him they would get him 'fucked,' accused him of being gay or bisexual, and made other sex-related comments." *Id.* at 1454. Although Goluszek complained to his supervisor that his co-workers were continually harassing him about "butt-fucking in the ass," his supervisor dismissed his complaints as mere "shop talk." *Id.*

98. *Id.* at 1453.

99. *Id.* at 1454.

100. *Goluszek*, 697 F. Supp. at 1455. According to his former employer, Goluszek was fired for failing to follow safety procedures, wasting time on the job, tardiness, and being absent from work without an excuse. *Id.* at 1454–55. Goluszek contended he was fired in retaliation because he had filed a sexual harassment charge against his employer. *Id.* at 1456.

sexual harassment was not actionable under Title VII.[101] The court explained that the harassment of which Goluszek complained was not the type of discrimination that Congress was concerned with when it enacted Title VII.[102] Instead, the court determined that Congress was only concerned with "an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."[103] In adopting what the court saw as a reading "consistent with the underlying concerns of Congress," the court found that Goluszek's harassment had not "created an anti-male environment in the workplace"; therefore, Goluszek's claim was not actionable.[104] Ironically, the court did find that Goluszek's claim of retaliatory discharge for his complaints about his harassment *was* actionable under Title VII.[105] No mention was made of the court's decision in *Wright*.[106] Like the *Goluszek* court, other courts that have held that same-sex sexual harassment is never actionable under Title VII rely on congressional intent to support their decisions.[107]

Six years after the decision in *Goluszek*, the United States Court of Appeals for the Fifth Circuit, in *Garcia v. Elf Atochem North America*,[108] considered a situation similar to that of Anthony Goluszek. Like the male-dominated factory environment involved in *Goluszek*, Freddy Garcia worked in a plant where he was allegedly sexually harassed.[109] Garcia complained that he was grabbed in the crotch by a male co-worker who made "sexual motions from behind."[110] The offender, a plant supervisor,

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101. *Id.* at 1456.

102. *Id.*

103. *Id.*

104. *Goluszek*, 697 F. Supp. at 1456.

105. *Id.* at 1456–57. Apparently, the *Goluszek* court found some evidence to support Goluszek's allegation that he was fired in retaliation for having filed a sexual harassment claim. *Id.* at 1457. The court noted that "those who made the decision to fire Goluszek were aware of his multiple complaints." *Id.* For this reason, the court denied the defendant-employer's motion for summary judgment with respect to the retaliatory discharge claim. *Id.*

106. *See generally* Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).

107. *See, e.g.*, Mayo v. Kiwest Corp., 898 F. Supp. 335, 338 (E.D. La. 1995) (finding plaintiff's interpretation of Title VII "at odds with the plain language of the statute"); *Benekritis*, 882 F. Supp. at 525–26 (holding that "defendants' conduct was not the type of conduct Congress intended to sanction when it enacted Title VII"); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822, 834 (D. Md. 1994) (adopting *Goluszek* court's interpretation of congressional intent).

108. 28 F.3d 446 (5th Cir. 1994).

109. *See Garcia*, 28 F.3d at 448 (describing actions by male co-workers which created hostile working environment for male plaintiff).

110. *Id.*

was promptly counseled and the harassment stopped.[111] Nevertheless, Garcia sued his employer for sexual harassment and for several state law claims as well.[112]

The court of appeals, in affirming the district court's granting of summary judgment in favor of Garcia's employer, rejected Garcia's arguments on several grounds.[113] First, the *Garcia* court determined that no appropriate equitable relief was available to Garcia.[114] Second, the court found that Garcia failed to make a prima facie case of sexual harassment under Title VII because the named defendants were not "employers" as defined in Title VII.[115] Third, and most notably, the court relied on *Giddens v. Shell Oil*[116] as authority in holding that "harassment by a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones."[117] The *Garcia* court simply stated that "Title VII addresses gender discrimination," therefore the conduct Garcia complained of was not sexual harassment under Title VII.[118] Similar to the *Goluszek* court's emphasis on congressional intent, the *Garcia* court's emphasis on "discrimination because of gender" has been relied upon by other courts when dismissing claims brought by males for same-sex harassment by other men.[119]

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111. *Id.*

112. *Id.* at 449.

113. *Garcia*, 28 F.3d at 450–52.

114. *Id.* at 450. The court found that Garcia was entitled only to equitable relief because the damages provisions of Title VII did not become effective until after Garcia had been harassed. *Id.* In considering what equitable relief might be available to Garcia, the court found that Garcia's employer had taken action to stop the harassment, that the offender-supervisor no longer worked for the plant, and that Garcia's employment at the plant had not been interrupted. *Id.* Because of this, the court found that equitable relief in terms of back pay or an injunction was not appropriate. *Id.*

115. *Id.* at 450–52. Garcia actually worked for Ozark-Mahoning Company, which was a subsidiary of the defendant, Elf Atochem North America. *Id.* at 448. Because Garcia failed to prove that he worked for Elf Atochem rather than Ozark-Mahoning, the court granted summary judgment in favor of the defendant because it was not Garcia's employer for purposes of Title VII. *Id.* at 450.

116. 12 F.3d 208 (5th Cir. 1993) (unpublished table decision).

117. *Garcia*, 28 F.3d at 451–52.

118. *Id.* at 452.

119. *See* Fleenor v. Hewitt Soap Co., No. C-3–94–182, 1995 WL 386793, at *3 (S.D. Ohio Dec. 21, 1994) (relying on *Goluszek* to deny same-sex sexual harassment claim); *Hopkins*, 871 F. Supp. at 833–35 (applying reasoning of *Goluszek* and *Garcia* in denying male plaintiff's claim of alleged harassment by another male). In *Fleenor*, the Southern District of Ohio dismissed Roger Fleenor's claim of sexual harassment based on a hostile working environment. *Fleenor*, 1995 WL 386793, at *5. The *Fleenor* court relied on the "well-reasoned" decision in *Goluszek*, noting that the *Goluszek* court required an "anti-male environment" to make such a claim actionable under Title VII. *Id.* at *3. So, despite Fleenor's allegations that a company employee had exposed his penis and testicles to him,

Since these cases were decided, other courts have reached similar conclusions in hostile work environment claims by relying on congressional intent and the requirement that the victim prove that he or she was discriminated against because of his or her gender.[120] As previously illustrated, however, other courts have found gender irrelevant[121] and have

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threatened him with oral sex, and stuck a ruler up his buttocks, the court dismissed Fleenor's claim because he had not alleged that his harassment had created an anti-male environment. *Id.* The court held that "[w]hen both the harasser and the victim are male, the harasser must have treated the victim in an inferior manner because of the victim's gender and, as a result, created an anti-male work environment." *Id.* Almost simultaneously with *Fleenor*, the United States District Court for the District of Maryland relied on *Goluszek* and *Garcia* to find that George Hopkins's claim of harassment due to a hostile work environment was not actionable. *Hopkins*, 871 F. Supp. at 835. Hopkins claimed that his male supervisor created a hostile work environment by subjecting him to sexual comments, sexual jokes, and gestures of a sexual nature. *Id.* at 824–25. The supervisor's actions included locking the door of the men's room behind the two of them and commenting, "Ah, alone at last," and holding a magnifying glass to Hopkins's crotch and saying, "[w]here is it (penis)?" *Id.* After reviewing the *Goluszek* and *Garcia* decisions, the *Hopkins* court reasoned that Congress had not intended Title VII to apply to such claims, concluding that "Title VII does not provide a cause of action for an employee who claims to have been a victim of sexual harassment by a supervisor or co-worker of the same gender." *Id.* at 834. Rather, in the opinion of the court, Title VII was intended to protect those who are discriminated against because of their gender; George Hopkins had not shown that he was discriminated against because he was male. *Id.* at 835.

120. Myers v. City of El Paso, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995) (applying Fifth Circuit's holding in *Garcia* to claim involving females). In *Myers*, the court considered the claim of a female employee who alleged that her female supervisor made sexual advances to her, including commenting on the size of her breasts and buttocks, and touching her clothing to "see what [she had] underneath." *Id.* at 1547. Without engaging in an analysis under Title VII, the court referred to *Garcia* and granted summary judgment in favor of the employer. *Id.* at 1548. One month later, the United States District Court for the Eastern District of Louisiana applied the *Garcia* decision to Joseph Oncale's claim of sexual harassment. *See* Oncale v. Offshore Sundowner Servs., Inc., No. 94–1483, 1995 U.S. Dist. LEXIS 4119, at *5 (E.D. La. Mar. 23, 1995) (denying male's claim despite outrageous conduct of male harassers). Even though the court found that Oncale's claim included "outrageous" verbal and physical assaults that would have been actionable under Louisiana state law, his same-sex sexual harassment claim was not actionable in federal court under Title VII. *Id.* at *2. Following Fifth Circuit precedent, the court granted summary judgment for Oncale's employer. *Id.* at *5; *see* Benekritis v. Johnson, 882 F. Supp. 521, 526 (D.S.C. 1995) (applying reasoning of *Goluszek* and *Garcia* in dismissing claim by male school teacher who alleged he was sexually harassed by male teacher from same school); Mayo v. Kiwest Corp., 898 F. Supp. 335, 336–37 (E.D. Va. 1995) (finding that, because Title VII applied only to gender discrimination, man who contended male supervisor had "made sexually explicit and vulgar comments to him, grabbed him in a sexual manner, and told others that [p]laintiff was a homosexual" made claim which was "completely at odds with the plain meaning" of Title VII).

121. *See Blozis*, 896 F. Supp. at 806 (stating that critical inquiry in sexual harassment allegation is not whether victim is opposite gender of offender); *accord* Sardinia v. Dellwood Foods, Inc., No. 94–CIV–5458(LAP), 1995 U.S. Dist. LEXIS 16073, at *19 (S.D.N.Y.

relied on the *absence* of congressional intent in holding same-sex sexual harassment actionable under Title VII.[122]

### F. *Sexual Harassment Based on Sexual Orientation Is Not Actionable Under Title VII*

Although many courts have held that Title VII protects employees against gender discrimination, courts have also found that Title VII does *not* protect employees from harassment based on sexual orientation.[123] Consequently, courts which have considered a hostile or abusive work environment claim involving a male victim and a male offender who believed the victim was homosexual rule against the plaintiff. What is notable about these cases is how closely the offensive conduct parallels other conduct which courts have found to be discriminatory.[124]

In *Carreno v. Local Union No. 226*,[125] Mario Carreno complained of "extensive and continuous verbal and physical sexual harassment by male union journeymen and supervisors," including daily physical assaults.[126] Carreno alleged that the resulting stress forced him to quit his job.[127] Nevertheless, the United States District Court for the District of Kansas found that Carreno had not been discriminated against because he was

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Oct. 30, 1995) (agreeing with *Blozis* that genders of victim and offender are not key issues in sexual harassment claim); Easton v. Crossland Mortgage Corp., 905 F. Supp. at 1378 (C.D. Cal. 1995) (finding that Title VII does not require difference in gender of parties in cause of action for sexual harassment).

122. *See, e.g.*, Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 354 (D. Nev. 1996) (disposing of defendant-employer's arguments by pointing to absence of legislative history); Ton v. Information Resources, No. 95-C-3565, 1996 U.S. Dist. LEXIS 51, at *19-20 (N.D. Ill. Jan. 3, 1996) (unpublished) (noting that defendant's argument that Congress did not intend for Title VII to prohibit same-sex sexual harassment is not supported by legislative history); Sardinia v. Dellwood Foods, Inc., No. 94-CIV-5458(LAP), 1995 U.S. Dist. LEXIS 16073, at *13-14 (S.D.N.Y. Nov. 1, 1995) (pointing to absence of legislative history to support intent argument).

123. *See, e.g.*, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (holding Title VII applies to discrimination on basis of gender, but not discrimination based on sexual orientation); Quick v. Donaldson Co., 895 F. Supp. 1288, 1297 (S.D. Iowa 1995) (refusing to extend Title VII protection to discrimination based on sexual preference); Carreno v. Local Union No. 226, 54 Fair Empl. Prac. Cas. (BNA) 81 (D. Kan. Sept. 27, 1990) (denying plaintiff's claim because harassment was not based on gender, but rather was based on sexual preference).

124. *Compare* Fredette v. BVP Mgmt. Assoc., 905 F. Supp. 1034, 1037 (M.D. Fla. 1995) (finding that male who complained he was given poor work assignments for refusing male supervisor's advances had not stated claim under Title VII), *with Wright*, 511 F. Supp. at 310 (finding that male who alleged he was fired for refusing male supervisor's advances had stated claim under Title VII).

125. 54 Fair Empl. Prac. Cas. (BNA) 81 (D. Kan. Sept. 27, 1990).

126. *Carreno*, 54 Fair Empl. Prac Cas. (BNA) at 82.

127. *Id.*

male, but rather because he was homosexual.[128] The *Carreno* court held that since Title VII did not protect employees from discrimination on the basis of sexual orientation, Carreno's claim was not actionable.[129] In *Henson v. City of Dundee*,[130] however, the court held that Barbara Henson's claim that she was "subjected . . . to numerous harangues of demeaning sexual inquiries and vulgarities" from male members of the police department where she worked was actionable under Title VII.[131] Like Carreno, Henson found her treatment so intolerable that she quit her job; however, unlike Carreno, Henson proved that she was discriminated against because she was female, making her claim actionable under Title VII.[132] Similar to the *Carreno* court, other courts have held that Title VII does not protect those who are harassed due to their sexual orientation.[133]

To conclude that Title VII does not protect against harassment based on sexual orientation, courts have relied on *DeSantis v. Pacific Telephone and Telegraph Company*.[134] In that case, the United States Court of Appeals for the Ninth Circuit considered the claims of three homosexuals who had allegedly been discriminated against by their employers because of their sexual orientation.[135] The plaintiffs argued that "sex" in Title VII's language should include "sexual preference."[136] The Ninth Circuit

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128. *Id.* at 81–82.

129. *Id.* at 83.

130. 682 F.2d 897 (11th Cir. 1982).

131. *See Henson*, 682 F.2d at 899 (describing events which provoked female plaintiff to file successful hostile working environment claim under Title VII).

132. *Id.* at 905.

133. *See, e.g.*, *Fredette*, 905 F. Supp. at 1038 (refusing to allow claim based on sexual orientation under Title VII). Robert Fredette complained he was repeatedly propositioned by his male supervisor and treated discriminatorily when he refused his supervisor's advances. *Id.* at 1036. The United States District Court for the Middle District of Florida found that Fredette was not discriminated against because he was male, but rather because of his refusal and because he "did not share the same sexual orientation or preference." *Id.* at 1037–38. Since Fredette was not discriminated against because he was male, the court granted summary judgment in favor of his former employer. *Id.* at 1038; *see also Quick*, 895 F. Supp. at 1297 (stating that there is no claim under Title VII when victim is harassed because of sexual orientation). Phil Quick argued that he was "bagged" by other male employees at least "100 times by at least twelve different male co-employees," but the court found his claim to be outside the scope of Title VII. *Id.* at 1292. In reaching its conclusion, the United States District Court for the Southern District of Iowa found that Quick was merely a victim of "personal enmity or hooliganism." *Id.* at 1297. Because Quick did not present evidence that showed he was discriminated against because he was male, the court held that he was not protected by Title VII. *Id.* at 1297–98.

134. 608 F.2d 327 (9th Cir. 1979).

135. *See DeSantis*, 608 F.2d at 328 (specifying plaintiff's claim as employment discrimination because of homosexuality).

136. *Id.* at 329.

rejected this argument, however, and refused to "expand Title VII's application in the absence of Congressional mandate."[137] The court focused on the "manifest purpose" of Title VII, which was "to ensure that men and women are treated equally";[138] therefore, the court held that Title VII applied only to discrimination on the basis of gender.[139]

## IV. ALTERNATIVES FOR RESOLVING THE SPLIT

The above discussion illustrates the need to resolve the split in the federal courts over whether a cause of action exists for same-sex sexual harassment. Available alternatives include: (1) simply denying a cause of action when the victim and the offender are of the same gender regardless of the circumstances;[140] (2) allowing a claim when the plaintiff is the victim of quid pro quo harassment by a member of the same gender, but denying same-sex hostile work environment claims;[141] and (3) relying on the traditional "but for" test for sexual harassment to determine which cases should be litigated.[142]

As will be shown, however, each of these alternatives has unsatisfactory consequences, since they fail to evaluate same-sex claims on an equal

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137. *Id.*

138. *Id.*

139. *DeSantis*, 608 F.2d at 329.

140. *See, e.g.*, Garcia v. Elf Atochem North America, 28 F.3d 446, 451–52 (5th Cir. 1994) (stating male plaintiff in same-sex hostile environment claim "does not state a claim under Title VII even though the harassment has sexual overtones"); Fredette v. BVP Mgmt. Assoc., 905 F. Supp. 1034, 1038 (M.D. Fla. 1995) (dismissing male plaintiff's claim of quid pro quo harassment because plaintiff was not harassed because he was male, but because he refused male supervisor's advances); Ashworth v. Roundup Co., 897 F. Supp. 489, 494 (W.D. Wa. 1995) (holding that since male plaintiff had not alleged anti-male environment, plaintiff's allegations that male supervisor repeatedly threatened to "butt fuck" him were not prohibited by Title VII).

141. *See, e.g.*, EEOC v. Walden Book Co., 885 F. Supp. 1100, 1103–04 (M.D. Tenn. 1995) (finding allegation that male supervisor pressured male employee for sexual favors was actionable under Title VII as quid pro quo harassment); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541 (M.D. Ala. 1983) (finding that "unwelcomed homosexual harassment . . . states a violation of Title VII" in allegation of quid pro quo harassment), *aff'd*, 749 F.2d 732 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 309–10 (N.D. Ill. 1981) (allowing cause of action under Title VII in lawsuit where male plaintiff was terminated "because he refused homosexual advances" by male supervisor).

142. *Compare Quick*, 895 F. Supp. at 1296 (finding plaintiff's claim, which alleged coworkers grabbed his genitals, was not harassment because of gender but rather harassment because of sexual orientation), *with* Sardinia v. Dellwood Foods, Inc., No. 94–CIV–5458(LAP), 1995 U.S. Dist. LEXIS 16073, at *19 (S.D.N.Y. Oct. 30, 1995) (finding male plaintiff, who alleged male supervisor frequently grabbed his genitals and buttocks, had stated claim that he was discriminated against because of gender).

basis with other sexual harassment claims.[143] Nevertheless, a satisfactory solution can be reached through a broader understanding of the term "sex" as used in sexual harassment, and by examining the nature of the alleged misconduct before considering the gender of the parties in a sexual harassment claim.[144] In this way, same-sex cases will be reviewed on equal footing with cases involving parties of different sexes. Why this type of analysis is superior to the above mentioned alternatives is discussed below.

### A. *Deny a Cause of Action Between Parties of the Same Gender*

One way to resolve the current split among the federal courts is to simply deny a cause of action for sexual harassment when the victim and the offender are of the same gender.[145] As noted in Part III, this approach has been taken by the Fifth Circuit and several district courts.[146] While this approach would appear to resolve the split within the federal court system, it results in an inconsistent application of Title VII and should not be used by courts considering same-sex cases in the future.[147] The case of quid pro quo harassment most clearly illustrates the inconsistency that results when a difference in gender is required in sexual harassment cases.

In quid pro quo harassment, a plaintiff must prove that he or she was the victim of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"[148] and that his or her "submission to such conduct . . . [was] made either explicitly or implicitly

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143. *See* Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 762 n.9 (D.D.C. 1995) (describing "several intellectually unsatisfying options" available to resolve split in federal court system).

144. *See* discussion *infra* Part IV.D.

145. *See* Garcia v. Elf Atochem North America, 28 F.3d 446, 451–52 (5th Cir. 1994) (setting Fifth Circuit precedent that same-sex sexual harassment is not actionable under Title VII); Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (finding that Congress did not intend for Title VII to cover same-sex sexual harassment).

146. *See, e.g.*, *Garcia*, 28 F.3d at 451–52 (denying same-sex claims under Title VII); Mayo v. Kiwest Corp., 898 F. Supp. 335, 337 (E.D. La. 1995) (dismissing plaintiff's same-sex hostile work environment claim because it was not discrimination based on gender); Ashworth v. Roundup Co., 897 F. Supp. 489, 494 (W.D. Wa. 1995) (adopting reasoning from *Goluszek* that same-sex sexual harassment is not actionable under Title VII); Benekritis v. Johnson, 882 F. Supp. 521, 526 (D.S.C. 1995) (denying same-sex sexual harassment as cognizable claim under Title VII).

147. *See* Pritchett v. Sizeler Real Estate Mgmt. Co., No. 93-2351, 1995 U.S. Dist. LEXIS 5565, at *6 (E.D. La. Apr. 20, 1995) (explaining that denying same-sex claims "allows a homosexual supervisor to sexually harass his or her subordinates either on a quid pro quo basis or by creating a hostile work environment, when a heterosexual supervisor may be sued under Title VII for similar conduct").

148. 29 C.F.R. § 1604.11(a) (1995).

a term or condition of . . . employment."[149] The critical factor in this type of claim is that there is an unwelcome demand for sex which is made in exchange for a job-related benefit.[150] Since supervisors are in the best position to offer a job benefit, the offender in quid pro quo harassment is usually a supervisor.[151] In same-sex harassment cases, the supervisor is usually homosexual.[152]

When a homosexual supervisor pressures an employee of the same gender for sexual favors, many courts recognize that the difference in the gender of the parties is irrelevant to the plaintiff's claim.[153] Instead, it is the "demand" and the "exchange" aspect of the supervisor's conduct that is relevant because it is that aspect of the conduct that makes it discriminatory.[154] With the essential elements of "demand" and "exchange" present, it is impossible to ignore the protection provided by Title VII by requiring a difference in genders of the parties. This is why most courts allow plaintiffs alleging homosexual harassment to proceed in proving their Title VII claims.[155] Any other conclusion would be illogical.

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149. *Id.* § 1604(a)(1).

150. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (stating that gravamen of sexual harassment claim is unwelcome sexual advances).

151. *See* SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 22.06 (1995) (characterizing nature of quid pro quo harassment as involving supervisor who pressures subordinate employee for sex). Omilian and Kamp describe several typical quid pro quo scenarios; in each scenario, the offender is a supervisor or a company official. *Id.*

152. *See, e.g.*, *Walden Book Co.*, 885 F. Supp. at 1100 (describing plaintiff's allegation that homosexual supervisor sexually harassed him); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1551 (M.D. Ala. 1995) (deciding case of homosexual quid pro quo harassment by supervisor); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 542 (M.D. Ala. 1983) (finding that plaintiff's rejection of supervisor's homosexual proclivities resulted in termination), *aff'd*, 749 F.2d 732 (11th Cir. 1984).

153. *See, e.g.*, Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1384 n.12 (C.D. Cal. 1995) (stating that gender is irrelevant "as long as an employer conditions the benefits of employment on the employee's acceptance of that employer's sexual advances"); Nogueras v. University of Puerto Rico, 890 F. Supp. 60, 63 (D.P.R. 1995) (holding that "[d]efendant['s] gender is irrelevant" in quid pro quo claims); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995) (agreeing with *Prescott* court that offender's gender in quid pro quo harassment is irrelevant); *Prescott*, 878 F. Supp. at 1550 (stating that "the gender of the person who requests . . . [sexual] favors is not relevant" in quid pro quo harassment).

154. *See Prescott*, 878 F. Supp. at 1551 (finding that plaintiff is discriminated against when supervisor requires "sexual favors in return for continued employment"); *see also Joyner*, 597 F. Supp. at 544 (holding that plaintiff who refused supervisor's sexual advances was discriminated against when not recalled); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (concluding that plaintiff who was fired by supervisor when he refused homosexual advances suffered discrimination).

155. *See, e.g.*, *Pritchett*, 1995 U.S. Dist. LEXIS 5565, at *1 (denying defendant-employer's motion for partial summary judgment on grounds that "same-gender sexual har-

If a court requires a difference in the gender of the parties, plaintiffs who are pressured for sexual favors by homosexual offenders would not have a cause of action under Title VII despite the presence of a "demand" for an "exchange."[156] However, if such demands are made by a member of the opposite gender, the plaintiff would have a cause of action under Title VII.[157] Such a result is simply illogical[158] and makes the total denial of same-sex quid pro quo allegations an unsatisfactory alternative to resolve the current split within the court system.[159]

Likewise, it is also illogical to require a difference in the gender of the parties in hostile work environment claims.[160] In a hostile work environment claim, the plaintiff must prove himself a victim of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"[161] which had "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[162] This type of claim is most frequently brought by a woman working in a predominantly male workplace, and whose male co-workers harass or intimidate her into

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assment . . . [was] rejected by Fifth Circuit as viable Title VII claim"); *Griffith*, 887 F. Supp. at 1141 (refusing defendant-employer's motion to dismiss and allowing plaintiff to proceed in proving allegation of quid pro quo harassment); *Walden Book Co.*, 885 F. Supp. at 1100 (denying defendant-employer's motion to dismiss same-sex quid pro quo harassment claim).

156. *See Pritchett*, 1995 U.S. Dist. LEXIS 5565, at *6 (explaining consequences of denying same-gender sexual harassment).

157. *Id.*

158. *See Walden Book Co.*, 885 F. Supp. at 1102–03 (concluding that it is illogical to deny claim of quid pro quo harassment because offender is same gender as victim).

159. *See* Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 762 n.9 (D.D.C. 1995) (commenting on unsatisfactory consequences that result from requiring difference in gender of offender and victim in sexual harassment case); *see also* Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 68 (1995) (arguing that it is illogical to treat homosexual harassment differently from heterosexual harassment).

160. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1198 (4th Cir. 1996) (Michael, J., dissenting) (arguing that same-sex harassment should be actionable). Although the majority in *McWilliams* focused on the sexual orientation of the victim and the harassers in denying the plaintiff a cause of action, Judge Michael focused on "an examination of what happened to the plaintiff." *Id.* Judge Michael believed that the plaintiff had produced sufficient evidence of "abuse and pressure" of a sexual nature to withstand the defendant-employer's motion for summary judgment. *Id.* at 1199. Gender was never mentioned in his analysis. *Id.* at 1198–1200. Likewise, he noted that the majority did not establish a difference in gender as a requirement to prove an allegation of sexual harassment. *Id.* at 1195 n.4. Apparently, the majority would recognize a quid pro quo allegation that involved a homosexual or bisexual offender. *Id.* at 1195 n.4 & 5.

161. 29 C.F.R. § 1604.11(a) (1995).

162. *Id.*

quitting her job.[163] In same-sex cases, a claim typically arises in a situation where a group of male heterosexual employees harass another male employee because they think he is homosexual or effeminate.[164] But here, reliance on the "but for the victim's gender" test often denies same-sex plaintiffs a cause of action.[165] In applying the "but for" test, many courts find that the male employee was harassed because he is homosexual rather than because he is male.[166] Since he was harassed because of his sexual orientation and not because of his gender, the "but for" test denies the plaintiff a cause of action.[167]

This result is illogical, however, because it denies the plaintiff's claim on the basis of a criterion that is irrelevant to the claim and never reaches the alleged misconduct.[168] When a court first looks at *why* the plaintiff

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163. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 369 (1993) (reciting female plaintiff's allegations that she was forced to quit her job at equipment rental company after becoming "target of unwanted sexual innuendoes"); Henson v. City of Dundee, 682 F.2d 897, 899 (11th Cir. 1982) (describing female police officer's allegations that police chief subjected female officers to "numerous harangues of demeaning sexual inquiries and vulgarities" which created environment so hostile she was forced to resign); *see also* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 184 (1994) (defining usual pattern of hostile work environment sexual harassment).

164. *See, e.g.*, *Quick*, 895 F. Supp. at 1291–92 (describing verbal and physical assaults, sexual in nature, directed to male plaintiff by other male employees who thought plaintiff was homosexual); Carreno v. Local Union No. 226, 54 Fair Empl. Prac. Cas. (BNA) 81, 82–83 (D. Kan. Sept. 27, 1990) (finding male plaintiff was harassed by male coworkers because he was homosexual); Goluszek v. Smith, 697 F. Supp. 1452, 1453–55 (N.D. Ill. 1988) (discussing verbal and physical assaults on effeminate male plaintiff).

165. *See, e.g.*, *Fredette*, 905 F. Supp. at 1038 (granting defendant-employer's motion for summary judgment because "Title VII does not provide a cause of action for discrimination or harassment levied because of one's sexual orientation or preference"); *Quick*, 895 F. Supp. at 1297 (explaining that Title VII prohibits harassment because of gender, not sexual orientation); *Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 82–83 (denying plaintiff's claim because harassment was based on sexual preference rather than gender).

166. *See, e.g.*, *Fredette*, 905 F. Supp. at 1037–38 (stating that plaintiff was not harassed because he was male, but because he did not share his supervisor's sexual orientation); *Quick*, 895 F. Supp. at 1297 (finding that plaintiff was not discriminated against because of gender, but because he was "unpopular with physically aggressive male co-workers"); *Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 82–83 (holding that plaintiff was not harassed because of sex, but rather because of sexual preferences).

167. *See, e.g.*, *Fredette*, 905 F. Supp. at 1038 (ruling against plaintiff because harassment was not due to gender); *Quick*, 895 F. Supp. at 1297 (dismissing plaintiff's claim because harassment was not based on gender); *Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 83 (granting summary judgment for defendant-employer because harassment was based on homosexuality of plaintiff).

168. *See* Trish K. Murphy, Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125, 1147–49 (1995) (demonstrating irrelevancy of sexual orientation to sexual harassment allegations); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII*: Garcia v. Elf Atochem

was harassed rather than focusing on the alleged misconduct, the plaintiff is denied an opportunity to prove the "verbal and physical contact of a sexual nature" that unreasonably interfered with his work performance or was directed toward intentionally creating an "intimidating, hostile or offensive environment."[169] Title VII, however, focuses on prohibited conduct[170] and on the impact of prohibited conduct on the employee's performance or treatment in the workplace;[171] the sexual orientation of a particular plaintiff is irrelevant.[172] No justification exists for denying a plaintiff's cause of action if he can successfully prove offensive conduct of a sexual nature that unreasonably interfered with his or her work.

EEOC guidelines emphasize that the victim in a hostile working environment claim need not be the person "at whom the unwelcome sexual conduct is directed."[173] This stipulation recognizes that by sexually harassing one employee, an offender can create a working environment

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*Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 123 (1995) (calling for courts to focus on conduct because gender and sexual orientation of parties in sexual harassment cases are irrelevant). Even when courts recognize the existence of the sexual misconduct of which the plaintiff complains, some courts dismiss the plaintiff's claim by focusing on either the gender or the sexual orientation of the parties. *See, e.g.*, *McWilliams*, 72 F.3d at 1195–96 (describing offenders' conduct as "shameful heterosexual-male-on-heterosexual-male conduct," but denying plaintiff's claim); *Mayo*, 898 F. Supp. at 336–37 (denying male plaintiff's hostile work environment claim even though supervisor made "sexually explicit and vulgar comments to him, grabbed him in a sexual manner, and told others [p]laintiff was a homosexual" because "Title VII does not afford [p]laintiff a remedy for alleged conduct"); *Ashworth*, 897 F. Supp. at 25 (dismissing male plaintiff's case despite male supervisor's admissions that he threatened to "butt fuck" plaintiff, referred to plaintiff as "shaky fuck," and physically assaulted plaintiff, because Title VII does not "make all forms of verbal harassment with sexual overtones actionable").

169. 29 C.F.R. § 1604.11(a) (1995).

170. *See* 42 U.S.C. § 2000e–2 (1988) (prohibiting discrimination on basis of sex). Section 2000e–2 of Title VII uses the verb "discriminate" to describe prohibited conduct, followed by the phrase, "because of such individual's . . . sex," to describe the employer's motivation. *Id.* Consequently, the initial concern in a sex discrimination case is conduct. *See* Tanner v. Prima Donna Resorts, 919 F. Supp. 351, 355 (D. Nev. 1996) (indicating that focus in Title VII inquiry is conduct, not sexual preference).

171. *See* 29 C.F.R. § 1604.11(a) (1995) (describing conduct that violates Title VII). The conduct described by this section is prohibited when "made either explicitly or implicitly a term or condition of . . . employment," serves as "the basis of employment decisions," or "unreasonably interfer[es] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment." *Id.*

172. *See* Trish K. Murphy, Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125, 1147–49 (1995) (arguing that sexual orientation of harasser in same-sex case is irrelevant to plaintiff's claim); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII*: Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 123 (1995) (contending that sexual orientation is irrelevant in sexual harassment claim).

173. EEOC Compl. Man. (CCH) ¶ 3101, at 3204 (1981).

that offends or intimidates a different employee.[174] Under the guidelines, even if a person is not the direct target of the offensive behavior, a non-target employee can sue under Title VII if the conduct creates an intimidating, offensive, or hostile environment.[175] The non-target employee is permitted to sue because the environment is still intimidating, offensive, or hostile, and the misconduct is still discriminatory, regardless of who was the actual target of the misconduct.[176] For example, if a male employee makes constant inquiries into a female employee's sexual habits, or makes insulting comments of a sexual nature to a female worker either directly or indirectly, another female employee who finds the resulting environment intimidating or offensive may sue under Title VII.[177] Ironically, if same-sex sexual harassment claims were denied altogether, the very target of the offensive behavior would be prevented from suing under Title VII, while a member of the opposite gender who found the misconduct offensive or intimidating could sue.[178] Surely such a result was not intended by a Congress which sought to eliminate disparate treatment of men and women in the workplace.[179] Yet this is the result if courts require a difference in genders of the victim and the offender in sexual harassment allegations.

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174. *Id.*

175. *Id.*; *see* Waltman v. International Paper Co., 875 F.2d 468, 476 (5th Cir. 1989) (reversing lower court decision because it failed to consider environment to which plaintiff was subjected); *see also* Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985) (noting that "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive"), *aff'd*, 477 U.S. 57 (1986); Broderick v. Ruder, 685 F. Supp. 1269, 1277–78 (D.D.C. 1988) (reversing lower court decision against plaintiff because plaintiff clearly showed she was forced to work in environment giving preferential treatment to women who submitted to male supervisors' sexual advances although plaintiff was not herself subject of quid pro quo demand).

176. EEOC Compl. Man. (CCH) ¶ 3102, at 3206 (1981). "[I]t is the sexual nature of the prohibited conduct which makes this form of sex discrimination sexual harassment." *Id.*

177. *See id.* at 3206 (offering examples of conduct that constitutes sexual harassment).

178. *See Garcia*, 28 F.3d at 451–52 (reporting 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") (quoting Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993) (unpublished table decision)).

179. *See Vinson*, 477 U.S. at 64 (remarking that Congress intended to eliminate disparate treatment of both men and women); *see also* LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 3.01 (1995) (describing Title VII as broad-based statute on employment discrimination). Larson writes that "[v]irtually any kind of employer action is covered, and even employer inaction may trigger liability; a violation may be found when an employer does nothing more than, for example, tolerate an atmosphere of sexual harassment in the workplace." *Id.*

At least one author has suggested that Congress included "sex" in Title VII simply because discrimination on the basis of gender was as unfair as discrimination based on race, color, religion, and national origin.[180] Regardless, the legislative history of Title VII is silent as to Congress's intent in regards to sexual harassment as sex discrimination.[181] Rather, a cause of action for sexual harassment is the product of judicial interpretation of Title VII.[182] If Congress had intended for Title VII protection to extend only to discrimination involving parties of opposite genders, Congress could have chosen the term "member of the opposite sex" in lieu of "sex" in determining prohibited conduct.[183] But this is not the language that was used to describe prohibited conduct.[184] Instead, a broad term was used—a term broad enough to be interpreted by the United States Supreme Court to encompass sexual harassment as employment discrimination.[185]

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180. *See* Michael E. Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 467–68 (1981) (arguing that "sex" was included in Title VII because sex discrimination is as unfair as other types of discrimination).

181. *See* 110 CONG. REC. H2577–2584 (daily ed. Feb. 8, 1964) (discussing, instead, how "sex" in Title VII is intended to protect women from discrimination in workplace).

182. *See* SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION §§ 21.02, 21.03 (1995) (describing how courts applied Title VII to allegations of sexual harassment as employment discrimination based on sex); *see also Vinson*, 477 U.S. at 64 (holding that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex").

183. *See, e.g.*, Williams v. District of Columbia, No. 94–02727(JHG), 1996 U.S. Dist. LEXIS 1338, at *29 (D.D.C. Feb. 5, 1996) (stating that Congress should have clarified Title VII language if it intended to insulate same-sex offenders from liability); *Easton*, 905 F. Supp. at 1378 (writing that "[i]f heterosexual sexual harassment was the sole kind of sexual harassment Congress sought to outlaw, they could have written the statute to only encompass claims brought by members of the opposite sex of the harasser"); King v. M.R. Brown, Inc., 911 F. Supp. 161, 167 (E.D. Pa. 1995) (reasoning that "nothing in the text of the statute indicates that Title VII's protections extend only to individuals who are harassed by members of the opposite sex"); *Griffith*, 887 F. Supp. at 1136–37 (explaining that Title VII is not restricted to protecting employees from discrimination from opposite gender); *Prescott*, 878 F. Supp. at 1550 (opining that if Congress had "intended to prevent only heterosexual sexual harassment, it could have used the term 'member of the opposite sex'"); *see also Sardinia*, 1995 U.S. Dist. LEXIS 16073, at *14 (finding that "[n]othing in the body of the statute limits its protection to heterosexual harassment").

184. *See* 42 U.S.C. § 2000e-2 (1994) (prohibiting discrimination in employment because of sex).

185. *See Harris*, 114 S. Ct. at 371 (discussing sexual harassment in terms of "Title VII's broad rule of workplace equality"); *Vinson*, 477 U.S. at 64–65 (finding that language of Title VII includes all disparate treatment of men and women, including sexual harassment). *But see* Alfred G. Feliu & Elizabeth A. Fealy, *The Role of "Sex" in Same-Sex Harassment Claims*, 21 EMPLOYEE REL. L.J. 39, 51 (1996) (arguing that Title VII language

The term "sex discrimination" is likewise broad enough to encompass same-sex cases.[186] Denying same-sex sexual harassment claims is an appropriate solution only if it is *assumed* that Congress, in enacting Title VII, wanted to only protect heterosexual conduct.[187] Such an assumption is not supported by the legislative history of Title VII.

"Sex" was included in the language of Title VII to protect employees from discrimination in the workplace on the basis of gender,[188] and to prevent those in a more powerful position from imposing "sexual demands or pressures on an unwilling but less powerful person."[189] The only way to reconcile this basic goal with the application of Title VII to sexual harassment cases is to focus on the discriminatory conduct rather than gender in determining whether Title VII applies to a particular case.[190] Denying Title VII protection simply because the parties share the same gender is a discriminatory use of a federal statute designed to protect all employees from discrimination.[191] For these reasons, this alternative should not be adopted by the courts.

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is too "plainly ambiguous" to apply to same-sex harassment not based on class discrimination).

186. *See Harris*, 114 S. Ct. at 371 (describing Title VII as calling for workplace equality for all). *But see* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (holding that if "Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals").

187. *See, e.g.*, *Sardinia*, 1995 U.S. Dist. LEXIS 16073, at *12–15 (arguing that no basis exists for believing Congress meant to protect only heterosexual harassment in enacting Title VII); Ecklund v. Fuisz Tech., Ltd., 905 F. Supp. 335, 338 (E.D. Va. 1995) (asserting that no authority exists to deny same-sex claims based on legislative history of Title VII); *Raney*, 892 F. Supp. at 287 (commenting that assumption that Congress did not intend for Title VII to cover same-sex sexual harassment cases is not supported by legislative history); *King*, 911 F. Supp. at 166–68 (noting lack of support for position that Congress did not intend for Title VII to protect against same-sex harassment).

188. *See Vinson*, 477 U.S. at 64 (finding that by adding "sex" to Title VII, Congress meant to eliminate disparate treatment of men and women in employment).

189. *Goluszek*, 697 F. Supp. at 1456; *see also Harris*, 114 S. Ct. at 371 (stating that "the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of . . . gender . . . offends Title VII's broad rule of workplace equality").

190. *See* Amy Shahan, Comment, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Harassment*, 48 BAYLOR L. REV. 505, 527 (1996) (calling on courts to fulfill purposes of Title VII by holding offenders liable for sexual harassment regardless of gender of parties).

191. *See Pritchett*, 1995 U.S. Dist. LEXIS 5565, at *6 (commenting on discriminatory effect of denying same-sex claims under Title VII).

### B. *Allow Same-Sex Sexual Harassment for Quid Pro Quo Harassment Only*

Much of the difficulty in applying Title VII in same-sex sexual harassment cases stems from the difference between the two types of sexual harassment claims.[192] While the parties' gender is almost always seen as irrelevant when a supervisor pressures an employee for sexual favors in quid pro quo harassment,[193] application of the "but for" test often results in denying homosexual or effeminate male plaintiffs the opportunity to prove their allegations in hostile working environment cases.[194] This result is exacerbated by negative public sentiment towards homosexuality and the lack of statutory protection for homosexuals in the United States.[195]

For example, many courts have held that Title VII does not protect homosexuals.[196] Since the United States Court of Appeals for the Ninth Circuit held in *Desantis v. Pacific Telephone and Telegraph Company*[197] that Title VII does not prohibit discrimination on the basis of sexual ori-

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192. *See* Bradley Golden, Note, Harris v. Forklift: *The Supreme Court Takes One Step Forward and Two Steps Back on the Issue of Hostile Work Environment Sexual Harassment*, 1994 DET. C. L. REV. 1151, 1156 (1994) (noting that issues in hostile work environment harassment are more frequently debated than quid pro quo harassment issues because courts interpret quid pro quo guidelines more consistently); Marren Roy, Comment, *Employer Liability for Sexual Harassment: A Search for Standards in the Wake of* Harris v. Forklift Systems, Inc., 48 SMU L. REV. 263, 265, 278–79 (1994) (describing hostile work environment harassment as much less obvious form of sexual harassment which causes more confusion than quid pro quo harassment).

193. *See* Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (finding male plaintiff's quid pro quo allegation was opposite of situation where male supervisor makes demand on female employee). Because Wright's supervisor had made a demand on him that would not have been directed to a female employee, Wright had stated a cause of action under Title VII. *Id.*

194. *See* Fredette v. BVP Mgmt. Assoc., 905 F. Supp. 1034, 1037 (M.D. Fla. 1995) (finding that because male plaintiff was not harassed "but for" his gender, but because he did not share his supervisor's sexual orientation, no remedy was available under Title VII).

195. *See* NATIONAL LAWYER'S GUILD: LESBIAN, GAY, BISEXUAL RIGHTS COMMITTEE, SEXUAL ORIENTATION AND THE LAW, at Intro.-1 to Intro.1-3 (Roberta Achtenberg & Karen B. Moulding eds., 1995) (summarizing legal and social discrimination faced by homosexuals); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1511–19 (1989) (describing attitudes Americans take toward homosexuality that manifest in legal problems for gay men and lesbians). *See generally* IRVING J. SLOAN, HOMOSEXUAL CONDUCT AND THE LAW 5–49 (1986) (surveying laws that condemn homosexual behavior).

196. *See* Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (holding that "Title VII does not prohibit discrimination against homosexuals"); Todd v. Navarro, 698 F. Supp. 871, 874 (S.D. Fla. 1988) (finding that "homosexuals are not a suspect class accorded strict scrutiny under the equal protection clause").

197. 608 F.2d 327 (9th Cir. 1979).

entation,[198] labeling offensive conduct as harassment because of sexual orientation rather than gender leaves many victims of same-sex harassment without legal protection.[199] If one accepts the proposition that Title VII does not prohibit discrimination based on sexual orientation, application of Title VII to same-sex allegations could be simplified by allowing a claim only when the victim alleges quid pro quo harassment, while denying those claims that allege harassment resulting from a hostile or abusive work environment.[200] By doing so, Title VII would control claims which readily fall within the concept of what is commonly envisioned as sexual harassment,[201] while denying claims that do not fall within traditional notions of sexual harassment and where it is easily argued that gender is not the basis of the plaintiff's mistreatment. However, this alternative is inequitable because it punishes homosexuals who harass other employees, but does not protect homosexual employees who are harassed.[202] This approach endorses the employment discrimination and abuse of homosexual employees who are already less protected by the law than heterosexual employees.[203]

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198. *See DeSantis*, 608 F.2d at 329–30 (ruling that Title VII protection applies to discrimination on basis of gender rather than homosexuality).

199. *Compare Fredette*, 905 F. Supp. at 1037–38 (implying male supervisor would not have discriminated against male plaintiff had plaintiff accepted supervisor's advances, but denying plaintiff cause of action under Title VII), *with* Barnes v. Costle, 561 F.2d 983, 989–90, 993 (D.C. Cir. 1977) (finding male supervisor violated Title VII by abolishing subordinate's job when she refused sexual advances).

200. This approach was taken by the United States District Court for the Northern District of Illinois. *Compare Goluszek*, 697 F. Supp. at 1456 (denying plaintiff's same-sex hostile work environment claim), *with Wright*, 511 F. Supp. at 310 (recognizing plaintiff's same-sex quid pro quo harassment claim).

201. *See* LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 46.01 (1995) (defining sexual harassment). In defining sexual harassment, Larson writes, "[a]s the term is popularly understood, sexual harassment refers to demands for sexual favors either in return for employment benefits or under threat of adverse employment action." *Id.*

202. *See* Pritchett v. Sizeler Real Estate Mgmt. Co., No. 93-2351, 1995 U.S. Dist. LEXIS 5565, at *6 (E.D. La. Apr. 20, 1995) (explaining that although Title VII does not prohibit discrimination against homosexuals, it does prohibit homosexual supervisor from harassing subordinate employee); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 10 (1992) (noting that although "homosexuals are not protected by Title VII, employees are protected from sexual harassment by homosexuals").

203. *Cf.* 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, 57–58 (1995) (discussing effect of discrimination faced by homosexual and effeminate men).

This alternative is also inequitable because it tolerates conduct that is otherwise considered offensive.[204] Labeling misconduct in the workplace as harassment because of sexual orientation, rather than harassment because of gender, permits men to discriminate against other men even though they are not allowed to treat women discriminatorily.[205] It is simply unfair that conduct considered discriminatory when occurring between a male and a female is tolerated under the law if occurring between two males or two females when its purpose is discrimination.[206] But because discrimination on the basis of sexual orientation is not considered as "morally reprehensible" as other types of discrimination, such unfairness is tolerated by many courts.[207] This attitude toward same-sex plaintiffs ignores Title VII's basic goal of workplace equality.[208]

The United States Supreme Court has indicated that in enacting Title VII, Congress sought to eliminate all disparate treatment of men and women.[209] Accordingly, sexual harassment of homosexual employees which takes the form of verbal and physical abuse is disparate treatment prohibited by Title VII, just as is disparate treatment occurring between members of the opposite sex.[210] Concluding that Title VII permits

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204. Alfred G. Feliu & Elizabeth A. Fealy, *The Role of "Sex" in Same-Sex Harassment Claims*, 21 EMPLOYEE REL. L.J. 39, 41 (1996) (explaining that women have remedy under Title VII when sexually harassed by men).

205. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 146–47 (1995) (describing legal loopholes to liability when employers argue that discrimination was based on sexual orientation).

206. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 147 (1995) (asserting that discrimination based on sexual orientation and gender stereotypes results in individual harm and injustice).

207. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 271 (1994) (commenting on gross "unfairness" of homosexual discrimination in arguing that homosexuals should be deemed suspect class).

208. *See* I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1169–70 (1991) (arguing that Title VII's broad remedial purpose of prohibiting inequality in employment is not met when "EEOC and courts limit . . . [Title VII's] coverage to 'traditional notions' of sex").

209. *See Vinson*, 477 U.S. at 64 (concluding that Congress intended "to strike at the entire spectrum of disparate treatment of men and women") (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

210. *Cf.* Trish K. Murphy, Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125, 1146–47 (1995) (arguing courts must consider nature and effects of unwelcome sexual conduct in same-gender harassment cases because conduct is not less injurious where offender is of same gender as victim); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII:* Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87,

discrimination based on sexual orientation does not remove same-sex plaintiffs from protection, because harassment based on sexual orientation is still sex discrimination.[211] Sex discrimination exists because homosexual plaintiffs in these cases are treated differently than a heterosexual member of the opposite sex.[212]

For example, if a male employee is fired, or treated offensively in the workplace because he has a male lover, he is treated in a way that a woman with a male lover is not treated. He is treated discriminatorily because he is a male, and because he engages in a behavior acceptable for women.[213] Because the offensive conduct would not be directed at him if he were female, he is discriminated against in the workplace because of his gender.[214] It is the discriminatory aspect of the offensive conduct that

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122–23 (1995) (concluding that Title VII prohibits harassment that is sexual in nature regardless of gender of parties). Despite the confusion within the federal courts over whether Title VII protects victims of same-sex harassment, several states offer protection in the form of anti-discrimination laws. For example, Connecticut law prohibits discrimination in employment on the basis of sexual orientation. *See* Lisa A. Lazarek, *Is "Same-Sex" Harassment a Violation of Title VII?*, 3 CONN. EMPL. L. LETTER 7 (1995) (warning Connecticut employers that same-sex harassment is prohibited under state law despite conflict in federal courts); *see also* Jill Hodges, *Same-Sex Harassment Also Illegal, Agency Says*, STAR TRIB., July 22, 1995, at 3D (reporting protection provided by Minnesota state law from sexual harassment by someone of same gender); Paul Holtzman, *Same-Sex Workplace Harassment and Chapter 151B*, MASS. LAW. WKLY., Nov. 27, 1995, at 11 (contrasting protection offered by Massachusetts law for victims of same-sex sexual harassment with uncertainty of protection under federal law); Jim Williams, *Looking to Eliminate Need to Hide Sexual Orientation*, N.Y.L.J., Oct. 31, 1994, at 7 (urging employers to take note of laws in New Jersey, Connecticut, and City of New York that "prohibit discrimination in employment based on sexual orientation").

211. *See* Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII:* Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 123–24 (1995) (stating that since sexual conduct is "necessarily based on the victim's gender," same-gender harassment is sex discrimination).

212. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994) (explaining why discrimination toward homosexuals is gender discrimination). "As a matter of definition, if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex." *Id.*

213. *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 5 (1992) (arguing that sex discrimination occurs when male employee is penalized for having sexual relationship with another male although female employees are not penalized for having sexual relationships with men).

214. *See* Pritchett v. Sizeler Real Estate Mgmt. Co., No. 93–2351, 1995 U.S. Dist. LEXIS 5565, at *6 (E.D. La. Apr. 20, 1995) (reasoning that same-sex harassment is gender discrimination because victim would not have been harassed but for victim's gender); *see also* Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII:* Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 124 (1995) (arguing

demands Title VII protection.[215] Consequently, homosexuals who are intentionally subjected to "verbal and physical conduct of a sexual nature"[216] should be protected by Title VII.

If a plaintiff's case is dismissed simply because his offender contends that he was motivated by the plaintiff's sexual orientation, one can imagine the legal consequences that will result. For example, what type of burden, if any, will be placed on the offender in showing that the employee was harassed because of sexual orientation rather than gender?[217] Is the employee protected if the offender is mistaken about the victim's sexual orientation?[218] How does a party prove that the victim is a homosexual and, therefore, beyond the protection of Title VII?[219] Obviously, these questions would be difficult, if not impossible, for courts to resolve.

Effeminate heterosexual male plaintiffs also face gender discrimination when they are sexually harassed by other employees.[220] Because such plaintiffs exhibit characteristics that have been traditionally thought of as feminine, effeminate heterosexual males are often victimized in the workplace for not conforming to male stereotypes.[221] In seeking relief, plaintiffs such as the male plaintiff in *Goluszek v. Smith*[222] face the same roadblock to Title VII protection in hostile work environment claims as

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that Title VII applies when homosexuals are harassed because they do not conform with gender stereotypes).

215. *Pritchett*, 1995 U.S. Dist. LEXIS 5565, at *6.

216. 29 C.F.R. § 1604.11(a) (1995).

217. *See* Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 762 (D.D.C. 1995) (commenting on problems courts face in deciding same-sex cases).

218. *See Quick*, 895 F. Supp. at 1297 (dismissing heterosexual male's claim that he was harassed by male co-workers). Phil Quick was a heterosexual male who sued his employer for sexual harassment suffered at the hands of his male co-workers. *Id.* at 1291. Even though the *Quick* court noted Quick's heterosexuality, and that Quick had been harassed because his male co-workers thought he was homosexual, the court denied his cause of action. *Id.* at 1296–97. This ruling seems inconsistent in light of the court's recognition of case law holding that Title VII does not prohibit discrimination because of sexual orientation. *Id.* at 1297.

219. *See* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 947–56 (1989) (contending that legal consequences of being homosexual deters homosexuals from appearing gay so that actual evidence of homosexuality is rare); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 266 (1994) (describing homosexuality as forbidden identity that is proved through self-identification).

220. *Cf.* 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, 3 (1995) (describing how effeminate male is "doubly despised" and suffers discrimination).

221. 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, 46–47 (1995).

222. 697 F. Supp. 1452 (N.D. Ill. 1988).

homosexual plaintiffs.[223] Once labeled as harassment based on effeminacy, many courts condemn the misconduct as "unnecessary juvenile" behavior[224] or "crude and offensive,"[225] but the conduct still goes unpunished. This result is unfair because it fails to acknowledge that the effeminate heterosexual male *was* harassed because of his gender.

When the effeminate heterosexual male is treated differently than a woman who acts similarly, he is ultimately discriminated against because of his gender.[226] When this discrimination takes the form of sex-related comments, physical assaults, and demeaning sexual epithets, the effeminate heterosexual male is sexually harassed.[227] This type of harassment is as discriminatory as the harassment that results when women are discriminated against for nonconformity with female stereotypes.[228] The courts have already condemned conduct that forces women to conform to female stereotypes;[229] it is only fair that the law should also protect men who do not conform to male stereotypes.[230]

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223. *See DeSantis*, 608 F.2d at 332 (holding that Title VII does not prohibit discrimination based on effeminacy).

224. *Quick*, 895 F. Supp. at 1296.

225. Mayo v. Kiwest Corp., 898 F. Supp. 335, 337 (E.D. Va. 1995).

226. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 143–44 (1995) (explaining why discrimination against effeminate male is prohibited gender discrimination); *see also* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 MIAMI L. REV. 511, 621–24 (1992) (describing effect of anti-gay discrimination on effeminate men). Fajer explains that anti-gay discrimination is a form of gender-related discrimination that occurs "when people, having decided that gay men share female characteristics, discriminate against them in a way that mirrors discrimination against women generally." *Id.* at 622.

227. *See* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 203 (1994) (explaining that effeminate male "may experience [sexual] harassment in much the same way as a woman").

228. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (condemning employment practices which evaluate women according to gender stereotypes).

229. *Id.*

230. *See* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 MIAMI L. REV. 511, 636–38 (1992) (advocating end to anti-gay discrimination). Fajer argues that anti-gay discrimination is inconsistent with the United States Supreme Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). *Id.* In *Hogan*, the Court rejected a university admissions policy that used gender-based classifications to perpetuate gender-role stereotypes. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (concluding that denying males enrollment at all-female university violated Equal Protection Clause of Fourteenth Amendment). Fajer reasons that because anti-gay discrimination perpetuates gender "stereotypes and the subordinate position of women," discrimination against homosexuals must end if "courts are serious about ending the states' use of gender-role stereotypes." Marc A. Fajer, *Can Two Real Men Eat Quiche Together?*

Because plaintiffs in these types of situations are discriminated against because of their gender, they should be protected by Title VII.[231] The conduct is already prohibited by Title VII; thus Title VII should be applied consistently so that same-sex plaintiffs are protected on an equal basis with other victims of sexual harassment.[232] Since same-sex plaintiffs

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*Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 MIAMI L. REV. 511, 637 (1992). Fajer's argument is equally applicable to effeminate heterosexual males since their treatment in same-sex cases is similar to that of homosexuals. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 8 (1995) (arguing that sex discrimination must encompass gender stereotypes imposed on both men and women in employment context); 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, 60–61 (1995) (reasoning that current sexual harassment doctrine should be extended to cover male effeminacy). *But see* Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 (5th Cir. 1978) (holding that Title VII does not protect males from discrimination based on effeminacy).

231. *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, 4 (1995) (arguing that effeminate males are protected under Title VII from disparate treatment resulting from nonconformity with gender stereotypes); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3–4 (1992) (urging interpretation that discrimination on basis of sexual orientation is prohibited by Title VII); *see also Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1554 (1989) (describing problems homosexuals face in employment). The editors of the *Harvard Law Review* explain:

> [L]esbians and gay men challenge conventional notions about the sexes. Because they reject traditional notions about the proper relationship between men and women, gay men and lesbians cast doubt on the validity of accepted male and female roles. Discrimination against gay men and lesbians, therefore, constitutes gender discrimination because it penalizes individuals who do not conform to stereotypical ideas about the way men and women should behave. Moreover, because gay men are penalized for their behavior and attitudes that would be acceptable for female workers, and lesbians are penalized for behavior and attitudes that would be acceptable for male workers, sexual orientation discrimination burdens men and women for different reasons, and is therefore precisely the sort of gender-specific discrimination that Title VII was designed to eradicate.

*Id.* at 1580–81.

232. *See Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1580–81 (1989) (calling for equal treatment of homosexuals under all anti-discrimination laws including Title VII); *see also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 95 (1995) (arguing that Title VII should prohibit conduct that penalizes nonconformity with gender stereotypes regardless of gender of parties). The editors of the *Harvard Law Review* call for legislation "explicitly forbidding public and private employers from basing hiring and firing decisions on an individual's sexual orientation." *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1584 (1989). The editors explain:

> As with race, gender, or national origin, sexual orientation has no relationship to an individual's ability to perform effectively on the job. The only conceivable bases for

in hostile work environment lawsuits are not protected by Title VII, allowing same-sex quid pro quo claims while denying same-sex hostile work environment claims is not an appropriate alternative for resolving the split in the federal courts.

### C. *Use the "But For" Test to Determine Which Cases Should Be Litigated*

Since 1977, the "but for" test has been used in determining sexual harassment cases with little criticism.[233] The test allows plaintiffs to litigate a cause of action that was not readily welcomed by either employers or the courts.[234] By using a reasonable victim standard, the "but for" test separates conduct that is merely offensive from conduct that is so offensive, intimidating, and hostile that it interferes with an employee's work performance.[235] In doing so, Title VII has protected plaintiffs from disparate

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> sexual orientation discrimination are employers' or co-workers' aversions to working with gay men and lesbians; by using these concerns to justify discriminatory treatment, the law merely reinforces and perpetuates those prejudices that lead to the stigmatization of gay and lesbian individuals in the first place. Title VII . . . and other anti-discrimination laws reflect Congress' belief that employers should consider only work-related attributes in choosing their employees. Congress should recognize that sexual orientation discrimination is as offensive to the principles of fairness and equal treatment as discrimination based on any other non-work-related attribute. . . .

*Id.*

233. *See* Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (establishing "but for" test for evaluating allegations of sexual harassment as sex discrimination); *see also* Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981) (reiterating "but for" standard used earlier in *Barnes v. Costle*); Michelle R. Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1087–90 (1989) (discussing application of "but for" standard to sexual harassment cases).

234. *See* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE §§ 2.3, 2.5 (tracing problems plaintiffs faced in early sexual harassment cases in convincing courts they had suffered discrimination); LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 46.02 (1995) (describing challenges faced by early courts in interpreting sexual harassment as sex discrimination); SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 21.01 (1995) (discussing reluctance of courts initially to treat sexual harassment as sex discrimination).

235. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). The United States Court of Appeals for the Ninth Circuit explained the rationale of the "reasonable victim" standard:

> If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy. We therefore prefer to analyze harassment from the victim's perspective.

*Id. See also* Burns v. McGregor Elec. Indus., 989 F.2d 959, 965 (8th Cir. 1993) (viewing allegation of sexual harassment from victim's perspective even though some males might not object to verbal abuse of female employees); Andrews v. City of Phila., 895 F.2d 1469, 1483–86 (3d Cir. 1990) (explaining that reasonable victim standard protects employers

treatment while protecting employers from false claims.[236] Therefore, why not eliminate "gender" from the analysis and use the "but for" test to distinguish between sexual harassment cases that should be litigated and those that should not?

The "but for" test fails because it can easily result in a judicial finding that a plaintiff was harassed because of sexual orientation and thus outside Title VII protection.[237] The test can just as easily be used to find that the plaintiff was harassed because of gender.[238] In the example discussed above, the "but for" test might show that the male employee was fired because he had a male lover and that a female employee who had a male lover would not have been fired. In this case, the plaintiff would be protected by Title VII.[239] On the other hand, under the same circumstances, the "but for" test could result in a finding that the plaintiff was harassed only because he is homosexual and thus outside Title VII protection.[240] Consequently, the application of the "but for" test is simply too unpredictable to apply without modification.[241]

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from hyper-sensitive employees while promoting equal opportunity in employment by prohibiting sex discrimination).

236. *See Ellison*, 924 F.2d at 878 (finding that reasonable victim standard protects employers from "idiosyncratic concerns of the rare hyper-sensitive employee" while protecting victims of sexual harassment). *But see* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 198–210 (1994) (criticizing reasonableness standard because it focuses on conduct of victim rather than conduct of offender).

237. *See* Fredette v. BVP Mgmt. Assoc., 905 F. Supp. 1034, 1037–38 (M.D. Fla. 1995) (finding that plaintiff was not harassed because he was male, but because he was not homosexual).

238. *See* Ton v. Information Resources, Inc., No. 95–C–3565, 1996 U.S. Dist. LEXIS 51, at *21 (N.D. Ill. Jan. 3, 1996) (unpublished) (finding that plaintiff was singled out for harassment because of his sex).

239. *See* Sardinia v. Dellwood Foods, Inc., No. 94–CIV–5458(LAP), 1995 U.S. Dist. LEXIS 16073, at *20 (S.D.N.Y. Oct. 30, 1995) (finding male plaintiff established prima facie case that he was discriminated against by male supervisors because of his sex).

240. *See Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 83 (ruling against plaintiff because harassment was based on sexual orientation).

241. The results of two same-sex cases considered by courts in the same district within 30 days of one another illustrate the unpredictable nature of the "but for" test. *Compare* Pritchett v. Sizeler Real Estate Mgmt. Co., No. 93–2351, 1995 U.S. Dist. LEXIS 5565, at *3–6 (E.D. La. Apr. 20, 1995) (finding plaintiff had stated viable Title VII claim by showing that harassment would not have occurred "but for" plaintiff's gender), *with Fredette*, 905 F. Supp. at 1037–38 (finding that harassment of male plaintiff by male supervisor was based on sexual orientation). *See also* Amy Shahan, Comment, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Sexual Harassment*, 48 BAYLOR L. REV. 507, 525 (1996) (arguing that "but for" test should be modified to "but for him/her being a sexual being").

Use of the "but for" test will result in inconsistent application of Title VII protection, regardless of whether the gender of the parties is considered relevant. For example, by requiring a male plaintiff to show that he would not have been harassed but for the fact that he was male, a defendant-employer can defeat the employee's case by proving the employee was harassed because he was homosexual regardless of how egregious the conduct.[242]

The "but for" test also does not reach all sexual harassment.[243] Harassment by a bisexual offender illustrates this point. The "but for" test does not always work in bisexual harassment because the offender directs the conduct at members of both sexes.[244] In this situation, it is argued that the bisexual offender's equal treatment of employees of both genders removes such conduct from the scope of Title VII, since the bisexual offender harasses no one but for the fact that they represent one gender or the other.[245] However, this leads to an inequitable result, because it allows the bisexual supervisor to go unpunished for conduct that is clearly discriminatory under Title VII when committed by a man against a wo-

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242. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 146–47 (1995) (describing sexual orientation loophole that allows employer to avoid legal repercussions in gender discrimination by claiming discrimination was based on sexual orientation).

243. *See* Michelle R. Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1095 (1989) (criticizing Title VII as remedy for sexual harassment, in part because "but for" test does not reach all cases of alleged sexual misconduct); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII:* Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 122 (1995) (noting that "but for" test does not always work in same-sex sexual harassment cases because it allows courts to factor sexual orientation into court's analysis of plaintiff's claim).

244. *See* Alfred G. Feliu & Elizabeth A. Fealy, *The Role of "Sex" in Same-Sex Harassment Claims*, 21 EMPLOYEE REL. L.J. 39, 54 (1996) (contending that some courts have stretched "but for" test so far as to go beyond class-based discrimination and virtually eliminate causation in some same-sex harassment cases); *see also* Michelle R. Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1099 (1989) (using bisexual harassment as illustration of inappropriateness of Title VII for sexual harassment claims, in part because Title VII does not reach all cases of sexual harassment with "but for" test).

245. *See* Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (commenting that in case where "supervisor makes sexual overtures to workers of both sexes . . . plaintiff would have no remedy under Title VII"); *Barnes*, 561 F.2d at 990 n.55 (noting that bisexual supervisor's request for sexual favors would not be sexual harassment since it applies to both males and females). *But see* Raney v. District of Columbia, 892 F. Supp. 283, 287–88 (D.D.C. 1995) (rejecting defendant-employer's defense that bisexual harassment is not actionable under Title VII); *Chiapuzio*, 826 F. Supp. at 1336–37 (rejecting defendant-employer's argument that bisexual harassment escapes Title VII protection).

man or vice versa.[246] To believe that a bisexual supervisor harasses neither men nor women because of gender permits a bisexual offender to prey equally upon men and women without liability under Title VII.[247]

Professor Ellen Paul explains that the bisexual harasser is not discriminating against a person because of his or her gender, but rather "is preferring or selecting some member of his [or her] gender for sexual attention, however unwelcome that attention may be to its object."[248] Regardless of whether one accepts this analysis, denying a same-sex claim because of the offender's bisexuality is irrational because the conduct is certainly no less offensive because the offender harasses both men and women.[249] In contrast to Professor Paul's analysis, the bisexual offender has been characterized as an "equal opportunity" offender whose misconduct is gender-driven.[250] From the victim's perspective, the conduct is still unwelcome, offensive, intimidating or hostile; therefore, the misconduct should be the first consideration in sexual harassment case. Continued use of the "but for" test will not resolve the split in the federal courts, but instead, will split protection between employees who are harassed by homosexual and bisexual offenders, and those who are harassed because they are homosexual or because they do not conform to traditional gender stereotypes.

### D. *A Recommended Judicial Approach: Apply Title VII to All Sexual Harassment Cases*

To protect employees from the entire spectrum of employment discrimination based on sex, Title VII must protect all employees.[251] One com-

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246. *See* Ellen F. Paul, *Sexual Harassment As Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 351 (1990) (describing "perplexing doctrinal anomaly" that results under Title VII when offender is bisexual); *see also* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 202–03 (1994) (stating that it is indefensible to claim bisexual supervisor does not sexually harass employees when offensive conduct is directed to both males and females).

247. *See* Michelle R. Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1099 (1989) (commenting that "but for" test allows bisexual to harass member of same gender without liability under Title VII).

248. Ellen F. Paul, *Sexual Harassment As Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 352 (1990).

249. *See Sardinia*, 1995 U.S. Dist. LEXIS 16073, at *19 (stating that "suffering sexual harassment from supervisors of the same sex does nothing to diminish the severity of that harassment").

250. *See Chiapuzio*, 826 F. Supp. at 1337 (characterizing bisexual offender as equal-opportunity harasser).

251. *See* I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1179–84 (1991) (calling for uniform application of Title VII). Capers argues that "[t]he judicial exemption of sexual orientation from Title VII's ban on sex discrimination

mentator has suggested that employers should ignore the legal confusion surrounding same-sex claims by simply treating same-sex harassment as unacceptable conduct.[252] Obviously, the problem could be avoided if managers took it upon themselves to prevent same-sex harassment; however, when such prevention does not take place, a legal basis for protecting victims must exist.[253] As shown above, the basis for applying Title VII to plaintiffs who have suffered same-sex harassment already exists, but a method is needed to apply Title VII with consistent results in all allegations of sexual harassment. These consistent results can be achieved through simple modifications of existing law. Consistency will result by adopting a broader meaning of the term "sex" when used in sexual harassment cases and by focusing on the alleged misconduct before applying the "but for" test.

A broader understanding of the term "sex" will help courts evaluate same-sex claims on equal terms with other sexual harassment claims.[254] To reach this broader understanding, the meaning of "sex" should be reconsidered in light of the nature of sexual harassment as gender discrimination.[255] Consider the current use of the term "sex" in sex discrimination law: although Title VII prohibits discrimination of the ba-

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results in unfairness and inconsistency when applied." *Id.* at 1179. A consistent application of Title VII can be achieved by treating discrimination against lesbians, bisexuals, and gays as discrimination based on gender stereotyping. *Id.* at 1184. In this way, the legislative intent of workplace equality would be achieved "while respecting the statutory text" of Title VII. *Id.* at 1179.

252. Jeffrey Goldfarb, *Courts' Dichotomy on Same-Sex Cases Makes Tough Job Tougher For Managers*, BNA Mgmt. Briefing, May 30, 1995 (advising employers to ignore confusion associated with same-sex harassment and treat same-sex harassment as employee misconduct), *available in* LEXIS, Labor Library, DLABRT File.

253. *See "Bagging/Goosing" Prompts Same Sex Discrimination Assault and Battery Claims*, 2 IOWA EMPL. L. LETTER 5 (1995) (urging Iowa employers to treat same-sex sexual harassment seriously by preventing misconduct in workplace).

254. *Cf.* Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII:* Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 124–26 (1995) (reasoning that more liberal definition of "gender" included gender stereotypes, enabling courts to adjudicate same-sex harassment cases). *But see* Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 (N.D. Ind. 1995) (discussing problems resulting from use of words "sex" and "sexual" in resolving same-sex harassment allegations). Judge Allen Sharp explained that the words "sex" and "sexual" "can mean either 'relating to gender' or 'relating to sexual/reproductive behavior.'" *Id.* Judge Sharp found that "Title VII only recognizes harassment *based* on the first meaning, although that [recognition of harassment] frequently *involves* the second meaning." *Id.* Judge Sharp did not advocate a broader meaning of "sex" in sexual harassment litigation, but he clearly recognized the complications that arise in same-sex allegations from the possible meanings of the term "sex." *Id.*

255. *See* EEOC Compl. Man. (CCH) ¶ 3102, at 3205 (1981) (stating that sexual harassment is sex discrimination because offender treats victim differently).

sis of "sex,"[256] courts use the term to mean "gender."[257] Despite this use of the term, "sex" is not defined in Title VII as "gender."[258] "Sex" in sexual harassment could mean "sex-related." In fact, the term often means "sex-related" under the facts of those cases that emerge from sexual harassment litigation.[259]

In quid pro quo harassment, there is no doubt that what the offender wants from the employee is sex-related conduct.[260] In hostile work environment cases, the conduct that makes the environment hostile is usually permeated with references to sex.[261] So in sexual harassment as a form of gender discrimination, "sex" essentially means "sex-related." If "sex" in sexual harassment is interpreted to mean "sex-related" rather than "gender," it is undeniable that Title VII should apply to cases where heterosexuals harass homosexual or effeminate heterosexual male employees

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256. *See* 42 U.S.C. § 2000e–2 (1994) (prohibiting discrimination on basis of sex).

257. *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329 (9tn Cir. 1979) (finding "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender"); Refusal to Hire Homosexual Was Not Discrimination Based on "Sex," No. 76–67, EEOC Dec. (CCH) ¶ 6493 (Mar. 2, 1976) (stating that when Congress used word "sex" in Title VII, it was referring to person's gender).

258. *See* 42 U.S.C. § 2000e–2 (1994) (prohibiting employment discrimination on basis of "sex" without defining "sex").

259. *See* Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (involving hostile work environment where plaintiff was object of sex-related slurs, insults and innuendo); Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 555 (1994) (characterizing sexual harassment environment as typically involving "sex-related inquiries, jokes, slurs, propositions, [and] touchings"); *see generally* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE § 3.19 (2d ed. 1994) (discussing what constitutes prohibited verbal and physical conduct in sexual harassment).

260. *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 33 (1992) (stating that since employer conditions continued employment or other job-related benefit on return of sexual favors, quid pro quo sexual harassment itself involves sex); *see also* ABIGAIL C. MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 1.05 (3d ed. 1995) (characterizing quid pro quo harassment as involving sexual advances directly linked to grant or denial of employment benefit); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229, 1232 (1991) (defining quid pro quo harassment as where supervisor conditions employee's job performance or submission to sex-related conduct).

261. *See* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE § 3.22 (2d ed. 1994) (describing behavior constituting hostile work environment in context of sexual harassment); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229, 1233 (1991) (reporting that hostile work environment harassment usually involves "barrage of sex-related inquiries, jokes, slurs, propositions, touchings, and other forms of abuse").

when the discriminatory conduct is sexual in nature.[262] EEOC Guidelines also support this broader meaning of "sex."

EEOC guidelines distinguish sexual harassment from other gender-based discrimination as follows:

> Sexual harassment is sex discrimination not because of the sexual nature of the conduct to which the victim is subjected but because the harasser treats a member of one sex differently from members of the opposite sex. However, it is the *sexual nature* of the prohibited conduct which makes this form of sex discrimination sexual harassment.[263]

This sexual conduct can take the form of verbal conduct, physical conduct, or both.[264] In the case of verbal conduct, requests for sexual favors in quid pro quo cases are clearly sexual in nature and thus prohibited.[265] But the verbal conduct in hostile work environment claims is different. In a hostile work environment, verbal conduct takes the form of comments or jokes involving sex or sexuality.[266] However, when *actions* are taken to demean an employee or create an intimidating work environment, disparate treatment exists in violation of Title VII.[267] To the contrary, language which is profane or vulgar, but does not demean another employee, does not constitute sexual harassment absent other conduct.[268]

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262. *Cf.* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 13–15 (1992) (calling for broader definition of "sex" in sexual harassment litigation). Marcosson argues that restricting "sex" to mean "gender-based" is improper because it "does not explain how a hostile work environment is sex discrimination." *Id.* at 13. Marcosson reaches this conclusion by noting that EEOC Guidelines define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* at 15. Because of this, a non-target employee can bring a Title VII claim "simply because the conduct is sexual in nature." *Id.* at 27. For this reason, he argues that what is required for sexual harassment is that "abusive, offensive conduct be sexual in nature." *Id.* at 38.

263. EEOC Compl. Man. (CCH) ¶ 3102, at 3205 (1981) (emphasis added).

264. *Id.*

265. *Id.*

266. *See* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE §§ 3.19, 3.22 (2d ed. 1994) (describing "verbal conduct" in hostile work environment harassment).

267. EEOC Compl. Man. (CCH) ¶ 3102, at 3206–07 (1981); *cf.* Amy Shahan, Comment, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Harassment*, 48 BAYLOR L. REV. 505, 527 (1996) (arguing that Title VII is violated when person is harassed in workplace because of sexual appetite of aggressor).

268. EEOC Compl. Man. (CCH) ¶ 3105, at 3217–18 (1981); Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1380–81 (C.D. Cal. 1995) (concluding that plaintiffs did not contend supervisor's conduct was hostile or abusive, but rather conduct was offensive and disgusting); *see also* Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1175 (D. Nev. 1995)

Likewise, physical conduct must be of a sexual nature to constitute sexual harassment.[269] If an employee shoves another employee without regard to the employee's gender, it is not sexual harassment. But if the employee fondles, grabs, or pokes another employee for the purpose of coercing an employee to provide personal sexual gratification, or to intimidate or demean another employee, the physical conduct constitutes sexual harassment.[270] Because the sexual nature of the prohibited conduct distinguishes sexual harassment from other sex discrimination,[271] a broader understanding of the term is consistent with Title VII's goal of equality in employment.

Consistent application of Title VII can also be facilitated by determining whether the sexual conduct was unwelcome and offensive[272] *before* applying the "but for" test. In same-sex cases, a combination of both verbal and physical conduct usually occurs.[273] When gender is the primary focus in analyzing the merits of the plaintiff's allegations in a same-sex claim, the actual verbal and physical conduct prompting the plaintiff's claim is often never reached because the offensive conduct is labeled as discrimination based on sexual orientation.[274] However, since Title VII prohibits discriminatory conduct, it is more logical to first focus on the alleged misconduct to determine if it is sexual in nature, and then to ap-

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(dismissing plaintiff's claim because, although work environment was "saturated with sexual references," no discrimination on basis of sex or gender occurred).

269. *See* EEOC Compl. Man. (CCH) ¶ 3102, at 3206 (1981) (describing physical conduct that constitutes sexual harassment).

270. *See id.* (prohibiting conduct which unreasonably interferes with work environment or creates "an intimidating, hostile, or offensive work environment").

271. *See id.* (distinguishing sexual harassment from other forms of sex discrimination).

272. *See* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 205 (1994) (criticizing reasonableness standard because it focuses court's attention on victim's conduct instead of alleged harasser's conduct, which is proper focus of sexual harassment claim); Trish K. Murphy, Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125, 1145–47 (1995) (arguing that courts should focus on nature and effects of unwelcome sexual advances).

273. *See, e.g.*, Nogueras v. University of Puerto Rico, 890 F. Supp. 60, 61 (D.P.R. 1995) (considering female plaintiff's allegations that female supervisor and coworker "sexually harassed plaintiff by touching her, making sexually-charged remarks about plaintiff's clothing and appearance, [and] inviting plaintiff to engage in sexual activity"); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1135 (C.D. Ill. 1995) (describing male plaintiff's complaint that he was "continually subjected to sexually suggestive comments and improper physical sexual contacts" by male foreman); Oncale v. Sundowner Offshore Servs., No. 94–1483, 1995 U.S. Dist. LEXIS 4119, at *2 (E.D. La. Mar. 23, 1995) (summarizing plaintiff's allegations as outrageous physical acts and verbal assaults).

274. *See* Fredette v. BVP Mgmt. Assoc., 905 F. Supp. 1034, 1037–38 (M.D. Fla. 1995) (dismissing claim of male plaintiff who was repeatedly propositioned by male supervisor because harassment was based on sexual orientation).

ply the "but for" test. Focusing first on the alleged misconduct, however, will require courts to disregard the sexual orientation of the parties in examining the conduct. Once the conduct is found to be of a sexual nature, the court should then examine the instances of misconduct to determine whether the offender would have targeted the victim but for his or her gender. All that need be asked in a same-sex sexual harassment allegation is "would this plaintiff have been targeted if he or she were of the opposite gender?" A truthful answer to this question will indicate whether the person was victimized "but for his or her gender." This puts the "but for" test in its proper perspective, while emphasizing Title VII's protection against misconduct.[275]

If courts instead focus primarily on gender, the very characteristic that distinguishes sexual harassment from other gender-based discrimination—misconduct—is ignored. But if courts first examine the alleged misconduct of the offender, the sexual nature of the conduct will indicate whether the victim would have been targeted if he or she had been of the opposite gender.[276] By giving "sex" a broader meaning in sexual harassment cases, and focusing on the alleged misconduct before any consideration of gender, courts can consider same-sex claims using the same standards used for other sexual harassment cases.

## V. A Recommended Legislative Approach: Enact the Employment Non-Discrimination Act

Despite the legal basis upon which same-sex sexual harassment allegations should be heard and the willingness of some federal courts to adjudicate such claims, the split in the federal courts is unlikely to be resolved by judicial initiative alone. Although the United States Supreme Court has not addressed this issue, the Court would most likely deny same-sex plaintiffs a cause of action because the Supreme Court has historically

275. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Cal. L. Rev. 1, 205–07 (1995) (calling for deconstruction of conflation of terms "sex," "gender," and "sexual orientation" so that nation's promise of equality under law can be achieved for all).

276. *See* Tanner v. Prima Donna Resorts, 919 F. Supp. 351, 355 (D. Nev. 1996) (noting that courts' focus should be "on the harassing conduct itself, and whether the harassment is 'because of sex'"); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII*: Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 Cal. W. L. Rev. 87, 126 (1995) (concluding that courts should focus on sexual conduct because it is indicator of sexual harassment based on gender).

refused to expand the definition of sex discrimination in its interpretation of Title VII without some form of instruction from Congress.[277]

The case of discrimination on the basis of pregnancy illustrates the Court's reluctance to expand the definition of "sex" under Title VII. While only women can become pregnant, the United States Supreme Court refused to recognize that discrimination on the basis of pregnancy constituted sex discrimination until Congress enacted the Pregnancy Discrimination Act (PDA) of 1978.[278] Prior to the enactment of the PDA, the EEOC interpreted Title VII's "ban on sex discrimination to include discrimination on the basis of pregnancy."[279] A 1972 EEOC guideline specifically stated that

> disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan . . . . [Benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.[280]

277. *See* JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 294 (1990) (illustrating United States Supreme Court's reluctance to expand definition of "sex" in discrimination cases involving pregnancy without congressional action); LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 47.01 (1995) (indicating that United States Supreme Court refused to extend Title VII's protection to sex discrimination on basis of pregnancy until Congress acted with affirmative legislation).

278. *See* Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (refusing to extend Title VII protection to discrimination on basis of pregnancy); General Elec. Co. v. Gilbert, 429 U.S. 125, 145–46 (1976) (failing to recognize discrimination because of pregnancy as violation of Title VII).

279. SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 19.01 (1995) (tracing history of courts' treatment of discrimination on basis of pregnancy prior to enactment of PDA); *see* LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 47.02 (1995) (emphasizing that EEOC interpreted discrimination on basis of pregnancy as sex discrimination before Congress enacted PDA).

280. 29 C.F.R. § 1604.10(b) (1972).

Although a majority of the lower federal courts agreed with the EEOC guidelines regarding sex discrimination and pregnancy,[281] the United States Supreme Court disagreed in *Geduldig v. Aiello*.[282]

In *Geduldig*, the Court considered the California State Temporary Disability Insurance plan which covered most temporary disabilities but specifically excluded pregnancy and childbirth.[283] Ruling on constitutional grounds, the Court found that the plan did not violate the Equal Protection Clause[284] even though it "specifically excluded disability due to normal pregnancy and childbirth from coverage, while covering most other temporary disabilities lasting from eight days to twenty-six weeks."[285] The Court determined that since there was no evidence that the distinction in disability benefits was a pretext designed to effect invidious discrimination against women, the state was free to structure its program to exclude more costly disabilities like pregnancy.[286]

Despite the *Geduldig* ruling, lower courts continued to follow the EEOC rule by distinguishing the *Geduldig* decision.[287] However, two

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281. *See, e.g.*, Hutchison v. Lake Oswego Sch. Dist. No. 7, 519 F.2d 961, 965 (9th Cir. 1975) (determining that school board's policy of denying female teachers sick leave benefits for pregnancy violates Title VII), *vacated and remanded in light of Gilbert*, 429 U.S. 1033 (1977); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1162 (W.D. Pa. 1974) (finding that company disability plan which excluded pregnancy discriminated on basis of sex), *aff'd*, 511 F.2d 199 (3d Cir. 1975), *vacated and remanded*, 424 U.S. 1737 (1976); Dessenberg v. American Metal Forming Co., 8 Fair Empl. Prac. Cas. (BNA) 290, 292 (N.D. Ohio 1973) (holding that company must provide sick leave benefits for pregnancy to same extent as other temporary disabilities). *But see* Newmon v. Delta Air Lines, 374 F. Supp. 238, 245–46 (N.D. Ga. 1973) (reasoning denial of disability benefits for pregnancy does not violate Title VII since pregnancy is neither sickness nor disability).

282. 417 U.S. 484 (1974).

283. *See Geduldig*, 417 U.S. at 486–87 (discussing details of disability insurance program which excluded pregnancy).

284. *Id.* at 494.

285. LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 47.02 (1995).

286. *See Geduldig*, 417 U.S. at 494–96 (reasoning that Equal Protection Clause was not violated when state structured its insurance plan to cover disabilities less costly than pregnancy where there was no intent to discriminate against women).

287. *Id.*; *see, e.g.*, Communications Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024, 1030 (2d Cir. 1975) (distinguishing *Geduldig* as decided on equal protection grounds and finding that disability plan, which did not include pregnancy, was discriminatory under Title VII); *Wetzel*, 511 F.2d at 203 (refusing to rely on *Geduldig* because decision was based on equal protection analysis rather than statutory construction of Title VII); *Hutchison*, 519 F.2d at 964–66 (opining that, despite *Geduldig*, income protection plan which covered most temporary disabilities except pregnancy discriminated on basis of sex); Satty v. Nashville Gas Co., 384 F. Supp. 765, 770–71 (M.D. Tenn. 1974) (concluding that *Geduldig* was not binding because it did not consider Title VII, and finding instead that exclusion of sick leave benefits for pregnancy violated Title VII), *aff'd*, 522 F.2d 850 (6th Cir. 1975), *modified*, 434 U.S. 136 (1977).

years after *Geduldig*, the United States Supreme Court expressly rejected the EEOC guideline on sex discrimination and pregnancy in *General Electric Co. v. Gilbert*.[288] In *Gilbert*, the Court overruled the decisions of five federal circuit courts[289] when it held that excluding pregnancy benefits from other benefits provided under an employer disability plan did not violate Title VII because it was condition-related and not gender-related.[290] The Court reasoned that the plan did not discriminate against women because it divided benefits between the pregnant and non-pregnant, and because the non-pregnant class included both men and women.[291]

In response to the *Gilbert* decision, Congress enacted the PDA, which became effective on October 31, 1978.[292] The PDA specifically provides that employers must treat pregnant women in the same manner as other employees "for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[293]

The United States Supreme Court's reluctance to interpret pregnancy discrimination as sex discrimination indicates that the Court will likely be reluctant to find that same-sex sexual harassment is within the protection of Title VII. Because the result in a same-sex sexual harassment case is so closely tied to the judicial interpretation of the term "sex,"[294] legisla-

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288. 429 U.S. 125 (1976).

289. *See Gilbert*, 429 U.S. at 146–47 (Brennan, J., dissenting) (criticizing majority opinion in part because it rejected unanimous conclusions of circuit courts in regard to meaning of Title VII); JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 294 (1990) (discussing effect of *Gilbert* on lower court decisions); *see also* George Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199, 232–33 (1979) (explaining that *Gilbert* decision rejected position of EEOC and lower federal courts in interpretation of "sex" in Title VII).

290. *Gilbert*, 429 U.S. at 134–36 (explaining that pregnancy is "condition" in sex discrimination analysis and not necessarily pretext for discrimination).

291. *Id.* at 135.

292. 42 U.S.C. § 2000e(k) (Supp. IV 1980); *see* LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 47.03 (1995) (explaining that Congress enacted PDA in reaction to United States Supreme Court's decision in *Gilbert*). *See generally* CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS § 1:213 (1995) (describing background of PDA).

293. 42 U.S.C. § 2000e(k) (Supp. IV 1980).

294. *See, e.g.*, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326–27 (5th Cir. 1978) (establishing that "sex" discrimination does not include discrimination on basis of male effeminacy); Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 n.1 (N.D. Ind. 1995) (noting that "sex" in context of Title VII's prohibition against discrimination means "gender, not behavior or affection"); EEOC v. Walden Book Co., 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) (construing "sex" in Title VII to mean that "it is unlawful to discriminate against women because they are women and against men because they are men"); Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1176 (D. Nev. 1995) (finding Title VII prohibits

tion similar to the PDA is needed to resolve the split in the federal courts over whether a cause of action is permitted for same-sex sexual harassment.[295] The proposed Employment Non-Discrimination Act (ENDA)[296] promises such relief.

Senators Edward Kennedy and James Jeffords first introduced ENDA to Congress on June 23, 1994.[297] If enacted, ENDA would prohibit employment discrimination on the basis of sexual orientation[298] and provide the same remedies as those currently available to Title VII claimants.[299] While ENDA was carefully crafted to extend protection to include sexual orientation,[300] it is not without its critics.

For example, ENDA addresses the concerns of those who object to the creation of special rights for homosexuals and bisexuals by specifically prohibiting disparate impact claims available under Title VII[301] and any form of preferential treatment on the basis of sexual orientation.[302] Yet opponents argue that ENDA, if enacted, will result in affirmative action programs for homosexuals.[303] In addition, because civil rights legislation has historically led to the adoption of "unofficial" quotas by employers

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gender-hostile work environment, but not work environment hostile to individual notions of sexuality); Carreno v. Local Union No. 226, 54 Fair Empl. Prac. Cas. (BNA) 81, 82 (D. Kan. Sept. 27, 1990) (opining that harassment because of sex does not include harassment because of sexual preference).

295. *See* Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII:* Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 CAL. W.L. REV. 87, 126 (1995) (arguing that legislative action is needed to amend Title VII to ensure that same-gender sexual harassment is prohibited); *see also* Kenneth A. Kovach, *Proposal Would Expand Civil Rights Legislation: Employment Non-Discrimination Act*, EMPL. REL. TODAY, Sept. 22, 1995, at 9, 15 (predicting that ENDA will eventually be enacted following considerable public and congressional debate).

296. S. 2238, 103d Cong. (1994).

297. 140 CONG. REC. S7581–82 (daily ed. June 23, 1994) (statement of Sen. Kennedy).

298. S. 2238, 103d Cong. § 3 (1994). Under ENDA, employers are prohibited from subjecting "an individual to different standards or treatment on the basis of sexual orientation . . . or otherwise discriminat[ing] against an individual on the basis of sexual orientation." *Id.*

299. *Id.* § 9.

300. *See* 140 CONG. REC. S7581, S7584 (daily ed. June 23, 1994) (containing remarks by Senator Feinstein in support of bill and applauding careful crafting of ENDA); Letter to Senator Edward M. Kennedy on the "Employment Non-Discrimination Act," 31 WEEKLY COMP. PRES. DOC. 1881 (Oct. 19, 1995) (presenting President Clinton's comments on careful craftsmanship in pledge of support for ENDA).

301. S. 2238, 103d Cong. § 5 (1994).

302. *Id.* § 6.

303. *See Employment Non-Discrimination Act, 1994: Hearing on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong. 35 (1994) (statement of Robert H. Knight, Director, Cultural Studies, Family Research Council) (testifying that ENDA will result in special rights for homosexual employees and destroy family values).

who want to prove that they are conforming with the law, critics argue that ENDA will likewise result in special rights for homosexuals.[304] This argument undoubtedly refers to the race and gender-conscious affirmative action programs implemented by many employers in response to the enactment of Title VII during the 1960s and 1970s; however, this argument fails because it ignores the plain language of ENDA which specifically prohibits any type of affirmative action program, including quotas.[305]

A second example of ENDA's carefully crafted provisions being criticized by opponents is ENDA's emphasis on equality.[306] Although ENDA urges equality, opponents argue that ENDA is not really about equality for homosexual and bisexual employees;[307] rather, opponents characterize ENDA as legislation forcing unwilling Americans to accept homosexuality.[308] Because these critics view homosexuality as immoral, unhealthy, and destructive to American society, they perceive ENDA as an attempt to legitimize homosexual behavior by placing homosexuality on a "moral par" with heterosexual marriage and family.[309] Taken to its extreme, this argument suggests that ENDA places homosexual couples above heterosexual couples in the workplace because there is no specific

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304. *Id.* at 36.

305. *See* S. 2238, 103d Cong. § 6 (1994) (prohibiting quotas and preferential treatment on basis of sexual orientation). In contrast to ENDA, which prohibits preferential treatment on the basis of sexual orientation, Title VII contains a remedial provision that permits a court, upon a finding of intentional discrimination, to order affirmative action. *See* 42 U.S.C. § 2000e-5(g) (1994) (permitting courts to enjoin employers who are found to have discriminated unlawfully). Although the statute itself does not require quotas, the United States Supreme Court has interpreted Title VII to permit race and gender-based quotas in *United Steelworkers of America v. Weber*, 443 U.S. 193, 200 (1979). After reviewing Title VII's legislative history, the *Weber* Court found that Congress hoped employers would embrace Title VII's goal of ending discrimination in employment through voluntary efforts. *See Weber*, 443 U.S. at 204 (finding that Congress intended employers to voluntarily support Title VII). In light of this finding and absent language prohibiting quotas, the Court held that Title VII does not prohibit employers from voluntarily implementing quotas. *Id.* at 208. However, a similar finding could not be made in regard to ENDA, since preferential treatment is specifically prohibited. *Compare* S. 2238, 103d Cong. § 6 (1994) (preventing employers from giving preferential treatment on basis of sexual orientation), *with* 42 U.S.C. § 2000e-2(j) (1992) (specifying that employers are not required to give preferential treatment to individuals because of race, color, religion, sex or national origin).

306. *See* S. 2238, 103d Cong. § 3 (1994) (prohibiting employers from discriminating on basis of sexual orientation).

307. *See Employment Non-Discrimination Act, 1994: Hearing on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103 Cong. 36-37 (1994) (statement of Robert H. Knight, Director, Cultural Studies, Family Research Council) (arguing that ENDA provides special protection for homosexual employees).

308. *Id.* at 90.

309. *Id.* at 92.

hiring protection for heterosexual couples.[310] This argument fails, however, because it disregards the clear language of ENDA: in contrast to Title VII which makes no mention of heterosexual couples, ENDA actually withdraws protection for homosexual couples by specifying that it does not apply to employment benefits for same-sex employee-partners.[311] Because employers are not required to "provide benefits, such as insurance, for the same-sex partner of an employee,"[312] ENDA can hardly place homosexual couples above heterosexual couples.

A final illustration of contentious ENDA provisions is embodied in the exemptions ENDA extends to the military forces,[313] small businesses,[314] and religious organizations.[315] Opponents argue that these exceptions are extremely narrow, opening a "pansexual pandora's box for litigious groups" seeking protection.[316] ENDA's religious exemption is especially criticized as ineffective because "for profit" religious activities are not exempted.[317] Opponents argue that ENDA will place organizations that have a religious point of view that opposes homosexuality, but do not have a formal relationship with a church, in the compromising position of having to hire people whom they consider to be immoral.[318] Consequently, organizations such as Christian bookstores, religious radio and television stations, and children's summer camps would be forced to comply with ENDA, ostensibly threatening the basic values these organizations try to promote.[319] This argument fails, however, because these types of organizations are not actually religious organizations; rather, they are "commercial enterprises that are owned by individuals who . . . hold certain religious beliefs or . . . use the proceeds of their business . . .

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310. *Id.*

311. *See* S. 2238, 103d Cong. § 4 (1994) (specifying that ENDA does not require employers to provide benefits for employer's same-sex partner).

312. *Id.*; *see also* 140 CONG. REC. S7582, S7584 (daily ed. June 23, 1994) (statement of Sen. Packwood) (reassuring Congress that ENDA does not require employers to provide employment benefits to same-sex partners of employees).

313. S. 2238, 103d Cong. § 8 (1994).

314. 140 CONG. REC. S7582, S7584 (daily ed. June 23, 1994) (statement of Sen. Feinstein).

315. S. 2238, 103d Cong. § 7 (1994).

316. *See Employment Non-Discrimination Act, 1994: Hearing on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong. 35–37 (1994) (statement of Robert H. Knight, Director, Cultural Studies, Family Research Council) (criticizing limited coverage of ENDA's exceptions and predicting that it will be used by numerous groups with sexual agendas).

317. *Id.* at 35–36.

318. *Id.* at 35–37.

319. *Id.* at 36.

to support other organizations that serve a religious mission."[320] Any dilemma faced by such organizations can be overcome by operating these organizations on a nonprofit basis. While ENDA has its religious-grounds opponents, many other religion-oriented groups have formally endorsed ENDA, believing that it adequately protects religious freedom.[321]

Although ENDA's opponents are vocal, they may be out-numbered by ENDA's supporters. Eight states and the District of Columbia already prohibit discrimination on the basis of sexual orientation.[322] Many private employers have likewise implemented internal programs prohibiting such discrimination, and ENDA is formally endorsed by a host of major American businesses.[323] However, despite these proponents and full support from President Clinton,[324] ENDA is unlikely to pass the Republican-controlled Congress.[325] For example, although the bill was reintroduced

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320. *See Employment Non-Discrimination Act, 1994: Hearing on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong. 78–79 (1994) (letter from Religious Action Center for Reform Judaism) (distinguishing religious organizations exempted from ENDA from businesses that support religious organizations).

321. *Id.*; *see also id.* at 82 (calling for end to discrimination on basis of sexual orientation and endorsing ENDA).

322. *See* Kenneth A. Kovach, *Non-Discrimination: ENDA Gains Support*, HR FOCUS, July 1995, at 15, 16 (reporting support for ENDA by state governments and American businesses); Larry Reynolds, *Proposed Bill Would Ban Workplace Discrimination Based on Sexual Orientation*, HR FOCUS, Oct. 1994, at 1, 8 (listing states that have civil rights law protecting homosexuals).

323. *See* Kenneth A. Kovach, *Non-Discrimination: ENDA Gains Support*, HR FOCUS, July 1995, at 15, 16 (identifying major American businesses that formally endorse ENDA); Kenneth A. Kovach, *Proposal Would Expand Civil Rights Legislation: Employment Non-Discrimination Act*, EMPL. REL. TODAY, Sept. 22, 1995, at 9 (reporting that over one hundred American businesses already include sexual orientation in their company non-discrimination policies).

324. *See* Letter to Senator Edward M. Kennedy on the Employment Non-Discrimination Act, 31 WEEKLY COMP. PRES. DOC. 1881 (Oct. 19, 1995) (containing President Clinton's pledge of support for ENDA); *see also* 141 CONG. REC. E2041, E2041 (daily ed. Oct. 26, 1995) (reporting comments of Rep. Farr commending President Clinton for supporting ENDA).

325. *See, e.g.*, *Mr. Clinton Stands Up for Fairness*, N.Y. TIMES, Oct. 28, 1995, at 20 (forecasting demise of ENDA); Kenneth A. Kovach, *Proposal Would Expand Civil Rights Legislation: Employment Non-Discrimination Act*, EMPL. REL. TODAY, Sept. 22, 1995, at 15 (concluding that majority of Congress will argue against ENDA); Deb Price, *Advocates for Rights Leaving Senate*, STAR TRIB. (Minneapolis-St. Paul), Oct. 2, 1995, at 9A (bemoaning loss of ENDA supporters from Senate after Republican take-over of Senate). After its introduction to the 104th Congress on July 15, 1995, the Senate voted on ENDA. *See* Cheryl Wetzstein, *Pro-Gay Bill Seen Dead this Session*, WASH. TIMES, Sept. 12, 1996, at A7 (reporting results of Senate vote on ENDA). On September 12, 1996, the Senate rejected ENDA by a razor-thin vote of 50–49. *Id.* Of the forty-nine senators who voted for ENDA, forty-one senators were Democrats and eight were Republicans. Elaine S. Povich,

to Congress on July 15, 1995,[326] with 29 sponsors in the Senate and 117 in the House of Representatives, neither the Chairman of the Senate Labor Committee nor the Chairman of the Economic and Educational Opportunity Committee support ENDA.[327]

As a federal law prohibiting discrimination in employment on the basis of sexual orientation, ENDA would ensure that homosexuals are judged by the same standards as all other working Americans—by their ability to do their jobs.[328] In doing so, ENDA would promote the economy by ensuring that *all* qualified individuals can contribute to society and make a living for themselves.[329] Therefore, it is imperative that discrimination based on sexual orientation be prohibited, because sexual harassment on the basis of sexual orientation would be prohibited as well.

The bill is only flawed in that it does not address the "transgendered"[330] employee who is also the victim of employment discrimination.[331] By modifying ENDA's definition of "sexual orientation" to

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*Gays Lose on Two Fronts: Senate Bans Same-Sex Marriages, Defeats Anti-Gay Bill*, NEWSDAY, Sept. 11, 1996, at A4. Only five Democrats voted against ENDA; the remaining nay-votes were from Republican senators. *Id.* The missing vote was represented by Senator David Pryor, a Democrat, who was attending his ill son at the time of the vote. *Id.* Previously, Senator Pryor voted to end the military's ban of homosexuals, so there is some indication that Senator Pryor would have voted in favor of ENDA had he been available on the day of the vote. *Id.* Had Senator Pryor voted "yea," the result would have been a tie which would have been broken by Vice President Gore. *Id.* There is no doubt that Vice President Gore would have voted in favor of ENDA. *Id.* It is interesting to note that the Senate voted on both ENDA and the Defense of Marriage Act on the same day; ENDA was barely defeated in the Senate, but the Defense of Marriage Act was overwhelmingly passed. *Id.* Although ENDA faced defeat in the 104th Congress, the fact that eight of its supporters were Republican indicates that ENDA may fare much better with the 105th Congress. *See* Press Release, Log Cabin Republicans, *Gay and Lesbian Civil Rights Legislation Shows Strong Showing in Senate Today*, LOG CABIN REPUBLICANS, Sept. 11, 1996 (commenting that real surprise in Senate vote on ENDA is that eight Republicans now support ENDA), *available in* LEXIS, News Library, CURNWS File. ENDA's sponsors indicate that ENDA will be a top priority for the 105th Congress. *See* Elaine S. Povich, *Gays Lose on Two Fronts: Senate Bans Same-Sex Marriages, Defeats Anti-Gay Bill*, NEWSDAY, Sept. 11, 1996, at A4 (reporting that Senator Kennedy, ENDA's primary sponsor, stated that ENDA will be "high" priority for 105th Congress).

326. 141 CONG. REC. S8501 (daily ed. June 15, 1995).

327. *Clinton Pledges Support for Bill Banning Job Discrimination Against Homosexuals*, 33 Gov't Empl. Rel. Rep (BNA), at 1339 (Oct. 23, 1995).

328. 141 CONG. REC. S8501, S8502 (daily ed. June 15, 1995) (statements of Sen. Kennedy).

329. *Id.*

330. *See* Jeff Stryker, *Bigotry and Ignorance vs. the "Transgendered,"* SAN FRANCISCO EXAMINER, Dec. 13, 1995, at A33 (defining "transgendered" as term encompassing transvestites and transsexuals), *available in* LEXIS, News Library, CURNWS File.

331. *See id.* (describing discrimination faced by transgendered person); Leroy Aarons, *That Was No Lady, That's . . .*, BALTIMORE SUN, Oct. 29, 1995, at 6F (commenting on

include the "transgendered" employee, ENDA would ensure that all Americans are protected from arbitrary discrimination in the workplace on the basis of sex. However, this modification would only make ENDA more controversial and endanger its chances for enactment.

## VI. CONCLUSION

Many courts have wrestled with the problems resulting from recognition of sexual harassment as a form of sex discrimination under Title VII. In doing so, perhaps one of the most accurate descriptions of sexual harassment was provided by Judge Ann Williams in *Goluszek v. Smith*.[332] Judge Williams wrote that "actionable sexual harassment fosters a sense of degradation in the victim by attacking their sexuality."[333] Judge Williams explained that such harassment is discriminatory because it deprives the victim of the right to participate in the workplace on equal footing with others similarly situated.[334] The truth of this explanation is clear. Any man or woman feels degraded when demeaned because of his or her sexuality, just as when the degradation is motivated by some other arbitrary personal characteristic.[335] Regardless of whether the offender in sexual harassment is motivated by the sexual orientation of the victim, nonconformity to gender stereotypes, or simply because a member of the victim's gender is not wanted in the workplace, the victim is placed on

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rejection of transgendered people); John Taylor, *The Third Sex: Transsexuals*, ESQUIRE, Apr. 1995, at 102 (tracing history of discrimination against transgendered persons to Biblical times); *see also* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (holding that Title VII does not protect transsexuals); Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982) (finding that term "sex" in Title VII does not encompass transsexuals); SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 28.01 (1995) (discussing lack of protection for transsexuals and transvestites under Title VII).

332. 697 F. Supp. 1452 (N.D. Ill. 1988).

333. Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

334. *Goluszek*, 697 F. Supp. at 1456.

335. *See* King v. M.R. Brown, Inc., 911 F. Supp. 161, 167 (E.D. Pa. 1995) (noting effect sexual harassment has on its victims); *see also* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE § 1.5 (2d ed. 1994) (discussing "debilitating consequences" of sexual harassment); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 MIAMI L. REV. 511, 631–32 (1992) (reporting frightening effect of being labeled homosexual); Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins: *A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495, 532–33 (1990) (arguing that sex discrimination offends community's sense of justice because gender does not indicate individual merit and is beyond individual control).

unequal footing.[336] Unfortunately, this truth is often lost in the adjudication of same-sex cases.

Ironically, Judge Williams wrote such an accurate description of the effect of sexual harassment while denying a same-sex sexual harassment claim.[337] Moreover, many courts have relied on Judge Williams' analysis in denying same-sex claims.[338] While it is arguable whether Congress contemplated sexual harassment when it enacted Title VII,[339] Congress clearly meant to free employees from discrimination in employment and to remove barriers to workplace equality.[340] In doing so, Congress outlawed a broad spectrum of disparate treatment used to exert power over other employees in the workplace.[341] Sexual harassment is different, however, from other forms of prohibited discrimination because the prohibited conduct is sexual in nature.[342]

In sexual harassment situations, sexual conduct is just another way an employee exerts power over another employee.[343] Such conduct is just another way of discriminating against employees in a way that has noth-

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336. *See* Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 79 (1995) (writing that "same-sex harassment presents the same potential for domination and degradation of an employee on the basis of his or her gender as does heterosexual harassment"); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 775 (1989) (stating that "sexual harassment victim has been placed in a position unequal and inferior" to that of harasser).

337. *See Goluszek*, 697 F. Supp. at 1456 (granting defendant-employer summary judgment in claim of same-sex sexual harassment).

338. *E.g.*, Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995); Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wa. 1995); Hopkins v. Baltimore Gas and Elec. Co., 871 F. Supp. 822 (D. Md. 1994); Fleenor v. Hewitt Soap Co., No. C-3-94-192, 1995 WL 386793 (S.D. Ohio Dec. 21, 1994).

339. *See* Michael E. Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 457–67 (1981) (discussing various theories behind Congress's motivation for including "sex" in language of Title VII).

340. 42 U.S.C. § 2000e-2 (1994).

341. *Id.*

342. EEOC Compl. Man. (CCH) ¶ 3102, at 3205 (1981).

343. *See* Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (emphasizing that offender in sexual harassment is motivated by desire for power and control, not necessarily sexual preference); Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 182–87 (1994) (discussing how sexual harassment is used by men in workplace to "reassert male dominance"); Anne C. Levy, *Sexual Harassment Cases in the 1990s: "Backlashing" the "Backlash" Through Title VII*, 56 ALB. L. REV. 1, 35–41 (1992) (explaining that sexual harassment is used to control women in workplace).

ing to do with job performance.[344] Labeling discriminatory conduct as homosexual harassment, or discrimination based on sexual orientation, does not change the character of the prohibited conduct (sexual), or its purpose (discrimination). Such conduct should be no more tolerated by the law than other forms of discrimination because it perpetuates gender stereotypes of how "real men" and "real women" should behave, interferes with productivity in the workplace,[345] and stands as a barrier to the goal of Title VII—promoting workplace equality.[346]

Resolution of the present split in the federal court system is the next step in the evolution of sexual harassment law. While same-sex claims do not fit neatly into the development of sexual harassment law, this Comment shows that a legal basis exists for judicial consideration of same-sex cases. A consistent application can be reached by focusing first on the alleged misconduct without considering the gender of the parties. Once the alleged misconduct is determined to be sexual in nature, the central question should then be whether the offensive conduct is "coercive because of the victim's subordinate position or [if it] demeans the victim as a worker."[347] This focus renders the gender of the parties irrelevant in sexual harassment cases and furthers Title VII's goal of workplace equality.

Despite this logic, federal employment legislation is needed to ensure victims of same-sex sexual harassment are protected in the workplace. ENDA would provide this protection; however, because the issue of homosexuality is so controversial in America, there is little ENDA's sponsors can do to make it more acceptable to those who oppose it. Like other advancements in the area of employment discrimination, legislation protecting employees from discrimination on the basis of sexual orientation will take time.[348] However, until ENDA's sponsors are successful in

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344. *See Sexual Orientation and the Law*, 21 HARV. L. REV. 1508, 1555–84 (1989) (describing arbitrary and unfair nature of employment discrimination based on sexual orientation).

345. *See* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE § 3.16 (2d ed. 1994) (discussing effect of sexual harassment on employees); Anne C. Levy, *Sexual Harassment Cases in the 1990s: "Backlashing" the "Backlash" Through Title VII*, 56 ALB. L. REV. 1, 42–50 (1992) (describing negative impact of sexual harassment on women in workplace).

346. *Cf.* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 MIAMI L. REV. 511, 632 (1992) (asserting that reinforcement of gender stereotypes and anti-gay discrimination "are incompatible with almost any conceivable vision of gender equality").

347. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 203 (1994).

348. *See* 141 CONG. REC. S8501, S8502 (daily ed. June 15, 1995) (showing Senator's Kennedy's view that attitudes about sexual orientation cannot be changed overnight); *see*

obtaining the votes needed to enact this legislation, the judicial approach discussed above will enable the courts to adjudicate same-sex sexual harassment cases by using existing law.

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*also* 140 CONG. REC. S7581, S7583 (daily ed. June 23, 1994) (containing remarks of Justin Dart, former Chairman of President's Committee on Employment of People With Disabilities, reflecting on historical opposition to civil rights advancements).

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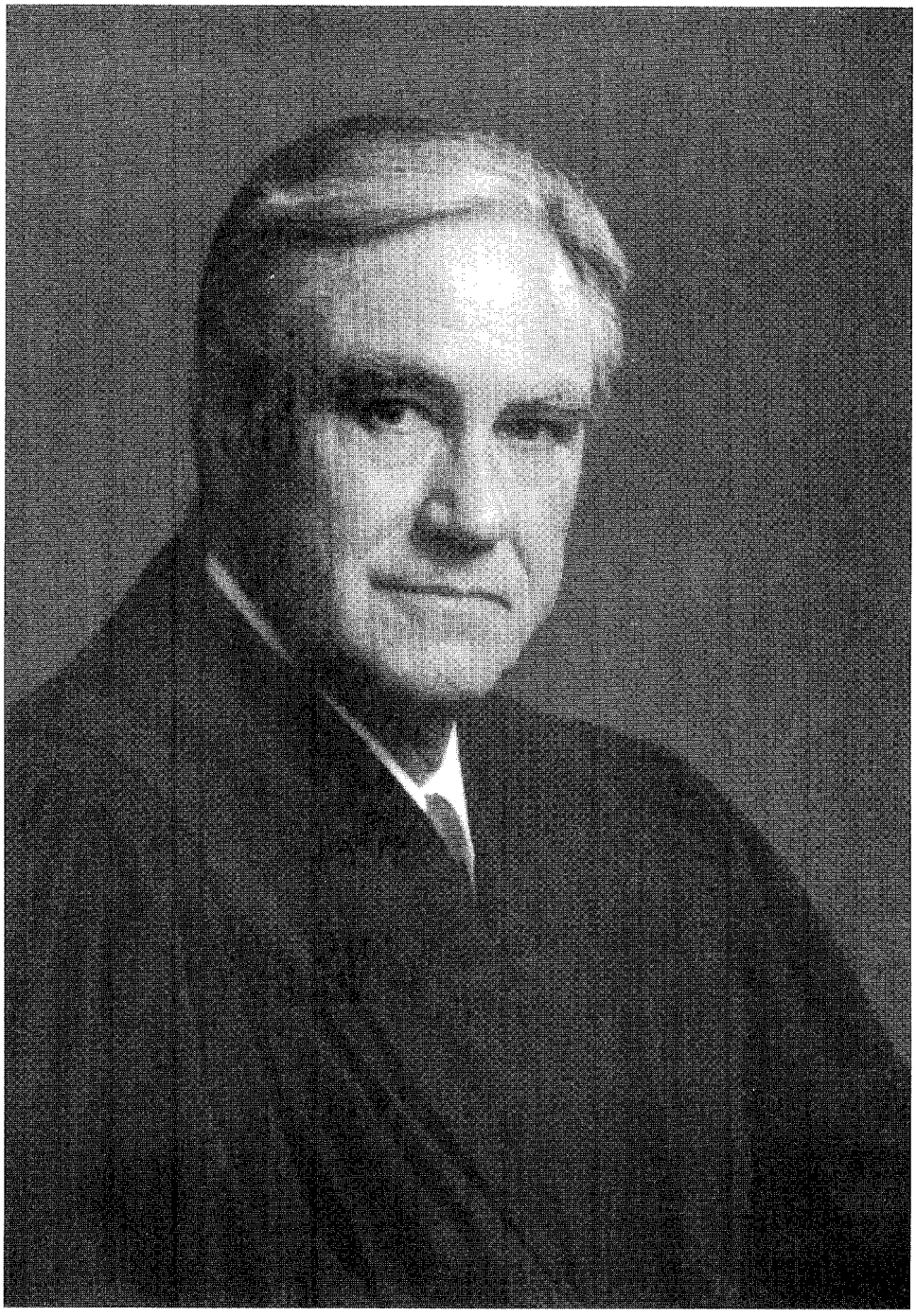

JUSTICE FRANKLIN S. SPEARS
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