

1995

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Recommended Citation

Wehren, Lisa (1995) "Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction," *California Western Law Review*. Vol. 32 : No. 1 , Article 5.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol32/iss1/5>

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SAME-GENDER SEXUAL HARASSMENT UNDER TITLE VII: GARCIA V. ELF ATOCHEM MARKS A STEP IN THE WRONG DIRECTION

INTRODUCTION

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits sexual harassment in the workplace.¹ Both women and men² can bring a Title VII action³ against either an individual supervisor or their employer.⁴ In most cases of sexual harassment, the harasser and the victim are of the opposite

1. Civil Rights Act of 1964 § 703(a)(1) as amended 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII provides that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” *Id.*

2. LAWRENCE SOLOTOFF & HENRY S. KRAMER, *SEXUAL DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE* § 3.04[3][a] (1994). See *Showalter v. Allison Reed Group*, 767 F. Supp. 1205, 1211 (D.R.I. 1991), *aff’d on other grounds*, 984 F.2d 4 (1st Cir. 1993) (“Title VII protects both males and females from sexual harassment.”); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1549 (M.D. Ala. 1995) (“[I]t is unquestioned that Title VII prevents ‘reverse discrimination’ against men.”). See, e.g., *Tomkins v. Public Service Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Pierce v. Commonwealth Life Ins.*, 40 F.3d 796, 801-02 (6th Cir. 1994). See also *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430 (7th Cir. 1995); *Henson v. City of Dundee* 682 F.2d 897, 903 (11th Cir. 1982); *Pritchett v. Sizeler Real Estate Management Co.*, No. Civ.A.93-2351, 1995 WL 241855, at *1 (E.D. La. April 25, 1995); *Equal Employment Opportunity Commission v. Walden Book Co.*, 885 F. Supp 1100, 1103 (M.D. Tenn. 1995); *Polly v. Houston Lighting Co.*, 825 F. Supp. 135, 136-37 (S.D. Tex. 1993). See also Michelle R. Peirce, Note, *Sexual Harassment and Title VII-A Better Solution*, 30 B.C. L. REV. 1071, 1087 (1989) (stating men can claim protection under Title VII based on sexual harassment by women).

3. The following elements are required to prove a Title VII employment discrimination claim:

(1) [T]he plaintiff must establish by a preponderance of the evidence a prima facie case of the discrimination alleged; (2) if successful in making such a showing, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the plaintiff’s discharge; (3) once the defendant articulates such a reason, the burden shifts to the plaintiff to show that the reasons proffered by the defendant were a mere pretext.

Roberts v. Wyeth Labs, Inc., No. 89-0822, 1991 U.S. Dist. LEXIS 890, at *6 (E.D. Penn. Jan. 25, 1991). *Accord Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 250-52 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

4. One author summarizes the coverage of Title VII as follows:

The following organizations are covered by Title VII: (1) employers having 15 or more employees in industries affecting commerce; (2) state and local governments; (3) labor organizations with 15 or more members in industries affecting commerce; and (4) employment agencies. The class of potential plaintiffs is broader than that of employees in the traditional sense. Potential defendants include individual supervisors as well as employers.

HENRY H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 2.3 (3rd ed. 1992) (citations omitted).

sex.⁵ There is no question that cross-gender sexual harassment⁶ is actionable under Title VII.⁷ Thus, Title VII prohibits sexual harassment either where the harasser is male and the victim is female⁸ or where the harasser is female and the victim is male.⁹ However, the question that has yet to be resolved is whether Title VII prohibits sexual harassment where the harasser and the victim are the same gender.¹⁰

The United States Supreme Court has not spoken on the question of whether same-gender sexual harassment¹¹ is actionable under Title VII.¹² Several federal courts have addressed this issue, but the results have been inconsistent.¹³ To date, the Fifth Circuit is the only United States Court of Appeals to rule on this issue.¹⁴

In *Garcia v. Elf Atochem*,¹⁵ the Fifth Circuit held that same-gender sexual harassment is not actionable under Title VII.¹⁶ In *Garcia*, a male employee sued his employer, alleging sexual harassment by his male

5. Janet Hughie Smith, *Sex Discrimination in the Workplace: Some Guidelines For Employers and Legal Update*, C983 A.L.I.-A.B.A. 135, 144 (1995). See also Peirce, *supra* note 2, at 1071.

6. Cross-gender sexual harassment refers to sexual harassment involving a harasser and a victim of the opposite sex.

7. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing an action under Title VII for hostile environment sexual harassment where a female employee was sexually harassed by her male supervisor); *Harris v. Forklift Systems Inc.*, 114 S. Ct. 367 (1993). See *Hopkins v. Baltimore Gas & Electric*, 871 F. Supp. 822, 832. See also Smith, *supra* note 5, at 144.

8. See, e.g., *Meritor*, 477 U.S. 57.

9. See, e.g., *Pierce v. Commonwealth Life Ins.*, 40 F.3d 796, 801-02 (6th Cir. 1994).

10. See *Vandeventer v. Wabash National Corp.*, 887 F. Supp. 1178, 1180 (N.D. Ind. 1995) (“[Same-sex harassment] is still a murky area of the law.”).

11. Same-gender sexual harassment refers to sexual harassment involving a harasser and a victim of the same sex.

12. *Pritchett v. Sizeler Real Estate Management Co.*, No. Civ.A. 93-2351, 1995 WL 241855, at *2 (E.D. La. 1995). See also *Hopkins v. Baltimore Gas & Electric*, 871 F. Supp. 822, 832 (D. Md. 1994) (“[The Supreme Court] did not, however, address the viability under Title VII of a claim of same-gender sexual harassment.”).

13. *Pritchett*, No. Civ.A. 93-2351, 1995 WL 241855, at *2 n.2. Compare *Wright v. Methodist Youth Services.*, 511 F. Supp. 307, 309 (N.D. Ill. 1981) (holding that discharge of a male employee because he rejects homosexual advances made by his male supervisor is a violation of Title VII) and *Joyner v. AAA Cooper Trans.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983) (“[U]nwelcoming homosexual harassment also states a violation of Title VII.”) with *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (holding harassment of male employee by male co-workers did not present actionable sexual harassment claim Title VII) and *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (“Harassment by male supervisor against male subordinate does not state a claim under Title VII even though the harassment has sexual overtones.” (quoting *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993))).

14. See *Hopkins*, 871 F. Supp. at 833 (“*Garcia* is the only reported appellate opinion to directly address this issue.”). See also *Raney v. District of Columbia*, 892 F. Supp. 283, 286 (D. D.C. 1995); *McKoy v. Johnson Controls World Services, Inc.*, 878 F. Supp. 229, 231 (S.D. Ga. 1995).

15. 28 F.3d 446 (5th Cir. 1994).

16. *Garcia*, 28 F.3d at 451-52. See also *Oncala v. Sundowner Offshore Services*, No. Civ.A.94-1483, 1995 WL 133349, at *1 (E.D. La. March 24, 1995) (“The Fifth Circuit has clearly articulated its position that same sex harassment does not state a claim under Title VII.”).

supervisor.¹⁷ The Court held that “harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones.”¹⁸ In reaching its decision, the Fifth Circuit relied¹⁹ on the reasoning of the District Court in *Goluszek v. Smith*.²⁰ In *Goluszek*, the court held that a claim brought by a male employee alleging that he was sexually harassed by male co-workers²¹ was not actionable under Title VII.²²

The essence of the reasoning in *Goluszek* lies in the court’s interpretation of the underlying concerns of Congress when it enacted Title VII.²³ The court found that Congress was concerned with creating equal employment opportunities by remedying discrimination against disadvantaged groups resulting from the abuse of an imbalance of power by dominant groups.²⁴ Accordingly, the court found that Congress intended to prohibit conduct that treats all males (or females) as inferior, thereby creating an anti-male (or female) environment.²⁵ The court concluded that the conduct at issue was not the kind which created an anti-male environment because the plaintiff was a male working in a male-dominated environment.²⁶ Thus, the court held that the harassment was not the type of conduct Congress intended to prohibit.²⁷

In *Garcia*, despite the Fifth Circuit’s reliance on the reasoning of *Goluszek*, the Court did not discuss whether or not the plaintiff worked in an environment that treated all males as inferior.²⁸ Nonetheless, the Court broadly held that harassment by a male against another male is not actionable under Title VII.²⁹ *Garcia*’s holding indicates that the Court does not find harassment of a male by another male to be capable of creating an anti-male atmosphere, regardless of the particular facts presented. Thus, according to *Garcia*, same-gender sexual harassment is not actionable under Title VII.³⁰

17. *Garcia*, 28 F.3d at 448. The employee, Freddy Garcia, alleged that his supervisor grabbed his crotch area from behind and made sexual motions. *Id.*

18. *Id.* at 451-52 (quoting *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993)).

19. *Raney v. District of Columbia*, 892 F. Supp. 283, 286 (D.D.C. 1995) (“[T]he Fifth Circuit in *Garcia*, relied heavily on the influential district court opinion in *Goluszek v. Smith*.”).

20. 697 F. Supp. 1452 (N.D. Ill. 1988).

21. *Id.* at 1454.

22. *Id.* at 1456.

23. *Id.* See also *Smith*, *supra* note 5, at 145.

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

25. *Id.*

26. *Id.*

27. *Id.*

28. *Garcia v. Elf Atochem*, 28 F.3d 446, 451-52 (5th Cir. 1994).

29. *Id.* at 452.

30. *Id.* Courts have interpreted *Garcia*’s holding to mean that same-gender sexual harassment is not actionable under Title VII. See *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995) (“The Fifth Circuit has clearly and succinctly stated that Title VII addresses gender discrimination and does not allow a claim for same-gender discrimination.”). See also *Hopkins v. Baltimore Gas & Electric Co.*, 871 F. Supp. 822, 834 (D. Md. 1994);

Despite the Fifth Circuit's rejection of same-gender sexual harassment under Title VII, federal district courts remain split on this issue.³¹ Several district courts have followed *Garcia*,³² while others have flatly rejected the Fifth Circuit's holding.³³ Some courts, while not expressly rejecting *Garcia*, have refused to preclude same-gender sexual harassment under Title VII.³⁴

Section I of this Note discusses the Congressional intent underlying Title VII's ban on sex discrimination; the judicial recognition of sexual harassment as a form of sex discrimination under Title VII; and the treatment of same-gender sexual harassment claims prior to *Garcia*. Section II discusses the *Garcia* decision and the reasoning of *Goluszek*, which the Fifth Circuit in *Garcia* relied upon to reject same-gender sexual harassment as a violation of Title VII.

Section III critiques the *Garcia/Goluszek* approach³⁵ to addressing the actionability of same-gender sexual harassment. This section concludes that the reasoning relied upon in *Garcia* is seriously flawed because it is based

Ashworth v. Roundup Co., 897 F. Supp. 489, 494 (W.D. Wash. 1995).

31. See *Ashworth*, 897 F. Supp. at 492 ("The courts . . . are split as to whether or not same-sex harassment (male against male) is actionable under Title VII."); *Fleenor v. Hewitt Soap Co.*, No. C-3-94-182, 1995 WL 386793, at *2 (S.D. Ohio Dec. 21, 1994) ("There is a split among courts as to whether male against male hostile environment sexual harassment is actionable under Title VII.").

32. See, e.g., *Hopkins*, 871 F. Supp. at 834; *Myers*, 874 F. Supp. at 1548; *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995); *Ashworth*, 897 F. Supp. at 294.

33. See, e.g., *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (concluding that *Garcia* is inconsistent with existing anti-discrimination jurisprudence and recognizing an action under Title VII where a homosexual male supervisor harasses a male employee but does not similarly harass female employees); *Pritchett v. Sizeler Real Estate Management Co.*, No. Civ.A.93-2351, 1995 WL 241855, at *2 (E.D. La. April 25, 1995) (refusing to follow *Garcia*'s statement that Title VII does not prohibit same-gender sexual harassment by holding a female employee's claim of sexual harassment by her female supervisor to be actionable gender discrimination under Title VII); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *Raney v. Dist. of Columbia*, 892 F. Supp. 283, 286-89 (D.D.C. 1995) (refusing to follow the questionable precedent of the Fifth Circuit and other jurisdictions by holding a male employee's claim of sexual harassment by his male supervisor to be cognizable where, but for his sex, he would not have faced similar discriminatory treatment).

34. See, e.g., *Roe v. K-Mart Corp.*, No. Civ.A.2:93-2372-18AJ, 1995 WL 316783, at *1 (D.S.C. March 28, 1995) (holding same-gender sexual harassment to be actionable under Title VII where a male homosexual employee was allegedly terminated because he refused his male homosexual supervisor's sexual advances); *McKoy v. Johnson Controls World Services, Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) (holding that homosexual harassment can violate Title VII where the employee would not have been harassed but for his or her sex because the plain language of the statute does not limit Title VII's restriction against discrimination to heterosexual harassment); *Equal Employment Opportunity Comm'n v. Walden Book Co.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) (holding that same-gender sexual harassment is actionable under Title VII because the harassment is based on gender where a homosexual supervisor makes offensive sexual advances to employees of the same sex but does not make advances to employees of the opposite sex); *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60, 63 (D.P.R. 1995) (holding that Title VII's language clearly prohibits same-gender sexual harassment).

35. Since the Fifth Circuit's holding in *Garcia* relies on the reasoning of *Goluszek*, I will refer to the Fifth Circuit's treatment of same-gender sexual harassment under Title VII as the "*Garcia/Goluszek* approach".

entirely on one district court's determination that Congress did not intend to prohibit same-gender sexual harassment. Rather than determining whether or not same-gender sexual harassment constitutes discrimination based on sex,³⁶ the court in *Goluszek* simply concludes that since Congress did not intend to prohibit this type of conduct, it is not based on gender.³⁷ Therefore, the *Garcia/Goluszek* approach is incorrect insofar as it merely recognizes an action under Title VII where the harassment creates an attitude of hostility towards all members of the victim's gender.

Section IV discusses *Garcia's* impact on subsequent decisions addressing the actionability of same-gender sexual harassment under Title VII and explores the possibility that *Garcia* reflects the current trend in this area of the law. Section V proposes a different approach to determining whether same-gender sexual harassment is a viable cause of action under Title VII.

This Note concludes that sexual harassment is actionable under Title VII regardless of whether the harasser and the victim are the same gender. To determine if same-gender sexual harassment is actionable, courts must look to whether the harassing conduct was based on the person's gender. Where the conduct at issue is based on gender, it is the type of conduct Congress intended to prohibit. It is no answer to say that same-gender sexual harassment is not based on gender because Congress did not intend to prohibit such conduct. If the harassing conduct amounts to actionable sexual harassment in the cross-gender context, the same exact conduct cannot be said to be outside the purview of Title VII merely because it is directed at a person of the same gender.

I. BACKGROUND

A. Title VII & Congress's Ambiguous Intent

According to Title VII, it is unlawful for an employer to discriminate against any person "because . . . of sex."³⁸ Although the language of Title VII clearly prohibits sex discrimination in the workplace, the intended scope of Title VII is ambiguous.³⁹ There is little legislative history available

36. As it is used in Title VII, courts have interpreted "sex" to mean "gender." *See infra* notes 85-87 and accompanying text. Based on judicial interpretations of Title VII's language, "sex" is referred to in this article as "gender." The use of "gender" to describe "sex" within the meaning of Title VII is not intended to imply that courts have correctly defined "sex" within the meaning of Title VII, nor that "sex" and "gender" are synonymous. Rather, "gender" is used to describe "sex" in this article in order to analyze the actionability of same-gender sexual harassment in light of existing judicial interpretations of sexual harassment under Title VII as well as to avoid confusion within the article. For an in depth discussion on the meaning of "sex" and "gender" and the synonymous use of these concepts in the law, see generally, 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 (1995).

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

38. 42 U.S.C. § 2000e-2(a)(1) (1988). *See supra* note 1 for relevant text.

39. *See Raney v. Dist. of Columbia*, 892 F. Supp. 283, 286-87 (D.D.C. 1995).

concerning Title VII's ban against sex discrimination⁴⁰ because the word "sex" was added to the proposed statute at the last minute.⁴¹ The lack of legislative history has left courts with the task of interpreting Title VII with little guidance as to the type of conduct Congress intended to prohibit.⁴²

Relying on the language of Title VII, courts interpreting Title VII shortly after its enactment concluded that the phrase "terms, conditions, or privileges of employment" was intended "to strike at the entire spectrum of disparate treatment of men and women in employment."⁴³ Accordingly, courts recognized Title VII's prohibition of sex discrimination as a guarantee of equal job opportunities for women and men.⁴⁴

40. *Equal Employment Opportunity Comm'n v. Walden Book Co.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995); *Raney*, 892 F. Supp. at 287. See also Ellen F. Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990) (noting the ban on sex discrimination "received no relevant discussion" due to the last minute addition of "sex" by Title VII's opponents). For comprehensive coverage of Title VII's legislative history, see generally Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

41. Opponents of Title VII added the proscription against sex discrimination when it was on the floor of the House of Representatives as a last minute attempt to prevent Title VII from passing. 110 CONG. REC. 2577-84 (1964). See *Walden Book Co.*, 885 F. Supp. at 1103 n.6. See also Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816-17 (1991) ("[I]ts proponents included a number of Congressmen opposed to the Act, who hoped that the inclusion of 'sex' would highlight the absurdity of the effort as a whole, and contribute to its defeat."); Kristi J. Johnson, Comment, *Chiapuzio v. BLT Operating Corporation: What Does it Mean to Be Harassed "Because of" Your Sex?: Sexual Stereotyping and the "Bisexual Harasser Revisited*, 79 IOWA L. REV. 731, 735 (1994) (stating that one day before Title VII passed its opponents amended the word "sex" hoping to strengthen opposition to Title VII).

42. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64 (1986).

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was the "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Id. (citations omitted). See also Peirce, *supra* note 2, at 1071-72 (stating Title VII's history provides little guidance as to the intended scope of "sex" discrimination because there was little debate on the subject).

43. *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

44. *Barnes v. Costle*, 561 F.2d 983, 987-88 (D.C. Cir. 1977).

Title VII has been invoked to strike down a wide variety of impediments to equal employment opportunity between the sexes, including insufficiently validated tests, discriminatory seniority systems, weight-lifting requirements, and height and weight standards solely for those of one gender.

Id. (citations omitted). See also *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (concluding that by prohibiting discrimination on the basis of sex, Congress only intended to guarantee equal job opportunities for males and females); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

When Title VII was amended by the Equal Opportunity Act of 1972,⁴⁵ Congress discussed the intended meaning of Title VII's language.⁴⁶ It became evident during these discussions that Congress was concerned about discrimination based on gender, especially the disparate treatment of women in the workplace.⁴⁷ Not only did these legislative discussions validate early judicial interpretations,⁴⁸ they also provided courts with at least some guidance in defining actionable sex discrimination. However, the scope of Title VII was still relatively undefined.

B. *Sexual Harassment Under Title VII*

The "sexual harassment"⁴⁹ cases brought under Title VII shortly after its enactment illustrate the ambiguity of the statute's coverage.⁵⁰ Courts that first addressed the scope of Title VII did not agree as to whether or not sexual harassment was a form of sex discrimination prohibited by Title

45. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)).

46. *Barnes*, 561 F.2d at 987.

47. H.R. REP. NO. 238, 92d Cong., 1st Sess. 4-5 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2140.

Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible, the less remunerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.

Id. See also *Barnes*, 561 F.2d at 987.

48. See *Peirce*, *supra* note 2, at 1072-73.

[The] early cases of sex discrimination brought under Title VII do provide some indication of its coverage. These early cases fall into four major categories. First, some early cases involved challenges to the outright exclusion of members of one sex from jobs. Second, several cases involved challenges to restrictions having a disproportionate effect on women. In the third group of cases, plaintiffs challenged restrictions placed solely on women. Early courts held that these three types of cases fell under Title VII's protection. In contrast, early courts held that Title VII did not apply to the fourth type, those cases involving challenges to an employer's pregnancy-related policy.

Id. (citations omitted).

49. As it is used here, this term is intended to include the broad spectrum of what one might describe as sexual misconduct, such as sexual requests, favors, innuendoes, and other conduct of a sexual nature. Any ambiguity in the meaning of sexual harassment at this point is intended as an illustration of how courts were left to define the scope of "sex discrimination" as well as the meaning of "sexual harassment" with very little legislative guidance.

50. See, e.g., *Barnes*, 561 F.2d at 989. In *Barnes*, a female employee was terminated because she refused her male supervisor's sexual advances. *Id.* at 984-85. According to the court, the pivotal issue was whether such conduct was based upon the employee's sex. *Id.* at 989. In other words, the court had to decide if such sexual harassment was within the meaning of sex discrimination under Title VII.

VII.⁵¹ Some courts held that sexual harassment, such as unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature, constitutes the type of sex discrimination prohibited by Title VII.⁵² Other courts, however, refused to recognize sexual harassment claims under Title VII.⁵³ The inconsistent outcomes of these initial judicial interpretations of Title VII left unresolved the question of whether sexual harassment constitutes discrimination “because of . . . sex.”⁵⁴

In 1980, the Equal Employment Opportunity Commission (“EEOC”)⁵⁵ issued guidelines which determined that sexual harassment⁵⁶ is sex discrimination within the meaning of Title VII.⁵⁷ Relying on the EEOC guidelines, courts generally agreed that sexual harassment constitutes sex discrimination under Title VII.⁵⁸ Since the issuance of the EEOC guide-

51. *Id.* at 989. See also Peirce, *supra* note 2, at 1080-83.

52. See, e.g., Barnes, 561 F.2d at 987 (finding a violation of Title VII where a female employee was fired because she “repulsed her male superior’s sexual advances.”).

53. e.g., Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (rejecting a sexual harassment claim under Title VII because the male supervisor merely “satisfied a personal urge.”), *vacated*, 562 F.2d 55 (9th Cir. 1977) and Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (declining to find employer liability for sexual misconduct because “it would seem wise for Courts to refrain from delving into these matters”), *rev’d*, 600 F.2d 211 (1979). See also Johnson, *supra* note 41, at 737 (noting that federal courts did not initially consider sexual harassment as sex discrimination under Title VII); Peirce, *supra* note 2, at 1072 (“[E]arly courts did not construe Title VII to include a claim for sexual harassment in the workplace.”).

54. Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981). See also Paul, *supra* note 40, at 338-40.

55. The EEOC was created by Title VII and is the administrative body responsible for defining the nature of and enforcing the proscriptions against employment discrimination under Title VII. 42 U.S.C. § 2000e-4 (1988). See also 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, 1160 (1994). Courts owe considerable deference to the EEOC’s interpretation of Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). Guidelines issued by the EEOC are “not controlling on the courts [but] by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). See also Barnes, 561 F.2d at 989; Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986).

56. The EEOC defines 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.

29 C.F.R. § 1604.11(a) (1995).

57. *Id.* The guidelines state that “[h]arassment on the basis of sex is a violation of Sec. 703 of Title VII.”

58. See, e.g., Meritor, 477 U.S. at 63; Barnes, 561 F.2d at 989; Bundy v. Jackson, 641 F.2d 934, 945 (D.D.C. 1981).

lines, courts have consistently recognized two types of sexual harassment: “quid pro quo”⁵⁹ and “hostile work environment.”⁶⁰

1. Quid Pro Quo Harassment

Quid pro quo harassment was the first type of sexual harassment to be recognized under Title VII.⁶¹ Quid pro quo harassment occurs when tangible job benefits are explicitly or implicitly conditioned upon submission to conduct of a sexual nature and adverse job consequences result from the refusal to submit to such conduct.⁶²

To establish an action for quid pro quo harassment the employee must show that: (1) she or he is a member of a protected class;⁶³ (2) she or he was subjected to unwelcome sexual harassment, such as sexual advances or requests for sexual favors; (3) the harassment was based on sex; and (4) the harassment altered the terms and conditions of employment.⁶⁴ The employee does not have to prove that the employer had knowledge of the harassing conduct.⁶⁵

59. The term, quid pro quo, literally means “something for something.” BLACKS LAW DICTIONARY 1248 (6th ed. 1990).

60. Golden, *supra* note 55, at 1355. See, e.g., Ellison v. Brady, 924 F.2d 872, 874 (9th Cir. 1991); Meritor, 477 U.S. at 65; Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Downes v. FAA, 775 F.2d 288, 290-91 (Fed. Cir. 1985); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 618-19 (6th Cir. 1986). See also Smith, *supra* note 5, at 138.

61. Debra L. Raskin, *Sexual Harassment in Employment*, 902 A.L.I.-A.B.A. 589, 591 (1994). See, e.g., Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) (recognizing a claim of sexual harassment as sex discrimination where female employee was fired after refusing supervisor’s sexual advances); Barnes, 561 F.2d at 990.

62. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987). See also Golden, *supra* note 55, at 1356 (“Quid pro quo harassment occurs when an employer promises favorable treatment in exchange for sex from an employee, or where such favorable treatment is withheld if requests for sex are denied.”); 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 (1994) ([Q]uid pro quo [harassment] . . . involves the offer of tangible employment benefits by a supervisor or employer in exchange for sexual favors from the subordinate employee.”).

63. In order to be in a protected class, the plaintiff must either be a man or a woman because Title VII prohibits sex discrimination against both men and women. Prescott v. Independent Life & Accident Ins., 878 F. Supp. 1545, 1549 (1995). The employee simply has to state that he or she is a man or a woman in order to satisfy this element. HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 2.5 (3rd ed. 1992); See also Henson, 682 F.2d at 903 (stating that satisfaction of this element “requires a simple stipulation that the employee is a man or a woman.”).

64. Prescott, 878 F. Supp. at 1549; Ryczek v. Guest Services Inc., 877 F. Supp. 754, 760 (1995).

65. Prescott, 878 F. Supp. at 1549. As discussed below, under the hostile work environment theory, the plaintiff must show knowledge on the part of the employer. *Id.*

2. Hostile Work Environment

The EEOC guidelines define hostile work environment as “conduct [which] has the purpose or effect of unreasonably interfering with an individual’s work performance or creates an intimidating, hostile, or offensive work environment.”⁶⁶ In accordance with the EEOC guidelines, courts began recognizing hostile work environment actions under Title VII.⁶⁷

In 1986, the Supreme Court addressed the viability of hostile work environment harassment under Title VII in its landmark decision, *Meritor Savings Bank v. Vinson*.⁶⁸ The Court in *Meritor* relied on the EEOC’s definition of sexual harassment⁶⁹ and held that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment.”⁷⁰ The Court limited its holding, however, by stating that not all instances of harassment in the workplace fall within the meaning of Title VII.⁷¹ The Court concluded that in order to be actionable, the sexual harassment must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁷²

When determining if the conduct complained of is sufficiently severe and pervasive to constitute hostile work environment harassment, courts must consider the totality of the circumstances.⁷³ The factors courts will look to in considering the totality of the circumstances include “the frequency of the

66. 29 C.F.R. § 1604.11(a) (1995).

67. Smith, *supra* note 5, at 138. See, e.g., *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Henson*, 682 F.2d at 902-05. See also Roy, *supra* note 62, at 265; Golden, *supra* note 55, at 1360.

68. 477 U.S. 57 (1986).

69. *Id.* at 66. See also Debra L. Raskin, *Sex in the Workplace: Stereotyping and Harassing*, 463 A.L.I.-A.B.A. 259, 269 (1989).

70. *Meritor*, 477 U.S. at 66. In reaching its decision, The Court also relied on its finding that the “language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination.” *Id.* at 64. By refusing to confine Title VII’s language to economic injury, the court recognized that Title VII protects employees from psychological and emotional harm as well. *Id.* at 65-66. See also *Rogers v. Equal Employment Opportunity Comm’n*, 454 F.2d 234, 238 (5th Cir. 1971) (“[E]mployee’s psychological as well as economic fringes are statutorily entitled to protection from employer abuse.”). It has been noted that recognition of hostile work environment harassment claims is based on the theory that an employee’s work atmosphere constitutes a “condition” or “term” of employment protected under Title VII. Joshua F. Thorpe, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1368. See also *Johnson*, *supra* note 41, at 737 (“The underlying premise of the hostile work environment is that an employee’s work atmosphere constitutes a protected ‘term, condition, or privilege’ of employment under Title VII.”).

71. *Meritor*, 477 U.S. at 66. See also *Henson*, 682 F.2d at 904.

72. *Meritor*, 477 U.S. at 67. To state a claim for hostile environment sexual harassment under Title VII, it is not necessary to prove the harassing conduct seriously affected the complaining employee’s psychological well-being or lead to injury. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993). According to *Harris*, a plaintiff could recover based on hostile work environment harassment “[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive.” *Id.* at 370-71.

73. *Meritor*, 477 U.S. at 69. See also Smith, *supra* note 5, at 140.

discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."⁷⁴

Some courts have narrowly applied the hostile work environment standards set forth in *Meritor* by refusing to recognize certain types or infrequent instances of harassment as sufficiently severe and pervasive to constitute hostile environment sexual harassment.⁷⁵ Other courts, on the other hand, have permitted broad application of those standards by finding various types and less frequent amounts of harassing behavior sufficiently severe and pervasive to be actionable hostile environment sexual harassment under Title VII.⁷⁶ While courts may vary in the expansiveness of the definition of hostile work environment harassment, the following elements are generally required to establish such a claim:

(1) the employee is a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; and (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive work environment; and (5) the existence of respondeat superior liability.⁷⁷

Hostile environment harassment is not as obvious as quid pro quo harassment because it typically involves a wide range of harassing conduct that amounts to actionable sexual harassment only if it is considered by the court to be offensive or hostile. Quid pro quo harassment, on the other hand, is more obvious because it involves specific instances of conduct that are easily identified as sexual harassment, such as where a supervisor requests sexual favors from a subordinate employee in exchange for tangible job benefits.⁷⁸ In addition, district courts have consistently based their interpretations of quid pro quo sexual harassment on those articulated in the EEOC

74. *Harris*, 114 S.Ct. at 371. See also *Price v. Public Service Co. of Colorado*, 850 F. Supp. 934 (D. Colo. 1994) (holding that the court must look to the totality of the circumstances, including the frequency and severity of the discriminatory conduct, the extent to which it is physically threatening or humiliating, and whether it interferes with the employee's work performance, to determine if the conduct is sufficiently severe or pervasive to create a hostile environment).

75. See, e.g., *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995) (reversing a judgment for the plaintiff where a male supervisor made several offensive and distasteful comments and made a reference to masturbation because the supervisor never touched her, he did not invite her to have sex with him, and the incidents were too infrequent).

76. See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) (holding that aggressive acts may constitute a hostile work environment even if they are not sexual in nature).

77. *Smith*, *supra* note 5, at 141-42. See also HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 2.5 (3rd ed. 1992). See, e.g., *Henson*, 682 F.2d at 903-05; *Equal Employment Opportunity Comm'n v. Walden Books Co.*, 885 F. Supp. 1100 n.1 (M.D. Tenn. 1995).

78. *Roy*, *supra* note 62, at 265.

guidelines, whereas judicial interpretations have varied as to the amount and severity of conduct required to state a claim for hostile environment harassment under the “sufficiently severe and pervasive” standard created by *Meritor*.⁷⁹ Thus, quid pro quo harassment is not the topic of as much debate as hostile environment sexual harassment.⁸⁰

Although the recognition of sexual harassment as sex discrimination has received criticism,⁸¹ it is beyond serious dispute that sexual harassment is actionable under Title VII.⁸² However, the actionability of same-gender sexual harassment is hotly disputed. Early treatment of cases involving sexual harassment in which the harasser and the victim are the same gender illustrates the significance of judicial interpretations of the phrase “because of . . . sex.”⁸³

C. Same-Gender Sexual Harassment Claims Prior To Garcia

1. “Unwelcome Homosexual Harassment” and “The Bisexual Harasser”

The first cases involving same-gender sexual harassment⁸⁴ focused on the meaning of the term “sex”⁸⁵ under Title VII. Using its plain meaning,⁸⁶ courts have construed the word “sex” to mean “gender.”⁸⁷ Consis-

79. Golden, *supra* note 55, at 1158. Courts have closely patterned their definitions of quid pro quo harassment after the language in the guidelines issued by the EEOC. Compare 29 C.F.R. § 1604.11(a)(1) (1995) (“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 . . .”) and *Hicks*, 833 F.2d at 1408 (“Quid pro quo sexual harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits.”).

80. Golden, *supra* note 55, at 1158; Raskin, *supra* note 69, at 268.

81. See, e.g., *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) (suggesting that Congress was not envisioning this type of individual harassment). See also Paul, *supra* note 40, at 352 (using the case of the bisexual harasser to illustrate the doctrinal anomalies of sexual harassment under Title VII); Peirce, *supra* note 2, at 1094.

82. L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 573 (1995). See also Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN’S L.J. 37, 57 (1993).

83. See Paula L. Ettlbrick, *Not All Speech is Equal: Some Thoughts on Lesbians, Free Speech and Harassment*, 3 TEMP. POL. & CIV. RTS. L. REV. 59, 66 n.15 (1994).

84. Although these cases were decided before the Supreme Court recognized the existence of hostile environment sexual harassment under Title VII, federal courts had already adopted the EEOC Guidelines and held claims based on a hostile working environment to be actionable under Title VII.

85. “Unfortunately, the term ‘sex’ possesses two different connotations; it can relate to the ‘traditional’ notion of sex as a gender-based classification or it can relate to erotic desires.” Johnson, *supra* note 41, at 737-38. See also Thorpe, *supra* note 70, at 1378 n.80 (noting that the linguistic ambiguity in the term “sex” does not exist in the context of race, national origin, or religion).

86. According to rules of statutory interpretation, absent any evidence of legislative intent, words are to be given their common and ordinary meaning. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). *Accord Perrin v. United States*, 444 U.S. 37, 42 (1979).

tent with this “traditional” interpretation of “sex,”⁸⁸ courts focused on whether members of one sex were being treated differently than members of the other sex.⁸⁹ Courts applied a “but for” test in order to determine if the victim of the alleged sexual harassment was treated differently than members of the opposite sex.⁹⁰ The “but-for” test requires the plaintiff to show that he or she would not have been harassed but for his or her gender.⁹¹

These initial same-gender sexual harassment cases illustrate the assumption made by courts that if a person sexually harasses members of the opposite sex, he or she must be heterosexual and if an employee sexually harasses members of the same sex, he or she must be homosexual.⁹² As a result of this assumption, when courts applied the “but-for” test in the context of same-gender sexual harassment, the actual or perceived sexual orientation of the harasser (or the victim) dictated the result.⁹³ For example, early courts agreed that a claim was authorized under Title VII where the

87. See, e.g., *Hopkins v. Baltimore Gas & Electric Co.*, 871 F. Supp. 822, 833 n.17 (stating that courts have recognized “sex” under Title VII to mean “gender”); *Ulane*, 742 F.2d at 1085 (“The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.”); *Parrish v. Washington Nat’l Ins. Co.*, No. 89.C.4515, 1990 WL 165611, at *7 (N.D. Ill. Oct. 16, 1990) (concluding that Title VII is limited to the prohibition of discrimination based on gender). See also *Johnson*, *supra* note 41, at 737-38.

88. Several courts have noted that “gender” is the traditional meaning of the word “sex” and since it is used in the same context as race, color and national origin, which are traditionally understood to describe immutable characteristics, Congress merely intended “sex” to be given its traditional interpretation. *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *4, (6th Cir. Jan. 15, 1992). See also *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329 (9th Cir. 1979) (arguing that “sex” only means “gender” because “Congress had only the traditional notions of ‘sex’ in mind,” (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977)); *Ulane*, 742 F.2d at 1085 (stating the lack of legislative history and the circumstances involving Title VII’s prohibition against sex discrimination indicates that Congress intended nothing more than the traditional concept of sex).

89. See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982) (stating that sexual harassment is based upon sex if it inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment); *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 372 (1993) (Ginsburg, J., concurring) (“The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”). See also *Equal Employment Opportunity Commission Manual (BNA) §§ 615, 615.2 (b)(3)* (“[T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex.”).

90. *Johnson*, *supra* note 41, at 738. See also *Peirce*, *supra* note 2, at 1087; *Megan P. Norris & Mark A. Randon*, *Sexual Orientation and the Workplace: Recent Developments in Discrimination and Harassment Law*, 19 EMPLOYEE REL. L.J. 233, 236 (1993); *Samuel A. Marcossan*, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 9 (1992).

91. *Peirce*, *supra* note 2, at 1087. See, e.g., *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Wright v. Methodist Youth Services*, 511 F. Supp. 307, 310 (N.D. Ill. 1981). See also *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986); *Henson*, 682 F.2d at 903-04.

92. See, e.g., *Parrish v. Washington Nat’l Ins. Co.*, No. 89.C.4515, 1990 WL 165611, at *7 (N.D. Ill. Oct. 16, 1990) (relying on cases dealing with unwelcome homosexual advances where the record contained no evidence that the harasser was a homosexual).

93. See *Peirce*, *supra* note 2, at 1094-95. See also *Norris & Randon*, *supra* note 90, at 236-39.

harassment is between a harasser and victim of opposite sex,⁹⁴ or where the harasser is homosexual.⁹⁵ However, a claim under Title VII would not be actionable where the harasser is bisexual because it could not be said that the harassment would not have occurred but for the victim's gender since a bisexual would presumably harass both women and men.⁹⁶

The issue of harassment by a bisexual supervisor was first discussed in the dicta of a cross-gender sexual harassment decision, *Barnes v. Costle*.⁹⁷ In *Barnes*, the court found that the discharge of a female employee for rejecting her male supervisor's sexual advances was a violation of Title VII.⁹⁸ However, the court noted in dicta that where the harasser is bisexual, the harasser's sexual advances do not constitute discrimination under Title VII.⁹⁹ The court reasoned that the "but-for" test could not be satisfied where the harasser is bisexual because the harassment would have occurred regardless of the victim's gender.¹⁰⁰ According to this reasoning, sexual

94. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 59 (1986) (finding a Title VII violation where a female employee was sexually harassed by her male supervisor).

95. See, e.g., *Wright*, 511 F. Supp. at 309.

96. See, e.g., *Henson*, 682 F.2d at 904 (noting discrimination cannot be based on sex in the case of a bisexual supervisor); *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981) (noting it is not sex discrimination where a bisexual supervisor harasses both men and women equally); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (noting it is not gender discrimination if a bisexual insists on sexual favors because both males and females are treated alike). See also Peirce, *supra* note 2, at 1088-89; Paul, *supra* note 40, at 351 (noting "if a bisexual of either sex preys equally upon men and women, he (or she) is beyond the reach of Title VII.").

97. 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

98. *Id.* at 989-90.

99. *Id.* at 990 n.55. This position was reiterated by the same court four years later. *Bundy*, 641 F.2d at 942 n.7). *Bundy* was among the first cases to recognize an action based on a discriminatory work environment, which is similar to what is now known as "hostile or abusive work environment" harassment, even though the employee had not lost any tangible job benefits. *Id.* After finding the conduct at issue to be a violation of Title VII, the court noted:

We noted that in each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender? Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike.

Id. at 942 n.7. (citations omitted) (emphasis added). Thus, the only situation that could not be sex discrimination within the meaning of Title VII is where a bisexual supervisor harasses both men and women. *Id.*

100. *Barnes*, 561 F.2d at 990 n.55. The court stated:

These situations, like that at bar, are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.

Id. Accord *Henson*, 682 F.2d 897. Although *Henson* involved cross-gender sexual harassment, the court noted that "[e]xcept in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex." *Id.* at 905. The court reasoned:

advances made by a homosexual supervisor towards an employee of the same gender constitute a violation of Title VII because the harassment is based on the victim's gender since a homosexual presumably would target only members of his or her own gender.¹⁰¹

The Court of Appeals for the Sixth Circuit followed the *Barnes* dicta in *Rabidue v. Osceola Refining Company*.¹⁰² Although *Rabidue* involved cross-gender sexual harassment,¹⁰³ the Court elaborated on Title VII's scope by applying the reasoning articulated in *Barnes* to other situations. The court stated that sexual conduct would not be actionable if it were equally offensive to both men and women.¹⁰⁴ The court's classification of non-actionable claims includes any situation involving conduct that is equally offensive to both men and women, whether or not the harasser is bisexual.¹⁰⁵

Since the sexual orientation of the harasser was not a factor in the *Rabidue* court's "but-for" analysis, *Rabidue* characterizes non-actionable claims more broadly than *Barnes*. In other words, *Rabidue* allows more opportunity for harassment to fall outside the scope of Title VII because harassment perpetrated by any person against both men and women is beyond Title VII's coverage. In *Barnes*, on the other hand, only harassment perpetrated by bisexuals is exempt from Title VII's coverage.

Also consistent with the *Barnes* "but-for" analysis¹⁰⁶ is *Wright v. Youth Methodist Services*.¹⁰⁷ The court in *Wright* was the first to recognize "homosexual advances" as actionable sexual harassment under Title VII.¹⁰⁸ In *Wright*, a male employee alleged that his male supervisor "made overt

There may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment.

Id. at 904. See also Johnson, *supra* note 41, at 738 ("[W]hen the supervisor equally harasses male and female employees, the situation does not support a Title VII sexual harassment charge because the employee's gender is not a but-for cause of the conduct.").

101. *Id.*

102. 805 F.2d 611 (6th Cir. 1986).

103. *Id.* at 614-16.

104. *Id.* at 620. ("It is of significance to note that instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment."). But see *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (holding that harassment directed at both genders does not preclude an employee's Title VII claim for sexual harassment).

105. *Rabidue*, 85 F.2d at 620.

106. *Norris & Randon*, *supra* note 90, at 236 ("Following *Barnes*, other courts began to recognize a cause of action for homosexual advances. However, these courts followed the *Barnes* dicta and conditioned their recognition of a cause of action upon the fact that an individual was treated differently than members of the opposite sex.").

107. 511 F. Supp. 307 (N.D. Ill. 1981).

108. *Id.* at 310.

homosexual advances” towards him.¹⁰⁹ The employee claimed that he lost his job because he rejected his supervisor’s advances.¹¹⁰ The court held that terminating an employee for refusing homosexual advances is a violation of Title VII.¹¹¹ The court applied the “but-for” test¹¹² and concluded that the conduct was based on the employee’s gender because it involved “an alleged demand of a male employee that would not be directed to a female.”¹¹³

Interestingly, the alleged sexual advances in *Wright* were referred to as “homosexual advances.”¹¹⁴ If this case involved cross-gender sexual advances the harassment would have been referred to as “sexual advances,” not “heterosexual advances.” Though the difference may be subtle, by replacing “sexual” with “homosexual” the court makes two assumptions: (1) that the term “sexual advances” only includes heterosexual sexual conduct; and (2) that the only conduct in which homosexuals engage is *sexual*. Since both cross-gender and same-gender sexual harassment involve conduct that is sexual in nature, the sexual orientation of the harasser should not alter the way in which courts describe or view the conduct at issue. It is only the

109. *Id.* at 308.

110. *Id.*

111. *Id.* at 310. The court 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 superior 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.

Id. Accord Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541 (M.D. Ala. 1983) (holding that “unwelcomed homosexual harassment . . . states a violation of Title VII”); Parrish v. Washington Nat’l Ins. Co., No. 89.C.4515, 1990 WL 165611, *7 (N.D. Ill. Oct. 16, 1990) (stating that unwelcome homosexual advances are actionable under Title VII because the advances are based on the victim’s gender since the harasser would not similarly treat an employee of the nonpreferred gender).

112. Commentators have described the application of the “but-for” test in *Wright* as follows:

[I]n *Wright* . . . the court adopted a “but for” test, holding that a cause of action arises where the individual would not have been harassed but for his or her sex . . . However, in these early cases the courts did not seem to recognize a cause of action for sexual harassment in and of itself. The prohibited activity was still gender discrimination, which would include harassment on the basis of gender, as opposed to all harassment that was sexual in nature.

Norris & Randon, *supra* note 90, at 236 (citations omitted).

113. *Id. Accord* Joyner, 597 F. Supp. at 542 (finding sexual advances directed at a male employee to be based upon sex because “the evidence established the . . . [male supervisor’s] homosexual proclivities”); Parrish, No. 89.C.4515, 1990 WL 165611, at *7 (“[U]nwelcomed homosexual advances . . . [are] based on the employer’s sexual preference and necessarily involve[] the plaintiff’s gender, for an employee of the non-preferred gender would not inspire the same treatment. Thus, unwelcome homosexual advances, like unwelcome heterosexual advances, are actionable under Title VII.”).

114. *Wright*, 511 F. Supp. at 308.

gender of the harasser and the victim that marks the difference between the two situations, thus the conduct should be referred to in the same manner.

The *Wright* court's use of different language to describe the same type of harassment simply because the harasser is homosexual indicates the court's differential treatment of cases involving homosexuals and those involving heterosexuals. The differential treatment lies in the court's unnecessary focus on the harasser's sexual orientation. Although the result in *Wright* is proper, the court's emphasis on the harasser's sexual orientation creates evidentiary questions that are not even considered in cross-gender sexual harassment cases. For example, in *Wright*, the victim complained that his supervisor made sexual advances towards him and that he lost his job as a result of his refusal to submit to those advances. In applying the "but-for" test, the court was satisfied that the harassment was based on gender only because the harasser was homosexual and thus would not subject women to the same harassment. In the cross-gender context, on the other hand, the sexual orientation of the harasser has never been raised as an issue in determining whether the harassment is based on gender.

The type of conduct at issue in *Wright* is based on the victim's gender because conduct that is sexual in nature exploits the victim's gender. Sexual advances may and often are motivated by factors other than sexual attraction.¹¹⁵ The court completely ignored the possibility that sexual harassment may be motivated by something other than sexual attraction, such as the desire to assert power and dominance over subordinate employees. Sexual behavior exploits the victim's gender even if the harasser is not in actuality sexually attracted to the victim. The question of whether the harassment was based on gender should not turn on the sexual orientation of the harasser since the conduct exploits the victim's gender no matter what the harasser's motivation.

In sum, the first courts to address the viability of sexual harassment claims involving a harasser and victim of the same gender focused their analysis on the harasser. These cases illustrate that the sexual orientation of the harasser was the dispositive factor in determining whether the harassment was based on gender.¹¹⁶ Courts essentially treated same-gender sexual

115. Judith I. Avner, *Sexual Harassment: Building a Consensus for Change*, 3 SPG KAN. J.L. & PUB. POL'Y 57, 58 (1994) ("Sexual harassment is about the abuse of power. It is not about sex. It is not about romance. Sexual harassment raises difficult and frightening issues about sexuality, power, personal relationships, and the ways in which we value or devalue individuals.").

116. It is interesting to note that evidence of a harasser's heterosexuality is not required in cross-gender cases to conclude that harassment was based upon sex. If a male supervisor directs sexual advances towards a female employee, the sexual orientation of the man is not even considered. It is assumed, based on nothing more than the fact that the advances were directed at the opposite sex, that he is heterosexual, and thus the harassment must have been based on gender.

harassment as a homosexuality issue.¹¹⁷ Thus, it is established by these cases that Title VII protects all employees from unwelcome sexual advances made by a homosexual harasser.¹¹⁸ However, these cases do not answer the broader question of whether Title VII protects all employees from sexual harassment where the harasser (homosexual, bisexual, or heterosexual) and the victim are the same gender.

2. Sexual Harassment Directed At Homosexuals

Judicial treatment of same-gender sexual harassment under Title VII has varied depending on whether courts focused on the harasser or the victim. In the cases discussed in the previous section, courts determined whether the harassment was based on the victim's gender by focusing on the harasser. Other courts, on the other hand, have made this determination by focusing on the victim of the harassment. This difference in focus has had an anomalous impact on the actionability of sexual harassment claims involving a harasser and victim of the same gender. For instance, Title VII proscribes harassment carried out by a person who is, or is believed to be, a homosexual,¹¹⁹ but it does not prohibit discrimination based on sexual orientation.¹²⁰ There-

117. See *Vandeventer v Wabash Nat. Corp.*, 887 F. Supp. 1178, 1181 (D. Ind. 1995). The court in *Vandeventer* stated:

When a man touches a woman in a sexual manner, or asks her to have sexual relations with him, it can be presumed that he is doing so because she is a woman. Her gender is probably not incidental. It is only with same-sex harassment that the distinction becomes very important. Some courts try to address the distinction by framing it as a homosexuality issue; this court does not believe that to be the proper course.

Id.

118. SOLOTOFF & HENRY S. KRAMER, *SEXUAL DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE* § 3.04[3][b] (1994).

119. See *supra* notes 108-13 and accompanying text.

120. *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329 (9th Cir. 1979). See also *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S. D. Tex. 1993) (holding Title VII does not protect homosexuals from harassment or discrimination in the workplace since such treatment arises from affectional preference rather than the person's gender); *Dillon v. Frank*, No. 92-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992) (noting courts have unanimously held that Title VII does not prohibit discrimination based on sexual orientation); *Ruth v. Children's Med. Ctr.*, No. 90-4069, 1991 U.S. App. LEXIS 19062, at *15 (6th Cir. Aug. 8, 1991) ("Title VII does not prohibit discrimination based upon affectional or sexual orientation, as the statutory provision proscribing sex discrimination uses the term 'sex' to refer only to membership in a class delineated by gender."); *Kelley v. Vaughn*, 760 F. Supp. 161 (W.D. Mo. 1991) ("sex" within the meaning of Title VII's prohibition against employment discrimination refers to gender, not sexual orientation); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990) (holding Title VII not to prohibit discrimination against homosexuals); *Carreno v. Local Union No. 226*, *slip Op.* No. 89-4083-S (D. Kan. Sept. 27, 1990) (rejecting Title VII claim for harassment because the harassment occurred because plaintiff was a homosexual, not because he was male); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977) (refusing to interpret the term "sex" beyond its "traditional meaning" because Title VII did not intend to protect against sexual orientation discrimination); *Parrish v.*

fore, Title VII prohibits homosexual sexual harassment, but it does not prohibit harassment against homosexuals.¹²¹

This bizarre result is a product of narrow-minded and rigid statutory interpretation of the word "sex."¹²² Despite the lack of legislative intent surrounding Title VII's proscription against sex discrimination, courts have insisted that Congress intended "sex" to mean gender, and nothing else.¹²³ Since sexual orientation does not fall within the meaning of "sex," Title VII does not prohibit discrimination based on sexual orientation. Instead of recognizing that sexual harassment in the form of attacks against the victim's actual or perceived sexual orientation is discrimination based on gender, courts have characterized such conduct as non-actionable sexual orientation discrimination.¹²⁴

This judicial reaction is best illustrated by *Dillon v. Frank*.¹²⁵ The alleged conduct in *Dillon* involved sexual epithets directed at the plaintiff's perceived homosexuality.¹²⁶ The plaintiff brought a Title VII action based

Washington Nat'l Ins. Co., No. 89.C.4515, 1990 WL 165611, *7 (N.D. Ill. 1990) (noting that Title VII does not prohibit discrimination against homosexuals, but that it does prohibit unwelcome homosexual advances). See also Marcossou, *supra* note 90, at 10; David A. Landau, *Employment Discrimination Against Lesbians and Gays: The Incomplete Legal Responses of the United States and The European Union*, 4 DUKE COMP. & INT'L. 335, 355 (1994); David E. Morrison, *You've Built the Bridge, Why Don't You Cross It? A Call for State Labor Laws Prohibiting Private Employment Discrimination on the Basis of Sexual Orientation*, 26 U. MICH. J.L. REF. 245, 252-56 (1992); Kenneth S. McLaughlin, Jr., *Challenging the Constitutionality of President Clinton's Compromise: A Practical Alternative to the Military's "Don't Ask, Don't Tell" Policy*, 28 J. MARSHALL L. REV. 179, 205-06 (1994); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103, 118-20 (1994).

121. See Norris & Randon, *supra* note 90, at 246.

Existing case law suggests that . . . under Title VII, an employer is not required to provide a homosexual with a working environment free of harassment resulting solely because the employee is a homosexual. However, in all jurisdictions, employers must guard against direct homosexual advances, as such advances may give rise to actionable quid pro quo or hostile environment sexual harassment.

Id.

122. Ettelbrick, *supra* note 83, at 64.

[M]ost federal courts . . . have refused to interpret Title VII sex discrimination law to prohibit sexually harassing speech directed at lesbians and gay men in the workplace. The effect of strict, narrow constructions of sexual harassment caselaw and sex discrimination statutes has led to the untempered allowance of hostile, sometimes assaultive, work environments for lesbians and gay men.

Id.

123. See *supra* notes 87-88 and accompanying text.

124. Ettelbrick, *supra* note 83, at 65 ("When a gay employee is involved, regardless of the form or type of harassment, the court usually concludes that the case is a gay case, not a sexual harassment case, and rejects the claim.").

125. No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

126. *Id.* at *1.

on hostile work environment sexual harassment.¹²⁷ The issue before the court was whether the harassing conduct¹²⁸ was directed at the plaintiff because he is male. The plaintiff was not asking the court to recognize discrimination on the basis of sexual orientation as a violation of Title VII. Rather, the plaintiff was asking the court to recognize that such conduct was based on his gender, thus constituting sexual harassment under Title VII. However, instead of focusing on whether these comments were made because of the plaintiff's gender, the court focused on the fact that the comments were motivated by his perceived homosexuality.¹²⁹ After stating that the comments were motivated by hatred towards the plaintiff's perceived sexual orientation, the court refused to recognize such conduct as sex discrimination under Title VII.¹³⁰ The court reached this conclusion by characterizing the conduct as sexual orientation discrimination, which is not a violation of Title VII.¹³¹

Even though the harassment in *Dillon* may have been motivated by the plaintiff's sexual orientation, it was also based on his gender insofar as it was motivated by gender stereotypes.¹³² According to gender stereotypes,

127. *Id.* at *3.

128. The conduct in *Dillon* involved comments such as "Dillon sucks dicks" and "Dillon gives head." *Id.* at *1.

129. The court framed the issue as "whether such a hostile working environment involving sexual epithets and directed at a person because of perceived sexual behavior (homosexuality) is also proscribed by Title VII." *Id.* at *4.

130. *Id.* at *7.

131. *Id.* See also Marcossou, *supra* note 90, at 31-32 (citations omitted). Marcossou states:

The only possible way to reconcile [*Dillon*] . . . the rest of the EEOC's regulations and policy guidance on sexual harassment, is to conclude that homophobic sexual harassment is entitled to a specific exemption from the law forbidding offensive hostile work environments . . . [because] this seems to me the only way to limit the principles underlying the sexual harassment case law to avoid the conclusion that anti-gay harassment is included among the hostile work environments barred by Title VII.

Id.

132. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, *on remand*, 737 F. Supp. 1202 (Dist. Col. 1989) (Justice Brennan, concurring) (concluding that acting according to sex stereotypes constitutes action on the basis of gender under Title VII). One commentator describes how gender stereotyping constitutes sex discrimination as follows:

[T]he harassment in . . . *Dillon* was gender-based in the broader sense. Because it was sexual in nature, the harassment reinforced male-created and male-dominated norms regarding the appropriateness of sexual conversation and conduct in the workplace. In this sense, it was directed at women, even if the immediate target was a man.

More fundamentally, anti-gay harassment . . . is "targeted" at women because it reinforces stereotypes about appropriate gender roles. The reinforcement of stereotypes is antithetical to the purposes of Title VII. The Supreme Court has held that employment decisions based upon stereotyped gender classifications are unlawful under Title VII. Thus, even more than most sexual harassment, that which is directed at gay men and lesbians in the workplace fits the paradigm of sex discrimination, for it is based upon the ultimate stereotype of proper sexual roles.

it is acceptable for women to engage in the same sexual activities for which the plaintiff in *Dillon* was harassed for allegedly having engaged. In *Dillon*, the plaintiff was harassed because he was a male who allegedly engaged in sexual acts that, according to gender stereotypes of proper sexual roles, only women should do. Notwithstanding the finding in *Dillon* that the harassing conduct was “clearly sexual in nature,”¹³³ the court held that it did not constitute hostile work environment sexual harassment under Title VII.¹³⁴

The United States Supreme Court’s decision in *Price Waterhouse v. Hopkins*¹³⁵ presented an obstacle to the *Dillon* court’s narrow-minded conclusion. In *Price Waterhouse*, the Court held that the treatment of female employees according to the notion that women cannot, or must not, be aggressive, constitutes harassment based on gender.¹³⁶ Amazingly, to distinguish *Price Waterhouse*, the *Dillon* court claimed that the comments directed at the plaintiff in *Dillon* were not “sex stereotyped remarks.”¹³⁷ In *Dillon*, the plaintiff’s co-workers harassed him because they believed he was a homosexual. This belief, unless the plaintiff’s co-workers had actual knowledge that he was in fact a homosexual, was based on the “ultimate gender stereotype.”¹³⁸ To the extent that the plaintiff in *Dillon* was the target of harassment because he did not conform to the stereotypical conception of a heterosexual male,¹³⁹ the harassment was based on his gender.

As *Dillon* illustrates, courts assume that because sexual orientation discrimination and sexual harassment of a homosexual are often manifested in the same ways,¹⁴⁰ the harassment is purely based on sexual orientation, and not on gender. The core of this assumption is that gender is not relevant

Marcosson, *supra* note 90, at 24 (1992) (citations omitted).

133. *Dillon*, No. 92-2290, 1992 WL 5436, at *6.

134. *Id.* at *7.

135. 490 U.S. 228 (1989), *on remand*, 737 F. Supp. 1202 (Dist. Col. 1989). In *Price Waterhouse*, a female employee was subjected to verbal abuse because she did not look or act according to stereotypical gender roles. *Price Waterhouse*, 490 U.S. at 250-52. The Court found the harassment to be a violation of Title VII because the harassment was based on sexual stereotypes. *Id.*

136. *Id.* at 250 (Brennan, J., concurring).

137. *Dillon*, No. 92-2290, 1992 WL 5436, at *9.

138. Marcosson, *supra* note 90, at 1 (“[S]exual orientation harassment is indistinguishable from gender-based sexual harassment . . . [because] it is based on the ultimate gender stereotype.”).

139. Ettelbrick, *supra* note 83, at 65-66.

Wouldn’t it be reasonable to conclude that Dillon’s co-workers taunted and harassed him because they stereotypically viewed him to be less than a man? Doesn’t the employer’s admonition “to fight back when taunted” reinforce the view of how a “real” man should respond? Couldn’t this be logically viewed as harassment “because of sex” in the way that evidence of sex stereotyping may indicate discriminatory animus?

Id. (footnotes omitted).

140. Avner, *supra* note 115, at 60.

to discrimination against gays and lesbians.¹⁴¹ By making this assumption, courts have separated gender from sexual orientation.¹⁴² However, the experiences of lesbian and gay employees indicate that gender does play a role in sexual orientation discrimination. For example, representatives of gay and lesbian organizations have reported that “any employee who exhibits what is perceived as gender non-conformity, whether it is a ‘too masculine’ female or a ‘too feminine’ male, is likely to suffer from a range of discriminatory acts, including sexual harassment, name calling, physical violence, and job loss.”¹⁴³ Thus, by failing to see the relevance of gender in situations involving harassment against homosexuals, courts have created an artificial distinction between gender and homosexuality.¹⁴⁴

The *Dillon* court essentially dismissed the plaintiff’s claim because he was believed to be homosexual and the alleged conduct involved the subject of homosexuality. The court did not even consider whether the conduct was based on the plaintiff’s gender. Nor does the court explain why harassment “because of perceived sexual behavior” is not harassment based on gender. Where sexual harassment is directed at a homosexual, courts should not deny that the harassment is based on her or his gender merely because the harassment manifests itself as an attack against the victim’s sexual orientation. Just as “[w]omen are not the only persons who are entitled to a working environment that is not sexually hostile and degrading,”¹⁴⁵ heterosexuals are not the only persons entitled to a work environment free of sexually hostile and degrading harassment.

In sum, courts have applied the “but-for” test in same-gender sexual harassment cases to determine whether the individual was harassed because of her or his gender.¹⁴⁶ In early cases involving a harasser and a victim of the same gender, the outcome of the “but-for” test often depended on the sexual orientation of either the harasser or the victim. For instance, some courts recognized same-gender sexual harassment¹⁴⁷ on the theory that, but for the victim’s gender, he or she would not have been subjected to the “unwelcome homosexual advances.”¹⁴⁸ However, these courts also concluded that “but-for” causation could not be established in cases involving either a bisexual harasser¹⁴⁹ or a harasser who was equally offensive to both men and women.¹⁵⁰ In cases involving same-gender sexual harassment

141. Arriola, *supra* note 120, at 119.

142. *Id.* at 118.

143. Avner, *supra* note 115, at 60.

144. Arriola, *supra* note 120, at 121.

145. Hébert, *supra* note 82, at 576.

146. Johnson, *supra* note 41, at 738. *See also* Peirce, *supra* note 2, at 1089, 1094.

147. This has been the result for same-gender sexual harassment claims in which the harasser is homosexual. *See supra* text accompanying note 116-18.

148. *See supra* text accompanying notes 108-13.

149. *See, e.g.,* Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

150. *See, e.g.,* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986).

against homosexuals, courts did not reach the question of whether the sexual harassment was based on gender. Rather, courts concluded that “sex” does not include sexual orientation¹⁵¹ and dismissed cases involving sexual harassment directed at homosexuals because Title VII does not prohibit sexual orientation discrimination.¹⁵² Thus, Title VII does not prohibit sexual harassment that is directed at gays and lesbians because they are gay or lesbian.¹⁵³

II. *GARCIA V. ELF ATOCHEM*

A. *The Facts and the Holding of Garcia*

Just as many of the recent same-gender sexual harassment cases have involved male against male sexual harassment,¹⁵⁴ *Garcia* involved a male supervisor harassing a male employee.¹⁵⁵ Freddy Garcia, an employee of a subsidiary company of Elf Atochem North America,¹⁵⁶ claimed that he was sexually harassed by his male plant foreman.¹⁵⁷ Garcia alleged that on several occasions his foreman grabbed his crotch area and made sexual motions from behind.¹⁵⁸

The Court held 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.”¹⁵⁹ To explain its decision, the Court stated only that “Title VII addresses gender discrimination.”¹⁶⁰ Although this statement offers little by way of explanation, the Fifth Circuit’s holding is resoundingly clear: sexual harassment is not actionable if the harasser and the victim are the same gender.

151. See cases cited *supra* note 120.

152. See *supra* text accompanying notes 120-24.

153. Ettelbrick, *supra* note 83, at 64 (arguing that “lesbians and gay men lack the legal mechanism for challenging hostile and harassing speech directed against [them]” because Title VII does not ban sexual orientation-based discrimination).

154. Smith, *supra* note 5, at 144.

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

156. *Id.* This case also presented the Fifth Circuit with the question of “parent corporation” and “individual” liability. *Id.* at 450-51. For discussion of the court’s treatment of these liability issues, see Janis van Meerveld & William J. Kelly, *Labor Law*, 42 LA. B.J. 480 (1995); *Labor Law Symposium*, 40 LOY. L. REV. 753, 779-80 (1994).

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

158. *Id.*

159. *Id.* at 451-52 (quoting *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993)).

160. *Id.*

B. *The Reasoning Behind the Garcia Holding*

Although the Fifth Circuit did not give any reasoning for its holding,¹⁶¹ the Court cited and relied¹⁶² on the reasoning of *Goluszek v. Smith*.¹⁶³ The plaintiff in *Goluszek*, Anthony Goluszek, was sexually harassed by male co-workers.¹⁶⁴ Goluszek's co-workers poked him in the buttocks with a stick, asked him if he ever had intercourse or oral sex with a woman,¹⁶⁵ accused him of being gay, and made other sexually explicit comments.¹⁶⁶

Notwithstanding the court's finding that the conduct satisfied the "but-for" test,¹⁶⁷ the court concluded that same-gender harassment was not the type of conduct Congress intended to prohibit.¹⁶⁸ The court found that "[t]he discrimination Congress was concerned about when it enacted Title VII was one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."¹⁶⁹

The court reasoned that since Title VII's purpose was to eliminate gender inequality in job opportunities, Congress only intended to prohibit harassment which creates an "anti-male" (or "anti-female") atmosphere.¹⁷⁰ Since Goluszek was a male working in a male-dominated environment, the court concluded that harassment by another male was not actionable under Title VII because it did not create an "anti-male" environment.¹⁷¹

161. The Fifth Circuit's treatment of the actionability of same-gender sexual harassment is only one paragraph in length. *Id.* See also Equal Employment Opportunity Comm'n v. Walden Book Co., 885 F. Supp. 1100, 1101 (M.D. Tenn. 1995); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995).

162. *Garcia*, 28 F.3d at 451-52. See *Raney v. District of Columbia*, 892 F. Supp. 283, 286 (D.D.C. 1995) ("[T]he Fifth Circuit in *Garcia*, relied heavily on the influential district court opinion in *Goluszek v. Smith*"). See also *Hopkins v. Baltimore Gas & Electric Co.*, 871 F. Supp. 822, 833 (D. Md. 1994); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521, 525 (D.S.C. 1995); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 493 (W.D. Wash. 1995). See also *Smith*, *supra* note 5, at 145.

163. 697 F. Supp. 1452 (N.D. Ill. 1988).

164. *Id.* at 1454.

165. Goluszek's co-workers "periodically asked Goluszek if he had gotten any 'pussy' or had oral sex, [and] showed him pictures of nude women." *Id.*

166. *Id.* at 1453-54. The co-worker's told Goluszek they would get him "fucked" and made comments to him about anal sex. *Id.* at 1454.

167. *Id.* at 1456. The court concluded that if Goluszek were a woman the harassment would not have continued to the point of being sufficiently severe and pervasive. In other words, he would not have been harassed but for the fact that he was male.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* It has been argued that the conclusion reached in *Goluszek* is incorrect because it is inconsistent with the court's own reasoning. See Hébert, *supra* note 82, at 576 (1995). This commentator convincingly argues:

While the district court judge in *Goluszek* correctly perceived the nature of the sexual harassment as an exercise of power in the workplace intended to degrade the

In sum, according to the *Garcia/Goluszek* approach, Title VII was intended to ensure equal job opportunities among men and women.¹⁷² Thus, conduct is actionable only where there exists an atmosphere which treats all members of one gender as inferior.¹⁷³

III. CRITIQUE OF THE *GARCIA/GOLUSZEK* APPROACH

Although other courts have adopted the “but-for” test to determine whether the same-gender sexual harassment at issue is based on gender,¹⁷⁴ the *Garcia/Goluszek* approach ignores the “but-for” test when making this determination.¹⁷⁵ Courts have employed the “but-for” test as a means of measuring whether the alleged sexual harassment is the type of conduct Congress intended to prohibit, such as the disparate treatment of women and men. Under the “but-for” test, if the victim’s gender was the “but-for” cause of the conduct, then the conduct was the type Congress intended to prohibit. The *Garcia/Goluszek* approach differs from the “but-for” test traditionally used to resolve sexual harassment claims¹⁷⁶ because it looks solely to the underlying concerns Congress intended to address when enacting Title VII to determine whether the conduct at issue was based on gender.¹⁷⁷ Based on the *Goluszek* court’s interpretation of congressional intent, the *Garcia/Goluszek* approach concludes that same-gender sexual harassment is not based on gender because Congress did not intend to prohibit this type of conduct.

Instead of relying on the “but-for” test, the *Garcia/Goluszek* approach relies on the *Goluszek* court’s interpretation of the type of harassment Congress intended to prohibit. In *Goluszek*, for instance, the court found that same-gender sexual harassment is not based upon gender because prohibiting such conduct does not further Congress’ goal of eliminating disparate

harasser’s target on the basis of gender, the judge incorrectly concluded that the harassment of the male plaintiff did not fit within that definition. *Just because all males in that environment were not harassed does not mean that the harassment of the plaintiff was not based on his gender.*

Id. (emphasis added) (citations omitted).

172. *Goluszek*, 697 F. Supp. at 1456. *Accord* *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451 (5th Cir. 1994). *See also* *Norris & Randon*, *supra* note 90, at 245 (suggesting that *Goluszek* requires the plaintiff to show that “the perpetrator is biased against everyone of the plaintiff’s sex.”).

173. *See Goluszek*, 697 F. Supp. at 1456.

174. *See* sources cited in *supra* note 146.

175. *See, e.g., Goluszek*, 697 F. Supp. at 1456. After stating that the “requirement remains that the plaintiff must demonstrate that but for the plaintiff’s sex the plaintiff would not have been the object of harassment” and finding that *Goluszek* would not have been harassed if he were a female, the court nonetheless concluded that the harassment was not the type or conduct Congress intended Title VII to prohibit. *Id.*

176. *See supra* notes 90-91 and accompanying text.

177. *Goluszek*, 697 F. Supp. at 1455-56. *See also* *Smith*, *supra* note 5, at 145.

treatment of men and women.¹⁷⁸ The court relied on this finding to conclude that Title VII does not prohibit same-gender sexual harassment because Congress did not intend to prohibit such conduct. Accordingly, any conduct beyond Congress' concern is not based on gender. The *Goluszek* court reached this conclusion without analyzing the conduct at issue to determine whether the harasser treated women and men differently. Thus, according to the *Garcia/Goluszek* approach, Congress did not consider same-gender sexual harassment to be based on gender because such conduct does not constitute disparate treatment.¹⁷⁹ This conclusion precludes any further analysis of the conduct at issue; same-gender sexual harassment claims are simply not actionable.

The *Garcia/Goluszek* approach's interpretation of the types of conduct Congress intended to prohibit under Title VII is weakened by the fact that there is little evidence of congressional intent concerning the scope of sex discrimination under Title VII.¹⁸⁰ In light of this sparse legislative history, other courts applied the "but-for" test for the very purpose of interpreting which types of conduct Congress intended to prohibit.¹⁸¹ The *Garcia/Goluszek* approach, on the other hand, precludes the entire category of same-gender sexual harassment from Title VII coverage based on the determination that such conduct does not fall within the congressional concerns underlying Title VII. However, the concerns underlying Title VII's prohibition of sex discrimination were ambiguous from the outset. This ambiguity motivated courts to apply the "but-for" test when determining whether certain conduct was based on gender because the "but-for" test provided courts with a consistent method to guide their interpretations of Title VII's intended scope. Since the legislative history does not clearly define the scope of Title VII's ban on sex discrimination, courts should not rely on Congress' intent alone to refuse the entire category of same-gender sexual harassment while at the same time recognizing cross-gender sexual harassment.

Not only is the *Garcia/Goluszek* approach different than the approach consistently applied by other courts, it inappropriately relies on the language of Title VII to support the contention that Congress did not intend to prohibit same-gender sexual harassment.¹⁸² There are two reasons why it is inappropriate to rely solely on Title VII's language. First, the intent underlying the language of Title VII is far from obvious.¹⁸³ For example, Title VII's language concerning sex discrimination consists solely of the phrase "because of . . . sex." It is arguable that the broad and undefined language indicates that Congress intended the prohibition of sex discrimination to include any

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

179. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994).

180. See sources cited *supra* notes 40-41.

181. See, e.g., *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Wright v. Methodist Youth Services*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

182. See, e.g., *Goluszek*, 967 F. Supp. at 1456.

183. See *supra* notes 39-42 and accompanying text.

discrimination that falls under the umbrella of “sex,” including same-gender harassment.¹⁸⁴ Even though Congress may not have foreseen that members of the same gender would harass one another, this does not necessarily mean Congress intended to exclusively prohibit cross-gender harassment.

Second, the amount of case law interpreting the word “sex” illustrates that Title VII’s language is not clear on its face.¹⁸⁵ While courts have interpreted this phrase to mean nothing more than gender,¹⁸⁶ this certainly is not because the language of Title VII is manifest. The fact that sexual harassment is actionable under Title VII proves that the intended meaning of “sex” is open to a broader interpretation than the *Garcia/Goluszek* approach suggests. For example, when sexual harassment was recognized as sex discrimination, the strict biological conception of “sex” expanded to include conduct of a sexual nature. Furthermore, the recognition of hostile environment harassment as actionable sexual harassment represents an even further move away from the disparate treatment conception of sex discrimination.¹⁸⁷ Hostile environment harassment is based on the view that unwanted physical or verbal conduct of a sexual nature creating a hostile atmosphere is based upon gender.¹⁸⁸

184. See Marcossou, *supra* note 90, at 8-9. This argument is used by Marcossou with respect to sexual orientation discrimination. *Id.* Marcossou argues that even though Congress did not specifically intend to protect homosexuals from employment discrimination, if Title VII’s ban on sex discrimination is viewed more generally, sexual orientation discrimination is covered by Title VII. *Id.* In support of this argument, Marcossou analogizes the interpretation of Congress’s intent concerning “sex” discrimination to that of the Framers’s intent behind the Fourteenth Amendment’s ban on “race” discrimination:

[A]t a broader level of generality, the framers of the Fourteenth Amendment intended to bar laws using racial classifications. Antimiscegenation laws obviously do this, bringing such laws within the sweep of the Fourteenth Amendment even if the framers did not then understand that antimiscegenation laws were included. The same is true of Title VII: we can express Congress’s intent at a level of generality to say that it “intended” to bar employer policies using gender classifications. If we agree that sexual orientation discrimination treats men and women differently in the same way that antimiscegenation laws treat blacks and whites differently, then such policies employ gender classifications, and they are barred from Title VII even if in 1964 Congress did not foresee that antigay discrimination was included.

Id. at 9 (citations omitted).

185. See cases cited *supra* notes 87-88, 120.

186. *E.g.* *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1980) (holding transsexuals are not protected by Title VII because the word “sex” means no more than biological gender); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) (holding Title VII’s prohibition of “sex” discrimination only applies to gender discrimination, and not to discrimination on the basis of sexual orientation).

187. See *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1336 (D. Wyo. 1993). See also *Peirce*, *supra* note 2, at 1098-99 (noting courts have shifted the focus of sexual harassment away from gender-based disparate treatment towards sexually offensive conduct).

188. *Chiapuzio*, 826 F. Supp. at 1336.

It has been argued that the recognition of sexual harassment as a form of sex discrimination is a strained extension of the intended scope of Title VII.¹⁸⁹ However, so long as cross-gender sexual harassment continues to be recognized under Title VII despite the criticism that sexual harassment is not an intended form of sex discrimination, there is no basis for rejecting same-gender sexual harassment. If the lack of Congressional intent does not prevent recognition of cross-gender sexual harassment, the same argument cannot be used to deny recognition of same-gender sexual harassment.

The *Garcia/Goluszek* approach is also flawed insofar as sexual harassment has been recognized as sex discrimination under Title VII without a requirement that the harassment reflect animosity towards all members of the victim's gender.¹⁹⁰ The *Garcia/Goluszek* approach shifts the emphasis in sexual harassment cases away from the individual's gender, concentrating instead on the individual's gender class.¹⁹¹ In order for harassment to violate Title VII under the *Garcia/Goluszek* approach, it must create an attitude of hostility towards all members of the victim's gender.¹⁹² For instance, even if a plaintiff is able to prove that the harassment would not have occurred but for the individual's gender, such proof is not sufficient to establish a Title VII action.¹⁹³ Thus, the *Garcia/Goluszek* approach insists that Title VII requires a showing of animus towards the entire class of the victim's gender for either same-gender or cross-gender sexual harassment to be actionable. However, while the failure to make such a showing is used by the *Garcia/Goluszek* approach to deny same-gender sexual harassment, cross-gender sexual harassment claims are recognized without expressly requiring the plaintiff to prove that the harassment was a reflection of hatred towards all members of the opposite sex.¹⁹⁴

Another criticism of the *Garcia/Goluszek* approach is that it views Congress' concern over eliminating gender-bias as the dispositive factor in declaring all same-gender claims non-actionable. Before *Garcia*, heterosexual employees were protected from harassment imposed on them by homosexuals, while homosexuals were not protected from harassment imposed on them by heterosexuals.¹⁹⁵ If courts continue to adopt the *Garcia/Goluszek* approach,

189. Paul, *supra* note 40, at 352 (arguing that sexual harassment does not fit within the meaning of Title VII because sexual harassment is not discrimination that harms a person or denies them a benefit based on their membership in a group despised by the discriminator); Peirce, *supra* note 2, at 1094 (arguing hostile environment harassment is a strained expansion of Title VII because sexual harassment is an individual issue rather than a gender-based issue). *But see* Marcossan, *supra* note 90, at 38 n.43 (arguing the definition of discrimination does not require the discriminating person to despise the target's entire group because Title VII is not concerned with the *motives* behind discrimination, rather discrimination under Title VII is concerned with compensating victims of discriminatory *acts*, regardless of their motive).

190. *See Chiapuzio*, 826 F. Supp. at 1336.

191. *See* Norris and Randon, *supra* note 90, at 245.

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

193. *See, e.g., id.* at 1456. *See also* Norris & Randon, *supra* note 90, at 245.

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

195. *See supra* text accompanying notes 108-13, 147-53.

no individuals will be protected from same-gender sexual harassment. Heterosexual victims of same-gender sexual harassment would no longer enjoy the Title VII protection afforded them under the “but-for” test.

A final criticism of the *Garcia/Goluszek* approach is the assumption that there cannot be disparate treatment between men and women in the context of same-gender sexual harassment. An example of this assumption lies in the *Garcia/Goluszek* approach’s interpretation of the Supreme Court’s suggestion that harassment within the meaning of Title VII arises from the harasser’s “differentiating libido.”¹⁹⁶ Based on this suggestion, the *Garcia/Goluszek* approach’s interpretation of disparate treatment incorrectly assumes that disparate treatment of men and women can only occur in the cross-gender context. For example, the *Garcia/Goluszek* approach fails to recognize that if a man imposes harassment on other men that he would not impose on women, then he is imposing disparate treatment on men and women. Thus, the *Garcia/Goluszek* approach leaps from requiring differentiating treatment to assuming that same-gender sexual harassment is not capable of constituting differentiating behavior. This is a glaring example of the “heterosexual presumption”¹⁹⁷ made by courts that all men and women in cross-gender sexual harassment claims are heterosexual and that only heterosexual behavior is differentiating. The same-gender sexual harassment issue has exposed the prevalence of this presumption in our courts, unmasking the heterosexism that exists in the law.

IV. THE AFTERMATH OF *GARCIA*

A. Courts Adopting The Garcia/Goluszek Approach

A flurry of decisions were handed down by federal district courts shortly after *Garcia* was decided.¹⁹⁸ A number of these courts have followed the *Garcia/Goluszek* approach, holding that same-gender sexual harassment

196. *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc), *aff’d on other grounds sub nom.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Although the Supreme Court has not addressed the same-gender sexual harassment issue, Justice Bork used this phrase to describe the type of harassment within the scope of Title VII. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994).

197. Leigh M. Leonard, *A Missing Voice In Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN’S RTS. L. REP. 39 (1990) (describing the “heterosexual presumption” as taking for granted that all women and men are heterosexual which results from the heterosexual bias that persists in the way people are socialized).

198. See *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 493-94 (W.D. Wash. 1995) (summarizing the results of cases addressing the actionability of same-gender sexual harassment after *Garcia*).

claims are not actionable under Title VII.¹⁹⁹ The first decision to follow *Garcia* was *Vandeventer v. Wabash National Corporation*.²⁰⁰

In *Vandeventer*, a male employee brought a sexual harassment action under Title VII against his employer based on comments made by his male supervisor.²⁰¹ The court agreed with the *Goluszek* analysis that the aim of Title VII is to eliminate “an atmosphere of oppression by a ‘dominant’ gender.”²⁰² Despite the fact that the plaintiff was “‘razzed’ in a way designed to be the most annoying to him personally—he was called a homosexual,” the court characterized the contention that there was an anti-male atmosphere as ridiculous.²⁰³ Since there was no evidence of an anti-male atmosphere, the court concluded that the plaintiff was not harassed because he was male.²⁰⁴ Thus, the court held that “[s]ame-sex harassment is not actionable under Title VII.”²⁰⁵

On a motion to reconsider, the *Vandeventer* court significantly limited its broad holding.²⁰⁶ Although the plaintiff’s motion to reconsider was denied because the facts presented did not rise to an actionable level, the court spent a considerable amount of energy explaining that its holding was “meant to be fact-specific.”²⁰⁷ The court concluded that same-gender sexual harassment may be actionable where the plaintiff can show that he or she was the victim of gender discrimination because there was an anti-male/female atmosphere in the workplace.²⁰⁸ The *Vandeventer* court seems to suggest that it is possible for a victim of same-gender sexual harassment to establish the existence of an anti-male/female atmosphere, even though such a case would be rare.²⁰⁹ The court stated that “a man can state a claim under Title VII for sexual harassment by another man only if he is being harassed because he is a man; the relative genders are irrelevant.”²¹⁰ While the *Vandeventer* court still adheres to the *Garcia/Goluszek* approach by requiring the existence

199. See, e.g., *Oncala v. Sundowner Offshore Services, Inc.*, 1995 WL 133349 (E.D. La. March 24, 1995) (dismissing same-gender sexual harassment claim based on *Garcia*’s holding); *Ashworth*, 897 F. Supp. at 494; *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995) (holding that same-gender sexual harassment is not a cognizable Title VII claim based on the reasoning of *Goluszek* and *Garcia*); *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995); *Hopkins*, 871 F. Supp. at 834; *Fleenor v. Hewitt Soap Co.*, No. C-3-94-182, 1995 WL 386793, *3 (S.D. Ohio Dec. 21, 1994).

200. 867 F. Supp. 790 (N.D. Ind. 1994).

201. *Id.* at 796.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Vandeventer v. Wabash Nat’l Corp.*, 887 F. Supp. 1178, 1179-82 (N.D. Ind. 1995).

207. *Id.* at 1179-80.

208. *Id.* at 1180.

209. *Id.*

210. *Id.* at 1181.

of an anti-male/female atmosphere,²¹¹ the court does not adopt the holding that same-gender sexual harassment is never cognizable.²¹²

*Hopkins v. Baltimore Gas & Electric Company*²¹³ was the second reported decision to follow *Garcia* and hold that same-gender sexual harassment is not actionable under Title VII.²¹⁴ In *Hopkins*, a male employee was allegedly sexually harassed by his male supervisor.²¹⁵ The court held that "Title VII does not provide a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender."²¹⁶ In accordance with the *Garcia/Goluszek* approach,²¹⁷ the court reasoned that Congress only intended to prohibit the disparate treatment of men and women and same-gender sexual harassment does not create disparate treatment based on gender.²¹⁸ The court concluded that, even though the harassment may have occurred because of the plaintiff's gender, same-gender sexual harassment is not actionable because it is not the type of conduct Congress intended Title VII to prohibit.²¹⁹

In addition to *Vandeventer* and *Hopkins*, several other decisions have adopted the *Garcia/Goluszek* reasoning, concluding that same-gender sexual harassment is not cognizable under Title VII.²²⁰ While these decisions may reflect a trend not to recognize same-gender sexual harassment under Title

211. *Id.* at 1182.

212. *Id.* at 1180. *Accord* Blozis v. Mike Raiser Ford, Inc., 896 F. Supp. 805, 806 (N.D. Ind. 1995). Shortly after *Vandeventer* was decided, another district court ruled on the same-gender sexual harassment issue in an unreported decision. *Fleenor v. Hewitt Soap Co.*, No. C-3-94-182, 1995 WL 386793 (S.D. Ohio Dec. 21, 1994). In *Fleenor*, the court relied heavily on *Goluszek* and concluded that "a claim of male against male hostile environment, sexual harassment is not actionable under Title VII, in the absence of an allegation that an anti-male environment was created thereby." *Id.* at *3. *Fleenor* and *Vandeventer*, therefore, adopt a similar interpretation of the *Goluszek* analysis insofar as neither court is willing to make the broad statement that same-gender sexual harassment is never actionable under Title VII.

213. 871 F. Supp. 822 (D. Md. 1994).

214. *Id.* at 834. Prior to *Hopkins*, the Fourth Circuit had not yet addressed this issue. *Id.*

215. *Id.* at 824. The plaintiff's supervisor subjected him to jokes, comments, and gestures of a sexual nature. *Id.* For instance, while the plaintiff was in the men's room, his supervisor walked in, pretended to lock the door, and said, "Ah, alone at last." *Id.* The plaintiff's Title VII claim was based on hostile work environment sexual harassment. *Id.*

216. *Id.* at 834. In addition, the court noted that the facts were not essential to resolution of the case because, even accepting *Hopkins*' version as true, no prima facie case for sex discrimination could be established. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 833-34.

220. See cases cited *supra* note 199.

VII,²²¹ a greater number of courts have refused to preclude same-gender sexual harassment from Title VII's protection.²²²

B. Courts Refusing to Follow The Garcia/Goluszek Approach

It appeared from the cases decided immediately after *Garcia* that the Fifth Circuit's decision was developing a trend to deny victims of same-gender sexual harassment protection under Title VII.²²³ However, since *Hopkins* several courts have reached the conclusion that same-gender sexual harassment is actionable under Title VII.²²⁴

*Prescott v. Independent Life*²²⁵ was the first decision to expressly reject the *Garcia/Goluszek* approach.²²⁶ In *Prescott*, a male employee brought a quid pro quo sexual harassment action against his employer alleging that his male supervisor subjected him to unwanted sexual advances.²²⁷ The court stated that the harassing supervisor's gender is not relevant because quid pro quo harassment requires only that the supervisor conditioned a term of employment on the employee's submission to his or her sexual demands.²²⁸ Applying the "but-for" test, the court concluded that the plaintiff would not have been subjected to the sexual advances but for his being male because a homosexual male would not similarly harass a female.²²⁹ Based on the facts presented, the court held that "homosexual sexual harassment" is actionable under Title VII.²³⁰

221. See *Plakio v. Congregational Home, Inc.*, No. 93-4222-SAC, 1995 WL 317120, at *1 (D. Kan. April 27, 1995) ("If the court were to follow the current trend and rule as a matter of law that same-gender sexual harassment is not actionable, then the court will have necessarily decided that the plaintiff is unable to prove a prima facie case of sexual harassment.")

222. See, e.g., *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995); *Pritchett v. Sizeler Real Estate Management Co.*, No. Civ.A.93-2351, 1995 WL 241855, at *2 (E.D. La. April 25, 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283, 286-88 (D.D.C. 1995); *Roe v. K-Mart Corp.*, No. Civ.A.2:93-2372-18AJ, 1995 WL 316783, at *1 (D.S.C. March 28, 1995); *McKoy v. Johnson Controls World Services, Inc.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995); *Equal Employment Opportunity Comm'n v. Walden Book Co.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995); *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60, 63 (D.P.R. 1995).

223. *Berenkritis v. Johnson*, 882 F. Supp. 521, 525 (D.S.C. 1995) ("Most reported opinions appear to be following [*Garcia's*] finding."). See, e.g., *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994); *Hopkins*, 871 F. Supp. at 834; *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (1995).

224. See cases cited *supra* note 222.

225. 878 F. Supp. 1545 (M.D. Ala. 1995).

226. *Id.* at 1550.

227. *Id.* at 1547-48.

228. *Id.* at 1550. Accord *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995).

229. *Prescott*, 878 F. Supp. at 1550-51.

230. *Id.* at 1551. Accord *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 542 (M.D. Ala. 1983); *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

The *Prescott* court interpreted the *Garcia/Goluszek* approach as being concerned with remedying the problem of a powerless group being disadvantaged by the dominant group.²³¹ To refute the *Garcia/Goluszek* approach, the court stated:

While this argument may be logically appealing, it is not the current state of anti-discrimination jurisprudence. If it were, a similar argument could be made when a white plaintiff attempts to sue for reverse discrimination under Title VII. That white plaintiff would have been at all times a member of the majority, a member of the “dominant” race. However, the Supreme Court “has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites . . .”²³²

The *Prescott* court also found the *Garcia/Goluszek* approach to be inconsistent with the language and intent of Title VII²³³ because Congress’ use of the gender-neutral and unmodified term “sex” indicates that Congress intended Title VII to prohibit same-gender sexual harassment.²³⁴ The court reasoned that if Congress intended for Title VII merely to prohibit cross-gender sexual harassment, it could easily have done so by using the term “member of the opposite sex.”²³⁵ Thus, Title VII’s plain language does not limit the scope of its prohibition to employees of the opposite sex.²³⁶

Relying on many of the same reasons cited in *Prescott*, in *Griffith v. Keystone Steel and Wire*,²³⁷ the district court for the Eastern District of Illinois held that same-gender sexual harassment is actionable under Title VII.²³⁸ The *Griffith* court offered an additional argument to reject the *Garcia/Goluszek* approach’s requirement of an anti-male/female atmosphere.²³⁹ To refute the *Goluszek* reasoning that an employee cannot establish an atmosphere of oppression where the employee is a male in a male-dominated environment, the court stated that “while the number of male

231. *Prescott*, 878 F. Supp. at 1550.

232. *Id.* (quoting *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976)). *Accord* *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995) (“[I]t cannot be denied that even if the Civil Rights Act of 1964 is silent as to its intended scope, the law’s breadth has since increased by judicial interpretation.”); *Equal Opportunity Employment Comm’n. v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995) (stating that the requirements for proving a prima facie case should be modified to accommodate the same-gender discrimination context because it would be untenable to prohibit reverse discrimination while at the same time refuse to prohibit same-gender sexual harassment).

233. *Prescott*, 878 F. Supp. at 1550 n.5.

234. *Id.* at 1550.

235. *Id.*

236. *Id.* *Accord* *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60, 63 (D.P.R. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *Walden Book*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995).

237. 887 F. Supp. 1133 (C.D. Ill. 1995).

238. *Id.* at 1136-37.

239. *Id.* at 1137.

and female workers in a work environment may be relevant in assessing the impact of sexual harassment, such a showing is not essential to prevail."²⁴⁰

One of the most interesting opinions rejecting the *Garcia/Goluszek* approach is *Pritchett v. Sizeler Real Estate Management Company*,²⁴¹ which was decided by a district court in the Fifth Circuit. *Pritchett* involved an allegation that a female employee was sexually harassed by her female supervisor.²⁴² The *Pritchett* court circumvented *Garcia* by characterizing the Fifth Circuit's treatment of the same-gender sexual harassment issue as dicta because the court decided the case on employer liability grounds.²⁴³ Refusing to adopt *Garcia*, the court chose instead to apply the "but-for" test.²⁴⁴ The court held that same-gender sexual harassment is a form of gender discrimination under Title VII because, but for her being female, the employee would not have been harassed.²⁴⁵

The *Pritchett* court felt it was unfair to deny same-gender sexual harassment under Title VII because this would allow homosexuals to be exempt from the very laws that govern the conduct of heterosexuals in the workplace.²⁴⁶ Thus, the actual motivation behind the court's conclusion is the fear that if same-gender sexual harassment is not actionable, heterosexuals would not be protected from homosexual harassers in the workplace. Although the court reaches the proper result, the court's motivation is heterosexist because it is not concerned in the least with the unfairness of not protecting homosexuals from discrimination based on sexual orientation.²⁴⁷

C. Does Garcia Reflect A Trend Not To Recognize Same-Gender Sexual Harassment Under Title VII?

Federal district courts look to *Garcia* when confronted with same-gender sexual harassment claims because it remains the only appellate decision to answer the question of whether same-gender sexual harassment is actionable under Title VII.²⁴⁸ The aftermath of *Garcia* has produced a split among the federal district courts,²⁴⁹ which makes it difficult to predict the outcome of same-gender sexual harassment claims in the future. The *Vandeventer* court's treatment of the issue best illustrates the difficulty of predicting the

240. *Id.*

241. No. Civ.A.93-2351, 1995 WL 241855 (E.D. La. April 25, 1995).

242. *Id.* at *1.

243. *Id.* at *2. *But see* *Oncale v. Sundowner Offshore Services*, No. Civ.A.94-1483, 1995 WL 133349, at *2 (E.D. La. Mar. 24, 1995) (concluding that *Garcia's* treatment of the same-gender sexual harassment issue is not dicta and represents a "clear directive" that Title VII does not prohibit male against male sexual harassment).

244. *Pritchett*, No. Civ.A.93-2351, 1995 WL at *2.

245. *Id.*

246. *Id.*

247. *Id.*

248. *See* cases cited *supra* note 14.

249. *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 492 (W.D. Wash. 1995).

actionability of same-gender sexual harassment in the future. For instance, even though *Vandeventer* adopted the *Garcia/Goluszek* approach, the court refused to accept the broad holding established by *Garcia* that same-gender sexual harassment is never actionable.²⁵⁰

Moreover, the Seventh Circuit, while not deciding the issue, stated in dicta that “sexual harassment of women by men is the most common kind, but we do not mean to exclude the *possibility* that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases.”²⁵¹ This dicta strongly suggests that if the Seventh Circuit addresses this issue, it will find same-gender sexual harassment actionable under Title VII. If this were to occur, district courts would be left with two Circuit Court opinions that are completely at odds with each other. Undoubtedly, this would create further controversy and confusion in this area of the law.

In sum, in light of the fact that some, though not all, courts are following *Garcia*, the decision has potential to establish a trend to refuse an action for same-gender sexual harassment under Title VII. Until the United States Supreme Court rules on the issue or Congress amends Title VII to be more specific in its application, *Garcia* will continue to have an impact on courts deciding whether or not same-gender sexual harassment is actionable.

IV. A BETTER APPROACH TO RECOGNIZING SAME-GENDER SEXUAL HARASSMENT UNDER TITLE VII

A. *Approaches That Fail To Recognize An Action Under Title VII For Same-gender Sexual Harassment*

Three different justifications have been used to deny an action under Title VII for same-gender sexual harassment. First, same-gender sexual harassment claims involving a bisexual or equal opportunity harasser have been denied because courts do not deem such conduct to satisfy the “but-for” test.²⁵² According to this theory, in order to establish that the conduct constitutes discrimination “because of . . . sex,” the plaintiff must show that, but for his or her gender, the harassment would not have occurred.²⁵³

Application of the “but-for” test has resulted in recognition of an action under Title VII in all situations, including the same-gender context, except for two: (1) where a bisexual is the harasser; and (2) where the harassment, regardless of the sexual orientation of the harasser, is directed at both men

250. See *supra* text accompanying notes 208-12.

251. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (emphasis added).

252. See *supra* text accompanying notes 97-105.

253. See, e.g., *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550-51 (M.D. Ala. 1995); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 542 (M.D. Ala. 1983); *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

and women.²⁵⁴ According to these cases, a claim brought against a person of the same gender is actionable under the “but for” test, unless it falls within one of the exceptions.

Where the “but-for” test fails is in its reliance on sexual orientation to determine if conduct is a form of sex discrimination prohibited by Title VII. The “but for” analysis fails to recognize the entire spectrum of possible scenarios and allows courts to interject the sexual orientation of the victim or the harasser to determine whether a same-gender claim is actionable.²⁵⁵ Although application of the “but-for” test has led to inconsistent and underinclusive results,²⁵⁶ it at least recognizes the disparate impact of sexual harassment even when it is among persons of the same gender.

The second justification used to deny an action for same-gender sexual harassment, is that the conduct merely amounts to sexual orientation discrimination. Some courts have refused to recognize harassment directed at homosexuals as valid hostile environment harassment²⁵⁷ on the theory that the harassment was merely sexual orientation discrimination.²⁵⁸ This approach rests on the assertion that harassment of a homosexual, even if it is sexual in nature, is permissible discrimination on the basis of sexual orientation, as opposed to impermissible gender-based discrimination.²⁵⁹

The third justification used to deny same-gender sexual harassment actions under Title VII is that Congress simply did not intend to prohibit members of the same gender from sexually harassing each other.²⁶⁰ This justification is manifested in the *Garcia/Goluszek* approach, which rests on the assertion that Congress was only concerned with the disparate treatment between men and women.²⁶¹ Accordingly, if the harasser and the victim are the same gender, then the conduct does not involve disparate treatment.²⁶²

B. *The Better Approach*

Sexual harassment constitutes an action under Title VII where the conduct is based on the victim’s gender.²⁶³ When determining whether the conduct involved in a sexual harassment claim is based on gender, courts should not look to the respective gender of the harasser and the victim. The

254. See *supra* text accompanying notes 146-50.

255. See *supra* text accompanying notes 116-18.

256. See *supra* text accompanying notes 94-96, 147-50.

257. See, e.g., *Dillon v. Frank*, No. 92-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

258. See *supra* text accompanying notes 120-24.

259. See *supra* text accompanying notes 130-34.

260. See *supra* text accompanying notes 168-73.

261. See *Goluszek v. Smith*, 697 F. Supp. 1452, 1455-56 (N.D. Ill. 1988).

262. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994).

263. See *supra* text accompanying notes 63-65, 77.

gender of the harasser with respect to the victim is irrelevant because it is the nature of the harasser's actions, not the motivation behind them, that gives rise to discrimination based on gender. Accordingly, courts should focus on whether the harassment is sexual in nature because sexual conduct is necessarily based on the *victim's* gender, regardless of the *harasser's* gender.²⁶⁴ Thus, as long as the alleged conduct is sexual in nature, same-gender sexual harassment should be actionable under Title VII.

Furthermore, the sexual orientation of the victim should not change the fact that conduct that is sexual in nature is based on gender. It is incorrect to conclude that harassment against a person based on his or her actual or perceived homosexuality is not based on the person's gender.²⁶⁵ There are two reasons why it is erroneous to conclude that sexual orientation discrimination is not based on gender.

First, an individual's gender cannot be separated from her or his sexuality. Since sexual harassment is inherently tied to sexuality,²⁶⁶ and a person's gender and sexuality cannot be separated, sexual harassment is necessarily based on a person's gender. Similarly, a person's gender cannot be separated from determining his or her sexual orientation.²⁶⁷ A human being who sexually desires men is labeled a particular sexual orientation based on his or her gender. If the human being is a man, then he is homosexual. If the human being is a woman, she is heterosexual. Thus, a person's sexual orientation cannot be determined unless we know his or her gender and to which gender he or she is attracted.

The failure to recognize that harassment against homosexuals is based upon gender strips homosexuals of their gender identity. If a homosexual is subjected to harassment in the form of sexually charged attacks against her or his homosexuality, the harassment is found merely to be a result of the person's homosexuality and hence had nothing to do with the person's gender. Such a finding results from the manner in which courts have confined "sex" to mean biological gender, rather than allowing it to encompass the broader meaning of gender.

264. See Hébert, *supra* note 82, at 568 ("Sexual harassment is gender harassment.").

265. See Arriola, *supra* note 120, at 118 (citations omitted).

Traditional models of analysis do not recognize claims of anti-gay or anti-lesbian sexism. This lack of recognition results from the ways in which traditional analysis defines and arranges categories, arbitrarily splitting apart "sex" and "gender" from "sexuality" or "sexual orientation." . . . In contrast, feminist theory and jurisprudence have failed to fully explore the relationship between gender discrimination and anti-homosexuality. Consequently, most courts assume that gender has little to do with lesbian or gay discrimination.

Id.

266. Marcossou, *supra* note 90, at 32.

267. Valdes, *supra* note 36, at 19 ("[S]exual orientation discrimination plays a key role in the perpetuation of sex and gender discrimination *precisely* because sex-determined gender plays a key role in the construction of sexual orientation.").

If a court is applying the “but-for” test, it should take into consideration other aspects of gender, such as gender stereotypes, especially those concerning appropriate sexual conduct. In our society, for example, every person is presumed to be heterosexual and those who do not conform to heterosexual norms are punished.²⁶⁸ Heterosexual norms dictate the assumption that sexual attraction occurs only in the cross-gender context. Same-gender sexual desire is thought to be unrelated to gender because of the heterosexist gender stereotypes regarding appropriate sexual conduct. Thus, attraction to a person of the same gender is explained away as a “sexual orientation” issue.²⁶⁹

A liberal view of gender within the meaning of Title VII includes gender stereotypes.²⁷⁰ Gender stereotypes dictate what is viewed as appropriate behavior for men and women. If the “but-for” test is applied according to this more liberal construction of gender, sexual harassment against homosexuals is prohibited under Title VII. Because harassment against homosexuals involving sexual conduct or comments reinforces gender stereotypes of appropriate gender roles, especially proper sexual roles, such harassment is based on gender.²⁷¹ Thus, harassment against homosexuals should be prohibited by Title VII’s ban on sex discrimination.

The second reason why it is incorrect to conclude that sexual orientation discrimination is not based on gender is that as long as the harassment involves sexual conduct, it should be considered to be based on the victim’s gender.²⁷² Taking each type of harassment separately, *quid pro quo* harassment directed at a homosexual is by definition conduct of a sexual nature, thus it is based on gender. Hostile environment harassment against an actual or perceived homosexual is also based on gender when it involves sexual conduct, even if the harassment can also be characterized as sexual orientation discrimination.

For example, consider the situation of a homosexual man who is harassed by co-workers with comments such as “Dillon sucks dicks.”²⁷³ Not only

268. See Leonard, *supra* note 196, at 43.

269. Arriola, *supra* note 120, at 116 (1994).

Gay sexuality is typically cast in opposition to the sexual norm of a heterosexually-dominant culture. Consequently, homosexuality can conveniently be cast as falling outside of the paradigm that encourages a court to rule, for example, that anti-lesbianism unfairly strikes at the core of a woman’s gender identity.

Id. (citations omitted).

270. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 250-52 (1989).

271. See *id.* at 250.

272. See Marcossou, *supra* note 90, at 3 (arguing that courts have defined hostile environment sexual harassment according to the sexual nature of the conduct, rather than the gender of the victim, thus sexual orientation harassment is indistinguishable from gender-based harassment because sexual orientation harassment is sexual in nature for sexuality is inherent in all cases of sexual harassment).

273. Dillon v. Frank, No. 90-2290, 1992 WL 5436, at *1 (6th Cir. Jan. 15, 1992).

is the comment based on a hatred of homosexuality that is properly labeled sexual orientation discrimination, but it is also sexual in nature, thus constituting gender-based discrimination.²⁷⁴ Even where harassment is based on sexual orientation, same-gender sexual harassment should be actionable because whenever a person is subjected to attacks that involve sexual content, the harassment is based on the victim's gender.

While it is necessary to consider the victim's sexual orientation when the conduct at issue involves attacks against a person's actual or perceived homosexuality, the harasser's sexual orientation is irrelevant in determining the actionability of any type of sexual harassment claim. The sexual orientation of the harasser should not be considered because it is only relevant that the victim was subjected to conduct of a sexual nature.²⁷⁵ Whether or not the harassment is based on gender depends on the nature of the harasser's actions. Looking to the harasser's sexual orientation as a factor in determining whether the conduct is based on gender inappropriately focuses on the motivation of the harasser's actions. Moreover, an individual is not necessarily motivated by their sexual orientation when they target another person for sexual harassment.²⁷⁶

Chiapuzio v. BLT Operating Corporation,²⁷⁷ offers an example of an approach that does not look to the sexual orientation of the harasser or the victim as a dispositive factor. In *Chiapuzio*, the "but-for" test did not preclude a same-gender action where harassment was directed at both women and men.²⁷⁸ *Chiapuzio* is the better approach because the court recognized the claim without using the harasser's sexual orientation as a factor, which, under the "but-for" test would have precluded the action were the harasser bisexual.

In sum, sexual orientation should be a factor in determining the actionability of same-gender sexual harassment only where the claim involves

274. Marcossou, *supra* note 90, at 27-28.

[S]exually offensive conduct is "because of . . . sex," and thus constitutes sexual harassment under Title VII. Some will argue that such an extension rips the principle from its statutory anchor, making it more vulnerable to being sunk in a conservative judicial sea. In my judgment, however, it is hypocritical to allow Title VII harassment claims against offensive conduct that is undirected at anyone, or, if directed, not because of the gender of the specific target simply because the conduct is sexual in nature, and then spin around and *not* allow a claim regarding conduct that is equally sexual in nature, but happens to be directed at someone because of his or her sexual orientation. If the sexual character of the harassment provides the link to gender, it should do so in both cases.

Id.

275. *Mogilefsky v. Superior Court*, 26 Cal. Rptr. 2d 116, 120 (2d. Dist. 1993) (interpreting a California statute similar to Title VII to provide an action for same-gender sexual harassment regardless of the harasser's sexual orientation).

276. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984).

277. 826 F. Supp. 1334 (D. Wyo. 1993).

278. *Id.* at 1336.

attacks against the victim's actual or perceived homosexuality. Furthermore, in such cases of alleged attacks against an employee's sexual orientation, it is only the victim's, not the harasser's, sexual orientation that is relevant. The harasser's sexual orientation should not be used as a factor in determining the actionability of same-gender sexual harassment because the harasser's sexual orientation speaks only to the motivation behind the acts, not to the nature of the acts. In the same-gender context, sexual orientation should not preclude finding actionable sexual harassment under Title VII. Whether a Title VII claim can be brought against a person of the same gender should not be supported by the fact that the harasser is homosexual and should not be precluded if the victim is or is perceived to be homosexual.

CONCLUSION

The most convincing extension of Title VII to same-gender sexual harassment claims is through legislative action. Only then would the application of Title VII to same-gender sexual harassment truly speak to the legislative intent. However, until Congress amends Title VII to expressly include same-gender sexual harassment and as long as *Garcia* remains the only appellate decision to address the issue, the door is open for courts to reject same-gender claims. The anomaly created by rejecting same-gender sexual harassment under Title VII and refusing to extend Title VII protection to sexual orientation discrimination while at the same time recognizing cross-gender sexual harassment claims illustrates the unfairness inherent in the judicial interpretations of sex discrimination under Title VII. This unfairness offers strong support in favor of recognizing same-gender sexual harassment under Title VII. Ideally, Congress would recognize this by way of legislative action.

Nonetheless, it should be judicially recognized that Title VII prohibits same-gender sexual harassment because it involves conduct that is based on gender. Moreover, when determining whether same-gender sexual harassment is actionable, courts should focus on the nature of the conduct. The relevant question should be whether the conduct involves conduct of a sexual nature because harassment involving sexual conduct is based on gender. Thus, when assessing whether same-gender sexual harassment constitutes actionable sex discrimination under Title VII, it is unnecessary to focus either on the motivation behind the harassment or on the respective genders of the harasser and the victim. Since the motivation of the conduct is irrelevant, it is also unnecessary to consider the harasser's sexual orientation as a factor in determining if same-gender sexual harassment is actionable.

The underlying problem of sexual harassment is that of employees being subjected to sexual exploitation at work. Sexual harassment is about power and it involves using sexuality as leverage against another person.²⁷⁹ No

279. See Avner, *supra* note 115 at 58.

person should be forced to tolerate such exploitation, regardless of the harasser's gender with respect to his or her victim's gender. An employee subjected to discrimination in the form of *sexually* harassing behavior should not be denied Title VII protection because her or his harasser is the same gender. Same-gender sexual harassment involves the same type of discriminatory conduct as cross-gender sexual harassment, which is actionable under Title VII because it constitutes discrimination based on gender.²⁸⁰ Similarly, same-gender sexual harassment should be actionable under Title VII.

As long as courts continue to recognize cross-gender sexual harassment claims, a victim of the same offensive, hostile, or abusive conduct must not be precluded from bringing an action simply because his or her harasser is the same gender. The fact that the harasser and the victim are both men or both women should not preclude an action for sexual harassment under Title VII because *sexual* conduct necessarily involves the victim's gender. Regardless of whether the harasser is the same or opposite gender as the victim, harassment involving conduct of a sexual nature, under either a quid pro quo or hostile work environment theory, constitutes sex discrimination under Title VII because such conduct is based on the victim's gender.

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280. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

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