Same-Gender Sexual Harassment: Is It Sex Discrimination under Title VII?

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SAME-GENDER SEXUAL HARASSMENT: IS IT SEX DISCRIMINATION UNDER TITLE VII?

I. INTRODUCTION

"Hey Stubby! Stop looking at your microscopic penis. It won’t help it grow. Get back to work!" If such a statement were made in the workplace by one male to another, could or should such a statement be the impetus for a sexual harassment charge under Title VII of the 1964 Civil Rights Act?1

After recent court decisions,2 it is unclear whether same-gender sexual harassment3 would be actionable as a form of sex discrimination under Title VII.4 Most people would agree that the above comment is rude and inappropriate workplace behavior. But, should victims of such harassment be allowed to file a federal discrimination claim against their employer?

Although sexual harassment between males and females has gained significant attention in recent years by both the public and the legal profession, same-gender sexual harassment is still not widely acknowledged.5 In many federal courts, same-gender sexual harassment is not actionable as discrimination under Title VII.6

It has, in fact, been less than a decade since sexual harassment was formally recognized and accepted as a form of

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2. See infra parts II.C-D, IV.
5. See discussion infra parts II.C-D, IV.C-D.
sex discrimination prohibited under Title VII.\textsuperscript{7} The United States Supreme Court first recognized that sexual harassment was actionable under Title VII in \textit{Meritor Savings Bank v. Vinson}.\textsuperscript{8}

Prior to its inclusion as a form of sex discrimination under Title VII, sexual harassment was not widely accepted as an injurious cause of action.\textsuperscript{9} The judiciary's recognition of the unique position of females in the workplace, however, has redefined the cultural meanings of interactions between males and females.\textsuperscript{10}

In other sexual discrimination suits not involving a claim of harassment, it is accepted that men complain of gender-based injuries.\textsuperscript{11} However, a majority of sexual harassment plaintiffs are women,\textsuperscript{12} and their complaints rarely have a "precise analogue in the experience of men."\textsuperscript{13}

In 1992, nine percent\textsuperscript{14} of the sexual harassment claims reported to the Equal Employment Opportunity Commission (EEOC) were filed by men.\textsuperscript{15} The previous year, only seven percent of the sexual harassment claims were by men.\textsuperscript{16} In 1982, a United States Merit System Protection Board study also found that fifteen percent of men reported having been sexually harassed at work within the preceding twenty-four months.\textsuperscript{17} However, neither the EEOC nor the Merit System Protection Board distinguished whether the complaints arose from situations where the man was harassed by another man or by a woman.\textsuperscript{18}

\begin{thebibliography}{9}
\bibitem{8} \textit{Id.} \textit{Meritor} is the only time the Supreme Court has ruled on the same-gender sexual harassment issue. \textit{Id.} However, with the conflicting lower court standards on same-gender sexual harassment, the Supreme Court should recognize a need for uniformity and grant certiorari to a Title VII same-gender sexual harassment case. \textit{See infra} parts II.C-D, IV.C-D.
\bibitem{10} \textit{Id.}
\bibitem{11} \textit{Id.} at 38.
\bibitem{12} \textit{Id.} at 38 n.3.
\bibitem{13} \textit{Id.}
\bibitem{14} \textit{Id.} at 38 n.3. Men filed 968 of the 10,577 total complaints. \textit{Id.}
\bibitem{15} \textit{Id.}
\bibitem{16} \textit{Id.}
\bibitem{17} Sandra S. Tangri et al., \textit{Sexual Harassment at Work: Three Explanatory Models}, 38 J. SOC. ISSUES 33, 42-43 (1982).
\bibitem{18} \textit{Id.; see also} Chamallas, \textit{supra} note 9, at 38 n.3.
\end{thebibliography}
Originally, federal courts were unwilling to recognize any sexual harassment actions brought under Title VII by males.\textsuperscript{19} As sexual harassment became an established cause of action, primarily through the work of the feminist movement,\textsuperscript{20} federal courts became more receptive to sexual harassment cases involving males.\textsuperscript{21} Title VII was found to protect both males and females.\textsuperscript{22} However, courts refused to allow homosexual harassment claims, because harassment based on an individual's sexual orientation is not covered under Title VII.\textsuperscript{23}

Even though some courts have stated that Title VII protection is also available to males,\textsuperscript{24} no cases have been decided in favor of a sexual harassment claim where the alleged sexual harassment was perpetrated solely by a heterosexual male against another heterosexual male.\textsuperscript{25} Many of the same-gender sexual harassment cases have involved homosexual or perceived homosexual conduct.\textsuperscript{26} In such cases, the

\textsuperscript{19} Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988) (disallowing claims for sexual harassment of a male because the plaintiff was employed in a predominantly male environment and males are not members of a protected class).

\textsuperscript{20} See \textsc{Catherine A. McKinnon, The Sexual Harassment of Working Women: A Case of Sex Discrimination} (1979).


\textsuperscript{26} Dillon v. Frank, 58 Empl. Prac. Dec. (CCH) ¶ 41,332 (6th Cir. Jan. 15, 1992) (complaining of graffiti on conveyor belts and loading trucks that said,
harassment by a homosexual was actionable, whereas if the victim of the harassment was a homosexual, it was not protected under Title VII. 27

Early development of sexual harassment law seemed to favor allowing claims by males against other males. 28 These early decisions allowed same-gender claims under Title VII but lacked extensive discussion of Title VII and its original purpose. 29 Title VII's original purpose was to prevent discrimination of certain groups of people in the workplace. 30 Same-gender sexual harassment was not contemplated by Congress. 31

However, the recent decisions of Garcia v. Elf Atochem North America, 32 Vandeventer v. Wabash National Corp., 33


31. See infra part II.A.
32. 28 F.3d 446 (5th Cir. 1994).
and Hopkins v. Baltimore Gas & Electric Co. and summarily concluded that same-gender sexual harassment is not a form of sex discrimination and is not protected by Title VII. The decisions by these three courts contain persuasive authority for other federal courts faced with Title VII sexual harassment cases filed by parties of the same gender.

This comment first traces the development of Title VII sexual harassment case law as it applies to same-gender sexual harassment, and examines the judicial reasoning of the courts in Garcia, Vandeventer, and Hopkins. This comment then compares these cases to the reasoning of other federal court decisions which allowed Title VII same-gender harassment claims under limited circumstances. Disparate judicial treatment of same-gender sexual harassment is also analyzed and compared with the intent and purpose behind sexual harassment law and Title VII. It is argued that same-gender sexual harassment does not have the same effects, nor does it further the goals of Title VII to empower the powerless and eliminate discrimination based on sex. Finally, this comment proposes that federal courts should follow the precedent set by Garcia, Vandeventer, and Hopkins. Title VII should not be applicable to same-gender sexual harassment, regardless of the sexual orientation of the parties. Rather, same-gender sexual harassment can be better handled and compensated using other judicial remedies. An alternative and more expedient remedy available to victims of same-gender sexual harassment is a cause of action for intentional infliction of emotional distress.

40. See discussion infra part II.C.
41. See discussion infra part II.A.
42. See infra part IV.A.
43. See infra part V.
44. See infra part V.
II. BACKGROUND

Title VII makes it unlawful for any employer "to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." Title VII, by its terms, prohibits only sex discrimination, not sexual harassment. However, according to the United States Supreme Court in Meritor Savings Bank v. Vinson, sexual harassment is a form of sexual discrimination under Title VII. Consequently, sexual harassment law was judicially created.

In order to better understand the implications of the disparate treatment of same-gender sexual harassment by various courts, the principles behind Title VII and the recognition of sexual harassment as a form of sexual discrimination must be examined and applied to same-gender harassment cases.

A. The Purpose of Sexual Harassment Law and Legislative Intent of Title VII

1. Legislative Intent of Title VII

The legislative history of Title VII does not indicate an intent to include sexual harassment. In fact, "sex" was a last minute addition to the legislation with little debate on the subject. The amendment was added by an opponent of the Civil Rights Act who intended to forestall the entire bill. The only debate on the amendment was an argument against it, that sex discrimination was different than other kinds of discrimination and should have its own separate legislation.

The Supreme Court recognizes that the doctrinal basis for classifying sexual harassment as sexual discrimination is to prevent and prohibit disparate treatment of employees be-

46. Id.
48. Id. at 63-64.
50. 110 CONG. REC. 2577 (1964).
51. Id.
cause of their sex. The Supreme Court has stated that the goal of Title VII is to provide equal employment opportunity for all members of society, regardless of their race, sex, national origin, etc. That goal is accomplished in part by imposing an affirmative duty on employers to maintain a working environment free of discriminatory intimidation such as sexual harassment. Judge Bork noted in Vinson that "Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove.

2. The Power Principle: What Is It?

Sexual harassment is often defined as "the exploitation of a powerful position to impose the sexual demands or pressures on an unwilling but less powerful person." The abuse of that power, in the form of sexual harassment, discriminates against members of a "discrete and vulnerable group," and it violates the civil rights of the victims. From this perspective, sexual harassment stems from the imbalance of power between men and women in society, and it is amplified when the relationship between the male and female becomes that of an employer and employee.

3. The Idea of Sexual Harassment as a Group Injury

The idea of "group injury" is derived from the perception that "women suffer because they are women, regardless of their unique qualities, and that men perpetrate [the suffering] because they enjoy economic power over women." An apt analogy for this dynamic is that "[e]conomic power is to sexual harassment as physical force is to rape." The pres-

54. See Meritor, 477 U.S. at 65.
57. Id.
59. See Note, supra note 56, at 1452.
61. MACKINNON, supra note 20, at 217-18.
ence or absence of a particular group's power in society qualifies sexual harassment as a form of sex discrimination. It logically follows that harassment based on sex is a "group injury."\(^{62}\)

B. **Hostile Work Environment Sexual Harassment**

1. **General Theories**

   Sexual harassment case law recognizes two theories under which sexual harassment may be claimed.\(^{63}\) The first, quid pro quo\(^{64}\) harassment, is the more familiar type of harassment. Quid pro quo sexual harassment occurs when a term of employment, or continued employment, is conditioned upon acceptance of unwelcome sexual advances.\(^{65}\) Harassment of this type includes "sexual propositions, unwarranted graphic discussion of sexual acts, comments on the employee's body and the sexual uses to which it could be put."\(^{66}\)

   Because quid pro quo harassment is universally accepted as egregious and results in discrimination for both sexes,\(^{67}\) this comment focuses primarily on the second class of sexual harassment actions, those charging discrimination based on a hostile or abusive work environment.\(^{68}\)

   According to case law\(^{69}\) and EEOC Guidelines\(^{70}\) an employer can be held liable for fostering hostile work environ-
Same-Gender Sexual Harassment if the following criteria are met: (1) the plaintiff is a member of a protected class; (2) the plaintiff is subjected to unwelcome verbal or physical conduct of a sexual nature; (3) the harassment complained of is based on sex; (4) the harassment alleged had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) there is respondeat superior liability.\(^7\)

By recognizing hostile environment sexual harassment claims, courts acknowledged that "employees have a right to a work environment free from denigrating comments, verbal abuse and other tactics of marginalization."\(^2\) However, this right is not absolute, and courts, through their interpretation of *Meritor* and close scrutiny of factual situations, have limited the scope of such claims.\(^7\) The question remains whether the courts will limit the use of hostile work environment sexual harassment claims to those between males and females or those involving claims against homosexuals, or whether the courts will expand their holdings to include all same-gender sexual harassment.

2. What Type of Behavior Creates a Hostile Work Environment?

In *Meritor*, the Supreme Court equated hostile sexual work environments to those of hostile racial environments,\(^7\) stating that "nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited."\(^7\) The Court established that, where a hostile work environment is created because of comments or conduct motivated strictly by a person's gender, the

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73. Dillon, 58 Empl. Prac. Dec. (CCH) at 70,106-07. Title VII punishes only those who deny their workers an environment free of abuse on the basis of certain attributes such as gender and race. *Id.*


75. *Id.*
actions are discriminatory and illegal. The Court concluded that Title VII is violated by a hostile work environment created by "discrimination based on sex." Since Meritor, courts have grappled with defining what kind of conduct was "based on sex." The Eleventh Circuit, in Henson v. City of Dundee, stated that "in proving a claim for hostile work environment due to sexual harassment . . . the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment."

The Seventh and Ninth Circuits recognize that "sex" as used in Title VII means "gender." Therefore, courts consistently have held that Title VII does not prohibit discrimination on the basis of sexual preference or orientation. Consequently, a male who was harassed by a supervisor who believed him to be a homosexual was not protected under Title VII. The motivation for this harassment was the victim's sexual orientation, not his gender.

3. Heterosexual Male Claims of Sexual Harassment

For a heterosexual male to state a claim for sexual harassment, he must prove that the harassment was directed toward him because he was a male. The harassing conduct need not be sexual in nature. Rather, it must have occurred because of the man's gender.

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76. See id.
77. Id.
78. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
79. Id.
80. Id. at 904 (emphasis added).
82. See Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989), cert. denied, 493 U.S. 1089; DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).
84. Id.
86. Dillon, 58 Empl. Prac. Dec. (CCH) at 70,108. The content of the harassing words is not the deciding factor in determining Title VII applicability. Rather, the inquiry is whether the harassment was motivated by the victim's sex. Id.
87. Id.
Deciding whether hostile conduct was directed toward someone because of his or her sex may seem a relatively easy standard. However, courts throughout the country find the standard difficult to apply, especially in situations involving conduct between males.88

There are two conflicting judicial interpretations regarding same-gender sexual harassment. One interpretation is that, by its nature, same-gender sexual harassment is not "based on sex" and is not actionable under Title VII.89 The other interpretation, however, looks at the facts of each harassment situation to determine whether the same-gender sexual harassment was based on sex.90 Invariably, under the latter view, if the harasser was a homosexual, then the harassment of a heterosexual was based on sex and was actionable under Title VII. However, if the victim was a homosexual, it was motivated by the victim's sexual orientation and was not actionable under Title VII.91


91. See discussion infra parts II.B-D, IV.C.
C. Development of Case Law Allowing Same-Gender Sexual Harassment in Limited Circumstances

Most courts have expanded Title VII's application beyond harassment of a female by a male. Many cases involving harassment exclusively between men have involved the more common form of sexual harassment, quid pro quo, where work conditions are dependent on acquiescence to sexual demands. Only a select few involve the less pervasive claim of hostile work environment.

Title VII's recognition of hostile work environment sexual harassment cases between males is important to the development of sexual harassment law. Such cases provide support for the assertion that Title VII is intended to apply to claims of sexual harassment "based on sex," without regard to the gender of the complainant or the harassing party.


In Parrish v. Washington International Insurance Co., the plaintiff alleged that physical contact between himself and his male supervisor constituted sexual harassment under Title VII. The complaint alleged a few isolated incidents of brushing sensations on the plaintiff's thighs while he was working with his supervisor. The court found that this was not actionable conduct because it was not sufficiently pervasive as to alter the conditions of employment.

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93. See discussion supra part II.A. Quid pro quo harassment involves acquiescing to sexual behavior in order to meet a term or condition of employment. Logically, such conduct is not and cannot be allowed under Title VII. See supra parts IV-V.


98. Id. at *3.

99. Id. at *3-*6.
In Parrish, the court stated, in dicta, that "unwelcome homosexual advances, like unwelcome heterosexual advances, are actionable under Title VII." The Parrish court reasoned that:

[i]f plaintiff complains of unwelcome homosexual advances, the offending conduct is based on the employer's sexual preference and necessarily involved the plaintiff's gender, for an employee of the non-preferred gender would not inspire the same treatment. Thus, unwelcome homosexual advances, like unwelcome heterosexual advances are actionable under Title VII.

The court in Parrish found only two prior cases that dealt with unwanted homosexual advances: Joyner v. AAA Cooper Transportation and Wright v. Methodist Youth Services, Inc. In both cases, the courts found that homosexual advances were actionable under Title VII as discrimination based on sex.

Parrish, Joyner, and Wright illustrate the judicial interpretation that same-gender sexual harassment is prohibited by Title VII, but only if the harassment is by a homosexual or perceived homosexual. It is unclear from this line of cases whether sexual harassment between two heterosexual males is prohibited under Title VII.

2. Chiapuzio v. BLT Operating Corp. and the Bisexual/Equal Opportunity Harasser

Parrish, Joyner, and Wright involved harassing conduct that was perceived as homosexual advances. Chiapuzio v. BLT Operating Corp. did not involve homosexual conduct. Rather, it concerned comments directed toward one heterosexual male by another heterosexual male, regarding the for-
mer's lovemaking abilities with his wife. This case was also unique in that the heterosexual male's complaint was filed in conjunction with that of his wife for the same sexually harassing conduct.

In *Chiapuzio*, a married couple was subjected to continuous sexually abusive remarks by their supervisor. Most of the remarks involved the supervisor's bragging about his superior sexual prowess, and the inadequacies of the married man in fulfilling his wife's sexual needs. Another plaintiff, a heterosexual male, was also subjected to similar remarks about his substandard libido.

The defendants argued that if the supervisor harassed both male and female employees, he could not be found to have discriminated against the plaintiffs based on their gender. The court found this argument flawed for several reasons, and it labeled the supervisor an "equal opportunity harasser" who was not insulated from liability under Title VII.

The "equal opportunity harasser," also referred to as the "bisexual harasser," was first recognized by the District of Columbia Circuit in a dissent by Judge Bork in *Vinson v. Taylor*. There, a "bisexual harasser" was defined as a supervisor who "makes unwanted sexual overtures to both men and women employees." In his dissent to the court's denial of a rehearing en banc, Judge Bork stated:

> Had congress been aiming at sexual harassment [in enacting Title VII], it seems unlikely that a woman would be protected from unwelcome heterosexual or lesbian ad-

108. *Chiapuzio*, 826 F. Supp. at 1334. The sexual orientation of the parties is not discussed in the case, but the assumption is that both males were heterosexual. *Id.*
109. *Id.* at 1335.
110. *Id.*
111. *Id.* at 1335-36.
112. *Id.* at 1335.
114. *Id.*
115. *Id.* at 1337-38.
vances but left unprotected when a bisexual attacks. That bizarre result suggests that Congress was not thinking of individual harassment at all [when it enacted Title VII] but of discrimination in conditions of employment because of gender. If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines.\textsuperscript{118}

The court in \textit{Chiapuzio} deduced that Judge Bork did not believe sexual harassment “fit comfortably” within the purview of Title VII.\textsuperscript{119} In \textit{Chiapuzio}, the court interpreted Judge Bork’s dissent to mean that if the courts were to use Title VII to prohibit sexual harassment in the workplace, then the courts would have to make “adjustments” in order to justify the use of Title VII.\textsuperscript{120} Legal doctrines such as the burden of proof for the plaintiff, as well as a different causation standard, were some of the adjustments that would be required.\textsuperscript{121} These adjustments made by each subsequent court led to the conflicting treatment of same-gender sexual harassment under Title VII.

D. Development of Case Law Prohibiting Same-Gender Sexual Harassment Claims Under Title VII

The \textit{Joyner}, \textit{Parrish}, \textit{Wright}, and \textit{Chiapuzio} cases were not the only federal cases to have addressed the issue of same-gender sexual harassment.\textsuperscript{122} Although, for the most part, same-gender cases were allowed under Title VII, the courts reached this conclusion without much discussion of Title VII and its intended purpose.\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{118} \textit{Vinson}, 760 F.2d at 1333 n.7 (Bork, J., dissenting).
  \item \textsuperscript{119} \textit{Chiapuzio} v. BLT Operating Corp., 826 F. Supp. 1335, 1337 (D. Wyo. 1993).
  \item \textsuperscript{120} \textit{Id}.
  \item \textsuperscript{121} \textit{Id}.
\end{itemize}
The view of allowing same-gender sexual harassment cases under Title VII was consistently followed until July 1994, when the Fifth Circuit Court of Appeals rendered its decision in Garcia v. Elf Atochem North America. The Garcia court resurrected the reasoning of the seemingly ineffective case of Goluszek v. Smith.

1. Goluszek v. Smith

The 1988 case of Goluszek v. Smith was one of the earliest cases to find that sexual harassment of a male by a male is not actionable under Title VII. In Goluszek, the plaintiff was an unmarried man who lived with his mother and worked in a predominately male work environment. Fellow co-workers made remarks about the plaintiff's limited sexual experiences and also teased him about being homosexual. The court held that the harassment by fellow male co-workers did not create an anti-male environment in the workplace and did not constitute actionable sexual harassment under Title VII.

The plaintiff was required to provide evidence that "but for his sex, he would not have been the object of harassment." Because the plaintiff was a male who worked in a predominately male environment, it was very difficult for him to prove that he was subjected to an environment that treated males as inferior.

The court concluded that, although the plaintiff may have been harassed because he was male, based on policy considerations, this type of harassment was "not the type of

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124. 28 F.3d 446 (5th Cir. 1994).
129. Id. at 1453-54.
130. Id. at 1456.
conduct Congress intended to penalize when it enacted Title VII.\footnote{133}

Subsequent federal courts, in \textit{Parrish} and \textit{Chiapuzio},\footnote{134} ignored the precedent set by \textit{Goluszek} and allowed sexual harassment claims between males under Title VII.\footnote{135}


\textit{Hannah v. Philadelphia Coca-Cola Bottling Co.} was an exception to the \textit{Parrish}, \textit{Joyner}, and \textit{Wright} decisions.\footnote{136} Although the \textit{Hannah} court did not explicitly rely on \textit{Goluszek}, it adopted the similar conclusion that the plaintiff, a heterosexual male working in a predominantly male environment, was not a member of a protected class.\footnote{137} Therefore, his claim was denied.\footnote{138} The incidents that were the basis for the sexual harassment claim in \textit{Hannah} included a supervisor’s kissing and hugging all employees regardless of their sex.\footnote{139} The claim also included one occasion where the plaintiff allegedly asked the harasser what he should do with the last bottle of a display of Coca-Cola that he had been merchandising, to which the supervisor replied, “Stick it up your ass.”\footnote{140}

The court did not determine or discuss the applicability of Title VII to same-gender sexual harassment.\footnote{141} Instead, the court simply concluded that the plaintiff did not present sufficient facts to satisfy a hostile work environment claim.\footnote{142} The court found that “the plaintiff was a heterosexual male employed in a heterosexual male environment,” and the plaintiff was not a member of a protected class for whom the hostile environmental theory of recovery was reserved.\footnote{143}

\begin{footnotes}
\item 133. \textit{Id}.
\item 134. See discussion supra part II.C.
\item 137. \textit{Hannah}, 56 Fair Empl. Prac. Cas. (BNA) at 1328.
\item 138. \textit{Id}.
\item 139. \textit{Id}. at 1327.
\item 140. \textit{Id}.
\item 142. \textit{Id}. at 1328.
\item 143. \textit{Id}.
\end{footnotes}
The court reasoned that employers must be protected from "the 'hypersensitive' employee."\(^{144}\) In this particular case, the court determined that the plaintiff must have been overly sensitive to have felt that the isolated incidents of vulgarity amounted to a hostile work environment.\(^{145}\) The Hannah court's decision was only the first in a line of cases that would ignore other federal courts' treatment of same-gender sexual harassment under Title VII, concluding that such harassment did not fall under the dictates of Title VII.\(^{146}\)

3. Garcia v. Elf Atochem North America

In July 1994, the Fifth Circuit Court of Appeals decided Garcia v. Elf Atochem North America.\(^ {147}\) In this case, the court stated unconditionally that "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones."\(^ {148}\) Title VII addresses gender discrimination.\(^ {149}\)

The plaintiff in Garcia complained on several occasions that his supervisor "approached [him] from behind and reached around and grabbed [his] crotch area and made sexual motions from behind [him]."\(^ {150}\) The court determined that the compensatory relief sought by Garcia was not available to him\(^ {151}\) and thus dismissed his case.\(^ {152}\) The alleged harassment took place prior to the enactment of the 1991 Civil Rights Act, which added punitive and compensatory re-

\(^{144}\) Id.

\(^{145}\) Applying the reasonable victim standard, the court in Hannah found that the language used in the Coca Cola Bottle incident ("stick it up your ass") was not sufficient to establish a hostile environment claim. Id. The court stated that "one would be hypersensitive if he found the isolated use of vulgarities constituted a hostile work environment." Id.

\(^{146}\) See supra part II.C.

\(^{147}\) Garcia, 28 F.3d 446 (5th Cir. 1994).

\(^{148}\) Garcia, 28 F.3d at 451 (quoting Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993), cert. denied, 115 S. Ct. 311 (1994)). The Fifth Circuit's decision in Giddens was not published and is not available from any electronic database or other service. Id.

\(^{149}\) Id. at 451-52; accord Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

\(^{150}\) Garcia, 28 F.3d at 448.

\(^{151}\) Id. at 449-50. Prior to amendment in 1991, Title VII allowed only injunctive relief, which was often criticized as being inadequate in sexual harassment cases. Krista J. Schoenheider, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. Pa. L. Rev. 1461, 1463 (1986).

\(^{152}\) Garcia, 28 F.3d at 450.
lief to the available remedies under Title VII. 153 Still, the court discussed the fact that same-gender sexual harassment is not actionable under Title VII. 154

In formulating its decision in Garcia, the court relied on Goluszek 155 and Giddens v. Shell Oil Co. 156 By reviving the earlier standard set in Goluszek, the court in Garcia established a new direction for federal courts to follow when applying Title VII to exclusively male sexual harassment cases. 157


Since the Fifth Circuit's decision in Garcia, two other federal courts have addressed the same issue. In Vandeventer v. Wabash National Corp., 158 the Indiana District Court also followed the reasoning of Goluszek and Garcia and dismissed the plaintiff's claims of sexual harassment under Title VII, on the grounds that same-sex harassment was not actionable under Title VII. 159 In Vandeventer, several defendants made comments directed toward the plaintiff, including calling him a "dick sucker" and wondering whether plaintiff "could perform fellatio without his false teeth." 160

The Vandeventer court agreed with the Goluszek analysis that "Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a 'dominant' gender." 161 The court found that the plaintiff was not subjected to an "anti-male" environment. 162 Rather, the court felt that the defendants simply "razzed" the plaintiff and found his "hot button and pushed it" by calling him a homosexual. 163 Additionally, the court stated, in dicta, that if the plaintiff felt he was in

154. Garcia, 28 F.3d at 450-52.
157. See generally Garcia v. ELF Autochem N. Am., 28 F.3d 446 (5th Cir. 1994).
159. Vandeventer, 867 F. Supp. at 793.
160. Id. at 796.
162. Vandeventer, 867 F. Supp. at 796.
163. Id.
fear of his safety, he had state law remedies available to him.\textsuperscript{164}

\textit{Vandeventer} not only reflected the federal courts' continued denial of protection under Title VII to same-gender sexual harassment, but it also offered alternative solutions, based on tort law, for the victim.\textsuperscript{166}


A recent case involving same-gender sexual harassment was decided on December 28, 1994.\textsuperscript{166} In \textit{Hopkins v. Baltimore Gas & Electric Co.},\textsuperscript{167} the court followed the reasoning of the Fifth Circuit in \textit{Garcia}, and that of the district courts in \textit{Vandeventer} and \textit{Goluszek}.\textsuperscript{168} The \textit{Hopkins} court held that Title VII “does not provide a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender.”\textsuperscript{169} The court stated that the use of Title VII in same-gender sexual harassment cases did not give effect to Congress’ intent to “strike at the entire spectrum of disparate treatment of men and women,”\textsuperscript{170} and that to apply Title VII to same-gender sexual harassment would “strain” the language of the statute “beyond its manifest intent.”\textsuperscript{171}

\textit{Hopkins} has added force to the federal courts’ decisions in \textit{Garcia} and \textit{Vandeventer}, which deny protection under Title VII to all same-gender sexual harassment. The \textit{Garcia}, \textit{Vandeventer}, and \textit{Hopkins} cases are in direct conflict with the \textit{Parrish}, \textit{Joyner}, \textit{Wright}, and \textit{Chiapuzio} courts, which grant protection of same-gender sexual harassment under Title VII.

III. IDENTIFICATION OF THE PROBLEM

Conflicting judicial decisions\textsuperscript{172} leave the federal courts with contradictory standards. If the federal courts follow \textit{Parrish}, \textit{Joyner}, \textit{Wright}, and \textit{Chiapuzio}, then same-gender

\textsuperscript{164} Id. at 796 n.2.
\textsuperscript{165} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 834.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Hopkins, 871 F. Supp. at 834.
\textsuperscript{172} See discussion supra part II.C-D.
sexual harassment is actionable under Title VII. Sexual harassment under Title VII would include the bisexual harasser, with perhaps the limiting instruction that in same-gender sexual harassment cases, Title VII should apply only to sexual harassment by a homosexual, and not against a homosexual.

However, if the federal courts agree with the decisions in Goluszek, Garcia, Vandeventer, and Hopkins, then no same-gender sexual harassment is actionable, regardless of the sexual orientation of the parties, the content of the harassing conduct, or whether the harasser is identified as a bisexual harasser. As the court in Vandeventer stated, other state law remedies are available to persons subjected to same-gender sexual harassment.

In Hopkins, Garcia, Goluszek, and Vandeventer, the courts did not examine what motivated the harassment of the male plaintiffs, or whether any of the parties were homosexuals. Rather, the courts removed all same-gender sexual harassment from the class of prohibited conduct under Title VII. Following Goluszek’s lead, the courts based their decisions on policy considerations, the goals of Title VII, and the idea that same-gender sexual harassment is not by its nature discriminatory.

As discussed above, the legislative history of Title VII does not by itself support the inclusion of sexual harassment as prohibited conduct under the act. Nor could the framers of the Civil Rights Act of 1964 have envisioned that the Act would be used to address sexual abuses in the workplace, especially since the term sexual harassment was not even used until the late 1970s. Congress was enacting a civil rights law meant to address the disadvantages and problems of individuals as a result of discrimination, and not a law that

173. See supra part II.D.
175. See discussion supra part II.D.
176. See discussion supra part II.D.
177. See discussion supra part II.D.
178. See supra part II.A.
would prohibit any kind of harassing act that might offend one person.\(^\text{181}\)

Because the court in Parrish accepted the rationale of Joyner and Wright without much scrutiny or extensive discussion of the legislative history and purpose of Title VII,\(^\text{182}\) the precedent of Joyner, Wright, and Parrish is precariously weak.

IV. ANALYSIS

The motivation behind recognizing sexual harassment as a form of discrimination under Title VII is that, commonly, the harassment based on sex is a result of the struggle between those in power. This struggle has in the past been mostly between men and women or other races that worked for them.\(^\text{183}\) Combined with this motivation is the additional effect that a person who sexually harasses another inflicts an injury on the entire gender by harassing an individual.\(^\text{184}\)

Same-gender sexual harassment, however, does not result in the same type of injury as would occur between males and females.\(^\text{185}\) The harassment is not a result of a power struggle between members of the same gender.\(^\text{186}\) Persons of the same gender usually do not suffer from the same imbalance of power that is present between males and females.\(^\text{187}\)

A. The “Power” and “Group Injury” Principles of Sexual Harassment Law

1. The Power Principle

Under Title VII, not all forms of harassment are actionable. Additionally, not all forms of verbal harassment with sexual overtones are actionable.\(^\text{188}\) Actionable sexual harassment under Title VII “is the exploitation of a powerful posi-

183. MACKINNON, supra note 20, at 28; Schoenheider, supra note 151, at 1461.
184. MACKINNON, supra note 20, at 172.
185. See Paul, supra note 60, at 352.
186. Id.
187. See infra part IV.A.
188. See discussion supra part II.A-B.
tion to impose sexual demands or pressures on an unwilling but less powerful person." 189 Sexual harassment fosters a sense of degradation in the victim by attacking his or her sexuality. 190 In effect, the offender is saying, by words or actions, that the victim is inferior because of the victim's membership in his or her gender group. 191

The problem with relying on the "power" principle to justify viewing sexual harassment as sexual discrimination, is that males, as well as females, can claim that they are victims of the stereotypical roles impressed upon them by a society that has historically repressed women. 192 According to Professor Paul, in her article Sexual Harassment as Sex Discrimination: A Defective Paradigm, men "are forced always to maintain an aura of invincibility and machismo; to shoulder responsibility for dependent women and children; to be enslaved to economic necessity for most of their adult lives; and to die early for their efforts." 193 Michael Douglas questioned the validity and soundness of the paradigm when he asked in the recent movie Disclosure, 194 if "sexual harassment is about power, when did I ever have the power?" 195

2. Sexual Harassment as a "Group Injury"

In addition to the power struggle analysis, early supporters of sexual harassment as a form of sex discrimination under Title VII were motivated by the notion that sexual harassment is a "group injury." 196

Professor Paul uses two examples to demonstrate the difference between sexual harassment used as a form of dis-

190. See Schoenheider, supra note 151, at 1464-65.
192. Paul, supra note 60, at 348.
193. Id. Professor Paul is making a generalization about male characterizations. It is arguable that homosexual men do not fit into this mold. Since sexual orientation is not a protected class under Title VII, this generalization of males is more appropriate to Title VII analysis.
194. DISCLOSURE (Warner Bros. 1995). Disclosure is a movie based on Michael Crichton's book about a man who is sexually harassed by his female boss. Id.
195. Id.
196. MACKINNON, supra note 20, at 172; Paul, supra note 60, at 349.
crrimination of a group, and harassment targeted toward an individual.  

[In the first situation, a] supervisor demands sexual favors in return for job benefits because of [his] sexual desire, and he selects his target because he finds her sexually attractive . . . . [In the second situation,] the supervisor refuses to hire, to promote, or to reward a female employee as he would a comparable male, because he has an animus of some sort against women.

The difference between the two situations is that in the former, the supervisor does not harass the female because she is a woman, but rather, because she is beautiful. In the latter example, the woman is discriminated against because she is a member of a certain group, regardless of her individual qualities. Professor Paul also uses examples to demonstrate how discrimination has historically been motivated by inflicting injury on individuals because of their membership in a group. Professor Paul states that “Nazis despised all Jews, not just those with certain attributes; South African apartheid [was] directed at all Blacks, not just those with certain features; Jim Crow laws were aimed at all Blacks.”

The recognition of sexual harassment as a form of sex discrimination was motivated by the understanding that sexual harassment was a way to perpetuate the power struggle between genders, and by the view that sexual harassment as inflicted on a member of a group was an insult and injury to all members of that gender.

B. Same-Gender Sexual Harassment Is Not Discriminatory

1. Defining Discriminatory Behavior

When, in Meritor, the Supreme Court first endorsed a sexual harassment and hostile work environment cause of action under Title VII, it stated, “Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.” In Harris v. Forklift

198. Id.
199. Id.
200. Id. at 350.
201. See discussion supra part IV.A.1.
Systems, Inc.,\textsuperscript{203} the Supreme Court consistently referred to a “discriminatorily” abusive or hostile environment. Therefore, to establish a cause of action of sexual harassment under Title VII, the work environment must not only be hostile, but it must be hostile on a discriminatory basis.

Although it is difficult to define exactly what constitutes discrimination, the classic understanding is that discrimination against a member of the group necessarily attaches the same scorn or negative stereotype to all members of the group.\textsuperscript{204} If one adheres to the “group injury” theory of discrimination, then discrimination can be defined as “harming someone or denying someone a benefit because that person is a member of a group that the discriminator despises.”\textsuperscript{205}

\section*{2. Discriminatory Behavior and Same-Gender Sexual Harassment}

With the above definition, same-gender sexual harassment cannot, by its nature, be considered sex discrimination under Title VII.\textsuperscript{206} In a situation where the harasser and the victim are of the same sex, the harasser is not trying to ridicule or scorn the victim because he is male.\textsuperscript{207} Rather, the harasser is really

preferring or selecting one member of his own gender for attention, however unwelcome that attention may be to the other person. The harasser most likely does not despise or want to adversely affect the entire group [gender], nor does he wish to harm its members, since he himself is a member.\textsuperscript{208}

Most Title VII cases involve inter-group discrimination.\textsuperscript{209} The one exception has been the willingness of the courts to recognize harassment by a homosexual against a heterosexual member of the same sex.\textsuperscript{210}

\begin{itemize}
\item \textsuperscript{203} 114 S. Ct. 367, 370-71 (1993).
\item \textsuperscript{204} See Paul, supra note 60, at 350.
\item \textsuperscript{205} Id. at 352.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 n.1 (D. Wyo. 1993) (quoting Paul, supra note 60, at 351-52).
\item \textsuperscript{209} Paul, supra note 60, at 352.
\end{itemize}
However, taking into consideration the "power" and "group injury" theories behind sexual harassment, all same-gender sexual harassment by its nature cannot be a form of sex discrimination.\footnote{Paul, \textit{supra} note 60, at 352; Note, \textit{supra} note 56, at 1451-52.} Men do not have comparable power over other men as they historically have had over women.\footnote{See \textit{BABCOCK}, \textit{supra} note 58, at 195-99.} Although it can be argued that there exists a power struggle between members of the same sex, the motivation and reasons behind that power struggle are generally not the same as those between the sexes. When a male uses his position of power to intimidate another male, he does so not because the employee is male, but because he is in control. However, in the situation where a male asserts his authority to ridicule a female, he is more likely motivated by the fact that she is a woman rather than because she is a subordinate worker.

Furthermore, it does not logically follow that a member of the same gender would, through his harassing conduct of another man, intend to injure or degrade the entire male gender group of which he is a member.\footnote{Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 n.1 (D. Wyo. 1993) (quoting Paul, \textit{supra} note 60, at 351-52).}

Harassment by a member of the same sex does not have the same effect as the harassment by a male of a female, or vice versa.\footnote{But cf. Note, \textit{supra} note 56, at 1451-52. The problems that women have had with bringing sexual harassment cases is that often their male harassers do not understand that their conduct is offensive to women. \textit{Id.} This difference in understanding between males and females "indicates a lack of social consensus on appropriate standards of behavior." \textit{Id.} This lack of understanding by males tends to support the proposition that males have a similar perception from which they view the world. \textit{Id.} This proposition, of course, does not take into account ethnic or racial norms which may affect one's understanding of appropriate behavior, which is beyond the scope of this comment.} In recent years, studies have shown that there is an increased incidence of conduct in the workplace that women find to be sexually harassing.\footnote{\textit{Id.} at 1451 n.9.} These studies also suggest that what women often find to be offensive is not similarly perceived by men.\footnote{\textit{Id.} at 1451 & n.10.} In fact, many of the men found the conduct or comments to be "harmless and innocent."\footnote{\textit{Id.} at 1451 nn.10-11.} However, when the harassment is inflicted on a person of the
same gender, the perspectives can be the same.\textsuperscript{218} The effect of sexual harassment is dependent on an individual's sensitivity level.\textsuperscript{219}

A logical analogy is to compare the distinction between homosexual pornography and traditional heterosexual pornography. In homosexual pornography, both participants are male. To the extent there is any objectification or violence depicted, both the perpetrator and the victim are male. There is no "other" against whom these degradations are committed. Conversely, in traditional male-centered heterosexual pornography, women are routinely shown in degrading and subservient positions. There is a distinct dominant class, men, and a subjugated class, women.\textsuperscript{220}

3. Application of the Reasonable Victim Standard

Courts often use the "reasonable victim" standard to determine whether there is actionable sexual harassment.\textsuperscript{221} The reasonable victim standard is defined as a reasonable person of the same gender as the victim.\textsuperscript{222} Additionally, in order to establish a prima facie case for sexual harassment under Title VII, the harassment must be "sufficiently severe and pervasive as to alter the conditions of [the victim's] employment and create a hostile or abusive work environment."\textsuperscript{223} Courts have stated that employers should be protected against the "hypersensitive employee."\textsuperscript{224}

Under the above standards and conditions, a claim of harassment by a person of the same gender would be hard to prove because of the difficulty in ascertaining what conduct a reasonable man would tolerate. The necessary inquiry would

\begin{itemize}
  \item \textsuperscript{218} See discussion supra part IV.A.1.
  \item \textsuperscript{220} See Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 Tex. L. Rev. 1097, 1137 nn. 174-75 (1974).
  \item \textsuperscript{223} E.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).
\end{itemize}
be whether a reasonable man — not a reasonable homosexual man — would find the work environment to be hostile.

One of the dangers of the reasonable victim standard is that it is more likely that the more dominant in the group — namely, white, affluent, heterosexual males — will be construed as representative of the whole group.\(^\text{225}\) A jury composed of men and women would probably find it very difficult to decide that a male subjected to sexual jokes or teasing from another male had to endure a work environment that was sufficiently pervasive as to create a hostile work environment.\(^\text{226}\)

Same-gender sexual harassment is not an injury to a group, but rather is focused on the individual victim. On the other hand, an argument often used against imposing liability for male-female sexual harassment is that the harasser is not intentionally trying to hurt the victim by his words or actions, but he does not realize he is offending her.\(^\text{227}\) Because he lacks the same perspective as the female, he does not understand how the victim feels about being harassed with sexual innuendoes.\(^\text{228}\) However, when the harasser and the victim are of the same gender, they must know how the words will affect their victim because they have, at least, a similar perspective.\(^\text{229}\)

4. Sexual Conduct in the Workplace

Research and literature support the above assertion that there are differences in the way sexual conduct in the workplace is perceived by men and women.\(^\text{230}\) Kathryn Abrams argues that men consider sexual comments and conduct as "comparatively harmless amusement."\(^\text{231}\) When sexual comments or conduct are directed toward them, men are more apt to find it harmless and even flattering, but they are un-

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225. Cf. Chamallas, supra note 9, at 50-51. Chamallas critiques the use of the reasonable woman standard in male on female sexual harassment. Id. The analysis in that situation is analogous to the use of the reasonable man standard in same-gender sexual harassment cases.


227. See Note, supra note 56, at 1451.

228. See supra part II.B.


231. Abrams, supra note 229, at 1203.
likely to consider it insulting or intimidating.\textsuperscript{232} Abrams refers mainly to harassment between a man and a woman, but she notes that her conclusions “might be different if a man were harassed by a gay male employer or supervisor.”\textsuperscript{233} But as discussed below,\textsuperscript{234} the treatment by the court of harassment of a heterosexual male by a homosexual has been found to be prohibited sex discrimination under Title VII.\textsuperscript{235} However, if the stigma of being harassed by a homosexual did not exist, then a heterosexual male subjected to sexual jokes or innuendoes from another heterosexual male would not feel as threatened. Furthermore, such same-gender harassment is not a form of discrimination and should not be actionable under Title VII.\textsuperscript{236}

Same-gender sexual harassment, whether perpetuated by or against a homosexual, is not sufficient to indicate a discriminatory work environment hostile to men. That an otherwise reasonable man would be highly offended by homosexual jokes or pictures is not enough. This man must reasonably feel that the homosexual depictions strike at his gender as a class, or at him personally because of his gender. Still, there is no clear interpretation of what same-gender sexual harassment means. Does a homosexual harass another man because he is a male, or because the harasser is a homosexual? How does the victim perceive the harassment? Does he feel threatened and ridiculed because he is a heterosexual being harassed by a homosexual or because he is man? There are no clear answers to these questions, and the courts do not offer any solutions to these interpretive problems. Rather, the courts confuse the issues by varying their treatment of same-gender sexual harassment under Title VII.

\begin{footnotes}
\footnotetext[232]{Id. at 1206.}
\footnotetext[233]{Id.}
\footnotetext[234]{See infra part IV.C.}
\footnotetext[236]{See discussion supra part IV.B.}
\end{footnotes}
C. Disparate Treatment of Same-Gender Sexual Harassment and Sexual Orientation Harassment

In Garcia, Hopkins, and Vandeventer, the courts articulated a general standard that same-gender sexual harassment is not actionable sex discrimination under Title VII.\(^{237}\) The facts of these cases, discussed above,\(^{238}\) included a mixture of heterosexual conduct and other actions which the victims perceived as being homosexual.\(^{239}\) Prior to the ruling in Garcia, courts distinguished between harassment by a homosexual, which is covered under Title VII, and harassment of a homosexual, which is not.\(^{240}\) Both the Garcia and Hopkins courts, while denying relief under Title VII to victims of same-gender harassment, did not address the prior inconsistent treatment of harassment by and against homosexuals in the federal courts. Rather, the Garcia, Hopkins, and Vandeventer courts concluded that Title VII does not cover same-gender sexual harassment, does not differentiate between the two situations, and denies relief under Title VII to all same-gender sexual harassment cases, even those of heterosexual males who are harassed by homosexual males.\(^{241}\)

This conflict leaves the federal courts with an interesting dilemma. If the courts follow Garcia, Vandeventer, and Hopkins, then heterosexual males harassed by homosexual males because of their sex will not be protected, even though the circumstances are similar to when a female is harassed by a male.\(^{242}\) However, a female who is repeatedly harassed by a male because she is an attractive woman, would have a Title VII claim.\(^{243}\)


\(^{238}\) See discussion supra part II.D.1-5.

\(^{239}\) See discussion supra part II.D.1-5.

\(^{240}\) See discussion supra part II.C.

\(^{241}\) See discussion supra part II.D.

\(^{242}\) See supra part IV.C. A heterosexual male harassed by a homosexual male because he is desired sexually, is the general equivalent to when a female is harassed by a male, or vice versa.

The Parrish, Joyner, and Wright courts would argue that a male who is repeatedly harassed by another male because he is good looking and sexually desirable would also have a claim under Title VII. In the same-gender harassment example above, the harasser is most likely a homosexual, since he has sexual desires for another man. Adhering to the standard of Parrish, Joyner, and Wright, a court faced with such a situation would likely find that the heterosexual male was harassed because of his sex. Similar to the situation where the female is harassed because she is sexually desired by her male harasser, so is the male who is harassed by the homosexual. However, if the courts follow Parrish, Joyner, and Wright, then only some males are protected.

In Parrish, the male plaintiff alleged that his male supervisor brushed up against his thighs and buttocks. In dicta, the court stated that unwelcome homosexual advances are actionable under Title VII, unlike harassment of homosexuals. However, as the court in DeSantis v. Pacific Telephone and Telegraph Co. stated, harassment of a homosexual is not based on gender but rather is based on sexual preference, which is not one of the forbidden categories in Title VII. On the other hand, harassment by a homosexual is based on gender because the harasser prefers the victim's gender, and if the employee is not of the preferred gender, he would not have inspired the harassing treatment by the homosexual.

Another example of a federal court decision that harassment based on sexual preference or orientation is not actionable is Carreno v. Local Union No. 226. In Carreno, the court rejected a Title VII claim for harassment based on the plaintiff's homosexuality because the harassment was moti-
vated by the fact that the plaintiff was a homosexual, not be-
cause he was male.

In Dillon v. Frank,251 the Sixth Circuit also examined the
legislative intent of Congress in enacting Title VII252 and the
plain meaning of the language of the statute.253 The court
concluded that a traditional interpretation of the word "sex"
as meaning gender was intended.254 "Sex" was added to the
legislation along with other "immutable characteristics,"255
like race, color, and national origin, or "almost immutable
characteristics such as religion."256

D. Comparison of the Bisexual Harasser and the Same-
    Gender Harasser

A bisexual harasser is one who harasses both males and
females to the same extent.257 For several years, numerous
courts of appeal have recognized, in dicta, that the sexual
harassment of an employee of either gender by a bisexual
harasser would fall outside the scope of Title VII.258 How-
ever, with the decision in Chiapuzio v. BLT Operating
Corp.,259 harassment by a bisexual harasser would be covered
and thus prohibited by Title VII.260 In Chiapuzio, the court
reasoned that "[t]he equal harassment of both genders does
not escape the purview of Title VII."261

In Chiapuzio, the supervisor, through his comments to
the men,262 intended to demean and humiliate them because
they were males.263 The court concluded, therefore, that the
nature of the supervisor's conduct indicated that he harassed

252. See supra part II.A.
253. See supra part II.A.
255. Norris & Randon, supra note 249, at 239.
256. Id.
    1993).
258. See, e.g., Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986),
    cert. denied, 481 U.S. 1041 (1987); Hensen v. City of Dundee, 682 F.2d 897, 902
    (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981).
261. Id.
262. The defendant made comments to plaintiffs regarding their inability to
    sexually please their wives. Id.
263. Id.
the males because of their gender, and such conduct was actionable under Title VII.264

But one should question whether the court allowed this claim because it was filed in conjunction with the traditional female/male sexual harassment, or whether the court was propounding that anytime there is same-gender sexual harassment, regardless of the circumstances, it is actionable under Title VII. The court does seem to suggest that a bisexual harasser is insulated from liability by either females or males simply because both are harassed,265 but the court does not discuss whether the same-gender sexual harassment is by itself discriminatory.266 The court seemed to treat the same-gender harassment by the bisexual harasser as contemporaneous with the more traditional harassment by the male of a female.267 The federal courts' treatment of the same-gender harassment as such leaves open the question whether same-gender harassment by itself is discrimination. Is it simply an individual injury which would be better dealt with under a tort theory, rather than under Title VII?

V. PROPOSAL

A. Same-Gender Sexual Harassment Should Not Be Sexual Harassment Under Title VII

According to Chiapuzio, Parrish, Joyner, and Wright, if the victim is a heterosexual, then he is protected by Title VII, and if the victim is a homosexual, then he is not protected.268 Federal courts, however, should follow the lead of Garcia, Vandeventer, and Hopkins, and deny relief for all same-gender sexual harassment under Title VII.269 According to the courts in Garcia, Vandeventer, and Hopkins, same-gender

264. Id. at 1338.
266. See id.
267. Id.
sexual harassment is not actionable as sexual discrimination under Title VII.  

Such harassment is not the type of conduct that sexual harassment law was meant to deter. A clear standard, such as the one proposed by the Garcia line of cases, would eliminate the inconsistent decisions resulting from situations when either the victim or the harasser is homosexual or a perceived homosexual.

Federal courts have repeatedly maintained that sexual preference is not protected under Title VII.  

Ironically, the Parrish line of cases allow such claims. These courts apply Title VII to claims where a man is harassed by a homosexual. When a homosexual male harasses a heterosexual male, the harassment is assumed to be motivated by the harasser's sexual preference for men. In this scenario, the victim feels harassed because he himself is a heterosexual. Allowing him protection from harassment by a homosexual under Title VII is inherently an issue of sexual orientation. However, here the sexual preference is heterosexual rather than homosexual.

If federal courts were to question the sexual orientation of persons involved in a Title VII sexual harassment case, the issues could become even more confusing. If courts find that one man harassing another man is a function of homosexuality, then logically an argument can be made that a man sexually harassing a female is a function of his heterosexuality. This would make all sexual harassment discrimination claims an issue of sexual preference, and not hostile work environments.


Also, considering the "power" principle, both females and homosexuals have historically been in positions of less power.\footnote{273} Yet, if the \textit{Parrish} line of cases is followed, the historically powerless homosexual who is harassed by the heterosexual male, the historically powerful one, has no recourse under Title VII. However, in the contrary situation, where the harasser is the homosexual, the heterosexual male would be protected under Title VII.\footnote{274} This result is entirely antagonistic to the "power" principles behind the creation of sexual harassment law.\footnote{275}

Sexual harassment between two males is sufficiently different than harassment between the sexes to deny it protection under Title VII. This is not to say that victims of same-gender sexual harassment are not hurt or injured by this behavior. Rather, Title VII is not the appropriate remedy. Title VII was enacted to prohibit sex discrimination. The fact that the courts have continuously failed to recognize that harassment of a homosexual is not discrimination, and that harassment by a homosexual of a heterosexual is protected, is evidence of the courts' reluctance to regulate all harassing behavior in the workplace. The federal courts must articulate a consistent standard to apply to workplace harassment.

B. Victims of Same-Gender Sexual Harassment Have Other Available Remedies

1. Tort Remedies

Even if \textit{Hopkins}, \textit{Garcia}, and \textit{Vandeventer} become the standard throughout the country, victims of same-gender sexual harassment will not be left without a judicial remedy. Several states have separate statutes prohibiting sexual harassment in the workplace with standards more lenient than those imposed by Title VII.\footnote{276} Victims of sexual harassment can sue their harasser under a tort theory of liability, such as

\footnote{273}{See \textit{MacKinnon}, supra note 20, at 174-75.}
\footnote{275}{See supra part IV.A.1.}
\footnote{276}{\textit{E.g.}, Mogilefsky v. Superior Court, 26 Cal. Rptr. 2d 116, 121 (Ct. App. 1993) (holding that "based on sex" protects all sexes, regardless of sexual orientation).}
intentional infliction of emotional distress. The employer could also be sued under a theory of respondeat superior, if the employer knew of the harassment and did not take reasonable measures to deter the injurious situation.

Although this proposition is not entirely novel, its limited application to situations involving same-gender sexual harassment is new. Previous suggestions of creating a separate sexual harassment tort cause of action applied to all sexual harassment, not just those involving parties of the same gender. Professor Paul, in her article Sexual Harassment as Sexual Discrimination: A Defective Paradigm, argues, the subsumption of sexual harassment under Title VII's ban on sex discrimination in employment has no basis in either the language or the legislative history of Title VII, generates numerous doctrinal difficulties and anomalies, and should be reconsidered and rejected in favor of a new common law tort of sexual harassment.

Another commentator suggests treating sexual harassment as a tort rather than discrimination under Title VII, because Title VII remedies are "grossly inadequate" to diminish the detrimental effect on women's economic opportunities and physical and emotional well-being. However, this suggestion to treat all sexual harassment as a tort was made prior to the passage of the 1991 Civil Rights Act, which added compensatory and punitive damages as remedies available under Title VII. Therefore, the concerns of this commentator are cured by the passage of the 1991 Amendment.

Many commentators have opposed applying tort remedies to sexual harassment "because they consider the problem societal — not personal." Another argument against sexual harassment as a tort is that under tort law, sexual harassment would only be viewed as an injury to an individ-

277. Treating sexual harassment as a tort has been suggested by two different authors. See Paul, supra note 60; see also Schoenheider, supra note 151.
278. Paul, supra note 60, at 359; Schoenheider, supra note 151.
279. Paul, supra note 60, at 359.
280. Schoenheider, supra note 151, at 1462.
281. Id.
282. Id.
284. Paul, supra note 60, at 360.
ual's dignity.\textsuperscript{285} Sexual harassment as a tort would ignore the "group injury" aspect of sexual harassment.\textsuperscript{286}

The negative resistance to allowing a separate sexual harassment tort cause of action for all sexual harassment rather than an action under Title VII, would not be a problem if the remedy applied only to same-gender sexual harassment. The arguments against sexual harassment as a tort do not apply to same-gender sexual harassment. Same-gender sexual harassment is not an injury to a group, but rather is focused on the individual victim.\textsuperscript{287} Moreover, sexual harassment is often perpetuated by a co-worker, but under Title VII, compensatory relief is unavailable for co-worker harassment.\textsuperscript{288} Thus, the individual's rights would be better served by tort compensatory remedies, than by Title VII's remedies.\textsuperscript{289}

Title VII provides that where conduct of an employer is discriminatory, the court may order action "which may include, but is not limited to reinstatement or hiring of employees, with or without back pay, ... or any other equitable relief as the court deems appropriate."\textsuperscript{290} Compensatory and punitive damages are not available under Title VII for conduct occurring before the enactment of the Civil Rights Act of 1991.\textsuperscript{291}

Likewise, if an employee does prevail in a Title VII lawsuit, fellow employees, or even the employer, may be hostile to the plaintiff, and relations may become so strained that an injunction or reinstatement under Title VII would not be preferable.\textsuperscript{292}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{285} Id.
\item \textsuperscript{286} See supra part IV.A.2.
\item \textsuperscript{287} See supra part IV.
\item \textsuperscript{289} See 42 U.S.C § 2000e-5(g) (1992).
\item \textsuperscript{290} Id.
\item \textsuperscript{291} See Landgraf v. USI Film Prods., 968 F.2d 427, 431 (5th Cir. 1992), aff'd, 114 S. Ct. 1483 (1994).
\end{itemize}
\end{footnotesize}
2. **Intentional Infliction of Emotional Distress**

Victims of repeated sexual harassment often suffer from emotional distress as well as physical problems. The tort of intentional infliction of emotional distress is a perfect model for a potential cause of action for sexual harassment.

The Restatement (Second) of Torts defines the tort of intentional infliction of emotional distress as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." According to section 46 of the Restatement (Second) of Torts, "mere insults, indignities, threats, annoyances, petty oppression or other trivialities will not be sufficient to cause liability."

For the victim of same-gender sexual harassment, this theory of recovery provides a particularly strong chance for recovery of monetary rewards. The fact that the tort is defined in terms of the actor's conduct almost assures an award for punitive damages. Punitive damages are also a vital deterrent to harassing in the first place. This cause of action would sufficiently protect would-be harassers from the overly sensitive person, as well as provide adequate compensation for those who truly are emotionally damaged by the sexual harassment, even though the standards for a cause of action for intentional infliction of emotional distress are difficult to establish.

Already, most Title VII sexual harassment cases are often combined with state tort causes of action. If same-gender sexual harassment is not actionable under Title VII, then a whole class of cases will be removed from federal court jurisdiction. This result would provide better judicial economy in the federal system, and it would allow the state courts to decide the appropriate state law tort action.

VI. **Conclusion**

As Professor Paul stated in her article, "[t]he law is supposed to look to acts whether criminal or tortuous,[sic] to de-
termine culpability and not to the individual characteristics of the perpetrators, that is precisely what is meant by the rule of law." If federal courts follow the reasoning in Chiapuzio, Parrish, Joyner, and Wright, and treat same-gender sexual harassment as actionable under Title VII depending on whether the harasser is a homosexual or heterosexual, the whole rule of law in this area would be undermined. Case decisions would continue to be inconsistent. Decisions would depend on the individual judge's interpretation of the facts. What one court could consider harassment based on homosexual behavior, such as a kiss on a cheek, another court could decide the opposite.

However, if the federal courts follow Garcia, Vandeven-ter, and Hopkins, and find that all same-gender sexual harassment is not actionable under Title VII, then the courts would have a clear standard to follow. This clear standard would provide courts with a definite guideline to follow when dealing with same-gender sexual harassment cases. This standard is justified because of the unique, individual effects of same-gender sexual harassment. The treatment of such conduct as discrimination under Title VII is not appropriate given the original intentions of recognizing sexual harassment as a form of sex discrimination.

Although same-gender sexual harassment would not be actionable under Title VII, a man who is harassed at work by another man would not be left without a legal remedy. He could complain to his employer and try to rectify the situation, or he could bring a claim for intentional infliction of emotional distress.

A line must be drawn between judicial treatment of sexual orientation sexual harassment and same-gender sexual harassment if the courts are to apply Title VII consistently. There are any number of situations of sexually harassing behavior that can be imagined involving various combinations of gender and sexual orientations. Although this comment focuses mainly on male to male, or homosexual male and heterosexual male sexual harassment, many other combinations

297. Paul, supra note 60, at 351.
298. See supra part IV.
299. See supra part V.
are possible. It is not the job of the courts to referee workplace behavior. The courts should focus their attention, when applying Title VII, to types of sexual harassment that advance the purposes of Title VII to eliminate invidious discrimination in the workplace. The function of the court is not to teach manners, but to apply the law.

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300. Other examples include harassment of a lesbian by a heterosexual female, a homosexual harassing another homosexual, or a female harassing another female.

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