

SEXUAL HARASSMENT AND TITLE VII — A BETTER SOLUTION

Sexual harassment is a serious problem in the workplace.¹ One commentator suggests that as many as one half of all women will be harassed during their careers.² This harassment can affect its victim psychologically as well as physically.³ Moreover, because of its physical and psychological effects, sexual harassment often impairs the job performance of its victim.⁴

Although cases and commentators do not completely agree as to what constitutes sexual harassment, it can be defined as the unwanted imposition of sexual requirements in the context of unequal power.⁵ Typically a female employee files a complaint against a male co-worker.⁶ The Bureau of National Affairs reports, however, that employers also receive complaints of homosexual harassment, and of harassment of men by women.⁷ Thus, there are many variations of sexual harassment.

Intending to protect blacks and other minorities from discrimination in the workplace,⁸ Congress enacted Title VII as part of the Civil Rights Act of 1964.⁹ Prior to its passage, and allegedly in an attempt to defeat it, Congress amended Title VII to include "sex" as a protected category.¹⁰ Little debate took place regarding this amendment, however, and thus, Title VII's history provides little

¹ Note, *Employer Liability Under Title VII For Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1258 (1987).

² B. GUTK, *SEX AND THE WORKPLACE* 44 (1985).

³ Note, *Sexual Harassment Law and the Impact of Vinson*, 13 EMPLOYMENT REL. L.J. 501, 503 (1988).

⁴ *Id.*

⁵ B. GUTK, *supra* note 2, at 44; C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979).

⁶ *Sexual Harassment: Employer Policies and Problems*, Personnel Policies Forum Survey No. 144 (BNA), at 16-17 (June 1987).

⁷ *Id.* at 17.

⁸ 110 CONG. REC. 6548 (daily ed. Mar. 30, 1964) (statement of Sen. Humphrey).

⁹ Title VII reads, 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 race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a) (1981).

¹⁰ 110 CONG. REC. 2577 (daily ed. Mar. 30, 1965).

guidance as to the intended scope of "sex" in that legislation.¹¹ Nevertheless, early cases of sex discrimination brought under Title VII do provide some indication of its coverage.¹² These early cases fall into four major categories. First, some early cases involved challenges to the outright exclusion of members of one sex from jobs.¹³ Second, several cases involved challenges to restrictions having a disproportionate effect on women.¹⁴ In the third group of cases, plaintiffs challenged restrictions placed solely on women.¹⁵ Early courts held that these three types of cases fell under Title VII's protection. In contrast, early courts held that Title VII did not apply to the fourth type, those cases involving challenges to an employer's pregnancy-related policy.¹⁶

Despite the protection offered to victims of discrimination in these three types of situations, early courts did not construe Title VII to include a claim for sexual harassment in the work place.¹⁷

¹¹ Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 884 (1967). See also *infra* notes 36-67 and accompanying text for a discussion of Title VII's early history.

¹² See *infra* notes 68-127 and accompanying text for a discussion of the inclusion of a claim of sexual harassment under Title VII.

¹³ *E.g.*, *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1223 (9th Cir. 1971) (denying women job of switchman on the grounds that they are physically unable to do the work violates Title VII); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.) (airline violated Title VII by refusing to hire males for position of flight attendant), *cert. denied*, 404 U.S. 991 (1971); *Weeks v. Southern Bell Tel. & Tel.*, 408 F.2d 228, 236 (5th Cir. 1969) (denying women the job of switchman violates Title VII). See *infra* notes 48-51 and accompanying text for a discussion of the outright exclusion of one sex.

¹⁴ *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (invalidating height and weight restrictions having a disproportionate effect on women); *Caviale v. State of Wisconsin, Dep't of Health & Social Servs.*, 744 F.2d 1289, 1296 (7th Cir. 1984) (employer's decision to choose from a pool of which two of two hundred members were women for job openings violated Title VII). See *infra* notes 52-60 and accompanying text for a discussion of disparate impact.

¹⁵ *E.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (refusal to hire women with pre-school-age children violates Title VII); *Sprogis v. United Air Line, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) (no marriage rule for women violates Title VII), *cert. denied*, 404 U.S. 991 (1971); *Jurinko v. Edwin L. Wiegand*, 331 F. Supp. 1184, 1187-88 (W.D. Pa. 1971) (no marriage rule for women violates Title VII). See *infra* notes 61-62 and accompanying text for a discussion of restrictions placed on one gender.

¹⁶ *E.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (no violation of Title VII where disability plan excluded pregnancy). Pregnancy has since been included under Title VII. 42 U.S.C. 2000e(k) (1981).

¹⁷ *E.g.*, *Tomkins v. Public Servs. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (sexual harassment not discrimination under Title VII), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (court refused to recognize a Title VII claim where plaintiff did not use department established by employer to investigate such claims), *rev'd and remanded*, 600 F.2d 211, 214 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163-65 (D. Ariz. 1975) (woman subjected to verbal and physical

Holding that sexual harassment is a personal proclivity, not gender discrimination,¹⁸ these courts reasoned that gender was incidental to the sexual advance or attack.¹⁹ Although they recognized that sexual harassment is a problem, these courts held that Title VII does not apply to offensive sexual conduct.²⁰

Despite courts' initial hostile reaction to sexual harassment claims, they soon recognized sexual harassment as Title VII gender discrimination.²¹ These courts held that gender discrimination existed when an employer conditioned a plaintiff's job on submission to sexual relations, in effect, creating a *quid pro quo* because the woman either submitted or risked losing her job.²² Subsequent courts extended Title VII's applicability, finding liability for gender discrimination where an employer created a sexually hostile work environment.²³

In 1986 in *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that the plaintiff stated a Title VII claim for sexual harassment that created a hostile environment.²⁴ Since *Vinson*, courts have addressed situations less typical than that of a man

sexual advances failed to state a claim under Title VII), *vacated*, 562 F.2d 55 (9th Cir. 1977); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 123 (D.D.C. 1974) (plaintiff fired for refusing her male superior's sexual advances failed to state a claim under Title VII), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983, 983 (D.C. Cir. 1977). See *infra* notes 72-83 and accompanying text for a discussion of these early cases.

¹⁸ *E.g.*, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) ("In the present case, Mr. Price's conduct appears to be a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge.").

¹⁹ *See, e.g.*, *Tomkins v. Public Servs. Elec. & Gas Co.*, 422 F. Supp. 555, 556 (D.N.J. 1976) ("The gender lines might as easily have been reversed, or not even crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.").

²⁰ *Id.*

²¹ *E.g.*, *Miller v. Bank of Am.*, 600 F.2d 211, 214 (9th Cir. 1979) (female plaintiff fired for refusing supervisor's demand for sexual favors stated a claim under Title VII); *Williams v. Bell*, 587 F.2d 1240, 1245 (D.C. Cir. 1978) (affirming lower court's recognition of a Title VII claim for sexual harassment); *Tomkins v. Public Servs. Elec. & Gas Co.*, 568 F.2d 1044, 1049 (3d Cir. 1977) (plaintiff stated Title VII claim where continued employment was conditioned upon submitting to male supervisor's sexual advances); *Barnes v. Costle*, 561 F.2d 983, 983 (D.C. Cir. 1977) (plaintiff stated claim under Title VII where employer fired her in retaliation for her refusal to grant sexual favors).

²² *See, e.g.*, *Barnes*, 561 F.2d at 989. *Quid pro quo* harassment is harassment in which a supervisor demands sexual favors in exchange for job benefits. C. MACKINNON, *supra* note 5, at 32-47.

²³ *See, e.g.*, *Bundy v. Jackson*, 641 F.2d 934, 443-44 (D.C. Cir. 1981). See *infra* notes 84-114 and accompanying text for a discussion of courts' extension of Title VII to include sexual harassment claims.

²⁴ 477 U.S. 57, 66 (1986).

harassing a woman.²⁵ Although there are no reported cases allowing a claim for males alleging sexual harassment by female employers, commentators generally agree that men too can be victims of sexual harassment.²⁶ In addition, most courts now allow a claim for homosexual harassment.²⁷ Moreover, recent courts have recognized a claim where plaintiffs' co-workers received preferential treatment by submitting to a supervisor's sexual advances.²⁸ Courts, however, using a "but for" approach, have suggested that harassment by a bisexual supervisor would not constitute sexual harassment because males and females would receive the same treatment.²⁹

²⁵ See *infra* notes 128-65 and accompanying text for a discussion of situations presently covered by Title VII.

²⁶ Conte & Gregory, *Sexual Harassment in Employment — Some Proposals Toward More Realistic Standards of Liability*, 32 *DRAKE L. REV.* 407, 417 n.41 (1982-83); Note, *Meritor Savings Bank v. Vinson: What Makes a Work Environment "Hostile"?*, 40 *ARK. L. REV.* 857, 857 n.1 (1987); Note, *Between the Boss and a Hard Place: A Consideration of Meritor Savings Bank v. Vinson and the Law of Sexual Harassment*, 67 *B.U.L. REV.* 445, 445 n.4 (1987) [hereinafter Note, *Between the Boss*]; Note, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 *ST. LOUIS U.L.J.* 239, 241 n.10 (1987) [hereinafter Note, *Recent Developments*]; cf. also *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) ("Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In each instance, the legal problem would be identical to that confronting us now — the exaction of a condition which, but for his or her sex, the employee would not have faced."); See *infra* notes 132-34 and accompanying text for a discussion of females harassing males.

²⁷ E.g., *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983) (allowing Title VII claim for homosexual harassment), *aff'd mem.*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Servs.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981) (allowing Title VII claim for homosexual harassment); *Barlow v. Northwestern Memorial Hosp.*, 30 *Fair Empl. Prac. Cas. (BNA)* 223, 224 (N.D. Ill. 1980) (allowing female employee's Title VII claim for sexual harassment by her female supervisor). See *infra* notes 135-42 and accompanying text for a discussion of homosexual harassment.

²⁸ E.g., *King v. Palmer*, 778 F.2d 878, 882 (D.C. Cir. 1985) (Title VII violated where nurse who engaged in sex with doctor received preferential treatment); *Broderick v. Ruder*, 685 F. Supp. 1269, 1277 (D.D.C. 1988) (Title VII violated where employer afforded preferential treatment to employees who submitted to his sexual advances); *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (Title VII violated where sex partners of the defendant received preferential treatment); *Toscano v. Nimmo*, 570 F. Supp. 1197, 1198 (D. Del. 1983) (Title VII violated where employer afforded preferential treatment to employees who submitted to his sexual advances). *But see* *DeCintio v. Westchester County Medical Center*, 807 F.2d 304, 306 (2d Cir. 1986) (rejecting expansion of Title VII to include cases of preferential treatment), *cert. denied*, 108 S. Ct. 455 (1987); *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa. 1988) (same), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988). See *infra* notes 152-165 and accompanying text for a discussion of preferential treatment.

²⁹ See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (dictum) (court stated that bisexual harassment was not gender discrimination), *cert. denied*, 481 U.S. 1041 (1987); *B.T. Jones v. Flagship Int'l*, 793 F.2d 714, 720 n.5 (5th Cir. 1986) (dictum) (bisexual

This note analyzes the suitability of Title VII for sexual harassment claims in light of modern cases expanding the number of situations where sexual harassment has been found to violate Title VII. Section I examines the early history of Title VII, demonstrating that the inclusion of "sex" within the protection of Title VII was not the principle focus of that legislation.³⁰ Section I also discusses the earliest cases where courts used Title VII to combat discrimination based on gender.³¹ Section II traces the historical expansion of Title VII, starting with the earlier cases that refused to include sexual harassment in Title VII, the recognition of *quid pro quo* harassment where tangible job benefits were made contingent upon sexual activity, and finally, the eventual inclusion of "hostile environment" as constituting sexual harassment.³² Section III highlights situations where courts have found sexual harassment to violate Title VII, including female harassment of males, homosexual harassment, and preferential treatment.³³ Section IV analyzes these modern cases in light of the intended purpose of Title VII, demonstrating that Title VII's prohibition of gender discrimination does not logically or practically include sexual harassment claims.³⁴ Consequently, Section V advocates the enactment of sexual harassment legislation that would alleviate these inconsistencies and permit courts to use Title VII as Congress intended.³⁵

I. EARLY HISTORY OF TITLE VII

This country's history of discrimination against blacks and other minorities is well documented. Discrimination has been readily apparent in the workplace, where talent often goes unused because of employers' prejudices.³⁶ In an attempt to integrate blacks

harassment not gender discrimination), *cert. denied*, 479 U.S. 1065 (1987); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (dictum) (bisexual harassment not gender discrimination); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.D.C. 1981) (same); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.D.C. 1977) (dictum) (same).

³⁰ See *infra* notes 36-43 and accompanying text for a discussion of the legislative history of Title VII.

³¹ See *infra* notes 44-67 and accompanying text for a discussion of early Title VII cases.

³² See *infra* notes 68-114 and accompanying text for a discussion of the recognition of *quid pro quo* and hostile environment sexual harassment.

³³ See *infra* notes 128-65 and accompanying text for a discussion of modern situations where sexual harassment has been found to violate Title VII.

³⁴ See *infra* notes 166-206 and accompanying text for an analysis of the inclusion of sexual harassment under Title VII.

³⁵ See *infra* Section V for a description of sexual harassment legislation.

³⁶ 110 CONG. REC. 6548 (daily ed. Mar. 30, 1964).

and minorities into society and to promote hiring on the basis of merit, Congress enacted Title VII.³⁷ Through Title VII, Congress made it an unlawful employment practice for an employer to discriminate against any person because of his or her race, and, among other things, sex.³⁸

Until the day before Congress passed Title VII, the bill did not prohibit discrimination based on sex.³⁹ On that day, an opponent of the bill, Representative Howard Smith, added the word "sex" in an amendment, reportedly in an attempt to defeat its passage.⁴⁰ Representative Smith, proclaiming to be serious about the amendment, read into the record a letter from a "lady."⁴¹ The letter complained of the numerical imbalance between men and women, and spoke of the right of every female to have a husband.⁴² Commentators suggest that these statements undermine Representative Smith's claims of sincerity.⁴³

Because of the lack of legislative history, the proper interpretation of "sex" in Title VII is unclear. An examination, however, of the four types of early cases brought under Title VII sheds light on the scope of "sex." Many cases involved challenges to employers' outright exclusion of women from jobs.⁴⁴ Another category of cases involved restrictions that had a disproportionate impact on women.⁴⁵ Other cases addressed restrictions placed on women but not on men.⁴⁶ Finally, a fourth group of cases arose from allegedly discriminatory pregnancy policies.⁴⁷

In the most blatant form of discrimination, some employers excluded all members of one sex from particular jobs. For example,

³⁷ *Id.* at 6549 (daily ed. Mar. 30, 1964) (statement of Sen. Humphrey).

³⁸ 42 U.S.C. § 2000e-2(a) (1981).

³⁹ Miller, *supra* note 11, at 880.

⁴⁰ 110 CONG. REC. 2577 (daily ed. Mar. 30, 1964) (statement of Rep. Smith); *see* Miller, *supra* note 11, at 884.

⁴¹ 110 CONG. REC. 2577 (daily ed. Mar. 30, 1964) (statement of Rep. Smith).

⁴² *Id.*

⁴³ *See* Miller, *supra* note 11, at 884; *see also*, Wells, *Sex Discrimination and Title VII*, 43 UMKC L. REV. 273, 274 (1975).

⁴⁴ *E.g.*, *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1255 (9th Cir. 1971) (employer's refusal to hire women for the position of agent-telegrapher violated Title VII).

⁴⁵ *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (invalidating height and weight restrictions).

⁴⁶ *E.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (refusal to hire women with pre-school-age children violated Title VII).

⁴⁷ *E.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (no violation of Title VII where disability plan excluded pregnancy). Pregnancy has since been brought within the coverage of Title VII. 42 U.S.C. 2000e(k) (1981).

in *Rosenfeld v. Southern Pacific Co.*, the United States Court of Appeals for the Eleventh Circuit in 1971 rejected the employer's exclusion of women from the job of agent-telegrapher where the employer felt that women were physically incapable of performing the job.⁴⁸ The *Rosenfeld* court refused to allow Southern Pacific's contention that being male was a bona fide occupational qualification ("BFOQ") for the position of agent-telegrapher.⁴⁹ The court reasoned that the stereotype that women are weak could not be the basis of a BFOQ.⁵⁰ Rather, the court stated that employees otherwise qualified for a job could be excluded only on the basis of individual inability to do the job, not on the basis of group traits.⁵¹

Similarly, courts held that restrictions having a disproportionate impact on women violate Title VII.⁵² In 1977, for example, the United States Supreme Court in *Dothard v. Rawlinson* invalidated height and weight restrictions imposed by an Alabama statute.⁵³ Although facially neutral, these restrictions disproportionately excluded women.⁵⁴

In *Dothard*, the plaintiff, Ms. Rawlinson, applied for employment as a prison guard but failed to meet the minimum 120-pound weight requirement.⁵⁵ The district court found that the combination

⁴⁸ *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971).

⁴⁹ *Id.* Title VII provides the statutory defense that:

... it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business ...

42 U.S.C. § 2000e-2(e) (1981).

This statutory exception to Title VII is extremely narrow, and therefore, an employer can rarely justify a single-sex hiring policy as a BFOQ. A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION* § 13.00 (1988).

⁵⁰ *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1224 (9th Cir. 1971).

⁵¹ *Id.* at 1225.

⁵² *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (invalidating height and weight restrictions having a disproportionate effect on women); *Caviale v. State of Wisconsin, Dep't of Health & Social Servs.*, 744 F.2d 1289, 1296 (7th Cir. 1984) (employer's decision to choose from a pool of which two of two hundred members were women for job openings violated Title VII). See *infra* notes 52-60 and accompanying text for a discussion of disparate impact.

In disparate impact cases, a plaintiff alleges that a facially neutral employment device works to exclude disproportionately members of a protected group. See, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). The employer then bears the burden of showing that the employment device is job related. *Id.* at 432.

⁵³ *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977).

⁵⁴ *Id.* at 329.

⁵⁵ *Id.* at 323-24. The statute also established a height minimum of 5 feet, 2 inches. *Id.* at 324.

of the height and weight restrictions would exclude 41.13 percent of the female population while excluding less than 1 percent of the male population. In addition, Ms. Rawlinson also challenged a regulation that established gender criteria for assigning correctional counselors to maximum-security institutions for positions requiring close physical proximity to inmates, or "contact" positions. The district court held that the height and weight requirements and the regulation violated Title VII.⁵⁶

The Supreme Court affirmed the district court's holding with respect to the height and weight requirements.⁵⁷ The Court noted that the defendants produced no evidence correlating those requirements with the requisite amount of strength necessary for good job performance. It held, however, that the district court erred in ruling that being male is not a BFOQ for the "contact" positions. The BFOQ exception, it noted, is a narrow one, valid only when the hiring of one sex is the essence of the business operation.⁵⁸ In so holding, the Court reasoned that inmates would be likely to assault a woman because she was a woman, thereby posing a threat not only to the victim, but also to the basic control of the penitentiary and to the protection of its inmates and other security personnel.⁵⁹ Thus, in the Court's view, the regulation did not reflect the paternalism the Court believed Title VII sought to combat.⁶⁰

In the early years of Title VII litigation, courts also held that restrictions placed on one sex violated Title VII. Thus, in the 1971 case of *Phillips v. Martin Marietta Co.*, the United States Supreme Court struck down the employer's policy of refusing to hire women with pre-school-age children.⁶¹ In *Phillips*, the Court held that persons of identical qualifications must be given opportunities regardless of their sex. The Court, however, remanded the case on the issue of whether the distinction between men and women with pre-school-age children could qualify as a bona fide occupational qualification.⁶²

Other early Title VII cases often involved employee challenges of employers' practices and policies regarding pregnancy. In *General Electric Co. v. Gilbert*, the United States Supreme Court in 1976 held

⁵⁶ *Mieth v. Dothard*, 418 F. Supp. 1169, 1180, 1183-85 (M.D. Ala. 1976).

⁵⁷ *Dothard*, 433 U.S. at 332.

⁵⁸ *Id.* at 331, 333, 336-37.

⁵⁹ *Id.* at 336.

⁶⁰ *Id.* at 335 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

⁶¹ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (*per curiam*).

⁶² *Id.*

that, under Title VII, an employer could exclude female employees' pregnancies from its disability plan.⁶³ Reversing the lower courts, the Court reasoned that although only women can become pregnant, that does not mean that every legislative classification concerning pregnancy is based on sex.⁶⁴ The Court noted that, although a plaintiff sometimes can establish a Title VII violation upon proof of a discriminatory effect, no such effect exists where there is no risk from which men are protected and women are not.⁶⁵ Moreover, the Court distinguished pregnancy from diseases typically covered by disability plans and noted that pregnancy is often voluntary.⁶⁶

In sum, Title VII's legislative history provides little guidance as to the proper scope or interpretation of "sex."⁶⁷ In the early sex discrimination cases, courts applied Title VII in a variety of situations. First, courts held that the outright exclusion of women from particular jobs violated Title VII. In addition, courts rejected restrictions having a disproportionate impact on members of one sex. The early courts also held that restrictions placed on women but not men, such as rules against marriage and prohibitions against women with pre-school-age children, violate Title VII. Finally, the courts held that the exclusion of pregnancy from disability plans did not constitute gender discrimination.

II. INCLUSION OF SEXUAL HARASSMENT UNDER TITLE VII

Currently, Title VII offers protection in situations where male or female employers make tangible job benefits contingent upon submission to sex in what is termed *quid pro quo* harassment.⁶⁸ Title VII also protects employees from sexually hostile work environments.⁶⁹ The protection from *quid pro quo* and hostile environment sexual harassment extends to homosexual as well as heterosexual harassment.⁷⁰ In addition, Title VII applies when co-workers receive preferential treatment as a result of their sexual relationships with supervisors.⁷¹

⁶³ General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976).

⁶⁴ *Id.* at 134 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).

⁶⁵ *Id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)). Likewise, women were not protected from risks that men were not. *Id.*

⁶⁶ *Id.* at 136.

⁶⁷ Miller, *supra* note 11, at 844.

⁶⁸ *E.g.*, Miller v. Bank of Am., 600 F.2d 211, 212 (9th Cir. 1979).

⁶⁹ *E.g.*, Bundy v. Jackson, 641 F.2d 934, 944-45 (D.C. Cir. 1981).

⁷⁰ *E.g.*, Wright v. Methodist Youth Servs., 511 F. Supp. 307, 310 (N.D. Ill. 1981).

⁷¹ *E.g.*, Broderick v. Ruder, 685 F. Supp. 1269, 1277 (D.C. Cir. 1988).

Despite the recent expansive application of Title VII, courts initially were unwilling to allow claims for sexual harassment under Title VII.⁷² This unwillingness stemmed from a view that sexual harassment is a personal attack, not a gender issue.⁷³ In addition, courts expressed a fear that allowing sexual harassment claims would generate voluminous litigation.⁷⁴ These courts refused to treat sexual harassment as a gender issue, and consequently, did not allow a cause of action under Title VII.

For example, in 1975 the United States District Court for the District of Arizona held that Title VII did not protect an employee from sexual harassment.⁷⁵ In *Corne v. Bausch & Lomb, Inc.*, a male supervisor subjected female employees to physical and verbal sexual advances.⁷⁶ Reasoning that the supervisor's conduct was a personal proclivity, the court stated that he acted to satisfy a personal urge. In other words, according to the court, the harassment was not a company policy, but instead, the act of an individual.⁷⁷

In addition, the *Corne* court noted the potential for voluminous litigation.⁷⁸ Title VII, the court reasoned, would be implicated whenever employees made sexual advances to one another. The court stated that employers would be forced to hire asexual employees in order to avoid such situations.⁷⁹

In the same way, in 1976, the United States District Court for the District of New Jersey in *Tomkins v. Public Services Electric & Gas Co.* held that Title VII does not protect employees from sexual

⁷² See *Tomkins v. Public Servs. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (sexual harassment not discrimination under Title VII), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (court refused to recognize a Title VII claim where plaintiff did not use department established by employer to investigate such claims), *rev'd and remanded*, 600 F.2d 211, 214 (9th Cir. 1979); *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163-65 (D. Ariz. 1975) (woman subjected to verbal and physical sexual advances failed to state a claim under Title VII), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 123 (D.D.C. 1974) (plaintiff fired for refusing her male superior's sexual advances failed to state a claim under Title VII), *rev'd sub nom. Barnes v. Costle*, 561 F.2d 983, 983 (D.C. Cir. 1977).

⁷³ See, e.g., *Tomkins*, 422 F. Supp. at 556 (sexual harassment not discrimination under Title VII); *Corne*, 390 F. Supp. at 163 (woman subjected to verbal and physical sexual advances failed to state a claim under Title VII); .

⁷⁴ E.g., *Tomkins*, 422 F. Supp. at 556-57; *Miller*, 418 F. Supp. at 236; *Corne*, 390 F. Supp. at 163.

⁷⁵ *Corne*, 390 F. Supp. at 163-64.

⁷⁶ *Id.* at 163.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 163-64.

harassment.⁸⁰ In *Tomkins*, a male supervisor harassed a female office worker by making sexual advances and detaining her against her will at a business lunch through economic threats and physical force. The court rejected her Title VII claim, expressing concern over opening the floodgates to litigation.⁸¹ The court reasoned that Congress did not create Title VII to provide a federal tort remedy for what is actually a physical attack motivated by sexual desire.⁸² Emphasizing the difference between gender and sexual desire, the court noted that gender is not the focus of the harassment. Thus, the court recognized that sexual harassment is an unfortunate feature of our social experience, but held that it did not come within Title VII's protection.⁸³

Shortly after *Tomkins*, courts began to allow claims for sexual harassment under Title VII for *quid pro quo* harassment where tangible job benefits were made contingent upon sexual compliance.⁸⁴ In 1977, the United States Court of Appeals for the District of Columbia Circuit became one of the first courts to allow a *quid pro quo* claim in *Barnes v. Costle*.⁸⁵ In *Barnes*, a female employee of the Environmental Protection Agency claimed sexual harassment where, despite her refusals, her male superior repeatedly solicited her to join him for social activities.⁸⁶ In addition, he repeatedly made sexual remarks to her, and suggested that her employment status would benefit if she had an affair with him. The supervisor fired her in retaliation for her refusals.⁸⁷

⁸⁰ *Tomkins v. Public Servs. Elec. & Gas Co.*, 422 F. Supp. 553, 556-57 (D.N.J. 1976).

⁸¹ *Id.* at 555-57.

⁸² *Id.* at 556. The court stated that Congress did not intend to create a federal tort remedy for a physical attack motivated by sexual desire that "happened to occur in a corporate corridor rather than a back alley." *Id.*

⁸³ *Id.*

⁸⁴ Professor Catherine MacKinnon is generally acknowledged as having first noted the distinction between *quid pro quo* type harassment and harassment resulting from a sexually hostile environment. C. MACKINNON, *supra* note 5, at 32-47; see also *Miller v. Bank of Am.*, 600 F.2d 211, 212 (9th Cir. 1979) (female plaintiff fired for refusing supervisor's demand for sexual favors stated a claim under Title VII); *Williams v. Bell*, 587 F.2d 1240, 1241 (D.C. Cir. 1978) (affirming lower court's recognition of a Title VII claim for sexual harassment); *Tomkins v. Public Servs. Elec. & Gas Co.*, 568 F.2d 1044, 1046 (3d Cir. 1977) (plaintiff stated Title VII claim where continued employment was conditioned upon submitting to male supervisor's sexual advances); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (plaintiff stated claim under Title VII where employer fired her in retaliation for her refusal to grant sexual favors).

⁸⁵ 561 F.2d at 990.

⁸⁶ *Id.* at 985.

⁸⁷ *Id.*

The court held that, "but for" her womanhood, the plaintiff's supervisor would not have solicited her participation in sexual activity.⁸⁸ Thus, the appeals court established a "but for" standard, which it used to conclude that the harassment of the plaintiff constituted a Title VII claim. The court reasoned that the sexual harassment constituted discrimination based on gender because the supervisor imposed upon her job tenure a condition that he would not have imposed on a man.⁸⁹

Having recognized *quid pro quo* sexual harassment as Title VII sex discrimination, courts soon began to expand the new cause of action to include hostile environment sexual harassment.⁹⁰ Hostile environment claims allege that working environments can become so riddled with discrimination that they destroy the emotional and psychological atmosphere of minority group workers.⁹¹ Thus, hostile environment claims treat Title VII as protecting psychological as well as economic interests.⁹²

The United States Court of Appeals for the District of Columbia Circuit in 1981 became one of the first courts to recognize a hostile environment sexual harassment claim.⁹³ In *Bundy v. Jackson*, the plaintiff did not suffer a loss of tangible job benefits, but rather alleged that her supervisor's demeaning propositions and advances destroyed her psychological and emotional work environment.⁹⁴ When Bundy complained to a higher supervisor, he too propositioned her.⁹⁵

The District of Columbia Circuit held that the plaintiff stated a claim for sexual harassment.⁹⁶ The court reiterated the "but for" standard it used in *Barnes*, noting that sexual harassment injects sexual stereotypes into the work environment.⁹⁷ Moreover, the court stated that as long as women remained a minority in the work force, they would have little recourse in such situations.⁹⁸ Thus, the court

⁸⁸ *Id.* at 990.

⁸⁹ *Id.* at 989 n.49.

⁹⁰ Hostile environment claims had already been recognized under Title VII by the Fifth Circuit in the context of race discrimination. *Rogers v. EEOC*, 454 F.2d 234, 238, 241 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

⁹¹ *E.g., id.* at 238.

⁹² *Id.*

⁹³ *Bundy v. Jackson*, 641 F.2d 934, 944-45 (D.C. Cir. 1981).

⁹⁴ *Id.* at 944-45.

⁹⁵ *Id.* at 940. This supervisor told Bundy that "any man in his right mind would want to rape [her]." *Id.*

⁹⁶ *Id.* at 948.

⁹⁷ *Id.* at 942, 945.

⁹⁸ *Id.* at 945.

noted, without such a cause of action employers would be immune from liability for sexual harassment as long as they stopped short of firing their victim. Later courts relied on *Bundy* and recognized claims of sexually harassing environments.⁹⁹

In 1986, the United States Supreme Court addressed the issue of sexual harassment for the first time in *Meritor Savings Bank v. Vinson*, holding that a plaintiff may state a claim under Title VII for a sexually hostile environment.¹⁰⁰ The dispute arose when a female bank employee, Ms. Vinson, brought an action for sexual harassment against both the bank where she worked and her supervisor, Mr. Taylor.¹⁰¹ Over the course of several years, he had intercourse with her forty or fifty times, fondled her in front of other employees, and even forcibly raped her several times. She alleged that she had succumbed to Taylor's demands for sex out of fear of losing her job.¹⁰² Upon being discharged for excessive use of an indefinite sick leave, Vinson brought the action against both the bank and Taylor.

The district court rejected the plaintiff's Title VII claim.¹⁰³ The court held that if there had been a sexual relationship, it had been voluntary and was unrelated to her continued employment. The district court held, furthermore, that the bank could not be held liable for the supervisor's alleged harassment because it did not have any notice of Taylor's actions.¹⁰⁴

The Court of Appeals for the District of Columbia Circuit reversed, holding that the district court had not sufficiently considered the hostile environment claim.¹⁰⁵ Additionally, the court of appeals held that the "voluntariness" of the plaintiff's sexual relationship with her supervisor was not determinative.¹⁰⁶ It reasoned that, if the fact that a plaintiff gave in to a supervisor's demands

⁹⁹ See, e.g., *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (female air traffic controller stated a Title VII claim where sexual harassment erected barriers to women's participation in the work force); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) (plaintiff stated a claim for sexual harassment irrespective of whether she suffered tangible job detriment); *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 783 (E.D. Wis. 1984) (female warehouse worker stated claim under Title VII for a hostile environment), *rev'd in part on other grounds*, 789 F.2d 540 (7th Cir. 1986).

¹⁰⁰ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 78 (1986).

¹⁰¹ *Id.* at 60.

¹⁰² *Id.*

¹⁰³ 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (D.D.C. 1980).

¹⁰⁴ *Id.* at 42.

¹⁰⁵ *Vinson v. Taylor*, 753 F.2d 141, 145 (D.C. Cir. 1985).

¹⁰⁶ *Id.* at 146.

were dispositive, a plaintiff would be forced into the difficult decision of choosing acquiescence, opposition, or resignation. Finally, the court held that an employer is strictly liable for sexual harassment by its supervisors.¹⁰⁷

The United States Supreme Court affirmed the court of appeals, construing Title VII to include a prohibition of sexually hostile work environments.¹⁰⁸ The Court also agreed that the plaintiff's voluntary sexual relationship did not necessarily defeat her claim.¹⁰⁹ In reaching this conclusion, the Court drew a distinction between "voluntary" and "welcome," the latter being the gravamen of a sexual harassment claim. The Court reasoned that the fact that the relationship was "voluntary" in the sense that Ms. Vinson consented to have sex was not a defense to a claim of sexual harassment.¹¹⁰ Vinson's provocative speech and dress, however, were not *per se* inadmissible in determining whether she found particular sexual advances unwelcome. On the contrary, the Court stated that such evidence was obviously relevant in judging the totality of the circumstances. Thus, although refusing to hold that such evidence is *per se* inadmissible, the Court left to the district court the determination of whether the evidence's admission would be unduly prejudicial.¹¹¹

Finally, the Supreme Court did not accept the court of appeals imposition of strict liability on employers.¹¹² The majority did not, however, issue a definitive rule on employer liability. Instead, the Court relied on the Equal Employment Opportunity Commission's *amicus curiae* brief, which stated that courts should formulate rules of employer liability by drawing from agency principles.¹¹³ The Court noted, however, that the absence of notice to an employer did not automatically protect the employer from liability.¹¹⁴

Since *Vinson*, courts have attempted to determine when an environment is hostile for the purposes of Title VII. In *Rabidue v. Osceola Refining Co.*, the United States Court of Appeals for the Sixth Circuit in 1986 developed a standard for making such deter-

¹⁰⁷ *Id.* at 150.

¹⁰⁸ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

¹⁰⁹ *Id.* at 68.

¹¹⁰ *Id.* at 68, 69.

¹¹¹ *Id.*

¹¹² *Id.* at 72.

¹¹³ *Id.* The EEOC's position in its *amicus curiae* brief did not follow the EEOC guidelines, which advocate the imposition of strict employer liability. 29 C.F.R. § 1604.11(c) (1988). For a discussion of employer liability, see Note, *supra* note 1.

¹¹⁴ *Vinson*, 477 U.S. at 72.

minations using EEOC guidelines, holding that the plaintiff did not have an actionable claim for hostile environment sexual harassment.¹¹⁵ Although the guidelines are not binding, the court noted, they have often been allotted favorable consideration by courts addressing the issue of sexual harassment.¹¹⁶

In *Rabidue*, the plaintiff complained of sexually oriented posters in the office.¹¹⁷ She also complained about a fellow supervisor's vulgar language. The court examined the totality of the work environment, including the nature of the harassment, the degree of obscenity in the workplace before the plaintiff took the job, and the personality of the plaintiff. Thus, the court held that both the posters and the vulgarity had minimal effect on the plaintiff, especially when viewed in the context of a society that condones such displays.¹¹⁸

Judge Keith concurred in part and dissented in part.¹¹⁹ Judge Keith stressed the "anti-female animus" of the office.¹²⁰ He focused on the fact that Rabidue did not receive free lunches, free gasoline, a telephone credit card, or entertainment privileges, as did other salaried male employees.¹²¹ In addition, Judge Keith noted that the company did not invite her to its weekly golf matches.¹²² Finally, he pointed out that after Rabidue became credit manager, the defendant did not allow her to take clients out to lunch as all previous

¹¹⁵ 805 F.2d 611, 619-20 (6th Cir. 1986). The court concluded that, to prevail in a Title VII offensive work environment sexual harassment action, a plaintiff must assert and prove that:

- (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the charged sexual harassment 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 [sic] well-being of the plaintiff; and (5) the existence of respondeat superior liability.

Id.

¹¹⁶ *Id.* at 619 n.4. The EEOC promulgated guidelines on November 10, 1980. See 29 C.F.R. § 1604.11 (1988). These guidelines attempt to define sexual harassment, to instruct employers as to their potential liability, and to suggest proper employer responses to the problem of sexual harassment in the workplace. See, 29 C.F.R. § 1604.11(a)-(g) (1988). Although the guidelines are not binding, courts indicate a willingness to give them substantial consideration. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

¹¹⁷ 805 F.2d 622.

¹¹⁸ *Id.* at 620, 622.

¹¹⁹ *Id.* at 623 (Keith, J., concurring in part and dissenting in part).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 624 (Keith, J., concurring in part and dissenting in part).

male credit managers had been able to do. Upon requesting such privileges, Rabidue's supervisor replied that it would be improper for a woman to take male customers to lunch and that she might have car problems.¹²³ Thus, Judge Keith argued that Ms. Rabidue had been a victim of discrimination because the defendant excluded her, the only female in management, from activities in which she needed to participate to do her job properly.¹²⁴

In *Goluszek v. H.P. Smith*, the United States District Court for the Northern District of Illinois held in 1988 that the harassment of a male employee by his male co-workers likewise did not violate Title VII. In *Goluszek*, the male plaintiff, an electronic maintenance mechanic, brought a Title VII action alleging sexual harassment by his male co-workers. Goluszek's co-workers accused him of being gay or bisexual, and poked him in the buttocks with a stick. Goluszek complained to the general foreman, who considered the behavior and statements to be mere shop talk.¹²⁵

The district court held that Goluszek's claim was not actionable under Title VII. The court ruled that, although a fact-finder could reasonably conclude that H.P. Smith would have stopped the harassment if Goluszek had been a woman, Goluszek's harassment was not the type of conduct Congress intended to prohibit when it enacted Title VII. The court reasoned that sexual harassment was actionable under Title VII when it reflected the use of a powerful position to impose sexual demands on an unwilling person in a less powerful position. The court, therefore, emphasized the fact that Goluszek was a male in a male-dominated environment. Thus, it concluded that Goluszek may have been harassed because he was a male, but that the harassment did not create an anti-male environment.¹²⁶

Nonetheless, after *Vinson*, sexual harassment is clearly sex discrimination under Title VII.¹²⁷ Although courts first held that Title VII did not prohibit sexual harassment because such harassment is a personal, non-gender oriented action, courts gradually extended Title VII to cover situations where an employer hinged tangible job benefits upon an employee's submission to sex. Eventually, courts extended this *quid pro quo* harassment to include sexually hostile

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1454, 1456 (D. Ill. 1988).

¹²⁶ *Id.* at 1456.

¹²⁷ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

environment claims where no tangible detriment existed, yet the harassment pervaded the working atmosphere to such an extent as to interfere with job performance. Subsequent courts, therefore, have been left to determine at what point a work environment becomes so hostile that it violates Title VII.

III. MODERN SITUATIONS WHERE SEXUAL HARASSMENT HAS BEEN FOUND TO VIOLATE TITLE VII

A. Application of the "But For" Standard

Courts addressing the issue of sexual harassment continue to apply the "but for" standard, originally developed in *Barnes v. Costle*, to sexual harassment claims.¹²⁸ In *Barnes*, the court reasoned that, "but for" the plaintiff's womanhood, her participation in sex would not have been solicited.¹²⁹ Thus, the *Barnes* court held that the supervisor placed an employment condition on the female subordinate that he would not have placed on a male.¹³⁰ Accordingly, the *Barnes* "but for" test requires the court to determine whether the alleged harassment would have occurred "but for" the plaintiff's gender.¹³¹

Several commentators have suggested that the "but for" reasoning applies equally well to men alleging sexual harassment.¹³² In each instance, the court must determine whether the employee would have been harassed "but for" his or her sex.¹³³ Although such claims rarely appear to be litigated, a recent survey by the Bureau of National Affairs suggests that companies do receive complaints of women harassing men. Thus, men may also claim protection under Title VII from sexual harassment by women.¹³⁴

¹²⁸ *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

¹²⁹ *Barnes*, 561 F.2d at 990.

¹³⁰ *Id.* at 989-90 n.49.

¹³¹ *Id.* at 990.

¹³² See, e.g., Conte & Gregory, *supra* note 26, at 417 n.41; Note, Meritor Savings Bank v. Vinson: What Makes a Work Environment "Hostile"?, 40 ARK. L. REV. 857 n.1 (1987); Note, Between the Boss, *supra* note 26, at 445 n.4; Note, Recent Developments, *supra* note 26, at 241 n.10.

¹³³ E.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The court stated that, "to prove a claim of abusive work environment premised upon sexual harassment, a plaintiff must demonstrate that she would not have been the object of harassment but for her sex."

¹³⁴ *Sexual Harassment: Employer Policies and Problems*, Personnel Policies Forum Survey No. 144 (BNA), at 16-17 (June 1987).

In addition, courts have applied the "but for" analysis and allowed a claim for discrimination under Title VII where a member of one sex sexually harasses a member of the same sex. For example, in 1981 the United States District Court for the Northern District of Illinois, in *Wright v. Methodist Youth Services, Inc.*, held that Title VII protected an employee from homosexual harassment.¹³⁵ In *Wright*, the defendant, Hillerman, allegedly fired the plaintiff, Donald Wright, for refusing his homosexual advances.¹³⁶ The court reasoned that Hillerman would not have made sexual demands of female employees, and therefore, that Wright would not have been harassed "but for" his sex. Thus, the court extended Title VII, formerly applied only to complaints of heterosexual harassment, to encompass a claim of homosexual harassment.¹³⁷

In 1983, in *Joyner v. AAA Cooper Transportation*, the Federal District Court for the Middle District of Alabama also held that homosexual harassment violates Title VII.¹³⁸ In *Joyner*, the defendant, a male terminal manager, propositioned Joyner, a male shop mechanic, at a local restaurant.¹³⁹ Joyner complained about the incident to the chairman of the board, who informed the terminal manager. The company eventually laid Joyner off because of a slowdown in business.¹⁴⁰ The court used the same "but for" analysis used in cases of heterosexual harassment.¹⁴¹ The court concluded, therefore, that Joyner's bid to return to work after the layoff would not have been rejected "but for" his refusal to succumb to the homosexual demands of his supervisor.¹⁴²

This "but for" analysis does not encompass a cause of action in the case of the bisexual supervisor. There are no reported cases of bisexual employers harassing both male and female employees.¹⁴³ Nonetheless, several cases discuss the problem in dicta, positing that bisexual harassment would not be considered discrimination based on sex under Title VII.¹⁴⁴ This conclusion stems from courts' ap-

¹³⁵ 511 F. Supp. 307, 310 (N.D. Ill. 1981).

¹³⁶ *Id.* at 309-10.

¹³⁷ *Id.*

¹³⁸ 597 F. Supp. 537, 541 (M.D. Ala. 1983).

¹³⁹ *Id.* at 539.

¹⁴⁰ *Id.* at 540.

¹⁴¹ Compare *Joyner*, 597 F. Supp. 537 with *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977).

¹⁴² *Id.* at 544.

¹⁴³ See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454 n.28 (1984) (situation of bisexual harassment has yet to appear in a reported case).

¹⁴⁴ E.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (dicta) (bisexual

plication of the "but for" standard. In *Barnes v. Costle*, the court of appeals suggested that the legal problem would be the same in cases where a man harasses a woman, a woman harasses a man, or a homosexual harasses a member of the same gender. The court distinguished these situations from one where a bisexual supervisor harasses employees of both sexes. The court reasoned that, in the case of the bisexual superior, the insistence upon sexual favors would not constitute discrimination because it would apply equally to male and female employees.¹⁴⁵

Some courts have compared bisexual harassment to racial harassment, as in the 1974 case of *Bradford v. Sloan Paper Co.* In *Bradford*, the Federal District Court for the Northern District of Alabama held that, where members of two races received like treatment, no discrimination existed.¹⁴⁶ In *Bradford*, two black employees brought suit under Title VII alleging racial discrimination affecting wages, promotions, restroom facilities, harassment, disparate discipline, and discharge from employment.¹⁴⁷ Addressing the claim of harassment, the court reasoned that, although the assistant warehouse manager's actions were indefensible and unwarranted, they did not reflect racial bias because he offended equally members of all races.¹⁴⁸ Thus, although there have been no reported cases involving a bisexual supervisor, courts have indicated their willingness to follow the reasoning in cases such as *Bradford* and have rejected the idea that Title VII encompasses bisexual harassment.¹⁴⁹

In sum, most courts applying the "but for" standard have suggested that female harassment of males and homosexual harassment constitute sexual harassment.¹⁵⁰ No court yet has decided whether bisexual harassment constitutes sex discrimination under Title VII. Many courts have stated in dicta, however, that bisexual harassment

harassment not covered by Title VII), *cert. denied*, 481 U.S. 1041 (1987); *Jones v. Flagship Int'l*, 793 F.2d 714, 720 n.5 (5th Cir. 1986) (dicta) (same), *cert. denied*, 479 U.S. 1065 (1987); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (dicta) (same); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (dicta) (same); *Barnes*, 561 F.2d at 990 n.55 (dicta) (same).

¹⁴⁵ *Barnes*, 561 F.2d at 990 n.5.

¹⁴⁶ *Rabidue*, 805 F.2d at 620 (dicta) (court indicated that the situation of bisexual harassment would be similar to the situation in *Bradford v. Sloan Paper Co.*, 383 F. Supp. 1157, 1161 (N.D. Ala. 1974)); *Henson*, 682 F.2d at 904 (dicta) (same).

¹⁴⁷ *Bradford*, 383 F. Supp. at 1159.

¹⁴⁸ *Id.* at 1161.

¹⁴⁹ *E.g.*, *Rabidue*, 805 F.2d at 620; *Henson*, 682 F.2d at 904.

¹⁵⁰ See *supra* notes 132-42 and accompanying text for a discussion of females harassing males and of homosexual harassment.

is not Title VII discrimination because the employee would still have been harassed had he or she been of a different gender.¹⁵¹

B. Preferential Treatment Sexual Harassment

Recently, courts have followed the suggestion of the EEOC guidelines and have expanded hostile environment sexual harassment claims to include those situations where plaintiffs' co-workers received preferential treatment based on their submission to superiors' sexual advances.¹⁵² Although the plaintiff is not placed in a *quid pro quo* situation, courts have stated that, because his or her co-workers' promotions were based on sex, the sexually offensive conduct affected the plaintiff's terms and conditions of employment.¹⁵³ Thus, although the plaintiff was not the target of harassment, the harassment of other employees created a claim for the plaintiff.¹⁵⁴

In 1983, the United States District Court for the District of Delaware allowed a Title VII claim for sexual harassment where

¹⁵¹ *E.g.*, *Rabidue*, 805 F.2d at 620 (dicta) (bisexual harassment not covered by Title VII); *Jones v. Flagship Int'l*, 793 F.2d 714, 720 n.5 (5th Cir. 1986) (dicta) (same), *cert. denied*, 479 U.S. 1065 (1987); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (dicta) (same); *Bundy*, 641 F.2d at 942 n.7 (dicta) (same); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (dicta) (same).

¹⁵² *E.g.*, *King v. Palmer*, 778 F.2d 878, 882 (D.C. Cir. 1985) (cognizable cause of action for nurse where nurse who engaged in sex with doctor received preferential treatment); *Broderick v. Ruder*, 685 F. Supp. 1269, 1277 (D.D.C. 1988); *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (waitress stated claim under Title VII where sex partners of the defendant received preferential treatment); *Toscana v. Nimmo*, 570 F. Supp. 1197 (D. Del. 1983). *But see* *DeCintio v. Westchester County Medical Center*, 807 F.2d 304, 306 (2d Cir. 1986) (rejecting expansion of Title VII to include cases of preferential treatment), *cert. denied*, 108 S. Ct. 455 (1987); *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa. 1988), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988). The EEOC guidelines state:

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

29 C.F.R. 1604.11(g) (1988).

¹⁵³ *See, e.g.*, *Toscana*, 570 F. Supp. at 1199.

¹⁵⁴ *E.g.*, *King v. Palmer*, 778 F.2d 878, 882 (D.C. Cir. 1985) (cognizable cause of action for female nurse where a nurse who engaged in sex with doctor received preferential treatment); *Broderick v. Ruder*, 685 F. Supp. 1269, 1277 (D.D.C. 1988) (female lawyer stated claim where numerous sexual affairs of four male supervisors created a hostile environment); *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (waitress stated claim under Title VII where sex partners of the defendant received preferential treatment); *Toscana v. Nimmo*, 570 F. Supp. 1197 (D. Del. 1983) (woman stated a claim where the woman who received a promotion was having an affair with the supervisor). *But see* *DeCintio v. Westchester County Medical Center*, 807 F.2d 304, 306 (2d Cir. 1986) (rejecting expansion of Title VII to include cases of preferential treatment), *cert. denied*, 108 S. Ct. 455 (1987); *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa. 1988), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988).

co-workers received preferential treatment.¹⁵⁵ In *Toscano v. Nimmo*, the plaintiff, a Medical Administration Assistant at the Veterans Administration, filed suit under Title VII, claiming that she was denied a promotion, and instead, another woman received the promotion because she was having an affair with Segovia, her supervisor. In holding that preferential treatment violated Title VII, the court reasoned that submitting to sex was a condition of employment, and therefore, that Toscano would not have been treated in the same way had she been a man.¹⁵⁶

Similarly, in *Broderick v. Ruder* in 1988, the District Court for the District of Columbia allowed the plaintiff's Title VII claim.¹⁵⁷ In *Broderick*, the plaintiff, a female staff attorney for a division of the Security and Exchange Commission, complained about the numerous sexual affairs between four male supervisors and their subordinates, alleging that they created a hostile environment.¹⁵⁸ Relying on *Toscano*, the *Broderick* court also stated that such conduct creates a hostile or offensive work environment that affects the motivation and work performance of those offended by such conduct.¹⁵⁹ The district court reversed the EEOC's finding of no discrimination, holding that the plaintiff had proven sexual harassment by demonstrating that the four male supervisors bestowed preferential treatment upon those employees who submitted to their advances.¹⁶⁰

Not all courts agree that preferential treatment constitutes Title VII gender discrimination.¹⁶¹ In *DeCintio v. Westchester County Medical Center*, in 1986, the United States Court of Appeals for the Second Circuit held that preferential treatment does not violate Title VII.¹⁶² In *DeCintio*, the defendant created a position for an assistant chief of respiratory therapy and required that applicants be registered with the National Board of Respiratory Therapists.¹⁶³ None of the plaintiffs, male physical therapists, were registered, and the defendant gave the position to a woman romantically involved with the Program Administrator of the Respiratory Therapy

¹⁵⁵ *Toscano*, 570 F. Supp. at 1206.

¹⁵⁶ *Id.* at 1198, 1199.

¹⁵⁷ 685 F. Supp. 1269, 1281 (D.D.C. 1988).

¹⁵⁸ *Id.* at 1270.

¹⁵⁹ *Id.* at 1278.

¹⁶⁰ *Id.*

¹⁶¹ E.g., *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), cert. denied, 108 S. Ct. 455 (1987).

¹⁶² *Id.* at 308.

¹⁶³ *Id.* at 305.

Department. Refusing to recognize the plaintiff's claim, the *DeCintio* court explicitly rejected a broad expansion of Title VII protection.¹⁶⁴ The court found no justification for defining "sex" so broadly as to include an ongoing, voluntary, romantic engagement. In doing so, it distinguished *Toscana*, where the employer's acts were coercive.¹⁶⁵

Thus, applying the "but for" test, courts have extended the sexual harassment claim to cover harassment of men by women and homosexual harassment. Bisexual harassment does not appear to be covered. Moreover, some courts have allowed employees to state a claim for discrimination when the conduct is not directed at them personally. These situations are placed under the rubric of "hostile environment" sex discrimination in violation of Title VII.

IV. ANALYSIS OF APPLICABILITY OF TITLE VII TO SEXUAL HARASSMENT CASES

The judicial expansion of Title VII to sexual harassment is improper. Based on Title VII's legislative history, it is clear that Congress gave little or no thought to the inclusion of "sex" in the statute, much less to "sexual harassment."¹⁶⁶ Congress intended to equalize job opportunities, not regulate sexual activity in the workplace.

The early cases brought under Title VII challenged policies or practices directed at or affecting women as a group. For example, the Court in *Dothard v. Rawlinson* held that height and weight restrictions not tailored to the job in question worked against women as a group, because such restrictions exclude a substantially greater number of women than men.¹⁶⁷ Similarly, the Court held that the employer's refusal in *Phillips v. Martin Marietta* to hire women with pre-school-age children represented a policy directed at a group of women solely because they were women.¹⁶⁸ Several lower federal courts have held that rules prohibiting married women from holding certain jobs constitute a similar attack on women as a group.¹⁶⁹

¹⁶⁴ *Id.* at 307.

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* notes 36-43 and accompanying text for a discussion of the legislative history of Title VII.

¹⁶⁷ 433 U.S. 321, 332 (1977).

¹⁶⁸ 400 U.S. 542, 543-44 (1971) (per curiam).

¹⁶⁹ E.g., *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (no marriage rule violates Title VII), *cert. denied*, 404 U.S. 991 (1971).

In contrast, sexual harassment is directed at an individual. As stated by the district court in *Corne v. Bausch & Lomb, Inc.*, where the employer subjected female employees to verbal and physical advances, an employer satisfies a personal urge when he or she harasses an employee.¹⁷⁰ Although offensive, this personal urge is not an attack upon women as a group as in other Title VII cases.¹⁷¹ Despite the unfortunate fact that some harassment might reflect the aggressor's societal or personal views of the opposite sex, often women, sexual harassment is an individual assault.

Despite the conceptual differences between traditional Title VII cases and sexual harassment, courts have demonstrated a willingness to expand Title VII to include such a claim. This willingness stemmed from the difficulties associated with bringing sexual harassment claims in tort, according to one commentator.¹⁷² The court's opinion in *Bundy v. Jackson*,¹⁷³ the first case to recognize a hostile environment sexual harassment claim, also suggests that these difficulties might have been at the foundation of its recognition of a hostile environment claim. The court reasoned that, as long as women remain inferior to men in the workplace, they would have little protection against harassment.¹⁷⁴ Thus, the *Bundy* court apparently stretched Title VII, not because it applied, but because of the victims' lack of viable alternative remedies.

By expanding Title VII to include sexual harassment, courts reacted more to the reprehensibility of sexual harassment than to the applicability of Title VII. For example, in *Bundy*, the court questioned how sexual harassment could *not* be *illegal*, given the fact that it involves demeaning sexual stereotypes.¹⁷⁵ The court,

¹⁷⁰ 390 F. Supp. 161, 163 (D. Ariz. 1975).

¹⁷¹ See *supra* notes 44-66 and accompanying text for a discussion of early cases brought under Title VII.

¹⁷² Note, *Between the Boss*, *supra* note 26, at 464. This note states that:

First, since [Title VII] specifically recognizes sexual harassment as a cause of action, it removes from the discretion of the judge issues about the validity and sufficiency of the injury and the amount of "outrageousness" necessary for a successful claim. The sexual harassment cause of action thus legitimates the injuries women suffer from sexual advances. Under tort law the question of the sufficiency of the injury is left to the judge; traditionally, sexual advances were not considered to be sufficient injury. (footnotes omitted)

¹⁷³ 641 F.2d 934 (D.C. Cir. 1981).

¹⁷⁴ *Id.* at 945.

¹⁷⁵ *Id.* ("How then 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, not be illegal?").

therefore, reasoned that because such behavior *should* be illegal, it is, under Title VII.¹⁷⁶

Congress enacted Title VII in 1964 to outlaw discriminatory behavior, not all behavior of which we strongly disapprove.¹⁷⁷ Although supervisors' abuse of authority for personal purposes is an unfortunate and unattractive feature of our social experience, which might well give rise to a civil action in tort, early courts were correct in holding that sexual harassment is not sex discrimination within the meaning of Title VII even when the purpose is sexual.¹⁷⁸ It is inappropriate for courts, in effect, to write legislation, or in this case, to rewrite it, whenever they object to certain behavior.

Because sexual harassment is an individual rather than a gender issue, the Supreme Court erred in *Meritor Savings Bank v. Vinson*¹⁷⁹ in allowing a Title VII hostile environment claim for sexual harassment. Reasoning that sexual harassment creating a hostile environment violates Title VII, the *Vinson* Court held that evidence of provocative speech and dress is not *per se* inadmissible and that the welcomeness of the sexual acts is the gravamen of a claim.¹⁸⁰ These considerations highlight the nature of sexual harassment as an individual affront. If the environment is hostile to one gender, then characteristics of the plaintiff should be, and typically are, immaterial. For example, in a claim of a racially hostile environment, no one would dare suggest that it was not hostile if the victimized individual possessed some of the stereotyped characteristics. It is equally unacceptable for the Court to suggest that a woman, by her choice in clothes and speech, volunteers to be harassed.¹⁸¹

An examination of the modern applications of the "but for" standard illustrates the problems with this strained expansion of Title VII.¹⁸² In the case of heterosexual harassment, courts have reasoned that an employer would not harass an employee "but for" the fact that the employee is a man or woman. It is, however, more accurate for a court to state that, "but for" the employer's sexual

¹⁷⁶ *Id.*

¹⁷⁷ *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (per curiam) (Bork, J., dissenting).

¹⁷⁸ See *supra* note 17 for examples of courts denying a claim for sexual harassment.

¹⁷⁹ 477 U.S. 57 (1986).

¹⁸⁰ *Vinson*, 477 U.S. at 69.

¹⁸¹ See Note, *Meritor Savings Bank v. Vinson: Sexual Harassment at Work*, 10 HARV. WOMEN'S L.J. 203, 221 (1987).

¹⁸² See *supra* notes 68-165 and accompanying text for a discussion of the expansion of Title VII.

attraction to the employee, the employee would not have been harassed. This reformulation of the problem emphasizes that sexual harassment is an individual attack.

The "but.for" standard also applies to the cases of homosexual harassment because a homosexual supervisor harasses only members of his or her sex.¹⁸³ An analysis of the "but for" standard, however, as applied to homosexual harassment illustrates the difficulties inherent in this extension of Title VII. As in the case of heterosexual harassment, homosexual harassment is an individual action or attack, rather than one against a group, based on gender. In addition, homosexual harassment lacks the discriminatory intent often accompanying gender discrimination; it is unlikely that a woman who sexually harasses another woman does so on the basis of stereotypical notions about the proper role or abilities of women. It also seems unlikely that Congress intended to protect members of one sex from the sexual advances of members of the same sex. Thus, the very existence of homosexual harassment highlights the idea that sexual harassment is based on sexuality, not on gender.

Despite the analytical problems with homosexual harassment as a Title VII violation, the "but for" standard does protect employees in such situations.¹⁸⁴ The standard's application, however, excludes bisexual harassment from Title VII's protection.¹⁸⁵ Although the problem of the bisexual supervisor is not typical and has not appeared in a reported case,¹⁸⁶ the application of the "but for" approach to bisexual harassment illustrates the logic problems that permeate the treatment of sexual harassment as a gender issue.

The earlier cases refusing to allow sexual harassment claims foresaw this problem.¹⁸⁷ The court in *Corne v. Bausch & Lomb* went so far as to say it would be "ludicrous" to call sexual harassment

¹⁸³ *E.g.*, *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983), *aff'd mem.*, 749 F.2d 732 (11th Cir. 1984).

¹⁸⁴ *E.g.*, *id.*

¹⁸⁵ *See, e.g.*, *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (dictum) (court stated that bisexual harassment was not gender discrimination), *cert. denied*, 481 U.S. 1041 (1987); *B.T. Jones v. Flagship Int'l*, 793 F.2d 714, 720 n.5 (5th Cir. 1986) (dictum) (bisexual harassment not gender discrimination), *cert. denied*, 479 U.S. 1065 (1987); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (dictum) (bisexual harassment not gender discrimination); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.D.C. 1981); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.D.C. 1977) (dictum) (bisexual harassment not gender discrimination).

¹⁸⁶ *See* Note, *supra* note 143, at 1454 n.28.

¹⁸⁷ *See* generally *supra* note 17 for a discussion of early cases refusing to allow a Title VII claim for sexual harassment.

gender discrimination because to do so would mean there would be no basis for suit where the offending party directed the conduct at both men and women.¹⁸⁸ The concurrence in *Vinson v. Taylor* demonstrated this flaw colorfully, stating that it is unlikely that Congress intended to protect women from unwelcome heterosexual or lesbian advances but leave them unprotected when a bisexual attacks.¹⁸⁹

Nonetheless, courts that have addressed the question of bisexual harassment have stated that the equal treatment allotted to men and women by the employer who harasses both sexes removes such harassment from Title VII.¹⁹⁰ It is not logical, however, that a woman denied a promotion because she failed to submit to her bisexual supervisor's advances should be treated differently from a woman denied a promotion by a heterosexual or homosexual supervisor. An application of the "but for" test used in *Barnes v. Costle*¹⁹¹ to hold the male employer liable for *quid pro quo* harassment of a female employee does create this anomalous result. This different treatment of bisexual harassment is unwarranted, because the offensiveness of the harassment is not lessened merely because the employer also harasses men. To the woman it is the harassment itself that offends.

Sexual harassment as gender discrimination under Title VII stands on equally uneasy footing when applied to cases where co-workers receive promotions ahead of a plaintiff based on their sexual relationship with the supervisor. For example, in *Broderick v. Ruder*, the court held that the preferential treatment allotted to women who slept with their supervisors reduced the plaintiff's motivation and work performance and deprived the plaintiff of pro-

¹⁸⁸ 390 F. Supp. 161, 163 (D.C. Cir. 1977) (The court stated that "[i]t would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit.").

¹⁸⁹ 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (per curiam) (Bork, J., dissenting). Judge Bork stated that:

Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, 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.

Id.

¹⁹⁰ *E.g.*, *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (dicta), *cert. denied*, 481 U.S. 1041 (1987). See *supra* notes 143-49 and accompanying text for a discussion of bisexual harassment.

¹⁹¹ 561 F.2d 983 (D.C. Cir. 1977).

motions and job opportunities.¹⁹² The *Broderick* court followed the EEOC guidelines in holding that preferential treatment created a hostile work environment affecting the job performance of those offended by such conduct.¹⁹³

The preferential treatment cases highlight the inappropriateness of treating sexual harassment as gender discrimination. The real message is that employment decisions should not be made on the basis of who has a sexual relationship with the boss. By addressing this problem with Title VII, however, courts have created the anomalous result that, under identical circumstances, a male or a female employee could claim successfully that he or she had been discriminated against on the basis of sex. For example, assume that a woman has received a promotion because she granted sexual favors to the employer. According to the EEOC guidelines, the man refused the promotion could state a Title VII claim because he received different treatment as a result of his sex.¹⁹⁴ In the same hypothetical, however, the woman also states a Title VII claim because the granting of sexual favors is condition of employment to which women — but not men — are subjected.¹⁹⁵

At first glance, this result appears to be the correct one, due to what is, hopefully, a general consensus that employees should be promoted on the basis of merit and not on the basis of their willingness to have sex with their employer. Analytically, however, it is difficult to understand how a situation can be said to *discriminate* on the basis of gender when both men and women can state a claim. Moreover, it is impossible to reconcile the reasoning that permits a claim for both individuals in this hypothetical with that reasoning used in the situation of the bisexual supervisor where equal, albeit poor, treatment of male and female employees removes the harassment from Title VII's protection. If both men and women are affected, the situation would be analogous to *Bradford v. Sloan Paper Co.*, where the court held that the equal, albeit poor, treatment allotted blacks and whites negated a claim under Title VII.¹⁹⁶ In the same way, therefore, co-worker preferential treatment should fall outside of Title VII, because both groups receive equal treat-

¹⁹² 685 F. Supp. 1269, 1277 (D.D.C. 1988).

¹⁹³ *Id.* at 1278.

¹⁹⁴ A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 41.63(c) (1988).

¹⁹⁵ *E.g.*, *Toscano v. Nimmo*, 570 F. Supp. 1197, 1199 (D. Del. 1983) (following 29 C.F.R. § 1604.11(g)).

¹⁹⁶ 383 F. Supp. 1157, 1164 (N.D. Ala. 1974) (no Title VII action where both blacks and whites treated poorly).

ment. Nonetheless, courts have extended Title VII to include preferential treatment cases for lack of a better solution to the problem.

Sexual harassment case law, especially as currently expanded, trivializes Title VII's important purpose. An examination of the different approaches of the majority and concurrence in the 1986 decision in *Rabidue v. Osceola Refining Co.*¹⁹⁷ helps to illustrate the damage done to Title VII in sexual harassment cases. In *Rabidue*, the Sixth Circuit rejected the plaintiff's claim of a sexually hostile environment.¹⁹⁸ In examining whether a hostile environment existed, the court focused mainly on sexual behavior, especially that of Douglas Henry, a supervisor from another department.¹⁹⁹ The court stressed Henry's vulgarity and crudity and the fact that he customarily made obscene comments about women generally, occasionally directing such comments at Rabidue.²⁰⁰ Moreover, the court noted that other male employees displayed pictures of nude or partially dressed women in their offices. The court reasoned that Henry's obscenities, although annoying, did not affect the totality of the workplace.²⁰¹

Instead of focusing on the sexual behavior in the office, Judge Keith, concurring in part and dissenting in part, emphasized the office's anti-female atmosphere.²⁰² Rather than looking at the individual acts of one employee, Judge Keith highlighted the secondary status regularly allotted to Ms. Rabidue, the only female in management.²⁰³ For example, he noted that Osceola Refining refused to let her take clients to lunch, seated Rabidue with clerical employees at a meeting, and refused to give her other privileges, such as a telephone credit card and free gas, that male salaried employees enjoyed.²⁰⁴

The two opposing views of the merits of the case illustrate the problem with the present state of the law, which places sexual harassment claims under Title VII. Although the sexual conduct that the majority emphasized certainly bears on the question of whether a hostile environment existed, overemphasis of this behavior caused the majority to ignore the evidence of disparate treat-

¹⁹⁷ 805 F.2d 611 (6th Cir. 1986).

¹⁹⁸ *Id.* at 623.

¹⁹⁹ *Id.* at 615, 623.

²⁰⁰ *Id.* at 615.

²⁰¹ *Id.* at 622.

²⁰² *Id.* at 623 (Keith, J., concurring in part and dissenting in part).

²⁰³ *Id.* at 624 (Keith, J., concurring in part and dissenting in part).

²⁰⁴ *Id.*

ment discussed by Judge Keith. As his concurrence argued, the majority's underemphasis of this disparate treatment was inappropriate because it was this unequal treatment of the sexes that Congress sought to prohibit with Title VII. By shifting the focus in sexual harassment cases from gender-based disparate treatment to sexually offensive conduct, courts such as the *Rabidue* court lose sight of the important gender questions at stake.

A further problem is that Title VII is ill-suited to deal effectively with the problem because it does not reach all situations. In *Goluszek v. H.P. Smith*, for example, the male plaintiff did not succeed in his claim for hostile environment sexual harassment under Title VII. Goluszek claimed that his co-workers' crude and derogatory comments, of which H.P. Smith had notice, created a hostile environment.²⁰⁵ Clearly, Goluszek's co-workers sexually harassed him by accusing him of being gay and by poking him with a stick in the buttocks, yet Goluszek did not fit within Title VII's protection. The result in *Goluszek* is analytically correct under Title VII's "but for" reasoning. It is illogical to suggest that an all-male environment was hostile to men on the basis of gender. Nonetheless, had Goluszek been a woman, he would probably have had a strong Title VII claim.²⁰⁶ Mr. Goluszek, therefore, would have no way to challenge behavior that a woman could attack by way of Title VII.

Therefore, a situation exists where conduct directed at a member of one sex constitutes Title VII discrimination, but identical conduct directed at a member of the other sex does not. This anomalous result reflects the fact that sexual harassment does not logically belong under the rubric of Title VII. No one doubts that sexual harassment is a pervasive problem in the workplace, and a barrier to merit-based employment decisions. It is not, however, gender discrimination as prohibited by Title VII. The treatment of bisexual harassment and preferential treatment highlights the inappropriateness of Title VII as a tool to combat sexual harassment. This overextension of Title VII by the courts not only weakens Title VII, but it also fails to cover cases of sexual harassment that the "but for" test does not reach.

²⁰⁵ *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1453-56 (N.D. Ill. 1988).

²⁰⁶ Compare *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 with *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784-85 (E.D. Wis. 1984) (female warehouse worker, one of two females employed, prevailed in sexual harassment claim despite defendant's contention that a male employee with plaintiff's personality would have suffered equally brutal harassment), *rev'd in part on other grounds*, 789 F.2d 540 (7th Cir. 1986).

V. PROPOSED SEXUAL HARASSMENT LEGISLATION

Enacting legislation with the primary purpose of combatting sexual harassment in the workplace would avoid the practical and conceptual problems associated with treating sexual harassment as gender discrimination. Sexual harassment legislation would address the heart of the problem — the inappropriateness of sexual harassment — rather than address the problem by way of a strained reading of Title VII. The new law would have three beneficial effects. First, it would alleviate the theoretical and analytical problems associated with defining sexual harassment as “gender discrimination” under Title VII. Second, it would provide a claim for plaintiffs where Title VII is presently inapplicable. More specifically, it would provide a cause of action for plaintiffs not presently included under Title VII, such as victims of bisexual harassment and victims in a single-sex environment. Finally, the proposed legislation would end the distortion of Title VII, thereby returning Title VII’s emphasis to legitimate gender issues.

Sexual harassment legislation would distinguish between harassment based on one’s gender and harassment based on one’s sexuality. Title VII properly covers the former. The latter, however, would be the target of the new legislation. In other words, the new legislation would have as its goal the removal from the workplace of inappropriate sexual conduct.

By distinguishing between sexuality and gender, sexual harassment legislation would encompass sexual harassment situations presently covered by Title VII. More importantly, it would go beyond these cases to protect victims of bisexual harassment and of harassment in the single-sex environment, where sexual harassment, though admittedly pervasive, is not based on gender.²⁰⁷ Although the proposed legislation would create a cause of action for plaintiffs otherwise excluded from coverage under Title VII, it would not result in a storm of litigation. Because Title VII, as extended, presently prohibits most forms of sexual harassment,

²⁰⁷ One commentator proposed a state “Fair Employment Practices Act” which included a prohibition against sexual harassment. Friedman, *Fair Employment Legislation in Louisiana: A Critique of the 1983 Act and a Proposed Substitute Statute*, 58 TUL. L. REV. 444, 489–90 (1983). Friedman noted that his:

subsection . . . goes beyond Title VII and does not limit acts of sexual harassment to acts directed only at members of one sex — i.e., it would not be necessary for a plaintiff to prove that the harassment would not have occurred if he or she had been of the opposite gender.

Id.

sexual harassment legislation would merely act to simplify the courts' analysis by removing the ill-fitting "but for" standard. Sexual harassment legislation would have the added benefit of returning Title VII's emphasis to legitimate issues of gender discrimination. This shift in focus is necessary, given courts' tendency to overemphasize physical harassment at the expense of thoughtful examination of true gender issues.

Admittedly, Congress is not likely to pass this legislation given the fact that the "but for" analysis includes the more recurring situations of sexual harassment. Moreover, because sexual harassment is such a problem, the use of Title VII as a weapon to combat it is preferable to having no weapon at all. Nonetheless, because of the analytical problems inherent in treating sexual harassment as gender discrimination, separate legislation would be the ideal alternative.

VI. CONCLUSION

Sexual harassment is a significant problem in the workplace. Using Title VII to combat it, however, inappropriately forces sexual harassment cases into a framework of gender discrimination analysis to which it is ill-suited. Consequently, there are serious analytical problems in treating sexual harassment as gender discrimination. More significant than these academic problems is the practical problem that the present approach fails to address some situations, such as bisexual harassment and harassment in a single-sex environment. Although these situations are rare, they are as reprehensible as those cases currently included under Title VII. There should, therefore, be a comparable federal remedy for plaintiffs harassed by bisexuals or plaintiffs harassed in a single-sex environment. The legislation described in Section V would provide this remedy. Moreover, it would have the added benefit of stopping the distortion of Title VII, thereby allowing Title VII to be used properly, as a tool to combat gender discrimination.

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