SAME-GENDER HARASSMENT AND HOMOSEXUALITY IN TITLE VII SEXUAL HARASSMENT LITIGATION

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 (Title VII)[1] forbids sexual harassment[2] involving victims and harassers of opposite genders.[3] A

1. 42 U.S.C. §§ 2000e-2000e-17 (1994).

2. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The statute prohibits public and private employers with fifteen or more employees, *see id.* § 2000e(b), from hiring, promoting, bestowing benefits on, or discharging any employee in such a discriminatory manner. *See id.* § 2000e-2(a)(1). Aggrieved employees may sue their employer to recover actual damages, including back pay, reinstatement, and promotion, *see id.* § 2000e-5(g)(1), as well as limited punitive and compensatory damages. 42 U.S.C. § 1981a(b)(1) (1994).

There are two types of sexual harassment actionable under Title VII: "quid pro quo" harassment and "hostile work environment" harassment. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1194-95 (4th Cir. 1996). Quid pro quo sexual harassment exists when an individual's employment status is conditioned upon the submission to sexual requests by his or her employer. *Id.* at 1195. Under this theory a plaintiff must allege and prove: (1) the plaintiff employee is a member of the protected class; (2) the sexual advances were unwelcome; (3) the harassment was sexually motivated; (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment; and (5) *respondeat superior* liability has been established. Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990). *But see* Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) (finding the five part test unduly complex and holding quid pro quo harassment occurs when an "individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment, upon an employee's

growing number of Title VII plaintiffs, however, are now alleging "same-gender"[4] sexual harassment—harassment by supervisors of the same gender as the plaintiff employee.[5] Whether Title VII protects employees

---

acceptance of sexual conduct").

Hostile work environment harassment typically does not affect the plaintiff employee's employment or economic status, rather it deprives the employee of the right to work in an environment "free from discriminatory intimidation, ridicule, and insult." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). In addition to proving the five elements required in a quid pro quo claim, a hostile work environment plaintiff must also show that the harassment complained of was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). *See also Henson*, 682 F.2d at 903-05 (outlining the elements of a hostile work environment claim).

Furthermore, courts require the plaintiff subjectively perceive the conduct as abusive, and that the harassment would have similarly affected a reasonable person in the same situation. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993). A plaintiff need not demonstrate psychological injury to prevail in a hostile environment case. *Id.* For a general discussion of Title VII's sexual harassment framework, see Trish K. Murphy, Note, *Without Distinction: Recognizing Coverage of Same-Gender Sexual Harassment Under Title VII*, 70 WASH. L. REV. 1125, 1126-30 (1995).

3. 42 U.S.C. § 2000e-2(a)(1) (prohibiting an employer from discriminating against an employee with respect to his "terms, conditions, or privileges of employment, because of . . . [the employee's] sex"). *See, e.g., Meritor*, 477 U.S. at 57 (recognizing sexual harassment claims under Title VII where the supervisor and the employee were of the opposite sex). *See also* Charles R. Calleros, *The Meaning Of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55 (1995); Murphy, *supra* note 2; Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII:* Garcia v. Elf Atochem *Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87, 88 (1995).

4. Because "sex" equates to "gender" under Title VII, the author employs the term "same-gender" as opposed to "same-sex." *See infra* notes 49-56 and accompanying text.

5. At least fifteen district courts addressed this issue in 1995. *See, e.g.*, Sardinia v. Dellwood Foods, Inc., No. 94 CIV.5458, 1995 WL 640502, at *3 (S.D.N.Y. Nov. 1, 1995) (noting that "[n]o fewer than fifteen district court decisions addressed the viability of same-sex claims in 1995 alone" and holding same-sex discrimination claims actionable under Title VII). *See generally* Wrightson v. Pizza Hut of Am., Inc., 909 F. Supp. 367 (W.D.N.C. 1995) (holding same-gender sexual harassment is not cognizable under Title VII); Ecklund v. Fuisz Technology, Ltd., 905 F. Supp. 335 (E.D. Va. 1995) (holding same-sex sexual harassment is cognizable under Title VII where a female plaintiff alleged sexual harassment at the hands of a female co-worker); Nogueras v. University of Puerto Rico, 890 F. Supp. 60 (D.P.R. 1995) (finding the plain language of Title VII prohibits same-sex harassment); Boyd v. Vonnahmen, No. 93-CV-4358, 1995 WL 420040 (S.D. Ill. Mar. 29, 1995) (declining to read Title VII as applicable only to cases of heterosexual sexual harassment); Fox v. Sierra Dev. Co., 876 F. Supp. 1169 (D. Nev. 1995) (ruling that a heterosexual man's offense at homosexual depictions will not by itself constitute a Title VII claim); Oncale v. Sundowner Offshore Serv., Inc., No. CIV.A.94-1483, 1995 WL 133349 (E.D. La. Mar. 24, 1995) (following *Garcia*).

from same-gender sexual harassment remains unsettled.[6] Complicating this issue is the related question of the role of sexual orientation in sexual harassment litigation.[7]

The controversy over whether Title VII protections extend to sexual orientation, in tandem with a dearth of legislative history, has fostered judicial reluctance to consider this issue.[8] The United States Supreme Court has not addressed same-gender sexual harassment, but two United States Courts of Appeal have ruled on these issues.[9] In 1994, in *Garcia v. Elf Atochem North America*,[10] the Fifth Circuit held a plaintiff does not have a valid claim for same-gender sexual harassment under Title VII.[11] Prior to *Garcia*, many courts confronting same-gender sexual harassment held Title VII prohibited such conduct.[12] After *Garcia*,

---

In addition, in the first 40 days of 1996, at least two district courts addressed this issue. *See, e.g.*, Williams v. District of Columbia, No. CIV.A.94-02727, 1996 WL 56100 (D.D.C. Feb. 5, 1996) (rejecting defendant's argument that same-gender sexual harassment is not actionable under Title VII); Ton v. Information Resources, Inc., No. 95-3565C, 1996 WL 5322 (N.D. Ill. Jan. 3, 1996) (holding Title VII prohibits same-gender sexual harassment). *See also* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (providing an expressly narrow holding that in hostile work environment cases Title VII does not recognize claims of heterosexual-male-on-heterosexual-male sexual harassment).

6. *See* Murphy, *supra* note 2, at 1125-26 (noting federal district courts are issuing conflicting opinions concerning same-gender harassment).

7. *See, e.g.*, *McWilliams*, 72 F.3d at 1195-96 (holding the plaintiff's hostile environment claim was insufficient because the male-plaintiff's "alleged harassers were . . . males, and no claim is made that any was homosexual").

8. *See* Calleros, *supra* note 3, at 56-57 (noting the difficulties courts have recognizing homosexual harassment).

9. *See McWilliams*, 72 F.3d at 1191; Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994). *See also infra* notes 10-19.

10. 28 F.3d 446 (5th Cir. 1994).

11. *Id.* at 451-52. *See also* Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (rejecting male plaintiff's claim of same-gender harassment).

12. *See* Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541 (M.D. Ala. 1983) (noting that homosexual harassment violates Title VII), *aff'd mem.*, 749 F.2d 732 (11th Cir. 1984); Wright v. Methodist Youth Servs. Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (finding a cause of action under Title VII when a male employee's refusal of a male supervisor's homosexual advances resulted in termination); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (stating with little discussion that homosexual harassment violated Title VII). *See also* Calleros, *supra* note 3, at 65-70 (proposing that the heterosexual harassment framework applies to homosexual harassment).

In addition, several states have recognized same-gender sexual harassment under state law. *Id. See also* Mogilefsky v. Superior Court, 26 Cal. Rptr. 2d 116, 121 (Ct. App. 1993) (holding that a victim of same-gender harassment may state a cause of action for

however, many district courts followed the Fifth Circuit's reasoning and ruled Title VII does not protect same-gender sexual harassment claims.[13] Today, federal courts remain divided on the issue.[14]

In the only other circuit court case on this issue, the Fourth Circuit, in *McWilliams v. Fairfax County Board of Supervisors*,[15] issued a narrow holding.[16] Like *Garcia*, the *McWilliams* court held Title VII does not allow same-gender heterosexual-on-heterosexual hostile work environment claims,[17] but it did note such claims may be cognizable if one party is a homosexual.[18] *McWilliams* suggests years of fact-specific circuit court decisions, and suggests these issues will enter the twenty-first century unresolved.[19]

This Section will consider the issues concerning same-gender harassment and homosexuality. Part II provides a brief background on the enactment and operation of Title VII. Part III examines the *Garcia* court's reasoning and the reasoning of other courts that have refused to

---

sexual harassment under a California statute); Barbour v. Department of Social Servs., 497 N.W.2d 216, 218 (Mich. Ct. App. 1993) (per curiam) (allowing a same-gender sexual harassment claim under the Michigan Civil Rights Act); Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 454 (N.J. 1993) (stating the New Jersey Law Against Discrimination applies to sexual harassment between members of the same gender).

13. *See* Ashworth v. Roundup Co., 897 F. Supp. 489, 494 (W.D. Wash. 1995); Quick v. Donaldson Co., 895 F. Supp. 1288, 1295-96 (S.D. Iowa 1995); Benekritis v. Johnson, 882 F. Supp. 521, 525-26 (D.S.C. 1995); Oncale v. Sundowner Offshore Services, No. CIV.A.94-1483, 1995 WL 133349, at *2 (E.D. La. Mar. 24, 1995); Myers v. City of El Paso, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995); Fleenor v. Hewitt Soap Co., No. C-3-94-1826, 1995 WL 386793, at *3 (S.D. Ohio Dec. 21, 1995). *But see* Raney v. District of Columbia, 892 F. Supp. 283, 286-88 (D.D.C. 1995) (rejecting *Garcia* and allowing a male employee's Title VII claim of sexual harassment by his male supervisor); Pritchett v. Sizeler Real Estate Management Co., No. CIV.A.93-2351, 1995 WL 241855, at *2 (E.D. La. Apr. 25, 1995) (allowing a female employee's Title VII claim of sexual harassment by her female supervisor); Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1549-51 (M.D. Ala. 1995) (allowing a Title VII action where a homosexual male supervisor harassed a male employee but did not similarly harass female employees).

14. *See* Sardinia v. Dellwood Foods, Inc., No. 94 CIV.5458, 1995 WL 640502, at *3 (S.D.N.Y. Nov. 1, 1995) (noting the split among courts).

15. 72 F.3d 1191 (4th Cir. 1996).

16. *Id.* at 1195-96.

17. *Id.* at 1195.

18. *Id.* at 1195 n.4.

19. *See id.* (noting that "the lower federal courts which have [decided this issue] are hopelessly divided").

allow same-gender sexual harassment claims. Part IV describes the rationale of courts that have approved same-gender claims. Part V discusses the application of Title VII to homosexual sexual harassment litigants. Finally, Part VI concludes that same-gender harassment claims are actionable under Title VII and suggests that courts focus on the harassing conduct and the gender of the victim, rather than the sexual orientation of the parties.

II. THE STATUTE

Title VII of the Civil Rights Act of 1964[20] makes it unlawful for an employer to discriminate against any employee because of that employee's sex.[21] The statute prohibits an employer with fifteen or more employees[22] from hiring, promoting, bestowing benefits on, or discharging any employee in a discriminatory manner.[23] Aggrieved employees may sue the employer to recover actual damages, including back pay, reinstatement, and promotion,[24] as well as limited punitive and compensatory damages.[25]

Congress enacted Title VII to eradicate employment practices that discriminate against individuals based on "race, color, religion, sex or national origin."[26] "Sex," however, was added as a protected category in a last minute attempt to thwart the passage of the statute.[27] As a

---

20. 42 U.S.C. §§ 2000e-2000e-17 (1994).

21. 42 U.S.C. § 2000e-2(a)(1). The provision states:

> 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.

Id.

22. 42 U.S.C. § 2000e(b) (defining "employer").

23. *Id.* § 2000e-2(a)(1).

24. *Id.* § 2000e-5(g).

25. Civil Rights Act of 1991, § 102(b)(1), 42 U.S.C. § 1981a(b)(1). In 1991, Congress enacted the Civil Rights Act to expand Title VII damages to include punitive and compensatory damages. *Id. See* Landgraf v. USI Film Products, 114 S. Ct. 1483, 1491 (1994) ("[A] Title VII plaintiff who wins a backpay award may also seek compensatory damages. . . . [and] punitive damages.").

26. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

27. *See* Mark Musson, Comment, *Sexual Harassment in the Workplace: The Time Has Come for All Offenders to Personally Suffer the Consequences of Their Actions*, 64

result, the scant legislative history does not give a clear indication of Congress' intent regarding sex discrimination in the workplace.[28] Therefore, the federal courts are split over whether Congress intended Title VII to encompass same-gender sexual harassment.[29]

III. THE RATIONALE FOR REJECTING SAME-GENDER HARASSMENT CLAIMS UNDER TITLE VII

Courts that reject same-gender harassment view discrimination as an abuse of power by a powerful person—the employer—against a vulnerable one—the employee.[30] The United States District Court for the Northern District of Illinois, in *Goluszek v. H. P. Smith*,[31] was the first court to rely on this theory when deciding a same-gender sexual harassment claim.[32] In *Goluszek*, the court concluded that Congress did not contemplate same-gender harassment when it enacted Title VII.[33] Instead, the court determined that Congress created Title VII to prohibit discrimination "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."[34]

UMKC L. REV. 237, 237 (1995) (discussing the legislative history of Title VII).

28. *See generally id.* at 237-43. Some members of Congress have proposed amendments to Title VII prohibiting discrimination against employees on the basis of sexual preference. *Id.*

29. *See supra* notes 12-14 and accompanying text.

30. *See* Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1994)).

31. 697 F. Supp. 1452 (N.D. Ill. 1988).

32. *Id.* at 1456. One cannot overstate *Goluszek*'s impact on the same-gender sexual harassment debate. *See* Sardinia v. Dellwood Foods, Inc., No. 94 CIV.5458, 1995 WL 640502 (S.D.N.Y. Nov. 1, 1995) ("Every case . . . disclosed by research to support the proposition that this Circuit should not recognize same-sex harassment claims relies in whole or in part on [*Goluszek*].").

33. *Goluszek*, 697 F. Supp. at 1456. Goluszek, a male employee, worked in a "male-dominated environment." *Id.* The other male employees consistently harassed Goluszek from the day he was hired in 1979 until he was fired in 1984. *Id.* at 1453-55. Goluszek filed a sexual harassment claim alleging his employer sexually discriminated against him by not preventing the harassment. *Id.* at 1455.

34. *Id.*

Although Goluszek worked in "a male-dominated environment,"[35] the court rejected his same-gender harassment claim because it did not involve an "environment that treated males as inferior."[36] Rather, the only sexual harassment claims the court viewed as actionable were those stemming from "words or actions that [say] the victim is inferior because of the victim's sex."[37] Because the male-on-male harassment did not create an atmosphere where males were inferior, the court implied that same-gender harassment is impossible.[38]

Six years later, in *Garcia v. Elf Atochem North America*,[39] the Fifth Circuit followed *Goluszek* when it decided the viability of same-gender harassment claims under Title VII.[40] In *Garcia*, a male plaintiff alleged his male supervisor harassed him by grabbing his crotch area from behind and making sexual motions.[41] The Fifth Circuit held "[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."[42] Although the court did not provide its own rationale, it did cite *Goluszek* with approval.[43]

Although several district courts have followed the Fifth Circuit's ruling in *Garcia*, many other district courts have openly rejected *Garcia*.[44] Although no circuit court has directly opposed *Garcia*, several circuit courts have implicitly approved same-gender claims under Title VII.[45] Finally, other district courts, while not expressly rejecting

35. *Id.*

36. *Id.*

37. *Id.*

38. *See Goluszek*, 697 F. Supp. at 1456.

39. 28 F.3d 446 (5th Cir. 1994).

40. *Id.* at 451-52.

41. *Id.* at 448.

42. *Id.* at 451-52 (quoting a Fifth Circuit decision that was published without opinion, Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir.), *cert. denied*, 115 S. Ct. 311 (1993)).

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

44. *See supra* notes 13-14 and accompanying text.

45. *See* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (noting that "[s]exual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in proper cases"); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (stating that "although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that *both* men and women . . . [employees] have viable claims

Garcia, have refused to preclude same-gender sexual harassment under Title VII.[46]

IV. THE RATIONALE FOR REJECTING *GARCIA* AND APPROVING SAME-GENDER SEXUAL HARASSMENT CLAIMS

Courts that recognize same-gender sexual harassment claims focus on the plain language of Title VII, the legislative history and the because-of-gender requirement.[47] In addition, many courts criticize the *Goluszek* and *Garcia* lines of cases.[48]

A. *Reading the Plain Language of Title VII to Allow Same-Gender Claims*

Numerous courts rely on the plain language of Title VII to hold employers liable for same-gender sexual harassment claims.[49] In *Easton*

---

against [the harasser] for sexual harassment"); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) (stating that "harassment is harassment regardless of whether it is caused by a member of the same or opposite sex"), *cert. denied*, 114 S. Ct. 1189 (1994); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192-93 (1st Cir. 1990) (hearing an allegation of homosexual harassment but affirming summary judgment for the defendant because the alleged conduct was not severe).

46. *See, e.g.*, Nogueras v. University of Puerto Rico, 890 F. Supp. 60 (D.P.R. 1995) (holding that the plain language of Title VII prohibits same-gender sexual harassment); EEOC v. Walden Book Co., 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995) (holding same-gender sexual harassment based on gender is actionable only where a homosexual supervisor harasses employees of the *same* sex); Roe v. K-Mart Corp., No. CIV.A.2:93-2372-18AJ, 1995 WL 316783, at *1 (D.S.C. Mar. 28, 1995) (holding a claim of same-gender sexual harassment actionable under Title VII where a male homosexual employee was allegedly terminated because he refused a male homosexual supervisor's sexual advances); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 231-32 (S.D. Ga. 1995) (concluding homosexual harassment and same-gender harassment violate Title VII where the female employee can prove that the harasser only harassed women and not men).

47. *See, e.g.*, Williams v. District of Columbia, No. CIV.A.94-02727, 1996 WL 56100 (D.D.C. Feb. 5, 1996).

48. *Id.* at *8.

49. *Id.* at *8-*9. *See also* Sardinia v. Dellwood Foods, Inc., No. 94 CIV.5458, 1995 WL 640502, at *5 (S.D.N.Y. Nov. 1, 1995) (stating "[n]othing in the body of the statute limits its protections to heterosexual harassment. On the contrary, the language of the statute is non-exclusive, creating a 'broad rule of workplace equality'") (quoting Harris v. Forklift Sys. Inc., 114 S. Ct. 367, 371 (1993)); Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1378 (C.D. Cal. 1995) ("[T]he plain language of Title VII . . . does not preclude a same-gender sexual harassment claim . . . . "); EEOC v. Walden Book Co., 885

v. Crossland Mortgage Corp.,[50] the court stated that, "[i]f heterosexual sexual harassment was the sole kind of sexual harassment Congress sought to outlaw, they could have written the statute to only encompass claims brought by members of the opposite sex of the harasser."[51] The *Easton* court concluded that tribunals that refuse to recognize same-gender harassment claims "have ignored the plain language of the statute and undertaken an unnecessary excursion into the mist shrouded netherworld of congressional intent."[52]

In *Prescott v. Independent Life & Accident Insurance Co.*,[53] the court relied on the lack of qualifying language for the term "sex."[54] The *Prescott* court recognized that Congress chose "an obviously gender neutral term, just as Congress chose to prohibit discrimination based on 'race,' rather than discrimination against African-Americans or other specific minorities."[55] Therefore, a plaintiff may argue Congress purposely employed a gender neutral term because the language in Title VII does not limit the Act's prohibitions to cross-gender discrimination.[56]

B. *The Legislative History*

Courts have interpreted the lack of legislative history and the uncertain congressional intent to reach contrary results concerning Title VII's prohibition of same-gender harassment.[57] Indeed, the lack of

---

F. Supp. 1100, 1103-04 (M.D. Tenn. 1995) (recognizing that Title VII prohibits discrimination "against women because they are women and against men because they are men"). *But see* Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822, 834 (D. Md. 1994) (holding where harasser and victim share the same gender, the language of Title VII would be "strained beyond its manifest intent were the Court to hold that under these facts there has been discrimination 'because of . . . sex'").

50. 905 F. Supp. 1368 (C.D. Cal. 1995).

51. *Id.* at 1378.

52. *Id.*

53. 878 F. Supp. 1545 (M.D. Ala. 1995).

54. *Id.* at 1550.

55. *Id.*

56. *See* 42 U.S.C. § 2000e-2(a)(1).

57. *See* Musson, *supra* note 27, at 237 (discussing Title VII's legislative history). *See also* Williams v. District of Columbia, No. CIV.A.94-02727, 1996 WL 56100, at *7 (D.D.C. Feb. 5, 1996) (citing cases permitting same-gender sexual harassment claims); Sardinia v. Dellwood Foods, Inc., No. 94 CIV.5458, 1995 WL 640502, at *3 (S.D.N.Y. Nov. 1, 1995) (listing various decisions).

legislative history is a source of constant frustration for courts faced with same-gender sexual harassment claims.[58] Courts that approve same-gender claims argue the dearth of legislative history renders fruitless the quest to determine congressional intent.[59] These courts argue that while one may ignore the plain language of Title VII, one will not find any congressional intent to exclude same-gender harassment suits from the statute's purview.[60]

Courts that reject same-gender harassment claims, however, also find support in the lack of legislative history.[61] These courts reason that "[t]he total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."[62]

C. *Varying Application of the But-for-Gender Test*

Courts that allow same-gender claims hinge their analysis on Title VII's but-for-gender requirement.[63] Using the plain meaning doctrine,[64] courts construe the word sex in Title VII to mean gender.[65]

---

58. See *supra* notes 12-14 for a list of cases wherein courts have come to different conclusions regarding congressional intent, and have ruled differently on the issue of same-gender harassment under Title VII.

59. *See, e.g.*, Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368, 1378 (C.D. Cal. 1995) (noting that courts that have precluded same-gender harassment claims have "undertaken an unnecessary excursion into the mist shrouded netherworld of congressional intent").

60. *See* Musson, *supra* note 27, at 240-42 (arguing that Congress could not have intended to protect a vulnerable person from a dominant person, otherwise white plaintiffs would not be able to seek protection under Title VII).

61. *See, e.g.*, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).

62. *Id.* at 1085.

63. *See, e.g.*, Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550-51 (M.D. Ala. 1995) (applying the because-of-gender test for a claim of same-gender harassment).

64. *See, e.g., Ulane*, 742 F.2d at 1085 (instructing courts to give words their common and ordinary meaning in the absence of legislative intent).

65. *See, e.g.*, Harris v. Forklift Sys. Inc., 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring) (concluding that Title VII prohibits discrimination "because-of-gender").

Several courts have noted that gender is the traditional meaning of the word sex and reason that because it is used in the same context as race, color and national origin, which are traditionally understood to describe immutable characteristics, Congress merely intended sex to be given its traditional interpretation. *E.g.*, Hopkins v. Baltimore Gas &

In *Williams v. District of Columbia*,[66] the court asked whether the plaintiff suffered the harassment because of his or her gender.[67] This analysis broadens the scope of Title VII and allows same-gender claims.[68]

In contrast, courts that follow *Goluszek* and *Garcia* find gender discrimination when there is evidence of an abuse of an imbalance of power.[69] In other words, members of the same sex would not treat fellow members as inferior due to their gender.[70] The *Goluszek* court explained that a male plaintiff, working in a male-dominated environment, could not work in an environment that treats males as inferior.[71] Thus, according to this argument, sexual harassment based on gender exists only when the victim and the harasser are of different genders.[72]

D. *Analytical Flaws in the Reasoning of* Goluszek & Garcia

Courts that have recently held same-gender harassment claims actionable under Title VII also suggest analytical problems with *Goluszek*'s rationale.[73] First, courts criticizing *Goluszek* note that "the support underlying [*Goluszek's*] central proposition came not from

---

Elec. Co., 871 F. Supp. 822, 832 n.17 (D. Md. 1994) (stating courts have read sex under Title VII as gender); Parrish v. Washington Nat'l Ins. Co., No. 89.C.4515, 1990 WL 165611, at *7 n.2 (N.D. Ill. Oct. 16, 1990) (concluding Title VII prohibits discrimination based on gender). *See also Ulane*, 742 F.2d at 1085 (arguing the lack of legislative history and the circumstances surrounding the enactment of Title VII's prohibition against sex discrimination indicate Congress intended Title VII apply to the traditional concept of sex); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (arguing that sex means gender because "Congress had only the traditional notions of 'sex' in mind") (quoting Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977)).

66. No. CIV.A.94-02727, 1996 WL 56100 (D.D.C. Feb. 5, 1996).

67. *Id.* at *6-*7.

68. *Id.* (noting that "Title VII broadly prohibits all forms of sex discrimination, which includes sexual harassment").

69. Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). See *supra* notes 30-46 and accompanying text for a discussion of the rationale of *Garcia* and *Goluszek* and their progeny.

70. *See Goluszek*, 697 F. Supp. at 1456 (explaining that the harassment did not create an anti-male environment). *See, e.g.*, Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822, 834 (D. Md. 1994) (following *Goluszek*'s rationale).

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

72. *Id.*

73. *See e.g.*, Williams v. District of Columbia, CIV.A.94-02727, 1996 WL 56100, at *8-*9 (D.D.C. Feb. 5, 1996) (listing seven analytical flaws in *Goluszek*).

Congress, but from a law student."[74] Moreover, the law student wrote the precedent-inspiring law review note before the Supreme Court decided *Meritor Savings Bank v. Vinson*,[75] which emphasized that harassment based on the victim's sex is gender-based harassment and violates Title VII.[76] The *Williams* court criticized *Garcia* and *Goluszek* for violating *Meritor*'s command.[77] The *Goluszek* court departed from *Meritor* when it struck Goluszek's claim, even though it acknowledged that the other employees may have harassed him because of his gender.[78]

In addition, it would be inconsistent to apply the abuse of power theory to reject same-gender harassment claims but allow reverse discrimination claims.[79] If a court applies the abuse of power theory in a race discrimination claim, then a white plaintiff, a member of the majority, would not be allowed to bring a reverse discrimination claim.[80] Such a result, *Goluszek*'s critics argue, is contrary to Congress' intent.[81]

Furthermore, the *Williams* court interpreted the holding of *Goluszek* as narrow, but overextended by its progeny.[82] *Williams* argued that the *Goluszek* court rejected same-gender sexual harassment because the male-on-male harassment did not involve an abuse of power.[83] But, as the *Williams* court noted, even if a court adopts the imbalance of power theory, not all same-gender sexual harassment claims occur in a vacuum

---

74. *Id.* at *8 n.7 (discussing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)). The *Williams* court also noted that the student note did not discuss congressional intent. *Id.*

75. 477 U.S. 57, 73 (1986).

76. *Id.*

77. *Williams*, 1996 WL 56100, at *9.

78. Goluszek v. H.P. Smith, 697 F. Supp 1452, 1456 (N.D. Ill. 1988). *See also Williams*, 1996 WL 56100, at *9 (criticizing *Goluszek's* departure from *Meritor*); Sardinia v. Dellwood Foods, Inc., No. 94 CIV.5458, 1995 WL 640502, at *6 (S.D.N.Y. Nov. 1, 1995) (same).

79. *Williams*, 1996 WL 56100, at *9.

80. *See, e.g.*, Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) (stating that the Supreme Court has recognized reverse discrimination) (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).

81. *Id.*

82. Williams v. District of Columbia, CIV.A.94-02727, 1996 WL 56100, at *9 (D.D.C. Feb. 5, 1996).

83. *Id.*

devoid of any abuse of power.[84] *Williams* also argued that the "harms resulting from same-sex sexual harassment are no less severe than those perpetrated by harassers of the opposite sex."[85]

Finally, many courts point out that a rule rejecting same-gender sexual harassment claims conflicts with the policy of Title VII's enforcement body, the Equal Employment Opportunity Commission (EEOC).[86] The EEOC Compliance Manual states:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (*not* on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.[87]

For these reasons, federal courts are split as to whether same-gender sexual harassment claims are protected under Title VII.[88] One additional factor, however, further clouds the murky waters of same-gender harassment litigation: sexual orientation often complicates the application of the but-for-gender test.[89]

---

84. *Id.*

85. *Id.* (citing EEOC Compl. Man. (CCH) § 615.2 (1981)). *See also* CATHERINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN 206 (1979) (stating that "[a] woman who is fired because of her refusal to submit to a lesbian supervisor is just as fired—and her firing is just as related to her gender—as if the perpetrator were a man").

86. *See, e.g.*, *Williams*, 1996 WL 56100, at *9.

87. EEOC Compl. Man. (CCH) § 615.2(b)(3), at 3204 (1991). The Manual also states:

> If a male supervisor of male and female employees makes unwelcome sexual advances toward a male employee because the employee is male but does not make similar advances toward female employees, then the male supervisor's conduct may constitute sexual harassment since the disparate treatment is based on the male employee's sex.

Id. at ex. 1.

88. *See supra* notes 47-48 and accompanying text. See also *supra* note 12 for cases that approve same-gender sexual harassment claims.

89. *See infra* part V.

V. THE ROLE OF SEXUAL ORIENTATION IN SAME-GENDER HARASSMENT CLAIMS

Both the EEOC and the courts agree that Title VII does not prohibit workplace discrimination based on an employee's sexual orientation.[90] Rather, Title VII prohibits gender discrimination.[91] Many same-gender harassment claims, however, involve at least one party that is admitted, perceived or alleged to be homosexual.[92]

The confusion occurs when a court is confronted with an instance of same-gender harassment based on sexual orientation.[93] This may occur when a supervisor harasses with words or actions indicating either anti-homosexual or anti-heterosexual animus toward an employee of the same gender.[94] Similarly, it may occur when a supervisor demands sexual favors from an employee who shares the supervisor's gender.[95]

---

90. *See* Quick v. Donaldson Co., 895 F. Supp. 1288, 1297 (S.D. Iowa 1995). *See also* Wiliamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978); Fredette v. BVP Management Assocs., 905 F. Supp. 1034 (M.D. Fla. 1995). *See generally* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3 (1992) (discussing sexual-orientation harassment). *See infra* notes 113-17 and accompanying text (discussing *Wright*).

Although Title VII does not protect homosexuals from harassment based on their sexual orientation, it does protect employees from sexual harassment by homosexuals. *See* Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (holding that but for the male employee's gender, a homosexual male supervisor would not have harassed him).

91. *Quick*, 895 F. Supp. at 1297 (quoting *DeSantis*, 608 F.2d at 329-30).

92. *See, e.g.*, King v. M.R. Brown, Inc., 911 F. Supp. 161, 163 (E.D. Pa. 1995); Wrightson v. Pizza Hut of Am., 909 F. Supp. 367 (W.D.N.C. 1995); Ecklund v. Fuisz Technology, Ltd., 905 F. Supp. 335 (E.D. Va. 1995); *Fredette*, 905 F. Supp. at 1038; *Quick*, 895 F. Supp. at 1292; Raney v. District of Columbia, 892 F. Supp. 283, 286 (D.D.C. 1995); EEOC v. Walden Book Co., 885 F. Supp. 1100, 1100 (M.D. Tenn. 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 539 (M.D. Ala. 1983); *Methodist Youth Serv.*, 511 F. Supp. at 308.

93. *See* Dillon v. Frank, No. 90-2290, 1992 WL 5436, at *5 (6th Cir. Jan. 15, 1992) ("[Homosexual male employee] contends that he was subjected to this abuse relating to homosexuality solely because he was a man. . . ."). *See generally* Marcosson, *supra* note 90, at 14 (concluding that Title VII recognizes harassment based on sexual orientation).

94. See *supra* note 87 for an example of how a supervisor may harass an individual because of his or her gender.

95. *See Joyner*, 597 F. Supp. at 539 (testifying that a male supervisor requested homosexual favors from a male subordinate).

In both same-gender harassment scenarios, sexual orientation is likely the motivating factor, otherwise if the employee had been of the opposite gender, he or she would not have suffered the harassment.[96] Therefore, the crucial inquiry to determine if such harassment was based on gender should not be whether the harasser selected the victim because of their sexual orientation.[97] Rather, courts must examine the nature of the harassing conduct and its impact on the victim relative to the treatment of members of the opposite gender.[98]

Similarly, same-gender harassment may occur when an alleged harasser harasses both men and women for failing to conform to the stereotypical vision of either gender.[99] Thus, when the alleged harasser denigrates an employee with an anti-orientation animus or propositions either men or women regardless of their sexuality, then the employee's gender plays a causal role in the harassment.[100] Thus, the harassment is based on the victim's sexual orientation *and* their gender.

However, if the alleged perpetrator harasses members of both sexes, the but-for-gender question is not easily answered.[101] Some courts and commentators suggest that one may escape liability by harassing homosexual men and women equally, or by harassing all men and women equally.[102] Others conclude that such conduct is more likely

---

96. *See* McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (allowing the plaintiff to prove that "her harasser only harassed women and, . . . did not treat men in a similar fashion").

97. *See, e.g.*, Williams v. District of Columbia, No. CIV.A.94-02727, 1996 WL 56100, at *7 (D.D.C. Feb. 5, 1996) (stating "Title VII makes no distinction based upon sexual orientation: the determinative question is not the orientation of the harasser, but whether the sexual harassment would have occurred but for the gender of the victim").

98. *See McCoy*, 878 F. Supp. at 232 (examining how a female harasser treated employees of the opposite gender).

99. *See* Marcosson, *supra* note 90, at 24-27.

100. *Id.*

101. *See* Ecklund v. Fuisz Technology, Ltd., 905 F. Supp. 335, 339 n.3 (E.D. Va. 1995) (arguing such a case does not constitute sex discrimination because there is no disparate treatment).

102. *See, e.g.*, Gross v. Burggraf Constr. Co., 53 F.3d 1531 (10th Cir. 1995) (finding plaintiff did not establish a discriminatory hostile work environment based on supervisor's harsh language while reprimanding all employees); Sheehan v. Purolator, Inc., 839 F.2d 99, 105 (2d Cir.) (noting that the sexual harassment claim was time-barred, but the record showed the supervisor's "temper was manifested indiscriminately toward men and women"), *cert. denied*, 488 U.S. 891 (1988). *See also* Murphy, *supra* note 2, at 1149 (discussing the possibility of an escape hatch for bisexual or equal opportunity harassers).

to create two sexual harassment claims.[103] This conclusion rests on the theory that harassment of men and women may differ in nature.[104]

Another question to consider is whether a harasser's or victim's homosexuality may save an otherwise inactionable same-gender harassment claim.[105] In *McWilliams v. Fairfax County Board of Supervisors*,[106] the Fourth Circuit, while dismissing a same-gender harassment claim,[107] suggested a claim involving a homosexual harasser or victim would be cognizable.[108] In essence, the *McWilliams* court required the plaintiff to prove the harasser's sexual orientation.[109]

To avoid this based-on-gender versus based-on-sexual-orientation dilemma, the court should disregard sexual orientation and focus on the nature of the harassing conduct and the gender of the parties.[110] This approach would eliminate the plaintiff's burden of proving "the 'true' sexual orientation of the harasser."[111] Conversely, consideration of the sexual orientation of the parties will bar hetero-on-hetero harassment claims even though such harassment may be as severe and pervasive as harassment by different sexes. Further, it signals tacit endorsement of gay-bashing conduct.

Courts should find harassment based on a victim's gender if the alleged harasser treated members of one sex differently.[112] Courts can answer this question without reference to sexual orientation. First, courts should ask whether the alleged harasser similarly harassed other employees not of the same gender as the plaintiff. Second, courts should

---

103. *See* Murphy, *supra* note 2, at 1148-49.

104. *Id.* (explaining how a supervisor harassed the men for their lack of prowess and harassed the women for being sexual objects).

105. *See supra* notes 15-18 and accompanying text.

106. 72 F.3d 1191 (4th Cir. 1996).

107. *Id.* at 1195. The court reasoned that Congress did not intend the word sex in Title VII to reach conduct concerning sex, but rather specifically gender. *Id.* at 1196.

108. *Id.* at 1195 n.4.

109. *Id.* at 1198 (Michael, J., dissenting).

110. *Id. See generally* Murphy, *supra* note 2; Calleros, *supra* note 3.

111. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1198 (4th Cir. 1996) (Michael, J., dissenting).

112. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372 (1993) (Ginsburg J., concurring) (stating that "t[h]e critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed").

examine the alleged harasser's specific words or acts and ask whether the plaintiff would have been subjected to either, had he or she been of the opposite gender.

The holding of *Wright v. Methodist Youth Services, Inc.*[113] followed this rationale. The *Wright* court found that but for the male employee's gender, a homosexual male supervisor would not have harassed him.[114] The plaintiff proved that the supervisor did not make the same demands on a female employee.[115] Even though Title VII does not protect homosexuals from harassment based on their sexual orientation,[116] the court in *Wright* held that Title VII did protect an employee from being sexually harassed by a homosexual.[117] As a result, a homosexual may be sued for sexual harassment, but may not have a remedial avenue if he is the victim of sexual harassment.

In contrast, the reasoning of *Goluszek* and *Garcia* does grant Title VII coverage to homosexual plaintiffs. A homosexual plaintiff can argue that, as a minority, he is vulnerable to domination by the majority population of heterosexuals.[118] Thus, when a supervisor harasses an employee because the employee is a homosexual male (i.e., the supervisor does not harass homosexual female employees), the supervisor is discriminating against a vulnerable group, which is consistent with the *Garcia* court's reading of Title VII.[119] Applying the *Garcia* court's rationale, a homosexual employee would have a valid claim under Title VII. The current trend indicates that courts are rejecting the reasoning of *Goluszek* and *Garcia*, and are approving same-gender claims based on an application of the but-for-gender test, which ignores sexual orientation.[120]

---

113. 511 F. Supp. 307 (N.D. Ill. 1981).

114. *Id.* at 310.

115. *Id.*

116. *See supra* notes 90-92 and accompanying text.

117. *Wright*, 511 F. Supp. at 310.

118. *See supra* notes 32-38 and accompanying text (discussing the abuse in power theory).

119. *See supra* notes 32-38 and accompanying text.

120. See *supra* notes 12 & 49 for a list of cases discussing the application of the but-for-gender test.

VI. CONCLUSION

Growing numbers of district courts allow same-gender sexual harassment claims under Title VII; however, it is difficult to predict whether circuit courts will follow suit. The lack of legislative history and the inconsistent interpretations of the statute's language signal disagreement among the circuits. The controversial factor of a litigant's sexual orientation need not complicate the process.

To apply Title VII to homosexual sexual harassment claims, the courts should ignore sexual orientation and focus on the harasser's conduct and the victim's gender. The alternate approach described in *McWilliams*, which requires proof of sexual orientation to satisfy the but-for-gender inquiry, may chill litigation if the victim is afraid of exposing his sexual orientation as a factor underlying the alleged harassment. In addition, if the courts apply a strict reading of Title VII that does not cover claims involving homosexual plaintiffs, the courts are in essence endorsing gay bashing in the workplace.

The Supreme Court or the United States Congress must address Title VII's application to same-gender harassment.[121] As the EEOC writes, "resolution of [this issue] is important to the EEOC's enforcement efforts and to an individual's ability to be free of employment discrimination in the workplace."[122]

---

121. In recent years a number of Representatives and Senators have introduced legislation directed at workplace discrimination based on sexual orientation. Although the appropriate committees have considered each proposal, they have not proceeded further in the legislative process. *See* H.R. 1863, 104th Cong., 1st Sess. (1995) (prohibiting employment discrimination on the basis of sexual orientation); H.R. 382, 104th Cong., 1st Sess. (1995) (amending the Civil Rights Act of 1964 to prohibit discrimination on the basis of affectional or sexual orientation); S. 932, 104th Cong., 1st Sess. (1995) (prohibiting employment discrimination on the basis of sexual orientation); H.R. 431, 103d Cong., 1st Sess. (1993) (prohibiting discrimination on account of sexual orientation, actual or perceived).

122. Amicus Curiae Brief of the EEOC at 1, Mayo v. Kiwest Corp., 898 F. Supp. 335 (E.D. Va. 1995). One commentator states:

> Cases that deny Title VII coverage to gay or lesbian same-gender harassment claims ultimately turn on the idea that there is some special exemption in Title VII to avoid protecting homosexuals. The result is to deny gays and lesbians the basic protections of Title VII. There is no principled way to distinguish such cases from those that do not involve homosexual litigants.

Telephone Interview with Samuel Marcosson, Appellate Counsel to the EEOC (Mar. 8, 1996). The referenced statement is purely the personal opinion of Mr. Marcosson and

*Cullen P. Cowley**

---

does not represent the views of the EEOC. *Id.*

See also Marcosson, *supra* note 90, at 31-32 (suggesting that only an express action by Congress or a Supreme Court decision declaring that homophobic or antigay harassment "is entitled to a specific exemption from the law forbidding offensive hostile work environments" can "avoid the conclusion that antigay harassment is included among the hostile work environments barred by Title VII," and pointing to the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), "when it simply carved out private homosexual conduct as a special category of conduct undeserving of protection under the constitutional right of privacy").

* J.D. 1996, Washington University.