

March 2012

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Recommended Citation

Katherine H. Flynn, *Same-Sex Sexual Harassment: Sex, Gender and the Definition of Sexual Harassment Under Title Seven*, 13 GA. ST. U. L. REV. (2012).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol13/iss4/9>

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SAME-SEX SEXUAL HARASSMENT: SEX, GENDER AND THE DEFINITION OF SEXUAL HARASSMENT UNDER TITLE VII

INTRODUCTION

In 1964, Congress passed Title VII of the Civil Rights Act,¹ which includes the following prohibition:

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. . . .²

This statute prohibits sex discrimination in employment. Compare the following statements of judicial interpretation of this statute: "Title VII was enacted in order to remove those artificial barriers to full employment which are based upon unjust and long-encrusted prejudice. Its aim is to make careers open to talents irrespective of . . . sex."³ "The goal of Title VII is equal employment opportunity. . . . The discrimination Congress was concerned about . . . is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."⁴ Both statements were offered to support the denial of sexual harassment actions brought under the sex discrimination provisions of Title VII.⁵ However, an important difference exists between the two cases from which the statements originated. In *Tomkins v. Public Service Electric & Gas Co. (Tomkins I)*, the harassment occurred between a man and a woman;⁶ in *Goluszek v. Smith*, both parties were men.⁷

1. 42 U.S.C.A. § 2000e (1994).

2. *Id.* § 2000e-2(a).

3. *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) [hereinafter *Tomkins I*].

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

5. *Id.*; *Tomkins I*, 422 F. Supp. at 556.

6. *Tomkins I*, 422 F. Supp. at 555.

7. *Goluszek*, 697 F. Supp. at 1453.

Why is the difference important? Because the theories presented in *Tomkins I*, which deny relief under federal law to women harassed by men, have long since been abandoned;⁸ sexual harassment is now recognized as a form of sex discrimination under Title VII.⁹ However, same-sex sexual harassment, a topic virtually ignored during the development of the sexual harassment cause of action, has recently become the focus of controversy in federal courts,¹⁰ and has led to controversy reflected by a split in the federal courts over the actionability of same-sex sexual harassment under Title VII.¹¹

This Note will examine the same-sex sexual harassment conflict. Section I will review the history of sexual harassment

8. *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1045 (3d. Cir. 1977) [hereinafter *Tomkins II*] (reversing *Tomkins I* and holding that sexual harassment is actionable under Title VII).

9. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (recognizing sexual harassment as an action under Title VII sex discrimination prohibitions).

10. The first case to directly address same-sex sexual harassment did not appear until 1981. *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981) (holding that unwelcome sexual advances of a male homosexual supervisor toward a male employee are actionable as sexual harassment under Title VII). The majority of cases addressing this issue, both reported and unreported, have arisen just since 1994. See, e.g., *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994); *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229 (S.D. Ga. 1995). In fact, of the many cases addressing same-sex sexual harassment, only four were decided prior to 1994. See *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993); *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

11. Compare *Oncala v. Sundowner Offshore Serv. Inc.*, 83 F.3d 118, 119 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3432 (U.S. Dec. 16, 1996) (No. 96-568); *Garcia*, 28 F.3d at 451-52 (quoting *accord Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) ("Harassment by a male supervisor against a male subordinate does not state a claim under Title VII. . . .")); *Torres v. National Precision Blanking*, 943 F. Supp. 952, 958 (N.D. Ill. 1996); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 732 (N.D. Ill. 1996); *Larry v. North Miss. Med. Ctr.*, 940 F. Supp. 960, 963 (N.D. Miss. 1996); *Benekritis v. Johnson*, 882 F. Supp. 521, 525-26 (D.S.C. 1995); *with Yeary v. Goodwill Indust.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.* 99 F.3d 138, 143 (4th Cir. 1996) ("[W]e hold that a same-sex 'hostile work environment' sexual harassment claim may lie under Title VII. . . ."); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996); *Raney v. District of Columbia*, 892 F. Supp. 283, 288 (D.D.C. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995) ("Sexual harassment . . . by a homosexual supervisor of the same sex is an adverse employment action" under Title VII); *Wright v. Methodist Youth Serv.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981); and *Marciano v. Kash n' Karry Foodstores, Inc.*, No. 94-1657CIV-T-17A, 1996 WL 420879, at *3 (M.D. Fla. July 1, 1996).

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under Title VII, from early cases denying sexual harassment actions to the Supreme Court's ultimate recognition of sexual harassment as a form of sex discrimination. Section II will survey the theories used by the federal courts to reject or support same-sex sexual harassment under Title VII by centering on the reasoning used by federal courts in deciding this issue. Finally, Section III will analyze the viability of the courts' theories on same-sex sexual harassment in the context of history, statutory interpretation, and case law.

I. THE HISTORY OF SEXUAL HARASSMENT UNDER TITLE VII

Although sexual harassment is not expressly prohibited by Title VII,¹² it is now recognized as a form of sex discrimination prohibited by the statute.¹³ Courts initially rejected sexual harassment claims brought under Title VII;¹⁴ these opinions cited both a lack of congressional intent to cover such cases¹⁵ and a reluctance to involve the judiciary in personal relationships.¹⁶ Gradually, however, both the courts and the Equal Employment Opportunity Commission¹⁷ (EEOC) recognized the prohibition of sexual harassment under Title VII and have found that a person who makes unwelcome sexual advances or creates an offensive sexual atmosphere at work

12. See 42 U.S.C.A. § 2000e-2 (1994).

13. *Meritor Sav.*, 477 U.S. at 66 (holding that sexual harassment is actionable under the sex discrimination prohibitions of Title VII).

14. See, e.g., *Tomkins I*, 422 F. Supp. at 556 (D.N.J. 1976) (holding sexual harassment and sexual assault of female employee by male supervisor are not sex discrimination as defined by Title VII), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (holding employer was not liable under Title VII for dismissing a female employee who refused a male supervisor's sexual advances), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 162 (D. Ariz. 1975) (stating that female employees' claims that their employment had been terminated for refusing a male supervisor's sexual advances are not cognizable under Title VII), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977).

15. See *Tomkins I*, 422 F. Supp. at 556 ("[Title VII's] aim is to make careers open to talents irrespective of . . . sex. It is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire . . .").

16. See *Miller*, 418 F. Supp. at 236 ("The attraction of males to females and females to males is a natural sex phenomenon [I]t would seem wise for the Courts to refrain from delving into these matters"); *Corne*, 390 F. Supp. at 163 ("By [the supervisor's] alleged sexual advances, [he] was satisfying a personal urge" and thus the employer is not liable).

17. The EEOC is the federal agency charged by Congress with the enforcement of Title VII. 42 U.S.C.A. § 2000e-5 (1994).

imposes barriers to equal employment for one gender and not another.¹⁸ This recognition culminated with the Supreme Court's ruling in *Meritor Savings Bank v. Vinson*,¹⁹ stating that sexual harassment is actionable under Title VII.²⁰

A. Legislative History

Not only is sexual harassment not mentioned in Title VII's prohibitions, but language prohibiting discrimination on the basis of sex itself was a last-minute addition to the language of Title VII,²¹ which initially was intended primarily to protect against race discrimination in employment.²² This last-minute addition was apparently a humorous attempt to defeat the bill; the representative who proposed the amendment supported his purported concerns for the "minority sex" with a letter lamenting the dearth of marriageable men and requesting that government take action to amend the situation.²³ This elicited an amused reaction from the House of Representatives.²⁴ However, female Representatives rushed to support the amendment;²⁵ they remarked upon the irony that those presenting the "sex" amendment were the most rabid opponents of a bill introduced months earlier requiring equal pay for women.²⁶

Despite the apparent attempt to defeat Title VII with the addition of protections against sex discrimination, the amendment passed on the day it was proposed.²⁷ However, this

18. See *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048 (3d Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976), *rev'd* 587 F.2d 1240 (D.C. Cir. 1978); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1994).

19. 477 U.S. 57 (1986).

20. *Id.* at 66.

21. 110 CONG. REC. 2577 (1964).

22. *Id.* at 2581; see also Dawn M. Buff, Note, *Beyond the Court's Standard Response: Creating an Effective Test for Determining Hostile Work Environment Harassment Under Title VII*, 24 STETSON L. REV. 719, 725 (1995).

23. 110 CONG. REC. 2577 (1964). The author of the letter takes the government to task for participating in wars that kill off "marriageable men," thus making them a scarce commodity. *Id.*

24. *Id.* at 2578.

25. *Id.* at 2578-83.

26. *Id.* at 2581, 2584.

27. *Id.* at 2584.

eleventh-hour addition allowed little discussion regarding Congress' intentions relating to sex discrimination.²⁸ The dearth of legislative history on sex discrimination under Title VII thus offered little guidance to courts first determining whether sexual harassment claims were actionable under Title VII.²⁹

B. Early Cases Rejecting Sexual Harassment Actions Under Title VII

When first asked to recognize sexual harassment claims under Title VII, most federal district courts refused to do so.³⁰ Their refusal was based upon the following concerns: (1) adoption of the theory that Title VII was never intended to extend to sexual harassment actions,³¹ (2) an unwillingness to intrude upon personal or private matters,³² and (3) a fear that allowing such actions would prompt a flood of litigation.³³

As articulated in *Tomkins I*,³⁴ one basis for rejecting sexual harassment claims brought under Title VII was that Congress intended Title VII as a remedy for removing barriers to equal employment opportunities, not as a remedy to attacks based on sexual desire.³⁵ In rejecting a sexual harassment action, the *Tomkins I* court found that, because the sexual advances were based on desire and not specifically on the gender of the victim, they were beyond the reach of Title VII's prohibitions against sex discrimination.³⁶

Rather than viewing sexual harassment as a sex-based barrier to employment opportunity, courts relied upon another theory that sexual harassment was really a "personal proclivity, peculiarity or mannerism" and an attempt to satisfy "a personal

28. *Meritor Sav.*, 477 U.S. at 64 ("[T]he bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting [Title VII's] prohibition against discrimination based on 'sex.' ").

29. *Miller v. Bank of Am.*, 418 F. Supp. 233, 234-35 (N.D. Cal. 1976), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977).

30. *Tomkins I*, 422 F. Supp. 553, 556 (D. N.J. 1976), *rev'd*, 568 F.2d 1044 (3d. Cir. 1977); *Miller*, 418 F. Supp. at 236; *Corne*, 390 F. Supp. at 163.

31. *Tomkins I*, 422 F. Supp. at 556; *Corne*, 390 F. Supp. at 163.

32. *Miller*, 418 F. Supp. at 236; *Corne*, 390 F. Supp. at 163.

33. *Tomkins I*, 422 F. Supp. at 557; *Miller*, 418 F. Supp. at 236; *Corne*, 390 F. Supp. at 163.

34. *Tomkins I*, 422 F. Supp. at 556.

35. *Id.*

36. *Id.*

urge.³⁷ In the absence of employer policies approving of such sexual advances, the harassment was unrelated to the victim's employment,³⁸ even though such behavior was distasteful and an unfortunate occurrence in the workplace.³⁹

Finally, early case law regarding sexual harassment demonstrates the courts' reluctance to intrude upon these personal incidents under the rationale that doing so would invite a flood of litigation.⁴⁰ To allow sexual harassment claims under Title VII would turn every "pass" into a potential lawsuit,⁴¹ would ignore the reality of natural sexual attraction between men and women,⁴² and would invite false claims of sexual advances as retaliation for negative employment decisions or discipline.⁴³

C. Early Acceptance Of Sexual Harassment Claims Under Title VII

The refusal to recognize sexual harassment as actionable under Title VII was short-lived.⁴⁴ Early cases allowing sexual harassment claims under Title VII did so under a different theory of Congressional intent: that unwelcome sexual advances and sexually offensive work environment created the barriers to employment, which Title VII was meant to eradicate.⁴⁵ Also, courts voiced disapproval for the early theories rejecting sexual harassment claims, including the reluctance to get involved in personal matters⁴⁶ and the fear of instigating massive case loads for courts.⁴⁷

37. *Corne*, 390 F. Supp. at 163; see also *Miller*, 418 F. Supp. at 236.

38. *Corne*, 390 F. Supp. at 163.

39. *Tomkins I*, 422 F. Supp. at 556.

40. *Id.* at 557; *Corne*, 390 F. Supp. at 163.

41. *Tomkins I*, 422 F. Supp. at 557; *Corne*, 390 F. Supp. at 163.

42. *Miller*, 418 F. Supp. at 236.

43. *Id.*

44. *Corne v. Bausch & Lomb, Inc.* was the first reported case dealing with sexual harassment under Title VII. 390 F. Supp. 161 (D. Ariz. 1975). The first case allowing sexual harassment actions under Title VII was decided in 1976. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd* 587 F.2d 1240 (D.C. Cir. 1978). By 1977, two Circuit Court of Appeals had followed suit. See *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Tomkins II*, 568 F.2d 1044 (3d Cir. 1977).

45. *Williams*, 413 F. Supp. at 657-58; *Barnes*, 561 F.2d at 987; *Tomkins II*, 568 F.2d at 1047 n.2.

46. *Williams*, 413 F. Supp. at 660.

47. *Id.* at 660-61; *Tomkins II*, 568 F.2d at 1049.

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Instead of excluding sexual harassment claims as beyond Title VII's scope and the intent of Congress, courts determined that prohibiting such behavior came squarely under Congress' intent to eradicate barriers in employment.⁴⁸ Specifically, the Third Circuit Court of Appeals reasoned that making sexual advances toward employees and requiring that they submit to such advances in order to remain or to advance in employment, imposes a condition of employment on one gender and not another.⁴⁹ The D.C. Circuit Court of Appeals dubbed this construction of prohibited behavior under Title VII as the "but for" test—but for the gender of the victim, he or she would not be harassed.⁵⁰

In response to the argument that sexual harassment was a personal matter into which the judiciary should not interfere, the D.C. District Court was the first to reject the notion that it was the victim's willingness (or lack thereof) to enter into such a personal relationship and respond to the sexual desires of the harasser rather than the victim's gender that was made a condition of employment.⁵¹ In *Williams v. Saxbe*,⁵² the court refused to give credence to this argument, stating that requiring such a choice of one gender rather than another in and of itself was prohibited conduct under Title VII.⁵³

Finally, the Circuit Courts of Appeal that first allowed sexual harassment claims under Title VII did so even in the face of possibly limitless litigation stemming from every initiation of social contact in the workplace.⁵⁴ The Third Circuit stated the "congressional mandate that the federal courts provide relief is strong; it must not be thwarted by concern for judicial economy."⁵⁵ The D.C. Circuit allowed that Congress may have

48. *Tomkins II*, 568 F.2d at 1046-47 n.2; *Barnes*, 561 F.2d at 987; *Williams*, 413 F. Supp. at 657-58.

49. *Tomkins II*, 568 F.2d at 1046-47.

50. *Barnes*, 561 F.2d at 990 ("But for her womanhood, . . . her participation in sexual activity would never have been solicited. . . . [S]he became the target of her superior's sexual desires because she was a woman . . .").

51. *Williams*, 413 F. Supp. at 657-58.

52. *Id.* at 654.

53. *Id.* at 659.

54. *Tomkins II*, 568 F.2d at 1049; see also *Barnes*, 561 F.2d at 994 n.81.

55. *Tompkins II*, 568 F.2d at 1049. Indeed, it was the very strength of this mandate, and its remedial nature, which convinced courts that it was necessary to construe Title VII to prohibit sexual harassment implicitly. See *Barnes*, 561 F.2d at 994; *Williams*, 413 F. Supp. at 658.

recognized this possibility when it acted to prohibit such discriminatory behavior.⁵⁶ Moreover, the courts recognized that existing judicial procedures for weeding out bad faith or frivolous claims would act to prevent such a flood.⁵⁷

D. Expansion of Sexual Harassment Theory

The earliest cases recognizing sexual harassment claims under Title VII involved situations in which an employee was threatened with adverse employment action absent submission to sexual demands.⁵⁸ This type of sexual harassment is known as *quid pro quo*⁵⁹ sexual harassment.⁶⁰ In 1980, the EEOC issued guidelines defining what behavior constituted *quid pro quo* sexual harassment.⁶¹ However, the EEOC outlined another type of actionable sexual harassment beyond the *quid pro quo* action; this new cause of action was not previously acknowledged by the courts.⁶² The Guidelines prohibit conduct of a sexual nature that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁶³

This new type of sexual harassment, known as "hostile environment harassment,"⁶⁴ did not require that a tangible loss of job benefits must be suffered for liability under Title VII, as was required by *quid pro quo* harassment.⁶⁵ The reasoning for

56. *Barnes*, 561 F.2d at 994 n.81.

57. *Tomkins II*, 568 F.2d at 1049.

58. See Michelle Ridgeway Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1081 (1989); Michael D. Vhay, Comment, *The Harms of Asking: Towards A Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 334 (1988).

59. "Something for something." BLACK'S LAW DICTIONARY 1248 (6th ed. 1930).

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

61. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.11(a)(1), (2) (1994). The Guidelines on *quid pro quo* harassment are as follows:

Harassment on the basis of sex is a violation 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, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. . . .

Id.

62. Vhay, *supra* note 58, at 336.

63. 29 C.F.R. § 1604.11(a)(3) (1994).

64. *Meritor Sav.*, 477 U.S. at 65.

65. Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective*

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this extension was set forth by the District of Columbia Circuit Court of Appeals in *Bundy v. Jackson*, the first court opinion to recognize a hostile work environment claim.⁶⁶ There, the D.C. Circuit stated that the “psychological and emotional work environment” is considered part of the conditions of employment;⁶⁷ sexual harassment that makes such an environment hostile and offensive for one gender and not for another would constitute discrimination on the basis of sex.⁶⁸ In other words, whereas *quid pro quo* sexual harassment claims dealt with the loss or threat of a loss of a tangible job benefit, hostile environment sexual harassment claims focused on the loss of an intangible job benefit—a non-hostile, non-offensive psychological environment.

In a span of six years, courts shifted from refusing to recognize sexual harassment claims under Title VII to extending the prohibitions to include not only direct actions taken against employees for refusing sexual advances, but also sexual conduct that would create a hostile work environment. This progression was ultimately ratified by the Supreme Court in its landmark decision, *Meritor Savings Bank v. Vinson*.⁶⁹

E. Meritor Savings Bank v. Vinson

The Supreme Court made it very clear that the sex discrimination provisions of Title VII prohibited sexual harassment: “*Without question*, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”⁷⁰ The Court acknowledged the actionability of both *quid pro quo* and hostile environment sexual harassment claims.⁷¹ The Court found, as

Paradigm, 8 YALE L. & POL’Y REV. 333, 341 (1990).

66. 641 F.2d 934 (D.C. Cir. 1981).

67. *Id.* at 944-45.

68. *Id.* at 945. This line of reasoning was also adopted in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). In *Henson*, the court established a five-part test for hostile environment sexual harassment claims. *Id.* at 903-05. In order to bring a claim, a plaintiff has to demonstrate that: (1) he or she is a member of a protected class, that is, male or female; (2) “the employee was subject to unwelcome sexual harassment”; (3) but for the employee’s sex, he or she would not have been harassed; (4) the harassment affected a condition of employment; and (5) the employer “knew or should have known of the harassment” and took no action. *Id.*

69. 477 U.S. 57 (1986).

70. *Id.* at 64 (emphasis added).

71. *Id.* at 64, 66.

had courts in the early cases recognizing sexual harassment claims under Title VII,⁷² that sexual harassment acted as a barrier to equal employment opportunity in the workplace.⁷³ It was Congress' intent to strike down these barriers in order "to strike at the entire spectrum of disparate treatment of men and women' in employment."⁷⁴

Thus, Title VII has been extended to cover sexual harassment claims, despite the fact that it contains neither an express prohibition against sexual harassment nor even explicit mention of an intent to do so in the scarce legislative history that exists. In so extending Title VII, courts have stated the following: (1) that sexual harassment sets up barriers to equal employment, barriers which Congress intended to remove via Title VII;⁷⁵ (2) that such barriers are sex discrimination because sexual harassment imposes a condition of employment on one gender and not another;⁷⁶ (3) that there is a cause of action for hostile work environment sexual harassment as well as for *quid pro quo* actions;⁷⁷ and (4) that unwelcomeness is the essential element of sexual harassment actions under Title VII.⁷⁸

II. THE SAME-SEX SEXUAL HARASSMENT CONFLICT

While it is now well-settled that opposite-sex sexual harassment is prohibited by Title VII's sex discrimination provisions, a new controversy has recently arisen regarding same-sex sexual harassment—that is, situations in which the harasser and the harassee are of the same gender.⁷⁹ The Fifth Circuit Court of Appeals has opined on the issue, flatly stating that Title VII does not apply to same-sex sexual harassment claims.⁸⁰ The Fourth Circuit has rejected this absolute

72. See, e.g., *Williams v. Saxbe*, 413 F. Supp. 654, 657-58 (D. D.C. 1976), *rev'd* 587 F.2d 1240 (D.C. Cir. 1978).

73. *Meritor Sav.*, 477 U.S. at 67.

74. *Id.* at 64 (citation omitted).

75. *Williams*, 413 F. Supp. at 657-58.

76. *Tomkins II*, 568 F.2d 1044, 1046-47 (3d. Cir. 1977).

77. *Meritor Sav.*, 477 U.S. at 64, 66.

78. *Id.* at 68.

79. See Pamela J. White & Stephanie A. Baldanzi, *Same-Sex Sexual Harassment Now Unpredictable Area of Law*, 4 EMPLOYMENT DISCRIMINATION REPORTER 240 (Feb. 22, 1995).

80. *Oncale v. Sundowner Offshore Serv., Inc.*, 83 F.3d 118, 119-20 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3432 (U.S. Dec. 16, 1996) (No. 96-568); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994).

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prohibition on same-sex sexual harassment claims under Title VII.⁸¹ However, when dealing with hostile environment claims, the Fourth Circuit, differentiating between situations involving homosexual harassers⁸² and those involving heterosexual harassers, has held that only in the first instances are sexual harassment claims actionable.⁸³ The Sixth Circuit has similarly recognized that a same-sex sexual harassment claim resulting from the harassment of a homosexual supervisor is actionable, although it has thus far refused to draw the same heterosexual-homosexual distinction as the Fourth Circuit.⁸⁴ Finally, the Eighth Circuit has adopted a broader categorization of actionable same-sex sexual harassment claims under Title VII to include situations in which both the harasser and his or her victim are heterosexual.⁸⁵ Four other Circuit Courts of Appeals have expressed in dicta a reluctance to exclude such claims from Title VII coverage.⁸⁶ The remaining Circuit Courts of Appeals have so far been silent on the issue. Federal district courts are split on the issue, albeit not evenly;⁸⁷ the majority of courts have

81. *Wrightson v. Pizza Hut of Am., Inc.* 99 F.3d 138, 141 (4th Cir. 1996).

82. *Id.*

83. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996). Note, however, that the Circuit Court has not yet expressed an opinion on the actionability of same-sex *quid pro quo* claims, although it has indicated a willingness to hold them actionable. *Id.* at 1195 n.4.

84. *Yeary v. Goodwill Indust.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997).

85. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378-79 (8th Cir. 1996).

86. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) ("[W]e do 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."); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995) ("[W]e do not rule out the possibility that both men and women working at Showboat have viable claims against [a male] for sexual harassment."); *Henson v. City of Dundee*, 682 F.2d 897, 905 n.11 (11th Cir. 1982) ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex."); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (rejecting defense's argument that a man could make sexual advances toward a man as easily as toward a woman; "In each instance, the legal problem would be identical . . . the exaction of a condition which, but for his or her sex, the employee would not have faced."); *see also Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984) (affirming without opinion the district court's recognition of a same-sex sexual harassment cause of action).

87. *See Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 737 (N.D. Ill. 1996) (holding that *Garcia* and the cases following its reasoning correctly interpreted Title VII as not covering same-sex sexual harassment claims); *Larry v. North Miss. Med. Ctr.*, 940 F. Supp. 960, 963 (N.D. Miss. 1996) (dismissing same-sex sexual harassment claim because bound by Fifth Circuit precedent); *Myers v. City of El Paso*, 874 F. Supp.

allowed, or at least have recognized the viability of, same-sex sexual harassment claims under Title VII.⁸⁸ The issue is so confused that the U.S. Supreme Court has requested that the U.S. Department of Justice submit a brief outlining its views on the actionability of same-sex harassment claims under Title VII.⁸⁹

Recognition of same-sex sexual harassment claims ranges from complete rejection of such claims to acceptance of same-sex claims on the same basis as opposite sex claims,⁹⁰ with several courts staking out the middle ground and only allowing certain such claims (for example, allowing only *quid pro quo* actions or factual scenarios involving homosexuals).⁹¹ Courts that flatly

1546, 1548 (W.D. Tex. 1995) (following *Garcia*); *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D. S.C. 1995) (refusing to recognize same-sex sexual harassment claim under Title VII).

88. See, e.g., *McCoy v. Macon Water Auth.*, No. 5:94-CV-480-4(HL), 1997 WL 50037, at *6 (M.D. Ga. Feb. 5, 1997) (allowing same-sex sexual harassment claims comports with Title VII's language and existing sexual harassment case law); *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 701 (E.D. Wis. 1996); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1409 (E.D. Wis. 1996) ("[S]ame-sex harassment claims are cognizable under Title VII"); *Gerd v. United Parcel Service, Inc.*, 934 F. Supp. 357 (D. Colo. 1996); *Marciano v. Kash n' Karry Foodstores, Inc.*, No. 94-1657CIV-T-17A, 1996 WL 420879, at *3-4 (M.D. Fla. July 1, 1996) (holding hostile environment same-sex sexual harassment cases are actionable under Title VII; *quid pro quo* actions are not); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1500 (E.D. Va. 1996) (holding Title VII prohibits sexual harassment regardless of the "gender combination" of the parties involved); *Williams v. District of Columbia*, 916 F. Supp. 1 (D.D.C. 1996); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1104 (M.D. Tenn. 1995); *Sardinia v. Dellwood Foods, Inc.*, 94 CIV. 5458(LAP), 1995 WL 640502, at *6 (S.D.N.Y. Nov. 1, 1995) (holding same-sex sexual harassment to be actionable under Title VII).

89. *Court Asks for Administration's View on Whether to Review Same-Sex Issue*, 7 EMPL. DISCRIMINATION REP. 765 (Dec. 18, 1996).

90. Compare *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (holding same-sex sexual harassment claims not actionable under Title VII) with *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996) (holding same-sex sexual harassment claims actionable under Title VII, using the same elements of proof as opposite sex harassment cases).

91. Compare *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996) (holding that hostile environment sexual harassment action where harasser and victim are both heterosexuals is not actionable under Title VII) with *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141 (4th Cir. 1996) (holding when harasser is homosexual, same-sex sexual harassment claim is actionable); see also *Marciano v. Kash N' Karry Foodstores, Inc.*, No. 94-1657CIV-T-17A, 1996 WL 420879, at *3 (M.D. Fla. July 1, 1996) (allowing hostile environment, but not *quid pro quo*, same-sex sexual harassment cases under Title VII); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995) (same-sex sexual harassment can only be actionable when anti-male or anti-female environment is created in the workplace).

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reject all same-sex sexual harassment claims do so on one theory: namely, that Congress intended Title VII as a tool to balance power inequalities in the workplace and never intended for same-sex sexual harassment to come under that protection.⁹²

Courts that allow same-sex sexual harassment actions, all or in part, have reasoned by way of the following: (1) the plain language of both the statute and the Supreme Court's decision in *Meritor Savings Bank v. Vinson* do not restrict Title VII coverage to opposite sex situations;⁹³ (2) the EEOC, as the appointed enforcer of Title VII, has interpreted the statute to allow same-sex claims;⁹⁴ (3) the "but-for" test established early in the history of sexual harassment law requires that harassment that an employee would not suffer but for his or her sex must be labeled sexual harassment, regardless of the harasser's gender;⁹⁵ (4) that dicta in the earliest sexual harassment cases implies such actions should be allowed;⁹⁶ and (5) that theories currently accepted in sexual harassment law, including reverse discrimination and actions alleging other-than-sexual behavior, lead courts to hold that same-sex sexual harassment cannot be excluded from Title VII protection.⁹⁷

92. See *Garcia*, 28 F.3d at 451-52 (citing *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730 (N.D. Ill. 1996); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 493-94 (W.D. Wash. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521, 525-26 (D.S.C. 1995)).

93. See *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 702 (E.D. Wis. 1996); *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1409 (E.D. Wis. 1996); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1500 (E.D. Va. 1996); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995).

94. See *Swage v. The Inn Phila., Civ. A. No. 96-2380*, 1996 WL 368316, at *2 (E.D. Pa. June 21, 1996); *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357 (D. Colo. 1996); *Ecklund v. Fruisz Tech., Ltd.*, 905 F. Supp. 335, 337 (E.D. Va. 1995).

95. *Gerd*, 934 F. Supp. at 361; *Raney v. District of Columbia*, 892 F. Supp. 283, 286 (D.D.C. 1996); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995), *rev'd* 99 F.3d 138 (4th Cir. 1996); *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

96. See *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1378 (C.D. Cal. 1995); *Griffith*, 887 F. Supp. at 1136; *Walden Book Co.*, 885 F. Supp. at 1102 n.3; *Boyd v. Vonnahmen*, No. 93-CV-4358-JPG, 1995 WL 420040 at *3 (S.D. Ill. Mar. 29, 1995); *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995).

97. See *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378-79 (8th Cir. 1996) (holding sexual harassment claim does not have to involve behavior expressing sexual interest or requesting sexual favors to be actionable); *Swage v. The Inn Phila., Civ. A. No. 96-2380*, 1996 WL 368316, at *3 (E.D. Pa. June 21, 1996) (holding it inconsistent to allow reverse discrimination cases but not same-sex sexual harassment cases); *Easton*,

A. *The Rejection of Same-Sex Sexual Harassment Claims*

The Fifth Circuit's opinion in *Garcia v. Elf Atochem North America*,⁹⁸ which reject same-sex sexual harassment claims,⁹⁹ has been cited as support by all later decisions also rejecting such claims.¹⁰⁰ Unfortunately, the decision offers little to analyze on its face. The court's reasoning consists of two sentences: "[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."¹⁰¹ Such brevity frustrates an analysis of the holding, but there are two mitigating factors. First, *Goluszek v. Smith*,¹⁰² the authority cited by the *Garcia* court in support of its brief statement,¹⁰³ explains in greater detail what is meant by "gender discrimination."¹⁰⁴ Second, some district courts following the court's ruling have discussed their own reasoning in greater detail.¹⁰⁵

1. *Goluszek v. Smith and the Imbalance of Power*

Goluszek v. Smith involved a hostile environment sexual harassment claim brought by a man whose co-workers commented incessantly about his supposed sexual inexperience and accused him of being a homosexual.¹⁰⁶ The court rejected

905 F. Supp. at 1379 (reverse discrimination cases demonstrate that not only "minority" group entitled to protection under Title VII).

98. 28 F.3d 446 (5th Cir. 1994).

99. *Id.* at 451-52.

100. See *Oncale v. Sundowner Offshore Serv., Inc.*, 83 F.3d 118, 119 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3432 (U.S. Dec. 16, 1996) (No. 96-568); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 731 (N.D. Ill. 1996); *Larry v. North Miss. Med. Ctr.*, 940 F. Supp. 960, 963 (N.D. Miss. 1996); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 494 (W.D. Wash. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995); *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995). Note that in both *Oncale* and *Larry*, the courts seemed unenthusiastic about following *Garcia*, repeated several times that they were impelled to accept the *Garcia* decision as binding precedent, and cited to the extensive opposition in other courts to the decision. See *Oncale*, 83 F.3d at 119-20; *Larry*, 940 F. Supp. 963-64.

101. *Garcia*, 28 F.3d at 451-52 (citation omitted).

102. 697 F. Supp. 1452 (N.D. Ill. 1988).

103. *Garcia*, 28 F.3d at 452.

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

105. See, e.g., *Schoiber*, 941 F. Supp. at 737-39; *Ashworth*, 897 F. Supp. at 493; *Benekritis*, 882 F. Supp. at 525.

106. *Goluszek*, 697 F. Supp. at 1453-54.

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his claim under Title VII.¹⁰⁷ The court's denial was based on its review of congressional intent in establishing the protections of Title VII.¹⁰⁸ Although the court recognized that the purpose of Title VII was to establish equal opportunity,¹⁰⁹ as was established in earlier sexual harassment cases under Title VII,¹¹⁰ it narrowly defined the means Congress intended to achieve that purpose.¹¹¹ The *Goluszek* court stated that Congress' intent was to end discrimination based upon "an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."¹¹² The only authority the court cited for this proposition was a student-written Note;¹¹³ it cited nothing from the statute itself, nor to any legislative history.¹¹⁴

Based upon this view of congressional intent, the court held that sexual harassment would not be actionable unless the harassment created an "anti-male environment" in which males were made to feel inferior because they are male.¹¹⁵ Because the plaintiff in *Goluszek* was a male in a male-dominated environment, his workplace was not an "anti-male environment."¹¹⁶ The court recognized that the plaintiff, *Goluszek*, may have been the recipient of treatment to which women would not be subjected, and thus an argument could be made that he was harassed because he was male.¹¹⁷ However, because no anti-male environment resulted, the harassment was

107. *Id.* at 1456.

108. *Id.*

109. *Id.*

110. *See, e.g., Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654, 658 (D.D.C. 1976), *rev'd* 587 F.2d 1240 (D.C. Cir. 1978).

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

112. *Id.*

113. *Id.* (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)).

114. *Id.*; *see also Miller v. Vesta, Inc.*, 946 F. Supp. 697, 704 (E.D. Wis. 1996) (noting lack of support in student-written note for *Goluszek* court's conclusions regarding legislative history for Title VII); *Williams v. District of Columbia*, 916 F. Supp. 1, 8-9 (D.D.C. 1996) (criticizing *Goluszek* court for supporting opinion with student Note rather than Congressional material); *Ton v. Information Resources, Inc.*, No. 95 C 3565, 1996 WL 5322, at *7 (N.D. Ill. Jan. 3, 1996) (criticizing *Goluszek* for failure to find support in statute or legislative history); *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995) (criticizing *Goluszek* court for failing to cite to legislative history).

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

116. *Id.*

117. *Id.*

not actionable under Title VII, and thus Goluszek had no claim under Title VII.¹¹⁸

2. *Garcia and Its Progeny*

In accepting *Goluszek's* holding without explication, the Fifth Circuit in *Garcia* reduced *Goluszek's* long discussion of congressional intent and the requirement of an anti-male environment to one phrase—"gender discrimination."¹¹⁹ Further discussion of *Goluszek's* theories did not occur until later opinions in agreement with the *Garcia* court were issued.¹²⁰ These later opinions focused solely on the theory of congressional intent, stating that Congress intended to remedy only those situations in which disparate treatment in the form of an anti-male or anti-female environment exists.¹²¹ These cases add no new support, whether from case law or legislative sources, for *Goluszek's* claims; they remain supported only by a student-written Note.

However, the Fourth, Sixth, and Eighth Circuits and many federal district courts have rejected *Garcia's* interpretation of congressional intent and instead have recognized that same-sex sexual harassment claims are or could be cognizable under Title VII.¹²² The decisions have varied significantly in outlining the types of same-sex claims that will be recognized,¹²³ the elements that will constitute proof of a same-sex claim,¹²⁴ and

118. *Id.*

119. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994).

120. *See, e.g., Ashworth v. Roundup Co.*, 897 F. Supp. 489, 493 (W.D. Wash. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521, 525 (D.S.C. 1995).

121. *See Ashworth*, 897 F. Supp. at 493; *Benekritis*, 882 F. Supp. at 525.

122. *See, e.g., Yeary v. Goodwill Indust.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.* 99 F.3d 138, 141 (4th Cir. 1996); *Quick v. Donaldson*, 90 F.3d 1372, 1378-79 (8th Cir. 1996); *Marciano v. Kash n' Karry Foodstores, Inc.*, No. 94-1657CIV-T-17A, 1996 WL 420879, at *3 (M.D. Fla. July 1, 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996); *Raney v. District of Columbia*, 892 F. Supp. 283, 288 (D.D.C. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995); *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995).

123. *E.g., compare McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.4 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996) (declaring that hostile environment same-sex sexual harassment claims are not actionable under Title VII, but that *quid pro quo* same-sex sexual harassment claims are not ruled out) *with Marciano*, 1996 WL 420879, at *3 (holding *quid pro quo* same-sex sexual harassment claims are not actionable under Title VII, but hostile environment same-sex sexual harassment claims may be brought).

124. *E.g., compare Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th

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the behavior that will be prohibited by Title VII in the same-sex context.¹²⁵ However, the courts have uniformly supported their decisions to allow these actions with the following: (1) citation to dicta in the earliest sexual harassment cases that implies such actions should be allowed;¹²⁶ (2) utilization of the but for test,¹²⁷ also established in the earliest sexual harassment cases;¹²⁸ (3) reference to the plain language of Title VII and the gender-neutral language used by the Supreme Court in *Meritor Savings Bank v. Vinson* to establish the actionability of sexual harassment claims;¹²⁹ and (4) deference to the EEOC's interpretation of Title VII, which allows for same-sex sexual harassment claims.¹³⁰

B. The Acceptance of Same-Sex Sexual Harassment Cases Under Title VII

1. Quid Pro Quo, Hostile Environment, and Sexual Preference

Although a majority of the circuit and district courts that have addressed the issue of same-sex sexual harassment have held it

Cir.), *cert. denied*, 117 S. Ct. 70 (1996) (holding principle method of proving harasser targeted a victim because of sex is proving harasser acted out of sexual attraction to the victim) *with Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996) (holding that sexual orientation of harasser not determinative of whether same-sex sexual harassment claim is actionable).

125. *E.g., compare Quick*, 90 F.3d at 1378-79 (holding that same-sex sexual harassment action could exist for "bagging"—grabbing and squeezing of man's testicles by male co-workers) *with McWilliams*, 72 F.3d at 1193, 1195 (finding no same-sex sexual harassment claim between heterosexual men even where co-workers fondled victim's genitals and made other sexual contact).

126. *See Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1378 (C.D. Cal. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 n.3 (M.D. Tenn. 1995); *Boyd v. Vonnahmen*, No. 93-CV-4358-JPG, 1995 WL 420040 at *3 (S.D. Ill. Mar. 29, 1995); *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229, 232 (M.D. Ga. 1995).

127. *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

128. *See Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 361 (D. Colo. 1996); *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1996); *Walden Book Co.*, 885 F. Supp. at 1102; *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

129. *See Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1409 (E.D. Wis. 1996); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1500 n.9 (E.D. Va. 1996); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996); *Griffith*, 887 F. Supp. at 1136-37.

130. *See Swage v. The Inn Phila.* No. Civ. A. No. 96-2380, 1996 WL 368316, at *3 (E.D. Pa. June 21, 1996); *Gerd*, 934 F. Supp. at 361; *Ecklund v. Fruisz Tech., Ltd.*, 905 F. Supp. 335, 337 (E.D. Va. 1995).

actionable under Title VII, no consensus exists as to whether all types of same-sex claims are included. For example, in *McWilliams v. Fairfax County Board of Supervisors*,¹³¹ the Fourth Circuit Court of Appeals examined the sexual harassment claim of a heterosexual male against several of his male co-workers.¹³² Mr. McWilliams complained that his co-workers asked him about his sexual activities, once placed a condom in his food, exposed their genitalia to him, and fondled his genitals.¹³³ However, Mr. McWilliams never claimed nor presented evidence that those accused were homosexual.¹³⁴ In dismissing Mr. McWilliams' claims, the court held that hostile environment same-sex sexual harassment claims are not actionable under Title VII.¹³⁵ In support of this ruling, the court, citing the language of Title VII, stated that the activities alleged by Mr. McWilliams could not have been directed at him because of his sex.¹³⁶ Instead, they were perhaps based upon his sensitivity or the vulgar nature of his tormentors.¹³⁷ To allow such claims would expand Title VII's protections beyond the intent of Congress and the Supreme Court to include broad protection of "the sensibilities of workers simply 'in matters of sex.'"¹³⁸

*Marciano v. Kash N' Karry Foodstores, Inc.*¹³⁹ presented an alternative theory for determining which types of same-sex sexual harassment actions may be brought. In *Marciano*,¹⁴⁰ the alleged harasser, a male supervisor, exposed his genitals to Mr. Marciano, made vulgar comments regarding oral sex, and told

131. 72 F.3d 1191 (4th Cir.), cert. denied, 117 S. Ct. 72 (1996).

132. *Id.* at 1193.

133. *Id.*

134. *Id.* at 1195.

135. *Id.* The court expressly stated, however, that it was not addressing whether the homosexuality of any of the parties would allow a hostile environment action to be brought, or whether a *quid pro quo* action would be actionable regardless of the parties' sexual orientation. *Id.* at 1195 n.4. This issue was later addressed by the Fourth Circuit in *Wrightson v. Pizza Hut of Am., Inc.*, in which the court held that same-sex sexual harassment claims based on the actions of homosexual harassers were actionable. 99 F.3d 138, 141 (4th Cir. 1996).

136. *McWilliams*, 72 F.3d at 1195-96.

137. *Id.* at 1196.

138. *Id.*; see also *Gibson v. Tanks Inc.*, 930 F. Supp. 1107, 1108 (M.D.N.C. 1996) (holding no hostile environment same-sex sexual harassment claim where both parties are heterosexual).

139. No. 94-1657-CIV-T-17A, 1996 WL 420879 (M.D. Fla. July 1, 1996).

140. *Id.* at *1.

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Mr. Marciano he had a "cute butt."¹⁴¹ Mr. Marciano also claimed that the harasser's actions were proof that the harasser was homosexual, which made his conduct actionable under Title VII under *McWilliams*.¹⁴² However, the court held, contrary to *McWilliams*' holding, that the harasser's sexual orientation was irrelevant in determining whether sexual harassment is actionable under Title VII.¹⁴³ In so holding, the court differentiated between hostile environment and *quid pro quo* sexual harassment actions.¹⁴⁴ The court stated that hostile environment sexual harassment actions were intended to ensure employee access to a workplace free of discrimination or harassment based on their gender and, thus, sexual orientation is irrelevant.¹⁴⁵ However, with *quid pro quo* same-sex actions, discrimination results when a claimant does not share a homosexual supervisor's sexual preference; the discrimination would be then based on sexual orientation rather than sex.¹⁴⁶ Such discrimination would not be actionable under Title VII.¹⁴⁷ These two examples demonstrate the wide variance in the types of actions courts have (or have not) found actionable in same-sex sexual harassment litigation under Title VII.

2. Elements of Proof

Courts recognizing same-sex sexual harassment claims also differ in their approaches to the level and elements of proof necessary to prove such claims. These different evidentiary standards focus on (1) the role sexual attraction plays in proving that the harassment occurs because of the victim's sex;¹⁴⁸ (2) the necessity of proving an environment generally hostile to a

141. *Id.*

142. *Id.* at *2.

143. *Id.* at *3.

144. *Id.*

145. *Id.*

146. *Id.* The court does not address the question of whether a *quid pro quo* claim would be valid if the victim of a homosexual harasser was also homosexual.

147. *Id.*; see *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (holding sexual orientation discrimination not actionable under Title VII); *Dillon v. Frank*, No. 90-CV-70799-DT, 1990 WL 358586 (E.D. Mich. Oct. 19, 1990), *aff'd* 952 F.2d 403 (6th Cir. 1992) (holding no action for sex discrimination under Title VII where claimant harassed based on sexual orientation).

148. See *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996).

gender;¹⁴⁹ and (3) the sexual nature of the conduct of the harasser, which shall be discussed in the context of prohibited behavior under Title VII.¹⁵⁰ The role sexual attraction plays in finding Title VII same-sex sexual harassment is closely related to the theories presented in the preceding cases regarding the effect of a harasser's sexual preference on the actionability of a claim, in that the discussions of proof and actionability accompany each other.¹⁵¹

In *Hopkins v. Baltimore Gas & Electric Co.*,¹⁵² the court discussed the proof necessary to show that same-sex sexual harassment has occurred "because of" sex.¹⁵³ The court case contrasted opposite-sex sexual harassment claims, in which the victim is presumed to be the focus of a heterosexual harasser's actions because of his or her sex, with same-sex sexual harassment cases, in which such conduct is usually not motivated by sex.¹⁵⁴ These presumptions stem from society's knowledge of the "realit[ies of] sexual conduct."¹⁵⁵ Because of this lack of presumption in same-sex cases, the victim must *prove* that he was harassed because of his sex.¹⁵⁶ The court states, "The principal way in which this burden may be met is with proof that the harasser acted out of sexual attraction. . . ."¹⁵⁷

Several courts have rebutted the assumption that sexual attraction is a necessary element of proof in same-sex sexual harassment cases. In *Tietgen v. Brown's Westminster Motors*,

149. Compare *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1182 (N.D. Ind. 1995) (holding that claimant must establish either an anti-male or anti-female environment) with *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 360-61 (D. Colo. 1996) (holding that work environment does not have to be hostile to all members of sex, just to individual plaintiff, to be actionable).

150. Compare *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378-79 (8th Cir. 1996) (holding harasser's conduct does not have to express sexual interest in or request sexual favors from victim) with *Gerd*, 934 F. Supp. at 361 (asking whether conduct is sexual in nature to determine whether same-sex harassment is actionable as sex discrimination under Title VII).

151. See, e.g., *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 n.5 (4th Cir. 1996).

152. 77 F.3d 745 (4th Cir. 1996).

153. *Id.* at 752.

154. *Id.*

155. *Id.*

156. *Id.* (emphasis added).

157. *Id.*; see also *Shermer v. Illinois Dept. of Transp.*, 937 F. Supp. 781 (C.D. Ill. 1996) (recognizing difficulty in meeting burden of proof in same-sex sexual harassment cases without proof of sexual attraction).

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Inc.,¹⁵⁸ the court acknowledged that a same-sex sexual harassment plaintiff might fail to allege sufficient facts required to state a case that he had been discriminated against on the basis of gender; however, it also rejected the argument that the plaintiff had to prove the harasser's sexual attraction to him. The court stated that in this case the facts as alleged could be sufficient to support the plaintiff's claim without such proof.¹⁵⁹ Similarly, in *Swage v. The Inn Philadelphia*,¹⁶⁰ the court refused to hold that a same-sex sexual harassment plaintiff would be unable to prevail in the absence of proof of the harasser's sexual orientation.¹⁶¹

In *Goluszek*, discussed above, the court rejected a same-sex sexual harassment claim on the basis that the objectionable conduct did not result in an anti-male environment.¹⁶² It held that such an environment was necessary to establish a claim under Title VII, which Congress enacted to rectify inequalities and remove "discriminatory intimidation."¹⁶³ Some courts that have rejected *Goluszek* to find that same-sex sexual harassment is actionable under Title VII have still incorporated the "anti-male environment" test as an element of same-sex claims.¹⁶⁴

Other courts, however, including the Eighth Circuit Court of Appeals, have rejected the requirement that the harassment must create an anti-male or -female environment. In *Quick v. Donaldson Co.*,¹⁶⁵ the court stated, "Protection under Title VII . . . extends to all employees and prohibits disparate treatment of an individual, man or woman, based on *that person's* sex. The district court therefore erred in requiring . . . evidence of an anti-male or predominantly female work

158. 921 F. Supp. 1495 (E.D. Va. 1996).

159. *Id.* at 1502. The plaintiff's complaint thus withstood a motion to dismiss. *Id.*

160. Civ. A. No. 96-2380, 1996 WL 368316 (E.D. Pa. June 21, 1996).

161. *Id.* at *4.

162. *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988); see discussion *supra* Part II.A.1.

163. *Id.*

164. See, e.g., *Blozis v. Mike Raiser Ford, Inc.*, 896 F. Supp. 805, 808 (N.D. Ind. 1995) (acknowledging it would be "[d]ifficult, but not impossible" to prove that same-sex sexual harassment resulted in necessary anti-male environment to state a Title VII claim); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1182 (N.D. Ind. 1995) (recognizing that same-sex sexual harassment might be actionable under Title VII and requiring that an anti-male or anti-female environment be established for same).

165. 90 F.3d 1372 (8th Cir. 1996).

environment."¹⁶⁶ Some courts have thus held that, based on Title VII's creation of individual claims for discrimination, requiring a showing of hostility to all members of a gender would be unwarranted.¹⁶⁷

3. *Prohibited Behavior in Same-Sex Sexual Harassment Claims*

There is little argument among the cases allowing same-sex sexual harassment actions that *quid pro quo* same-sex harassment¹⁶⁸ is actionable under Title VII.¹⁶⁹ However, same-sex sexual harassment claims often concern vulgarity and sexual taunting between men that is unrelated to any sort of sexual desire; rather, it reflects the sort of uninhibited, coarse behavior found in settings completely dominated by one gender.¹⁷⁰ Nonetheless, the targets of this behavior may well be treated differently than if they were women; but for their gender, they would not be the brunt of this type of harassment.¹⁷¹ Because of this unique situation, the question arises whether same-sex sexual harassment must be "sexual" in nature, in that the object is to express sexual interest or to request sexual favors, in order to be actionable under Title VII.¹⁷² In opposite-sex sexual

166. *Id.* at 1378 (citations omitted) (emphasis added).

167. *Id.*; see also *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 360-61 (D. Colo. 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995).

168. These *quid pro quo* actions would include instances in which a man makes sexual demands on a male employee and conditions that person's employment on submitting to such demands.

169. In fact, the earliest cases recognizing same-sex sexual harassment as a cognizable claim under Title VII were *quid pro quo* cases. See *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

170. See, e.g., *Shermer v. Illinois Dept. of Transp.*, 937 F. Supp. 781 (C.D. Ill. 1996) (finding defendant accused plaintiff on an all-male work crew of having sexual relations with other men); *Gerd*, 934 F. Supp. at 357 (finding male co-workers groped and teased plaintiff about sex life); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368 (C.D. Cal. 1995) (finding female supervisors spoke of sexual matters and exposed their bodies to female employees); *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (finding male co-workers teased employee about his sex life).

171. See, e.g., *Quick*, 90 F.3d at 1374 ("bagging" or groping of genitalia was not inflicted on female employees); *Goluszek*, 697 F. Supp. at 1456 (finding employer would have taken action in response to a complaint of sexual harassment from a female, unlike plaintiff's situation).

172. See *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378-79 (8th Cir. 1996); *Gerd*, 934 F. Supp. at 361.

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harassment cases, non-sexual behavior that is nonetheless intimidating or hostile to one sex has been declared actionable as sexual harassment under Title VII on the theory that such treatment singles out one gender for poor treatment.¹⁷³ The Eighth Circuit Court of Appeals has stated that likewise behavior does not have to be sexual in nature to be actionable in applying this rule to same-sex sexual harassment claims.¹⁷⁴

However, most courts have not ruled specifically on whether conduct must be sexual in nature to be actionable.¹⁷⁵ Rather, they have looked to the sexual nature of the conduct to determine whether it is the sort of vulgar treatment between members of the same sex that, while sexual in content, is not meant to express sexual desire.¹⁷⁶ Such conduct targets the victim because of personal dislike,¹⁷⁷ the victim's sensitivity or vulnerability,¹⁷⁸ or the vulgarity of the harasser,¹⁷⁹ but not because of the victim's sex; thus, Title VII does not apply.

C. Theoretical Underpinnings of the Recognition of Same-Sex Sexual Harassment Actions Under Title VII

The roots upon which acceptance of same-sex sexual harassment claims are based can be traced to the original cases recognizing the actionability of sexual harassment;¹⁸⁰ these cases acknowledged in dicta that same-sex actions might be allowed under Title VII.¹⁸¹ In *Barnes v. Costle*,¹⁸² for example,

173. *Gus v. Hall Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988).

174. *Quick*, 90 F.3d at 1378-79.

175. However, one case has held that the "determinative inquiry is solely whether the conduct is sexual in nature" and whether it would have occurred but for the victim's sex. *Gerd*, 934 F. Supp. at 361.

176. See, e.g., *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403 (E.D. Wis. 1996) (holding insults with sexual overtones are based on animosity, not sex, and are not severe enough to allow an action under Title VII); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1384 (C.D. Cal. 1995) (holding a person who finds sexually charged atmosphere oppressive because not comfortable with sexuality being openly expressed does not entail a violation of Title VII).

177. *Johnson*, 940 F. Supp. at 1411.

178. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

179. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996).

180. See, e.g., *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1502 n.16 (E.D. Va. 1996); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1101 (M.D. Tenn. 1995) (all citing *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977)).

181. See *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (stating that

the defendants argued that sexual harassment was not sexual discrimination, because such behavior would not be actionable if directed against those of the harasser's gender.¹⁸³ Disagreeing, the court stated that even if the parties were of the same gender, the harassment would not have occurred but for the gender of the victim.¹⁸⁴

This but for test has thus been utilized since to support actions for same-sex sexual harassment under Title VII.¹⁸⁵ For example, in *Wright v. Methodist Youth Services, Inc.*,¹⁸⁶ the district court allowed a *quid pro quo* action for same-sex sexual harassment.¹⁸⁷ Using the but for test, the court reasoned that the plaintiff would not have been the object of his supervisor's sexual advances had he been of a different gender.¹⁸⁸ Thus, but for his gender, the advancements would not have been made.¹⁸⁹ In a hostile environment case, *Ecklund v. Fruisz Technology, Ltd.*,¹⁹⁰ the court found that the female plaintiff had been the object of a female co-worker's harassment, including the use of sexual language and touching the plaintiff, because she was female; "but for" her sex, she would not have been the target.¹⁹¹

Courts allowing same-sex sexual harassment claims under Title VII also have relied upon a plain language argument, which refers to both the language used by Congress in the statute as well as the language used by the Supreme Court in *Meritor Savings*¹⁹² to establish conclusively an action for sexual

same-sex sexual harassment would still involve "the exaction of a condition which, but for his or her sex, the employee would not have faced."; *Williams v. Saxbe*, 413 F. Supp. 654, 659 n.6 (D.D.C. 1976), *rev'd* 587 F.2d 1240 (D.C. Cir. 1978) ("[A] finding of discrimination [could] be made if the supervisor were a homosexual.").

182. *Barnes*, 561 F.2d at 983.

183. *Id.* at 990 n.55.

184. *Id.*

185. *See, e.g.*, *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995); *Pritchett v. Sizeler Real Estate Management Co.*, No. 93-2351, 1995 WL 241855 (E.D. La. Apr. 25, 1995); *Boyd v. Vonnahmen*, No. 93-CV-4358-JPG, 1995 WL 420040, at *2-3 (S.D. Ill. Mar. 29, 1995); *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995).

186. 511 F. Supp. 307 (N.D. Ill. 1981).

187. *Id.* at 310. The plaintiff alleged he was terminated as a result of his rejection of his homosexual male supervisor's advances. *Id.* at 308.

188. *Id.* at 310.

189. *Id.*

190. 905 F. Supp. 335 (E.D. Va. 1995).

191. *Id.* at 339.

192. *See, e.g.*, *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1409 (E.D. Wis. 1996);

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harassment. Some courts have stated that there is nothing in the language of Title VII indicating that Congress intended to restrict sexual harassment actions to opposite-sex situations.¹⁹³ Some courts also cite the language used by the Supreme Court in *Meritor Savings*¹⁹⁴ to support same-sex sexual harassment claims because the Court was careful to use gender-neutral terminology and did not limit its holding to opposite-sex situations.¹⁹⁵ In addition, the Court expressed a desire to reach the "entire spectrum of disparate treatment of men and women in employment."¹⁹⁶

Finally, courts also defer to the EEOC's interpretation of Title VII to allow same-sex sexual harassment claims.¹⁹⁷ The EEOC has been given authority by Congress to implement and enforce Title VII, and as such, its interpretations of Title VII's coverage are persuasive authority.¹⁹⁸ The EEOC has stated in its Compliance Manual that harassers and victims do not have to be of different sexes and that same-sex sexual harassment is actionable under Title VII.¹⁹⁹

In summary, the lone congressional intent theory used by some courts to deny same-sex sexual harassment claims contrasts with the attempts of other courts to use combinations of theories to fashion an action for same-sex sexual harassment claims under Title VII. These theories include the following: (1) the dicta

Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1500 (E.D. Va. 1996); *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995).

193. *Griffith*, 887 F. Supp. at 1136-37; see also *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) ("[T]he plain language of 42 U.S.C. § 2000e-2 does not limit Title VII to heterosexual harassment.")

194. An example of this gender-neutral language: "[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (citation omitted).

195. See *Raney*, 892 F. Supp. at 287; *McCoy*, 878 F. Supp. at 232; *Walden Book Co.*, 885 F. Supp. at 1102.

196. *Meritor Sav.*, 477 U.S. at 64 (citations omitted). This language was cited by the court in *Raney* to support a broad interpretation of the scope of Title VII to include same-sex sexual harassment claims. 892 F. Supp. at 287.

197. See, e.g., *Swage v. The Inn Phila.*, Civ. A. No. 96-2380, 1996 WL 368316, at *2 (E.D. Pa. June 21, 1996); *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 361 (D. Colo. 1996); *Ecklund v. Frusz Tech., Ltd.*, 905 F. Supp. 335, 337 (E.D. Va. 1995).

198. See *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996).

199. EEOC COMPL. MAN. (BNA) § 615.2.

supporting same-sex claims in early cases establishing sexual harassment as a cause of action under Title VII; (2) the but for test, which provides that discriminatory conduct that would not occur but for the victim's sex is actionable under Title VII; (3) the plain language of both Title VII and the Supreme Court's opinion in *Meritor Savings*, which lack any indicia that same-sex harassment claims are not actionable under Title VII; and (4) the EEOC's interpretation of Title VII favoring same-sex sexual harassment claims. An analysis of these theories in light of the historical development of sexual harassment law will demonstrate that courts allowing same-sex sexual harassment claims have chosen the better-reasoned course.

III. HISTORICAL SUPPORT FOR SAME-SEX SEXUAL HARASSMENT

Although the Fifth Circuit in *Garcia* held that congressional intent to balance power relationships in the workplace would not admit same-sex sexual harassment actions into Title VII's circle of coverage,²⁰⁰ this view is not supported by the plain language of the statute, the legislative history of its passage, the earlier cases recognizing sexual harassment claims under Title VII, or under the Supreme Court's acknowledgment of sexual harassment as actionable under Title VII in *Meritor Savings*.²⁰¹

As noted by courts allowing same-sex sexual harassment claims under Title VII, no language in the statute prohibits its application to same-sex claims.²⁰² Therefore, there is no clear statutory bar to allowing same-sex sexual harassment claims under Title VII. Because of the nature of the amendment process by which "sex" was added to Title VII protected groups,²⁰³ legislative history as to Congress' intent with respect to same-sex sexual harassment offers little guidance. The scant historical guidance that does exist does not support the *Goluszek* theory of Title VII's "balancing of power" purpose.²⁰⁴ Rather, it seems

200. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994).

201. 477 U.S. 57, 64, 66 (1986).

202. *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1409 (E.D. Wis. 1996); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1500 (E.D. Va. 1996); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995); *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995).

203. See generally 110 CONG. REC. 2577-2584 (1964).

204. See *Raney v. District of Columbia*, 892 F. Supp. 283, 286-87 (D.D.C. 1995) (noting that *Goluszek* court cited to no congressional record for its support of its theory of congressional intent, but instead cited to a student-written Note).

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that the congressional intent theory offered by many courts allowing same-sex claims of sexual harassment is the better interpretation based on what little can be gleaned from the legislative history; such courts point to the language of the statute itself to find that Congress intended to reach all "disparate treatment of men and women."²⁰⁵ This position is bolstered by the EEOC's congressionally mandated interpretation of Title VII to cover same-sex sexual harassment claims.²⁰⁶

Historical sexual harassment case law also supports such a conclusion. The early cases allowing sexual harassment under Title VII clearly recognized both the possibility and the appropriateness of same-sex sexual harassment cases being brought under Title VII.²⁰⁷ These decisions also recognized the but for test relied upon by cases allowing same-sex sexual harassment.²⁰⁸ In addition, the Supreme Court stated in *Meritor Savings Bank v. Vinson*²⁰⁹ that it was Congress' intent that Title VII's protections extend across a broad sweep of "disparate treatment of men and women."²¹⁰ Moreover, the court also carefully used gender-neutral language in defining sexual harassment under Title VII's sex discrimination provisions.²¹¹ Thus, as stated in cases upholding the viability of same-sex sexual harassment claims, Title VII cannot be read to apply to only opposite sex sexual harassment claims.²¹²

205. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

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

207. *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654, 659 n.6 (D.D.C. 1976).

208. See *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); see also *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995); *Pritchett v. Sizeler Real Estate Management Co.*, No. 93-2351, 1995 WL 241855 (E.D. La. Apr. 25, 1995); *Boyd v. Vonnahmen*, No. 93-CV-4358-JPG, 1995 WL 420040, at *2-3 (S.D. Ill. Mar. 29, 1995); *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995); *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

209. 477 U.S. 57 (1986).

210. *Id.* at 64.

211. *Id.*

212. *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D. D.C. 1995); *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995).

CONCLUSION

Although sex was added as a protected group to Title VII as a mere afterthought (and probably as a ploy to defeat Title VII), and although Title VII does not explicitly include sexual harassment, courts today recognize that both *quid pro quo* and hostile environment sexual harassment claims are actionable under Title VII. Same-sex sexual harassment has only recently been suggested as a controversial expansion to sexual harassment law. Proponents of the expansion seek recognition under the same theories of sexual harassment used in cases dealing with members of the opposite sex.

Some courts hold that same-sex sexual harassment is not actionable under Title VII because Congress intended the statute to equalize power relationships in the workplace between members of the opposite sex. However, the more correct view, based upon the plain language of the statute, early case law interpreting Title VII to cover sexual harassment claims, the Supreme Court's language in the landmark case of *Meritor Savings Bank v. Vinson*, and the EEOC's interpretation of Title VII, clearly allows same-sex sexual harassment claims to be brought under Title VII.

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