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## Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation

### Cover Page Footnote

Many thanks to my family, whose continued support has made everything possible. In Addition, I would like to thank Professor Tracy Higgins for her valuable insight during the writing of this Note.

## NOTE

### BEYOND SEX DISCRIMINATION: A PROPOSAL FOR FEDERAL SEXUAL HARASSMENT LEGISLATION

*Deborah N. McFarland\**

“Yet as we look at how far we have come . . . we see also how far we have yet to go.”<sup>1</sup>

#### INTRODUCTION

For several months, a female worker has been subjected to a stream of offensive sexual conduct from a male co-worker. Everyday, upon arriving at work, she is met with questions and speculation about when she last “got it,” what sexual acts she has performed, and whether she performed those acts with the boss. Furthermore, her coworker physically assaults her, grabbing various parts of her body whenever possible. On several occasions, the coworker has propositioned her in front of other coworkers, taunting her to “have sex with me; you know you want it.”

Presumably, no individual should be subjected to this type of offensive behavior in the workplace. In fact, Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>2</sup> prohibits such harassment. This statutory protection from abusive sexual conduct, however, is conditional—the sex<sup>3</sup> and sexual orientation of both the harasser and the victim determine whether there is protection under Title VII.<sup>4</sup> For instance, under the specific circumstances described above, the conduct presents a clear cause of action under Title VII<sup>5</sup> because the woman was harassed by a male who presumably would not direct such conduct towards another man.<sup>6</sup>

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1. 140 Cong. Rec. E1311 (daily ed. June 23, 1994) (statement of Rep. Studds).

2. 42 U.S.C. § 2000e-2 (1994).

3. The meaning of “sex” under Title VII has been debated since the statute’s enactment. Generally, however, courts use the term interchangeably with gender and have construed both terms to mean “male” or “female.” See *infra* part II.A (noting the judiciary’s narrow construction of sex under Title VII).

4. See *infra* part III (discussing various forms of sexual harassment that are not considered discrimination based on sex, and therefore not covered by Title VII, because of either the sexes or sexual orientations of the parties).

5. This assumes that the plaintiff would also meet the other requirements for a Title VII sexual harassment claim. See *infra* note 104 (listing the requirements for a claim of sexual harassment under Title VII).

6. The victim of such conduct might have a cause of action under “hostile work environment” sexual harassment. See *infra* note 104 (discussing hostile work environ-

If the harasser victimizes a member of the same sex, however, the victim's access to relief is less certain. Whether an individual subjected to such harassment by a member of the same sex would be entitled to relief would depend on the jurisdiction in which he or she is located.<sup>7</sup> In addition, the viability of a cause of action in this context often depends on the homosexuality of the harasser.<sup>8</sup> Even then,

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ment sexual harassment, which involves sexual conduct that alters the work environment). In analyzing a claim of hostile work environment sexual harassment, the Eleventh Circuit, in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), stated:

In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion. It will therefore be a simple matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment.

*Id.* at 904. Under the same reasoning, courts have accepted claims of reverse harassment where a female harasses a male. *See infra* note 109 and accompanying text (discussing the expansion of Title VII to include claims of reverse sexual harassment). Cases of opposite-sex harassment illustrate that sexuality—both “gender status” and sexual behavior—is inextricably tied to sexual harassment. Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case for Sex Discrimination* 182 (1979) (defining women's sexuality as being comprised of both “secondary sex characteristics and sex-role behavior”). Courts premise sex discrimination in these cases on the presumption that a male harassing a female is doing so out of attraction, and thus would not treat a male in the same manner. Discrimination is therefore established because men and women are treated differently. *See infra* text accompanying notes 94-97 (discussing the “differences” approach utilized by courts in discrimination cases). As a result of this presumption, however, the sexual orientation of the harasser becomes determinative: the harasser's attraction to the victim underlies the presumption that the victim was harassed because of his or her sex.

7. To date, only the Fourth Circuit, in *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996), and the Fifth Circuit, in *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994), have addressed the issue. Although the Fourth Circuit found that the conduct at issue did not rise to the level of sexual harassment under Title VII, the court recognized the viability of same-sex sexual harassment under Title VII. *Baltimore Gas*, 77 F.3d at 752. The Fifth Circuit, however, held that Title VII does not cover same-sex sexual harassment. *Garcia*, 28 F.3d at 452. Even though other circuits have not decided the issue, several circuits have indicated that such conduct would be actionable under Title VII. *See, e.g.*, *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (commenting that, although male-female harassment is the most common form of sexual harassment, there is a possibility that female-male harassment or same-sex harassment would be actionable under Title VII); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (recognizing the possibility that both men and women might have a cause of action for sexual harassment against their employer), *cert. denied*, 115 S. Ct. 733 (1995); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) (“[H]arassment is harassment regardless of whether it is caused by a member of the same or opposite sex.”), *cert. denied*, 510 U.S. 1165 (1994); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (acknowledging that harassment by a homosexual of the same sex as the victim may constitute sexual harassment under Title VII). For a fuller discussion of same-sex sexual harassment and the underlying theories that courts have used when determining these cases, see *infra* part III.A.

8. *See infra* notes 159-60 and accompanying text. *But see infra* notes 117-22 and accompanying text (presenting cases that do not require that the harasser be homosexual).

however, some courts have found same-sex sexual harassment unactionable.<sup>9</sup>

In addition, if the harasser victimizes members of both sexes, there is, at most, questionable protection under Title VII.<sup>10</sup> For instance, if a bisexual directed harassment identical to that described above at both men and women, the behavior would fall outside the protection of Title VII.<sup>11</sup> Because men and women would be treated equally, there would be no discrimination based on sex despite abusive treatment.<sup>12</sup>

Protection under Title VII also would be uncertain if a heterosexual directed the same conduct at both men and women.<sup>13</sup> In this case, the conduct presumably is directed at the women with a different purpose or intent than that directed at the men. Toward the women, the harasser may act out of attraction, or with the intent of demeaning the women because they are women. The conduct directed at the men, however, attacks their manhood and demeans them for failing to fit into a certain stereotype of masculinity. In at least one case such behavior has been found actionable under Title VII due to the different nature of the conduct directed at the men and the women.<sup>14</sup> Because the reasoning used to reach this result involved a strained interpretation of Title VII analysis, however, future protection of such claims is questionable.<sup>15</sup>

Finally, if the behavior described above were directed at an individual because of that individual's sexual orientation, there would be no

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9. See *infra* note 137 and accompanying text (citing cases that have found same-sex sexual harassment unactionable under Title VII).

10. See *infra* parts III.B, III.C (discussing forms of harassment in which both men and women are harassed).

11. See *infra* notes 162-76 and accompanying text. Bisexual harassment circumvents the premise of opposite-sex and homosexual same-sex harassment—that because of his or her sexual orientation, the harasser would victimize members of one sex to the exclusion of members of the other sex. In the case of the bisexual harasser, both men and women are treated equally, albeit poorly, and the harassment falls beyond the scope of Title VII.

12. See *infra* part II.B (discussing the “but-for” requirement as an element of Title VII analysis that determines whether there was discrimination based on sex).

13. This conduct has been termed “equal opportunity harassment.” See *infra* note 174 (comparing an equal opportunity harasser to a bisexual harasser). For example, an equal opportunity harasser might direct comments at male employees that question their manhood with the intent to demean them. To the women, however, he might direct sexual propositions and describe sexual acts he wishes to perform with them. Although all of the employees are subjected to abusive conduct of a sexual nature, the conduct is qualitatively different, and therefore possibly motivated by gender in each case. See *infra* part III.C (discussing the viability of equal opportunity harassment under Title VII and a recent case addressing the issue).

14. *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993). The court in *Chiapuzio* focused on the different types of comments and behavior that the harasser directed at both the men and the women, and determined that the different nature of the conduct satisfied the “but-for” requirement in each case. *Id.* at 1338; see *infra* notes 186-90 and accompanying text.

15. For a discussion of the unstable reasoning in *Chiapuzio*, see *infra* part III.C.

protection under Title VII.<sup>16</sup> Despite persuasive arguments that an individual's sexual orientation is intimately tied to his or her gender and therefore falls within "sex,"<sup>17</sup> courts have refused to interpret the term in a liberal manner.<sup>18</sup>

The above hypothetical illustrates that some forms of sexual harassment, although harmful and abusive, do not constitute sex discrimination, and thus fall outside of Title VII's protection, often as a result of the harasser's sex and/or sexual orientation.<sup>19</sup> Although Title VII has developed into a broad and effective means of protection from sexual harassment for women, a number of individuals remain unprotected from the abusive treatment to which they are subjected in the workplace.<sup>20</sup>

Accordingly, an alternate cause of action must be created for those forms of harassment that do not fit within the paradigm of sexual harassment as sex discrimination.<sup>21</sup> Congress should enact federal sexual harassment legislation that focuses on sexual harassment per se—unreasonable sexual conduct in the workplace—rather than sexual harassment as a subset of sex discrimination.<sup>22</sup> A federal statute should follow the Equal Employment Opportunity Commission's ("EEOC" or "Commission")<sup>23</sup> Guidelines on sexual harassment, focusing on the nature of the harassment, rather than the genders or sexual orientations of the parties. Such legislation should emphasize the content of the harassment and its effect on the victim and the victim's work environment.

Part I of this Note discusses the history of Title VII, including the political movement leading to the inclusion of "sex" within the statute.

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16. See *infra* notes 202-16 and accompanying text.

17. See, e.g., Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 Geo. L.J. 1, 24-25 (1992) (asserting that harassment based on sexual orientation violates Title VII because it is based on stereotypes of the proper sexual roles for men and women).

18. See *infra* part II.A (discussing the courts' narrow construction of "sex").

19. See Susan P. Woodhouse, Comment, *Same-Gender Sexual Harassment: Is It Sex Discrimination Under Title VII?*, 36 Santa Clara L. Rev. 1147, 1176 (1996). Woodhouse notes that if the courts follow the case law barring protection from same-sex sexual harassment under Title VII, "then heterosexual males harassed by homosexual males because of their sex will not be protected, even though the circumstances are similar to when a female is harassed by a male." *Id.* (footnotes omitted). In addition, the rationale potentially creates an opportunity for a defendant to escape liability by stating that the harassment was motivated by his or her perception of the victim's homosexuality, just as a harasser can cover his or her tracks by harassing members of both sexes, thereby becoming an "equal opportunity harasser." See Ellen F. Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 Yale L. & Pol'y Rev. 333, 352 (1990) ("A savvy harasser need only note this anomaly and become an equal opportunity harasser.")

20. See *infra* parts III.A.2, III.B, III.D.

21. See *infra* notes 91-101 and accompanying text (summarizing Catharine MacKinnon's theory of sexual harassment as a form of sex discrimination).

22. See *infra* part IV.

23. See *infra* note 129 (outlining the EEOC's role in Title VII actions).

In addition, part I notes that although the feminist movement's emphasis on the subordination of women to men initially resulted in a broader interpretation of Title VII, courts today are unwilling to incorporate a more expansive definition of "sex" into the statute. Part II explores the development of sex discrimination under Title VII, particularly the theoretical construction of sexual harassment as a form of sex discrimination. Furthermore, part II highlights the expansion of Title VII to include "reverse harassment" and sexual favoritism. Part III then summarizes the disagreement within the judiciary regarding same-sex sexual harassment. Additionally, part III analyzes the judiciary's approach to the situation of a bisexual harasser, as well as a recent case allowing a claim of "equal opportunity harassment." Finally, part III notes the exclusion of harassment based on sexual orientation from the protection of Title VII. Part IV sets forth a proposition for federal sexual harassment legislation that focuses more broadly on sexual harassment as wrongful conduct in the workplace rather than as a form of discrimination. Part IV suggests that federal sexual harassment legislation should track the EEOC Guidelines, focusing on the nature of the conduct and the effect on the victim's work environment. In addition, part IV discusses the evaluation of sexual harassment claims under the proposed legislation through a reconfiguration of the current standards for sexual harassment claims. This Note concludes that federal sexual harassment legislation should be enacted to address those forms of sexual harassment that do not fall under Title VII's proscription on discrimination because of sex. Because not all forms of sexual harassment constitute sex discrimination, federal sexual harassment legislation should focus on sexual harassment per se, emphasizing the sexual conduct involved and the effect of such conduct on the victim, while leaving intact the sex discrimination construct which has provided extensive protection for women in the workplace.

## I. HISTORY OF TITLE VII

Title VII of the Civil Rights Act of 1964 was enacted to provide individuals with work "environment[s] free from discriminatory intimidation, ridicule, and insult"<sup>24</sup> based on race,<sup>25</sup> religion,<sup>26</sup> national

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24. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

25. *See, e.g., Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977) (holding that segregated eating arrangements resulting from the exclusion of African-American firefighters from informal "supper clubs" was "highly offensive" and violated Title VII); *Gray v. Greyhound Lines, E.*, 545 F.2d 169, 176 (D.C. Cir. 1976) (finding that the defendant's discriminatory hiring practice against African-Americans, as well as the employer's arbitrary discipline and discriminatory treatment of those African-Americans who were hired, violated Title VII).

26. *See, e.g., Compston v. Borden, Inc.*, 424 F. Supp. 157, 158, 160-61 (S.D. Ohio 1976) (finding that, where a supervisor referred to an employee as "Jew-boy," "the kike," "the Christ-killer," "the damn Jew," and "the goddamn Jew," such conduct was

origin,<sup>27</sup> or sex.<sup>28</sup> To achieve such an end, the statute makes it

an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his [or her] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>29</sup>

Although Title VII initially was aimed at ending discrimination against African-Americans,<sup>30</sup> Congress ultimately drafted Title VII with the broad purpose of eradicating all forms of workplace discrimination.<sup>31</sup> Accordingly, protection under the statute extends to all

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because of the employee's religious beliefs and altered the conditions of employment in contravention of Title VII).

27. See, e.g., *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1129, 1132 (4th Cir. 1995) (reversing grant of defendant's summary judgment motion on national origin harassment claim where the employer called the Iranian plaintiff "the local terrorist," a "camel jockey," "the ayatollah," and "the Emir of Waldorf" and withheld job benefits).

28. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19, 21-23 (1993) (holding that the plaintiff had a cause of action under Title VII where a supervisor often insulted a female employee because of her sex, suggested going to a hotel to negotiate her raise, referred to the plaintiff as a "dumb ass woman," and made other sexual innuendos about the plaintiff and other female employees); *Meritor*, 477 U.S. at 60 (recognizing a claim of hostile work environment sexual harassment where the female plaintiff agreed to sexual relations with her supervisor out of fear of losing her job, and her supervisor repeatedly demanded sexual favors, fondled the plaintiff in front of other employees, exposed himself to her, and raped her on several occasions).

29. 42 U.S.C. § 2000e-2(a) (1994). Title VII's coverage is fairly broad and applies to "(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." Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* § 2.3, at 91 (3d ed. 1992) (citations omitted). Under Title VII "[t]he class of potential plaintiffs is broader than that of employees in the traditional sense." *Id.* (citing cases in which Title VII's protection extended to nonemployees). Additionally, "[p]otential defendants include individual supervisors as well as employers." *Id.*

30. See 110 Cong. Rec. 2556 (1964) ("[T]he basic purpose of title VII is to prohibit discrimination in employment on the basis of race or color.") (statement of Rep. Celler); 110 Cong. Rec. 2581 (1964) ("[L]et us not add any amendment that would place in jeopardy in any way our primary objective of ending that discrimination that is most serious, most urgent, most tragic, and most widespread against the Negroes of our country.") (statement of Rep. Green); see also Nancy E. McGlen & Karen O'Connor, *Women's Rights: The Struggle for Equality in the Nineteenth and Twentieth Centuries* 175 (1983) (noting that the Civil Rights Act was "largely geared to alleviating racial discrimination").

31. See *Williams v. Saxbe*, 413 F. Supp. 654, 658 (D.D.C. 1976) (noting the "ample evidence that Congress' intent was not to limit the scope and effect of Title VII, but rather, to have it broadly construed"); see also *Quick v. Donaldson Co.*, No. 95-3387,



members of a given class, rather than only those who are traditionally victims of discrimination. As with racial discrimination, this has been construed to apply to any member of the protected class rather than just those who are traditionally victims of discrimination, e.g., men as well as women, and Catholics as well as Jews.<sup>32</sup> Thus, the statute prohibits any employment practices motivated by the employee's or applicant's membership in a protected class, regardless of which race, sex, religion, or national origin is involved.<sup>33</sup>

This part discusses the political background of Title VII leading up to the statute's enactment. In particular, this part traces the role of the women's movement in the inclusion of "sex" in Title VII, and the subsequent development of the provision into a powerful tool for women against sex discrimination in the workplace.

### A. *The Political Background of Title VII: The Women's Movement*

The political background of Title VII and the role of the women's movement in the development of Title VII doctrine shaped and directed the protection afforded to victims of sexual harassment under the statute. As noted above, however, some individuals fall outside of Title VII's scope. Nevertheless, Title VII's development into a powerful tool against sex discrimination demonstrates the potential for a statutory remedy to effectively address sexual harassment as a whole in the workplace. At the same time, Title VII's history emphasizes the need to fashion the federal legislation in such a way as not to lessen Title VII's effectiveness in the realm of sex discrimination which encompasses many cases of sexual harassment.

With the civil rights movement in the African-American community during the 1960s came a "renewed struggle" for women's equality.<sup>34</sup> Recognizing the pervasive discrimination against them, women campaigned for the presidency of John F. Kennedy, with the hope that he

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1996 WL 420381, at \*5 (8th Cir. July 29, 1996) (stating that "Congress intended to define discrimination in the broadest possible terms"); 110 Cong. Rec. 6548 (1964) ("Title VII is designed to give Negroes and other minority members a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America.") (statement of Rep. Humphrey); 110 Cong. Rec. 2583 (1964) ("Let us recognize that there are many minorities in this country. . . . For their opportunity, we seek to secure these rights under this bill . . .") (statement of Rep. Kelly).

32. *E.g.*, *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996) ("While Congress' particular focus in amending Title VII to prohibit discrimination on the basis of 'sex' was to ensure equal employment rights for women, the Supreme Court has interpreted the Act's broad language to protect both men and women.").

33. Thus, the policy of Title VII, as stated in section 701(a), reads:

The Congress hereby declares that the opportunity for employment without discrimination of the types described in sections 704 and 705 is a right of all persons within the jurisdiction of the United States, and that it is the national policy to protect the right of the individual to be free from such discrimination.

110 Cong. Rec. 6548 (1964).

34. Sara M. Evans, *Born for Liberty: A History of Women in America* 273 (1989).

would work to further women's rights.<sup>35</sup> After his election, President Kennedy created the President's Commission on the Status of Women ("CSW") on December 14, 1961.<sup>36</sup> The CSW's mandate "was to analyze and recommend changes to end the 'prejudices and outmoded customs that act as a barrier to full realization of women's basic rights.'"<sup>37</sup> The Commission was chaired by Eleanor Roosevelt and led to the creation of state commissions as well, thus establishing a communications network that fostered awareness both of women's pervasive secondary status and the need to take ameliorative action.<sup>38</sup>

The first major legislative victory for women arising out of this renewed feminist movement<sup>39</sup> was the Equal Pay Act of

35. See McGlen & O'Connor, *supra* note 30, at 169.

36. See *id.*; Evans, *supra* note 34, at 274. Kennedy's establishment of the CSW was partially an effort to appease women voters who felt that Kennedy failed to fulfill his promise of promoting the equality of women. See McGlen & O'Connor, *supra* note 30, at 169 (asserting that Kennedy created the Commission on the Status of Women to appease "outraged" female supporters when only two out of Kennedy's 240 appointees were women); Women's Rights in the United States: A Documentary History 279 (Winston E. Langley & Vivian C. Fox eds., 1994) [hereinafter Documentary History] (noting that the Commission on the Status of Women served other purposes, such as "giving greater satisfaction to women, an important political constituency"). In addition, Kennedy was hoping possibly to quiet the struggle for the Equal Rights Amendment. See Documentary History, *supra*, at 279 ("Equally important, the Kennedy administration hoped that the commission would help it deal tactfully with the politically controversial issue of the proposed Equal Rights Amendment to the Constitution."); McGlen & O'Connor, *supra* note 30, at 169 (noting that some believed that the Commission on the Status of Women was created partially in an effort "to get the 'administration off the hook on the equal rights amendment question'" (quoting Mary A. Baker et al., Women Today: A Multidisciplinary Approach to Women's Studies 24 (1980))).

37. McGlen & O'Connor, *supra* note 30, at 169 (quoting Executive Order 10980 (Dec. 14, 1961)). Rather than advocating special protections for women, the CSW believed that "equality of rights under the law for all persons, male or female [was] so basic to democracy . . . that it must be reflected in the fundamental law of the land." Evans, *supra* note 34, at 274 (quoting the CSW's report). Accordingly, the CSW, as Kennedy had hoped, opposed the Equal Rights Amendment, instead asserting that women already had protection under the Fifth and Fourteenth Amendments to the Constitution. *Id.*

38. McGlen & O'Connor, *supra* note 30, at 28, 169. These commissions "laid the groundwork for the future movement" in three ways:

- (1) it brought together many knowledgeable, politically active women who otherwise would not have worked together around matters of direct concern to women;
- (2) the investigations unearthed ample evidence of women's unequal status, especially their legal and economic difficulties, in the process convincing many previously uninterested women that something should be done;
- (3) the reports created a climate of expectations that something would be done.

Jo Freeman, The Politics of Women's Liberation: A Case Study of an Emerging Social Movement and Its Relation to the Policy Process 52 (1975); see also McGlen & O'Connor, *supra* note 30, at 28 (recognizing that reports of federal and state commissions "documented, often for the first time, the extent of discrimination against women").

39. The women's movement began in the 1800s with the campaign for suffrage, protesting "discrimination that legally subordinated women to men and made a mock-

1963<sup>40</sup> which was recommended by the CSW.<sup>41</sup> The women's movement was active in the passage of the Equal Pay Act, and provided Congress with extensive information documenting the extent and the severity of discrimination against women in the United States.<sup>42</sup>

### B. *Passage of Title VII*

The feminist movement's role in obtaining rights for women specifically under Title VII is unclear. Despite the active participation of women's organizations in the enactment of the Equal Pay Act,<sup>43</sup> as a whole, feminist groups were noticeably absent from the proceedings regarding Title VII.<sup>44</sup> Although the severe unequal treatment of women was well known, there seemed to be less noticeable outward support specifically for the inclusion of "sex" in Title VII.<sup>45</sup>

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ery of the nation's claim to be a community of equals." Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 *Yale L.J.* 2175, 2175 (1993). Although activity in the women's movement has occasionally surged on particular issues, e.g., suffrage, the Civil Rights Act, abortion, etc., the feminist movement has been a continuum that "took shape in the middle of the nineteenth century and continues as a transformative force today." *Id.* at 2175. This continuous effort to achieve equality eventually led to the inclusion of sex in Title VII, and a recognition of the extent of women's subordination to men.

40. 29 U.S.C. § 206(d)(1) (1994). The Equal Pay Act makes it unlawful to pay women less than men for equal work and reads, in pertinent part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

*Id.* The Equal Pay Act was enforced by the Department of Labor ("DOL"), which was empowered to bring suits to enforce the act. McGlen & O'Connor, *supra* note 30, at 170. Because women could bring complaints anonymously, many complaints were filed and then acted upon by the DOL. *Id.* As a result, the DOL collected over 100 million dollars in back pay awards in the first ten years of the act's existence, mostly for female employees. *Id.* at 170-71.

41. See Documentary History, *supra* note 36, at 279; Evans, *supra* note 34, at 275.

42. See Caruthers G. Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 *Val. U. L. Rev.* 326, 330 (1971).

43. See *supra* text accompanying note 42.

44. See McGlen & O'Connor, *supra* note 30, at 176 ("Unlike the large number of women's groups that had testified in favor of the Equal Pay Act, that action was missing [in support of Title VII]."). *But see infra* text accompanying notes 51-53 (presenting one commentator's view of the women's movement as the motivating factor for Congress's inclusion of sex within Title VII).

45. See McGlen & O'Connor, *supra* note 30, at 175 ("While Commission on the Status of Women members recognized that employment discrimination was rampant, no specific call was made by the commission for an antidiscrimination provision."). *But see* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. Pa. L. Rev.* 1, 23 (1995) (noting that when the Civil Rights Act of 1964 was introduced without protection for women, "[t]he National Women's Party and other supporters of the ERA began a campaign to have sex included in the bill").

In fact, the term "sex" was not added to the bill until the day before its passage.<sup>46</sup> Additionally, the motives of Representative Howard Smith, a Southern congressman, in introducing the amendment have been questioned. Judges and commentators have concluded that Smith, "an ardent segregationist"<sup>47</sup> who opposed the Civil Rights Bill as a whole, suggested the inclusion of "sex" within Title VII in order to demonstrate the absurdity of the bill, divide supporters, and thereby assure the bill's defeat.<sup>48</sup> These commentators have insisted that the amendment was proposed as a "joke,"<sup>49</sup> and that the women's movement had little to do with the passage of the provision.<sup>50</sup>

Nonetheless, at least one commentator has argued that the extensive work of the women's organizations is the sole reason for the inclusion of sex in Title VII.<sup>51</sup> Caruthers Berger asserts that the information revealed to Congress during the legislative hearings for the Equal Pay Act "was influential in convincing Congress of the need for the sex discrimination provision of Title VII."<sup>52</sup> Thus, Berger dismisses the lack of legislative debate and history about the amendment because the proceedings surrounding the Equal Pay Act revealed the status of women and made the "exploitation of women in employment . . . a well known fact in American life."<sup>53</sup>

46. 110 Cong. Rec. 2577-84 (1964).

47. Evans, *supra* note 34, at 276.

48. *Id.*; Freeman, *supra* note 38, at 53; McGlen & O'Connor, *supra* note 30, at 175; see *infra* note 49 and accompanying text.

49. Freeman, *supra* note 38, at 53; see *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984) (stating that the amendment was intended as a "joke"), *aff'd*, 805 F.2d 611 (1986), *cert. denied*, 481 U.S. 1041 (1987); Paul, *supra* note 19, at 339 n.24 and accompanying text; Michelle R. Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. Rev. 1071, 1076 & nn.39-43 (1989).

The record of the proceedings supports this view and undermines claims that Smith was genuine in his proposal. When introducing the amendment, Smith read part of a letter that he received from a woman in order "to illustrate that women have some real grievances and some real rights to be protected." 110 Cong. Rec. 2577 (1964). The letter noted an imbalance in the male and female population, and lamented that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct . . . Up until now, instead of assisting these poor unfortunate females in obtaining their "right" to happiness, the Government has on several occasions engaged in wars which killed off a large number of eligible males, creating an "imbalance" in our male and female population that was even worse than before.

*Id.* Although this may have been read in an attempt to highlight, in Smith's view, the absurdity of the bill, it hardly reflects a deep commitment to women's equality.

50. Freeman, *supra* note 38, at 53 n.24 (noting that Representative Martha Griffiths "told [Freeman] in 1969 that the [National Women's Party] did not have a great influence on congress [sic]"); McGlen & O'Connor, *supra* note 30, at 176 ("The enactment of [Title VII] is interesting because *no* organized women's group spoke in its behalf, although Griffiths and other female representatives lined up solidly behind its passage.").

51. Berger, *supra* note 42, at 330-38.

52. *Id.* at 330.

53. *Id.* at 330-31.

More likely, it was a combination of these scenarios that inspired the proposal and inclusion of sex within Title VII.<sup>54</sup> To focus solely on Smith's alternative motives for proposing the amendment ignores the continuous struggle for women's equality beginning with the suffrage movement, continuing with the Equal Rights Amendment movement, and leading up to the Civil Rights Act.

Regardless of Smith's intentions in introducing the amendment, the congresswomen avidly argued for its inclusion and the bill was passed in its entirety.<sup>55</sup> Even if women's organizations were not vocal with respect to Title VII, these groups nonetheless enlightened Congress about the discrimination of women and fully supported equal rights, in some form, for women.<sup>56</sup> Thus, despite the last minute inclusion of sex within Title VII, the amendment reflects a long advocacy by feminist groups for the equal rights of women.<sup>57</sup>

### C. *Protection for Women Under Title VII: Another Struggle for the Women's Movement*

Despite the controversy over the inclusion of sex within Title VII, the EEOC, the agency created to enforce Title VII, initially rendered the provision virtually meaningless. Immediately after the passage of the Act, the EEOC itself "still considered the inclusion of sex a bit of a joke."<sup>58</sup> The EEOC was completely ineffective in its enforcement of the act, and thus, despite the fight for women's equality, the inclusion

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54. See Evans, *supra* note 34, at 276 (positing that "[a]s a long-time supporter of the ERA [Smith] offered the amendment seriously, but as an ardent segregationist he probably also hoped it would help to kill the bill"); Franke, *supra* note 45, at 23 ("For Smith, it was a win/win strategy: either the sex amendment would defeat the Civil Rights Act—a regulation of private business which he opposed—or it would amount to the passage of the ERA—a measure that he had always supported.").

55. Franke, *supra* note 45, at 23-24. (noting that after Smith proposed the amendment, "all but one of the women members of the House spoke in favor of the amendment"); Freeman, *supra* note 38, at 54 (recognizing the "determined leadership of the congresswomen" that led to the passage of the act, despite the disagreement over the inclusion of sex).

56. See Evans, *supra* note 34, at 276 (noting that the feminist movement and recent victory of the Equal Pay Act "set the stage for debate on the 1964 Civil Rights Act").

57. See Franke, *supra* note 45, at 15 (stating that the rights women possess under the Equal Protection Clause and Title VII "reflect[ ] the results of a political and legal compromise struck by leaders in the women's community and in Congress after years of bitter debate about both what it means to be a woman and what it means to treat women fairly").

58. Evans, *supra* note 34, at 276; see also Freeman, *supra* note 38, at 54 (quoting the statement of the EEOC's first executive director that the provision was a "'fluke' that was 'conceived out of wedlock'"); McGlen & O'Connor, *supra* note 30, at 176 ("From the beginning, EEOC officials refused to take the sex-discrimination provision seriously, noting its lack of legislative history and the mirth that it inspired when it reached the floor."). Thus, Title VII differed significantly from the Equal Pay Act, which the DOL enforced actively and successfully, and which gave real meaning to the protection of women from discriminatory pay practices.

of sex in Title VII was "aborted by the very agency set up to administer it."<sup>59</sup> Alarmed by the failure of the EEOC to give effect to the provisions of Title VII, women united and formed the National Organization for Women ("NOW") and took a more active and visible role in the development of Title VII.<sup>60</sup> NOW exerted extensive pressure on the EEOC to enforce Title VII and to hold hearings in order to promulgate regulations regarding discrimination based on sex under Title VII.<sup>61</sup>

The EEOC finally enacted such regulations in 1972.<sup>62</sup> Since then, the EEOC has taken a more active role in the enforcement of Title VII,<sup>63</sup> rendering Title VII a more accessible and legitimate means of protection for women.

## II. SEXUAL HARASSMENT AS SEX DISCRIMINATION

This part illustrates the effect of Title VII's complicated history on the scope of protection from sexual harassment under the statute. Specifically, this part discusses the courts' initial skepticism of women's rights, and the resulting narrow construction of "sex." In addition this part notes the development of the "but-for" requirement that courts used to determine whether there was discrimination based on sex. This part also discusses the culmination of the feminist movement's emphasis on the secondary status of women—Catharine MacKinnon's expansive "inequality" approach to sexual harassment. The acceptance of MacKinnon's categorization of sexual harassment as a form of sex discrimination provided broader protection for victims of discrimination and more fully recognized women's unequal status.

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59. Freeman, *supra* note 38, at 54; *see also* McGlen & O'Connor, *supra* note 30, at 176 (noting the EEOC's "totally inadequate" enforcement of Title VII).

60. Evans, *supra* note 34, at 277-78; Freeman, *supra* note 38, at 55.

61. Evans, *supra* note 34, at 277-78 (listing among NOW's activities "continuous pressure on the EEOC to enforce Title VII"); McGlen & O'Connor, *supra* note 30, at 176 (noting NOW's pressure on the EEOC throughout 1966 to hold hearings in order to issue regulations). In May 1967, the EEOC held the hearings. McGlen & O'Connor, *supra* note 30, at 176.

62. 29 C.F.R. § 1604 (1995).

63. *See infra* note 129 (outlining the EEOC's role in Title VII actions). In addition, Congress enacted the Equal Employment Opportunity Act in 1972, which enabled the EEOC to bring suits against discriminatory employers. Congress also passed Title IX of the Civil Rights Act of 1972, which prohibited discrimination against women in educational programs receiving federal funds. 20 U.S.C. § 1681 (1994). Together, these legislative victories give substance to women's rights. Title IX ensures that women will be trained and qualified for jobs, which, under Title VII, more women will be able to pursue. Finally, under the Equal Pay Act, women can receive equal compensation for these jobs. Most recently, Congress enacted the Civil Rights Act of 1991, providing for compensatory and punitive damages in Title VII actions, thereby demonstrating a full-fledged commitment to women's equality. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

### A. *The Definition of "Sex" Under Title VII*

Integral to Title VII analysis is the definition of "sex." In the absence of legislative history regarding the provision, courts have debated the meaning of "sex"<sup>64</sup> and generally have construed the term consistently with the plain meaning of the word.<sup>65</sup> Therefore, courts have held sex "to mean either 'man' or 'woman,'" thus "bar[ring] workplace harassment against women because they are women and against men because they are men."<sup>66</sup> Under this narrow definition, sex "encompass[es] only gender rather than any characteristic relating to sexuality or sexual behavior."<sup>67</sup> Thus, courts have focused on a traditional notion of sex, rather than any broader conceptions involving sexual orientation or sexual affiliations.

In addition, courts have used the terms "sex" and "gender" interchangeably in Title VII analysis.<sup>68</sup> Although gender has been defined to include cultural and societal classifications of masculine and feminine rather than just biological classifications of "man" and "woman," courts generally ignore this more expansive definition of gender, and instead construe it to mean sex.<sup>69</sup>

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64. See *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996) (en banc) ("Since Title VII's enactment, the meaning of the term 'sex' as used in the Act has become the subject of judicial and academic debate.").

65. See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (noting that "[i]t is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning"), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (stating that in the "absence of clear congressional intent," terms must be given their plain meaning); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (interpreting "sex" in light of its plain meaning).

66. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996); *accord Ulane*, 742 F.2d at 1085 (finding that the plain meaning of "sex" proscribes discrimination "against women because they are women and against men because they are men"); *Doe v. United States Postal Serv.*, 37 Fair Empl. Prac. Cas. (BNA) 1867, 1868 (D.D.C. 1985) (concluding that there is no indication that "sex" includes "anything other than the biological male or female sexes").

67. Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 *Vt. L. Rev.* 55, 58 (1995).

68. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (using "gender" to determine that sex-stereotyping violates Title VII); *Vandevanter v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1181 n.1 (N.D. Ind. 1995) ("Sex" [under Title VII] means gender, not behavior or affection"); *Pritchett v. Sizeler Real Estate Management Co.*, Civ. A. No. 93-2351, 1995 WL 241855, at \*2 (E.D. La. Apr. 25, 1995) (using "gender" and "gender discrimination" when discussing the viability of same-sex sexual harassment under Title VII).

69. See *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996) (stating that "courts, speaking in the context of Title VII, have used the term [sic] 'sex' and 'gender' interchangeably to refer simply to the fact that an employee is male or female"). *But see J.E.B. v. Alabama*, 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting) (distinguishing between "sex" and "gender" and noting that "'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes"); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) ("The term 'sex' . . . is not synonymous with 'gender.'"). In differentiating between the two terms, the *Dobre*

The Supreme Court expanded this narrow definition of sex in *Price Waterhouse v. Hopkins*<sup>70</sup> by determining that sex-stereotyping violated Title VII.<sup>71</sup> In *Price Waterhouse*, the plaintiff was denied partnership, despite an impressive record, due to what certain partners described as a "macho" attitude that "overcompensated for being a woman."<sup>72</sup> In addition, the plaintiff was told that in order to increase her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>73</sup> In determining that *Price Waterhouse* violated Title VII, the Supreme Court stated:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

. . . .

. . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.<sup>74</sup>

Thus, in *Price Waterhouse*, the Court extended Title VII's protection against sex-based discrimination to include stereotypical notions of behavioral characteristics associated with being a man or a woman.

The judiciary, however, has limited this holding to stereotypes that relate to male or female characteristics, such as aggressiveness or passivity, that affect employment decisions, and have refused to consider these stereotypes as they relate to sexual orientation.<sup>75</sup> Therefore, courts interpret the Supreme Court's holding in *Price Waterhouse* as prohibiting stereotypes that relate to an individual's sex, i.e., male or female, but not an individual's sexuality.<sup>76</sup> Accordingly, courts have rejected arguments asserting that Title VII prohibits discrimination on

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court noted that "[t]he term 'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term 'gender' refers to an individual's sexual identity." *Dobre*, 850 F. Supp. at 286.

70. 490 U.S. 228 (1989).

71. *Id.* at 250-52.

72. *Id.* at 235.

73. *Id.* (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

74. *Id.* at 250-51.

75. See *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at \*9-10 (6th Cir. Jan. 15, 1992).

76. See *supra* note 6 (defining sexuality as a combination of gender and sexual behavior).



the basis of sexual orientation or preference<sup>77</sup> because such discrimination is based on gender stereotypes.<sup>78</sup>

Courts have also emphasized that Congress intended to remedy the inequality between men and women through the provision regarding sex discrimination.<sup>79</sup> Thus, in light of Congress's refusals to extend the protection of Title VII beyond the narrow definition of sex,<sup>80</sup> courts have refused to make such an extension as well.<sup>81</sup>

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77. See, e.g., Marcossou, *supra* note 17, at 25 (arguing that harassment based on sexual orientation violates Title VII because it is "based upon the ultimate stereotype of proper sexual roles"); Sandra Levitsky, Note, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 Minn. L. Rev. 1013, 1034, 1038-44 (1996) (advocating a dominance analysis that focuses on whether the harassment "perpetuated gender stereotypes" and stigmatized victims for "demonstrating real or perceived characteristics of a subordinate sex"); Miranda Oshige, Note, *What's Sex Got to Do with It?*, 47 Stan. L. Rev. 565, 567 (1995) (asserting that plaintiffs should only have to demonstrate that they were subjected to disparate treatment that was because of sex, and which perpetuated "invidious stereotypes about women"); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction*, 32 Cal. W. L. Rev. 87, 124 (1995) (asserting that courts utilizing the "but-for" requirement "should take into consideration other aspects of gender, such as gender stereotypes, especially those concerning appropriate sexual conduct").

78. See, e.g., *Dillon*, 1992 WL 5436, at \*10 (noting that the plaintiff was not placed in the "intolerable and impermissible Catch-22" requiring him to display certain traits to keep his job, while at the same time losing his job for displaying those traits (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989))).

79. See *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996) (stating that Congress's "particular focus in amending Title VII to prohibit discrimination on the basis of 'sex' was to ensure equal employment rights for women"); *Somers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (noting that the "major thrust of the 'sex' amendment was towards providing equal opportunities for women"); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) ("[T]he clear intent of the 1972 legislation was to remedy the economic deprivation of women as a class.").

80. All legislative attempts to broaden the scope of Title VII have failed. See H.R. 709, 100th Cong., 1st Sess. (1987); H.R. 1454, 97th Cong., 2d Sess. (1982); H.R. 2074, 96th Cong., 2d Sess. (1980); H.R. 8269, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 5452, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975); H.R. 166, 94th Cong., 1st Sess. (1975). In addition, the Employment Non-Discrimination Acts of 1994, see 140 Cong. Rec. E1311 (daily ed. June 23, 1994), and 1995, see 141 Cong. Rec. S8502 (daily ed. June 15, 1995), both of which prohibited discrimination based on sexual orientation, failed. Most recently, the Senate, in a 50 to 49 vote, defeated an anti-discrimination measure which would have banned discrimination based on sexual orientation in the workplace. See Eric Schmitt, *Senators Reject Gay Marriage Bill and Job Bias Ban*, N.Y. Times, Sept. 11, 1996, at A1. Even if the measure had passed, the bill "faced stiff opposition in the House [of Representatives]." *Id.*

81. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (citing Congress's rejection of an extension of Title VII to include protection for sexual orientation as a reason for giving "sex" a traditional, narrow meaning), *cert. denied*, 471 U.S. 1017 (1985); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (same); *Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (1978) (same). Accordingly, courts have found

### B. The "But-For" Requirement Under Title VII

In addition to construing "sex" narrowly, courts have found that in order to state a claim, a victim must show that he or she was discriminated against because of his or her sex. This requirement has been termed the "but-for" requirement—the victim's sex must be a "but-for" cause of the discrimination in order to state a claim under Title VII.<sup>82</sup> When read in conjunction with courts' interpretation of sex, plaintiffs must show that they were harassed because they are men or women.

Consistent with this strict "but-for" approach, courts initially were skeptical of sexual harassment claims.<sup>83</sup> In *Corne v. Bausch & Lomb, Inc.*,<sup>84</sup> the court stated that "there is nothing in [Title VII] which could reasonably be construed to have it apply to 'verbal and physical sexual advances' by another employee, even though he be in a supervisory capacity where such complained of acts or conduct had no relationship to the nature of the employment."<sup>85</sup> Because sexual harassment was aimed at an individual rather than a group, and dealt with "personal urge[s]" and "proclivit[ies],"<sup>86</sup> sex was considered to be merely incidental to the harassment.<sup>87</sup> Consequently, the victim was deemed not to have been harassed because of her sex, and she could not state a claim under Title VII.<sup>88</sup> Instead, courts limited Title VII sex discrimination claims to cases involving disparate treatment<sup>89</sup> and dispa-

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that Title VII does not prohibit discrimination based on sexual orientation, transsexualism, or sexual affiliations. *See infra* part III.D.

82. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (noting that a plaintiff must show that but for her sex, she would not have been harassed in order to state a claim of hostile work environment sexual harassment); 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, 737-38 (1994) (noting that gender must be a "but-for" cause of the victim's harassment to be actionable under Title VII).

83. *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974); *see also* Paul, *supra* note 19, at 338 (noting that the "early cases almost unanimously said that sexual harassment fell outside practices proscribed by the Civil Rights Act"); Peirce, *supra* note 49, at 1080 & n.72 (stating that courts' unwillingness to allow claims of sexual harassment under Title VII "stemmed from a view that sexual harassment is a personal attack, not a gender issue").

84. 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

85. 390 F. Supp. at 163.

86. *Id.*

87. *Id.*; *see also* Peirce, *supra* note 49, at 1073 (discussing the courts' refusal to extend Title VII's protection to sexual harassment because "gender was incidental to the sexual advance or attack").

88. 390 F. Supp. at 163.

89. Disparate treatment requires proof of intentional discrimination and is the basis for quid pro quo and hostile work environment sexual harassment claims. *See* Paul, *supra* note 19, at 337. Disparate treatment could include, for example, a policy or

rate impact.<sup>90</sup> Under both of these theories, the “but-for” requirement works to establish discrimination against a protected class such as women.

### C. *The “Inequality” Approach to Sexual Harassment*

In 1979, Catharine MacKinnon published her well-known book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*.<sup>91</sup> MacKinnon begins her book with the following statement:

Intimate violation of women by men is sufficiently pervasive in American society as to be nearly invisible. Contained by internalized and structural forms of power, it has been nearly inaudible. Conjoined with men’s control over women’s material survival, as in

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practice of excluding women, regardless of their qualifications, from certain jobs where sex is not a bona fide occupational qualification. See Calleros, *supra* note 67, at 58-59; see also, e.g., *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1223-24 (9th Cir. 1971) (finding that an employment practice that excluded women because they were not considered “physically or biologically suited for such work” distinguished between employees on the basis of sex when sex was not a bona fide occupational qualification); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235-36 (5th Cir. 1969) (holding that sex was not a bona fide occupational qualification for a job simply because the job required heavy lifting, and therefore, the employer violated Title VII by refusing to give the job to a female employee).

Under a disparate treatment theory, a plaintiff must establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff meets this standard, the burden then shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” *Id.* Finally, even if the employer articulates a nondiscriminatory reason for the decision, the plaintiff may establish that the reason proffered is a pretext for discrimination. *Id.* at 804-05. The exact proof required under this framework varies on a case-by-case basis. *Id.* at 802 n.13.

90. Disparate impact cases involve employer practices or regulations which appear facially neutral, but in fact disproportionately disadvantage protected groups. See Calleros, *supra* note 67, at 58-59. For example, an employer might require a minimum height or weight requirement for a job which is set at such a level that it excludes only a small percentage of males, but a large percentage of females. Unless there is a legitimate job-related necessity for the requirement, it violates Title VII. See *id.* at 59 nn.20-24 and accompanying text; see also, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329-31 (1977) (finding that a height and weight requirement for correctional counselors that resulted in an exclusion of 33.29% of women and only 1.28% of men on the basis of height, and 22.29% of women and 2.35% of men on the basis of weight, had a discriminatory impact on women); *Blake v. Los Angeles*, 595 F.2d 1367, 1376 (9th Cir. 1979) (holding that a policy “maintain[ing] sex-segregated job classifications that barred all women from police patrol work and prohibited women from being promoted above the level of sergeant,” violated Title VII because there was no evidence that such a policy “was necessary to the safe and efficient operation” of the police department), *cert. denied*, 446 U.S. 928 (1980).

Disparate impact analysis involves a three-part inquiry. *Dothard*, 433 U.S. at 329. First, a plaintiff must show that “facially neutral standards” used for the selection of applicants result in a discriminatory hiring pattern. *Id.* Once established, the employer may demonstrate that the standards used have “a manifest relationship to the employment in question.” *Id.* (quoting *Griggs v. Duke Power Co.*, 411 U.S. 424, 432 (1971)). Even if the requirement is job related, the plaintiff may still show that other, nondiscriminatory hiring devices could be employed. *Id.*

91. MacKinnon, *supra* note 6.

the home or on the job, or over women's learning and educational advancement in school, it has become institutionalized. Women employed in the paid labor force, typically hired "as women," dependent upon their income and lacking job alternatives, are particularly vulnerable to intimate violation in the form of sexual abuse at work.<sup>92</sup>

MacKinnon defines sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another."<sup>93</sup>

MacKinnon's theory highlights the distinction between the "differences" approach and the "inequality" approach.<sup>94</sup> The differences approach that courts utilize in discrimination cases rests on the premise that similarly situated individuals should be treated equally.<sup>95</sup> Thus, the differences approach does not prohibit all distinctions between the sexes, but instead, only prohibits distinctions that are "inaccurate or overgeneralized,"<sup>96</sup> and focuses only on those distinctions that are "irrationally grounded upon a sex difference."<sup>97</sup>

In contrast, the inequality approach recognizes that "sex discrimination is a system that defines women as inferior from men, that cumulatively disadvantages women for their differences from men, as well as ignores their similarities."<sup>98</sup> Because women have been subordinated to men socially and defined as women by their sexuality, they are in fact discriminated against because of sex when they are sexually harassed.<sup>99</sup> The inequality approach centers on the second class status of women as a group, and the powerful hierarchy in the workplace that keeps women subordinate to men.<sup>100</sup> Thus, MacKinnon argues that sexual harassment is a form of sex discrimination: "Women are sexually harassed *because they are women*, in the full social meaning of the term. Sexual harassment is a clear social manifestation of male privilege incarnated in the male sex role that supports coercive sexuality reinforced by male power over the job."<sup>101</sup>

MacKinnon's theory of sexual harassment as sex discrimination was revolutionary and it radically altered the case law regarding sexual harassment.<sup>102</sup> MacKinnon is credited with creating the distinction

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92. *Id.* at 1 (footnotes omitted).

93. *Id.*

94. *Id.* at 4.

95. *Id.* at 107.

96. *Id.* at 101.

97. *Id.* at 101-02.

98. *Id.* at 116.

99. *See id.* at 182 ("Sexual harassment is discrimination 'based on sex' in the inequality approach because women are socially defined largely in sexual terms.").

100. *Id.* at 102.

101. *Id.* at 191-92.

102. *See* Jeffrey Minson, Questions of Conduct: Sexual Harassment, Citizenship, Government 70 (1993) (noting that MacKinnon's role in the development of sexual

between quid pro quo<sup>103</sup> and hostile work environment<sup>104</sup> sexual harassment that was later adopted by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*<sup>105</sup> and added a tremendous amount of protection for women under Title VII.

Courts have accepted MacKinnon's paradigm of sexual harassment as sex discrimination<sup>106</sup> and have recognized the pervasive subordination of women in the workplace.<sup>107</sup> The "but-for" requirement is met

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harassment is "exemplary" and that her theories have "helped to shape legal judgments [sic] both in the US and abroad"); Holly B. Fechner, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts*, 23 U. Mich. J.L. Ref. 475, 481 (1990) (describing Sexual Harassment of Working Women as a "major conceptual breakthrough in feminist theory"). Even though MacKinnon's book was not published until 1979, drafts of the book were circulated as early as 1975, a "critical year" for sexual harassment case law. Minson, *supra*, at 70.

103. Quid pro quo harassment involves the conditioning of job benefits on the submission to sexual advances. *Barnes v. Costle*, 561 F.2d 983, 989-90 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (finding that a supervisor's retaliation for an employee's rejection of his sexual advances constituted sex discrimination and that such conduct creates "an artificial barrier to employment which was placed before one gender and not the other"); see *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59, 62 (2d Cir. 1992). A quid pro quo claim requires the denial of an economic benefit either because of sex or because the plaintiff rejected a supervisor's sexual advance. *Id.* In the case of quid pro quo harassment, the "but-for" requirement conveniently is considered fulfilled because courts assume that a male solicits sexual favors from the victim because she is a woman and would not similarly solicit men. *Barnes*, 561 F.2d at 990; see also Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 Geo. L.J. 1, 34 & n.129 (1992) (noting that "in order to maximize his chances of 'success,'" a harasser will target someone of the opposite sex; thus, a heterosexual male will target females, while a homosexual male will target men).

104. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (holding that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment"); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.").

Hostile work environments were first recognized as a form of discrimination in the context of racial harassment in *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("[E]mployment discrimination . . . [is] no longer confined to bread and butter issues. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and . . . Title VII was aimed at the eradication of such noxious practices."), *cert. denied*, 406 U.S. 957 (1972). Essentially, a plaintiff must establish five elements to maintain a claim of hostile work environment sexual harassment: (1) membership in a protected class, (2) unwelcome sexual conduct, (3) the harassment would not have occurred but for his or her sex, (4) the harassment was sufficiently severe or pervasive to affect "term, condition, or privilege" of employment, (5) respondeat superior. *Henson*, 682 F.2d at 903-05.

105. 477 U.S. 57 (1986); see Fechner, *supra* note 102, at 483 (noting that MacKinnon developed the two distinct theories of sexual harassment).

106. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 681 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Henson*, 682 F.2d at 908 n.18; *Bundy v. Jackson*, 641 F.2d 934, 945-46 (D.C. Cir. 1981).

107. Numerous commentators and studies have noted the widespread discrimination and harassment of women in the workplace. See Paul, *supra* note 19, at 333 ("In

in these cases, because, as MacKinnon emphasized, women were defined in sexual terms,<sup>108</sup> therefore, when women were sexually harassed, they unquestionably were harassed because of sex.

Since the acceptance of sexual harassment as a form of sex discrimination, courts have recognized that Title VII also includes claims of "reverse harassment" where a female harasses a male,<sup>109</sup> and cases of sexual favoritism where the work environment generally requires "submission to sexual demands on the part of women [as] a condition to tangible employment benefits."<sup>110</sup> In each of these cases, members of one sex are treated differently than members of the other sex and thus are discriminated against because of their sex.

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the 1970s and 80s, women entered the workplace in ever increasing numbers, and the women's movement raised the issue of women's putative subjection to men with ever greater vehemence."); see also Center for Women Policy Studies, *Harassment and Discrimination of Women in Employment 1* (1981) ("All women who work must do so with the expectation that they are likely to experience harassment at some time in their working lives. Many women experience it on a daily basis as part of the standard work environment."); Kerry Segrave, *The Sexual Harassment of Women in the Workplace, 1600 to 1993*, at 200-03 (1994) (citing two studies of sexual harassment in the federal government workplace conducted by the Merit Systems Protection Board, each of which showed that 42% of the female respondents experienced some form of sexual harassment); B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. Rev. 1, 2 n.3 (1993) (providing statistics indicating the pervasive sexual harassment of women in the workplace).

108. See *supra* note 99 and accompanying text.

109. See *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (noting that female-male harassment presents the same "legal problem" as male-female harassment).

110. *Dirksen v. City of Springfield*, 842 F. Supp. 1117, 1122 (C.D. Ill. 1994) (finding "gender" based discrimination where employees were required to grant sexual favors for professional advancement); see *King v. Palmer*, 778 F.2d 878, 882 (D.C. Cir. 1985) (finding that an employee who was passed over for a promotion due to a fellow employee's sexual relationship with the supervisor established a claim of discrimination); *Broderick v. Ruder*, 685 F. Supp. 1269, 1277 (D.D.C. 1988) ("Title VII is . . . violated when an employer affords preferential treatment to female employees who submit to sexual advances or other conduct of a sexual nature and such conduct is a matter of common knowledge."); *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (defining sexual favoritism as "preferential treatment to female employees who submit to [an employer's] sexual advances or other conduct of a sexual nature, or when [an employer's] conduct or statements, impl[y] that job benefits will be conditioned on an employee's good natured endurance of his sexually-charged conduct or sexual advances" (citing *Toscano v. Nimmo*, 570 F. Supp. 1197 (D. Del. 1983)). These cases are limited, however, to those in which tolerance of sexual behavior in exchange for job benefits is a generally known condition in the workplace. Title VII does not encompass cases involving a single instance of favoritism where a supervisor prefers his paramour over other employees. *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986). In *DeCintio*, a supervisor created a position with special requirements that only his paramour could fill, to the exclusion of several male employees. *Id.* The court determined that the passed-over employees were not discriminated against based on sex because a female employee would have been in the same position—the supervisor would consider no one for the position other than his paramour. *Id.*

### III. ADDITIONAL FORMS OF SEXUAL HARASSMENT

The judiciary's definition of sex and its "but-for" analysis determine whether Title VII affords protection for other forms of sexual harassment. This part outlines the effect of the "but-for" requirement in the emerging area of same-sex sexual harassment and the resulting split among the courts in their treatment of same-sex sexual harassment cases. Furthermore, this part discusses forms of harassment that, although abusive, fall outside of Title VII's proscription on sex discrimination due to the "but-for" requirement and/or a narrow construction of "sex."

#### A. Same-Sex Sexual Harassment

Since the early 1980s, there has been a stream of cases alleging same-sex sexual harassment.<sup>111</sup> Courts are divided as to whether harassment by a member of the same sex is discrimination based on sex within the meaning of Title VII.<sup>112</sup> Oddly, courts on both sides of the issue have relied, at least in part, on the "but-for" requirement in their decisions.<sup>113</sup>

##### 1. Same-Sex Sexual Harassment Violates Title VII as Discrimination Based on Sex

Many courts have recognized a cause of action for victims of same-sex sexual harassment,<sup>114</sup> utilizing a "but-for" analysis of the claims to

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111. See Megan P. Norris & Mark A. Randon, *Sexual Orientation and the Workplace: Recent Developments in Discrimination and Harassment Law*, 19 Employee Rel. L.J. 233, 234 (1993) ("[T]he number of workplace lawsuits involving sexual orientation has increased significantly in recent years."). Norris and Randon note that generally two types of cases arise—either same-sex sexual harassment by a homosexual harasser, or harassment of a homosexual or bisexual because of sexual orientation. *Id.*

112. See *infra* notes 114, 137.

113. See *infra* notes 115-16, 151-60 and accompanying text.

114. See, e.g., *Sardinia v. Dellwood Foods, Inc.*, 69 Fair Empl. Prac. Cas. (BNA) 705, 708 (S.D.N.Y. 1995) (recognizing same-sex discrimination as actionable under Title VII); *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335, 337 (E.D. Va. 1995) (same); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1380 (C.D. Cal. 1995) (holding that quid pro quo same-sex sexual harassment claims are not precluded as a matter of law under Title VII); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1100 (M.D. Tenn. 1995) (same); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983) ("[U]nwelcomed homosexual harassment . . . states a violation of Title VII."), *aff'd*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Servs.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981) (allowing a claim of same-sex sexual harassment). *But see* *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) ("[A] claim does not lie where both the alleged harassers and the victim are heterosexuals of the same sex."); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (finding that harassment of a male by another male does not constitute gender discrimination) (relying on *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) ("Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones.")); *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 793 (N.D. Ind. 1994) ("[S]ame-sex sexual harassment is not actionable under Title VII.").

determine that there was discrimination based on sex.<sup>115</sup> If the victim can show that the harasser did not treat members of the opposite sex the same way, then the victim was harassed because of his or her sex and has a cause of action under Title VII. As a result of this approach, same-sex sexual harassment cases often turn on the sexual orientation of the harasser.<sup>116</sup> If the harasser is homosexual, the plaintiff can fulfill the "but-for" requirement and state a claim under Title VII because a homosexual male presumably would not direct sexual advances at a woman.

In *Tanner v. Prima Donna Resorts, Inc.*,<sup>117</sup> however, the court rejected the view that the harasser must be homosexual in order to state a same-sex sexual harassment claim.<sup>118</sup> Instead, the court held that

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115. See *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996) ("[T]he determinative question is . . . whether the sexual harassment would have occurred *but for* the gender of victim."); *Walden Book*, 885 F. Supp. at 1102-03 ("[I]t is obvious that sexual harassment by a homosexual supervisor of the same sex is exaction of a condition of employment which, but for his or her sex, an employee would not have faced."); *McCoy v. Johnson Controls World Servs.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) (holding that the plaintiff could meet the "based upon sex" requirement by proving that her female harasser did not treat males in the same manner (quoting *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982))); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550-51 (M.D. Ala. 1995) (stating that "[w]hen a homosexual man propositions or harasses a male subordinate, but does not similarly proposition or harass female workers, the male employee has been singled out because of his gender"); *Pritchett v. Sizeler Real Estate Management Co.*, 67 Fair Empl. Prac. Cas. (BNA) 1377, 1379 (E.D. La. 1995) ("Same gender harassment is clearly a form of gender discrimination because 'but for' the gender of the subordinate, she would not have been subjected to the harassment.").

116. See *McWilliams*, 72 F.3d at 1195 n.4 (holding that, although a hostile environment sexual harassment claim fails when both the harasser and the victim are heterosexuals of the same-sex, the homosexuality of either might "make the claim nevertheless cognizable as one of 'discrimination because of [the victim's] sex'" (alteration in original)); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1502 (E.D. Va. 1996) (holding that if the plaintiff can show by a preponderance of the evidence that the harasser solicited sexual acts from the victim, the jury may infer that the harassment was because of sex); *Joyner*, 597 F. Supp. at 541 (referring to same-sex sexual harassment as "homosexual harassment"); *Wehren*, *supra* note 77, at 99 (noting that "when courts applied the 'but-for' test in the context of same-gender sexual harassment, the actual or perceived sexual orientation of the harasser . . . dictated the result"). *But see infra* notes 117-22 and accompanying text (discussing cases that recognize same-sex sexual harassment regardless of the sexual orientation of the harasser).

117. 919 F. Supp. 351 (D. Nev. 1996).

118. *Id.* at 356; see also *Marciano v. Kash n' Karry Foodstores, Inc.*, No. 94-1657CIV-T-17A, 1996 WL 420879, at \*3 (M.D. Fla. July 1, 1996) (describing sexual preference and sexual orientation as "incidental occurrences" to a hostile work environment determination); *Johnson v. Community Nursing Servs.*, No. Civ. 95CV1116G, 1996 WL 376875, at \*3 (D. Utah May 28, 1996) (noting that the sexual orientation of the harasser is irrelevant under Title VII); *Williams*, 916 F. Supp. at 7 (stating that because "Title VII makes no distinction based upon sexual orientation," the harasser's sexual orientation is not determinative); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 806-07 (N.D. Ind. 1995) ("[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. There may or may not be homosexual aspects to such harassment. There may



"[a]s long as a plaintiff can prove he or she was harassed because of his or her sex, the sexual preference of the parties is irrelevant to whether a claim is stated."<sup>119</sup> Similarly, in *Waag v. Thomas Pontiac, Buick, GMC, Inc.*,<sup>120</sup> the court found no reason to "distinguish 'unwelcome' heterosexual advances from 'unwelcome' homosexual advances."<sup>121</sup> In each case, the harassment would not have occurred but for the victim's gender.<sup>122</sup>

In addition to the "but-for" analysis, courts also rely on several other theories in recognizing claims of same-sex sexual harassment. Based on the non-exclusive language of Title VII, courts have held that the text of the statute does not support the exclusion of same-sex sexual harassment claims; had Congress intended to exclude same-gender sexual harassment from the protection of the statute, they eas-

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or may not be hatred of one's own gender involved." (footnote omitted)); *Sardinia*, 69 Fair Empl. Prac. Cas. (BNA) at 710 (adopting the reasoning of *Blozis*). In *Sardinia*, a male supervisor grabbed the plaintiff's genitals and buttocks and referred to him as "babe" and "faggot." *Id.* at 706. Because the plaintiff alleged that the supervisor only harassed males, *id.*, the court denied the defendant's motion to dismiss, thereby "implicitly endors[ing] the proposition that, under Title VII, an individual can target a member of his or her own gender for harassment and discrimination without being sexually attracted to the victim." Jay W. Waks & SaraJane Steinberg, *Courts Now Find Same-Sex Harassment to Be Actionable, But They Vary on the Relevance of a Defendant's Sexual Orientation*, Nat'l L.J., Jan. 8, 1996, at B4, B6.

119. *Tanner*, 919 F. Supp. at 356.

120. 930 F. Supp. 393 (D. Minn. 1996).

121. *Id.* at 401.

122. *Id.* Courts rejecting the requirement that the harasser must be homosexual for same-sex sexual harassment to be actionable reach the correct result in that they avoid the anomalous result of some victims of same-sex harassment receiving protection while others do not. As a practical matter, though, it may be difficult to show that a heterosexual harasser is harassing a member of the same sex because of his or her sex. Therefore, it is likely that a victim of same-sex sexual harassment would attempt to show that his or her harasser is a homosexual in order to clearly establish harassment based on sex. Thus, despite these courts' more liberal approach, it may have little effect in the end because, out of necessity, sexual orientation may still play a large role in sexual harassment cases.

This point illustrates the difficulty of separating sexuality from claims of sexual harassment. Classic cases of male-female harassment are premised on, among other things, the fact that men would not direct the offensive conduct at members of the same sex because they are attracted to women. Sexuality and sexual orientation form the basis of the rationale. Thus, the courts' summary conclusion that same-sex sexual harassment can exist regardless of the sexual orientation of the harasser tends to refute an underlying premise of sexual harassment, and offers little guidance as to how a plaintiff can fulfill the "but-for" requirement without referring to the sexual orientation of his or her harasser. Sexuality, and thus, sexual orientation, are integral factors in sexual harassment analysis. As a result, Title VII should include protection from discrimination based on sexual orientation. In the absence of an amendment, however, sexual harassment legislation would be the ideal mechanism for protecting those victims who fall outside of Title VII's protective ambit. *See infra* part IV (proposing sexual harassment legislation that prohibits sexual harassment regardless of the sexes or sexual orientations of the parties).

ily could have done so in the language of the statute.<sup>123</sup> Rather than prohibiting discrimination by a “member of the opposite sex,” however, Congress chose simply to use “the unmodified word ‘sex’ when referring to the discrimination that is forbidden.”<sup>124</sup>

Furthermore, courts have pointed to the Supreme Court’s use of gender-neutral language when deciding sexual harassment cases.<sup>125</sup> In *Meritor Savings Bank, FSB v. Vinson*,<sup>126</sup> the Court used the gender-neutral terms “supervisor” and “subordinate” rather than sex-specific terms in deciding a case of male-female sexual harassment.<sup>127</sup> Thus, lower courts have noted that the Supreme Court’s use of gender-neutral terms in *Meritor* reflects Title VII’s protection of all persons, regardless of sex or sexual preference, from discrimination based on sex.<sup>128</sup>

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123. See *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335, 337 (E.D. Va. 1995) (stating that the “literal language” of Title VII supports the view that same-sex sexual harassment is cognizable); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (allowing a claim of same-sex sexual harassment because, among other things, Congress did not indicate through the language of the statute that same-sex harassment was excluded); see also Trish K. Murphy, Comment, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 Wash. L. Rev. 1125, 1137 (1995) (arguing that because “Title VII lacks gender-based limitations,” the focus of sexual harassment analysis should be on the discriminatory and unwelcome nature of the conduct rather than on the harasser’s sexual orientation).

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

125. See *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355-56 (D. Nev. 1996); *Ecklund*, 905 F. Supp. at 338; *Sardinia v. Dellwood Foods, Inc.*, 69 Fair Empl. Prac. Cas. (BNA) 705, 709 (S.D.N.Y. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995); *McCoy v. Johnson Controls World Servs.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995).

126. 477 U.S. 57 (1986).

127. *Id.* at 70.

128. *Tanner*, 919 F. Supp. at 355-56; *Ecklund*, 905 F. Supp. at 338; *Sardinia*, 69 Fair Empl. Prac. Cas. (BNA) at 709.

Courts have further relied on the EEOC<sup>129</sup> Compliance Manual<sup>130</sup> to support the view that same-sex sexual harassment is included in Title VII.<sup>131</sup> The Compliance Manual states:

The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex . . . and the harasser does not treat employees of the opposite sex the same way.<sup>132</sup>

According to the Guidelines, as long as the harassment is based on sex, the same sex of the parties does not render Title VII inapplicable.

Furthermore, these courts have rejected the view that Title VII exists solely for the protection of members of discrete and vulnerable

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129. The EEOC is the administrative agency that enforces Title VII. *See* 42 U.S.C. §§ 2000e-4 to -12 (1994) (establishing the EEOC and enumerating the Commission's various powers and duties). In addition to promulgating guidelines which aid in the interpretation of the statute, the EEOC plays an integral role in the procedural aspects of bringing a Title VII claim. Pursuant to 42 U.S.C. § 2000e-5, an individual must file a charge regarding an alleged unlawful employment practice with the EEOC. 42 U.S.C. § 2000e-5(e)(1). The Commission then must serve a written notice of charge on the employer and conduct an investigation. *Id.* § 2000e-5(b). After such an investigation, if the EEOC determines there is reasonable cause for the charge, the Commission must attempt to resolve the unlawful employment practice through conferences with the employer. *Id.* If the Commission cannot obtain an acceptable conciliation agreement from the respondent, the EEOC may bring a civil action against any respondent that is not a government, governmental agency, or political subdivision. *Id.* at § 2000e-5(f)(1). If, however, the EEOC dismisses a charge, or fails either to procure a conciliation agreement or to file a civil action, the Commission shall notify the aggrieved individual. *Id.* Thereafter, the individual, or any other person aggrieved by the alleged employment practice, may receive a right to sue letter from the EEOC and pursue a civil action against the employer. *Id.*

Despite the EEOC's extensive role in Title VII actions, the EEOC Guidelines are not binding on the courts. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (noting that the Guidelines are not "controlling upon the courts" (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976))). The Guidelines, however, are viewed as persuasive authority, and accordingly are given considerable weight. *Id.* ("[The Guidelines] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (citing *General Elec.*, 429 U.S. at 141-42)); *see also Ecklund*, 905 F. Supp. at 338 (noting that "[s]everal district courts throughout the country have found the EEOC's interpretation of Title VII to be persuasive").

130. The EEOC issues the Compliance Manual (the "Manual") as a "reference source for use by the [Equal Opportunity Specialists] and attorneys to familiarize themselves with the positions that the Commission and the courts have taken on various issues arising under [*inter alia*] Title VII." EEOC Compl. Man. (BNA) § 601.1. The Manual provides information regarding EEOC investigations and procedure, and discusses issues with respect to Commission Decision Precedent. *See id.* §§ 602-605. The Manual also addresses policy issues with which investigators may have to grapple and provides guidance regarding the investigation of those issues. *See id.* §§ 604-605.

131. *See Ecklund*, 905 F. Supp. at 337-38; *Sardinia*, 1995 WL 640502, at \*6; *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995).

132. EEOC Compl. Man. (BNA) § 615.2(b)(3).

groups from discrimination by those in dominant and more powerful groups.<sup>133</sup> In arriving at such a conclusion, courts have compared sexual harassment to racial harassment and concluded that “[i]t would be untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII.”<sup>134</sup> In addition, the requirement of an “anti-male” or “anti-female” environment is not an element of Title VII jurisprudence.<sup>135</sup> Therefore, plaintiffs in Title VII sexual harassment cases need not be members of the minority group and be harassed by a member of the dominant group in the workplace.<sup>136</sup> Instead, they simply need to show that they were harassed because of their sex.

## 2. Same-Sex Sexual Harassment Does Not Constitute Discrimination Based on Sex Under Title VII

Despite various courts' inclusion of same-sex sexual harassment under Title VII, several courts have held that Title VII simply does not protect against same-sex sexual harassment.<sup>137</sup> Primarily, these courts reasoned that the environment must be a discriminatory one—an anti-male or anti-female environment—in order for there to be protection under Title VII.<sup>138</sup> Therefore, a male in a male-dominated

133. See *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996) (noting that “Title VII creates an individual claim which is ripe before the work environment has been poisoned for all workers of one sex or the other,” and therefore rejecting a requirement that the plaintiff prove an anti-male environment); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (rejecting the argument that a male in a male-dominated workplace cannot state a claim of sexual harassment because such an environment cannot be discriminatory). *But see Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994) (“Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a ‘dominant’ gender.”); *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (“In fact, [the plaintiff] may have been harassed ‘because’ he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace.”).

134. *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995); see *Sardinia*, 1995 WL 640502, at \*5-6 (noting the anomaly of allowing a claim of reverse racial harassment, but barring a claim of same-sex harassment); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1379 (C.D. Cal. 1995) (same); *Prescott*, 878 F. Supp. at 1550 (indicating that the requirement of an anti-male environment is “not the current state of anti-discrimination jurisprudence” because a similar argument could be made in cases where a white plaintiff sues for reverse discrimination under Title VII) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) (“Title VII . . . proscribe[s] racial discrimination . . . against whites on the same terms as racial discrimination against nonwhites . . .”)).

135. See *Sardinia*, 1995 WL 640502, at \*4-5.

136. See, e.g., *id.* (stating that a requirement of an imbalance and abuse of power is contradictory to the Supreme Court's holding in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

137. See *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994); *Martin v. Norfolk S. Ry.*, 926 F. Supp. 1044, 1050 (N.D. Ala. 1996); *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995); *Vandeventer*, 867 F. Supp. at 796; *Polly v. Houston Lighting & Power Co.*, 803 F. Supp. 1, 6 (S.D. Tex. 1992).

138. *Vandeventer*, 867 F. Supp. at 796; *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

workplace cannot state a claim of sexual harassment if the conduct does not create an anti-male environment.<sup>139</sup> For example, in *Goluszek v. Smith*,<sup>140</sup> the court stated that Title VII prohibited discrimination "stemming from an imbalance of power and abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."<sup>141</sup> As a result, the plaintiff must prove not only that he was harassed because of his sex, but that males were treated as inferior in order to establish a claim under Title VII.<sup>142</sup>

In *Garcia v. Elf Atochem North America*,<sup>143</sup> the Fifth Circuit barred all same-sex sexual harassment claims.<sup>144</sup> In *Garcia*, the court summarily stated: "[H]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination."<sup>145</sup> Therefore, the court found that the alleged behavior could not constitute sexual harassment within the meaning of Title VII.<sup>146</sup>

Bound by the *Garcia* decision, the Fifth Circuit recently upheld a district court's grant of summary judgment in favor of the employer where the plaintiff was subjected to a continuous stream of egregious and abusive harassment by two fellow employees.<sup>147</sup> The court indicated that under Title VII, as long as the plaintiff demonstrates that the harassment occurred because of the victim's sex, the respective genders of the parties are irrelevant.<sup>148</sup> Nevertheless, because the court could not overrule a prior panel's decision,<sup>149</sup> the court upheld summary judgment for the employer.<sup>150</sup>

Some courts also have used a "but-for" analysis to reject claims of same-sex sexual harassment.<sup>151</sup> In *McWilliams v. Fairfax County*

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139. *Vandevanter*, 867 F. Supp. at 796; *Goluszek*, 697 F. Supp. at 1456.

140. 697 F. Supp. 1452 (N.D. Ill. 1988).

141. *Id.* at 1456.

142. *Id.*; see also *Polly v. Houston Lighting & Power Co.*, 803 F. Supp. 1, 6 (S.D. Tex. 1992) (relying on the *Goluszek* court's rationale to deny a claim of same-sex sexual harassment).

143. 28 F.3d 446 (5th Cir. 1994).

144. *Id.* at 451-52.

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

146. *Id.*

147. *Oncale v. Sundowner Offshore Servs.*, 83 F.3d 118 (5th Cir. 1996). In *Oncale*, the plaintiff's harassment included being restrained physically while a coworker put his penis on the plaintiff, having a bar of soap forced into his anus while he was showering, and being threatened with homosexual rape. *Id.* at 118-19.

148. *Id.* at 120.

149. In the Fifth Circuit, a panel cannot "overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superceding decision by the [c]ourt *en banc* or the Supreme Court." *Id.* (citing *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991)).

150. *Id.* at 119-21.

151. See, e.g., *Martin v. Norfolk S. Ry.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996) (noting that in same-sex hostile work environment cases, "the facts . . . do not provide any assurance that the alleged conduct occurred because of the employee's gender";

*Board of Supervisors*,<sup>152</sup> the court held that Title VII does not prohibit sexual harassment when the harasser and the victim are heterosexuals of the same sex.<sup>153</sup> In *McWilliams*, coworkers teased the plaintiff about his sexual activities, exposed themselves to him, and placed a condom in his food.<sup>154</sup> On at least three occasions, the plaintiff's hands were tied together and he was blindfolded and forced to his knees, and once, a coworker put his finger in the plaintiff's mouth to simulate an oral sex act.<sup>155</sup> In addition, two coworkers placed a broomstick to the plaintiff's anus while another exposed his genitals to the plaintiff.<sup>156</sup> On one occasion, a coworker fondled the plaintiff while he was working.<sup>157</sup> Despite the egregious nature of the conduct, the court found that because the harasser and the victim were heterosexuals of the same sex, there was no protection under Title VII.<sup>158</sup>

The court went on to say in a footnote, however, that if either of the involved parties were homosexual, a recognizable claim for discrimination based on sex could be stated.<sup>159</sup> As a result, in these cases, the "but-for" requirement establishes an additional element for a prima facie case of sexual harassment, i.e., in order to state a claim, a plaintiff must show that either he or she, or the harasser, is homosexual.<sup>160</sup>

This judicial divergence regarding same-sex sexual harassment has left some victims of sexual harassment without protection under Title VII. Plaintiffs who are subjected to similar conduct have conditional access to remedies; their relief depends on the district in which they are located. Furthermore, such reasoning treats victims of same-sex sexual harassment differently than victims of opposite-sex sexual harassment. Egregious, abusive behavior that clearly would constitute sexual harassment if the harasser and the victim were of the opposite

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therefore, "the presumption of sexual gratification and thus, sex discrimination, ceases to exist"); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1175 (D. Nev. 1995) (finding that "[a] work environment, saturated with sexual references, is potentially abusive or hostile to men and women in equal measure" and therefore is not discriminatory on the basis of gender).

152. 72 F.3d 1191 (4th Cir. 1996).

153. *Id.* at 1195.

154. *Id.* at 1193.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1195.

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

160. *See Gibson v. Tanks, Inc.*, 930 F. Supp. 1107, 1109 (M.D.N.C. 1996) (following *McWilliams*, and thus concluding that the defendant was entitled to judgment as a matter of law because there was no allegation or evidence that either party was homosexual); *see also Wehren, supra* note 77, at 122 (noting that the "but-for" requirement "allows courts to interject the sexual orientation of the victim or the harasser to determine whether a same-gender claim is actionable").

sex might be left unactionable merely because of the parties' same sex.<sup>161</sup>

### B. Bisexual Harassment

Although courts disagree with respect to same-sex sexual harassment, all of the courts that, in dicta, have addressed the issue, have indicated that sexual harassment by a bisexual<sup>162</sup> is not actionable under Title VII.<sup>163</sup> Again, these courts have relied on a "but-for"

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161. *Martin v. Norfolk S. Ry.*, 926 F. Supp. 1044 (N.D. Ala. 1996), provides another example of this anomalous result. The plaintiff in *Martin* alleged twenty-two separate acts that, together, formed a course of harassment. *Id.* at 1046-47. The most egregious of these instances include having coworkers repeatedly grab at or swat the plaintiff's genitals, being bent over by a co-worker while another one tried to stick a broom handle into his anus, and being pinched. *Id.*

Clearly, if *Martin* and *McWilliams* had fit into the classic model of male-female sexual harassment, such conduct would constitute hostile work environment sexual harassment. In each case, however, the plaintiff was left without a remedy because his harasser was of the same sex.

In cases such as these that involve unwanted physical contact, the plaintiffs certainly have causes of action in tort for assault and battery, and possibly for intentional infliction of emotional distress. These torts, however, fail to address the full implications of sexual harassment in the workplace. *See infra* note 229 and accompanying text (commenting on the inadequacy of a tort remedy for sexual harassment claims).

162. To date, there have been no reported cases involving a bisexual harasser who harassed both men and women. Nevertheless, the hypothetical bisexual harasser illustrates another form of harassment that would be left unprotected under Title VII. Bisexual harassment further demonstrates the need for sexual harassment legislation that would protect victims of sexual harassment that does not constitute sex discrimination, but is nonetheless offensive sexual conduct that unreasonably alters the work environment.

The importance of the hypothetical bisexual harasser is borne out by experience. For example, prior to 1981, there were no same-sex harassment or equal opportunity harassment cases. Since *Wright v. Methodist Youth Servs.*, 511 F. Supp. 307 (N.D. Ill. 1981), however, there have been a number of cases involving same-sex sexual harassment, *see supra* note 114, and as recently as 1993, the hypothetical equal opportunity harasser became a reality in *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993). *See supra* part III.A; *infra* part III.C. Before *Chiapuzio*, the equal opportunity harasser was just as much of a theoretical construct for analysis as the bisexual harasser is today. *See Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (reasoning that where the alleged conduct is equally offensive to both men and women, the "harassment would not be based upon sex because men and women are accorded like treatment"); *see also Johnson, supra* note 82, at 742 n.85 (noting that the bisexual harasser is a "hypothetical construct" that courts use in analyzing Title VII sexual harassment cases). Therefore, it is possible that, in the future, there will be claims of sexual harassment involving a bisexual harasser. Without an amendment to Title VII or the enactment of federal sexual harassment legislation, those potential victims' only recourse would be to quit their jobs or to accept their harasser's conduct passively.

163. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting), *aff'd sub nom, Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Henson*, 682 F.2d at 904; *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *McCoy v. Johnson Controls World Servs.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1551 n.6 (M.D. Ala. 1995); *cf. Tietgen v.*

analysis to determine that when both men and women are being harassed, none are singled out because of their gender.<sup>164</sup>

In *Barnes v. Costle*,<sup>165</sup> the D.C. Circuit stated that a woman whose job was conditioned upon submission to sexual advances was in fact discriminated against as a result of sex, because, but for her sex, the supervisor would not have sexually solicited her.<sup>166</sup> The court went on to recognize that this condition was not altered in the case of female-male harassment or homosexual same-sex harassment because, in each case, the harassment would still result from the victim's gender.<sup>167</sup> In the case of a bisexual harasser who solicits both men and women in exchange for job-related benefits, however, "the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."<sup>168</sup>

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Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1501 n.10 (E.D. Va. 1996) (reasoning that Title VII precludes protection from bisexual harassment "if one assumes that a bisexual chooses whom to solicit for sex according to some criteria other than gender" and noting that "this assumption may be false"); *Chiapuzio*, 826 F. Supp. at 1337 (differentiating between equal opportunity harassment which is prohibited under Title VII and bisexual harassment which is not).

164. See *Rabidue*, 805 F.2d at 620 ("[I]nstances 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."); *Vinson*, 760 F.2d at 1333 n.7 (Bork, J., dissenting) ("[T]his court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible."); *Henson*, 682 F.2d at 904 ("In [bisexual harassment] cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment. . . . [Therefore] the plaintiff would have no remedy under Title VII."); *Bundy*, 641 F.2d at 942 n.7 ("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."); *Barnes*, 561 F.2d at 990 n.55 ("In the case of a bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."); *McCoy*, 878 F. Supp. at 232 ("[S]exual harassment of any kind is in fact 'based upon sex' and is considered sexual discrimination, except where the harasser is *bisexual* and subjects men and women to the same treatment . . ."); *Prescott*, 878 F. Supp. at 1551 n.6 ("Interestingly, if a supervisor, male or female, created a hostile environment for all of the employees, this would not technically violate Title VII. There would be harassment, but it would not be based on gender."); see also *Johnson*, *supra* note 82, at 734 ("[S]exual advances made toward men and women alike are not sexual harassment but-for a person's gender and, therefore, are not within the purview of Title VII's proscriptions."); *Wehren*, *supra* note 77, at 121 ("[S]ame-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."); cf. *Chiapuzio*, 826 F. Supp. at 1337 ("Where a harasser violates both men and women, 'it is not unthinkable to argue that each individual who is harassed is being treated badly because of their sex.'" (quoting John J. Donahue, *Review Essay: Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 Stan. L. Rev. 1583, 1611 n.134 (1992))).

165. 561 F.2d 983 (D.C. Cir. 1977).

166. *Id.* at 990.

167. *Id.* at 990 n.55.

168. *Id.*



Almost ten years later, the Sixth Circuit in *Rabidue v. Osceola Refining Co.*,<sup>169</sup> addressed a claim of hostile work environment sexual harassment of a female employee.<sup>170</sup> In recognizing such a claim under Title VII, the court held that to sustain a hostile work environment claim, the plaintiff must demonstrate that the conduct was because of her sex.<sup>171</sup> Thus, the court noted, "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."<sup>172</sup>

The *Rabidue* court's reasoning precludes a broader range of cases under Title VII than *Barnes* and potentially leaves even more victims unprotected.<sup>173</sup> While *Barnes* states that a bisexual would not discriminate based on gender, *Rabidue* forecloses coverage of a heterosexual's harassment of both men and women—the equal opportunity harasser<sup>174</sup>—because the court considers "harassment perpetrated by any person against both men and women [to be] beyond Title VII's coverage."<sup>175</sup> Thus, under both courts' reasoning, when either a bisex-

169. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

170. *Id.*

171. *Id.* at 620.

172. *Id.*; *see also* Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1551 n.6 (M.D. Ala. 1995) (noting that if a hostile work environment offended both men and women, there would be no violation of Title VII because the harassment would not be because of gender).

173. *See* Wehren, *supra* note 77, at 101. For instance, Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wyo. 1993), in which the court held that heterosexual harassment of both men and women was actionable because of the different nature of the harassment directed at each, *see infra* part III.C, presumably would have come out differently under the reasoning in *Rabidue*. Because the conduct in *Chiapuzio*, although different in nature, was equally offensive, the men and women were "accorded like treatment." *Rabidue*, 805 F.2d at 620. Therefore, Title VII would not apply. *Id.*

174. In contrast to a bisexual harasser, an equal opportunity harasser is a heterosexual who nonetheless harasses both men and women with gender-driven conduct. *See Chiapuzio*, 826 F. Supp. at 1336-37 (noting the distinction between a bisexual harasser and an "equal opportunity harasser"); Johnson, *supra* note 82, at 733-34 ("The equal opportunity harasser makes gender-driven comments to subordinates of both sexes with an intent to demean and harm them because of their maleness or femaleness. The bisexual harasser makes unwanted sexual overtures to subordinates of both genders." (footnotes omitted)); *infra* part III.C (discussing *Chiapuzio* which recently allowed a claim of equal opportunity harassment).

175. Wehren, *supra* note 77, at 101. The more sweeping analysis in *Rabidue* most likely results from the fact that the plaintiff alleged a hostile work environment rather than a quid pro quo claim as in *Barnes*. The *Barnes* analysis rests on the assumption that someone who sexually propositions both males and females is in fact bisexual, whereas this assumption is not necessary in the case of hostile work environment sexual harassment. Conduct creating a hostile work environment may have nothing to do with sexual attraction, and therefore, a heterosexual may harass members of both genders. Other courts have recognized the distinction and excluded both from Title VII's protection. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (noting that, in cases where "a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers," there is no remedy under Title VII).

ual or a heterosexual harasses both men and women, the "harassment literally is 'nondiscriminatory.'"<sup>176</sup>

Although the bisexual harasser has yet to materialize in a Title VII sexual harassment case, the underlying rationale of bisexual harassment exposes another type of harassment that, although harmful and offensive, does not fit into the sexual harassment as sex discrimination framework. Thus, bisexual harassment illustrates another potential class of victims who would have no remedy for their sexual harassment<sup>177</sup> and the need for sexual harassment legislation. Although Title VII has proven to be a powerful tool for many victims of sexual harassment, not all forms of sexual harassment constitute sex discrimination. In these unprotected cases, however, the harassment is just as abusive and demoralizing, and warrants legislation that recognizes the harmful effects on the victims and provides the victims with a remedy.

### C. *The Equal Opportunity Harasser*

Unlike a bisexual harasser who is motivated by sexual attraction for both sexes, an "equal opportunity harasser" is a heterosexual who, irrespective of his or her sexual proclivities, engages in offensive sexual behavior towards both men and women.<sup>178</sup> The same rationale courts use to determine that bisexual harassment would not be prohibited under Title VII would seemingly preclude equal opportunity harassment claims as well because men and women would be accorded like treatment.

In *Chiapuzio v. BLT Operating Corp.*,<sup>179</sup> however, the court circumvented the "but-for" requirement and held that equal opportunity sexual harassment is within Title VII's purview.<sup>180</sup> In *Chiapuzio*, the supervisor, Eddie Bell, subjected both male and female employees, as well as one employee's non-employee wife, to a stream of sexual abuse.<sup>181</sup> Bell emphasized his sexual prowess to the men, and suggested that he "could do a better job of making love to [their wives] than [they] could."<sup>182</sup> In addition, Bell made sexually abusive remarks

176. George, *supra* note 107, at 31.

177. The possibility of a bisexual harassment case increases with the growing awareness, acceptance, and in certain states and cities, protection of sexual orientation because more individuals will feel comfortable to reveal their sexual orientation. See *infra* notes 250-51 and accompanying text (listing states that do and do not have laws prohibiting discrimination on the basis of sexual orientation). This result has already occurred in the case of same-sex sexual harassment, which prior to the 1980s was not a widely litigated form of harassment, but since has been extensively litigated and widely debated.

178. See *supra* note 174.

179. 826 F. Supp. 1334 (D. Wyo. 1993).

180. *Id.* at 1338.

181. *Id.* at 1335.

182. *Id.*

to the women, including on one occasion offering Bean's wife one hundred dollars to sit on his lap.<sup>183</sup>

The *Chiapuzio* court characterized Bell as an "equal-opportunity" harasser who used gender-driven remarks, rather than a bisexual harasser.<sup>184</sup> The court further stated that "the equal harassment of both genders does not escape the purview of Title VII."<sup>185</sup> Bell described to the females sexual acts he desired to perform with them.<sup>186</sup> He never, however, directed such descriptions to the male employees.<sup>187</sup> Instead, he made comments about his superior sexual abilities, often in front of the plaintiffs' wives and other employees.<sup>188</sup> Unlike a bisexual harasser, Bell's conduct indicated that he "intended to demean and, therefore, harm" the plaintiffs because each was male.<sup>189</sup> As a result, the court reasoned that "the nature of Bell's remarks indicate[d] that he harassed the plaintiffs because of their gender and constitute[d] exactly the type of harassment contemplated to fall within the purview of Title VII."<sup>190</sup>

In effect, the *Chiapuzio* court isolated the plaintiff's claims and found each to be based on gender.<sup>191</sup> The court conducted a comparative analysis and found that, despite the fact that all of the defendant's conduct was sexual in nature, the remarks made to the males were qualitatively different from those directed to the females.<sup>192</sup> Thus, the

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183. *Id.* For a more detailed description of the facts of *Chiapuzio*, see Johnson, *supra* note 82, at 739-40 & nn.54-72.

184. 826 F. Supp. at 1337; see *supra* note 174 (distinguishing between a bisexual harasser and an equal opportunity harasser).

185. 826 F. Supp. at 1337; see *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994). *Steiner* involved a case of male-female harassment. In discussing the female plaintiff's claim, however, the court left open the possibility of viable sexual harassment claims for both men and women:

[E]ven if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby "cure" his conduct toward women. . . . [A]lthough words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that both men and women working at Showboat have viable claims against Trenkle for sexual harassment.

*Steiner*, 25 F.3d at 1464.

Like the court in *Chiapuzio*, the *Steiner* court's analysis also focused on the different nature of the harassment directed at the women from that directed at the men. *Id.* at 1463 ("Trenkle was indeed abusive to men, but . . . his abuse of women was different."). As a result, the court determined that the plaintiff was harassed because of her gender. *Id.* at 1464.

186. *Chiapuzio*, 826 F. Supp. at 1338.

187. *Id.*

188. *Id.*

189. *Id.* at 1337.

190. *Id.* at 1338.

191. See Johnson, *supra* note 82, at 742-43 (discussing the compartmentalization of claims in *Chiapuzio*).

192. *Chiapuzio*, 826 F. Supp. at 1338.

abuse in each case was gender-driven.<sup>193</sup> As a result, the court held that the plaintiffs stated a cause of action under Title VII.<sup>194</sup>

Although this reasoning allowed a seemingly just result, its theoretical justification is unsound.<sup>195</sup> Primarily, the reasoning appears contrived to engineer a fair outcome. The *Chiapuzio* court separated the conduct aimed at the females from that directed at the males; both, however, were subjected to continuous sexually abusive comments in front of other employees.<sup>196</sup> Essentially, the court neglected to consider the workplace as a whole. Analyzing the women's claims separately from the men's claims departs from, and effectively eliminates, the traditionally strict "but-for" requirement, because such a requirement focuses on the treatment of both sexes to determine that one sex was treated differently than the other sex.<sup>197</sup> By separating the plaintiffs' claims, the court overlooks that both the men and the women were subjected to verbal sexual abuse. The distinction between what Bell said to each gender seems arbitrary; in the end, both were subjected to a similar form of harassment. In each case, the intent and the method were the same: Bell intended to demean both the men and the women, and he did so through sexual jokes and comments. Because both men and women were treated equally, albeit abusively, there is no discrimination based on sex under the judiciary's differential analysis.<sup>198</sup>

Furthermore, the separate analysis of male and female plaintiffs' claims could prove to be inadequate in certain situations. A harasser potentially could harass both men and women in a similar manner,

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193. *Id.*

194. *Id.*

195. See Johnson, *supra* note 82, at 743 (stating that the *Chiapuzio* decision rests on "unstable ground").

196. *Id.* at 746 ("By separating the plaintiffs into separate gender groups, the court declined to analyze the plaintiffs as a class. . . . [and therefore] easily concluded that Bell harassed each because of his or her gender and overlooked the more complicated issue of law, namely, that Bell harassed employees of *both* genders.").

197. *Id.* at 743. Johnson notes that the elimination of the "but-for" requirement, which results from the rationale in *Chiapuzio*, would permit plaintiffs who were harassed because of their sexual orientations to state a claim under Title VII without having to prove that the harassment was based on their gender. *Id.* at 747. Instead, such plaintiffs would simply have to show that "their harassers harassed them with gender-driven remarks characterized to harm them because they are men." *Id.* Under the current state of the law, however, it is well-established that harassment based on the victim's sexual orientation is not actionable. See *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at \*6-7 (6th Cir. Jan. 15, 1992); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979); see also EEOC Compl. Man. (BNA) § 615.2(b)(3) (stating that Title VII does not prohibit discrimination based on sexual orientation). Indeed, Congress has repeatedly refused to amend Title VII to include discrimination based on sexual orientation. See *supra* note 80. Thus, the *Chiapuzio* court's holding contradicts a well-settled and established line of case law and legislative history.

198. See *supra* note 172 and accompanying text (discussing cases that preclude a finding of discrimination based on sex when both men and women are subjected to a hostile work environment).

subjecting them to abusive remarks, simulating sexual acts, physically touching them, and even sexually propositioning each of them. Utilizing the *Chiapuzio* court's analysis would require an investigation into the harasser's motivations to determine whether the harassment was gender-driven.<sup>199</sup> The harasser's motive in each case, however, may be different—the harasser may be trying to belittle the men, while trying to get the women to submit to sexual acts with him. On an external level, however, the conduct is substantially similar in each case.<sup>200</sup> Therefore, by requiring an investigation into the harasser's motivations, inconsistent outcomes may result for harassment victims subjected to substantially similar conduct.

Finally, separating sexual harassment claims along gender lines continues to leave the situation of a bisexual harasser outside the protection of Title VII.<sup>201</sup> Because a bisexual harasser would subject both males and females to the same type of harassment and would have the same motivations for harassing both sexes, the harassment of each would not be different in nature. Therefore, the harassment would not be gender-driven. Instead, the sexual harassment of both men and women would be permissible. Thus, even where a court would allow a claim of sexual harassment by an equal opportunity harasser, the reasoning provides questionable support for future similar claims and continues to leave whole categories of sexual harassment without protection.

#### D. *Sexual Harassment Based on Sexual Orientation*

In addition, courts unanimously have held that Title VII does not include discrimination based on sexual orientation or sexual iden-

199. Despite the obvious difficulties of such an investigation with regard to time, there is also the difficulty of probing the harasser's motives. Although motivation is always an issue in Title VII actions, if a harasser knows that purely equal, non-gender-driven harassment is not prohibited, the harasser could easily tailor both his harassment, and/or his testimony regarding the harassment and his motivations, to protect himself from liability. See *supra* note 19.

200. See Murphy, *supra* note 123, at 1148-49. As Murphy notes:

[S]ituations may arise in which the nature of the harassment experienced by members of both genders is indistinguishable. . . . In such scenarios, one could not characterize the conduct as discrimination on the basis of gender. If, in fact, the nature of the harassment were indistinguishable, alternative remedies would be more appropriate.

*Id.*

201. *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (noting a "critical difference" between the equal opportunity harasser who "intend[s] to demean and, therefore, harm" the male victims, and the "theoretical bisexual harasser" who presumably does not have a discriminatory motive towards either sex because he or she is attracted to both sexes); see also Johnson, *supra* note 82, at 734 (noting that although the *Chiapuzio* court found equal opportunity harassment to be prohibited under Title VII, "the court implied that Title VII did not prohibit bisexual harassment because the harassment of both men and women was not done 'but-for' the individual's sex" (footnote omitted)).

tity.<sup>202</sup> This result is due to the judiciary's narrow interpretation of "sex," and the plaintiffs' consequential inability to fulfill the "but-for" requirement.

In *Ulane v. Eastern Airlines, Inc.*,<sup>203</sup> the Seventh Circuit held that discrimination based on transsexuality<sup>204</sup> was not prohibited under Title VII.<sup>205</sup> The *Ulane* court focused on the lack of legislative history regarding the prohibition of discrimination based on sex, and concluded that, in the absence of clear legislative direction, statutory words must be given their plain meaning.<sup>206</sup> Thus, the court held that Title VII proscribed discrimination because someone was a woman or a man, but not because someone had a "sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male."<sup>207</sup>

In addition, the *Ulane* court noted that there were several attempts to amend Title VII to include protection from discrimination based on "affectational or sexual orientation," each of which failed.<sup>208</sup> Further-

202. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) (emphasizing that Congress has refused to extend Title VII's protection to harassment based on sexual preference and concluding that Title VII only applies to discrimination based on gender); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (refusing to extend Title VII to prohibit discrimination based on sexual preference); *Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (noting that Title VII contains "[n]o mention . . . of sexual preference"), *aff'd*, 570 F.2d 354 (1978); see also Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 *Yale J.L. & Feminism* 375, 388 (1995) (commenting that neither the judiciary nor Congress is "eager to extend Title VII's protection to gay men and lesbians any time soon"); Waks & Steinberg, *supra* note 118, at B6 (recognizing the "well-established precedent that Title VII does not prohibit discrimination purely on the basis of sexual orientation or preference").

203. 742 F.2d 1081 (7th Cir. 1984).

204. The court defined transsexualism as "a condition that exists when a physiologically normal person (*i.e.*, not a hermaphrodite . . . ) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex." *Id.* at 1083 n.3. The court distinguished transsexuals from homosexuals, "who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress . . . for sexual arousal rather than social comfort; both [of which] are content with the sex into which they were born." *Id.* Recognizing the difference between transsexuals, transvestites, and homosexuals, the court concluded that the same reasoning excludes protection for all three. *Id.* at 1085.

205. *Id.* at 1084; accord *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (focusing on congressional intent and the plain meaning of sex, and thus finding that Title VII does not prohibit discrimination based on transsexuality); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977) (same); *James v. Ranch Mart Hardware, Inc.*, 66 Fair Empl. Prac. Cas. (BNA) 1338, 1339 (D. Kan. 1994) (same); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (same); *Doe v. United States Postal Serv.*, 37 Fair Empl. Prac. Cas. (BNA) 1867, 1868-69 (D.D.C. 1985) (same); *Terry v. EEOC*, 35 Fair Empl. Prac. Cas. (BNA) 1395, 1396-97 (E.D. Wis. 1980) (same); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 370-71 (D. Md. 1977) (same); *Voyles*, 403 F. Supp. at 457 (same).

206. *Ulane*, 742 F.2d at 1085.

207. *Id.*

208. *Id.*; see *Sommers*, 667 F.2d at 750 (noting that three bills proposing to amend the Civil Rights Act to prohibit discrimination on the basis of sexual preference were

more, Congress's rejection of such an extension occurred after courts had excluded protection for transsexuals.<sup>209</sup> The court also found that even though Title VII, as a remedial statute, should be construed broadly, the statute cannot be interpreted contrary to legislative intent.<sup>210</sup> Instead, only Congress can extend to transsexuals protection from discrimination based on sex.<sup>211</sup>

In *DeSantis v. Pacific Telephone & Telegraph Co.*,<sup>212</sup> the Ninth Circuit relied on *Holloway v. Arthur Andersen & Co.*<sup>213</sup> and held that "sex" as used in Title VII "should not be judicially extended to include sexual preference such as homosexuality."<sup>214</sup> Like the *Ulane* court, the *DeSantis* court focused on the lack of congressional intent indicating any interpretation other than a traditional construction of sex,<sup>215</sup> and concluded that such an interpretation did not include sexual orientation.<sup>216</sup>

Title VII by its terms does not prohibit discrimination based on sexual orientation.<sup>217</sup> In addition, courts have refused to make such an extension through a broad interpretation of sex that would include sexual orientation.<sup>218</sup> As a result, sexual orientation harassment does not fit into the paradigm of sexual harassment as sex discrimination. Short of an amendment to Title VII<sup>219</sup> to include sexual orientation,<sup>220</sup>

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presented to the 94th Congress and seven were presented to the 95th Congress, all of which were defeated).

209. *Ulane*, 742 F.2d at 1086.

210. *Id.*; see *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977). In *Holloway*, the court also noted that despite the lack of legislative intent regarding "sex" in the Civil Rights Act of 1964, the amendments in 1972 reflected the "clear intent" of Congress "to remedy the economic deprivation of women as a class. . . . [and] place women on an equal footing with men." *Id.* at 662 (citation omitted).

211. 742 F.2d at 1086.

212. 608 F.2d 327 (9th Cir. 1979).

213. 566 F.2d 659 (9th Cir. 1977).

214. 608 F.2d at 329-30.

215. *Id.* at 329.

216. *Id.* at 330.

217. See *supra* note 202 and accompanying text.

218. See *supra* note 67 and accompanying text.

219. As noted, such an amendment is unlikely, at least in the near future. See *supra* note 80 and accompanying text.

220. Carolyn Grose notes that the exclusion of protection on the basis of sexual orientation makes Title VII a "double-edged sword for lesbians and gay men [in the context of same-sex sexual harassment]: as plaintiffs, they fall outside the universe of its protection, while, as alleged harassers, they fall squarely within its universe of liability." Grose, *supra* note 202, at 393. Grose thus concludes that, unless Title VII is amended to include sexual orientation, the statute should not be used to regulate same-sex sexual harassment. *Id.* at 388. The current regulation of same-sex sexual harassment, which is not prohibited if based on sexual orientation, sends an impermissible message that

it is okay to make a workplace miserable for a dyke or a faggot, or for someone who looks or acts like a dyke or a faggot, but it is not okay to make a workplace miserable for a straight man or woman, or for someone who looks or acts like a straight man or woman.

the most effective way to address these unprotected forms of sexual harassment is to enact federal sexual harassment legislation. Because the legislation would focus on conduct rather than discrimination, the genders and sexual orientations of the parties would be irrelevant for a claim of sexual harassment.

#### IV. TITLE VII AND FEDERAL SEXUAL HARASSMENT LEGISLATION

Title VII has developed into a broad and effective tool against sex discrimination. In many cases, sexual harassment fits within the Title VII framework, protecting individuals from demeaning sexual conduct directed at them because of their sex. Other types of sexual harassment, however, such as harassment based on sexual orientation and bisexual harassment, and possibly same-sex and equal opportunity harassment, do not constitute sex discrimination. These forms of harassment, however, are nonetheless abusive and demoralizing for the victims.<sup>221</sup> This part emphasizes the need for federal sexual harassment legislation and suggests a framework that eliminates the “but-for” requirement and tracks the EEOC Guidelines on sexual harassment. In addition, this part discusses the evaluation of sexual harassment claims under Title VII and proposes an analytical framework for claims under the legislation based on a reconfiguration of Title VII standards which would address other impediments to sexual harassment claims that exist under Title VII.

##### A. *The Need for Federal Sexual Harassment Legislation*

The right to be free from sexual harassment in the workplace should not depend upon the sexual orientation of the harasser or victim, the motivation for the harassment, or differential treatment between the sexes. Under the “but-for” requirement and the current definition of “sex,” victims of sexual orientation harassment are not protected under Title VII.<sup>222</sup> In addition, victims of bisexual harassment, and possibly same-sex and equal-opportunity harassment<sup>223</sup> are

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*Id.* Thus, in the absence of an amendment to Title VII, federal sexual harassment legislation would effectively protect against sexual harassment while addressing these issues.

221. See *infra* note 224 and accompanying text (noting that same-sex and equal opportunity sexual harassment are no less harmful to the victims than opposite-sex sexual harassment).

222. See *supra* part III.D. As Samuel Marcossou notes, homosexuals are “unprotected by the law, and subject to whatever prejudices society (in forms such as sodomy laws) and individuals (in forms such as gay-bashing and harassment on the job) may decide to inflict.” Marcossou, *supra* note 103, at 38; see also *Torkildsen Promises Hearings on Measure to Ban Sexual Orientation Discrimination*, Daily Lab. Rep. (BNA) No. 54, at A-2 (Mar. 20, 1996) (“[G]ays and lesbians are the ‘last group subjected to legal discrimination on the job’ . . .” (quoting Senator Jim Jeffords)).

223. Although a claim of equal opportunity harassment has been found actionable, the court’s reasoning is unsound, and thus provides questionable support for future claims. See *supra* part III.C.



left without protection under Title VII, even though such conduct is equally offensive and interferes with the workplace as much as, if not more than, classic forms of sexual harassment.<sup>224</sup> These individuals would be forced to “run a gauntlet of sexual abuse” in exchange for the privilege of working because their harassment does not constitute discrimination based on sex.<sup>225</sup> Thus, in order to achieve full equality in the workplace, these forms of sexual harassment should be protected to the same extent as traditional types of sexual harassment.<sup>226</sup>

### B. *Inadequacy of a Tort Remedy*

More than one commentator has argued that sexual harassment should be addressed through the use of tort law as an alternative or supplement to Title VII.<sup>227</sup> In particular, at least one commentator has asserted that sexual harassment should be taken out of Title VII and that a tort of sexual harassment should be created.<sup>228</sup> Separating sexual harassment from sex discrimination, however, ignores the fact that sexual harassment often results from issues of power and domination, and is often used as a tool to emphasize and perpetuate women's secondary status in the workplace. Catharine MacKinnon has re-

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224. See, Levitsky, *supra* note 77, at 1014 (noting that “victims of equal opportunity and same-sex sexual harassment suffer no less an injury from sexual harassment than victims of opposite-sex sexual harassment”); Murphy, *supra* note 123, at 1146 (stating that “unwelcome sexual advances, ridicule, intimidation, and other harassing acts are no less injurious and degrading to someone of the harasser's same gender than they are to an individual of the opposite gender”).

225. *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

226. Carolyn Grose has commented that, without specific provisions for sexual orientation, any protection that might exist for lesbians and homosexuals under Title VII is “illusory and dangerous,” because those protections are afforded on heterosexual terms. Grose, *supra* note 202, at 397. Accordingly, Grose concludes that “[w]hether [a] statute takes the form of an expanded Title VII or a new piece of stand-alone legislation governing sexuality in the workplace, it must prohibit discrimination and harassment on the basis of sexual orientation.” *Id.* Although the proposed federal sexual harassment legislation will not specifically protect against sexual orientation discrimination, the statute removes gender and sexual orientation from the analytical framework, and thus addresses all forms of sexual harassment, including harassment based on homosexuality or sexual identity.

227. See, e.g., Terry M. Dworkin et al., *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 San Diego L. Rev. 125, 137-46 (1988) (noting that tort causes of action are “attractive” options for victims of sexual harassment despite the availability of Title VII); Jane P. Mallor, *Discriminatory Discharge and the Emerging Common Law of Wrongful Discharge*, 28 Ariz. L. Rev. 651, 655-68 (1986) (suggesting the use of common law wrongful discharge actions as a viable remedy that does not conflict with, but instead facilitates the goals of Title VII); Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 Minn. L. Rev. 151, 167 (1979) (noting that tort remedies provide “realistic alternatives” for victims of sexual harassment); Krista J. Schoenheider, Note, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. Pa. L. Rev. 1461, 1485-94 (1986) (proposing a tort of sexual harassment that focuses on “unreasonable interference with an individual employee's right to work in an environment free from sex-based intimidation or hostility,” and utilizes a reasonable woman standard to determine recovery).

228. See Paul, *supra* note 19, at part III.

jected the tort approach because it fails to recognize the injury sexual harassment causes to women as a group, and instead treats sexual harassment as a harm perpetrated against an individual.<sup>229</sup> Furthermore, the tort approach turns sexual harassment into an issue of morality<sup>230</sup> as opposed to an issue of "economic coercion, in which material survival is held hostage to sexual submission."<sup>231</sup> Because sexual harassment is "a social wrong and a social injury that occurs on a personal level," the tort approach is inadequate.<sup>232</sup>

Moreover, even if a tort of sexual harassment were used in the limited context of those cases that are outside Title VII's protection, or as an alternate cause of action, a tort remedy would still fail to adequately protect victims of sexual harassment. Primarily, a tort of sexual harassment would render sexual harassment claims unreasonably difficult to maintain. For instance, Professor Ellen Frankel Paul proposes a tort of sexual harassment modeled after the tort of intentional infliction of emotional distress.<sup>233</sup> In order to establish a hostile work environment sexual harassment claim under Paul's tort of sexual harassment, the conduct would have to be "extreme and outrageous,"

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229. MacKinnon, *supra* note 6, at 172; see also Christopher P. Barton, Note, *Between the Boss and a Hard Place: A Consideration of Meritor Savings Bank, FSB v. Vinson and the Law of Sexual Harassment*, 67 B.U. L. Rev. 445, 466 (1987) (noting that "the use of tort theory undercuts the goals of Title VII by ignoring the more pervasive problem of discrimination and instead claiming that the harm is the result of an individual act"); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1463 (1984) ("[T]ort damages alone do not acknowledge that sexual harassment injures a discrete and identifiable group by subjecting its victims to demeaning treatment and relegating them to inferior status in the workplace.").

In her discussion of the use of tort law as a remedy for sexual harassment, MacKinnon refers to traditional torts such as assault, battery, and intentional infliction of emotional distress and notes that "short of developing a new tort for sexual harassment as such, the tort approach misses the nexus between women's sexuality and women's employment." MacKinnon, *supra* note 6, at 171. A proposed tort of sexual harassment that recognizes such a nexus, however, still treats sexual harassment as an individual injury. See Paul, *supra* note 19, at 336 (proposing a tort of sexual harassment that "emanates from the 'individual-rights perspective,'" as opposed to the "'group-rights perspective' MacKinnon endorses"). As a result, even a tort specifically tailored to sexual harassment fails to address the full implications of sexual harassment in the workplace. As MacKinnon recognized, because the tort approach forces a choice between sexual harassment as an injury to the person or an injury to the job, when it is in fact both, a tort perspective "omits the social dynamics that systematically place women in these positions, that may coerce consent, that interpenetrate sexuality and employment to women's detriment because they are women." MacKinnon, *supra* note 6, at 171.

230. See *id.* at 173 (stating that "tort sees sexual harassment as an illicit act, a moral infraction, an outrage to the individual's sensibilities and the society's cherished but un-lived values").

231. *Id.* But see Minson, *supra* note 102, at 88-89 (criticizing MacKinnon's view of the tort approach for failing to view anti-discrimination legislation as "one regulatory vehicle among others" that is compatible with tort law).

232. MacKinnon, *supra* note 6, at 173.

233. See Paul *supra* note 19, at 359-63.

and the victim would have to suffer "extreme emotional distress."<sup>234</sup> In her proposal, Paul defines the terms consistently with traditional tort law, requiring that conduct be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."<sup>235</sup> Such a standard would render it almost impossible to establish an actionable claim of sexual harassment. The difficulty of meeting such a strict requirement is seen in cases where plaintiffs assert both Title VII and intentional infliction of emotional distress claims.<sup>236</sup>

In *Harley v. McCoach*,<sup>237</sup> the court noted that the Court of Appeals for the Third Circuit "has recognized that conduct in the employment context almost never gives rise to recovery under this tort theory."<sup>238</sup> Generally, the Third Circuit requires an "extra factor" to find conduct outrageous in the employment context.<sup>239</sup> Specifically, an employer must have subjected the employee to both sexual harassment and retaliation for rejecting sexual propositions.<sup>240</sup> For example, in *James v. IBM Corp.*,<sup>241</sup> the court found that the plaintiff failed to raise a factual issue regarding her intentional infliction of emotional distress claim despite her subjection to two years of joking and harassment, and being called a "bitch" on two occasions.<sup>242</sup> Thus, although the court denied summary judgment with respect to the plaintiff's Title VII claim, the court granted summary judgment to the employer with respect to intentional infliction of emotional distress.<sup>243</sup>

Furthermore, Title VII sexual harassment claims, under current judicially established parameters, are already difficult to maintain.<sup>244</sup>

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234. *Id.* at 361-63.

235. *Id.* at 361 (citing Restatement (Second) of Torts § 46 (1965)); see also Hardy v. Fleming Food Cos., No. H-94-3759, 1996 WL 145463, at \*7 (S.D. Tex. Feb. 9, 1996) (noting that severe distress is an element of the tort rather than just a matter of damages, and that "[t]he law intervenes only where the distress is so severe that no reasonable person should be expected to endure it" (citation omitted)).

236. See *Harley v. McCoach*, 928 F. Supp. 533, 542 (E.D. Pa. 1996); see also Woodhouse, *supra* note 19, at 1184 (proposing a tort of intentional infliction of emotional distress as a remedy for same-sex sexual harassment, but admitting that "the standards for a cause of action for intentional infliction of emotional distress are difficult to establish"). Although the standards for sexual harassment and intentional infliction of emotional distress are different, plaintiffs commonly assert both causes of action because the plaintiff could potentially meet both standards in egregious cases of sexual harassment, e.g., where the employer knew of the conduct and failed to take action, and the harassment resulted in the plaintiff's severe emotional distress.

237. 928 F. Supp. 533 (E.D. Pa. 1996).

238. *Id.* at 542.

239. *Id.*

240. *Id.*

241. 737 F. Supp. 1420, 1427-28 (E.D. Pa. 1990).

242. *Id.*

243. *Id.*

244. See, e.g., George, *supra* note 107, at 18 ("If proving a quid pro quo case is difficult, the legal obstacles in the hostile work environment victim's path are almost

Paul's approach, however, suggests an even heightened standard for sexual harassment claimants. "Extreme and outrageous" conduct requires more offensive conduct to establish a claim than is necessary under Title VII. As a result, the tort requirement that the victim suffer economic detriment and/or extreme emotional distress all but forecloses hostile work environment claims which, by definition, result in an unreasonably abusive work environment rather than economic detriment.<sup>245</sup> As the law stands, psychological injury is not necessary to establish a sexual harassment claim.<sup>246</sup> The standard Paul proposes would almost require "the harassing conduct to lead[ ] to a nervous breakdown" before a victim would have a valid claim of sexual harassment, a requirement which the Supreme Court clearly has rejected.<sup>247</sup> The criterion of severe emotional distress is extremely difficult to meet, and would require victims to stay in abusive and hostile environments until their psyches have been sufficiently harmed to meet such a high standard.<sup>248</sup>

Moreover, placing the regulation of sexual harassment at the state level risks unequal protection for victims of sexual harassment. States may or may not<sup>249</sup> enact sexual harassment statutes, and those that do

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insurmountable in all but the most extreme cases—and sometimes not even then."); Oshige, *supra* note 77, at 576 (arguing that the unwelcomeness requirement is "gratuitous in theory and vicious in practice" and that the severe or pervasive standard "creates a perverse safety zone in which women may be subjected to gender-based discriminatory treatment for which Title VII offers no remedy").

245. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-68 (1986) (holding that Title VII is not limited to "economic" or "tangible" discrimination," but instead includes discrimination resulting from a hostile or abusive work environment).

246. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993). Woodhouse also imposes such a requirement in her proposal: "This cause of action would . . . provide adequate compensation for those who truly are emotionally damaged by the sexual harassment . . ." Woodhouse, *supra* note 19, at 1184. Emotional damage suggests a requirement of psychological harm, again, an unnecessary element of sexual harassment.

247. *Harris*, 510 U.S. at 21-23.

248. Although this Note asserts that an alternate framework is necessary to address certain forms of sexual harassment that currently are not covered by Title VII, it does not propose a statute that requires an emotional collapse before a victim has a remedy. Paul's proposal would make it even more difficult to establish a claim of sexual harassment rather than provide even-handed coverage for those victims whose sexual harassment does not constitute sex discrimination.

249. Recent controversies over anti-gay initiatives suggest a strong likelihood that not all states will enact statutes protecting homosexuals from discrimination in the workplace. These conflicts indicate that the equal protection of all citizens, regardless of sexual orientation, lacks universal support among the states. See Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 *Fordham Urb. L.J.* 1057 (1994) (discussing the trial of *Evans v. Romer* and Colorado's constitutional amendment prohibiting laws that protected against discrimination based on sexual orientation). Although the Supreme Court, in *Romer v. Evans*, 116 S. Ct. 1620 (1996), held such actions unconstitutional as a violation of the Equal Protection Clause, *id.* at 1629, Colorado's passage of a constitutional amendment prohibiting any laws that protect homosexuals from discrimination demonstrates the existing animus against homosexuals and the dangers of leaving

may provide varying levels of protection. Causes of action would then depend on the state in which an individual works—conduct which constituted illegal harassment in one state might be completely legal in another. Disparity between available state remedies has already occurred in the context of protections against discrimination based on sexual orientation. While homosexuals presently have protection from discrimination in some states,<sup>250</sup> they do not in others.<sup>251</sup> Fur-

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protection at the state level. The Supreme Court found that Colorado's amendment "withd[r]ew from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 1625. The amendment stripped these rights in no uncertain terms:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Colo. Const. art. II, § 30b (1992).

Colorado is not the only state to have entertained such a proposal. Oregon's Measure 9, a similar action, would have additionally "declared homosexuality to be 'abnormal, wrong, unnatural and perverse.'" Goldberg, *supra*, at 1058 (quoting Timothy Egan, *Anti-Gay Backlashes Are on 3 States' Ballots*, N.Y. Times, Oct. 4, 1992, § 4, at 4). Even after the Colorado district court declared that Amendment 2 was unconstitutional, attempts were made in Arizona, Maine, Michigan, Missouri, Nevada, and Washington to place anti-gay initiatives on November, 1994 ballots. Goldberg, *supra*, at 1081 & n.146. Only two passed. *Id.* at 1081 n.146. Even where similar initiatives have failed, however, the number of voters supporting the proposals is alarming. See *Cincinnati Council Removes Sexual Orientation from Rights Law*, Daily Lab. Rep. (BNA) No. 49, at A-6 (Mar. 14, 1995) (reporting that sixty-two percent of voters in Cincinnati passed an initiative to bar laws providing protection from discrimination based on sexual orientation); *Maine Voters Block Restriction on Rights Laws*, Daily Lab. Rep. (BNA) No. 217, at A-13 (Nov. 9, 1995) (noting that an anti-gay initiative was rejected in Maine with fifty-three percent in favor of rejection and forty-seven percent against rejection); cf. *Fla. City's Discrimination Ordinance Retained*, Daily Lab. Rep. (BNA) No. 9, at A-12 (Jan. 13, 1995) (reporting that fifty-six percent of West Palm Beach voters voted to retain an ordinance prohibiting discrimination on the basis of sexual orientation). Thus, even where these actions were defeated, as much as forty-seven percent of the voters favored the initiatives. As a result, it is unlikely that all states will enact laws prohibiting sexual harassment on the basis of sexual orientation. In order to fully and equally protect homosexuals from discrimination in the workplace, such action must be taken at the federal level.

250. See Cal. Lab. Code § 1102.1(a) (West 1996) ("Sections 1101 and 1102 prohibit discrimination or different treatment in any aspect of employment or opportunity . . . based on actual or perceived sexual orientation."); Conn. Gen. Stat. Ann. § 46a-81c (West 1995) (prohibiting discrimination in employment on the basis of an individual's sexual orientation); Mass. Gen. Laws Ann. ch. 151B, § 4 (West 1996) (same); Minn. Stat. Ann. § 363.03 (West 1996) (same); N.J. Stat. Ann. § 10:5-12 (West 1993 & Supp. 1996) (same); R.I. Gen. Laws § 28-5-7 (1995) (same); Vt. Stat. Ann. tit. 21, § 495 (1995) (same); Wis. Stat. Ann. § 111.36(1)(d)(1) (West 1988) (defining employment discrimination because of sex to include discrimination because of sexual orientation).

251. See, e.g., La. Rev. Stat. Ann. § 23.1006B(1) (West 1996) (prohibiting discrimination based on race, color, religion, sex, disability, or national origin, but not sexual orientation); N.Y. Exec. Law § 296 (McKinney 1993) (proscribing discrimination in employment on the basis of "age, race, creed, color, national origin, sex, or disability,

thermore, as the court in *Rogers v. EEOC*<sup>252</sup> noted, the "relationship between an employee and his working environment is of such significance as to be entitled to statutory protection."<sup>253</sup> Thus, sexual harassment should be addressed at the federal level in order to ensure that all employees have the right to work in an environment free from abusive sexual conduct.

### C. Sexual Harassment Legislation

Federal legislation prohibiting sexual harassment should be enacted<sup>254</sup> in order to protect individuals from sexual harassment that does not constitute sex-based discrimination within the meaning of Title VII.<sup>255</sup> Although a broad statute focusing only on harassment would include harassment cases currently covered by Title VII, the legislation would simply provide an alternate theory for individuals whose claims fit under both statutes.<sup>256</sup> Those victims who do not

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or marital status," but not on the basis of sexual orientation); *see also Clinton Pledges Support for Legislation to Ban Sexual Orientation Discrimination*, Daily Lab. Rep. (BNA) No. 204, at A-1 (Oct. 23, 1995) (quoting a letter from President Clinton to Senator Edward Kennedy that noted that "discrimination on the basis of sexual orientation 'is currently legal in 41 states' . . . 'Men and women in those states may be fired from their jobs solely because of their sexual orientation . . . and have no legal recourse'").

252. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

253. *Id.* at 238.

254. The enactment of sexual harassment legislation would be within Congress's power under the Commerce Clause, which typically has included regulation of a wide spectrum of workplace behavior, ranging from workplace safety, e.g., the Occupational Safety Hazard Act, to discrimination, e.g., Title VII. *See* Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sex Harassment and the First Amendment: No Collision in Sight*, 47 Rutgers L. Rev. 461, 484 (1995) (discussing Congress's "wide powers" under the Commerce Clause to regulate forms of coercion and competition in the workplace); Dawn M. Buff, Note, *Beyond the Court's Standard Response: Creating an Effective Test for Determining Hostile Work Environment Harassment Under Title VII*, 24 Stetson L. Rev. 719, 720 n.13 (1995) (noting that Congress has the power to regulate anything affecting interstate commerce, and as a result, has the power to regulate discriminatory practices in the workplace); *see also* 110 Cong. Rec. 6548 (1964) ("The constitutional basis for title VII is, of course, the commerce clause. The courts have held time and again that the commerce clause authorizes Congress to enact legislation which affects interstate and foreign commerce.") (statement of Rep. Humphrey).

255. *See* Theodore F. Claypoole, Note, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 Ohio St. L.J. 1151, 1166-69 (1987) (concluding that legislation that regulates sexual harassment in the workplace should be enacted); Peirce, *supra* note 49, at 1100-01 (proposing that sexual harassment legislation would be the "ideal alternative").

256. A plaintiff could plead both theories, and the court could fashion an appropriate and fair, non-duplicative remedy based on the facts of the case. Thus, the overlap between the legislation and Title VII would be similar to the overlap between Title VII and §§ 1981 and 1983. *See* Headley v. Bacon, 828 F.2d 1272, 1274 (8th Cir. 1987) (noting that Title VII and §§ 1982, 1983, and 1985 "simply permit recovery for various injuries arising out of the same wrong or series of wrongs"); *see also* Leon Friedman, *Relationship Between Title VII, Section 1981, 1983, ADEA, the Equal Pay Act and State Causes of Action for Employment Discrimination*, ALL-ABA Course of Study

have protection under Title VII, however, could pursue a claim under the sexual harassment legislation.

The legislation's focus will be on the sexual behavior at issue, and the effect on the victim's workplace environment. Primarily, the legislation will avoid determinations based on the sexual orientation of the harasser through the elimination of the "but-for" requirement.<sup>257</sup> Although evaluation of sexual harassment claims under the new legislation would otherwise remain consistent with Title VII analysis, the legislation also will address obstacles that unreasonably impede the establishment of sexual harassment claims under Title VII through a reconsideration of Title VII standards.

### 1. Analysis of Hostile Work Environment Sexual Harassment Claims Under Title VII

In order to establish a claim of hostile work environment sexual harassment under Title VII, a plaintiff must prove several elements. First, a plaintiff must establish membership in a protected class, which is fulfilled with the stipulation that the plaintiff is a man or a woman.<sup>258</sup> The plaintiff must also demonstrate that the harassment would not have occurred but for his or her sex.<sup>259</sup> This requirement establishes that the harassment was in fact discriminatory, and results in the preclusion of certain forms of sexual harassment from Title VII's protection. Additionally, the plaintiff must establish that the harassment was unwelcome<sup>260</sup> and "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abu-

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Materials 539, 551-52 (1996), available in Westlaw, CA35 ALI-ABA 539 (outlining the overlap between Title VII and §§ 1981 and 1983 and noting the advantages of bringing a case on both theories).

The sexual harassment legislation would be an attractive option for plaintiffs who possess causes of action under the statute and Title VII because the plaintiffs would not have to establish discrimination based on sex. Specifically, they would not have to fulfill the "but-for" requirement that exists under Title VII. See *infra* part IV.C.2.a (proposing elimination of the "but-for" requirement under the sexual harassment legislation). In addition, unwelcomeness would be an affirmative defense for the defendant to raise and prove, rather than an element of the plaintiff's prima facie case. See *infra* notes 283-85 and accompanying text (suggesting that unwelcomeness would be an affirmative defense under the sexual harassment legislation).

257. This analysis will focus only on hostile work environment claims. The evaluation of quid pro quo claims is more straightforward, requiring only the grant of an economic benefit in exchange for submitting to a supervisor's sexual demands, or the denial of job benefits because of the refusal to submit to the sexual demands. See *supra* note 103. These requirements would remain the same under new legislation.

258. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

259. *Id.* at 903-04.

260. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" (citing 29 C.F.R. § 1604.11(a) (1985))). Such a determination is made "in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

sive working environment.’”<sup>261</sup> In addition, the work environment must be one that a reasonable person would find hostile or abusive, as well as one that the victim subjectively perceived as abusive.<sup>262</sup> Finally, in order to state a claim under Title VII, a plaintiff must establish employer liability.<sup>263</sup>

## 2. Analysis of Hostile Work Environment Sexual Harassment Claims Under Sexual Harassment Legislation

Similarly, under sexual harassment legislation, severe or pervasive sexual conduct that unreasonably alters the work environment will constitute an impermissible hostile work environment. Additionally, the standards for employer liability will remain unchanged. Thus, an employer will be liable for its own acts, as well as those of its agents or supervisory employees, regardless of the employer’s knowledge or endorsement of such acts.<sup>264</sup> When a fellow non-supervisory employee perpetrates the harassment, the employer will be responsible if the employer knew or should have known of such conduct, unless the employer took immediate and appropriate remedial steps.<sup>265</sup> In these instances, knowledge will be imputed to the employer if any of its agents or supervisory employees had knowledge of the harassment.<sup>266</sup> Furthermore, an employer may be held liable even if the harasser is a non-employee.<sup>267</sup> Employer liability will be premised on whether the employer knew or should have known of the conduct, and whether the employer took reasonable steps to end the harassment.<sup>268</sup> In this context, the extent of the employer’s control or legal responsibility over the non-employee harasser would be relevant.<sup>269</sup>

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261. *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 67). The Supreme Court further elaborated relevant factors for analysis of sexual harassment claims, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* at 23. Psychological harm of the victim is relevant to the analysis, but is neither required nor determinative. *Id.*

262. *Id.* at 21-22.

263. *Henson*, 682 F.2d at 905. Employer liability can be established by showing either that the employer provided no procedural mechanism to address complaints, *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59, 63 (2d Cir. 1992), or that the employer knew of or should have known of the harassment, but failed to take remedial steps to end the harassment. *Id.*; *Hardy v. Fleming Food Cos.*, No. Civ. A. H-94-3759, 1996 WL 145463, at \*15 (S.D. Tex. Mar. 21, 1996).

264. *See* 29 C.F.R. § 1604.11(c) (1995).

265. *See id.* § 1604.11(d).

266. *See id.*

267. *See id.* § 1604.11(e).

268. *See id.*

269. *See id.*



a. *Elimination of the "But-For" Requirement*

Federal legislation prohibiting sexual harassment should track the language of the EEOC Guidelines' section regarding sexual harassment.<sup>270</sup> By tracking the Guidelines' language, the legislation will focus on the sexual nature of the conduct, rather than on the sex of the parties or the motivation for the harassment. Thus, the legislation will prohibit harassment based on sexual orientation, as well as harassment based on any other motive.

Accordingly, the legislation will eliminate the "but-for" requirement that normally accompanies sexual harassment analysis.<sup>271</sup> As a result, a plaintiff will need to show simply that he or she was subjected to conduct of a sexual nature and that

- (1) submission to such conduct [was] 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 [was] used as the basis for employment decisions affecting such individual, or (3) such conduct [had] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.<sup>272</sup>

Sexual conduct will be defined to include "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."<sup>273</sup> In determining the validity of a claim, the emphasis will be on the sexual nature of the conduct and the resulting effect on the individual's work environment,<sup>274</sup> without regard to the sexes or sexual orientations of the parties.

b. *Reconceptualizing the Standards of Sexual Harassment Claims*

Although the standards of sexual harassment claims will remain relatively unchanged, the application of the standards should be reformulated in order to more effectively protect against sexual harassment. The reformulation will focus on removing unreasonable impediments to claims of sexual harassment. For instance, in determining whether harassment rises to the level of unreasonably interfering with the work environment, the severe or pervasive standard will continue to be used for analysis.<sup>275</sup> The severe or pervasive require-

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270. See 29 C.F.R. § 1604.11 (1995). For the relevant text of the Guidelines, see *infra* text accompanying notes 272-73.

271. See *supra* note 82 and accompanying text (discussing the "but-for" requirement as an element of Title VII sexual harassment analysis).

272. 29 C.F.R. § 1604.11(a) (1995).

273. *Id.*

274. The legislation will emphasize the effect on the work environment, not the effect on the plaintiff's emotional stability. Although a plaintiff could offer evidence of psychological harm to demonstrate the effect of the harassment, such a showing would not be required to establish a sexual harassment claim.

275. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (listing severe or pervasive harassment as an element of a Title VII claim).

ment, as currently construed, however, presents an obstacle that is unreasonably difficult for plaintiffs to overcome in all but the most extreme cases.<sup>276</sup> Thus, the interpretation of these requirements should be reexamined.

The requirement, as the Supreme Court has framed it,<sup>277</sup> suggests an inverse ratio of severity and pervasiveness—the more severe the conduct, the less pervasive it must be, and vice versa.<sup>278</sup> Seemingly trivial behavior, if regular enough, would constitute sexual harassment.<sup>279</sup> Courts have suggested this reasoning,<sup>280</sup> but such an approach has not been consistently applied in practice.<sup>281</sup> Therefore, greater consideration must be given to the severe *or* pervasive standard in the analysis of sexual harassment claims, rather than the imposition of a severe *and* pervasive requirement in order to establish a claim of sexual harassment. In addition, beyond a certain threshold level, evidence of severity or pervasiveness could be a factor in the determination of damages.<sup>282</sup>

Furthermore, under the sexual harassment legislation, the unwelcomeness requirement will be reformulated as an affirmative de-

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276. See Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 843-47 (1991) (asserting that the courts' application of an objective test that does not reflect what the plaintiff finds pervasive renders the pervasive requirement difficult to meet); George, *supra* note 107, at 20 (noting the "difficulties of establishing pervasiveness").

277. See *Meritor*, 477 U.S. at 67 (1986).

278. George, *supra* note 107, at 21 ("[T]he more offensive a remark or the greater a discrepancy in treatment, the less frequently the conduct would have to occur to be actionable. . . . Triviality alone would no longer be a defense if the behavior were regular, ongoing, and discriminatory.").

279. See *id.*

280. See, e.g., *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) ("It is not how long the . . . conduct lasts. . . . The offensiveness of the individual actions complained of is also a factor to be considered in determining whether such actions are pervasive").

281. See *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59, 62 (2d Cir. 1992) ("The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief."); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (stating that quid pro quo sexual harassment "may evolve from a single incident," whereas hostile work environment sexual harassment is "characterized by multiple and varied combinations and frequencies of offensive exposures" and requires the plaintiff to "demonstrate that the injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency"), *cert. denied*, 481 U.S. 1041 (1987); *Parrish v. Washington Nat'l Ins. Co.*, No. 89-C-4515, 1990 WL 165611, at \*3 (N.D. Ill. Oct. 16, 1990) ("Although a single act can be enough to make a case of sexual harassment, generally, repeated incidents create a stronger claim of hostile environment, with the intensity of those incidents."); see also George, *supra* note 107, at 20 & nn.108-09 (discussing the divergent results of sexual harassment claims due to the courts' disagreement as to the necessary combination of nature and severity of conduct that will constitute sexual harassment).

282. See *Oshige, supra* note 77, at 592-93 (arguing that plaintiffs should only have to prove that harassment (1) was because of gender, (2) treated men and women differently, and (3) reflected "invidious stereotypes about women," and pervasiveness should be only an element of damages).

fense rather than an element of the plaintiff's claim.<sup>283</sup> Requiring the plaintiff to prove that he or she did not welcome the advances unfairly places the focus on the victim's conduct.<sup>284</sup> The initial assumption would be that the victim did not welcome sexual conduct.<sup>285</sup> Furthermore, evidence of the plaintiff's behavior should relate directly to the cause of action. Therefore, only evidence "of specific words or gestures that reasonably encouraged or solicited *in kind* behavior" would be admissible.<sup>286</sup> General behavior of the victim, for example his or her mode of dress, would not be evidence that he or she welcomed the harasser's conduct. Instead, the defendant will have to point to conduct that was directed at or involved him or her.

Thus conceived, the legislation will prohibit harassing sexual conduct without regard to the genders or the sexual orientations of the parties. A heterosexual male who harasses a male will be held liable, as will someone who sexually harasses another because the victim is homosexual. As long as the conduct meets the requirements outlined above, it will constitute sexual harassment. The emphasis will be placed on the alleged harasser's behavior instead of on sexual preferences.<sup>287</sup> As a result, those victims who cannot establish sex discrimination under Title VII will have protection from their abusive sexual harassment. In addition, such an approach will continue to recognize that many cases of sexual harassment in fact constitute discrimination because of sex, and will not disrupt Title VII's protection of these cases.

#### CONCLUSION

Ideally, Title VII should be amended to proscribe discrimination based on sexual orientation. With such an amendment, sexual orientation harassment would be clearly prohibited, and same-sex sexual harassment could be more easily regulated. In light of the fact that such an amendment is unlikely, at least in the near future, the most effective way to protect victims of harassment who fall outside of Title VII's protection is to enact federal sexual harassment legislation. By focusing on the conduct at issue rather than on discrimination, such legislation would protect victims of sexual orientation and same-sex sexual harassment. In addition, it would protect against equal oppor-

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283. See George, *supra* note 107, at 28-30 (proposing to eliminate unwelcomeness from the plaintiff's *prima facie* case); Oshige, *supra* note 77, at 590-92 (asserting that the unwelcomeness requirement establishes too difficult a burden, discourages victims from bringing claims, and thus, should be eliminated as an element of the plaintiff's case).

284. George, *supra* note 107, at 29 ("The 'victim focus' effect of the unwelcomeness criteria bears a sickening resemblance to what sometimes occurs in rape trials.").

285. See *id.* at 30 (suggesting that "the appropriate inference [is] that any sexual conduct in the workplace is unwelcome").

286. *Id.*

287. *Id.* at 28-30.

tunity harassment and bisexual harassment, two forms of conduct that, even with an amendment to Title VII, would fail to constitute discrimination based on sex, and thus would fall outside of Title VII's protection.

Federal sexual harassment legislation would protect a broader range of individuals from abusive sexual conduct, while leaving intact the sexual harassment as sex discrimination framework that has developed into a powerful tool in the fight for women's equality. Thus, the legislation would protect individuals from sexual harassment and continue the movement for equality that persists today.