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SAME-SEX SEXUAL HARASSMENT UNDER TITLE VII

DALE CARPENTER*

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* Associate attorney, Vinson & Elkins L.L.P. Law clerk to the Honorable Edith H. Jones, United States Court of Appeals for the Fifth Circuit (1992-93). This Article was originally prepared for the HBA/CLE Institute, *Sexual Orientation and the Law: Emerging Issues for the General Practitioner*, December 15, 1995, Houston, Texas. I gratefully acknowledge the helpful comments of Anne M. Pike and Sarah Cooper on this Article. I also acknowledge the love and support of my companion, P.J. Foster; our dog, Mary; and our parrot, Gus, who possesses an unmatched ironic sensibility.

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This is a ghost ship of an [argument]. One hears the creak of the rigging, the groan of the timber, and the muted sound of voices through the fog—but there is nothing solid to be grasped.¹

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits private employment discrimination on the basis of "sex."² In 1986, the United States Supreme Court interpreted the "no sex discrimination" command of Title VII to forbid sexual harassment on the job.³ In the wake of *Meritor Savings Bank v. Vinson*,⁴ perhaps no single area of the law is in a greater state of flux than the question of whether sexual harassment by a member of one sex against a member of the same sex is actionable under Title VII. Not only do we have the spectacle of numerous federal district courts in different circuits at odds with one another;⁵ we also have district courts within a circuit at odds with each other;⁶ we have a single judge issuing three different opinions with two different outcomes in the space of just six months;⁷ and we have the truly

1. *Nogueras v. University of P.R.*, 890 F. Supp. 60, 62 (D.P.R. 1995) (commenting on defendants' argument that Title VII prohibits opposite-sex, but not same-sex, sexual harassment) (quoting *Sanchez v. Puerto Rico Oil*, 37 F.3d 712, 716 (1st Cir. 1994).

2. 42 U.S.C. § 2000e-2(a)(1) (1994).

3. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986).

4. 477 U.S. 57 (1986).

5. For a discussion of cases opposing same-sex causes of action see *infra* note 27 and accompanying text. For a discussion of cases supporting same-sex causes of action see *infra* note 63 and accompanying text.

6. See *infra* notes 54-59 and accompanying text.

7. *Vandevanter v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994) (opposing same-sex cause of action) (hereinafter *Vandevanter (I)*), *on motion to reconsider*, *Vandevanter v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1179 (N.D. Ind. 1995) (hereinafter *Vandevanter (II)*) (holding that "[s]ame-sex sexual harassment is not actionable . . . may

rare event of two district courts in almost open rebellion on the question against their governing appellate court.⁸ In the last year alone, district courts have issued at least fifteen opinions on the subject. Even that number undercounts the ferment on this issue in the district courts since there are undoubtedly numerous cases around the nation that have been decided either without a published opinion or without any opinion at all. Only one appellate court, the Fifth Circuit, has directly addressed the issue, and some authorities consider its word to be dicta. The Supreme Court has been silent, but that silence may end in the near future. Just this past August, a same-sex harassment suit went to a jury for the first time ever. The jury found in the plaintiff's favor and the parties settled before it could assess damages.⁹ Clearly, the question of same-sex sexual harassment is one of the hottest areas in employment law.

Moreover, the arguments marshalled for and against a cause of action for same-sex harassment under Title VII have cut across expected ideological lines. Traditional conservative notions of strict construction have been offered to support the cause of action while more typical liberal approaches to statutory construction based on broad and malleable notions of congressional "purpose" have been offered to oppose the cause of action. While many advocates of legal equality for gays and lesbians have cheered the growing recognition of the cause of action, others fear it may lead to a backlash against gays in the workplace and perhaps be used to intimidate homosexuals through the threat of legal action. Indeed, some practitioners report—and written court opinions seem to confirm—that the most persuasive arguments on behalf of a same-sex harassment cause of action have been those that played to stereotypes of the sexually predatory homosexual roaming the American workplace looking for unsuspecting and innocent heterosexual victims. Furthermore, the "special rights" notion often used against anti-discrimination statutes covering sexual orientation has been implicitly employed to support recognition of this cause of action under Title VII. On this legal controversy, perhaps on more than any other, the law has made strange bedfellows.

This Article examines the state of federal law on the question of whether Title VII of the Civil Rights Act of 1964 provides a cause of action for same-sex sexual harassment. It presents and analyzes the

have been overbroad"); *Blozis v. Mike Raiser Ford, Inc.*, 896 F. Supp. 805 (N.D. Ind. 1995) (favoring same-sex harassment cause of action).

8. See *infra* notes 58–59 and accompanying text.

9. *Male-on-Male Harassment Suit Won*, HOUS. CHRON., Aug. 12, 1995, at A21.

reasoning of those courts that have addressed the issue, with a particular focus on recent developments in the law. The Article does not examine all aspects of a recovery for same-sex sexual harassment under federal anti-discrimination employment law. For example, it does not address the procedural requirements for making a claim under Title VII nor discuss remedies, such as the measure of damages or other relief. Further, the Article does not discuss at any length the doctrinal elements of a claim sounding in sexual harassment. In any event, these issues should not require an analysis in the same-sex context different from that which would apply in the more common opposite-sex context. Finally, this Article does not address the numerous state law causes of action—under either state statutes or state common law—that might support an action for same-sex harassment. In the case of state anti-discrimination statutes, some states have explicitly barred employment discrimination based on sexual orientation. Other states, like Texas, have employment discrimination laws that closely track the language of Title VII and are ordinarily interpreted to follow constructions of the federal law.

II. TITLE VII AND SAME-SEX SEXUAL HARASSMENT

To understand the arguments now circulating in the federal courts on the question of whether Title VII provides a cause of action for same-sex sexual harassment, it is important to recognize two concurrent developments in the interpretation of Title VII. The first is the federal courts' refusal to read the statute as prohibiting discrimination on the basis of sexual orientation. The second is the courts' recognition of sexual harassment as a form of sex discrimination.

It is now settled in the federal courts that Title VII's prohibition of sex discrimination does not encompass discrimination on the basis of sexual orientation. In the leading case, *DeSantis v. Pacific Telephone & Telegraph Co.*,¹⁰ one of the plaintiffs complained that he was not hired after a supervisor determined he was gay; several others claimed that they were continually harassed and insulted by co-workers because of their sexual orientation, after which they were fired or were forced to leave to preserve their health.¹¹ The Ninth Circuit turned aside the plaintiffs' Title VII claim, reasoning that the prohibition of "sex" discrimination in Title VII "applies only to discrimina-

10. 608 F.2d 327 (9th Cir. 1979).

11. *Id.* at 328-29.

tion on the basis of gender¹² and should not be judicially extended to include sexual preference such as homosexuality.”¹³ The plaintiffs also argued that discrimination against homosexuals disproportionately affects men because of the greater incidence of male homosexuality than female homosexuality and because male homosexuality is more likely to be discovered. The court rejected this argument as nothing more than an attempt to “bootstrap” Title VII protection for homosexuals under the guise of protecting men generally.¹⁴ Finally, the plaintiffs argued that employers should not be allowed to discriminate against a man for having an “effeminate” appearance. The court rejected that claim, too, on the grounds that it fell outside the scope of Title VII’s prohibition of sex discrimination.¹⁵ Other courts have since followed the lead of *DeSantis*, holding that Title VII does not prohibit sexual orientation discrimination.¹⁶

Even as they were denying protection from discrimination based on sexual orientation, courts began to recognize a new subset of sex discrimination called “sexual harassment.” Although a detailed review of the development of sexual harassment doctrine is beyond the scope of this Article, a brief sketch of its contours is helpful. The Supreme Court divides sexual harassment claims into two types: (1) those alleging *quid pro quo* harassment, and (2) those alleging a hostile work environment.¹⁷ Under a *quid pro quo* sexual harassment claim, a plaintiff must establish that a supervisor required sexual fa-

12. Like many courts, the *DeSantis* panel uses “gender” and “sex” interchangeably to mean anatomical or biological sex. See, e.g., *J.E.B. v. Alabama, ex rel. T.B.*, 114 S. Ct. 1419, 1421 (1994) (interpreting the word sex to mean gender in an Equal Protection case). Recently, however, some jurists have begun to recognize a distinction between gender—the set of behavioral and dress expectations traditionally attached to biological males and females—and biological sex. See *id.* at 1436 n.1 (Scalia, J., dissenting) (refusing to interpret the word sex to mean gender because the word gender “has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine [is] to male.”).

13. *Desantis*, 608 F.2d at 329-30 (footnote omitted).

14. *Id.* at 330.

15. See *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (Title VII does not prohibit discrimination based on “effeminacy”); *Valdes v. Lumbermen’s Mut. Casualty Co.*, 507 F. Supp. 10, 12–13 (S.D. Fla. 1980) (no Title VII protection for “lesbian mannerisms”); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (Title VII does not protect transsexuals). *But cf.* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (male partners failed to promote a woman to partner at least in part because of her alleged unfeminine qualities).

16. *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987).

17. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

vors in exchange for job benefits.¹⁸ Under a hostile environment claim, a plaintiff must establish that the harassment was severe or pervasive enough to alter the terms and conditions of employment, creating a hostile, or abusive work environment and violating the employee's right to work in an environment free from discriminatory intimidation, ridicule, and insult.¹⁹ The typical case involves unwelcome sexual advances and sex-related behavior and comments by co-workers or supervisors. The discrimination thus resulting must be based on the employee's sex.

To defeat a motion for summary judgment in a hostile environment sexual harassment case, a plaintiff must demonstrate: (1) that she belongs to a protected group;²⁰ (2) that she was subject to unwelcome sexual harassment;²¹ (3) that the harassment was based on her sex;²² (4) that the harassment affected a "terms, conditions, or privileges" of employment;²³ and (5) that her employer knew or should

18. See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3rd Cir. 1977) (employer violated Title VII by retaliating against plaintiff when she complained about supervisor's sexual harassment); *Barnes v. Costle*, 561 F.2d 983, 989 (D.C. Cir. 1977) (employer violated Title VII when it abolished female employee's job because she rejected her male supervisor's sexual advances); *Garber v. Saxon Business Prod., Inc.*, 552 F.2d 1032 (4th Cir. 1977) (employer violated Title VII by acquiescing in practice of compelling female employees to submit to sexual advances by male supervisors); Michael D. Vhay, Note, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 331 (1988).

19. See *Meritor Savings*, 477 U.S. at 65; Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1455 (1984).

20. It may be impossible *not* to meet this prong of the test. Because Title VII protects both males and females, one need only plead being male or female in a sex discrimination case. *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1549 n.2 (M.D. Ala. 1995).

21. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982). The E.E.O.C. regulations helpfully define the type of conduct that may constitute sexual harassment: "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. . . ." 29 C.F.R. § 1604.11(a) (1981); see E.E.O.C. Dec. No. 81-18 (1981). In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive. *Gan v. Kepro Circuit Sys., Inc.*, 28 FAIR EMPL. PRAC. CAS. (BNA) 639, 648 (E.D. Mo. 1982); *Vinson v. Taylor*, 23 FAIR EMPL. PRAC. CAS. (BNA) 37, 42 (D.D.C. 1980) (only unwelcome sexual advances generate Title VII liability); Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U. L. REV. 535, 561 (1981) ("whether the advances are unwelcome . . . becomes an evidentiary question well within the courts' ability to resolve").

22. See *infra* notes 72-77 and accompanying text.

23. The Fifth Circuit has held that the state of psychological well being is a term, condition or privilege of employment within the meaning of Title VII. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). The court in *Rogers* made it clear, however, that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not affect the terms, conditions or privileges of employment to a suffi-

have known of the harassment and failed to take remedial action.²⁴ Generally, to meet the third requirement, courts have required that the plaintiff show that “but for” her sex she would not have been subjected to the harassment.²⁵

Federal courts are split whether same-sex sexual harassment may constitute sex discrimination under Title VII, though the recent trend appears to favor recognition of the claim. The claims have been based on both *quid pro quo* and hostile environment theories. The hostile environment claims, in turn, have involved (1) unwelcome sexual advances, and/or (2) offensive sex-related remarks and teasing not necessarily meant as a sexual advance. Often, the abusive sex-related remarks have been directed against the employee’s perceived or actual sexual orientation. For the sake of clarity and brevity, I will call the first group “unwelcome sexual advances” cases; the second, “abusive treatment” cases.²⁶ This Article will now examine the arguments for and against recognition of same-sex sexual harassment claims under Title VII, highlighting the more important and well reasoned opinions.

A. *Cases and Arguments Against a Title VII Same-Sex Sexual Harassment Cause of Action*

Several district courts and one circuit court have held that same-sex sexual harassment is not actionable under Title VII.²⁷ These

ciently significant degree to violate Title VII. *Id.*; see also *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (derogatory ethnic comments by supervisor did not rise to level of Title VII violation).

24. *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 195 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992). See *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981).

25. See, e.g., *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 138 (S.D. Tex. 1993).

26. I do not mean to suggest that the division between unwelcome sexual advances cases and abusive treatment cases is always so clean. First, the recited facts in written opinions do not always make it clear whether the harasser meant to invite a sexual encounter. Second, “abusive treatment” often has undertones of “sexual advance.” Finally, courts themselves have not explicitly recognized this dichotomy in deciding same-sex sexual harassment claims. However, as will be seen, same-sex abusive treatment claims have received a decidedly cooler response from the courts than unwelcome sexual advances claims. The reason for that difference is unclear, except insofar as the unwelcome sexual advances cases may conjure images of stereotypically predatory homosexuals engaging in sexual practices that may disgust some jurists—not simply because the advances are uninvited, but because they are homosexual. At least one practitioner has admitted to me that she exploits anti-gay prejudice in her efforts to induce the court to recognize same-sex harassment in the context of unwelcome sexual advances.

27. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451–52 (5th Cir. 1994); *Oncale v. Sundowner Offshore Servs.*, No. 95-30510, 1996 WL 223627 at *3 (5th Cir. May 20, 1996); *Martin v. Norfolk Southern Ry. Co.*, No CV-94-N-2928-S, 1996 WL 283911 at *5–*6 (N.D.

courts have decided against the cause of action in the context of hostile environment claims. The hostile environment claims, in turn, have involved both unwelcome sexual advances and abusive treatment. With one possible exception,²⁸ there is no reported case of which I am aware in which a court explicitly rejected a same-sex *quid pro quo* claim.²⁹

I. Goluszek and the "Dominant Gender" Theory of Title VII

The leading case holding that Title VII does not afford a cause of action based on same-sex sexual harassment is *Goluszek v. Smith*,³⁰ a typical abusive treatment case. Goluszek worked as an electronic maintenance mechanic.³¹ Shortly after he began work at the defendant's plant, his co-workers began questioning him as to why he had no wife or girlfriend and joked that one had to be married to work at the plant. One supervisor told Goluszek that he should "get married

Ala. May 22, 1996); *Oncale v. Sundowner Offshore Servs., Inc.*, No. CIV.A. 94-1483, 1995 WL 133349 at *2 (E.D. La. Mar. 24, 1995); *Wrightson v. Pizza Hut of Am., Inc.*, 909 F. Supp. 367, 368 (W.D.N.C. 1995); *Mayo v. Kiwest Corp.*, 898 F. Supp. 335, 337 (E.D. Va. 1995); *Quick v. Donaldson Co. Inc.*, 895 F. Supp. 1288, 1295-96 (S.D. Iowa 1995); *Sarff v. Continental Express*, 894 F. Supp. 1076, 1082 (S.D. Tex. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1176 (D. Nev. 1995); *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 833-34 (D. Md. 1994); *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994) (hereinafter *Vandeventer (I)*), *on motion to reconsider*, *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1179 (N.D. Ind. 1995) (hereinafter *Vandeventer (II)*) (holding that "[s]ame-sex harassment is not actionable . . . may have been overbroad"); *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). One circuit court recently held that there is no Title VII cause of action for a same-sex hostile environment claim "where both the alleged harassers and the victim are heterosexuals of the same sex," leaving open the availability of a cause of action where either the harasser or victim is homosexual. *McWilliams v. Fairfax County Bd.*, 72 F.3d 1191, 1195 (4th Cir. 1996). For a criticism of this approach of focusing on the sexual orientation of the parties, see *infra* notes 42, 74 and accompanying text.

28. *Vandeventer (I)*, 867 F. Supp. at 792, 796 (holding that "same-sex harassment is not actionable" in case where plaintiff charged both hostile environment and *quid pro quo* sexual harassment), *on motion to reconsider*, *Vandeventer (II)*, 887 F. Supp. at 1179.

29. This is not to suggest that a same-sex *quid pro quo* claim would get a better reception from these courts than a same-sex hostile environment claim. The recitation of the parties' contentions in some written opinions simply does not reveal the precise doctrinal basis for the plaintiff's sexual harassment claim. See, e.g., *Garcia*, 28 F.3d at 449 (plaintiff complained of being "sexually harassed"). Thus, some of the cases may well have involved a rejected same-sex *quid pro quo* claim. Further, the reasoning employed by the courts that have rejected same-sex sexual harassment claims seems sufficiently broad to reject *quid pro quo* claims as well as hostile environment claims.

30. 697 F. Supp. 1452 (N.D. Ill. 1988).

31. Actually, the court in *Goluszek* somewhat gratuitously began its recitation of the facts by noting that the *Goluszek* "has never been married nor has he lived anywhere but at his mother's home." *Id.* at 1453.

and get some of that soft pink smelly stuff that's between the legs of a woman."³² On another occasion certain operators told Goluszek he should go out with a female employee because she "fucks."³³ The operators periodically asked Goluszek if he had gotten any "pussy" or had oral sex, showed him pictures of nude women, "accused"³⁴ him of being gay or bisexual, and made other sex-related comments.³⁵ The operators also poked him in the buttocks with a stick.³⁶ When Goluszek complained to a supervisor that his co-workers were "out there talking to me about butt-fucking in the ass," the supervisor dismissed the statements as mere "shop talk."³⁷ Goluszek filed suit under Title VII claiming that he had been sexually harassed by his male co-workers.

In rejecting Goluszek's claim of same-sex harassment, the district court sketched what I will call the "dominant gender" theory of Title VII. The court conceded that Goluszek had demonstrated that "but for" his sex he would not have been the object of harassment.³⁸ However, the court asserted that same-sex harassment did not fall within the broad purpose of Title VII. "[T]he defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII."³⁹ Relying solely on a student note in a law journal published two years before *Meritor Savings*, the court asserted that the prohibition on sex discrimination in Title VII aimed to correct "an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."⁴⁰ The sexual harasser "is saying by words or actions that the victim is inferior because of the victim's sex."⁴¹ The court cited neither the language of Title VII nor its legislative history to reach these conclusions about its purpose.

The court observed that "Goluszek was a male in a male-dominated environment."⁴² Thus, reasoned the court, he necessarily did not "work[] in an environment that treated males as inferior."⁴³

32. *Id.*

33. *Id.*

34. This is the court's verb, not mine.

35. *Id.* at 1454.

36. *Id.*

37. *Goluszek*, 697 F. Supp. at 1454 (internal quotations omitted).

38. *Id.* at 1456.

39. *Id.*

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

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

42. *Id.*

43. *Id.*

Although he was harassed because he was male, "that harassment was not of a kind which created an anti-male environment in the workplace."⁴⁴

The dominant gender theory of *Goluszek*—that same-sex harassment does not violate Title VII because it cannot create a climate hostile to the victim's sex or abuse the imbalance of power between the sexes—has been followed by most of the courts rejecting same-sex harassment claims.⁴⁵ Indeed, these courts have offered almost no other argument—aside from precedent—against the cause of action.⁴⁶ Moreover, even though *Goluszek* was itself an abusive treatment case, courts have also relied on its dominant gender rationale in unwelcome sexual advances cases.⁴⁷

44. *Id.*

45. *Mayo v. Kiwest Corp.*, 898 F. Supp. 335, 337 (E.D. Va. 1995) (to recognize a male-on-male harassment claim "[t]his court would have to assume that such harassment of the male subordinate prevented men from having the same employment opportunities as women."); *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1295 (S.D. Iowa 1995) ("[T]he inquiry under Title VII . . . is to ascertain whether the environment is anti-male or anti-female."); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1176 (D. Nev. 1995) (supervisors' conduct in writing, drawing and explicitly discussing homosexual sex acts did not "inherently intimidate, ridicule or insult men" or "impl[y] a threat of violence towards men, hatred of men, or . . . humiliate[] or ridicule[] . . . men as such"); *Vandeventer (I)*, 867 F. Supp. at 796 ("Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a 'dominant' gender."), *on motion to reconsider*, 887 F. Supp. 1178, 1179 (N.D. Ind. 1995) (court's initial holding that same sex sexual harassment is not actionable may have been overbroad); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 833 (D. Md. 1994) (The same-sex harasser "certainly does not despise the entire group [of his sex], nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive.") (citation omitted).

46. One court, declining to decide whether the cause of action existed, cited the "troubling possibility" of having "litigants debate and juries determine the sexual orientation of Title VII defendants" if the cause of action were allowed. *Ryczek v. Guest Servs., Inc.*, 877 F. Supp. 754, 762 (D.D.C. 1995). In the case, the defendant argued that she was "bisexual," and therefore accorded equal treatment to the sexes. *Id.* at 761. The plaintiff argued that the defendant was a lesbian, and therefore targeted her harassment only at women. *Id.* at 761-62. The court scoffed at the idea of "what would be legally sufficient to submit the issue of a supervisor's bisexuality to a jury." *Id.* at 762 n.7. However, courts need not inquire into a person's status as heterosexual, homosexual, or bisexual in order to determine whether the person's conduct on the job discriminated on the basis of sex. Courts would be well advised to avoid phrases like "homosexual harasser," "heterosexual harasser," and "bisexual harasser," which misleadingly focus on the harasser's status and not his conduct. For a recent example of this misplaced focus on the sexual orientation of the parties, see *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (disallowing same-sex hostile environment claim "where both the alleged harassers and the victim are heterosexuals of the same sex."). The only proper focus of Title VII is the harasser's conduct. See *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996) (sexual orientation of parties is a nonissue, "[t]he focus should be on the harassing conduct itself, and whether the harassment is 'because of sex.'").

47. *Mayo*, 898 F. Supp. at 336-37; *Benekritis*, 882 F. Supp. at 523-26.

2. Unwelcome Sexual Advances v. Abusive Treatment

In at least four cases rejecting a cause of action for same-sex harassment based on abusive treatment, courts have suggested that a different result might be reached in the case of a sexual *quid pro quo* or a hostile environment theory based on unwelcome homosexual sexual advances. In *Quick v. Donaldson Co.*, co-workers repeatedly subjected the heterosexual plaintiff to both physical and verbal assaults.⁴⁸ One type of physical assault, called "bagging" by the co-workers, consisted in having one employee lift the plaintiff off the ground while a second employee grabbed the plaintiff's testicles.⁴⁹ Verbal assaults included writing the word "Queer" on the plaintiff's ID card, telling other employees to "Watch that guy, he's gay," writing "Gay and Proud" on the plaintiff's belt loop, placing a tag in the plaintiff's work area stating "pocket lizard licker," and suggesting he had committed "some deviant activity with a cucumber."⁵⁰ The court characterized the case as involving "heterosexual male-to-male sexual harassment."⁵¹ The court rejected the plaintiff's claim on the familiar ground that such harassment could not create a gender-biased atmosphere characterized by oppression from a dominant gender.⁵² However, the court took pains to point out that "heterosexual male-to-male harassment may present issues different from homosexual male-to-male sexual harassment,"⁵³ and distinguished cases involving unwelcome homosexual sexual advances.⁵⁴ Even courts holding that Title VII does protect employees from same-sex harassment have distinguished *Goluszek* on the ground that it "involved sexual teasing of a heterosexual male by other heterosexual males rather than sexual

48. 895 F. Supp. at 1291.

49. *Id.* at 1292.

50. *Id.*

51. *Id.* at 1294; *see also* *McWilliams* 72 F.3d at 1195 (disallowing harassment claim where parties are same-sex heterosexuals); *Martin v. Norfolk Southern Ry. Co.*, No CV-94-N-2928-S, 1996 WL 283911 at *5-*6 (N.D. Ala. May 22, 1996) ("heterosexual teasing" case disallowing same-sex harassment claim).

52. *Id.* at 1294-95.

53. *Id.* at 1294.

54. *Id.* at 1297 n.7; *see also* *Hopkins*, 871 F. Supp. at 835 ("None of the alleged incidents of sexual harassment . . . involved implicit or explicit requests or demands for sexual favors."); *Fox*, 876 F. Supp. at 1172 (abusive treatment claim asserting hostile environment theory; "There are no facts alleged indicating a quid pro quo form of harassment existed."); *Childress v. City of Richmond*, 907 F. Supp. 934, 939 (E.D. Va. 1995) ("Title VII permits no claim for hostile environment based on same-sex harassment where there is neither an allegation of quid pro quo nor some sexual component of the harassing behavior.").

harassment of a subordinate by a homosexual supervisor."⁵⁵ Neither *Quick* nor any other court has identified the doctrinal or logical basis for distinguishing abusive treatment from unwelcome sexual advances claims in the context of same-sex harassment. No such distinction is recognized for opposite-sex hostile environment claims.⁵⁶

In abusive treatment cases, the courts that have rejected same-sex harassment claims have been especially alert to deny any claim that seems to be based on discrimination or abuse aimed at a victim because of her actual or perceived sexual orientation. These courts often invoke the settled principle that Title VII forbids discrimination on the basis of sex, not sexual orientation. The typical case in this category involves taunts directed at a co-worker or subordinate who is, or is suspected to be gay.⁵⁷

3. Same-Sex Sexual Harassment in the Fifth Circuit

For practitioners in the Fifth Circuit, recognition of same-sex sexual harassment claims will be an uphill battle. In *Garcia v. Elf Atochem North America*, the appellate court rejected a sexual harassment claim by a male employee against his superior.⁵⁸ Freddy Garcia, the plaintiff, alleged that his supervisor approached him from behind

55. *EEOC v. Walden Book Co. Inc.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F.Supp. 1495 (E.D. Va. 1996) (suggesting that there is no cause of action for mere locker room antics, joking, or horseplay); *see also* *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335, 338 (E.D. Va. 1995) (same-sex sexual advances case distinguishing *Goluszek* because it "involved a (heterosexual) male employee . . . taunted by (heterosexual) male co-workers about his single status and lack of girlfriends").

56. Opposite-sex harassment involving abusive treatment—as opposed to unwelcome sexual advances—that creates a hostile working environment states a cause of action under Title VII. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1462 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995) ("Trenkle was abusive to men and women alike; however, his abusive treatment and remarks to women were of a sexual or gender-specific nature."); *see also* EEOC regulations, 29 C.F.R. §§ 609.1, 1609.2 (sexual harassment includes "harassment due to gender-based animus").

57. *Sarff v. Continental Express*, 894 F. Supp. 1076, 1079 (S.D. Tex. 1995) (discrimination designed to "impugn [plaintiff's] manhood" is not cognizable in part because Title VII does not forbid sexual orientation discrimination); *Fox*, 876 F. Supp. at 1172 ("[P]laintiffs must allege facts indicating the work environment was hostile to men *qua* men, not merely hostile on the basis of sexual orientation or preference."); *Id.* at 1175 n.6 ("[s]uch discrimination, or harassment is not prohibited" by Title VII where environment is hostile to heterosexual workers because they are heterosexual or homophobic); *Quick v. Donaldson, Inc.*, 895 F. Supp. 1288, 1297 (S.D. Iowa 1995) (no Title VII action when male co-employees targeted plaintiff for taunting and physical harassment "because they were under the false impression that he was gay"); *Hopkins*, 871 F. Supp. at 832 n.17 (Title VII prohibits neither sexual orientation discrimination nor "sexual harassment" based on a belief that the victim is homosexual") (citation omitted).

58. 28 F.3d 446, 452 (5th Cir. 1994).

and “reach[ed] around and grab[bed] [Garcia’s] crotch area and ma[de] sexual motions from behind [Garcia].”⁵⁹ The court, relying on a previous unpublished opinion held that “[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.”⁶⁰ Under the circumstances, declared the court, the supervisor’s conduct “could not in any event constitute sexual harassment within the purview of Title VII.”⁶¹ The Fifth Circuit recently held that *Garcia* is binding precedent, despite the fact that it offered the ruling on same-sex harassment as an alternative holding.⁶²

The Fifth Circuit in *Garcia* offered no analysis to support its conclusory statements about the coverage of Title VII. The court’s statement that same-sex harassment does not state a claim because “Title VII addresses gender discrimination”⁶³ is a conclusion needing an argument. Every court that has reviewed the matter agrees with the *Garcia* truism that Title VII addresses gender (sex) discrimination. The question, which the Fifth Circuit’s conclusory argument avoids, is: does the prohibition on sex discrimination apply in a case of same-sex harassment?

Garcia has gotten a decidedly—and unusually—mixed reception in the district courts within the Fifth Circuit. Three district courts in the Fifth Circuit have relied on *Garcia* to reject same-sex sexual harassment claims.⁶⁴ Despite the apparently clear directive from the

59. *Id.* at 448.

60. *Id.* at 451–52 (citation omitted).

61. *Id.* at 452.

62. *Oncala v. Sundowner Offshore Servs.*, No. 95-30510, 1996 WL 223627 at *3 (5th Cir. May 20, 1996).

63. *Id.*

64. *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995) (unwelcome sexual advances case); *Oncala v. Sundowner Offshore Servs.*, No. CIV.A. 94-1483, 1995 WL 133349 at *2 (E.D. La. Mar. 24, 1995) (no cause of action under Title VII for male against other male co-worker); *Sarff*, 894 F. Supp. at 1082 (abusive treatment case). In *Sarff*, Judge Samuel Kent noted that gay employees have no statutory protection from employment discrimination or same-sex sexual harassment in the “vast majority of states.” *Id.* at 1081. In an extraordinary and rare statement of personal opinion, he added:

Nevertheless, this Court cannot pass over this legal fact in this case without commenting that the absence of a legal duty on [the] employer’s part is not coterminous with the scope of a duty of good faith and fair dealing. This Court deeply believes that discrimination against *all* Americans, despite their gender, race, religion, or sexual orientation, is profoundly wrong and that it violates the fundamental and essential right of individuals to engage in the full rights and privileges of citizenship. In addition, it makes little economic sense for employers to discriminate against the 15-25 million gay and lesbian people in this country, many of

Fifth Circuit in *Garcia*, at least two district courts in the circuit have held that same-sex harassment is actionable under Title VII.⁶⁵ Both of these cases have been implicitly overruled by the Circuit Court.⁶⁶ Plaintiffs' only alternatives in the Circuit will be to request *en banc* review, an unlikely prospect, or to take their cases to the Supreme Court.

4. *Retaliatory Discrimination For Complaining of Same-Sex Sexual Harassment*

Several courts have held that although Title VII does not cover same-sex sexual harassment claims, such claims may nevertheless form the basis for a retaliatory discrimination claim. That is, even though the employer-supervisor may not be held liable for the underlying sexual harassment, she may be held liable for taking employment action against the employee in retaliation for the filing of a complaint based on same-sex harassment.⁶⁷ The courts that have permitted retaliatory discharge claims in the context of same-sex harassment have reasoned that the language of Title VII, 42 U.S.C. § 2000(e)(3)(a) extends a possible retaliation claim to anyone participating in proceedings under Title VII, if they have a reasonable belief that a violation occurred, even if their claims are ultimately denied.⁶⁸

Similarly, the so-called "opposition clause" of Title VII prohibits adverse action against an individual if he had a reasonable and good faith belief that the practice opposed constituted a violation of Title VII.⁶⁹

Given the unsettled state of the law on same-sex sexual harassment, litigants in every jurisdiction may well have a "reasonable and good faith belief" that same-sex harassment is actionable even if the claim is ultimately denied. Thus, practitioners may want to look

whom hold positions at the highest levels of professional, scientific, academic, and political enterprises.

Id. (emphasis in original). Nevertheless, Judge Kent felt compelled by *Garcia* to reject the plaintiff's claim. *Id.*

65. *Pritchett v. Sizeler Real Estate Mgmt. Co.*, No. CIV.A. 93-2351, 1995 WL 241855, at *2 (E.D. La. Apr. 25, 1995) (calling *Garcia's* rejection of same-sex harassment claims "dicta," arguing that it would be "discriminatory" to exempt homosexual harassers from Title VII strictures), *aff'd without opinion*, 44 F.3d 1004 (5th Cir. 1996); *Castellano v. Whole Foods Market*, No. H-94-2675 (unpublished) (*Garcia* is "almost dicta" and "completely contradictory").

66. *Oncala*, 1996 WL at *3.

67. *See, e.g., Benekritis*, 882 F. Supp. at 526; *Hopkins*, 871 F. Supp. at 835; *Goluszek*, 697 F. Supp. at 1456-57.

68. *See, e.g., Benekritis*, 882 F. Supp. at 526.

69. *De Anda v. St. Joseph Hosp.*, 671 F.2d 850, 851-52 n.1 (5th Cir. 1982).

closely at whether there is evidence that an employer took employment action against the same-sex harassment plaintiff in response to her complaint.

III. CASES AND ARGUMENTS FOR A TITLE VII SAME-SEX SEXUAL HARASSMENT CAUSE OF ACTION

A large and rapidly increasing number of district courts have held that same-sex harassment does state a claim under Title VII.⁷⁰ At least two circuit courts, in dicta, have also indicated their approval of the cause of action.⁷¹ The district courts approving the cause of action have done so in the context of both *quid pro quo* and hostile environment claims. However, the hostile environment claims have uni-

70. See, e.g., Tietgen v. Brown's Westminster Motors, Inc., 921 F.Supp. 1495 (E.D. Va. 1996); Ton v. Information Resources, Inc., No. 95 C 3565, 1996 WL 5322 *5 (N.D. Ill. Jan. 3, 1996); Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351 (D. Nev. 1996); Williams v. District of Columbia, 916 F. Supp. 1, 7 (D.D.C. 1996); Sardinia v. Dellwood Foods, Inc., No. Civ. 94-5458, 1995 WL 640502, at *3 (S.D.N.Y. Nov. 1, 1995), *appeal granted*, 1995 WL 710205 (S.D.N.Y. Dec. 1, 1995); Castellano v. Whole Foods Market, Inc., No. H-94-2675 (S.D. Tex. Oct. 25, 1995) (unpublished); King v. M. R. Brown, Inc., 911 F.Supp. 161, 166 (E.D. Pa. 1995); Pritchett v. Sizeler Real Estate, No. 93-2351, 1995 WL 241855, at *2 (E.D. La. Apr. 25, 1995); Boyd v. Vonnahmen, No. 93-CV-4358-JPG, 1995 WL 420040, at *3 (S.D. Ill. Mar. 29, 1995); Roe v. K-Mart Corp., No. Civ.A. 2:93-2372-18AJ, 1995 WL 316783, at *2 (D.S.C. Mar. 28, 1995); Easton v. Crossland Mortg. Corp., 905 F. Supp. 1368, 1378 (C.D. Cal. 1995); Ecklund v. Fuisz Tech., Ltd., 905 F. Supp. 335, 337 (E.D. Va. 1995); Blozis v. Mike Raisor Ford, Inc., 896 F. Supp. 805, 806 (N.D. Ind. 1995); Noguerras v. University of Puerto Rico, 890 F. Supp. 60, 62 (D.P.R. 1995); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1180 (N.D. Ind. 1995); EEOC v. Walden Book Co., Inc., 885 F. Supp. 1100, 1104 (M.D. Tenn. 1995); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1551 (M.D. Ala. 1995); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541 (M.D. Ala. 1983); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981). For discussion of actionable sexual harassment claims under Title VII see generally Gayle Ecabert, Comment, *An Employer's Guide to Understanding Liability for Sexual Harassment Under Title VII*: Meritor Savings Bank v. Vinson, 55 U. CIN. L. REV. 1181 (1987).

71. The Seventh Circuit, in an influential opinion by Judge Posner, stated in dicta that same-sex harassment might be actionable in "appropriate cases." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995). The District of Columbia circuit court, in dicta, has strongly suggested that it would permit a same-sex harassment claim. *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). Arguing that a female subordinate had been chosen for sexual advances based on her sex, the court said:

It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. *In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced.*

Id. (emphasis added). The court repeated this statement in *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981). Because the cases were decided nineteen and fifteen years ago, respectively, the dicta in *Barnes* and *Bundy* may be of limited persuasive value.

formly involved unwelcome sexual advances. No court of which I am aware has allowed a claim of same-sex abusive treatment, either directed at the victim's (actual or perceived) sexual orientation or not, to proceed.

A. *Arguments for Recognition of a Same-Sex Sexual Harassment Cause of Action*

Unlike courts rejecting same-sex harassment claims, which have tended to offer little or no analysis or to rely solely on precedent, courts recognizing the cause of action have made several arguments on its behalf. This section summarizes those arguments.

1. *The "Plain Language" of Title VII*

Almost every court that has recognized the cause of action has cited the "plain language" of Title VII in support of its conclusion.⁷² These courts reason that in choosing the gender-neutral term "sex," Congress did not limit Title VII to opposite-sex harassment. Nothing in the text of the statute limits its effect to discrimination by members of the opposite sex. Had Congress desired Title VII to prohibit only opposite-sex harassment, it could have prohibited discrimination against a "member of the opposite sex."⁷³ Further, Title VII prohibits discrimination on the basis of the *employee's* sex; it does not mention the defendant's sex.⁷⁴ Similarly, the language of Supreme Court opinions discussing sexual harassment is almost invariably sex-neutral, suggesting that the Supreme Court regards the harasser's sex irrelevant to the inquiry under Title VII.⁷⁵

2. *Congressional Intent and Legislative History*

Goluszek and its progeny speak of the broad purpose of Title VII as if they have divined the intent of Congress in adding "sex" to the Title VII laundry list of prohibited employment criteria. However, the Supreme Court has noted the absence of legislative history regarding the inclusion of "sex" discrimination in Title VII.⁷⁶ The word

72. See, e.g., *McCoy*, 878 F. Supp. at 232; *Nogueras*, 890 F. Supp. at 63; *Prescott*, 878 F. Supp. at 1550; *Walden Book*, 885 F. Supp. at 1103.

73. *Prescott*, 878 F. Supp. at 1550. Similarly, the text of Title VII prohibits "race" discrimination, not merely discrimination against African Americans.

74. *Nogueras*, 890 F. Supp. at 63.

75. See, e.g., *Meritor Savings*, 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.").

76. *Id.* at 63-64.

“sex” was added on the day before the legislation passed in the House of Representatives in an effort to defeat the Civil Rights Act of 1964.⁷⁷ Since the language of Title VII facially supports a same-sex harassment claim, the interpretive burden should be on opponents of the cause of action to find legislative history indicating a contrary congressional intent. But there is no such legislative history.

Similarly, some courts following *Goluszek* argue that Congress in 1964 did not “foresee” that Title VII would cover same-sex sexual harassment. That is not a persuasive argument in the interpretation of Title VII. Congress presumably did not “foresee” that courts would use Title VII to prohibit any sexual harassment, including opposite-sex harassment, which is now an entrenched part of sex discrimination jurisprudence.

3. Same-Sex Harassment Is “But For” Sex Discrimination

As noted earlier, a claim of sex discrimination requires the plaintiff to show that she would not have been subject to harassment “but for” her sex.⁷⁸ For example, to sustain an action against a male for opposite-sex sexual harassment, a woman must show that “but for” her sex he would not have harassed her. That is, if she had been a male she would not have been subject to the harassment. Numerous courts recognizing a same-sex harassment claim have argued that same-sex harassment meets the “but for” test for Title VII liability.⁷⁹

Some courts have had conceptual difficulties with the hypothetical case of the “bisexual harasser,” one who harasses both men and women.⁸⁰ The specter of the “equal opportunity” harasser might be

77. *Walden Book*, 885 F. Supp. at 1103 n.6; 110 CONG. REC. 2577-84 (1964); see WILLIAM N. ESKIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION; STATUTES AND THE CREATION OF PUBLIC POLICY* 17 (1988); Bobbie Loper Flynt, *Sex Discrimination: Psychological Injury From Hostile Work Environment Sexual Harassment*, 20 U. DAYTON L. REV. 1049, 1051-52 (1995); Vhay, *supra* note 18, at 331.

78. *Polly*, 825 F. Supp. at 138.

79. See, e.g., *Walden Book*, 885 F. Supp. at 1103-04 (“When a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, and not doing so to employees of the opposite sex, it absolutely is a situation where, but for the subordinate’s sex, he would not be subjected to that treatment.”); *Prescott*, 878 F. Supp. at 1551 (when supervisor harasses a male subordinate, but does not similarly proposition female subordinates, “[b]ut for the [subordinate’s] being male, the harassment would not have occurred”); *McCoy*, 878 F. Supp. at 232 (to prove “but for” sex discrimination in same-sex harassment case, female plaintiff “must show that her harasser ‘did not treat male employees in a similar fashion’”).

80. See, e.g., *Prescott*, 878 F. Supp. at 1551 n.6 (court would have to dismiss Title VII claim “if the defendant supervisor could show that in addition to harassing a plaintiff of one gender, he treated those of the other gender with similar disrespect”). But see *McDonnell v. Cisneros*, No. 95-1864, 1996 WL 266561 at *4 (7th Cir. May 20, 1996) (stating that it

thought a reason to reject same-sex sexual harassment claims altogether.

On the other hand, it is unlikely that a harasser would expose both sexes to truly equivalent amounts and types of harassment. Again, it is the defendant's *conduct* (his treatment of males and females), not his *status* (in this case, a "bisexual"), that should guide a court's inquiry into the existence of sex discrimination.⁸¹ It seems probable that the evidence in a given case will almost always show that a harasser "favors" one sex over the other. When a preference for targeting one sex over the other is evident, as demonstrated by more frequent or more intensive harassment of one sex, the harasser discriminates on the basis of sex.⁸² The differing types of harassment to which the "bisexual" harasser subjects his victims may also reveal sex discrimination.⁸³

4. *Rejection of Dominant Gender Theory for Title VII Liability*

Several of the courts recognizing same-sex sexual harassment claims have criticized the reliance of *Goluszek* and its progeny on dominant gender theory. Some courts have noted that there is no basis in Title VII jurisprudence for the requirement that harassment create a generalized "anti-male" or "anti-female" atmosphere before courts recognize an action for sexual harassment.⁸⁴ Another court has pointed out the practical difficulties of determining whether a given work environment is "anti-male" or "anti-female":

Does an all-male environment mean that it is also a "pro-male" environment? Is a workplace "anti-female" only if all female employees suffer harassment? Or is it enough if over half are harassed? In a workplace that is not "anti-male" or "anti-female," however that determination is made, cannot one man or

would be "exceedingly perverse" to read Title VII to permit harassment of both sexes); *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (stating that "the equal harassment of both genders does not escape the purview of Title VII").

81. *Tanner*, 919 F. Supp. at 355.

82. *See McCoy*, 878 F. Supp. at 232 (harassing defendant escapes Title VII liability only if he treats both sexes "in a similar fashion"); *Raney*, 892 F. Supp. at 288 ("only in the rare case when the supervisor harasses both sexes equally can there be no sex discrimination").

83. *See Chiapuzio*, 826 F. Supp. at 1337-38 (allowing action where defendant harasser made sexual advances on female employees, but made sexually suggestive comments to male employees about potential sexual encounters with their wives).

84. *See, e.g., Walden Book*, 885 F. Supp. at 1102 (*Goluszek's* theory "is contrary to the law regarding sexual harassment in the Sixth Circuit"); *Prescott*, 878 F. Supp. at 1550 (*Goluszek's* theory "is not the current state of anti-discrimination jurisprudence").

woman employee still be sexually discriminated against by a supervisor?⁸⁵

Many courts have permitted so-called "reverse discrimination" claims, involving suits by males against women or by whites against blacks, to proceed under Title VII.⁸⁶ Courts have reasoned that it would be indefensible to permit these reverse discrimination suits but to disallow same-sex sexual harassment cases under Title VII.⁸⁷ The Prescott court pointed out that if the dominant gender theory prevailed, then a similar argument could be made when a white plaintiff attempted to sue for discrimination. "[The] white plaintiff would have been at all times a member of the majority, a member of the 'dominant' race," argued the court.⁸⁸

Further, the identity of the harasser is irrelevant to consideration of whether the plaintiff states a claim under Title VII. For example, black-on-black racial discrimination is cognizable under Title VII⁸⁹. Similarly, in deciding whether to dismiss a plaintiff's opposite-sex harassment claim, a court need not inquire into the harasser's sex.

Courts adopting the dominant gender model have concocted a "victim group"—rather than an "individual victim"—approach to Title VII liability. These courts have suggested that the idea of same-sex harassment is somehow "illogical," in part because victims of same-sex harassment would have a hard time proving that the harassment created an atmosphere of hostility towards all members of the victim's (and harasser's) sex.⁹⁰ For example, in rejecting same-sex harassment as actionable under Title VII, the Maryland District Court, in *Hopkins v. Baltimore Gas & Electric Co.*, argued that same-sex harassment could not satisfy Title VII because the harasser "certainly does not despise the entire group [of his sex], nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive."⁹¹

There are two flaws in this reasoning. First, there is no requirement in Title VII law or theory that a victim show that her harasser despised all members of her sex. The victim need only show that she,

85. *Sardinia*, 1995 WL 640502 at *7 n.5.

86. *Id.* at 5-6.

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

88. *Id.* at 1550.

89. *Parrott v. Cheney*, 748 F. Supp. 312, 316 (D. Md. 1989) (same race discrimination is possible in a case where a black employee brought action against a black supervisor).

90. See *supra* notes 38-47 and accompanying text.

91. *Hopkins*, 871 F. Supp. at 833.

an individual, was harassed because of her sex.⁹² If the novel proposition in *Hopkins* and similar dominant gender cases were applied to opposite-sex harassment almost no plaintiff could maintain suit. In almost every case, the defendant could successfully argue that the suit is barred because "he finds [the victim and] others of the group sexually attractive." There is no precedent in Title VII jurisprudence for such a remarkable defense. Second, the *Hopkins* court and others following the dominant gender model evidently do not consider that sexual harassment against members of one's own sex, like sexual harassment of members of the opposite sex, might be an expression of self-loathing and/or power abuse rather than sexual attraction. At the very least, the sexual-attraction thesis of *Hopkins* has no place in an abusive treatment sexual harassment case.

5. *Homosexuals Should Not be Exempt from Work-Place Restrictions Placed on Heterosexuals*

At least one court favoring a cause of action for same-sex harassment (in unwelcome sexual advances cases) has relied on thinly veiled "special rights"-type rhetoric and stereotypes of gay sexuality to do so. In *Pritchett v. Sizeler Real Estate Management Co.*, the court averred that it would be "discriminatory" to allow a supervisor to escape Title VII "solely because of that supervisor's sexual orientation."⁹³ To deny a claim for same-sex harassment would be to allow the homosexual supervisor to engage in the very activity that would be prohibited a heterosexual supervisor, warned the court.⁹⁴ Homosexuals, argued the court, should not be "exempt" from "the very laws that govern the workplace conduct of heterosexuals."⁹⁵

Without saying so directly, the court seemed to suggest that denying claims for same sex harassment would give homosexuals a "special right" to engage in harassment not enjoyed by heterosexuals. This notion that homosexuals should not be given a special place in the eyes of the law has been repeatedly used to defeat or repeal anti-discrimination legislation designed to prohibit sexual orientation discrimination, most recently and famously in the dispute over Colorado's Amendment 2. In *Pritchett*, ironically, a form of this "special rights" argument is used to argue for legal recognition of homosexuality as a

92. See *Sardinia*, 1995 WL 640502 at *7 n.5 ("I understand Title VII to create an individual cause of action. Its prohibitions are not stayed until a work environment has been poisoned for all the members of one gender or the other.").

93. *Pritchett*, 1995 WL 241855 at *2.

94. *Id.*

95. *Id.*

category of concern and analysis. The *Pritchett* court did so, of course, because it conceptualized the recognition of same-sex sexual harassment claims as a form of "restriction" on homosexuals in the work place, rather than a "right" homosexuals would enjoy.

The court reassured readers of the opinion that Title VII does not protect a homosexual from discrimination based on sexual orientation, but added that "here it is not the homosexual who seeks to be protected."⁹⁶ In its concern to place homosexuals under the same restrictions as heterosexuals, the *Pritchett* court ignored the possibility that a homosexual might himself be subjected to unwelcome same-sex advances. The tableau the court painted is one in which opportunistic homosexuals, free from legal restraint, sexually pursue unwilling heterosexuals. Perhaps, unconsciously, the court cannot fathom that homosexuals could ever be subject themselves to "unwelcome" sexual advances or harassment by members of the same sex. As a result, the court notes that its opinion is not designed to protect homosexuals.

Some practitioners may find it distasteful to rely on implicit anti-gay stereotyping and "special rights" arguments to gain acceptance of a same-sex sexual harassment cause of action. Moreover, such arguments will only support the cause of action in a case involving unwelcome sexual advances or a *quid pro quo*. Workplace abusive treatment by members of the same sex will escape Title VII liability. However, depending on the jurist the practitioner confronts, a *Pritchett*-style analysis may be the only successful avenue.

6. EEOC's Interpretation

The Equal Employment Opportunity Commission interprets Title VII to bar same-sex sexual harassment. After stating that "a man as well as a woman may be the victim of sexual harassment,"⁹⁷ the EEOC's Compliance Manual concludes:

The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex . . . and the harasser does not treat employees of the opposite sex the same way.⁹⁸

96. *Id.*

97. EEOC Compliance Manual (CCH) § 615.2(b)(1) (1993).

98. *Id.* § 615.2(b)(3).

Although agency interpretations of federal statutes are not binding on federal courts, they are persuasive authority.⁹⁹ In *Meritor Savings*, the Supreme Court relied heavily on EEOC guidelines in recognizing hostile environment claims as a form of sexual harassment, and therefore as a form of sex discrimination.¹⁰⁰

7. *Same-Sex Harassment Is No Less Harmful to the Victim than Opposite-Sex Harassment*

Same-sex harassment is no less severe than opposite-sex harassment. Further, it does not lessen the factors that must be weighed in deciding whether, under the totality of the circumstances, the harassment created a hostile environment for the employee.¹⁰¹

Under the "totality of the circumstances" test laid out in *Harris v. Forklift Systems, Inc.*,¹⁰² courts examine, among other things, the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work. These factors simply do not vary depending upon the sex of the harasser. Same-sex harassment can be just as frequent, just as severe, just as threatening and humiliating, and just as disruptive to work as opposite-sex harassment.

8. *Equal Protection*

One court has argued that unless Title VII is read to make same-sex sexual harassment actionable it may be subject to attack on constitutional equal protection grounds.¹⁰³ Although this argument has not been fully articulated by any court, it urges a reading of Title VII that would avoid unconstitutionality, a common cannon of statutory construction.

B. *Same-Sex Harassment Based on Abusive Treatment*

Even some courts sympathetic to a cause of action for same-sex sexual harassment have been careful to limit it to cases involving unwelcome homosexual advances. This section considers those cases

99. *Polly*, 825 F. Supp. at 137 (relying on EEOC interpretation regarding same-sex harassment); *Sardinia*, 1995 WL 640502 at *6 (same).

100. 477 U.S. at 65-66 (EEOC Guidelines "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'").

101. *Sardinia*, 1995 WL 640502 at *6.

102. 510 U.S. at 19.

103. *Roe*, 1995 WL 316783 at *2 n.2 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 7181 (1982)).

and then offers a suggestion for placing same-sex sexual harassment claims based on abusive (often anti-gay) treatment within the framework of dominant gender theory and/or standard sex discrimination doctrine.

1. *Recognition of a Same-Sex Harassment Cause of Action Limited by Dominant Gender Theory*

In the context of same-sex abusive treatment claims, some courts have adopted what amounts to an intermediate approach between non-recognition and recognition of the claims. These courts do not categorically reject the possibility of such a claim, but sharply limit the scope of such a claim to those circumstances that demonstrate hostility to the victim's own sex—for example, an “anti-male” atmosphere if the victim is a man. Thus, these cases borrow from the dominant gender theory of Title VII liability.

In *Vandeventer v. Wabash National Corp.*,¹⁰⁴ a male co-worker called the male plaintiff a “dick sucker,” told him to “drop down,” asked him whether he could perform fellatio without his false teeth, and asked the plaintiff if he would go with him to a gay bar.¹⁰⁵ On the defendant's motion for summary judgment, the court initially categorically rejected the plaintiff's same-sex harassment claim.¹⁰⁶ On plaintiff's motion to reconsider, the court retreated from its categorical rejection of same-sex harassment claims, saying that male-on-male sexual harassment can be actionable if it demonstrates “anti-male bias” or an “anti-male atmosphere.”¹⁰⁷ The court dutifully noted that “[p]eople who are harassed *because* they are homosexual (or are perceived as homosexual) are not protected by Title VII any more than are people who are harassed for having brown eyes.”¹⁰⁸ The court also noted that harassment that involves offensive sexual behavior “but is not based on gender bias does not state a claim under Title VII.”¹⁰⁹

The court observed that cases of male prejudice against males or female prejudice against females would be “rare.” The offensive, abusive comments of the defendant in *Vandeventer* did not evince the

104. 867 F. Supp. at 796.

105. *Id.* at 796.

106. *Id.* (relying on *Goluszek* dominant gender theory).

107. *Vandeventer (II)*, 887 F. Supp. at 1181. *Vandeventer (II)* was decided one month prior to *Blozis v. Mike Raisor Ford, Inc.* which offered identical reasons to reach the same conclusion. 896 F. Supp. 805 (N.D. Ind. 1995).

108. *Vandeventer (II)*, 887 F. Supp. at 1180.

109. *Id.* at 1181 & n.2 (abuse must be based on the “harasser's disdain for the victim's gender”).

“anti-male” atmosphere required for Title VII liability, according to the court. “Absent extenuating circumstances,” concluded the court, “it would seem difficult to prove that sexually explicit words or conduct between men would demonstrate an anti-male atmosphere.”¹¹⁰

A case reaching a conclusion similar to *Vandeventer* involved numerous incidents of offensive and abusive sexually-explicit remarks among women. In *Easton v. Crossland Mortgage Corp.*,¹¹¹ another pure abusive treatment case, the court allowed the theoretical possibility of a same-sex sexual harassment claim based on a hostile environment theory but observed that it would be hard for a plaintiff to prevail on such claims.¹¹² The court asserted that conduct of a sexual nature between women or conduct that is “gender-oriented” could not be “presumptively discriminatory,” even though it would be if the same conduct were aimed by a male at a female.¹¹³ Why?

Communications among women do not carry the same societal baggage that creates the inequities Title VII seeks to correct. The sexual or gender-oriented conduct occurs within an environment removed from the concerns about male dominance and sexual violence. The imbalance of power resulting from a dominant gender disadvantaging a subservient [one] does not figure into the exchanges between the parties.¹¹⁴

Vandeventer and *Easton* thus accept the premise of *Goluszek* that Title VII requires the assertion of power by a dominant gender over a subordinate one, but diverge from *Goluszek's* conclusion. They modify *Goluszek* by allowing the theoretical possibility that a same-sex harassment plaintiff might be able to show the requisite sex bias. However, neither case outlines the type of evidence of harassment that might successfully meet the difficult challenge of proving such bias.

2. Same-Sex Abusive Treatment as a Form of Gender Dominance

Even if we accept *Goluszek's* dominant gender theory of Title VII, litigants might argue that recognition of same-sex harassment in the abusive environment context supports the underlying rationale for the statute that *Goluszek* and its progeny have identified. Courts like *Goluszek*, *Vandeventer*, and *Easton* plausibly claim that the basic pur-

110. *Id.* at 1182; see also *Blozis*, 896 F. Supp. at 808 (noting that it would be “[d]ifficult, but not impossible” to prove an anti-male atmosphere in a male-on-male harassment context).

111. 905 F. Supp. 1368 (C.D. Cal. 1995).

112. *Id.* at 1384 n.12.

113. *Id.* at 1382-83.

114. *Id.* at 1383.

pose of Title VII is to remove an imbalance of power between the sexes. They reason from this premise that male-on-male or female-on-female sexual harassment does not touch on the male-female power imbalance. Indeed, most of the sex-discrimination litigation following the enactment of Title VII has involved discrimination by men against women.¹¹⁵ Courts have recognized that unwelcome sexual advances or nonsexual "horseplay" or sex-biased taunting and ridicule can have a damaging effect on the ability of women (or men) to succeed in the workplace.¹¹⁶ Whether the behavior takes the form of a sexual advance or just sex-biased teasing, it constitutes sex discrimination if sufficiently pervasive to create a hostile environment for the victim.

When the sex discrimination is directed by a man against a woman, it is easy to see its potentially discriminatory and harmful effect on the environment in which all women must work. Consider the *Price Waterhouse v. Hopkins* litigation in which male partners failed to promote a woman to partner at least in part because of her alleged unfeminine qualities.¹¹⁷ Several male partners felt she did not act like a woman is "supposed" to act, was abrasive, macho, and foul-mouthed.

On the other hand, when abusive treatment is directed by a man against a man or a woman against a woman, the connection to a male-female power imbalance is harder to see at first glance. A sort of intra-sex "boys will be boys" rationale to excuse same-sex abusive treatment emerges from the *Goluszek* line of cases. One court has gone so far as to describe intra-sex "horseplay" as "sexually neutral."¹¹⁸ A line of cases is emerging that would disallow any Title VII claims where the same-sex harassment involves only this kind of abusive treatment.

However, same-sex "horseplay" or "shop talk" often both reflects and reinforces expectations about proper sex or gender roles—expectations that themselves may have a retarding effect on the success of women in the workplace. Consider again the male-on-male "shop talk" present in *Goluszek*. Much of the harassment aimed at Anthony

115. See *Nogueras v. University of P.R.*, 890 F. Supp. 60, 62 (D.P.R. 1995).

116. See, e.g., *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370-71 (1993) ("A discriminatorily abusive environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.").

117. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

118. *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1501 (E.D. Va. 1996).

Goluszek, a male, reflected deep prejudices about the role of women and men. In the world of Goluszek's co-workers, men were expected to marry women and were somehow suspect or less worthy of civil treatment if they did not. Women were reduced to sexual objects existing solely for the satisfaction of men. The *Goluszek* court failed to place this male-on-male harassment in the context of male-female relations. Consider, again, the *Price Waterhouse* litigation, but imagine that the female employee had been discriminated against by *female* partners for not meeting traditional gender expectations. Would the effect on her progress have been any less real, or any less based on her sex, or any less constricting on the role of women in the workplace generally?

Male-on-male or female-on-female harassment can have the purpose or effect of enforcing the very gender expectations and sex roles that retard women's progress relative to men in the workplace. In other words, when "boys are being boys" around each other in the workplace, they reinforce a code of behavior that indirectly affects women, constricting the choices women may have in pursuing economic success because of the expectations men harbor—and act upon—in their workplace relationships with women. Women's own traditional expectations of the role to be played by other women may have a similar reinforcing effect of constricting sex and gender roles. Therefore, we cannot properly speak of "an environment removed from the concerns about male dominance and sexual violence."¹¹⁹ In fact, it may turn out that the intra-sex enforcement of traditional roles for men and women ultimately has a more profound and pervasive discriminatory effect than direct male-on-female harassment. Far from being outside the "underlying rationale" for the prohibition on sex discrimination in Title VII, recognition of same-sex abusive treatment claims may be at the heart of Title VII.

This conclusion should be equally applicable where the same-sex abusive treatment takes the form of an anti-gay harassment. Such harassment should fit within the gender dominance model of Title VII liability. Consider that anti-gay harassment often relies on precisely the same stereotypes about gender roles that sex discrimination draws upon. In *Goluszek*, for example, the plaintiff's co-workers used derogatory remarks about women even as they "accused" the plaintiff of being gay or bisexual.¹²⁰ When one co-worker impugns the manhood

119. *Easton v. Crossland Mortg. Corp.*, 905 F. Supp. 1368, 1383 (C.D. Cal. 1995) (emphasis added).

120. 697 F. Supp. at 1453–54.

of another for being gay, he employs stereotypes about both gay men and the relationship between men and women. Indeed, heterosexuality is embedded in the traditional concept of what it means to be a "man" or a "woman." These stereotypes and traditional concepts about the proper roles of men and women, as discussed above, have the purpose or effect of constricting the choices that members of either sex may make—or have available to them—in the workplace.

3. *Anti-Gay Abusive Treatment as a Form of Sex Discrimination*

Even courts reluctant to accept the gender dominance model of Title VII liability might be persuaded that anti-gay harassment in the form of abusive treatment is a subset of sex discrimination. Arguments that Title VII forbids discrimination on the basis of sexual orientation have been, and likely will continue to be, unsuccessful. Litigants might consider, instead, arguing that harassment based on actual or perceived sexual orientation is a form of "sex" discrimination, which Title VII unquestionably prohibits.

Instead of asserting that Title VII forbids sexual orientation discrimination outright, litigants might, for example, argue that in cases of anti-gay male harassment the perpetrator finds something about male homosexuals that is particularly revolting or threatening and therefore disproportionately the object of abuse.¹²¹ In this hypothetical, the harasser would not treat a female homosexual in that way because he finds gay women less threatening, less revolting, and so forth. It is the nexus of the victim's sex (male) and sexual orientation (gay) that prompts the discrimination. This theory would capture discrimination that would not occur "but for" the male homosexual's sex. Similar claims might be made where a harasser directs her abuse solely or primarily at gay women. An employer clearly may not favor gay men over gay women as a pretext for sex discrimination.¹²² This theory would, of course, also apply to opposite-sex sexual harassment involving anti-gay abusive treatment.

Litigants might find evidentiary support for this theory in the following: the harasser's own statements; the vehemence and frequency of the harasser's words or actions; the sex-specific language or behavior directed at the victim; or the actual treatment accorded known or suspected gay men and women in the workplace. The statement, "I

121. Compare *Valdes v. Lumbermen's Mut. Cas. Co.*, 507 F. Supp. 10, 13 (S.D. Fla. 1980) (permitting claim under Title VII where employee alleged that the employer's "policy against employing homosexuals was not applied uniformly and was used against her only because she is a female").

122. *Id.*

hate faggots," would support a claim of sex-specific discrimination claim; the statement, "I hate homosexuals," as an expression of hatred against both gay men and women, would not. Other offensive epithets like "dick sucker" or "butt fucker" or "pussy licker" would be further evidence of sex-specific discrimination. Statements or actions aimed at gay men, but not gay women, on the job would support a finding of sex discrimination. Moreover, even if the harasser attacked both gay men and gay women through words or deeds on the job, the harasser might attack one or the other group with special vehemence, vituperation or frequency. There will be an endless variety of fact patterns, behavior, and epithets. The trier of fact will have to scrutinize each case individually to determine whether the harasser singled out a sex for special abuse. There is always the possibility, however remote, that the harasser might be equally anti-gay male and anti-gay female, in which case (as with the true "equal opportunity harasser") there may not be a claim for discrimination on the basis of sex.

IV. CONCLUSION

The question whether Title VII forbids same-sex sexual harassment, and if so, what forms of same-sex sexual harassment, will continue to plague the bench and bar until definitive word on the subject comes from the Supreme Court. As of now, district courts across the land are at odds over the question. Although the momentum seems to favor recognition of the cause of action, courts have not applied it to the common case involving abusive treatment of a member of the same sex that does not involve an unwelcome sexual advance. Resolution of the questions presented in this Article will require a theory of what purpose courts should ascribe to Title VII's prohibition of sex discrimination.