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WITHOUT DISTINCTION: RECOGNIZING COVERAGE OF SAME-GENDER SEXUAL HARASSMENT UNDER TITLE VII

Trish K. Murphy

Abstract: Federal court decisions conflict regarding the applicability of Title VII of the Civil Rights Act of 1964 to sexual harassment cases where the alleged harasser and victim are members of the same gender. This Comment examines the courts’ treatment of same-gender sexual harassment claims and argues that same-gender sexual harassment claims fall within the purview of Title VII as impermissible discrimination. In reaching this position, this Comment demonstrates that Title VII lacks gender-based limitations. It then argues that no valid justification exists for distinguishing between same-gender sexual harassment and sexual harassment involving members of different genders. Finally, this Comment suggests that the inquiry should focus on the discriminatory and unwelcome nature of the conduct alleged.

Elizabeth suffered from sexual harassment at her place of employment. Her supervisor, Terry, repeatedly made sexually explicit comments to Elizabeth, also propositioning and touching her in a sexually offensive manner. Terry failed to treat male employees similarly. Unable to tolerate such conditions, Elizabeth filed a Title VII sexual harassment claim in federal court.

If Terry is male, Elizabeth should have little difficulty stating a Title VII sexual harassment cause of action. However, if Terry is female, Elizabeth has then alleged a same-gender sexual harassment claim. Depending on the jurisdiction, Elizabeth may face defeat on summary judgment for failure to show a prima facie case of discrimination under Title VII.

Prior to 1988, Terry’s gender would have been irrelevant because courts agreed that Title VII covers sexual harassment regardless of the gender of the harasser and victim. However, in Goluszek v. Smith, a federal district court departed from established precedent by refusing to recognize a Title VII claim brought by a male plaintiff against his employer, alleging sexual harassment by his male co-workers. In 1994, other courts began to follow suit. Consequently, federal court decisions

4. See, e.g., Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994). See also infra note 82.
currently conflict regarding Title VII's application to same-gender sexual harassment claims.

The U.S. Supreme Court has declared workplace sexual harassment illegal and offensive to Title VII's broad rule of workplace equality.\(^5\) Courts refusing to recognize same-gender sexual harassment claims enable employers to ignore egregious workplace conduct and deny victims of such discrimination a federal remedy. With the increasing willingness of courts to dismiss same-gender sexual harassment claims on summary judgment, a rising number of plaintiffs are denied the civil rights coverage to which they are properly entitled.

This Comment analyzes the problems inherent in recent federal court decisions declining to extend Title VII coverage to victims of same-gender sexual harassment. Part I describes the general parameters of federal sexual harassment law. Part II then surveys the courts’ treatment of same-gender sexual harassment claims. Finally, part III argues that Title VII coverage should include same-gender sexual harassment. This section illustrates that Title VII lacks limitations based on gender and that no justification exists for distinguishing between same-gender sexual harassment and sexual harassment involving members of different genders. It then suggests that the crucial inquiry involves the discriminatory and unwelcome nature of the conduct alleged.

I. TITLE VII AND SEXUAL HARASSMENT

A. Generally

Title VII of the Civil Rights Act of 1964 prohibits discrimination by an employer "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."\(^6\) Title VII prohibits sex discrimination against men as well as women.\(^7\)

Although the language of Title VII fails to specifically address sexual harassment, case law has established that Title VII proscribes such conduct.\(^8\) These decisions derive from the principle that sexual


\(^{7}\) Harris, 114 S. Ct. at 370; Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1046 n.4 (3d Cir. 1977).

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harassment is no different from traditional discrimination because of sex. Female employees file most sexual harassment complaints; however, male employees also may state a sexual harassment cause of action under Title VII.

Congress neither defined nor made clear in the legislative history what it meant by "sex." Courts have interpreted the term to refer to gender, thus adopting a narrow construction as to sexuality. Consequently, federal courts uniformly decline to recognize sexual orientation discrimination as actionable under Title VII, rendering harassment based solely on sexual orientation beyond the protections of the statute.

B. Theories of Liability

Sexual harassment encompasses two basic theories of liability: "quid pro quo" and "hostile environment." Quid pro quo and hostile environment sexual harassment possess differing characteristics but often overlap. Accordingly, more than one theory of liability may apply in a particular case.

9. Meritor, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

10. Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990) (involving male plaintiff's sexual harassment claim against female supervisor); Brooms v. Regal Tube Co., 881 F.2d 412, 418 (7th Cir. 1989) (noting that both men and women can state Title VII claims of sexual harassment), overruled in part on other grounds, Saxton v. AT&T Co., 10 F.3d 526 (7th Cir. 1993).


15. Henson v. City of Dundee, 682 F.2d 897, 903-10 (11th Cir. 1982); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1995).

1. **Quid Pro Quo Sexual Harassment**

In "quid pro quo" sexual harassment, a term of employment is conditioned upon submission to unwelcome sexual advances. In such a case, an individual relies on apparent or actual authority to extort sexual consideration from an employee. For a court to find liability, an employee must demonstrate that his or her reaction to the sexual advances affected tangible aspects of the employee’s compensation, terms, conditions, or privileges of employment.

*Henson v. City of Dundee* articulates the elements necessary to establish a quid pro quo sexual harassment claim. Under this standard, the plaintiff must prove: (1) the employee is a member of a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the receipt of an employment benefit or a tangible job detriment expressly or impliedly depended on the acceptance or rejection of the harassment by the employee; and (5) the existence of respondeat superior liability. With some variation, courts widely follow this basic formulation of the prima facie quid pro quo case.

2. **Hostile Environment Sexual Harassment**

In *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court recognized that sexual harassment that creates a hostile or offensive work environment violates Title VII. The Court declared that Title VII grants individuals the right to work free from discriminatory intimidation, ridicule, and insult. Under *Meritor*, the elements of a hostile environment sexual harassment claim reflect the quid pro quo requirements, but the fourth element differs: “The harassment complained of affected a term, condition, or privilege of employment and was sufficiently severe and pervasive so as to alter the conditions of

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17. *Henson*, 682 F.2d at 910.
18. Id.
19. Id. at 909.
20. Id. at 909–10.
21. Id.
24. Id. at 67–68.
25. Id. at 65.
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employment and create an abusive working environment." As in the quid pro quo prima facie case, courts commonly follow this formulation.

In *Harris v. Forklift Systems, Inc.*, the U.S. Supreme Court declared that, in determining whether an environment is hostile or abusive, the trier of fact must examine the totality of the circumstances. Such circumstances may include the severity and frequency of the discriminatory behavior; whether it involves physical threats or humiliation, or a mere offensive utterance; and whether it unreasonably interferes with an employee's ability to perform his or her work. In contrast to quid pro quo sexual harassment, the employee alleging hostile work environment need not prove the actual or threatened loss of a tangible job benefit to recover. Also, there is no requirement that the conduct seriously affect the employee's psychological well-being or cause the employee injury.

Further, an actionable hostile environment claim need not involve conduct that is explicitly sexual in nature. Harassment that lacks sexual overtones but is motivated by a gender-based animus may create a hostile environment if it is sufficiently severe or pervasive. Such gender-based harassment resembles harassment based on race or national origin and may include unwarranted criticism, ridicule, insults, and epithets.

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26. *Id.* at 67 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
29. *Id.* at 371.
30. *Id.*
II. TREATMENT OF SAME-GENDER SEXUAL HARASSMENT UNDER TITLE VII

The Equal Employment Opportunity Commission (EEOC) places same-gender sexual harassment within the purview of Title VII, and the federal courts once did so uniformly. However, courts now conflict regarding the applicability of Title VII to same-gender sexual harassment. This section describes the treatment of same-gender sexual harassment under Title VII and the development of the split among the courts.

A. The Interpretation by the EEOC

The EEOC recognizes same-gender sexual harassment as actionable under Title VII. The EEOC Compliance Manual provides:

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

These guidelines constitute an administrative interpretation of the Civil Rights Act by the agency charged with its enforcement. Although the guidelines are not controlling upon the courts, they form a body of experience and informed judgment to guide courts and litigants. The Compliance Manual suggests that the EEOC understands that the consequences of same-gender sexual harassment are substantially similar to those of sexual harassment between members of different genders.

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37. EEOC Compl. Man. (BNA) § 615.2(b)(3) at 130.
39. Id. (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976)).
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B. Recognition of Same-Gender Sexual Harassment Claims by Federal Courts

Historically, federal courts recognized the validity of Title VII same-gender sexual harassment claims. Courts initially addressed same-gender sexual harassment in dicta in several early sexual harassment decisions. In *Barnes v. Costle*, one of the first cases to recognize a Title VII cause of action for sexual harassment, the court's dicta suggested that same-gender sexual advances could also give rise to a claim for sexual harassment. It posited that where a homosexual superior harasses a subordinate of either gender, courts are faced with a legal problem identical to that in the situation of a male harassing a female—the imposition of a condition that, but for his or her sex, the employee would not have faced. Similarly, the court in *Bundy v. Jackson* maintained in dicta that sexual harassment is no less “because of sex” when it involves a female harassing a subordinate male or a superior of either sex harassing a subordinate of the same sex.

Courts in early sexual harassment decisions also confronted in dicta the issue of a bisexual harasser. According to these cases, sexual advances against members of both sexes would fail to give rise to a claim for sexual harassment. In such situations, these opinions asserted, the sexual harassment would not constitute gender discrimination because

40. Several states have recognized this form of sexual harassment under corresponding state law. See *Mogilefsky v. Superior Court*, 26 Cal. Rptr. 2d 116 (Cal. Ct. App. 1993) (holding that cause of action for sexual harassment in violation of Cal. Gov't Code § 12940(h) may be stated by member of same sex as harasser); *Barbour v. Department of Social Serv.*, 497 N.W.2d 216 (Mich. 1993) (finding Michigan Civil Rights Act proscribed alleged same-gender sexual advances directed at employee by his supervisor); *Lehmann v. Toys 'R' Us*, Inc., 626 A.2d 445 (N.J. 1993) (stating that New Jersey statute applied to sexual harassment occurring between members of the same gender). These cases demonstrate the willingness of some courts to define same-gender sexual harassment as discrimination. However, this Comment does not specifically address such state cases because they fail to guide the analysis under federal law.

41. 561 F.2d 983 (D.C. Cir. 1977).
42. 561 F.2d 983 (D.C. Cir. 1977), at 990 n.55.
43. Id.
44. 641 F.2d 934 (D.C. Cir. 1981).
46. *Bundy*, 641 F.2d at 942 n.7. See also Catherine A. MacKinnon, *Sexual Harassment of Working Women* 206 (1979) (“A woman who is fired because of her refusal to submit to a lesbian supervisor is just as fired—and her firing is just as related to her gender—as if the perpetrator were a man.”).
the alleged conduct applies to male and female employees alike and consequently would not be based upon sex. 47

For a number of years, courts actually confronting same-gender sexual harassment accepted it as within the purview of Title VII. 48 These conclusions for the most part followed particularly brief discussions of the issue. Accordingly, the case law acknowledging that Title VII prohibits same-gender sexual harassment lends little guidance to the analysis.

Perhaps the most recognized case finding Title VII coverage for same-gender sexual harassment claims is Wright v. Methodist Youth Services, Inc. 49 In Wright, the male plaintiff brought a quid pro quo cause of action claiming that his male supervisor fired him because he had refused the supervisor’s overt sexual advances. 50 The court noted that the supervisor allegedly made a demand of a male employee that would not be directed to a female, and cited Barnes for the proposition that “but for” his sex, the plaintiff would not have faced the harassment. 51 The court in Wright thus concluded that Title VII prohibits same-gender sexual harassment. 52

In addition, at least two appellate courts refused to explicitly reject same-gender sexual harassment claims when presented with an opportunity to do so. The Ninth Circuit recognized a hostile environment sexual harassment cause of action that involved members of the same

47. Henson, 682 F.2d at 904; Barnes, 561 F.2d at 990 n.55.
50. Id. at 309-10.
51. Id. at 310.
52. Id.
gender in *EEOC v. Hacienda Hotel.* In *Hacienda Hotel,* female employees alleged that two supervisors, a male and a female, subjected them to disparaging and sexually offensive comments. Although the court neglected to specifically address the validity of the claim on the basis of the same-gender issue, it found that the severity and pervasiveness of the harassment altered the terms and conditions of employment. The court therefore held the employer liable for the sexual harassment by both supervisors.

The First Circuit confronted same-gender sexual harassment in *Morgan v. Massachusetts General Hospital.* A male employee brought a hostile environment claim based on unwanted sexual attention by a male co-worker. Without discussing the same-gender element of the claim, the court stated that a Title VII cause of action for sexual harassment existed, but determined that the alleged conduct failed to rise to a level of actionable sexual harassment.

C. Conflict Among the Courts

Beginning in 1994, many federal decisions have refused to extend Title VII coverage to victims of same-gender sexual harassment. In doing so, these cases have relied on the reasoning set forth in a 1988 case, *Goluszek v. Smith.* In *Goluszek,* a federal district court declined to recognize sexual harassment because the victim and the alleged perpetrator were members of the same gender.

I. Goluszek v. Smith

*Goluszek* involved a young man from an unsophisticated background who blushed easily and was “abnormally sensitive” to comments pertaining to sex. Goluszek’s co-workers subjected him to a barrage of sexually explicit comments, references to a perceived lack of sexual

53. 881 F.2d 1504 (9th Cir. 1989).
54. Id. at 1507–08.
55. Id. at 1515.
56. Id. at 1515–16.
57. 901 F.2d 186 (1st Cir. 1990).
58. Id. at 188.
59. Id. at 192–93.
60. 697 F. Supp. 1452 (N.D. Ill. 1988).
61. Id. at 1456.
62. Id. at 1453.
experience and prowess, and remarks questioning his sexual orientation. They also poked him in the buttocks with a stick.

The court found that Goluszek easily rebutted the defendant's argument that Goluszek could not prove that his co-workers harassed him because of his sex. The court then stated that a fact-finder could reasonably conclude that the employer would have taken action to stop the harassment if the plaintiff had been a woman, that such action would have stopped the harassment, and that the harassment was pervasive and continuous from the time Goluszek began working until he was fired. The court also conceded that a wooden application of the verbal formulations created by the courts interpreting Title VII would dictate recognition of the plaintiff's claim. Nevertheless, the court granted summary judgment to the defendant.

In denying Goluszek's cause of action, the court adopted a reading of Title VII that it claimed was consistent with the "underlying concerns" of Congress, contending that Congress did not intend to forbid conduct such as the defendant's when it enacted Title VII. According to the court, Congress was concerned about discrimination resulting from an imbalance of power that affected a discrete and vulnerable group. The court asserted that in the context of sexual harassment this meant a powerful person exploiting a less powerful individual through the imposition of sexual demands or pressures. Next, the court emphasized that the plaintiff was a male in a male-dominated environment and that

63. Id. at 1453–54.

64. Id. at 1454. These allegations make it difficult to determine whether the conduct constituted gender discrimination or merely abusive treatment with sexual overtones. One could perhaps view the plaintiff as a victim of discriminatory harassment under a sex stereotype theory. Goluszek's co-workers harassed him in part based on his failure to conform to traditional stereotyped notions of what it means to be male. In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Supreme Court held that discrimination based on a sex stereotype violates Title VII. Nevertheless, a detailed examination of this issue is beyond the scope of this Comment.


66. Id. When Goluszek complained to his supervisor about the sexual harassment, no action was taken. Id. at 1454. However, evidence existed that the employer reacted differently to female claims of sexual harassment. Id. at 1455.

67. Id. at 1456.

68. Id.

69. Id.

70. Id.

71. Id.

72. Id. (citing Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1451–52 (1984)).
he did not work in an environment that treated males as inferior. Although the court acknowledged that Goluszek may have been harassed because he was male, it stated that the harassment was not the type that created an anti-male environment in the workplace. For these reasons, the court concluded that the cause of action failed.

2. Application of Goluszek Reasoning by Other Courts

In 1994, the Fifth Circuit dismissed a same-gender hostile environment sexual harassment claim in Garcia v. Elf Atochem North America, flatly holding that a male plaintiff alleging harassment by a male supervisor failed to state a claim under Title VII even though the harassment had sexual overtones. The court cited Goluszek and simply stated that the statute addresses gender discrimination, implying that same-gender sexual harassment does not constitute such discrimination. Subsequently, district courts in several circuits have followed suit.

73. Id.
74. Id.
75. Id.
76. 28 F.3d 446 (5th Cir. 1994).
77. Id. at 451–52. The plaintiff alleged that on several occasions his supervisor had approached from behind, grabbed Garcia’s crotch area, and made sexual motions from behind him. The employer viewed this conduct as “horseplay.” Id. at 448.
78. Id. at 451–52. The court also mentioned a Fifth Circuit unpublished opinion, Giddens v. Shell Oil Co., No. 92-8533 (5th Cir. Dec. 6, 1993), in which it had reached the same conclusion.
In Hopkins v. Baltimore Gas & Electric Co., the court dismissed the plaintiff's same-gender hostile environment action and elaborated on the reasoning set forth in Goluszek. The court asserted that it seemed peculiar to find sex discrimination when sexual harassment is of a male by a male, or of a female by a female. The court contended that what the harasser is really doing is preferring or selecting a member of the same gender for sexual attention, however unwelcome that attention may be. It further reasoned that the harasser certainly "does not despise the entire group nor wish to harm its members because the harasser is also a member and finds others of the group sexually attractive." Hopkins then cites Goluszek at length and held that where the harasser and the alleged victim belong to the same gender, the court would strain the language of the statute beyond its manifest intent if it found that discrimination "because of sex" existed.

3. Other Recent Decisions Decline To Adopt the Goluszek Rationale

In contrast to the cases denying Title VII coverage to victims of same-gender sexual harassment, other district court decisions expressly reject the Goluszek holding and rationale. These decisions primarily rely on

81. Id. at 831–35.
82. Id. at 833 (citing Ellen Frankel Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 Yale L. & Pol'y Rev. 333, 351–52 (1990)).
83. Id.
84. Id.
85. Id. at 834.
the plain meaning of Title VII and the fact that the conduct complained of was based on sex. Part III elaborates on these arguments and advances others in advocating Title VII coverage of same-gender sexual harassment by all courts.

III. SAME-GENDER SEXUAL HARASSMENT AND THE SCOPE OF TITLE VII

Same-gender sexual harassment claims fall within the purview of Title VII as impermissible discrimination. An examination of the statutory construction indicates that Title VII fails to make distinctions based on gender, thus providing no express or implied exclusion of coverage to victims of same-gender sexual harassment. Additionally, in the face of this evidence, courts declining to recognize same-gender sexual harassment under Title VII fail to produce any rational basis for distinguishing between this type of harassment and the more typical form. Finally, rather than attempt to create these distinctions, courts should focus on the discriminatory and unwelcome nature of the conduct itself.

A. Recognizing a Title VII Cause of Action Conforms with the Statutory Construction

Title VII lacks gender-based limitations. Nothing in the statute’s plain language, its legislative history, or the U.S. Supreme Court’s interpretation indicates that Title VII’s coverage of sexual harassment is restricted to situations where the victim and the harasser are members of different genders. Consequently, acknowledging the viability of same-gender sexual harassment claims under Title VII is in no way contradictory to the statute.

See also Baskerville v. Culligan Int’l Co., 50 F.3d 428, 430 (7th Cir. 1995) (indicating in dicta that although sexual harassment of women by men is the most common kind, the court “[did] not mean to exclude the possibility that sexual harassment of... men by other men, or women by other women, would not also be actionable in appropriate cases”).


1.  The Plain Meaning of Title VII

Where the language of a statute is plain, a court’s sole function is to enforce the statute according to its terms. 89 Title VII protects against discriminatory treatment of either gender. The statute declares that sex discrimination by an employer is prohibited “against any individual.”90 The plain meaning prohibits discrimination against women because they are women and against men because they are men.91

Nothing in the language of the statute suggests that Title VII coverage is limited to discrimination against an individual of one gender by a member of the other gender.92 Neither would the language of the statute be strained beyond its manifest intent, as the Hopkins court maintained,93 if a court found that sex discrimination existed in a same-gender case. Accordingly, a finding that Title VII encompasses same-gender sexual harassment conforms with the language of the statute.

2.  The Legislative History of Title VII

The scant legislative history regarding sex and Title VII suggests that the statute protects everyone from discrimination based on sex, regardless of gender. While debating whether to add the prohibition against discrimination based on sex, members of the House of Representatives had a discussion indicating that Title VII would cover both men and women.94 Therefore, at the time of Title VII’s enactment, it appears Congress intended to protect all citizens, male or female, from sex discrimination.

94. House members had the following discussion:

   Mrs. Griffiths: I would like to ask the chairman of the Committee on the Judiciary, the gentleman from New York, a question. Mr. Chairman, is it your judgment that this bill will protect colored men and colored women at the hiring gate equally?

   Mr. Celler: This bill is all-embracing and will cover everybody in the United States.

   Mrs. Griffiths: It will cover every colored man and every colored woman?

   Mr. Celler: Yes, it will cover white men and white women and all Americans.

But the prohibition against discrimination based on sex was added to the Civil Rights Act at the last minute on the floor of the House of Representatives. Because the bill passed shortly thereafter, very limited legislative history exists to guide interpretations of the Act's prohibition against discrimination on the basis of sex. As previously noted, Title VII specifically fails to address sexual harassment. Further, a federal court did not even recognize sexual harassment as discrimination on the basis of sex until over a decade after the statute was enacted. Thus, the current sexual harassment doctrine is entirely a judicial creation.

Consequently, decisions denying same-gender sexual harassment claims rest on faulty assumptions when proclaiming the "underlying concerns" of Congress and when maintaining that the conduct alleged was not of the type Congress intended to prohibit when it enacted Title VII. Such cases cite no evidence for this position because so little legislative history of the Act exists regarding discrimination based on sex and because no legislative history specifically addressed sexual harassment. There is simply nothing in the legislative history suggesting that courts should not apply Title VII literally. Therefore, the legislative history of Title VII provides no justification for the position that the statute covers sexual harassment between members of opposite genders but not sexual harassment between those of the same gender.

3. The U.S. Supreme Court's Interpretation of Title VII

Two leading U.S. Supreme Court cases set forth broad interpretations of what constitutes sexual harassment and who Title VII protects. The Court declared in *Harris v. Forklift Systems, Inc.* that the language of Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." Similarly, in *Meritor Savings Bank v. Vinson*, the Court stated that requiring "a man or a woman to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as racial harassment." Nothing in the

95. Id. at 2577–84.
97. See *supra* notes 6–8 and accompanying text.
98. See *supra* note 8 and accompanying text.
101. 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)) (emphasis added).
Court's decisions suggest that the gender of the victim or the perpetrator affects the applicability of Title VII to the harassing conduct.

B. No Rational Basis Exists for Distinguishing Same-Gender Sexual Harassment from Different-Gender Sexual Harassment

In denying coverage to victims of same-gender sexual harassment, courts have relied on several factors. These factors include the absence of a dominant group discriminating against a socially disempowered group, the lack of an environment oppressive to all members of the protected group to which plaintiff belongs, and the supposed inability of a harasser to discriminate against a victim of the same gender. However, the use of these factors is misguided and fails to adequately distinguish same-gender sexual harassment from typical sexual harassment.

1. An Actionable Title VII Claim Need Not Involve Discrimination of a Powerless Group by a Dominant Group

Courts declining to prohibit same-gender sexual harassment under Title VII have maintained that the problem Congress sought to remedy was discrimination resulting from an imbalance of power. In the context of sexual harassment, this meant a person belonging to a powerful social group exploiting someone from a less powerful group. This assertion is inaccurate and conflicts with the current state of anti-discrimination jurisprudence.

Title VII's protections plainly are not limited to women, minorities, and other disempowered groups. Employers may not treat similarly situated employees differently solely because they differ with respect to race, color, religion, sex, or national origin. It is immaterial whether the discrimination is directed against members of majorities or minorities. If courts determined Title VII coverage by the amount of

103. Id.
105. E.g., Goluszek, 697 F. Supp. at 1456.
106. Id. (citing Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1451–52 (1984)).
107. See supra note 6 and accompanying text.
power possessed by the employee's social group relative to the perpetrator's social group, male employees would lack protection, as would white employees in racial discrimination cases.

Title VII protects men from sex discrimination just as it protects women.\footnote{Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).} This protection extends to the context of sexual harassment, where male employees have stated claims against females even though the plaintiffs are members of the dominant group and the harassers belong to a less powerful group.\footnote{See, e.g., Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990).} The U.S. Supreme Court has expressly acknowledged the validity of such claims.\footnote{See supra note 101 and accompanying text.}

Furthermore, when interpreting Title VII, the Court consistently has applied the same standard to proscribe discrimination in private employment against both whites and non-whites.\footnote{Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550 (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976)). See also Calcote v. Texas Educ. Found., Inc., 578 F.2d 95, 96 (5th Cir. 1978) (holding that white plaintiff stated prima facie case of racial discrimination); Carter v. Community Action Agency, 625 F. Supp. 199, 204 (M.D. Ala. 1985) (stating that white plaintiff made a prima facie case of racial discrimination involving black supervisor); Lucero v. Beth Israel Hosp. & Geriatric Ctr., 479 F. Supp. 452, 454 (D. Colo. 1979) (finding evidence sufficient to conclude black supervisor engaged in racial discrimination against non-black employees, including white plaintiff).} For example, in McDonald v. Santa Fe Trail Transportation Co.,\footnote{427 U.S. 273 (1976).} the Court held that Title VII's terms are not limited to discrimination against members of any particular race.\footnote{Id. at 278-80.} Thus, the fact that racial minorities possess less power than whites in the workplace does not eliminate the applicability of Title VII to a white person's claim of racial discrimination.

In addition, although Goluszek and subsequent cases insisted on a nexus between social disempowerment and discrimination in the workplace, this is not an element of a prima facie case of sexual harassment.\footnote{See supra notes 21 and 26 and accompanying text.} Neither has other hostile environment harassment case law required that a plaintiff specifically demonstrate such a nexus in order to state a Title VII claim.\footnote{The prima facie elements of a hostile environment claim based on race or national origin tend to reflect those found in the hostile environment sexual harassment prima facie case, with slight variation. See, e.g., Bivins v. Jeffers Vet Supply, 873 F. Supp. 1500 (M.D. Ala. 1994) (stating that elements of a prima facie case of racially hostile work environment include: plaintiff was a member of a protected class; plaintiff was subjected to unwelcome racial harassment; harassment was based on race; and the harassment was severe, frequent, and pervasive).} Such a social disempowerment requirement
lacks justification and cannot form a valid basis on which to distinguish same-gender sexual harassment from different-gender sexual harassment.

2. *Title VII Does Not Require the Existence of an Environment Oppressive to All Members of the Protected Group*

Decisions denying coverage to victims of same-gender sexual harassment cite a lack of an environment oppressive to members of the protected group to which the plaintiff belongs. For example, the court in *Goluszek* emphasized that the plaintiff was a male in a male-dominated environment, that he did not work in an environment that treated males as inferior, and that the harassment did not create an “anti-male environment in the workplace.” The court’s reasoning implies that the work environment must discriminatorily affect the protected group in its entirety rather than simply the individual plaintiff. However, it is not essential to a Title VII cause of action that the discrimination be directed at all members of the group. Title VII’s protections apply to any “individual.”

Indeed, the U.S. Supreme Court has focused its attention on the individual in determining whether discrimination has occurred. In *Connecticut v. Teal,* the Court declared that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because the employer treats other members of the employees’ group favorably. And in *Los Angeles Department of Water & Power v. Manhart,* the Court recognized that fairness to a class of women employees as a whole does not justify unfairness to an individual female employee. In so holding, the court found Title VII’s focus on the individual to be unambiguous.

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122. *Id.* at 455.
124. *Id.* at 708.
125. *Id.*
Focusing on the individual makes particular sense in the realm of sexual harassment. This is so, in part, because the harasser may single out one employee as a victim. However, the fact that a specific individual is subject to sexual harassment does not contradict the assertion that the harassment is based on gender and therefore sex discrimination. Furthermore, the prima facie case of sexual harassment emphasizes the individual by focusing solely on the employee bringing the claim.\textsuperscript{126}

3. \textit{A Victim of the Same Gender Does Not Definitively Inhibit the Perpetrator from Committing Discriminatory Behavior}

The suggestion that a supervisor or employee cannot discriminate against a member of his or her gender group is erroneous. In \textit{Hopkins v. Baltimore Gas & Electric Co.}, the court contended that an individual cannot discriminate against someone of the same gender because the individual does not wish to harm members of his or her own gender because of their gender.\textsuperscript{127} However, membership in a particular social group fails to disqualify someone from discriminating against an individual in that same social group.

The scenarios of the same-gender sexual harassment cases themselves demonstrate this point. For instance, in \textit{Joyner v. AAA Cooper Transportation},\textsuperscript{128} the male plaintiff brought a quid pro quo sexual harassment claim based on his male supervisor’s unwanted advances.\textsuperscript{129} The plaintiff alleged that his supervisor had invited him into his automobile, and while inside, had placed his hands on the plaintiff’s private parts, asking him to engage in sexual activities.\textsuperscript{130} The plaintiff rejected the advances, and his supervisor later threatened him with termination.\textsuperscript{131} Shortly thereafter, the employer terminated the plaintiff because of a slowdown in business.\textsuperscript{132} But when business sufficiently increased to recall the plaintiff, his supervisor refused to do so.\textsuperscript{133} In concluding that the plaintiff had proven his claim of sexual harassment, the court found that he was subjected to unwelcome sexual harassment to

\textsuperscript{126} See \textit{supra} notes 21 and 26 and accompanying text.
\textsuperscript{128} 597 F. Supp. 537 (M.D. Ala. 1983).
\textsuperscript{129} \textit{Id.} at 538.
\textsuperscript{130} \textit{Id.} at 539.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 540.
\textsuperscript{133} \textit{Id.}
which members of the opposite sex had not been subjected.\footnote{134} Undoubtedly, the circumstances of \textit{Joyner} illustrate the discriminatory nature of the supervisor's treatment of the victim, even though both parties belonged to the same gender.

Furthermore, case law outside the realm of sexual harassment recognizes the existence of intra-group discrimination. The U.S. Supreme Court held in \textit{Castaneda v. Partida}\footnote{135} that it could not be presumed as a matter of law that individuals of one definable group will not discriminate against other members within their group.\footnote{136} In addition, the court in \textit{Hansborough v. City of Elkhart Parks & Recreation Department}\footnote{137} held that discrimination by a black person against another black person because of race violates Title VII.\footnote{138} And in \textit{Franceschi v. Hyatt Corp.},\footnote{139} the court found discrimination by one Puerto Rican against another Puerto Rican actionable under a related statute, 42 U.S.C. § 1981.\footnote{140}

Finally, in sexual harassment cases it is immaterial whether the perpetrator wishes to harm the victim. The inquiry need not delve into the motivation of the harasser because sexual harassment takes various forms. The proposition that harassment must necessarily demonstrate antagonism is incorrect. Title VII is not a fault-based tort scheme.\footnote{141} Thus, the absence of discriminatory intent fails to redeem an otherwise unlawful employment practice.\footnote{142} For instance, compliments by well-intentioned co-workers or supervisors can support a sexual harassment cause of action if the remarks are sufficiently severe or pervasive so as to alter a condition of employment and create an abusive working environment.\footnote{143} Accordingly, the perpetrator need not actually wish to cause harm to illegally discriminate against the victim.

\begin{itemize}
\item \footnote{134} \textit{Id.} at 542–43.
\item \footnote{135} 430 U.S. 482 (1977) (holding that Mexican-American majority in county population and governing majority in county elective offices did not dispel presumption of intentional discrimination where minority of persons summoned for jury duty were Mexican-American).
\item \footnote{136} \textit{Id.} at 499.
\item \footnote{137} 802 F. Supp. 199 (N.D. Ind. 1992).
\item \footnote{138} \textit{Id.} at 202–06. \textit{See also} \textit{Walker v. Secretary of Treasury 713 F. Supp.} 403, 407–08 (N.D. Ga. 1989) (stating that in Title VII action, it is "not controlling that... a black person is suing a black person").
\item \footnote{139} 782 F. Supp. 712 (D.P.R. 1992).
\item \footnote{140} \textit{Id.} at 723.
\item \footnote{141} \textit{Ellison v. Brady}, 924 F.2d 872, 880 (9th Cir. 1991).
\item \footnote{142} \textit{Griggs v. Duke Power Co.}, 401 U.S. 424, 432 (1971).
\item \footnote{143} \textit{Ellison}, 924 F.2d at 880.
\end{itemize}
C. The Inquiry Should Focus on the Discriminatory and Unwelcome Nature of the Conduct Itself

Goluszek v. Smith and its progeny exclude an entire class of harassment victims from the protections of Title VII. Rather than attempt to create distinctions to justify differential treatment of same-gender sexual harassment and the more typical form of sexual harassment, courts should concentrate on the actual conduct alleged so as to protect all victims of discriminatory treatment based on sex.

The inquiry should focus on whether the perpetrator's actions were discriminatory. Additionally, courts should examine whether the actions were unwelcome to the victim. Courts should not inquire as to the sexual orientation of the harasser, however, because it is irrelevant to their determination of these matters. If the conduct was discriminatory and unwelcome, and if it fulfills all the elements of a prima facie sexual harassment case, it falls within the purview of Title VII.

I. Courts Should Determine Whether the Perpetrator Discriminated Against the Employee Based on the Employee's Sex

In a sexual harassment case, the victim must demonstrate that the harassment complained of was based on sex and that "but for" the fact of the victim's sex, he or she would not have been the object of the harassment. Sexual harassment is no less "because of sex" or any less discriminatory in a same-gender case. Sex discrimination violates Title VII whenever sex is, for no legitimate reason, a substantial factor in the discrimination. When an individual sexually harasses an employee of the same gender, but fails to similarly harass employees of the opposite gender, that harassed employee has been singled out because of gender. Case law recognizing same-gender sexual harassment almost uniformly bases its holding on the fact that the employee can demonstrate that the perpetrator would not have harassed the victim "but for" the victim's gender.

144. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).
Inevitably, scenarios will arise in which an employee is a victim of mistreatment that has sexual overtones, yet the behavior fails to qualify as gender discrimination. In such situations, Title VII is not invoked. Same-gender sexual harassment cases often may necessitate fact-specific inquiries into the existence of discrimination and, therefore, Title VII coverage for the alleged conduct.

2. 

Courts Should Examine Whether the Conduct Is Unwelcome

To state a Title VII cause of action, the conduct alleged need not only be discriminatory. According to the U.S. Supreme Court, "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" The plaintiff must show that he or she perceived the conduct as undesirable or offensive and that it was not solicited or invited. If the alleged conduct was in fact both discriminatory and unwelcome, courts will view it as having altered the conditions of the victim's employment.

Unwelcome sexual advances, ridicule, intimidation, and other harassing acts are no less injurious and degrading to someone of the harasser's same gender than they are to an individual of the opposite gender. Title VII is aimed at the consequences of an employment practice rather than at the particular motivation of supervisors or co-workers. By illustration, the factors set forth by the U.S. Supreme Court in 

\[\text{Harris v. Forklift Systems, Inc.}\] 

for determining the existence of a hostile environment sexual harassment claim make no reference to the gender of the victim in relation to the harasser. Instead, these factors focus exclusively on the circumstances surrounding the harassing conduct and the effect it has on the victim. The Court recognized that a discriminatorily abusive work environment can detrimentally affect the workplace by detracting from employees' job performance, discouraging employees from remaining on the job, or keeping them from advancing in their careers. Thus, the emphasis of the Court is on the nature and effects of the conduct rather than on the gender of the parties.

148. Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).
150. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).
151. 114 S. Ct. at 370.
152. Id.
153. Id. at 370–71.
Consequently, in same-gender sexual harassment cases, courts should focus on the nature and effects of the unwelcome advance.

3. The Sexual Orientation of the Harasser Is Irrelevant

Same-gender sexual harassment decisions have tended to draw unnecessary distinctions based on the gender and sexual orientation of both harassers and victims. For example, many of the cases characterize the alleged same-gender harassment as "homosexual" harassment, and one decision goes as far to suggest that the discrimination that brings a claim of sexual harassment within the scope of Title VII arises from the "differentiating libido" of the alleged harasser. This inquiry into the specific sexuality of the parties is needless because the conduct itself is the appropriate focus.

Further, characterizing same-gender sexual harassment as "homosexual" harassment creates the need to prove an individual's sexual preference in a court of law. Such a procedure seems unnecessarily complicated and intrusive. For that matter, in cases where the alleged harassment involves a male harasser and a female victim, the court does not consider the male's assumed heterosexuality. In addition, inquiring into the sexual orientation of the harasser would contribute little to the determination because victimization is not always motivated by attraction; harassment frequently involves issues of power and control on the part of the harasser.

Moreover, distinctions based on the sexual orientation of the harasser necessitate a reasoning process that renders bisexuals immune from sexual harassment liability. Such a process is irrational and fails to adequately acknowledge the discriminatory nature of the treatment experienced by the victim. Although the methodical harassment of both male and female employees by a bisexual would not constitute gender discrimination per se, in any given case the finder-of-fact could conclude

154. See, e.g., Pritchett v. Sizeler Real Estate Mgmt. Co., 67 Fair Empl. Prac. Cas. (BNA) 1377, 1379 (E.D. La. 1995) ("To conclude that same gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws that govern the workplace conduct of heterosexuals.").


156. MacKinnon, supra note 45, at 220–21.

157. See supra notes 46–47 and accompanying text.
that gender motivated a particular encounter, therefore satisfying the "but for sex" requirement.  

Some case law supports the concept that harassing employees of both genders does not shield an individual from liability. In *Chiapuzio v. BLT Operating Corp.*, the court stated that the equal harassment of both genders did not escape the purview of Title VII. It reasoned that where a harasser violates the rights of both men and women it is conceivable that each harassed individual is being treated badly because of gender. Similarly, in *Steiner v. Showboat Operating Co.*, the Court of Appeals for the Ninth Circuit stated that it did not rule out the possibility of viable claims against the supervisor for sexual harassment by both men and women in the workplace.

For example, if a male experienced sexual harassment based on male attributes, and a female at the same workplace found herself subjected to harassment based on female qualities, Title VII should encompass both employees' claims. The plaintiffs in *Chiapuzio* alleged this type of scenario. The *Chiapuzio* court characterized the defendant as an "equal-opportunity harasser" whose remarks were gender-driven. It maintained that the perpetrator harassed the men based on their perceived lack of sexual prowess and intended to demean and, therefore, harm them because each was male. The court further found that the perpetrator harassed the women as objects of his sexual advances. The court concluded that the perpetrator differentially harassed the men and women because of their particular sex.

In contrast, other situations may arise in which the nature of the harassment experienced by members of both genders is

160. *Id.* at 1337.
162. 25 F.3d 1459 (9th Cir. 1994).
163. *Id.* at 1464. The defendant had argued that the male supervisor harassed males and females alike and therefore should avoid Title VII liability because his harassment of the female plaintiff was not based on her gender. Nevertheless, the court determined that the supervisor's abusive treatment and remarks to women were of a sexual or gender-specific nature, thus justifying the Title VII cause of action. *Id.* at 1463-64.
165. *Id.*
166. *Id.* at 1338.
167. *Id.* at 1337–38.
Same-Gender Sexual Harassment

indistinguishable. By illustration, a supervisor may make identical sexual advances toward both males and females or may treat them in an equally abusive manner. In such scenarios, one could not characterize the conduct as discrimination on the basis of gender.\(^{168}\) If, in fact, the nature of the harassment were indistinguishable, alternative remedies would be more appropriate.\(^{169}\)

In any event, the possibility of a bisexual loophole indicates an even greater need to focus the inquiry in sexual harassment cases on the unwelcome advance and adverse employment action rather than on the sexual orientation of the harasser. Whether the harasser is heterosexual, homosexual, or bisexual is irrelevant. Rather, the emphasis should remain on the conduct itself.

IV. CONCLUSION

Courts declining to extend Title VII coverage to victims of same-gender sexual harassment may do so out of fear that allowing such claims will blur the distinction between harassing conduct that discriminates based on gender and harassing conduct that has sexual overtones but lacks such a discriminatory effect. Alternatively, their refusal may simply stem from a general discomfort with the proposition that sexual harassment constitutes gender discrimination. Whatever the case, rather than denying same-gender sexual harassment claims, courts should recognize the actionability of same-gender sexual harassment by focusing on the discriminatory and unwelcome nature of the conduct. Finding Title VII coverage for such harassment will prohibit employers from ignoring this form of egregious workplace behavior. More importantly, it will protect all victims of demeaning, discriminatory treatment based on sex.

\(^{168}\) See, e.g., Gross v. Burggraf Constr. Co., 53 F.3d 1531 (10th Cir. 1995) (finding that plaintiff failed to establish a discriminatory hostile work environment because supervisor used crude or harsh language in reprimanding all of his employees); Sheehan v. Purolator, Inc., 839 F.2d 99, 105 (2d Cir.) (affirming judgment against hostile environment claim where supervisor’s “temper was manifested indiscriminately toward men and women”), cert. denied, 488 U.S. 891 (1988).

\(^{169}\) Plaintiffs could address the harassment under state employment discrimination statutes. They could also pursue state tort claims such as assault and intentional infliction of emotional distress. Additionally, state employees may assert a violation of their constitutional right to equal protection.