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Toward Gender Equality and Understanding: Recognizing That Same-Sex Sexual Harassment Is Sex Discrimination

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NOTES

TOWARD GENDER EQUALITY AND UNDERSTANDING: RECOGNIZING THAT SAME-SEX SEXUAL HARASSMENT IS SEX DISCRIMINATION

"We take these words [of Title VII] to mean that gender must be irrelevant to employment decisions." — U.S. Supreme Court (1989)[1]

INTRODUCTION

Title VII of the 1964 Civil Rights Act prohibits employment discrimination on the basis of protected categories.[2] Title VII's provision prohibiting sex discrimination was enacted to eliminate gender inequality in the workplace by ensuring that employment decisions are based on individual merit and not on the gender of the employee.[3] Therefore, gender-based decisions motivated either by the employee's sex[4] (male or female) or by

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[1] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

[2] Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (1988). The relevant portion of Title VII of the Civil Rights Act of 1964, § 703(a), reads:

> (a) It shall be 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 compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2 (1988).

[3] The original purpose of Title VII was to promote employment decisions on the basis of job qualifications, rather than on the basis of race or sex. *Price Waterhouse*, 490 U.S. at 243.

[4] This Note, in accordance with Title VII interpretation, uses the terms gender, sex and biological sex interchangeably. This Note also does not differentiate between the phrases "gender discrimination," "discrimination based on sex," and "discrimination because of sex." Convincing arguments have been advanced that gender is not equivalent to sex and that the two terms should not be used synonymously in the law. For a more complete discussion on this topic, see Mary Anne

stereotypes associated with the individual's sex (masculine or feminine) violate Title VII's mandate of workplace equality.[5] Similarly, harassment of an individual because of the individual's sex or because of the individual's failure to conform to preconceived gender roles violates Title VII because such harassment perpetuates gender inequality. The threshold question in determining Title VII violations is whether the harassment is gender-based. Therefore, it should make no difference whether the harasser and the victim are the same gender, provided that the harassment occurs because of the employee's gender.[6]

While this inquiry appears rather straightforward, several district and circuit courts continue to disagree on the issue of whether same-sex sexual harassment is actionable under Title VII.[7] Simply defined, same-sex sexual harassment refers to gender-motivated harassment committed by an individual toward a member of the same sex. There are two types of conduct which may constitute same-sex sexual harassment: (1) erotic harassment—harassment which typically entails sexual advances, invitations or innuendoes toward the victim based on the victim's gender; and (2) non-erotic harassment—harassment based on the victim's gender but not motivated by sexual desire. Non-erotic harassment generally includes derogatory statements, ridicule and physical or verbal assaults.[8] The com-

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Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995) ("gender [is] to sex what masculine and feminine are to male and female"); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

[5] *Price Waterhouse*, 490 U.S. at 250.

[6] Tietgen v. Brown's Westminster Motors, 921 F. Supp. 1495, 1500 (E.D. Va. 1996).

[7] The U.S. Supreme Court has yet to address this issue directly. A petition for writ of certiorari on a same-sex sexual harassment case in the Fifth Circuit, Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996), was filed on October 10, 1996. On December 16, 1996, the Supreme Court requested that the Justice Department submit briefs on the issues raised in that case. The Supreme Court has yet to decide whether to grant or deny cert. *U.S. Supreme Court Seeks Advice from Justice Department on Same-Sex Harassment Appeal*, West's Legal News, Dec. 18, 1996, *available at* 1996 WL 722516 [hereinafter *Supreme Court Seeks Advice*].

[8] For consistency and convenience, the author of this Note coined the terms erotic and non-erotic harassment to refer to two different types of harassment that

mon denominator in both erotic and non-erotic harassment that makes each type of conduct actionable is the fact that the harassment occurs because of the employee's gender.[9] Circuits are divided on whether Title VII allows for same-sex sexual harassment claims, and also on the issue of which type of same-sex sexual harassment may be actionable.

Several district courts, the Fourth, Eighth and Eleventh Circuits, and the Equal Employment Opportunity Commission ("EEOC") have held that same-sex sexual harassment may violate Title VII.[10] However, the majority of circuit and dis-

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comprise sexual harassment and, by extension, same-sex sexual harassment. Erotic and non-erotic harassment are easily understood in the context of opposite-sex sexual harassment. For example, Title VII opposite-sex sexual harassment claims typically arise in two different circumstances, both equally actionable. The first type is where a male subjects a female to unwanted sexual touchings, invitations and innuendoes because of her sex. This Note refers to such conduct as erotic sexual harassment. The second type involves a male subjecting a female, because of her gender, to hostile, rude or disparaging treatment that differs in kind and degree from treatment that males receive. This Note refers to the latter conduct as non-erotic sexual harassment. *See Tietgen*, 921 F. Supp. at 1500; *see also* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 369 (1993) (plaintiff prevailed on hostile environment claim where defendant called her a "dumb ass woman," said "you're a woman, what do you know," and suggested the female employee have sex to negotiate her raise); Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1363 (arguing that "all forms of gender discrimination that affect an employee's work environment are potentially actionable under Title VII without regard to whether they arise from sexual motives"). Other scholars have employed various terms to articulate these two distinct types of gender-motivated harassment. For example, Thorpe utilizes the term "gender-based harassment" to describe the conduct referred to in this Note as non-erotic harassment. *Id.* at 1363. This latter type of harassment based on discriminatory insult and ridicule was originally recognized in the context of racial harassment. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986); *see also* CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 237 (1979). Racial harassment violations of Title VII are often predicated on a supervisor's racial epithets, derogatory statements and other types of verbal and physical harassment directed at the employee because of the employee's race. Similarly, sexual harassment that is not erotically motivated is often predicated on a supervisor's gender epithets, derogatory statements and other types of verbal and physical harassment directed towards the employee because of the employee's sex.

[9] *Tietgen*, 921 F. Supp. at 1501.

[10] Three federal appellate courts and sixteen federal district courts have held that same-sex sexual harassment is cognizable under Title VII. *Supreme Court Seeks Advice, supra* note 7; *see, e.g.*, Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1996) (holding same-sex sexual harassment claim actionable where supervisor is homosexual); Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996) (denying summary judgment in same-sex sexual harassment claim); Joyner v. AAA Cooper Transp., 749 F.2d 732 (11th Cir. 1984) (affirming district court

trict courts that have addressed this issue have only been willing to recognize the first type of same-sex sexual harassment, erotic harassment, where the supervisor makes sexual advances toward the subordinate. Similarly, the EEOC Guidelines explicitly state that erotic harassment violates Title VII but are silent as to whether non-erotic harassment should also be actionable. Most courts have failed to recognize the second type of same-sex sexual harassment, non-erotic harassment, in which the supervisor, typically motivated by the employee's failure to conform to stereotypical gender ideals, subjects the employee to hostile, rude or disparaging treatment. To date, the Eighth Circuit is the only circuit to recognize that non-erotic same-sex sexual harassment claims may be actionable under Title VII.[11]

Several district courts and the Fifth Circuit have refused to recognize any form of same-sex sexual harassment.[12] The circuit split in recognizing erotic same-sex sexual harassment claims, and the failure by the majority of courts to recognize non-erotic same-sex sexual harassment claims undermine Title VII's goal of workplace equality.

Both erotic and non-erotic same-sex sexual harassment should be considered sex discrimination under Title VII. First, gender is the motivating force behind both erotic and non-erotic sexual harassment. Second, employment decisions based on an employee's gender perpetuate gender inequality. Third, imposing traditional stereotypical gender-role behaviors systematically disadvantages women. These three premises underlie Title VII's prohibition of opposite-sex sexual harassment and are equally applicable to the context of same-sex sexual

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decision holding that same-sex sexual harassment claim is actionable); EEOC v. Walden Book Co., 885 F. Supp. 283 (D.D.C. 1995); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545 (M.D. Ala. 1995); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229 (S.D. Ga. 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981). These are just a few representative cases.

[11] *Quick*, 90 F.3d 1372 (1996).

[12] *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir.), *reh'g denied*, 95 F.3d 56 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3310 (U.S. Oct. 10, 1996) (No. 96-568); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994); Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wash. 1995); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995); Myers v. El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995). These are just a few representative cases that hold that same-sex sexual harassment is not actionable under Title VII.

harassment. Same-sex sexual harassment is motivated by the employee's gender. Regardless of whether the harasser and the victim are the same sex, where gender is a motivating factor behind the harassment, gender inequality is perpetuated. Moreover, an employer's harassment of an employee because he or she fails to conform to stereotypical gender-role behaviors reinforces what the harasser feels are the appropriate roles for men and women; such roles typically undervalue women and elevate men.[13] This Note concludes that employers[14] should be prohibited from making gender-motivated employment decisions,[15] including the decision to harass an employee of the same sex. Only employment decisions that are gender neutral will result in equality of the sexes and will advance the goals of Title VII.

Part I of this Note closely examines the language of Title VII and briefly discusses the rationale for recognizing opposite-sex sexual harassment claims under Title VII. Part II discusses and critiques the current legal treatment of both types of same-sex sexual harassment claims: erotic and non-erotic harassment. This Part also discusses various representative decisions by both those courts that hold that Title VII prohibits same-sex sexual harassment and the opinions of the courts that reach the opposite conclusion. Part III analyzes how both types of same-sex sexual harassment are sex discrimination and violate Title VII. This Part also discusses the problems inherent in the standard that courts currently utilize when determining whether the employer discriminated because of gender, the "but for your sex" standard. This Part then proposes a modified approach, a "because of your sex" standard, for

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[13] *See infra* notes 199, 201-202 and accompanying text.

[14] Title VII liability is based on the doctrine of respondeat superior. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982). Therefore, an employer is liable for harassment inflicted by coworkers and supervisors where the employer knew or should have known of the conduct and failed to take corrective action. *Id.* For ease of reference, this Note will often use the term "employer" to refer to the individual inflicting the harassment.

[15] The most obvious employment decisions are decisions directly regarding hiring, firing and promotions. However, Title VII is not limited to these employment decisions. The Supreme Court has broadly interpreted Title VII to include the privilege of working in an environment free of discriminatory insult and ridicule. Thus, since 1986 it has been settled law that sexual harassment is actionable under Title VII. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

the analysis of same-sex sexual harassment cases. This new standard avoids the anomalous and absurd result, which is currently possible, in which same-sex and opposite-sex sexual harassment claims are recognized but bisexual harassers are granted immunity. Finally, Part IV discusses various public policy reasons for holding same-sex sexual harassment actionable under Title VII and the consequences of the failure to recognize these claims.

I. BACKGROUND

Title VII was created in order to eliminate unfair and unequal treatment on the basis of protected categories, including sex. To achieve these remedial goals, Title VII must be interpreted broadly.[16] The critical inquiry involved in sexual harassment cases seeks to determine whether the employer's actions were gender-motivated. When gender is used as a motivating factor in an employment decision and there is no legitimate reason for the decision, the purpose of Title VII is clearly undermined, and equal treatment for women in the workplace is jeopardized.

A. *Interpreting the Language of Title VII: Comparing Title VII's Prohibition of Race Discrimination to Sex Discrimination*

The language of Title VII of the Civil Rights Act of 1964 is subject to varying interpretation. The drafters of Title VII neglected to define the words "discrimination," "terms" and "conditions" of employment, and the phrase "because of . . . sex."[17] Because the legislative history regarding the inclusion of sex as a protected category is scarce,[18] courts and commentators

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[16] Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989). The broad remedial purpose of Title VII requires courts to interpret the statute liberally in order to effectuate Congress' intent to eliminate employment discrimination and its consequential effects.

[17] Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (1988); *see supra* note 2; *see also* RALPH J. LINDGREN & NADINE TAUB, THE LAW OF SEX DISCRIMINATION 112 (1988).

[18] Title VII of the Civil Rights Act of 1964 was enacted to eliminate racial discrimination in the hiring and promoting practices of employers. The noble idea of securing racial equality in the workplace was not paralleled by, nor accompa-

have drawn analogies between Congress' inclusion of race and its inclusion of sex as protected categories in Title VII.[19] Indeed, the statute on its face treats "race" and "sex" exactly the same; they are coequal and should be analyzed as such.[20] Therefore, while several of the legislature's statements regarding Title VII focused specifically on race, these statements should be understood to apply to sex as well.[21] Additionally, it is helpful to analyze cases that involve discrimination based on other statutorily protected categories, such as race, to discern how Title VII should be construed in same-sex sexual harassment cases.[22]

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nied with, a congressional desire to achieve gender equality in the workplace. "The story of how gender came to be included in Title VII as a prohibited basis of employment discrimination is anything but edifying." Indeed, the original bill did not even include "sex" as a protected category; the term "sex" was only proposed as an amendment to the bill on the last day of the floor debate in an attempt to block passage of the entire Act. The attempt failed, and the Act, which included discrimination based upon sex, was passed. The amendment to the original bill adding "sex" to "race, color religion and national origin" was proposed by Representative Howard Smith of Virginia, Chairman of the House Rules Committee. Representative Smith's ploy failed. As a result, "one of the most powerful remedies for sex discrimination available today owes its origin to a misfired political tactic on the part of opponents of the Act." LINDGREN & TAUB, *supra* note 17, at 110-11. Because of the hasty and unexpected inclusion of sex as a protected group under Title VII, it is difficult to discern Congress' intent.

[19] *See Price Waterhouse*, 490 U.S. at 244 n.9; *Meritor*, 477 U.S. at 65.

[20] MACKINNON, *supra* note 8, at 129; *see, e.g., Price Waterhouse*, 490 U.S. at 244 n.9. While the congressional statements may have focused on race, these statements are not limited to the context of race. Instead, the statements are understood to be "general statements on the meaning of Title VII." *Id.* at 243, 244 n.9.

[21] *Price Waterhouse*, 490 U.S. at 244 n.9.

[22] The first hostile work environment cause of action was a claim of racial discrimination in the workplace. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). This theory was then applied to opposite-sex sexual harassment claims. *See Meritor*, 477 U.S. at 65. Similarly, it should be applied to same-sex sexual harassment claims.

Discrimination based upon race—any race—is prohibited under Title VII.[23] The reason for affording employees protections from race-based decisions is that prior reliance on race as a criteria for decisionmaking has historically privileged whites and disadvantaged blacks. Race-based decisions harm both the individual who is treated unfairly and the minority race as a whole.[24]

Title VII was originally intended to protect African-American employees from discriminatory employment practices.[25] However, Congress' use of the unmodified term "race," instead of the specific term "African-American race," enables Title VII to prohibit discrimination against any race, regardless of the race of the employer or employee.[26] Therefore, while Title VII's prohibition against racial discrimination was originally intended to protect only African-Americans—a historically disadvantaged group—the statute has been recognized to protect all races, including whites—a historically empowered group.[27] Indeed, the unmodified term "race" allows a "majority" race to bring suit against a "minority" race for alleged discriminatory practices.[28]

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[23] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (holding that Title VII is not limited to discrimination against members of any particular race); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII prohibits its discriminatory preference for any racial group); Lucero v. Beth Israel Hosp. and Geriatric Ctr., 479 F. Supp. 452 (D. Colo. 1979) (holding that nonblack employees were permitted to bring a cause of action under Title VII on the basis that they were discriminated against because of their race by a black supervisor); Calcote v. Texas Educ. Found., Inc., 458 F. Supp. 231, 237 (W.D. Tex. 1976) (holding that racial harassment of white employees by black supervisor violates Title VII). In addition, the EEOC interprets Title VII to proscribe racial discrimination in private employment against whites and nonwhites. *McDonald*, 427 U.S. at 279.

[24] Consequently, the legislative history of Title VII demonstrates that "Congress was concerned with eliminating not only specific instances of employment discrimination, but its broader economic and social effects as well." MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 225 (3d ed. 1987); *see id.* at 60 (excerpt from Paul Brest, *Foreword: In Defense Of The Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976)); *infra* note 230 and accompanying text.

[25] *Griggs*, 401 U.S. at 430; *see* ROTHSTEIN & LIEBMAN, *supra* note 24, at 225-27 (briefly reviewing the legislative history of Title VII).

[26] *McDonald*, 427 U.S. at 278-90; *see supra* note 23.

[27] *McDonald*, 427 U.S. at 278-90.

[28] *Id.* at 273, 279 (holding that a white plaintiff can sue for reverse discrimination under Title VII). "Title VII prohibits racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites." *Id.*

Both the Supreme Court and the EEOC Guidelines have interpreted Title VII to prohibit racial discrimination against both white and nonwhite employees.[29] The Supreme Court and the EEOC have stressed that any other interpretation would subvert the mandate of Title VII, which is the elimination of *all* employment practices that disadvantage a statutorily protected group.[30] Additionally, the inclusion of the term "race" allows an employee to bring suit against his or her employer of the same race as long as the victim was discriminated against because of his or her race.[31] Just as Title VII's prohibition of race discrimination allows for same-race racial harassment claims, its prohibition of sex discrimination should allow for same-sex sexual harassment claims.

Similar to the protected category of race, the inclusion of sex as a protected category was initially interpreted to protect a historically disadvantaged sex from a historically empowered sex. Congress may have originally interpreted Title VII to apply only to the discriminatory treatment of women employees by male employers. However, it is well recognized that Title VII also protects men from discriminatory treatment by women.[32] The proper analysis does not seek merely to pro-

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[29] *Id.* at 279.

[30] The Supreme Court stated "to proceed otherwise would constitute a derogation of the EEOC's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII including Caucasians . . . ." *Id.* (citing EEOC Decision No. 74-31, 7 FEP 1326, 1328 (CCH) (1973)).

[31] Title VII prohibits same-race racial harassment. *See, e.g.*, Hansborough v. City of Elkhart Parks & Recreation Dep't, 802 F. Supp. 199 (N.D. Ind. 1992) (recognizing intraracial discrimination claims in discriminatory termination case); Franceshi v. Hyatt Corp., 782 F. Supp. 712, 723 (D.P.R. 1992) ("intra-racial color discrimination claims are authorized by both Title VII and existing Supreme Court precedent"); Walker v. Secretary of Treasury, 713 F. Supp. 403 (N.D. Ga. 1989), *aff'd*, 953 F.2d 650 (11th Cir.), *cert. denied*, 406 U.S. 957 (1992) (recognizing same-race racial harassment claim by a light-skinned black plaintiff against a dark-skinned black supervisor). These courts recognized same-race racial harassment claims because the employer's discriminatory conduct was based on the race of the employee. Similarly, same-sex harassment should be equally recognized as long as the discriminatory conduct is based on sex.

[32] Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 (6th Cir. 1994) (acknowledging reverse sex discrimination claim but stating that the male employer failed to satisfy the requirements for such a claim); Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993) (upholding reverse discrimination challenge to a city fire department's affirmative action plan for women fire fighters), *reh'g en banc denied*, No. 92-3340, 1993 U.S. App. LEXIS 25526 (6th Cir. Oct. 4, 1993), *cert. denied*, 510

tect a historically disadvantaged group from a historically dominant group.[33] Rather, Title VII protects against all gender-based decisions in the workplace.[34]

The Supreme Court stated in *Price Waterhouse v. Hopkins* that Congress' intent to forbid employers from taking gender into account in making employment decisions appears on the face of the statute.[35] Because there is scant legislative history regarding Congress' intent behind prohibiting sex discrimination, this statutory language is crucial. Title VII expressly mandates that no employer may discriminate on the basis of sex.[36] The term "sex," like "race," is unmodified in the statute. Therefore, by its plain meaning, Title VII protects employees of either sex from being discriminated against because of their sex, regardless of whether the sex of the employer and the employee are the same.[37] As long as the harassment is motivated because of the victim's gender, Title VII is violated.[38]

The plain language of Title VII demonstrates that a plaintiff's cause of action should not be limited to opposite-sex harassment.[39] Had Congress intended to prohibit only discrimination by harassers of the opposite sex, it would have stated that no person shall discriminate against a "member of the opposite sex."[40] With such phrasing, Congress would have

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U.S. 1164 (1994); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating that standard for discrimination should be modified to accommodate different employment discrimination contexts, e.g., reverse discrimination).

[33] Historically, women in western culture have been considered the inferior and subordinate sex. Women have traditionally been defined in their relation to men, who have historically been considered the superior or dominant sex. Man's ability to retain his historically elite position in society is dependent upon his ability to subordinate women. MACKINNON, *supra* note 8, at 157.

[34] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

[35] *Id.* at 239.

[36] *See supra* note 2.

[37] Title VII, on its face, protects all employees from sex discrimination without reference to the sex of the employer or employee. Proposed Brief Amicus Curiae of the Women's Rights Project of the ACLU at 3, Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

[38] Tietgen v. Brown's Westminster Motors, 921 F. Supp. 1495, 1500 (E.D. Va. 1996).

[39] *See* Wrightson v. Pizza Hut of America, 99 F.3d 138, 142 (4th Cir. 1996); Prescott v. Independent Life and Accident Ins. Co., 878 F. Supp. 1545, 1550 (M.D. Ala. 1995).

[40] *Prescott*, 878 F. Supp. at 1550 ("[H]ad Congress intended to prevent only heterosexual sexual harassment, it could have used the term 'member of the oppo-

prohibited both male-female sexual harassment and female-male harassment.[41] Congress' failure to include such language and to amend the statute to reflect such a position demonstrates its willingness to have Title VII interpreted more broadly.[42] By omitting specification as to gender, Congress allows a claim to be brought by either sex, regardless of whether the employer and employee are the same sex.

The EEOC Guidelines,[43] which are given substantial deference by the courts,[44] are also helpful tools in interpreting the relationship between Title VII and sexual harassment. The EEOC Guidelines unequivocally state that same-sex sexual harassment violates Title VII, stressing that "[t]he victim does not have to be of the opposite sex from the harasser."[45]

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site sex.'").

[41] *Id.*

[42] *See id.*

[43] In 1980, the EEOC published its Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1980). Specifically, the guidelines state:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id. § 1604.11(a). Courts have interpreted these guidelines to prohibit two types of sexual harassment: quid pro quo harassment and hostile work environment harassment. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 61 (1986).

[44] *Meritor*, 477 U.S. at 65 (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that the EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"))).

[45] EEOC Compl. Man. (BNA) § 615.2(b) (1981) (citation omitted). The relevant portion of the EEOC Guidelines reads:

> 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 (not the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.

Id. § 615.2(b)(3).

Federal courts have been faced with interpreting the broad language of Title VII to determine whether same-sex sexual harassment cases fall within the Act's purview. The analytical approaches used, and the conclusions reached, by a number of courts are contradictory. This lack of uniformity in approaches and results sends a mixed message to victims of same-sex sexual harassment regarding their legal rights and remedies. By examining the similar motives behind opposite-sex harassment and same-sex harassment, it will become evident that both erotic and non-erotic same-sex sexual harassment should be actionable.

B. *Recognition of Opposite-Sex Sexual Harassment as Sex Discrimination under Title VII*

It is well settled that opposite-sex sexual harassment[46] violates Title VII because it is a form of sex discrimination.[47] In 1986, the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*[48] expanded the scope of Title VII when it recognized that this statute protects employees from "discriminatory sexual harassment."[49] The Court held that when a supervisor "sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex."[50] The Supreme Court recognized that the consequences of using biological sex as a motivating factor for harassment are similar to the effects of using gender as a factor in any decision: when

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[46] There are several situations which constitute opposite-sex sexual harassment under Title VII. Opposite-sex sexual harassment occurs whenever an employer discriminates against an employee of the opposite sex on the basis of the employee's gender. The inquiry must always come back to the question of whether the victim's gender motivated the harassment. If the answer is yes, a violation of Title VII has occurred. If the answer is no, regardless of how awful the mistreatment, the harassing behavior is not sex discrimination and is not actionable under Title VII. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989). For instance, Title VII is not violated when a male employer harasses a female employee because she speaks with a southern accent if the sole criterion on which he is basing his harassment is her accent—regardless of how severe or pervasive the harassment is. *Id.*

[47] Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993); *Meritor*, 477 U.S. 57 (1986).

[48] 477 U.S. 57 (1986).

[49] *Id.* at 57.

[50] *Id.* at 64.

gender-based decisions are made, women and men are classified according to their sex and not according to their individual merit.[51] Moreover, when the sexes are viewed as distinct categories in contrast and opposition to one another, women have historically been perceived as inferior to men.[52] After *Meritor*, sexual harassment—either quid pro quo[53] or hostile work environment[54]—is viewed as a form of sex discrimination because the harassment is (1) motivated by the employee's gender, and (2) hinders equality of the sexes.[55]

1. Quid Pro Quo Harassment

Quid pro quo harassment[56] occurs when an employer offers tangible, economic job benefits in exchange for sexual favors from an employee, or where an employer purposely withholds favorable treatment when requests for sex are denied.[57] In order to prevail on a quid pro quo sexual harassment claim, the employee plaintiff must prove the following: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment was based on the employee's sex; (4) the employee's

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[51] According to Catherine MacKinnon, sex discrimination is the result of transforming biological sex differences into systematic social inequalities. Relying on sex as a criterion benefits men and is detrimental to women. MACKINNON, *supra* note 8, at 126-27.

[52] Sex discrimination is a "system that defines women as inferior to men, that cumulatively disadvantages women for their differences from men, as well as ignores their similarities." MACKINNON, *supra* note 8, at 116.

[53] Quid pro quo sexual harassment occurs when a supervisor requires or requests sexual favors in return for tangible job benefits, including not being terminated. Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989) (stating that the gravamen of a quid pro quo claim is that an actual job benefit is conditioned on the employee's submission to "sexual blackmail" and adverse consequences follow the employee's refusal to cooperate).

[54] Hostile work environment sexual harassment occurs when a supervisor's conduct creates a work atmosphere that is so abusive that it alters the terms and conditions of employment. The conduct must be severe or pervasive. Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993).

[55] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (sexual harassment in the workplace is a barrier to sexual equality).

[56] Quid pro quo harassment is described in §§ 1604.11(a)(1) and (a)(2) of the EEOC Guidelines on Sexual Harassment. *See supra* note 43.

[57] *See Carrero*, 890 F.2d 569 (2d Cir. 1989); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 618 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

acceptance or rejection of the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment; and (5) respondeat superior.[58]

One of the earliest cases recognizing quid pro quo sexual harassment was *Tomkins v. Public Service Electric & Gas Co.*[59] In *Tomkins*, the Third Circuit held that a supervisor violates Title VII when he or she "makes sexual advances or demands toward a subordinate employee and conditions that employee's job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those advances . . . ."[60] More recent case law has held that an employee need not show actual economic loss in order to prove quid pro quo harassment.[61]

2. Hostile Work Environment Harassment

Discrimination based on the theory of a hostile work environment was first recognized as actionable under Title VII in the early 1980s.[62] The Eleventh Circuit in *Henson v. City of Dundee*,[63] adopting the EEOC Guidelines,[64] held that sexual harassment may be actionable under Title VII regardless of whether there was tangible job detriment.[65] The *Henson* court, in prohibiting noneconomic sexual harassment, stated that sexual harassment is "every bit the arbitrary barrier to sexual equality at the workplace as racial harassment is to racial equality."[66] An employee must prove the following in order to prevail on a hostile work environment claim: (1) he or she belongs to a protected group; (2) the harassment was unwelcome; (3) the harassment was based upon sex; (4) the ha-

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[58] Henson v. City of Dundee, 682 F.2d 897, 909 (1982).

[59] 568 F.2d 1044 (3d Cir. 1977).

[60] LINDGREN & TAUB, *supra* note 17, at 171 (citing *Tomkins*, 568 F.2d 1044 (3d Cir. 1977)).

[61] Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994) (holding that plaintiff need only show a threat of economic loss if she did not comply with the employer's sexual demands).

[62] Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981).

[63] 682 F.2d 897 (11th Cir. 1982).

[64] Section 1604.11(a)(3) of the EEOC Guidelines describes hostile or abusive work environment harassment. *See supra* note 43.

[65] *Henson*, 682 F.2d at 902.

[66] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting *Henson*, 682 F.2d at 902).

rassment had the effect of unreasonably interfering with the employee's work performance and creating an intimidating, hostile, or offensive work environment; and (5) that the employer knew or should have known of the harassment and failed to implement appropriate corrective action.[67]

In 1986, the Supreme Court in *Meritor*[68] held that Title VII is violated when an employee proves that sex-based discrimination created an abusive or hostile environment.[69] The Court stated that inclusion within Title VII of the phrase "'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the *entire spectrum of disparate treatment of men and women' in employment,*"[70] thus indicating the need for a broad inclusive application of Title VII. In recognizing that sexual harassment violated Title VII, the *Meritor* Court relied on the EEOC Guidelines which provide that prohibited sexual harassment includes harassment that has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[71] The EEOC Guidelines were developed based on a synthesis of prior case law which protected the rights of all employees "to work in an environment free from discriminatory intimidation, ridicule, and insult."[72] Specifically, the Guidelines drew upon previously recognized national origin and racial harassment claims.[73]

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[67] *Henson*, 682 F.2d at 909. Element (5) is also referred to as respondeat superior liability. *See generally* Justin S. Weddle, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724 (1995) (analyzing and critiquing various theories of employer liability in Title VII sexual harassment cases).

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

[69] *Id.* The *Meritor* Court stated 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." *Id.* at 66. The theory of hostile work environment harassment was further articulated in *Harris v. Forklift Systems, Inc.*, where the Court held that an employee need not prove psychological injury for the claim to survive under Title VII. 114 S. Ct. 367 (1993).

[70] *Meritor*, 477 U.S. at 64 (emphasis added) (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

[71] *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).

[72] *Id.*

[73] *Id. Meritor* was the first Supreme Court case to recognize that a sexual harassment claim creating a hostile work environment was actionable under Title VII. Hostile work environment claims had previously been recognized by the court of appeals with regard to claims of racial harassment. Rogers v. EEOC, 454 F.2d

Indeed, in *Rogers v. EEOC*[74] the Court of Appeals for the Fifth Circuit held that an employer violated Title VII by creating an offensive work environment for Hispanic employees.[75] Thereafter, this hostile work environment theory was applied to other racial harassment claims.[76] The Eleventh Circuit, in *Henson*, extended this principle to the context of sexual harassment. The *Meritor* Court simply adopted this rationale in its holding, stressing that "nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not likewise be prohibited."[77] While the Supreme Court was willing to follow the lead of the EEOC and prior circuit court decisions in recognizing hostile work environment opposite-sex sexual harassment claims, the Court has thus far been reluctant to follow a similar lead by the EEOC and some circuit court decisions in recognizing that same-sex sexual harassment violates Title VII.

II. CURRENT LEGAL TREATMENT OF SAME-SEX SEXUAL HARASSMENT CLAIMS

Circuits are divided with regard to whether same-sex sexual harassment claims may be brought under Title VII. The origin of this split can be traced back to two divergent cases from the Northern District of Illinois: *Wright v. Methodist Youth Services, Inc.*,[78] a 1981 case where the court held that Title VII clearly encompasses erotic same-sex sexual harassment; and *Goluszek v. H.P. Smith*,[79] a 1988 case which held that Title VII should not protect against any form of

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234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In *Rogers*, the Fifth Circuit stated that "the phrase 'terms, conditions or privileges of employment' in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . ." *Id.* at 238.

[74] 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

[75] *Id.*

[76] *Meritor*, 477 U.S. at 65 (citing Firefighters Inst. for Racial Equality v. St. Louis, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied sub nom.* Banta v. United States, 434 U.S. 819 (1977)).

[77] *Id.*

[78] 511 F. Supp. 307 (N.D. Ill. 1981).

[79] 697 F. Supp. 1452 (N.D. Ill. 1988).

same-sex sexual harassment.[80] Both cases failed to recognize that non-erotic same-sex sexual harassment may violate Title VII.

A. *Courts that Have Held that Same-Sex Sexual Harassment Is Not Actionable under Title VII*

The Fifth Circuit, in *Garcia v. Elf Atochem North America*,[81] was the first federal appellate court to address directly the issue of whether same-sex sexual harassment was actionable under Title VII.[82] The Fifth Circuit held that male-on-male harassment was not actionable even though the harassment had sexual overtones.[83] *Garcia* involved a male supervisor who on several occasions harassed a male employee by grabbing the employee's crotch and simulating sex with the employee from behind.[84] The court did not analyze whether the harassment was gender motivated, nor did it discuss whether the harassment created an atmosphere of gender inequality. Rather, the Fifth Circuit dismissed plaintiff's hostile work environment claim in a mere two sentences.[85] The *Garcia* court simply reiterated the holding from one of its own previous unpublished opinions, *Giddens v. Shell Oil*, where it

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[80] *See* Schoiber v. Emro Mktg. Co., 941 F. Supp. 730, 732 (N.D. Ill. 1996). Dating back farther, the Third Circuit and the District of Columbia Circuit, in dicta, recognized the potential for a same-sex sexual harassment cause of action in 1977. *See* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); Tietgen v. Brown's Westminster Motors, 921 F. Supp. 1495, 1502 (E.D. Va. 1996) (citing Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981)).

[81] 28 F.3d 446 (5th Cir. 1994) (affirming the dismissal of an employee's same-sex sexual harassment Title VII claim).

[82] *Schoiber*, 941 F. Supp. at 732.

[83] *Garcia*, 28 F.3d at 451.

[84] *Id.* at 448. Prior to Garcia's complaint, two other arguably similar complaints had been lodged against this supervisor. *Id.*

[85] The entire sexual harassment discussion in the *Garcia* opinion consists of the following two sentences:

> Finally, we held in *Giddens v. Shell Oil Co.* that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." Thus what '[a male supervisor] did to [a male employee] could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.

Id. at 451-52 (internal citations omitted).

held that "harassment by a male supervisor against a male subordinate does not state a claim under Title VII."[86] The *Garcia* court discussed neither the facts of *Giddens*, nor the applicability of that holding to the instant facts. The Fifth Circuit also failed to explain why this conduct did *not* constitute gender discrimination, even though the conduct was directed only toward men and not toward women.

Perhaps even more surprisingly, the Fifth Circuit cited as persuasive authority the Illinois district court case of *Goluszek v. Smith*,[87] which involved an entirely different set of facts. *Garcia* involved erotic harassment. In contrast, *Goluszek* involved non-erotic harassment. In that case Goluszek, a male employee, claimed that his employer discriminated against him by refusing to remedy the continuous sexual harassment directed toward him by his male coworkers.[88] The harassment of which Goluszek complained consisted of his male coworkers commenting on Goluszek's unmarried status, and taunting him because of his sexual naiveté and his "abnormally" sensitive disposition to comments pertaining to sex.[89] Additionally, the coworkers harassed Goluszek for not desiring to engage in sexually explicit conduct with one of the female employees, they showed him pornographic pictures of nude women, and they accused him of being gay or bisexual.[90] The coworkers subjected Goluszek to such harassment because he did not conform to what they considered "appropriate" male conduct. Goluszek reported the harassment to his supervisors to no avail.[91]

Goluszek brought suit under Title VII claiming hostile work environment harassment. Goluszek claimed that he was subjected to such harassment because of his gender; if he had

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[86] *Id.* at 451 (citing *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished)).

[87] *Id.* (citing *Goluszek*, 697 F. Supp. 1452 (N.D. Ill. 1988)).

[88] *Goluszek*, 697 F. Supp. at 1454.

[89] *Id.* at 1452.

[90] *Id.* at 1453-54. Specific harassment included statements that Goluszek needed to "get married and get some of that soft pink smelly stuff that's between the legs of a woman," and that Goluszek should date Carla, a female coworker, "because she fucks." Additionally, male coworkers continuously taunted Goluszek by asking whether he had "gotten any pussy," by showing him pictures of nude women and by accusing him of being gay or bisexual. *Id.*

[91] *Id.*

been a woman, he would not have received the same treatment. Moreover, Goluszek's complaint asserted that had he been female, his supervisors would have taken actions to remedy the harassment, but because he was male, his supervisors did nothing.[92] It appears that the *Goluszek* court was so determined to rule that same-sex sexual harassment did not violate Title VII that the court based its decision on an argument that was not even advanced by the defendants.[93] The defendants argued unsuccessfully that Goluszek could not prove the harassment was because of his sex.[94] The court, sua sponte, stated that the more convincing argument is that plaintiff's claim is not actionable because the "defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII."[95] The court paid lip service to the broad goal of Title VII—equal employment opportunity—but simultaneously espoused an extremely narrow application of Title VII, as applying only to cases of sexual demands on less powerful employees.[96]

Without citing any precedent or interpretive case law, the *Goluszek* court concluded that in enacting the statute, Congress intended to eliminate the imbalance and abuse of power which results in discrimination against vulnerable groups.[97] The court imposed a requirement that Goluszek needed to prove not only that he was harassed because of his sex, but also that his work environment "treated males as inferior."[98] In requiring Goluszek to prove the existence of an anti-male

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[92] *Id.* at 1454.

[93] The court stated that it reached its conclusion by relying on an argument that the "[employer] failed to make." *Goluszek*, 697 F. Supp. at 1456.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* The court supported its interpretation of Title VII by relying solely on a student law review note published in 1984. *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984). Consequently, numerous courts have criticized the *Goluszek* decision. *See, e.g.*, Miller v. Vesta, Inc., No. 94-C-1270, 1996 WL 683725 (E.D. Wis. 1996) ("the *Goluszek* court built its understanding of Congressional intent upon a foundation of quicksand"); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 354 (D. Nev. 1996) ("Notwithstanding the *Goluszek* court's sweeping statements regarding Congressional intent, its analysis is unsupported by any legislative history.").

[98] *Tanner*, 919 F. Supp. at 354.

environment, the court imposed additional burdens on the plaintiff not found in legislative history, statutory language or Supreme Court precedent.[99]

The *Goluszek* court based its holding on a misinterpretation of Title VII and a misunderstanding of congressional intent. The court superficially reasoned that because Goluszek was a male working in a male dominated workplace, the conduct complained of could not constitute gender discrimination.[100] The court disregarded the importance of the fact that Goluszek was treated differently *because of his sex.* The court admitted that the record supported a finding that "a fact-finder could reasonably conclude that if Goluszek were a woman, the [employer] would have taken action to stop the harassment" and that the "harassment was pervasive and continuous."[101] Despite this recognition that Goluszek was treated differently because of his sex,[102] the court held that such conduct was not actionable. While the court recognized that a direct application of the established legal standard in opposite-sex sexual harassment cases "created by the courts would salvage Goluszek's claim," it chose instead to adopt its own reading of Title VII.[103] However, the conduct at issue—differential treatment based on a protected category—is exactly the type of conduct Congress sought to eliminate when it enacted Title VII.[104]

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[99] Williams v. District of Columbia, 916 F. Supp. 1 (D.C. Cir. 1996). The *Williams* court offered the following six reasons for disregarding the rationale in *Goluszek*: (1) the court relied solely on a student law review note for its central proposition; (2) the student note was written prior to the Supreme Court's decision in *Meritor*, which articulates plaintiff's burdens in sexual harassment cases; (3) the statutory language of Title VII is not limited to harassment by the opposite sex; (4) *Goluszek* departs from Supreme Court precedent established in *Meritor*; (5) *Goluszek* departs from the EEOC Guidelines; and (6) the injury suffered because of same-sex harassment is as severe as that suffered because of opposite-sex harassment. *Id.* at 8.

[100] *Goluszek*, 697 F. Supp. at 1456.

[101] *Id.* at 1455.

[102] The court stated that "in fact, Goluszek may have been harassed 'because' he is male, but that harassment was not of a kind which created an anti-male environment in the workplace." *Id.* at 1456.

[103] *Id.*

[104] The coworkers' conduct also created a work environment that was hostile, humiliating and denigrating toward women. The coworkers' conduct, by referring to women as sexual objects and by showing Goluszek pornographic pictures of naked women, perpetuated harmful and stereotypical attitudes about women and women's roles. Such conduct constitutes a bar to gender equality in the workplace as it

The *Garcia* court's blind reliance on *Goluszek* and *Giddens* demonstrates that the court appears to have adopted the holding it desired to reach, despite the lack of support for its position.[105] Unfortunately, subsequent district and circuit court cases continue to rely on these decisions in support of their determination that same-sex sexual harassment is not actionable.[106] Recently, in *Oncale v. Sundowner Offshore Services, Inc.*,[107] the Fifth Circuit reluctantly held that the plaintiff's same-sex sexual harassment claim was not cognizable under Title VII even though the defendant's egregious conduct consisted of threatening to rape an employee of the same sex.[108]

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conceptualizes women as sex objects and not as coworkers.

Moreover, the coworkers' harassment of Goluszek for not conforming to the heterosexual male gender stereotype of sexual prowess and sexual dominance over women reinforces traditional gender stereotypes, which are harmful to women because they connote images of women as socially and sexually passive. The underlying controlling message of the coworkers' language and harassing conduct was in every way a barrier to gender equality in the workplace. Such conduct violates Title VII on two levels: (1) Goluszek was treated differently because he was a male; and (2) the conduct itself and the employer's failure to remedy such inappropriate behavior perpetuated an environment hostile to women. *See infra* text accompanying notes 214-218.

[105] *See, e.g.*, Schoiber v. Emro Mktg. Co., 941 F. Supp. 730, 737 (N.D. Ill. 1996) ("The Fifth Circuit's stance on the issue [of same-sex harassment] is well-recorded, but minimally supported.").

[106] For a few representative district court cases, see Ashworth v. Roundup Co., 899 F. Supp. 489 (W.D. Wash. 1995) ("accept[ing] the reasoning of the district court in *Goluszek*, and Fifth Circuit Court of Appeals in *Garcia*"); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995) ("accept[ing] the reasoning of the district court in *Goluszek* and the Fifth Circuit Court of Appeals in *Garcia*"); Oncale v. Sundowner Offshore Servs., Inc., 67 Fair Empl. Prac. Cas. (BNA) 769 (E.D. La. Mar. 24, 1995) (granting summary judgment for defendant based on *Garcia* holding), *aff'd*, 83 F.3d 118 (5th Cir.), *reh'g denied*, 95 F.3d 56 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3310 (U.S. Oct. 10, 1996) (No. 96-568); Myers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995); Hopkins v. Baltimore, 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996).

[107] 83 F.3d 118 (5th Cir. 1996). A petition for writ of certiorari was filed on October 10, 1996. On December 16, 1996, the Supreme Court requested that the Justice Department submit briefs on the issues raised in that case. The Supreme Court has yet to decide whether to grant or deny cert. *See Supreme Court Seeks Advice, supra* note 7.

[108] 83 F.3d 118 (5th Cir.), *reh'g denied*, 95 F.3d 56 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3310 (U.S. Oct. 10, 1996) (No. 96-568). Defendant's conduct included the use of force to push a bar of soap into plaintiff's anus and threats of homosexual rape.

The court stated that it was bound by its earlier decision in *Garcia* to hold that Title VII does not proscribe such conduct.[109]

B. *Courts that Have Held that Same-Sex Sexual Harassment of an Erotic Nature Is Actionable under Title VII*

The overwhelming majority of federal district and circuit courts that have addressed the issue of same-sex sexual harassment consisting of sexual advances have held that such conduct violates Title VII.[110] One of the first cases to address erotically-driven same-sex sexual harassment was the 1981 Illinois district court case of *Wright v. Methodist Youth Services*.[111] In *Wright,* a male supervisor subjected Wright, a male employee, to overt homosexual advances.[112] Wright alleged that his employment was terminated in violation of Title VII because he resisted these advances.[113] The defendant moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The *Wright* court held that it was a violation of Title VII to terminate a male employee because he refused homosexual advances made toward him by his supervi-

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[109] *Id.* at 119. The court stated that *Garcia* was binding precedent and that it could not overrule a prior panel's decision. *Id.* at 118. *See Supreme Court Seeks Advice, supra* note 7.

[110] Williams v. District of Columbia, 916 F. Supp. 1, 7 (D.D.C. 1996) (stating there exists considerable weight of authority in which federal courts have held directly, implied, or stated in dicta that same-sex sexual harassment is actionable under Title VII); Sardinia v. Dellwood Foods, Inc., No. Civ. 94-5458, 1995 WL 640502, at *3 (S.D.N.Y. Oct. 30, 1995) ("dominant trend" is to allow same-sex claims); King v. M.R. Brown, Inc., 911 F. Supp. 161, 166-67 (E.D. Pa. 1995) ("the trend is to permit such claims to proceed"); *see* Proposed Brief Amicus Curiae of the Women's Rights Project of the ACLU at 4, Hopkins v. Baltimore Gas and Elec. Co., 871 F. Supp. 872 (D. Md. 1994) ("The overwhelming majority of federal courts that have addressed this issue have recognized that the sexual harassment of a male by another male, or of a female by another female is actionable under the statute."), *aff'd*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

[111] 511 F. Supp. 307 (N.D. Ill. 1981). Ironically, seven years later another Illinois district court decided *Goluszek*, on which the Fifth Circuit relied in *Garcia* to hold that same-sex claims are not actionable. The Seventh Circuit has yet to decide this issue.

[112] *Id.* at 309.

[113] *Id.* While this case specifically dealt with alleged quid pro quo harassment, the court's rationale for its holding was broad enough to apply to hostile environment harassment cases as well.

sor.[114] This was an issue of first impression in the Seventh Circuit.[115] Even though there was no direct precedent, the court held that the supervisor's conduct clearly violated Title VII.[116]

The court reached this conclusion by examining other court decisions which involved male-on-female sexual harassment and by drawing analogies between opposite-sex sexual harassment and same-sex sexual harassment.[117] The court reasoned that opposite-sex sexual harassment is a violation of Title VII because a supervisor's demand upon a female employee that would not be made upon a male employee constitutes sex discrimination.[118] The court stated that Wright's complaint presented the reverse of that situation.[119] Wright's complaint alleged that the supervisor demanded sexual favors from a male employee and did not demand similar favors from a female employee. The employer treated Wright differently from similarly situated female employees because of his gender. In both cases—male-on-female harassment and male-on-male harassment—the sexual advances directed toward employees based upon their sex violate Title VII's prohibition against sex discrimination. The court concluded that but for

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[114] *Id.*

[115] *Id.* The Seventh Circuit has yet to rule on whether same-sex harassment claims are actionable.

[116] *Wright*, 511 F. Supp. at 309. Although the court was "unable to locate any precedent for such a claim, [the court held that] Title VII should clearly encompass [same-sex sexual harassment]." *Id.*

[117] *Id.*

[118] *Id.*

[119] Whereas opposite-sex sexual harassment typically involves a male supervisor making sexual advances towards a female employee because of her gender, the *Wright* court held that Wright's complaint represented "the obverse of that coin . . . the alleged demand of a male employee that would not be directed to a female." *Id.* at 310.

Wright's status as a male, he would not have been harassed.[120] Therefore, the supervisor discriminated against him on the basis of sex in violation of Title VII.

In support of its holding, the court cited two decisions from the District of Columbia Circuit.[121] While these cases involved male-on-female harassment, the *Wright* court determined that the D.C. Circuit's arguments applied to same-sex harassment. In *Bundy v. Jackson*,[122] the court stated that whenever sex is a substantial factor in the discrimination, Title VII is violated.[123] The *Bundy* court did not distinguish between same-sex and opposite-sex harassment, stressing instead that anytime employment decisions are irrationally and arbitrarily based upon sex, sex discrimination has occurred.[124] The *Wright* court also followed the rationale of *Barnes v. Costle*,[125] which held that the legal issue is the same for male-on-male sexual discrimination as for male-on-female sexual discrimination: the imposition of a condition for employment to which, but for the employee's sex, the employee would not have been subjected.[126]

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[120] The "but for" analysis was originally developed in Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977), with respect to heterosexual harassment. In *Barnes*, the court stated that "[b]ut for her womanhood, . . . her participation in sexual activity would never have been solicited." *Id.* The *Barnes* court held that the supervisor placed an employment condition on a female that would not have been placed on a male. The essential inquiry is "but for plaintiff's gender, plaintiff would not have been harassed." *Id.* The *Wright* court relied on the but for standard originated in *Barnes*. The *Wright* court was the first to interpret Title VII to encompass a complaint of homosexual harassment. Michelle Ridgeway Pierce, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071 (1989).

[121] Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); *Barnes*, 561 F.2d 983 (D.C. Cir. 1977).

[122] 641 F.2d 934 (D.C. Cir. 1981).

[123] The *Bundy* court stated that "discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination." *Id.* at 942. The *Bundy* court was the first court to recognize a claim of hostile work environment sex discrimination.

[124] *Id.*

[125] 561 F.2d 983 (D.C. Cir. 1977).

[126] *Id.* at 990 ("[T]he legal problem would be identical to that confronting us now [if a] subordinate of either gender [was sexually harassed] by a homosexual superior of the same gender.").

Shortly after *Wright*, in *Joyner v. AAA Cooper Transportation*,[127] an Alabama district court also held that same-sex sexual harassment involving unsolicited homosexual advances is actionable under Title VII.[128] Both the *Joyner* and *Wright* courts incorrectly added a "homosexual intent" element to their discussion of whether the sexual harassment was gender based. In contrast, in opposite-sex sexual harassment cases, courts do not look to a "heterosexual intent" element. While the Supreme Court in opposite-sex sexual harassment cases focuses only on whether the harassment was motivated by the victim's gender, and not on the sexual orientation of the harasser, the *Joyner* and *Wright* courts deviated from the traditional Title VII inquiry and focused instead on the defendant's sexual orientation and homosexual proclivities. Following the lead of these early cases, recent decisions have also incorrectly focused on the sexual orientation of the employer in determining whether same-sex sexual harassment is actionable.[129] *Joyner* was affirmed by the Eleventh Circuit without opinion, and as a result, little guidance was available to other circuits on how to analyze same-sex claims.

The Fourth Circuit first addressed the issue of same-sex sexual harassment in *McWilliams v. Fairfax County Board of Supervisors*.[130] The *McWilliams* court held that no hostile

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[127] 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd without opinion*, 749 F.2d 732 (11th Cir. 1984).

[128] The unwelcome sexual harassment alleged in *Joyner* consisted of the manager inviting plaintiff to enter the manager's car, placing his hands on plaintiff's genitalia and asking plaintiff to engage in sexual activities. Plaintiff refused and was thereafter laid off from work. The court found that the defendant maintained a legitimate reason for initially laying off plaintiff—the downsizing of its work staff. Nevertheless, the court held that defendant's actions constituted quid pro quo harassment. *Id.* at 539.

[129] *See, e.g.*, Wrightson v. Pizza Hut of America, 99 F.3d 138 (4th Cir. 1996), discussed *infra* pp. 1190-1191. After *Joyner*, several years passed before the issue of same-sex harassment was revisited. The reason for this hiatus is unclear. However, the increase in sexual harassment suits as a result of Professor Anita Hill's testimony during Justice Clarence Thomas's confirmation hearings has been at least one factor in the recent onslaught of same-sex harassment cases. After Justice Thomas's confirmation hearings, the nation's consciousness about sexual harassment was heightened and within one year the number of cases involving same-sex harassment grew dramatically. David Tuller, *Trends in the Workplace Rise in Gay Sex-Harassment Cases*, S.F. CHRON., Nov. 27, 1995, at A1. Presumably, an even larger number never reached the courts, either because of settlement or because plaintiffs failed to pursue legal remedies.

[130] 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996). The Fourth Cir-

work environment Title VII cause of action lies where both the perpetrator and the victim are heterosexuals of the same sex.[131] The court based its conclusion on the fact that the plaintiff did not allege or prove that any of his supervisors were homosexual.[132] The dissent stated that the nature of the coworkers' conduct—including sexually offensive touching and forcing themselves upon plaintiff[133]—suggests that such harassment was directed at McWilliams because he was a man, and that the plaintiff should not be required to allege and prove the sexual orientation of the perpetrators.[134] According to the dissent, such a requirement "would shift the [Title VII] focus . . . to a pursuit (surely to be complicated, far ranging, and elusive) of the 'true' sexual orientation of the harasser."[135] The *McWilliams* court specifically reserved the issue of whether Title VII proscribes erotic same-sex sexual harassment where the supervisor is homosexual.[136]

The Fourth Circuit answered this question in *Wrightson v. Pizza Hut of America*,[137] where the court held that a hostile work environment claim may lie where the supervisor is homosexual and the harassment is erotically driven.[138] Wrightson, a male employee, alleged that his homosexual male supervisor and coworkers made sexual advances toward him because of his sex.[139] The court reasoned that the statutory language of Title VII places no gender limitations on the perpetrators or

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cuit in *Hopkins v. Baltimore Gas & Electric Co.* declined to address the issue of whether Title VII proscribes same-sex sexual harassment; instead the Court affirmed the district court's dismissal of a same-sex claim on other grounds. 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

[131] *McWilliams*, 72 F.3d at 1195.

[132] *Id.*

[133] *McWilliams* involved a male employee whose coworkers, on several occasions, tied McWilliams's hands together, blindfolded him and forced him to his knees. During these instances a coworker placed his finger in McWilliams's mouth to simulate oral sex, and another coworker placed a broomstick to McWilliams's anus while a third coworker exposed his genitals. Other harassment included, but was not limited to, fondling and verbal sexual harassment of McWilliams. *Id.* at 1193.

[134] *Id.* at 1199.

[135] *Id.* at 1198.

[136] *McWilliams*, 72 F.3d at 1195.

[137] 99 F.3d 138 (4th Cir. 1996).

[138] *Id.* at 143.

[139] Specifically, Wrightson alleged that his coworkers would pressure him to engage in sexual acts, would constantly make sexually lewd remarks and innuendoes, and would touch Wrightson in sexually provocative ways. *Id.* at 138-39.

targets of harassment, nor does it require that they be of the opposite sex. The court concluded that an employee is harassed because of his or her sex if "but for" the employee's sex, he or she would not have been discriminated against.[140] The court reasoned that *because the supervisor was a homosexual*, he subjected McWilliams, a male, to disparate treatment because of his sex. The *Wrightson* court stated that the sexual orientation of the harasser is a determinative factor.[141] In doing so, the court dangerously turned away from the traditional Title VII inquiry, which focuses on whether the harassment was gender-motivated. The court transformed the inquiry into an investigation of the sexual orientation of the harasser, instead of asking whether the conduct was gender-based. Thus, the holding suggests that the Fourth Circuit will only recognize erotic, and not non-erotic, same-sex sexual harassment claims.

In all of the cases where erotic same-sex sexual harassment has been actionable under Title VII, courts have relied on the "but for" standard, which reasons that but for the employee's sex, the employee would not have been treated in that manner.[142] This standard and the rationales utilized in the above cases are indicative of the reasoning employed by the majority of courts addressing same-sex sexual harassment claims.[143]

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[140] *Id.* at 142.

[141] *Id.* at 143.

[142] The following cases are examples of court decisions that have held that same-sex harassment is actionable *and* that have relied upon the "but-for your sex" standard: McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (holding that the plaintiff, a female employee, proved that "but for the fact of her sex, she would not have been the object of harassment," and therefore the employer violated Title VII); Roe v. K-Mart Corp., No. CIV.A. 2:93-2372-18AJ, 1995 WL 316783 (D.S.C. 1995) (citing both *Joyner* and *Wright* in holding that unwanted same-sex sexual advances are "based on the employer's sexual preference and necessarily involve[ ] the plaintiff's gender for an employee of the non-preferred gender would not have inspired the same treatment"); Pritchett v. Sizeler Real Estate Management Co., 67 Fair Empl. Prac. Cas. (BNA) 1377 (E.D. La. 1995) (stating that plaintiff must demonstrate that "but for" her sex, she would not have been the object of harassment); *see* EEOC v. Walden Book Co., 885 F. Supp. 1100 (M.D. Tenn. 1995). This list provides a sample of cases recognizing same-sex sexual harassment and is by no means complete.

[143] See *infra* pp. 1197-99 and accompanying notes for a discussion of the problems that result from applying the "but for" standard.

C. *Courts that Have Held that Same-Sex Sexual Harassment of a Non-Erotic*[144] *Nature Is Actionable under Title VII*

The Eighth Circuit, in *Quick v. Donaldson Co.*,[145] is the only circuit thus far to hold that same-sex sexual harassment of a non-erotic nature may state a cause of action under Title VII.[146] Quick, a male employee, brought a hostile work environment suit alleging that his male coworkers subjected him to "bagging," physical assault and verbal harassment, including falsely labeling and taunting Quick about being homosexual.[147] In fact, the record states that both Quick and his coworkers were heterosexual.[148]

The district court granted summary judgment for the defendants.[149] Relying on reasoning similar to that used in *Goluszek*, the district court opined that because the workplace did not constitute an anti-male atmosphere, and was not predominately female, Quick failed to state a cause of action under Title VII.[150] The district court concluded that the challenged conduct was not sexual harassment because it did not express sexual interest, constitute sexual advances, or involve

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[144] To reiterate, non-erotic harassment includes derogatory statements, ridicule, verbal or physical assaults, and unwelcome criticism directed at the employee because of the employee's gender. *See, e.g.*, Burns v. Andrews, 989 F.2d 959, 964-65 (8th Cir. 1993) (plaintiff prevailed on sexual harassment suit where supervisor referred to her via derogatory and degrading language, including "bitch," "slut," "cunt," and "asshole"); Andrews v. City of Pennsylvania, 895 F.2d 1469, 1485 (3d Cir. 1990) (holding that "pervasive use of derogatory language and insulting terms relating to women generally . . . may serve as evidence in hostile environment suits"); *see also* Thorpe, *supra* note 8, at 1363.

[145] 90 F.3d 1372 (8th Cir. 1996).

[146] Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996) (reversing summary judgment for defendants on non-erotic same-sex sexual harassment claim).

[147] *Id.* at 1372. "Bagging" typically refers to an action aimed at a man's groin area; it includes grabbing and squeezing another man's testicles or making a feinting or flicking motion to that effect. The physical assaults included an incident where a coworker held plaintiff's arms while another grabbed and squeezed his left testicle, producing swelling and bruising. Another assault consisted of punching plaintiff in the neck. The verbal harassment included falsely labeling plaintiff as a homosexual, calling him "queer," and placing tags on him which depicted sexual acts with cucumbers and stated "pocket lizard licker" and "gay and proud." *Id.* at 1374-75.

[148] *Id.* at 1374.

[149] Quick v. Donaldson Co., 895 F. Supp. 1288, 1291 (S.D. Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996).

[150] *Id.* at 1295.

requests for sexual favors.[151] Lastly, the district court stated that the coworkers' conduct was mere horseplay and hooliganism based on personal enmity and not on sex.[152]

The Eight Circuit reversed. The circuit court quickly disposed of the district court's reasoning by declaring that protection under Title VII is not limited to only disadvantaged or vulnerable groups; rather, it extends to all employees discriminated against because of their sex.[153] Moreover, the circuit court stated that the challenged conduct constituted sexual harassment even though it was not based on sexual desire.[154] Additionally, the court refused to regard the conduct as mere horseplay.[155]

The Eighth Circuit held that the plaintiff satisfied the elements established in *Meritor* for stating a hostile work environment claim. The court reasoned that Quick is a member of a protected group (men), and that he was subjected to unwelcome sexual harassment by his coworkers.[156] The court specifically noted that conduct constituting actionable sexual harassment need not be explicitly sexual in nature, nor must it have sexual overtones.[157] The court reiterated the Supreme Court's language in *Harris v. Forklift Systems, Inc.*,[158] where the Court stated that "Title VII 'strikes at the entire spectrum of disparate treatment of men and women in employment' in order to provide a workplace free of 'discriminatory intimidation, ridicule and insult.'"[159] Accordingly, the coworkers' physical and verbal harassment constituted actionable conduct under Title VII, regardless of the fact that it was not erotically motivated. Moreover, the conduct at issue was clearly unwel-

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[151] *Id.* at 1296.

[152] *Id.* at 1297. Similar arguments were traditionally advanced by defendants and accepted by courts in opposite-sex sexual harassment cases and in race discrimination cases, but have since been rejected. MACKINNON, *supra* note 8, at 83-90.

[153] *Quick*, 90 F.3d at 1378.

[154] *Id.*; see *supra* note 8 for a discussion of non-erotically motivated conduct constituting sexual harassment.

[155] *Quick*, 90 F.3d at 1376.

[156] *Id.* at 1377-78.

[157] *Id.* at 1377 (citing Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1988)).

[158] Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993).

[159] *Quick*, 90 F.3d at 1377 (quoting *Harris*, 114 S. Ct. at 370).

come, uninvited and offensive.[160] Quick satisfied the remaining elements by establishing that the harassment was based on his sex by showing that women were not subjected to such treatment.[161] Further, the court found that the harassment was sufficiently severe and pervasive to create an abusive work environment, and that the employer failed to remedy the conduct.[162]

The Eighth Circuit's decision is most significant because it recognizes that same-sex sexual harassment may be actionable when the defendants' conduct does not consist of sexual advances and there are no allegations that defendants are homosexuals. The Eighth Circuit reached this conclusion by analyzing the various forms of harassing conduct that violate Title VII and by concluding that the coworkers' gender-motivated conduct satisfied the standards articulated by the Supreme Court for creating a hostile work environment. The Eighth Circuit noted that because Congress intended to define discrimination broadly, it did not enumerate specific discriminatory conduct "nor elucidate the parameters of such nefarious activities."[163] Accordingly, the court noted that sexual harassment may occur in many forms that are unrelated to sexual desire, including physical violence and verbal abuse.[164] Specifically, the court stated that "a worker need not be propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually harassed."[165]

The *Quick* decision is noteworthy for its rejection of the Fifth Circuit rationale in the *Garcia/Goluszek* line of cases, which focuses on whether the plaintiff can demonstrate an anti-male environment. *Quick* is also significant for its departure from the Fourth Circuit approach in *McWilliams*, which held that sexual harassment between heterosexuals of the same sex is not actionable.[166]

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[160] *Id.* at 1378.

[161] *Id.*

[162] *Id.* at 1377.

[163] *Id.* (citing Hall v. Gus Const. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (citations omitted)).

[164] *Quick*, 90 F.3d at 1377.

[165] *Id.* at 1379 (citing Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964 (8th Cir. 1993)).

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

Relying on the Eighth Circuit's decision and rationale, a Colorado district court in *Gerd v. United Parcel Service, Inc.*,[167] held that a male employee's claim of non-erotic same-sex sexual harassment was cognizable under Title VII. This issue was a matter of first impression in the Tenth Circuit. Gerd's complaint alleged that he was subjected to "unwelcome sexual or otherwise abusive conduct which was directed at him . . . because of his gender."[168] The conduct consisted of taunting Gerd about having numerous boyfriends and referring to him as a member of the Village People,[169] as well as physical harassment including coworkers approaching Gerd from behind and thrusting their pelvises forward in a manner resembling fornication.[170] Defendant UPS cited to authority from the Fourth and Fifth Circuits to support its position that same-sex sexual harassment was not actionable under Title VII.[171] However, the *Gerd* court relied on the Eighth Circuit decision in *Quick*. In fact, the *Gerd* court arguably went further in advancing the broad goals of Title VII and in focusing the Title VII inquiry on whether the harassment was gender based, regardless of the sexual orientation of the perpetrator or the victim. The *Gerd* court explicitly stated that "[j]ust as courts do not inquire into the sexual preferences of the victim in cases of opposite sex harassment, the sexual preference of the victim should be a non-issue in a same-sex sexual harassment case."[172]

Gerd alleged that the sexually offensive conduct was directed at him because he was a man. The court did not inquire into Gerd's sexuality, nor did it mischaracterize the issue as harassment of homosexuals. According to the court, "although the motive and causation may be less evident in same-sex

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[167] 934 F. Supp. 357 (1996).

[168] *Id.* at 358.

[169] The Village People was a 1970s pop music group that flaunted the homosexuality of its members.

[170] *Gerd*, 934 F. Supp. at 358. Additional harassment included coworkers grabbing and squeezing Gerd's buttocks in the presence of other employees, and continuous jokes about Gerd engaging in sex with other men.

[171] *Id.* at 359. UPS relied on *McWilliams* and *Garcia*, respectively.

[172] *Id.* at 360 (citing Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (citations omitted)).

sexual harassment actions," the facts alleged were sufficient to state a Title VII claim because the conduct was directed at Gerd because of his sex.[173]

III. RESOLVING THE CIRCUIT SPLIT: BOTH EROTIC AND NON-EROTIC SAME-SEX SEXUAL HARASSMENT VIOLATE TITLE VII

A. *Same-Sex Sexual Harassment of an Erotic Nature*

The most publicized form of sexual harassment occurs in cases where a male supervisor makes unwelcome sexual advances toward his female employees. While the typical scenario involves a man making sexually suggestive advances toward a woman, sexual harassment also occurs when women sexually harass men, when men harass men or when women harass women.[174]

A few hypotheticals will illustrate this point. Assume the typical heterosexual sexual harassment situation of a male employer making sexual advances toward his female employee. Imagine, for example, a male employer who continuously invites his female employee to dinner, makes sexually suggestive comments to her, fondles her on several occasions, asks her to engage in sexual relations with him and ultimately forces himself upon her. In *Meritor,* based on similar facts, the Supreme Court held that such conduct constitutes sex discrimination. The Court stated that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex."[175] The employer's actions violate Title VII because the employer is targeting and mistreating the woman because of her biological sex. He is focusing on her sex and not her merit and is therefore creating a barrier to sexual equality in the workplace. It is undisputed today that hostile environment harassment, as articulated in *Meritor*, violates Title VII. While

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[173] *Id.*

[174] Sexually harassing behaviors constitute harassment of a sexual nature that is motivated by erotic desire.

[175] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986).

the facts in *Meritor* involved the most common form of harassment, male-on-female, the Court's reasoning and holding was not limited to such interactions.[176]

Now assume that the employer and the employee are both male,[177] and that this employer is engaging in the exact same behavior as the employer above: The employer constantly harasses his male employee for dates, makes sexually suggestive comments to him, fondles him at work, and asks him to participate in sexual relations. Here also, the male employer is making a particular decision to mistreat his employee because of the employee's biological sex. Whenever gender is used as a criterion in harassment, the conduct is gender discrimination. As in opposite-sex harassment, this supervisor is sexually harassing his subordinate because of the subordinate's sex. Thus, the male employer's actions violate Title VII.

The harassment in each scenario is directed at the employee because of the employee's sex. These situations should not be treated differently under Title VII simply because the gender of the harasser and the harassed are the same. Nor should they be treated differently because of the sexual orientation of the employer or the employee. There simply is no need for an investigation into the perpetrator's sexual orientation because the sexual orientation of the harasser is irrelevant to a Title VII claim.[178] The determinative factor in both scenarios is that gender is used as a criterion in an employment decision.[179] Once this is recognized, it follows logically that both scenarios constitute sex discrimination and violate Title VII.

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[176] Thomas A. Wiseman, Jr., *Same-Sex Sexual Harassment Is Actionable Under Title VII of 1964 Civil Rights Act*, 63 U.S.L.W. 2710 (U.S. May 23, 1995).

[177] The male employee may be either homosexual, heterosexual or bisexual. The male employer making the advances presumably will be either homosexual or bisexual.

[178] Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996).

[179] Proposed Brief Amicus Curiae of the Women's Rights Project of the ACLU at 2, Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 872 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (U.S. Oct. 7 1996). "The sole question for a court in determining whether a plaintiff has stated a claim of sexual harassment is whether he or she was mistreated because of his or her sex. This inquiry is identical regardless of the genders of the harasser and the victims." *Id.* However, if an employer can demonstrate that the gender-based decision was motivated by a legitimate, nondiscriminatory business necessity, the burden shifts to the plaintiff to show that the defendant's proffered reason was merely a pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The same rationale should be applied to situations where women make sexual advances toward other women. Where a female employer makes a gender-conscious decision to harass a woman, the employer is using gender as a criterion. This conduct is sex discrimination because the female employer is mistreating the female employee because of her sex.

1. Traditional Approach: "But For Your Sex" Standard

The Fourth and Eleventh Circuits, and a host of district courts that have held that erotic same-sex sexual harassment is actionable under Title VII, have reached the proper conclusion, but they have relied on a problematic standard. These courts have relied on the "but for your sex" standard, which provides that a Title VII cause of action lies where the supervisor would not have subjected the employee to such conduct but for his or her sex. This standard fails to account for an individual that harasses both genders equally. Most courts either have shied away from addressing the logical problems raised by the bisexual harasser or have indicated that a bisexual harasser would be immune from liability.[180] The former approach merely postpones the issue, while the latter approach is both illogical from a legal point of view and absurd from a policy perspective.

A bisexual harasser is one who makes unwelcome sexual advances to both men and women alike. Courts that have relied on the "but for your sex" standard have stated that the bisexual harasser is not discriminating on the basis of gender because his or her offensive conduct is applied equally to both men and women. Thus, courts applying this standard have indicated that bisexual harassers are not subject to liability under Title VII.[181] To illustrate, imagine a male bisexual em-

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[180] There are no reported cases of a bisexual supervisor erotically harassing both sexes. However, courts have inferred in dicta that bisexual harassment would not be covered under Title VII. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Jones v. Flagship Int'l, 793 F.2d 714, 720 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

[181] McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (stating that all sexual harassment is based upon sex and is a violation of Title VII except where the employer is bisexual and subjects men and women to the same harass-

ployer who harasses both a female and a male employee. The female employee cannot successfully argue that *but for her sex* she would not have been discriminated against. Her argument fails under the "but for" standard because if she were a man she may still be subject to the bisexual employer's sexual advances. Because the bisexual harasser may demand sexual favors of both male and female employees, neither gender is the "but for" cause of the employer's harassment. Therefore, several courts have suggested that bisexual harassers are immune from liability.

Most courts, however, have avoided the logical inconsistencies created by applying the "but for" standard to cases where supervisors harass employees of each gender. For example, in *Chiapuzio v. BLT Operating Corp.*,[182] the district court sought to distinguish bisexual harassment from equal opportunity harassment. The *Chiapuzio* court labeled this case an equal opportunity harassment case rather than a bisexual harassment case in order to show Title VII violations.[183] In *Chiapuzio*, the male supervisor's harassment of each gender was different: His harassment of women was of an erotic nature while his harassment of men was of a non-erotic nature. The *Chiapuzio* court broke from the rationale of prior courts which relied on the "but for your sex" standard.[184] Instead, the court relied on the Supreme Court's decision in *Meritor* which "moved away from a disparate treatment or 'but-for' analysis of gender harassment."[185]

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ment)). The *McCoy* court further states that only in the "exceedingly atypical case of a bisexual supervisor, it should be clear that *sexual harassment is discrimination based upon sex.*" *Id.* (citing *Henson*, 682 F.2d at 905); *see* Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981) ("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.").

[182] 826 F. Supp. 1334 (D. Wyo. 1993).

[183] *Id.* at 1337 (holding that sexually offensive comments directed at women and men may amount to gender harassment in violation of Title VII). The *Chiapuzio* case involved a supervisor that harassed married couples by making comments that the supervisor could satisfy the women better than their husbands. The court distinguished between bisexual harassment and equal opportunity harassment. *Id.*

[184] *Id.* at 1336.

[185] *Id.*

The *Chiapuzio* court concluded that the equal harassment of both genders does not escape the purview of Title VII.[186] The court stated that the employer harassed the man because he was male and the woman because she was female.[187] That is, the employer harassed both genders *because of their gender.* Using this paradigm, the bisexual harasser would also be liable under Title VII.

2. New Approach: "Because Of Your Sex" Standard

The application of a new modified "because of your sex" standard hinted at in *Chiapuzio* is necessary to ensure that the goal of Title VII's prohibition against sex discrimination is met. Instead of asking whether discrimination occurred *but for* the plaintiff's sex, the determinative inquiry should be whether the discrimination occurred *because of* plaintiff's sex.[188] While the difference may appear slight, this new standard is more closely in accordance with the statutory language and goals of Title VII. In fact, the statutory language specifically states that it is "an unlawful employment practice to discriminate against an individual *because . . . of sex.*"[189] Thus, the plain meaning of Title VII's prohibition of discrimination based on sex suggests that the "because of your sex" standard is the appropriate standard. Despite this statutory language, several courts have interpreted Title VII to apply only where the discrimination would not have occurred but for the plaintiff's sex.[190] This interpretation is inaccurate and misleading. The Supreme Court in *Price Waterhouse v. Hopkins*[191] stated that "to construe the words 'because of' as colloquial shorthand for

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[186] *Id.* at 1337; *see* Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) (holding that sexually offensive comments directed at both women and men can constitute a Title VII violation where the harassment of women was different from the harassment of men).

[187] *Chiapuzio,* 826 F. Supp. at 1337. The court stated that "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 gender.'" *Id.* (quoting John J. Donahue, *Review Essay: Advocacy Versus Analysis in Assessing Employment Discrimination Law,* 44 STAN. L. REV. 1583, 1610-11 (1992)).

[188] The inquiry should be whether gender was a factor in the employment decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).

[189] 42 U.S.C. § 2000e-2(a)(1) (1988) (emphasis added).

[190] *Price Waterhouse,* 490 U.S. at 240.

[191] *Id.*

'but for causation' is to misunderstand them."[192] "But for" causation represents the outermost limits of what may be shown in order to prove sex discrimination. That is, "but for" causation is sufficient, but not necessary.[193]

Moreover, the "because of your sex" standard is preferable to the "but for" standard because the latter necessitates an improper inquiry into the sexual orientation of the harasser, whereas the former is able to address gender discrimination without inquiring into the harasser's sexual orientation. Sexual orientation should not be a factor when determining whether or not the victim of sexual harassment has a legal remedy.[194] Indeed, from the victim's point of view it makes no difference whether the harasser is male, female, heterosexual, homosexual or bisexual. Application of the "because of your sex" standard would help accomplish the broad anti-discrimination goals of Title VII.

B. *Same-Sex Sexual Harassment of a Non-Erotic Nature*

It is undisputed that an employer's harassment, if based on the gender of an employee, violates Title VII. Thus, the harassment need not be sexually motivated to be actionable under Title VII. "Title VII does not require that sexual harassment be motivated by attraction, only that it be 'because of sex.'"[195] Harassment that is based on an individual's biological sex but is not motivated by erotic desires may include physical abuse, verbal taunting and rude or derogatory statements. Often such harassment is directed at an employee because the employee fails to conform to the socially-constructed gender roles traditionally assigned to each sex.[196] The socially-con-

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[192] *Id.*

[193] The Supreme Court has stated that plaintiffs need not show "but for" causation. If, however, "but for" causation is proven, the plaintiff will undoubtedly prevail. *Id.*

[194] Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (holding that the sexual preference of the harasser should be irrelevant to Title VII claims).

[195] *Id.* Harassment, like other types of victimization, is often motivated by the need to control others and exert one's power. While this conduct may be expressed through sexual advances, it need not be. *Id.*

[196] Individuals who do not conform to the traditional gender roles associated with their sex are often labeled "effeminate men" or "masculine women." Because

structed conduct and characteristics stereotypically deemed "appropriate" for men include, but are not limited to, rational, aggressive, domineering, independent and sexually experienced behavior.[197] In contrast, socially-constructed conduct and characteristics stereotypically deemed "appropriate" for women include emotional, submissive, subordinate, dependent and sexually naive behavior.[198]

Harassment of an employee because the employee's conduct does not conform to the stereotypical traditional sex roles or sex ideals[199] is sex discrimination.[200] An employer who

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of the obvious offensiveness of such terms, this Note will refer to such individuals as nonconformists. Hereinafter, the term "nonconformist" or "nonconforming" is used to refer to individuals who do not conform to the socially-constructed gender ideals that society has traditionally sought to impose as gender norms.

[197] *See* Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1976 (1995) [hereinafter *Patriarchy Is Such a Drag*]. Issues surrounding socially constructed gendered characteristics are frequently discussed by feminist theorists. *See generally* KATHERINE T. BARTLETT, GENDER AND LAW (1993); SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley ed. & trans., 1957); HOLLY DEVOR, GENDER BLENDING: CONFRONTING THE LIMITS OF DUALITY (1989); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987); Judith Butler, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*, *in* FEMINISM/POSTMODERNISM 324 (Linda J. Nicholson ed., 1990).

[198] *Patriarchy Is Such a Drag*, *supra* note 197, at 1976. At the risk of belaboring the obvious, these characteristics, of course, are generalized stereotypes. They are by no means exclusive to or indicative of either gender, nor are they "deemed appropriate" by all men and women.

[199] Throughout this Note the terms sex roles and gender roles have been used interchangeably. Sex roles and gender roles refer to the behavior, conduct and traits that are stereotypically and traditionally associated with each sex. Arguably, these behaviors have nothing to do with biological sex; rather these gender roles are created, constructed, assigned, enforced and perpetuated by society. That is, there is no *inherent* female gender role or male gender role; these roles are merely ideals created by society in order to maintain the superior status of men. *See* MACKINNON, *supra* note 8, at 152-58. Sex roles prescribe appropriate male and female conduct and allocate power "in the interest men and to detriment of women." MACKINNON, *supra* note 8, at 157. "[O]ne function of the female sex role is to reinforce the impression, and create the social actuality, of male dominance and female subordination." MACKINNON,, *supra* note 8, at 157; *see generally*, DEVOR, *supra* note 197 (gender roles are the product of systematic power imbalances based on gender discrimination). If all women adhered to their assigned "gender ideals"—passive, maternal, nurturing, domestic, dependent, relational, emotional and sexually passive—men in society would be able to maintain their socially created status and ground that status in biological sex. Similarly, if all men adhered to their assigned "gender ideals"—aggressive, independent, powerful, career-oriented, sexually active, individualistic, public and rational—men would be able to tout that, because of their biological sex and the traits inherent in it, they are superior beings. *Patriarchy Is Such a Drag*, *supra* note 197, at 1973, 1976, 2008.

[200] *See Goluszek* discussion *supra* pp. 1181-1184 and accompanying notes. The

makes distinctions based on "appropriate" behaviors for men and "appropriate" behaviors for women either consciously or unconsciously devalues women. Inherent in the distinction between "acceptable" male and female conduct is a value judgment that male behaviors are superior to female behaviors.[201] The socially-constructed "male behaviors" have historically and traditionally been more highly esteemed than socially-constructed "female behaviors."[202] Consequently, the enforcement and maintenance of these gender ideals perpetuates a system of male hierarchy and female subordination. Individuals who transcend these gender categories by not conforming to gender role stereotypes threaten the status quo. The Supreme Court in *Price Waterhouse* recognized that employer decisions that are based on such rigid distinctions between appropriate conduct for men and women violate Title VII.

1. *Price Waterhouse v. Hopkins*: Gender Stereotyping Is Sex Discrimination

> "[A]n 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." — U.S. Supreme Court (1989)[203]

The Supreme Court condemned gender stereotyping in the employment context in the early 1970s,[204] and the EEOC

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harassment in *Goluszek* was based on plaintiff's failure to conform to the stereotypical image of "appropriate" male behaviors. The coworkers subjected Goluszek to such treatment because he was a male. While the harassment was directed toward Goluszek, a male, and not toward a female, it was also denigrating to women because of the offensive and derogatory language about women as sex objects.

[201] *See generally* Case, *supra* note 4, at 72; Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 635 (1983) ("Each sex has its role, but their stakes and power are not equal."); *see also* DEVOR, *supra* note 197.

[202] "[G]endered characteristics . . . seen as masculine are often more highly valued than those seen as feminine." Case, *supra* note 4, at 6, 17. See *supra* note 197 for a list of representative feminist theorists whose works are commonly associated with such views.

[203] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

[204] In *Frontiero v. Richardson*, statutes that facially discriminated against women were held unconstitutional. 411 U.S. 677 (1973) (adopting a sex stereotyping approach to constitutional law and opposing "invidiously relegating the entire class of females to inferior legal status"). In 1979, the Supreme Court later revisited the issue of impermissible sex stereotyping. The Court held that decisions made on the basis of gender "carry the inherent risk of reinforcing stereotypes about the proper place of women." Case, *supra* note 4, at 38 (citing Orr v. Orr, 440 U.S. 268, 283

Guidelines and various district court cases had proscribed gender stereotyping since the 1960s.[205] However, it was not until 1989 that the Supreme Court in *Price Waterhouse* recognized that gender stereotyping constitutes sex discrimination.[206] The Court held that the defendants violated Title VII by failing to promote a qualified woman because she did not conform to the stereotypical traits associated with her sex.[207]

In *Price Waterhouse*, the employer described the female employee, Ann Hopkins, as "aggressive" and "macho."[208] She was advised by her superiors to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[209] The Court stated that 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."[210] The employer's conduct violated Title VII on two levels. First, the employer would not have harassed a male for exhibiting the same behaviors. Therefore, the employer discriminated because of the female employee's sex. Second, this harassment is discrimination because the employer was sex stereotyping—relying upon traditional and harmful notions of acceptable conduct for women. The Court stated that

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[211]

(1979)).

[205] Case, *supra* note 4, at 37. Sex stereotyping has been defined as "the assigning of certain behavioral characteristics as appropriate for women or for men, but not for the other sex." Dillon v. Frank, 58 Empl. Prac. Dig. (CCH) ¶ 41,332 (6th Cir. 1992).

[206] *Price Waterhouse*, 490 U.S. at 250.

[207] Several feminist theorists would argue that stereotypical gender role traits are *assigned* to each sex, rather than "associated" with each sex. For an in-depth discussion of this assertion, see Butler, *supra* note 197; *Patriarchy Is Such a Drag*, *supra* note 197.

[208] *Price Waterhouse*, 490 U.S. at 235. Other supervisors stated that Hopkins "overcompensated for being a woman" and that she "had matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady." Hopkins was also criticized for cursing because she was a "lady using foul language." *Id.*

[209] *Id.*

[210] *Id.* at 250.

[211] *Id.* at 251 (quoting Los Angeles Dep't of Water and Power v. Manhart, 435

The *Price Waterhouse* decision established that employers cannot compel employees to exhibit socially-constructed gender ideals or punish employees for failing to conform to such ideals without violating Title VII.[212] After *Price Waterhouse*, such conduct violates Title VII.

The Supreme Court condemns sex stereotyping because it reduces and confines women and men to separate spheres. The "appropriate" female sphere is typically undervalued in society, and thus sex stereotyping results in women being perceived as inferior.[213] The dangers inherent in sex stereotyping are independent of the sex of the employer and of whether the employer and employee are the same sex. Therefore, while *Price Waterhouse* involved a male employer that discriminated against a female employee, the same result should apply in cases where a female employer subjects a female employee to similar conduct and ridicule that Hopkins experienced.

Assume a further variation of the facts in *Price Waterhouse*—that a male employer is harassing his male employee for "acting like a woman" because the male employee is exhibiting what are preceived to be stereotypical female traits: passivity, sensitivity, excitability or sexual naiveté.[214] As in the *Price Waterhouse* case, the employer's harassment is sex discrimination for two reasons. First, the employer is harassing the male employee because of his biological sex; had the employee been a woman exhibiting the same characteristics, the employer would not have harassed the employee. Second, the employer is indirectly enforcing traditional gender role behaviors. By harassing the male employee, the employer is seeking to suppress the employee's "feminine" conduct that does not conform to the employer's notions of "appropriate" male behaviors.[215]

U.S. 702, 707 n.13 (1978)).

[212] *Id.*

[213] *See supra* notes 197, 199, 201-202 and accompanying text.

[214] These traits are examples of stereotypical characteristics associated with socially-constructed gender roles. Again, they are by no means exclusive to or indicative of the female gender; they are merely utilized here to develop the argument. Accordingly, postmodern feminist theory refuses to treat gender as if it were the truth about men and women. Rather, it focuses on the external forces—society, law, environment—that "construct" gender and gendered roles. *See Patriarchy Is Such a Drag*, *supra* note 197, at 1973; *see supra* notes 197-199.

[215] The *Goluszek* case is a perfect example. In *Goluszek*, male coworkers ha-

As in *Price Waterhouse,* this employee, by exhibiting transgender traits, presents a threat to the male hierarchy.[216] The employee, whose biological sex is male but who exhibits both socially-constructed "male" and "female" characteristics, breaks down the strict barriers between what are considered "male behaviors" and "female behaviors," what makes "men" distinct from "women."[217] By transgressing these socially-constructed barriers, the employee presents a threat to the traditional patriarchal order, which depends for its existence on its ability to "otherify" the female gender and women as a whole in society.[218] Therefore, the transgression of the socially constructed gender-ideal barriers jeopardizes the foundation of the current system that subordinates women and privileges men.

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rassed Goluszek, a male employee, because he did not demonstrate the stereotypical traits associated with his gender: he was prudish, shy and sexually inexperienced. Because he did not exhibit sexual prowess and a demeaning attitude toward women that was shared by his coworkers, he was subject to harassment. *See supra* note 104 and accompanying text.

[216] Similarly, gays and lesbians "threaten the stability of masculinity and femininity by making the repression of difference impossible." *Patriarchy Is Such a Drag, supra* note 197, at 1975; *see generally* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

[217] *Patriarchy Is Such a Drag, supra* note 197, at 1976.

[218] "Masculinity and femininity are not only polar opposites, but also complementary—each is defined in terms of what the other is not." *Patriarchy Is Such a Drag, supra* note 197, at 1976. Indeed, each depends upon the other for its status. *Cf. Patriarchy Is Such a Drag, supra* note 197, at 1974; *see* DE BEAUVOIR, *supra* note 197, at xv-xviii; Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 158 (1988) [hereinafter *Miscegenation Analogy*] (homosexuality is threatening because it calls into question the distinct and superior status of being male); Thomas Szasz, *Legal and Moral Aspects of Homosexuality, in* SEXUAL INVERSION 124, 135 (J. Marmor ed., 1965) (homosexuals do not threaten society by their actual conduct but rather by their symbolic significance).

2. Expanding *Price Waterhouse*: Sexual Harassment of a Gay or Lesbian Employee for Not Conforming to His or Her Sexually-Defined Gender-Role Stereotype Is Sex Discrimination[219]

The *Price Waterhouse* rationale should also apply to the harassment of gay employees.[220] Assume that Ms. Hopkins, in addition to or in lieu of her aggressiveness and other "male" behavioral traits, chooses to engage in sexual activity with women. In addition, assume that Ms. Hopkins's employer would not harass male employees for desiring or engaging in sex with women. The harassment of Ms. Hopkins for her desire to engage in sex with women would violate Title VII for the same two reasons articulated in *Price Waterhouse*: first, the employer would not have harassed a male employee who exhibits the same desires or who engages in the same activity; and second, the harassment is a result of sex-role stereotyping. The employer is, in effect, mandating that the woman's conduct conform to heterosexual ideals and punishing her for not conforming.[221] The heterosexual paradigm that the employer seeks to enforce is one that is premised on traditional sex roles in which men are viewed as dominant and women as subordinate, sexually and socially. Since the employer's conduct is based on the employee's sex and on the employer's notion of "accepted" sex-role behaviors, the harassment violates Title VII.

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[219] The term "sexually-defined gender-role stereotype" refers to the heterosexual ideal that "appropriate" male sexual activity occurs with a woman and "appropriate" female sexual activity occurs with a man. Harassment of employees who do not conform to the heterosexist sex-role stereotype is exactly the type of sex stereotyping that the Supreme Court sought to eradicate in *Price Waterhouse*.

[220] The terms "gay" and "lesbian" in this section were added reluctantly. Once the employee is labeled gay, it is likely that his or her case will be mischaracterized as a claim of sexual orientation discrimination, rather than sex discrimination. Courts have frequently mischaracterized valid same-sex harassment claims based on sex discrimination as sexual orientation discrimination claims; this misconception is dispositive. Once a court presumes sexual orientation discrimination, which is not protected under Title VII, the issue is unfairly predetermined. As a result, discrimination "against effeminate men may be overdetermined, and effeminacy conflated with gayness." Case, *supra* note 4, at 17. "Courts often conflate gender with sex and particularly with sexual orientation." Case, *supra* note 4. Hereinafter, unless otherwise specified, this Note will use the term "gay" as an umbrella term encompassing both lesbian women and gay men.

[221] *Patriarchy Is Such a Drag*, *supra* note 197, at 1973.

Similarly, a male employer who harasses a gay male employee for having sex with men is violating Title VII if the employer would not have harassed a woman for having sex with men.[222] Therefore, the employer is treating men and women differently because of their sex. To illustrate, if Mr. Smith, a heterosexual male employer, verbally and physically harasses Dave, a gay male employee who desires to have sex with men, and does not similarly harass Jen, a female employee who also desires to have sex with men, then Mr. Smith's conduct violates Title VII because he is harassing Dave on the basis of his gender. If Dave were a female, like Jen, and exhibited the same desire to have sex with men, Mr. Smith would not have similarly harassed him.

As in *Price Waterhouse*, Mr. Smith mistreats Dave because of Mr. Smith's own preconceived notions of "acceptable" gender-role behaviors. At the heart of such harassment is the heterosexist ideal that men are supposed to have sex with women.[223] The employer, in essence, is making a decision based upon his view of appropriate conduct for men (having sex with women) as distinct from appropriate conduct for women (having sex with men). If the harassment is in response to an individual's deviation from stereotypical gender roles, the harasser is in effect attempting to reinforce such traditional sex stereotypes.[224] By trying to enforce different behaviors for

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[222] Andrew Koppelman, *Why Discrimination Against Lesbian and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994) (if the same conduct is prohibited when engaged in by an individual of one sex, but is tolerated when engaged in by the other sex, then the party imposing the prohibition is discriminating on the basis of sex).

[223] Traditionally, women were expected to be passive participants in sex and to be dominated by men. This led to the notion of women as the penetrated and degraded sex. Koppelman, *supra* note 222, at 234. Arguably, one of the reasons that gays are discriminated against is because they allow themselves to be penetrated like women. Gay men threaten "the hierarchical significance of sexual intercourse and the polluted status of the penetrated person. The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading." Koppelman, *supra* note 222, at 235. Similarly, lesbianism is threatening to the "hierarchical significance of sexual intercourse . . . . Lesbianism is a form of insubordination: it denies that female sexuality exists or should exist, only for the sake of male gratification." Koppelman, *supra* note 222, at 236.

[224] Koppelman, *supra* note 222, at 234; *Patriarchy Is Such a Drag*, *supra* note 197, at 36 (discussing the perceived need for males to police gender boundaries against any intrusion of the female in order to guard against taint by the inferior); *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that sex stereo-

men and women based on their sex, the employer creates and mandates arbitrary differences between the sexes based on the employer's belief in "gender-appropriate conduct." As the Supreme Court held in *Price Waterhouse*, this imposition of traditional sex roles is sex discrimination.[225]

3. Recognizing that Harassment of Gays and Lesbians and Nonconforming Men and Women Perpetuates Female Subordination

To understand how harassment of a nonconforming employee both directly harms the individual employee and indirectly harms women in society overall, it is useful to look at a similar situation that arose in the context of racial subordination. In *Loving v. Virginia*,[226] the Supreme Court held that miscegenation statutes, prohibiting whites and blacks from marrying, were unconstitutional. The Court's decision in *Loving* recognized that the miscegenation laws, mandating traditional marriage relationships of white men and women, perpetuated the subordination of blacks by enforcing a separation between the races.[227] Similarly, non-erotic same-sex sexual harassment, which often mandates traditional sex roles, maintains a hierarchical system that elevates men and relegates women to an inferior status.

In *Loving*, the Supreme Court declared that miscegenation statutes prohibiting interracial marriages were unconstitutional because they drew distinctions on the basis of race. Proponents of such statutes argued that they did not discriminate because they treated blacks and whites equally—neither could marry outside of their race.[228] Even though the statutory language treated blacks and whites alike, the intent and effect of the statutes violated the Equal Protection Clause of the Fourteenth Amendment.[229] These statutes were unconstitutional for two reasons: First, such statutes directly discriminated on basis of race by permitting persons to marry individuals of

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typing is sex discrimination).

[225] *Price Waterhouse*, 490 U.S. 228 (1989).

[226] 388 U.S. 1 (1967).

[227] Koppelman, *Miscegenation Analogy*, *supra* note 218, at 147.

[228] *Loving*, 388 U.S. at 8.

[229] *Id.* at 12.

their own race but prohibiting such persons from marrying individuals of another race. Second, the underlying purpose and effect of these statutes was to support indirectly a hierarchical system that secured a superior status for whites and an inferior status for blacks.[230]

The Supreme Court recognized that miscegenation laws discriminated on the basis of race in order to maintain a system of white supremacy.[231] A superior white status could only exist by differentiating and distinguishing itself from the black population. White supremacy thrived on the notion that skin color inherently dictated a certain social status assigned at birth. White skin pigment was assigned a superior status and nonwhite pigment was assigned an inferior status. Those in favor of miscegenation statutes believed that the mixing of the races would pollute the white's "superior status" by blurring the distinctions between the two races.[232] Therefore, while miscegenation statutes applied to both blacks and whites, the underlying intent was to maintain white superiority.

Similarly, while interracial marriages threatened white supremacy because they blurred the distinction between white and black status, homosexuality and other nonconforming conduct threatens male supremacy because it "calls into question the superior status of being male" by blurring the distinctions between "men" and "women."[233] The arguments surrounding the dual discriminatory effect of miscegenation statutes are applicable in the context of same-sex sexual harassment not based on erotic desires. First, the harassment directly discriminates against the nonconforming employee who exhibits characteristics or desires that would be acceptable if exhibited by the opposite sex; and second, the harassment of employees who fail to conform to stereotypical sex role behav-

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[230] Koppelman states that the purpose of miscegenation statutes was twofold. "Beyond the immediate harm they inflict upon their victims, their purpose is to support a regime of caste that locks some people into inferior social positions at birth." Koppelman, *Miscegenation Analogy*, *supra* note 218, at 147.

[231] *Loving*, 388 U.S. at 11; Koppelman, *supra* note 222, at 201.

[232] In upholding the constitutionality of these statutes, Virginia's highest court reasoned that the statutes serve the state's legitimate interest to "preserve the racial integrity of its citizens," to prevent "the corruption of blood" and "the obliteration of racial pride." *Loving*, 388 U.S. at 7. The *Loving* Court referred to Virginia's stated objectives as "obviously an endorsement of White Supremacy." *Id.*

[233] Koppelman, *Miscegenation Analogy*, *supra* note 218, at 158-60.

iors indirectly supports a heterosexual system that historically secured a superior status for men and an inferior status for women. Just as white supremacy was perpetuated by society's ability to maintain separate spheres for whites and blacks, the patriarchal system thrives on its ability to maintain socially constructed differences between men and women. Employees that blur these distinctions by not conforming to traditionally accepted gender roles are in effect reinforcing and perpetuating a heterosexual system that privileges men and disadvantages women.[234]

C. *Courts that Have Held that Erotic and Non-Erotic Same-Sex Sexual Harassment Are Actionable Have Reached the Proper Conclusion by Incomplete Analysis*

The district and circuit courts that have held that same-sex sexual harassment claims are actionable have all reached their conclusions based on the fact that the employee in each case was subjected to differential treatment based upon his or her sex.[235] While this argument is logically sound and conforms to the broad goals of Title VII, this analysis is not fully developed. Courts should go one step further and recognize and address the more fundamental underlying issue: that gender-based employment decisions, including the enforcement of traditional gender stereotypes, result in gender inequality in the workplace. Courts need to analyze and discuss the effect of disparate treatment on the sexes, and the resonating consequences for women in society overall. Specifically, in non-erotic harassment cases, where employers harass employees for not conforming to the stereotypical roles associated with each sex, courts have failed to recognize that such treatment ultimately harms women by perpetuating traditionally accepted roles of women—socially, sexually and politically. Additionally, courts need to keep their inquiries focused on whether the harass

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[234] Discrimination against lesbians and gay men reinforces the hierarchy of males over females and perpetuates the oppression of women. Koppelman, *supra* note 222, at 197; *see* Law, *supra* note 216, at 187.

[235] *See supra* Sections II.B, II.C.

ment was motivated by the victim's gender, rather than investigating into the sexual orientation of the harasser or the harassed.

IV. POLICY REASONS FOR ALLOWING VICTIMS OF EROTIC AND NON-EROTIC SAME-SEX SEXUAL HARASSMENT TO RECOVER UNDER TITLE VII

In recent years, the number of same-sex sexual harassment cases has risen dramatically due to a growing acceptance and recognition of sexual harassment claims in general.[236] Also, this past decade has witnessed a greater openness regarding gay men and lesbian women in the workplace. The combination of these trends will undoubtedly lead to an increased number of erotic and non-erotic same-sex sexual harassment suits. Therefore, the need for clear guidelines and their uniform application is imperative.

As more courts begin to recognize same-sex sexual harassment claims, an increasing number of employees who are sexually harassed because of their gender will have a federal legal remedy. Recognition of erotic and non-erotic same-sex sexual harassment would allow heterosexual and homosexual victims of gender harassment to seek legal redress for their victimization.[237] While Title VII clearly does not prohibit discrimination based on sexual orientation, homosexuals harassed be-

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[236] Approximately five percent of harassment cases fall into the same-sex category. This proportion may increase as gays and lesbians become increasingly aware of and vocal about their rights as employees. "There is a new political awareness in the gay community that makes gays less willing to allow themselves to be victimized. . . . And, as gays come to see the law as protecting their rights in general, they will use the legal system more and more to stop discriminatory conduct." Susan Christian, *Battle Against Same Sex Harassment Comes Out of the Closet*, L.A. TIMES (Orange County Edition), July 12, 1994.

[237] In holding that same-sex sexual harassment claims are actionable under Title VII, courts will allow gay employees to achieve the same federal legal remedies for sexual harassment as those possessed by heterosexuals since the early 1970s. The ability of gays to prevail on sexual harassment claims is a significant step toward increasing gay and lesbian legal rights; however, it is hardly a substitute for protection against sexual orientation discrimination. The issue regarding whether sexual orientation harassment and discrimination should be actionable under Title VII is beyond the scope of this Note.

cause of their gender should be afforded the same existing protections under Title VII as anyone else.[238] Title VII's exclusion of sexual orientation as a protected category

> cannot be extended to embrace the proposition that a homosexual harasser may harass a person of the same sex with impunity, or that a homosexual victim may be harassed by a person of the same sex with impunity. Title VII protects all persons, whether male or female, heterosexual or homosexual, from discrimination based on sex.[239]

The recognition of same-sex sexual harassment claims is a highly controversial issue and is often criticized by both heterosexual and homosexual communities. Indeed, those arguments that oppose same-sex sexual harassment claims reflect a very narrow interpretation of Title VII, whereas current employment discrimination jurisprudence advocates a more expansive reading of Title VII.[240] That is, recent court decisions have applied Title VII to nontraditional modes of discrimination such as reverse race discrimination,[241] reverse sex discrimination[242] and same-race racial harassment.[243] Claims of same-sex sexual harassment should also be included in this broad and liberal reading of Title VII. As one commentator notes, it would be "simply untenable to allow reverse [sex] discrimination cases but not same-sex harassment cases under

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[238] Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996).

[239] *Id.*

[240] The Supreme Court implied that Title VII applies to nontraditional discrimination contexts by stating in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), that the standard for establishing discrimination should be modified to accommodate different employment discrimination contexts. Wiseman, *supra* note 176.

[241] The term "reverse race discrimination" refers to discrimination that occurs when a member or members of a minority race discriminate against a member or members of a majority race. Many courts have permitted reverse race discrimination actions under Title VII. *See, e.g.*, McNabola v. Chicago Transit Auth., 10 F.3d 501 (7th Cir. 1993) (holding that white doctor was the victim of reverse race discrimination).

[242] The term "reverse sex discrimination" refers to discrimination which occurs when a female employer discriminates against a male employee because of his gender. *See* Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994).

[243] Courts have recognized that same-race racial discrimination violates Title VII. Hansborough v. City of Elkhart Parks & Recreation Dep't, 802 F. Supp. 199 (N.D. Ind. 1992) (recognizing viability of intraracial discrimination claim); Walker v. Secretary of Treasury, 713 F. Supp. 403 (N.D. Ga. 1989) (light-skinned black asserting racial harassment by dark-skinned black supervisor).

Title VII."[244] Men and women should have the right to protect themselves from harassment based on their sex, regardless of the gender of their harasser.

Persuasive arguments have been made that court recognition of same-sex sexual harassment claims will only result in harming gay employers.[245] This position is premised on the fact that almost all of the district and circuit courts that have held that same-sex sexual harassment violates Title VII have done so only in cases concerning gay employers and heterosexual employees.[246] As a result, many people fear that the recognition of same-sex claims will amount to nothing more than court-sanctioned homophobia.[247]

Convincing arguments have also been made that the recognition of same-sex claims would still fail to benefit nonconforming employees who are discriminated against because of their gender. The majority of courts often label such cases as "sexual orientation" harassment cases and dismiss them summarily without acknowledging the underlying and pervasive gender discrimination which is at the root of such harassment.[248] However, the Eighth Circuit in *Quick*[249] and the district court in *Gerd*[250] recently departed from these trends and recognized Title VII's applicability to same-sex claims, regardless of the sexual orientation of the harasser or the harassed.

> Just as courts do not inquire into the sexual preference of the victim in cases of opposite-sex sexual harassment, the sexual preference of the victim should be a non-issue in a same-sex sexual harassment case. The focus should be on the harassing conduct itself and whether the harassment is because of sex.[251]

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[244] Wiseman, *supra* note 176.

[245] *See generally* Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm*, 7 YALE J.L. & FEMINISM 375 (1995).

[246] *But see* Roe v. K-Mart Corp., No. CIV.A.2:93-2372-18AJ, 1995 WL 316783 (D.S.C. Mar. 28, 1995) (holding gay employer liable for same-sex sexual harassment of gay employee).

[247] Wiseman, *supra* note 176.

[248] *See, e.g.*, Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996).

[249] Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996).

[250] Gerd v. United Parcel Serv., 934 F. Supp. 357 (D. Colo. 1996).

[251] *Tanner*, 919 F. Supp. at 355.

The recognition of same-sex sexual harassment claims under Title VII will result in legal protections for all employees who are subjected to discrimination because of their gender, regardless of the sexual orientation of the harasser or the victim. The value of preventing gender-motivated employment decisions outweighs the potential misuse that may accompany any expansion of Title VII to include same-sex sexual harassment claims.

CONCLUSION

Any form of harassment in the workplace that is based on an individual's sex should be considered a violation of Title VII. The central issue should be whether the harassment was motivated by the employee's gender, not whether the employer and employee are members of the same sex. Title VII's prohibition of sex discrimination has been interpreted to ensure that gender is irrelevant to employment decisions. Title VII forbids gender-motivated employment decisions because such decisions systematically disadvantage women. By allowing same-sex sexual harassment to exist and by withholding legal remedies to victims of this discrimination, the courts permit gender to remain a factor in the workplace and therefore undermine the effectiveness of Title VII. For these reasons, same-sex sexual harassment, just like opposite-sex sexual harassment, constitutes sex discrimination and violates Title VII.

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