The "Undifferentiating Libido": A Need for Federal Legislation to Prohibit Sexual Harassment by a Bisexual Sexual Harasser

Robin Applebaum

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THE "UNDIFFERENTIATING LIBIDO": A NEED FOR FEDERAL LEGISLATION TO PROHIBIT SEXUAL HARASSMENT BY A BISEXUAL SEXUAL HARASSER

I. INTRODUCTION

Allison Stern recently graduated from law school ranked third in her class. Immediately thereafter, she began working as an associate with Emerson, Emerson & Hoffman, a highly regarded Urban City litigation firm. She began her day at 5:00 a.m. The long commute gave her an opportunity to proofread the briefs that kept her working until midnight. Although the hours were grueling, she knew that her commitment was an investment in her future. She had a great deal of respect for the attorneys at the firm, especially her supervising partner, Daniel Emerson, whose confidence in her was invaluable.

A few months after Allison began working for Emerson, conditions began to change. Daniel Emerson retired and Ronald Austin was promoted to the senior partner of Allison's division. Her success at Emerson depended upon Ronald's evaluation.

Initially, Allison respected Mr. Austin. However, as the weeks passed, he began to make comments about her appearance, making her feel uneasy. Shortly thereafter, Austin's subtle comments progressed into constant overt physical and verbal sexual propositions, creating an unbearable working environment.

Two months later, Allison resigned. She met with an employment attorney to discuss any appropriate legal actions against her former employer. Title VII of the Civil Rights Act of 1964 ("Title VII") afforded her protection because the firm fell within the jurisdiction

1. This is a fictional story for illustrative purposes only. All names, places and events have been made up. Any similarity to real names, places and events is purely coincidental.

of the statute. Her state also has a discrimination statute similar to Title VII. Moreover, Allison could have also sought various tort remedies, one of which is intentional infliction of emotional distress.

After consulting the Equal Employment Opportunity Commission guidelines, Allison's attorney was confident that she had a prevailing case. Austin made "unwelcome advances [and] requests for sexual favors . . . that create[d] an intimidating, hostile or offensive environment." Consequently, her attorney contacted the EEOC which conducted an investigation and subsequently dismissed the claim. Allison and her attorney were unaware that Ronald Austin was also behaving the same towards Michael, another associate in the office. Since both a man and a women were being harassed in the same fashion, Title VII affords no protection to either victim.

The individual who sexually harasses both sexes alike, the bisexual sexual harasser, presents a troubling anomaly. There is a federal statute protecting women from sexual harassment in the workplace by males and males from sexual harassment by females. Some courts have even extended this protection to victims of harassment.

3. See 42 U.S.C. § 2000e(b) which in pertinent part states, "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." Id.

4. To establish a cause of action for intentional infliction of emotional distress, one must by extreme and outrageous conduct intentionally or recklessly cause severe emotional distress to another. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).


7. Id.

8. See 42 U.S.C. § 2000e (1994); see also Barnes v. Costle, 561 F.2d 983, 990 (D.D.C. 1977) (holding that Title VII states a cause of action for sexual harassment); see also infra notes 12-43 and accompanying text.

9. See 42 U.S.C. § 2000e (1994); see also Dillon v. Frank, 58 Fair Empl. Prac. Cas. (BNA) 90, 94 (E.D. Mich. 1990) (dismissing the complaint of a homosexual employee alleging sexual harassment on the basis of sexual orientation, stating that "a discriminatory practice is unlawful when it occurs because an individual is male or female" and not on the basis of sexual orientation).
by members of the same sex as their victims.\textsuperscript{10} However, no legislation provides a remedy to those harassed by a bisexual harasser.\textsuperscript{11}

This note addresses the inadequacy of federal and state causes of action addressing the bisexual sexual harasser. An analysis is made by examining the evolution of the law of sexual harassment. It then sets forth the reasoning behind the disparity among the courts on the issue of providing a Title VII remedy to victims of same-sex sexual harassment. Following, is the rationale for excluding the bisexual sexual harasser from liability and the problems associated with this exclusion, such as the lack of available state law remedies. Finally, it suggests the need for federal legislation prohibiting all sexual harassment in the workplace.

II. SEXUAL HARASSMENT UNDER TITLE VII

Congress enacted the Civil Rights Act of 1964 to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [certain] employees over other[s],"\textsuperscript{12} with regard to "compensation, terms, conditions, or privileges of employment."\textsuperscript{13} Because "sex" was inserted as a protected classification only one day prior to its passage,\textsuperscript{14} the legislative history provides no assistance as to the scope of "sex" within the purview of Title VII.\textsuperscript{15}

Although early courts recognized sexual harassment as a problem,\textsuperscript{16} they did not interpret Title VII to encompass sexual harass-


\textsuperscript{11} See Barnes, 561 F.2d at 990 n.55.


\textsuperscript{13} 42 U.S.C. § 2000e (1994). Title VII provides in pertinent part: "It shall be an unlawful employment practice for an employer 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... sex...." 42 U.S.C. § 2000e-2(a) (1994).


\textsuperscript{15} See Corne, 390 F. Supp. at 163; see also Michelle Ridgeway Pierce, Sexual Harassment and Title VII—A Better Solution, 30 B.C. L. Rev. 1071 (1989). Historically, Title VII was applied in a variety of situations. See id at 1072. For example, the outright exclusion of women from particular jobs and restrictions that have a disproportionate impact on women but not on men. See id.

\textsuperscript{16} See, e.g., Corne, 390 F. Supp. at 163 (stating that the supervisor "was satisfying a personal urge").
ment in the workplace. The first case to address this issue was *Come v. Bausch and Lomb, Inc.*, in which, the court held that the employment practice must be derived from company policy to be actionable. The court opined that the supervisor’s behavior “appears to be nothing more than a personal proclivity . . . .” It was also concerned that “an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.”

Despite initial ambivalence, courts soon began to recognize sexual harassment under Title VII. By permitting Title VII sexual harassment claims under a quid pro quo theory, courts required that tangible job benefits are made contingent upon sexual compliance. In doing so, they used a “but for” standard to determine whether the harassment constituted sex discrimination.

Courts thereafter began considering “terms, conditions, or privileges of employment” to include the state of psychological well-being at the workplace in a racial context. Thus, an employer violates Title VII by creating or condoning an environment at the workplace which significantly affects an employee because of his race or ethnicity, regardless of any tangible job detriment.

17. *See id.* at 163-65.
19. *See id.* at 163.
20. *Id.* (holding that even if the female employees were subjected to verbal and physical advances from superiors, there was no right to relief under Title VII).
21. *Id.*
23. *Id.* at 990. Under a theory of quid pro quo harassment, the corporate defendant is strictly liable for the supervisor’s harassment. *See Prescott v. Independent Life & Accident Ins.,* 878 F. Supp. 1545, 1549 (M.D. Ala. 1993). Hostile environment sexual harassment, however, only imputes liability upon the corporate defendant when the harassment was known to the employer or the employer should have been aware of the harassing conduct. *See Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1981); *see also infra* notes 36-40 and accompanying text.
24. *See Barnes*, 561 F.2d at 990. The court held that “but for” her womanhood, the plaintiff’s supervisor would not have solicited her participation in the sexual activity. *See id.*
26. *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (stating that Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination).
27. *See id.*
In the early 1980's, courts began to analogize sexual harassment to racial harassment.28 Both situations created a hostile or offensive environment for members of their respective groups.29 Such severe harassment becomes discriminatory because it deprives the victim of the right to participate in the work place on equal footing with others similarly situated.30 Hence, sexual harassment is "every bit the arbitrary barrier to sexual equality in the workplace that racial harassment is to racial equality."31 The EEOC has since issued guidelines on sexual harassment.32 In pertinent part, the guidelines provide:

unwelcome sexual advances and requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.33

Subsequent to judicial acceptance and the EEOC guidelines, the Supreme Court in Meritor Savings Bank v. Vinson34 expressly accepted the EEOC's interpretive guidelines, recognizing for the first time that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive working environment.35 Title VII thus affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult.

To establish a prima facie case of hostile work environment sexual harassment plaintiffs must show that: (1) the employee belongs to a protected group;36 (2) the employee was subjected to unwel-

28. See Henson, 682 F.2d at 902.
29. See id.
30. See Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986) (citing Henson, 682 F.2d at 902).
31. Id.
33. Id.
34. 477 U.S. 57 (1986).
35. See id. at 66-67. The court reasoned that an employer who creates or condones a work environment which is discriminatorily hostile or abusive to members of a protected class, such as blacks or women, is thereby discriminating with respect to terms and conditions of employment. See id.
36. See Henson, 682 F.2d at 903 (requiring a simple stipulation that the employee is a man or a woman).
come sexual harassment;\(^37\) (3) the harassment was based upon sex;\(^38\) (4) the harassment affected a term, condition or privilege of employment\(^39\) and (5) the employer knew or should have known of the harassment.\(^40\)

The courts apply the same “but for” analysis to hostile environment as to quid pro quo harassment.\(^41\) The analysis requires a determination as to whether the employee would have been harassed “but for” the employee’s gender.\(^42\) Since Title VII does not explicitly limit claims to women, men may also commence a Title VII action for sexual harassment.\(^43\)

III. SAME-SEX SEXUAL HARASSMENT AND THE DISPARITY AMONG THE CIRCUITS

There is a disparity among the district and circuit courts as to whether Title VII affords protection to victims who have been harassed by members of the same sex. To date, the Supreme Court has not granted certiorari to a case addressing same-sex sexual harassment. The District of Columbia District Court was first to examine this issue in dicta in *Barnes v. Costle*.\(^44\) The court stated:

[that there is no reason why sexual harassment] could [not] be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. The legal problem would be identical to that confronting us now [between a male supervisor and a

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37. See id. The EEOC regulations define the conduct that constitutes sexual harassment as “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature...” 29 CFR § 1604.11(a) (1996).

38. See Henson, 682 F.2d at 903.

39. See id. at 904. “For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.” Id. To be actionable, the conduct “need not seriously affect an employee’s psychological well-being... Title VII comes into play before the harassing conduct leads to a nervous breakdown.” Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). So long as the environment would reasonably be perceived and is perceived as hostile or injurious, there is no need for it also to be psychologically injurious. See id.

40. See Henson, 682 F.2d at 905.

41. See id. at 904; see also Barnes v. Costle, 561 F.2d 983, 990 (D.D.C. 1977).

42. See Henson, 682 F.2d at 903; see also Barnes, 561 F.2d at 990.

43. See Henson, 682 F.2d at 903.

female subordinate] the exaction of a condition which, but for his or her sex, the employee would not have faced.\textsuperscript{45}

Relying on the language in \textit{Barnes}, the Northern District of Illinois, in 1981, decided \textit{Wright v. Methodist Youth Services, Inc.}\textsuperscript{46} Wright, like \textit{Barnes}, was based upon a quid pro quo harassment theory.\textsuperscript{47} A male employee was discharged because he rejected homosexual advances made toward him by his supervisor.\textsuperscript{48} The court held that discharging an employee because he rejected homosexual advances made by his male supervisor is a violation of Title VII.\textsuperscript{49}

The Middle District of Alabama in \textit{Joyner v. AAA Cooper Transportation}\textsuperscript{50} also directly addressed quid pro quo same-sex sexual harassment.\textsuperscript{51} The court in \textit{Joyner} held that the plaintiff established a prima facie case of sexual harassment, notwithstanding the harasser and the victim were members of the same sex.\textsuperscript{52} The courts readily held that quid pro quo harassment existed between members of the same sex because all that is required is that a supervisor conditions the terms of employment on the employee’s surrendering to the supervisor's sexual demands.\textsuperscript{53}

Until 1990, \textit{Joyner} and \textit{Wright} were cited as the only reported decisions dealing with same-sex sexual harassment.\textsuperscript{54} Courts had little difficulty recognizing a Title VII claim between members of the same sex.\textsuperscript{55} In 1990, the court in \textit{Parrish v. National Insurance Co.}\textsuperscript{56}
stated that it would have found a cause of action for same-sex hostile environment harassment, however, the claim was dismissed because the nature of the conduct did not rise to the level of sexual harassment.\textsuperscript{57} In \textit{EEOC v. Hacienda Hotel},\textsuperscript{58} female employees alleged sexual harassment by two supervisors, male and female.\textsuperscript{59} Although the court did not specifically address the same-sex issue, it ruled that the harassment altered the terms and conditions of employment, thus permitting a hostile environment sexual harassment claim between members of the same sex under Title VII.\textsuperscript{60}

Following what seemed to be judicial acceptance of the premise that same-sex sexual harassment was a viable claim under Title VII, was a line of cases refusing to extend Title VII coverage to such harassment victims.\textsuperscript{61} They have all relied on the reasoning of a 1988 district court case, \textit{Goluszek v. Smith}.\textsuperscript{62}

\textit{Goluszek} involved a young man who had “never been married nor had he lived anywhere but at his mother's home.”\textsuperscript{63} He came from an “unsophisticated background” and “blushe[d] easily and [wa]s normally sensitive to comments pertaining to sex.”\textsuperscript{64} Goluszek’s co-workers subjected him to ongoing sexually explicit comments regarding his lack of sexual experience and his sexual orientation.\textsuperscript{65} The court found that his co-workers harassed him because of his gender and that a jury could conclude that the employer would have attempted to cease the harassment had the

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\textsuperscript{57} See Parrish, 1990 WL 165611, at *6-7 n.2; see also Showalter, 767 F. Supp. at 1205 (concluding that a cause of action exists where a supervisor coerced plaintiffs to both observe and engage in a sexual relationship between him and a female employee). \textit{But cf.} Polly v. Houston Lighting & Power Co., 825 F. Supp. 135, 137 (S.D. Tex. 1993) (holding that it is not necessary to decide this issue in the present case, but approving the applicability of Title VII to same-sex sexual harassment in hostile environment claims).

\textsuperscript{58} 881 F.2d 1504 (9th Cir. 1989).

\textsuperscript{59} See \textit{id.} at 1507-08.

\textsuperscript{60} See \textit{id.} at 1515-16. This court focused on the severity of the conduct. See \textit{id.; see also} Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186 (1st Cir. 1990) (declaring that a Title VII cause of action existed for sexual harassment between members of the same sex, but determined that the alleged conduct did not constitute sexual harassment).

\textsuperscript{61} See \textit{infra} note 77 and accompanying text.

\textsuperscript{62} 697 F. Supp. 1452 (N.D. Ill. 1988).

\textsuperscript{63} \textit{Id.} at 1453.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} See \textit{id.}
plaintiff been a woman. However, the court nonetheless granted summary judgment in favor of the defendant. The court's rationale for denying Title VII protection for same-sex sexual harassment was a reading of Title VII, which was, in their view, "consistent with the underlying concerns of Congress." The court held that the defendant's conduct was not the type of conduct Congress intended to prohibit when it enacted Title VII. It reasoned that the goal of Title VII is equal employment opportunity which was accomplished in part by imposing an affirmative duty on employers to maintain a working environment free from discriminatory intimidation. The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by superiors which resulted in discrimination against "a discrete and vulnerable group." In essence, the offender is inferring that the victim is inferior because of his or her sex. Because throughout the times of the alleged harassment, Goluszek was a male in a male dominated atmosphere, the court determined that, although he may have been harassed because he was male, this was clearly not the kind of harassment which created an anti-male environment in the workplace.

The Fifth Circuit, in Garcia v. ELF Atochem North America, held that harassment by a male supervisor against a male subordinate does not establish a Title VII claim.

66. Id. at 1456. The court found evidence that the employer reacted differently to female claims of sexual harassment. Id. at 1455.
67. See id. at 1456.
68. Id.
69. See id.
70. See id.
71. Id.
72. Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable. The 'sexual harassment' that is actionable under Title VII is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.
73. Id. However, Title VII has consistently been applied to claims brought by a member of a dominant race against a minority. See McDonald v. Santa Fe Trial Transp. Co., 427 U.S. 273, 279 (1976); see also Prescott, 878 F. Supp. at 1550.
74. See Goluszek, 697 F. Supp. at 1456.
75. See id.
Since Garcia, many federal courts have refused to uphold a Title VII sexual harassment claim for hostile environment same-sex sexual harassment. However, some courts, since Garcia, have recognized a cause of action for same-sex sexual harassment under Title VII even though it seems as if the language of the statute would be "strained beyond its manifest intent" for the court to hold that discrimination exists in a same-sex context. These courts rely on the premise that Title VII is not expressly limited to heterosexual discrimination. If Title VII was intended to outlaw only heterosexual discrimination, it would have expressly done so. On the contrary, all that is required is that the plaintiff be a member of a protected group. Even where same-sex sexual harassment exists, these courts have essentially concluded that but for the plaintiff's sex, the victim would not have been harassed.

Some courts have reasoned that the availability of reverse discrimination claims pursuant to Title VII is evidence that same-sex cases should proceed. They also criticize Goluszek because its rationale relies on legislative history that does not exist in congressional records, but cites to a student note written before the Supreme Court decided Meritor Savings Bank v. Vinson.
A recent court of appeals decision addressing this issue is *McWilliams v. Fairfax County Board of Supervisors*. This decision contributed an interesting twist to the same-sex dilemma. A male employee brought a claim under Title VII for sexual harassment by two male co-workers. The court held that, because the alleged harassers were males and the plaintiff did not proffer evidence that the harassers were homosexual, there was no cause of action under Title VII. The Fourth Circuit required a finding of homosexuality to establish a cause of action for same-sex sexual harassment under Title VII. To hold otherwise, the court reasoned, the harassment could never be "but for" the victim's sex. Many courts have since held that the perpetrator's homosexuality in a same-sex sexual harassment claim is an essential element. Consequently, in *Wrightson v. Pizza Hut of America, Inc.*, with facts very similar to those in *McWilliams*, the plaintiff was able to state a cause of action because the harasser in *Wrightson* was homosexual.

Congress did not anticipate sexual harassment when it enacted Title VII, especially as applied to modern cases. This is evidenced by the last minute insertion of and the lack of legislative intent to

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85. 72 F.3d 1191 (4th Cir. 1996).
86. See id. at 1193.
87. See id. at 1195-6.
88. See id.
89. See id. But see Jones v. Commander, Kansas Army Ammunitions Plant, 147 F.R.D. 248, 252 (D. Kan. 1993). The court stated that evidence of the sexual preference is irrelevant because the issue is whether or not the plaintiff was sexually harassed, not whether the alleged perpetrator was or could have been sexually interested in the victim because of the perpetrator's sexual preference. The key in a sexual harassment case is the perspective of the victim, i.e., whether or not a reasonable victim or person would believe that he or she was being sexually harassed.
92. See id.
include sex among the protected classes. However, sex has been a protected class since 1964 and survived the 1991 amendments. Furthermore, Congress has not shown its disapproval of the application of Title VII to sexual harassment claims, evidenced by the fact that it has been applied since the late 1970s. Since the Supreme Court in Meritor, all courts must recognize that sexual harassment between members of the opposite sex is prohibited pursuant to Title VII. As discussed previously, courts are split as to whether same-sex sexual harassment is cognizable under Title VII. Those who disapprove of Title VII expansion to same-sex cases argue that the “but for” standard illustrates the inherent problems with interpreting sexual harassment within the scope of Title VII. Because a same-sex sexual harasser targets only members of his or her sex, the requisite discriminatory intent is absent.

Despite the Supreme Court's recognition of sexual harassment as a form of sex discrimination prohibited by Title VII, commentators still argue that including sexual harassment within Title VII is inappropriate. They contend that judicial expansion of Title VII is improper because Congress did not give much thought to the inclusion of sex, much less to sexual harassment, in the statute. “What Congress intended was to equalize job opportunities, not regulate sexual activity in the workplace.” The argument is still being made that sexual harassment is directed at an individual. These commentators discern that when a supervisor harasses an employee, he or she is satisfying a personal urge and the harass-
moment is not an attack upon the entire gender. The willingness to expand Title VII stemmed from the difficulties associated with bringing sexual harassment claims under a tort theory. One court reasoned that so long as women remain inferior to men in the workplace, they would have little protection against harassment.

Apparently, Title VII was extended to sexual harassment because the behavior is repulsive and should be curbed. With no alternative, it is treated as a violation of Title VII. In a dissenting opinion from a denial of a rehearing en banc, Judge Bork appreciated the doctrinal difficulty in this area due to the “awkwardness of classifying sexual advances as discrimination.” He stated, “[h]arassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove.”

IV. THE BISEXUAL SEXUAL HARASSER: A PERPLEXING LOOPHOLE

One major problem with classifying sexual harassment under Title VII is, regardless of how offensive the harassment, if done bisexually, it is legally permissible.

Had Congress been aiming at sexual harassment, it seems unlikely that a woman would be protected from unwelcome heterosexual or lesbian advances but left unprotected when a bisexual attacks. That bizarre result is evidence that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender.

Yet, sexual harassment is a problem.

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105. See id. at 1093.
108. See Bundy, 641 F.2d at 945 (questioning, “[H]ow [can] sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual’s innermost privacy, [can] not be illegal.”)
109. Vinson, 760 F.2d at 1333 n.7.
110. Id.
111. See id.
112. Id.
[U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [to the extent that it] either affects an individual's work performance or creates an intimidating, hostile or offensive environment, or where submission to or rejection . . . is used as a basis for employment decisions\textsuperscript{113}

is so inappropriate in the working environment, that it appears abhorrent to our social fabric to permit it.\textsuperscript{114} When a supervisor uses his or her position of power to create such a situation, it seems disconcerting, regardless of the sexual preference of the harasser or the history of the particular harasser's harassing conduct.

The bisexual sexual harasser is most often known as the sexual harasser who harasses both men and women,\textsuperscript{115} however courts and commentators have varying definitions.\textsuperscript{116} One author defines the bisexual sexual harasser in terms of the supervisor's sexual orientation.\textsuperscript{117} In this context, the bisexual sexual harasser is the harasser who is bisexual, but may only single out one sex.\textsuperscript{118} One case recognized this confusion and although dismissing the complaint on procedural grounds, it stated

\begin{quote}
the Court notes that the language in Barnes could be interpreted to prohibit Title VII sexual harassment cases any time a supervisor is bisexual. Alternatively, the language could mean that a supervisor is only immune from Title VII sexual harassment suits when there is evidence that the supervisor has actually harassed members of both sexes.\textsuperscript{119}
\end{quote}

If the bisexual sexual harasser is a supervisor who has a bisexual orientation, but happens to single out one sex, the definition of bisexuality could create problems. This definition could often be very subjective and easily utilized as an affirmative defense.\textsuperscript{120}

\begin{footnotes}
\textsuperscript{113} 29 C.F.R. § 1604.11 (1996). \\
\textsuperscript{114} See McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996) ("[T]here perhaps 'ought to be a law against' such puerile and repulsive workplace behavior . . . in order to protect the victims against its indignities and debilitation, but we conclude that Title VII is not the law."). \\
\textsuperscript{115} Raney v. District of Columbia, 892 F. Supp. 283 (D.D.C. 1995) (holding that the bisexual harasser only describes an individual who harasses members of both sexes). \\
\textsuperscript{116} See Ruth Colker, A Bisexual Jurisprudence, 3 L. & Sex 127 (1993). \\
\textsuperscript{117} See id. \\
\textsuperscript{118} See id. \\
\textsuperscript{120} See generally Colker, supra note 116, at 127. The author insists that from a bisexual perspective, "blatant homophobia" underlies this rule exempting bisexuals from liability. Id.
\end{footnotes}
Under this definition, if the "but for" standard controls the determination of whether sexual harassment is actionable and the supervisor is sexually attracted to both sexes the standard is impossible to satisfy. However, the most accepted definition of the bisexual sexual harasser is one who harasses members of both sexes. Since McWilliams, it is unclear whether the defendant must establish bisexuality.

The loophole for the bisexual harasser can potentially cause supervisors to harass both sexes to avoid liability from harassing one, thus leaving victims without recourse. Moreover, society is becoming more open minded toward varying sexual preferences. Therefore, a straight supervisor could find it less humiliating today to lie about his sexual preference to avoid liability than he would have found it in the past. Furthermore, if a bisexual supervisor would normally single out one sex, he could be more likely to harass the other to escape liability.

121. See supra notes 42-43 and accompanying text.

122. See supra note 90 and accompanying text.

123. See Raney, 892 F. Supp. at 288 ("[O]nly in the rare case when the supervisor harasses both sexes equally can there be no discrimination. If however, the supervisor singles out one sex, then the protections of Title VII are invoked.").

124. See McWilliams, 72 F.3d at 1195. It would, however, be difficult not to show that the harasser is bisexual in the case of a bisexual sexual harasser because the defendant would have to prove that he is treating both sexes alike, unless the court does not distinguish between the bisexual sexual harasser and the equal opportunity harasser as the court did in Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wy. 1993). See also infra notes 131-38 and accompanying text. Unlike McWilliams, in the case of a bisexual sexual harasser, it would be the employer that would have to prove bisexuality. This has the potential for causing great confusion because the cases since McWilliams have required the victim of same-sex sexual harassment to show evidence that the harasser is either homosexual or bisexual. See supra notes 86-92 and accompanying text.

125. See discussion of the options afforded to sexual harassment victims discussed in Part IV infra.

126. See Colker, supra note 116, at 135.
Technically, Title VII should not provide a remedy to victims of bisexual harassment because the harasser is treating both sexes alike and therefore, the requisite “but for” standard can never be satisfied. However, the male supervisor may only sexually harass one woman, despite working among several. Similarly, in a same-sex sexual harassment situation, not everyone of the harasser’s gender will be harassed. The “but for” standard is not necessarily “but for” the victim’s sex, rather “but for” the employer’s sexual attraction to the employee, the employee would not have been harassed.127

Since many courts have stretched Title VII beyond its original legislative intent, they might contemplate stretching it to include the bisexual sexual harasser as well.128 The “but for” standard is inappropriate, but because this issue is forced into the rubric of sex discrimination, there is no alternative. Although sexual harassment may be improperly included under Title VII, the behavior should be proscribed somewhere. Without protection for victims of bisexual harassment, the message courts are sending is not, don’t sexually harass, but rather, harass everyone and, depending upon the court, fake your sexual orientation.129 It may be worth avoiding liability for you or your employer. This is because “only the differentiating libido runs afoot of Title VII.”130

Fortunately, one court has provided Title VII protection to victims of the equal opportunity harasser, distinguishing it from the bisexual sexual harasser.131 Where men and women are both subjected to harassment, a plaintiff can prove discrimination on the basis of sex by showing that members of the opposite sex were

128. Courts have even extended Title VII to include situations where a fellow employee was given preferential treatment because the employee granted the employer sexual favors. See Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983); see also Pierce, supra note 127, at 1090. But see Ayers v. American Tel. & Tel. Co., 826 F. Supp. 443 (S.D. Fla. 1993) (holding that favoring a paramour or disfavoring a non-paramour does not constitute a violation of Title VII).
129. See Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wy. 1993) (differentiating between the bisexual and equal opportunity harasser, noting that there is a viable claim against the equal opportunity harasser who, although harasses men and women, does not harass them “alike”).
treated differently. In *Chiapuzio v. BLT Operating Corp.*, the supervisor subjected women to "an incessant series of sexually abusive remarks" and also made harassing comments to a male employee about his wife. In this case, Title VII prohibited the harasser's conduct. Because the supervisor's comments to the man were about his wife and were directed to the women personally, the harasser essentially differentiated between the women and the man. Consequently, the harasser was not a bisexual sexual harasser, but rather, an equal opportunity harasser whose behavior is prohibited by Title VII.

V. CONFUSION ASSOCIATED WITH THE EXCLUSION OF THE BISEXUAL SEXUAL HARASSER

In cases where the harasser treats men and women alike, the question arises as to whether the harasser's sexual preference becomes an issue, as was required in *McWilliams.* Making sexual orientation a jury question is dangerous. Enough liability may facilitate lying. In the case of the supervisor, his job may be at stake if he causes the employer to be liable.

What could end up being central to a claim is the definition of bisexuality. Is it someone who is attracted to members of both sexes? Is it someone who has had sexual relations with both sexes? Is it someone who, at one time experimented with a member of the same sex, but has since been married for twenty-five years to someone of the opposite sex? Do we want juries making a determination

132. See Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1994) (rejecting the district court's conclusion that supervisor's harassment of men and women alike precluded plaintiff's claim of sexual harassment, stating that male supervisor's use of sexual insult's against male as well as female employees does not cure supervisor of sexual harassment claims by employees and noting "we do not rule out the possibility that both men and women working at Showboat have viable claims . . . for sexual harassment"); see also *Chiapuzio*, 826 F. Supp. at 1337-38 (permitting a Title VII sexual harassment claim where supervisor harassed both men and women so long as the plaintiff demonstrates that harassment was based upon his or her sex).


134. Id.

135. See id. at 1335.

136. See id. at 1336. In essence, if the supervisor had been bisexual and harassed both employees alike, Title VII would not have prohibited his conduct towards both the male or female employees. Thus, the supervisor's sexual orientation invariably becomes an issue. See id.

137. See discussion supra notes 86-92 and accompanying text.

by using their stereotypes of bisexuals to ascertain whether there is a Title VII cause of action? Moreover do we want to spend the time on extrinsic evidence determining the supervisor's sexual orientation? Will that entail trying to locate former sexual partners of the harasser?

The validity of the previous harassment presents another problem. All of the courts that have eluded to this issue deal with concurrent harassment. Suppose a woman is currently being sexually harassed by her male supervisor. She sues for sexual harassment under Title VII and discovers that ten years ago, the supervisor made sexual advances towards a man. What would be the just result? Does the jury then have to determine the validity of the sexual harassment of his previous victim by determining whether plaintiff established a prima facie case? Is it logical for the viability of an actionable Title VII claim to depend on whether the former victim comes forward and not on the conduct or its effect on the victim?

VI. PROBLEMS WITH ALTERNATIVE CAUSES OF ACTION

If there were alternatives for victims of the bisexual sexual harasser, excluding them from liability under Title VII would not appear so troubling. Common law tort claims are available to plaintiffs, notwithstanding that their sex discrimination claim under Title VII would not survive summary judgment in the case of a bisexual sexual harasser. Unfortunately, the elements are difficult to satisfy in most sexual harassment claims. Intentional infliction of emotional distress, assault and battery are common causes of action for sexual harassment victims.

The tort of intentional infliction of emotional distress protects conduct that "go[es] beyond all possible bounds of decency and [is] regarded as atrocious, and utterly intolerable in a civilized society." One might argue that this tort would apply to all sexual harassment claims because bringing sex into the workplace seems "atrocious, and utterly intolerable in a civilized society," how-

139. Consequential and punitive damages are available in tort claims, however, there is a cap under Title VII. See 42 U.S.C. § 1981A (1994).
140. Restatement (Second) of Torts § 46 (1965).
141. Id. §46 cmt.(d) (1965).
142. Id.
ever, satisfying the elements of intentional infliction of emotional distress is extremely difficult.

A cause of action for intentional infliction of emotional distress requires that the plaintiff demonstrate (1) extreme and outrageous conduct on the part of the defendant, (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress and (3) severe or extreme emotional distress. What makes this even more difficult is that often victims do not experience emotional distress, yet it does not make the harasser's conduct any more acceptable.

Sexual harassment is easier to establish than a claim for intentional infliction of emotional distress. This is because the Supreme Court in *Harris v. Forklift Systems, Inc.*, declared that there is no requirement that the conduct seriously affect the employee's psychological well-being. Therefore, in a situation where the victim is fired or the conduct was offensive enough to cause a reasonable person to resign, but did not rise to the level of outrageousness or extreme emotional distress, the plaintiff would not prevail under the tort of intentional infliction of emotional distress. Moreover, if the conduct would cause a reasonable person extreme emotional distress, but did not in fact cause this particular plaintiff to experience such distress, there is also no cause of action under this theory. Some courts have acknowledged a lesser showing of emotional distress when a special relationship exists between the parties, such as an employer-employee relationship.

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143. See id. § 46.
144. But see Gleason v. Callahan Indus., Inc., 610 N.Y.S.2d 671, 672 (N.Y. App. Div. 1994) (recognizing that even though aggrieved individuals do not need to produce the quantum and quality of evidence to prove compensatory damages as they would have to produce under other circumstances because of the strong anti-discriminatory policy, there must be sufficient proof of mental anguish caused by the discrimination); Alcorn v. Anbro Eng'r, Inc., 468 P.2d 216, 218 n.4 (Cal. 1970) (acknowledging a lesser showing of severe emotional distress when a special relationship exists between the parties, such as an employer-employee relationship).
145. See Collins v. Wilcox Inc., 600 N.Y.S.2d 884, 886 (N.Y. Sup. Ct. 1992) (suggesting that "although each individual act allegedly attributable to . . . [the supervisor] is probably not actionable, except as to a specific claim for sexual harassment," that sexual harassment is easier to establish).
147. See id. at 371.
148. See Collins, 600 N.Y.S.2d at 886 (suggesting that sexual harassment is easier to prove than intentional infliction of emotional distress).
149. See Alcorn, 468 P.2d at 218 n.4.
there still must be some showing of emotional distress.\textsuperscript{150} Additionally one court recognizes that because of a strong anti-discriminatory sentiment, aggrieved individuals do not need to produce the quantum and quality of evidence to prove compensatory damages as is required to produce under most circumstances, however, there still must be some proof of mental anguish caused by the discrimination.\textsuperscript{151}

Assault and battery are additional avenues for sexual harassment victims. Unfortunately, a battery action is only appropriate where there is unpermitted physical contact.\textsuperscript{152} The Supreme Court in \textit{Harris} declared that an environment can be considered hostile or abusive with only a mere offensive utterance, depending on the totality of the circumstances.\textsuperscript{153}

Unlike battery, assault does not require contact, but an apprehension of a harmful or offensive contact.\textsuperscript{154} Words alone generally are insufficient to support a cause of action for assault, yet may be sufficient to support a sexual harassment claim under Title VII.\textsuperscript{155}

Many states also have discrimination statutes that encompass sexual harassment.\textsuperscript{156} Unfortunately, these discrimination statutes were modeled after Title VII. Consequently, the language is either identical to Title VII or varies slightly. As such, the legislation would not encompass protection from the bisexual sexual harasser because of the applicability of the "but for" standard.\textsuperscript{157} Even the states with specific sexual harassment statutes would not protect these victims because they denote a "but for" standard, as set forth in \textit{Meritor}.\textsuperscript{158}

\textsuperscript{150} See id.
\textsuperscript{151} See \textit{Gleason}, 610 N.Y.S.2d at 673.
\textsuperscript{153} See \textit{Harris v. Forklift Sys., Inc.}, 510 U.S. 17, 22 (1993).
\textsuperscript{154} See \textit{Restatement (Second) of Torts} § 21 (1965).
\textsuperscript{155} See \textit{id.} at § 31; see also \textit{Harris}, 510 U.S. at 22.
\textsuperscript{158} See, e.g., \textit{Jones v. Flagship Int'l}, 793 F.2d 714, 719 (5th Cir. 1986); \textit{Cal. Gov't Code} § 12940(h) (having a special provision outlawing sexual harassment, however, requires a "but for" standard in its language).
For bisexual sexual harassment victims, where the harassing behavior does not amount to severe emotional distress, but aggravating enough to cause a reasonable person to leave his or her job, there is no cause of action.\footnote{See Winson v. Taylor, 760 F.2d 1330, 1333, n.7 (D.C. Cir. 1985); see also Corne v. Bausch & Lomb, Inc. 390 F. Supp. 161, 163 (D. Ariz. 1975) ("[I]t would be ludicrous to hold that [sexual harassment] was contemplated by [Title VII] because to do so would mean that if the conduct complained of was directed equally to males there would be no bases for suit.").} This lack of recourse is due to the "but for" standard that is not even wholeheartedly applied in the case of harassment by a superior against a member of the opposite sex.\footnote{See supra note 127 and accompanying text.} Unfortunately, interpreting sexual harassment within the purview of Title VII leaves no logical alternative but to encompass a discriminatory requirement.

The fact that sexual harassment is a problem is undisputed. Even the early courts, although disagreeing that this behavior should be extracted from Title VII, recognized its disturbing effect.\footnote{See Corne, 390 F. Supp. 161.} Whether we title this conduct discrimination or we call it something else, it should be outlawed. Sexual harassment is inappropriate in the workplace and those in superior positions should be prohibited from using their power to intimidate their subordinates. Regardless of whether it is included within the scope of Title VII does not matter, Congress needs to prohibit this activity.

VII. FEDERAL LEGISLATION: A POSSIBLE SOLUTION

A plausible solution is the passage of federal legislation prohibiting conduct of a sexual nature in the workplace.\footnote{See Michelle Ridgeway Pierce, Sexual Harassment and Title VII—A Better Solution, 30 B.C. L. Rev. 1071 (1989) (proposing that federal legislation be passed due to various loopholes that result from interpreting sexual harassment under Title VII despite the fact that it is not likely that Congress will pass such legislation); Deborah N. McFarland, Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation, 65 Fordham L. Rev. 493, 542 (1996) (asserting that federal sexual harassment legislation should be enacted to “focus on the conduct at issue rather than on discrimination . . .”).} With such legislation, victims would have a cause of action and supervisors would not have an escape from liability. Congress can utilize the definition of sexual harassment contained within the EEOC guidelines.\footnote{See 29 C.F.R. § 1604.11 (1996). Omitting the first sentence from the guidelines: “[h]arassment on the basis of sex is a violation of 703 of Title VII.” Id. This is because we are no longer going to view sexual harassment in light of Title VII. The damages and those employers within the statute’s jurisdiction could be modeled after Title VII.} By
omitting the “but for” standard mandated by Title VII, this legislation would include within its ambit a same-sex sexual harasser, whether heterosexual or homosexual, heterosexual opposite sex sexual harassment, the equal opportunity harasser and the bisexual harasser. The behavior would be prohibited and their victims would be protected.

VIII. CONCLUSION

Any action taken in violation of Title VII must clearly be discriminatory. Therefore, it seems logical that a “but for” standard apply.\textsuperscript{164} However, in a sexual harassment context, a man harasses a woman, not necessarily simply because of her sex, but on the basis of her attractiveness. This point is illustrated by the situation where a male supervisor could work with fifty women, but may only harass one. The fact that same-sex sexual harassment is actionable in some circuits is inconsistent with what Title VII was intended to prevent.\textsuperscript{165} Moreover, the cognizability of sexual harassment claims brought by men against women also contradicts the intention of Congress. The judicial expansion of Title VII to include sexual harassment is noble in trying to prevent such atrocities in the workplace. However, including it within discrimination legislation is inappropriate because the same behavior would be enough to establish sexual harassment in one situation and not in another, depending upon the sex and the sexual orientation of the harasser.

Since tort remedies are not always available to sexual harassment victims, the best solution is legislation. Consequently, a victim would have the choice of pursuing various tort remedies if available. And the victim may still seek actual damages under the sexual harassment statute.\textsuperscript{166}

Prohibiting harassment when a supervisor engages in crude behavior to one gender, but not when that same behavior is directed equally towards both is illogical. Additionally, making sexual orientation a jury question presents a judicial nightmare. The indecent behavior is reprehensible and should be unlawful, regard-

\textsuperscript{164} If it was not done “but for” what is being discriminated against, the act would not be discriminatory.


\textsuperscript{166} See supra note 139.
less of the sex or the sexual orientation of the perpetrator and his or her history of harassing conduct.

By permitting bisexual sexual harassers to escape liability, we are focusing on the harasser and not on the harasser’s conduct and its effect upon the victim. The environment is no less hostile for the sexual harassment victim knowing that the supervisor is just as offensive towards those of the opposite sex. It is no more tolerable that, although the male victim’s working environment was unbearable, so was the working environment of a fellow female worker. The fact that the harasser is a bisexual sexual harasser does not eliminate the impact that the harassing conduct has upon his victims.

Robin Applebaum